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

(80 DOCUMENTS)

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

December 14, 2010

IN THE MATTER OF ALTERNATE ENERGY 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 Alternate Energy Holdings, Inc. ("AEHI") because of questions regarding the accuracy and adequacy of disclosures by AEHI concerning, among other things: (1) the stock sales of certain AEHI officers, (2) the status and viability of funding to build a nuclear reactor, and (3) executive compensation. AEHI is quoted on the OTC Bulletin Board and on the Pink Sheets operated by Pink OTC Markets, Inc. under the ticker symbol "AEHI."

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. EST, on December 14, 2010 through 11:59 p.m. EST, on December 28, 2010.

By the Commission.

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

Elizabeth M. Murphy
Secretary

1 of 80

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

April 11, 2011

In the Matter of **RINO International Corporation,** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of RINO International Corporation, because the company has failed to disclose that: (i) the outside law firm and forensic accountants hired by the audit committee to investigate allegations of financial fraud at the company resigned on or about March 31, 2011, after reporting the results of their investigation to management and the board; (ii) the chairman of its audit committee resigned on March 31, 2011; and (iii) the company's remaining independent directors have also resigned. Further, questions have arisen regarding, among other things: (i) the size of the company's operations and number of employees; (ii) the existence of certain material customer contracts; and (iii) the existence of two separate and materially different sets of corporate books and accounts. RINO is a Nevada corporation with its headquarters and operations in the People's Republic of China, which trades on OTC Link under the symbol "RINO."

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

Therefore, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period from 9:30 a.m. EDT, April 11, 2011, through 11:59 p.m. EDT, on April 25, 2011.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

June 1, 2011

IN THE MATTER OF UNIONTOWN ENERGY, 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 Uniontown Energy, Inc. because of questions regarding the accuracy of assertions by the company, and by others, including in press releases to investors concerning, among other things: the acquisition and exploration of oil properties.

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, 2011 through 11:59 p.m. EDT, on June 14, 2011.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3230 / July 1, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14449

In the Matter of Jeffrey R. Neufeld, 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 Jeffrey R. Neufeld ("Neufeld" 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. 3 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.

III.

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

1. Neufeld, age 36, is the founder, owner, and manager of Paridon Capital Management, LLC ("Paridon"), an unregistered investment adviser. Neufeld is not registered with the Commission and lives in Elgin, Illinois.

2. Paridon is an Illinois limited liability corporation based in Elgin, Illinois. Neufeld started Paridon in January 2006 as Tritone Capital Management, LLC but changed its name in April 2009. Paridon is the general partner and investment adviser to the TCM Global Strategy Fund, LP, ("TCM Fund" or the "Fund"), an unregistered investment commodity pool that, among other things, invested in securities. Neufeld handled the day-to-day management of the TCM Fund and oversaw the Fund's investment portfolio on Paridon's behalf. Paridon was also the general partner and investment adviser to the Paridon Currency Fund, LP, an unregistered investment pool.

3. On April 27, 2011, a judgment was entered by consent against Neufeld and Paridon permanently enjoining them from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2), 206(3), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. Jeffrey R. Neufeld and Paridon Capital Management, LLC f/k/a Tritone Capital Management, LLC, Civil Action Number 10-2399, in the United States District Court for the Northern District of Illinois.

4. The Commission's complaint alleged, among other things, that since 2006, Neufeld and Paridon reported and disseminated false and fictitious rates of returns and assets under management to TCM Fund investors and prospective investors. Neufeld and Paridon also used false performance and assets under management to lure prospective investors to join the TCM Fund and continued to report false rates of return to hide trading losses from investors. Neufeld and Paridon also engaged in improper self-dealing by having the TCM Fund purchase $75,000 of "debt securities" from its general partner, Paridon. Investors were never told about this purchase, which was actually a loan by the Fund to Paridon.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Jeffrey R. Neufeld be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

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

SECURITIES EXCHANGE ACT OF 1934
Release No. 64799 / July 1, 2011

Admin. Proc. No. 3-14365

In the Matter of COMEDCO, INC., *et al.* CONSOLIDATED RESOURCES GROUP, INC., Respondent	ORDER DISMISSING PROCEEDING AGAINST CONSOLIDATED RESOURCES GROUP, INC.

On May 3, 2011, we issued an Order Instituting Proceedings ("OIP") against Consolidated Resources Group, Inc. ("Consolidated") and five other issuers under Section 12(j) of the Securities Exchange Act of 1934.[1] The OIP alleged that Consolidated had "a class of securities registered with the Commission pursuant to Exchange Act Section 12(g)" and that Consolidated was "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 February 28, 2002 . . . ."

On May 12, 2011, the Division of Enforcement (the "Division") moved to dismiss Consolidated from the proceeding. The Division states that Consolidated was previously the subject of a proceeding under Section 12(j).[2] That proceeding revoked the registration of Consolidated's securities. The Division further reports that Consolidated has not sought a new Section 12 registration since that date. The Division accordingly asks that the Commission

1 15 U.S.C. § 78*l*(j).

2 *Consolidated Resources Group, Inc.*, Securities Exchange Act Rel. No. 60677 (Sept. 16, 2009), 96 SEC Docket 20533.

dismiss the proceeding "because [Consolidated] has no Section 12 securities registered to be suspended or revoked, so this proceeding is moot as to this Respondent and should be dismissed."

Under these circumstances, we find it appropriate to grant the Division's motion and dismiss Consolidated from the proceeding.[3]

Accordingly, it is ORDERED that the proceeding with respect to Consolidated Resources Group, Inc. be, and it hereby is, dismissed.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M Peterson
By: Jill M. Peterson
Assistant Secretary

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[3] *See BCI Telecom Holding, Inc.*, Exchange Act Rel. No. 62649 (Aug. 4, 2010), 99 SEC Docket 31002, 31003 (dismissing Section 12(j) proceeding where respondent no longer had a class of securities registered under Section 12 of the Exchange Act); *TelcoBlue, Inc.*, Exchange Act Rel. No. 58061 (June 30, 2008), 93 SEC Docket 7335, 7335 (same).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64795; File No. S7-27-11)

Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment

AGENCY: Securities and Exchange Commission

ACTION: Exemptive order; request for comment

SUMMARY: The Securities and Exchange Commission ("Commission" or "SEC") is issuing an order granting temporary exemptive relief from compliance with certain provisions of the Securities Exchange Act of 1934 ("Exchange Act") in connection with the pending revision of the Exchange Act definition of "security" to encompass security-based swaps and is requesting comments on the temporary relief granted.

DATES: This exemptive order is effective July 1, 2011. Comments must be received on or before July 15, 2011.

ADDRESSES: Comments may be submitted, identified by File Number S7-27-11, 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 email to rule-comments@sec.gov. Please include File Number S7-27-11 on the subject line; or
- Use the Federal Rulemaking 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 S7-27-11. 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 website (http://www.sec/gov/rules/other.shtml). Comments are also available for website 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 a.m. and 3:00 p.m. All comments received will be posted without charge; the Commission does not edit personal identifying information from submissions. You should only submit information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: In general, Joshua Kans, Senior Special Counsel, at (202) 551-5550; or Leah Drennan, Attorney-Adviser, at (202) 551-5507; in connection with the section 5 and 6 relief, Constance Kiggins, Special Counsel, at (202) 551-5701; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

I. Introduction and Background

On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") into law.[1] Title VII of the Dodd-Frank Act ("Title VII") establishes a regulatory regime applicable to the over-the-counter ("OTC") derivatives markets by providing the Commission and the Commodity Futures Trading

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1 The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Commission ("CFTC") with the authority to oversee these heretofore largely unregulated markets.[2] The Dodd-Frank Act provides that the CFTC will regulate "swaps," the SEC will regulate "security-based swaps," and the CFTC and the SEC jointly will regulate "mixed swaps."[3]

Title VII amends the Securities Exchange Act of 1934[4] ("Exchange Act") to substantially expand the regulation of the security-based swap markets, establishing a new regulatory framework within which such markets can continue to evolve in a more transparent, efficient, fair, accessible, and competitive manner. Among other aspects, Title VII amends the Exchange Act to add new provisions concerning security-based swaps, including those related to: clearing; execution facilities; segregation requirements; antifraud prohibitions; position limits; transaction reporting; registration and regulation of security-based swap dealers and major security-based swap participants; and registration of clearing agencies that clear security-based swaps.[5]

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2 See generally Securities Exchange Act Release No. 64678 (June 15, 2011) ("Effective Date Release").

3 Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System ("Federal Reserve"), shall further define the terms "swap," "security-based swap," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," "eligible contract participant," and "security-based swap agreement." The Commission and the CFTC jointly have proposed to further define these terms. See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping," Securities Act Release No. 9204, Securities Exchange Act Release No. 64372 (Apr. 29, 2011), 76 FR 29818 (May 23, 2011); Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," Securities Exchange Act Release No. 63452 (Dec. 7, 2010), 75 FR 80174 (Dec. 21, 2010).

Moreover, section 712(a)(8) of the Dodd-Frank Act provides that the Commission and the CFTC, after consultation with the Federal Reserve, shall jointly promulgate such regulations regarding mixed swaps as may be necessary to carry out the purposes of Title VII. The Commission and the CFTC have jointly proposed such regulations. See 76 FR 29818.

4 15 U.S.C. 78a et seq.

5 See generally Effective Date Release, note 2, supra.

The Title VII amendments generally are effective on July 16, 2011 (360 days after the enactment of the Dodd-Frank Act, referred to herein as the "Effective Date"), unless a provision requires a rulemaking.[6] The Commission recently issued a release to provide guidance in connection with the effectiveness of Exchange Act provisions related to security-based swaps added by subtitle B of Title VII (which generally creates, and relates to, the regulatory regime for security-based swaps), and to provide temporary exemptions and other relief in connection with certain of those provisions.[7] Moreover, the Commission has proposed conditional exemptions under the Securities Act of 1933[8] ("Securities Act"), Exchange Act and the Trust Indenture Act of 1939[9] ("Trust Indenture Act") for security-based swaps issued by certain clearing agencies.[10] Also, the Commission intends to provide temporary conditional exemptive relief for entities that provide certain clearing services for security-based swaps. In addition, the Commission will take other actions to address certain security-based swaps, such as providing guidance regarding – and where appropriate, temporary relief from – the various pre-Dodd Frank Act provisions that would otherwise apply to security-based swaps on the Effective Date, as well as extending existing temporary rules under the Securities Act, the Exchange Act, and the Trust Indenture Act for certain security-based swaps.[11]

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6 If a Title VII provision requires a rulemaking, the provision will go into effect not less than 60 days after the publication of the related final rule or on the Effective Date, whichever is later. See Sections 754 and 774 of the Dodd-Frank Act.

7 Effective Date Release, note 2, supra.

8 15 U.S.C. 77a et seq.

9 15 U.S.C. 77aaa et seq.

10 See Exemptions for Security-Based Swaps Issued by Certain Clearing Agencies, Securities Act Release No. 9222, Securities Exchange Act Release No. 64639, Trust Indenture Act Release No. 2474 (June 9, 2011). These proposed exemptions will not be in place as of the Effective Date.

11 See SEC Announces Steps to Address One-Year Effective Date of Title VII of Dodd-Frank Act, available at http://www.sec.gov/news/press/2011/2011-125.htm (June 10, 2011).

This Order primarily addresses a change that the Title VII amendments will make to an already existing definition in the Exchange Act.[12] Specifically, as of the Effective Date, the Exchange Act definition of "security" will expressly encompass security-based swaps.[13] In making this change, Congress intended for security-based swaps to be treated as securities under the Exchange Act and the underlying rules and regulations. Nonetheless, this expansion of the scope of the regulatory provisions of the Exchange Act raises certain complex issues of interpretation. Absent additional time to analyze those issues, and to consider whether to provide interpretive or operational guidance, these changes may lead to unnecessary market uncertainty.[14]

As is discussed in more detail below, we are addressing those issues in part through a temporary exemption from the application of the Exchange Act to security-based swaps, subject to certain exceptions to this exemption by which specific Exchange Act provisions nonetheless will apply to security-based swaps. Separate exemptions within this Order will address registered broker-dealers and exchange registration requirements. The overall approach is directed toward maintaining the status quo during the implementation process for the Dodd-Frank Act, by preserving the application of particular Exchange Act requirements that already

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12 We also are providing guidance in connection with part I of subtitle A of Title VII, which includes certain provisions that relate to security-based swaps or to the Commission specifically. See part III, infra. The Exemptive Date Release addressed subtitle B of Title VII, while part II of subtitle A generally creates, and relates to, the regulatory regime for swaps. See sections 721 through 754 of the Dodd-Frank Act.

13 See Exchange Act section 3(a)(10), 15 U.S.C. 78c(a)(10), as revised by section 761 of the Dodd-Frank Act.

14 The Commission has received a request for relief by a number of industry participants in connection with the revised scope of the Exchange Act (as well as in connection with the new Exchange Act provisions we have addressed in the Effective Date Release). See letter to the Commission from the American Bankers Association, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, Securities Industry and Financial Markets Association and U.S. Chamber of Commerce, dated June 10, 2011 ("Trade Association Letter").

are applicable in connection with instruments that will be "security-based swaps" following the Effective Date, but deferring the applicability of additional Exchange Act requirements in connection with those instruments explicitly being defined as "securities" as of the Effective Date.

The revision of the Exchange Act's "security" definition raises, among other things, issues related to the Exchange Act definition of "broker,"[15] particularly with regard to which activities (such as facilitating the central clearing of security-based swaps for customers) may lead to the requirement to register as a broker. The revision of the "security" definition also raises interpretive issues in the context of the Exchange Act definition of "dealer" in that, following the Effective Date, the definition of "dealer" under the Exchange Act will exclude security-based swap dealing activities only to the extent that these activities are with counterparties that constitute "eligible contract participants."[16] In other words, while an entity's security-based swap activities involving eligible contract participants cannot cause the entity to be a "dealer" (though the entity may otherwise be a "security-based swap dealer"), an entity's activities involving security-based swaps with counterparties that are not eligible contract participants could, depending on the facts and circumstances, still cause the entity to fall within

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15 In relevant part, a "broker" is defined as a person "in the business of effecting transactions in securities for the account of others." See Exchange Act section 3(a)(4), 15 U.S.C. 78c(a)(4). The Dodd-Frank Act did not modify this definition. As a result, absent an exemption or other relief, a person who meets this definition in connection with security-based swaps activities would be a broker and would be subject to the registration and other regulatory requirements applicable to brokers, absent an exception or exemption.

16 As of the July 16 effectiveness of the Dodd-Frank Act amendments, the definition of "dealer" in Exchange Act Section 3(a)(5), 15 U.S.C. 78c(a)(5), will incorporate, in relevant part, "any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants), for such person's own account."

At that time, the term "eligible contract participant" will be incorporated into Exchange Act section 3(a)(65), 15 U.S.C. 78c(a)(65), and will refer to the definition of that term in section 1a of the Commodity Exchange Act, 7 U.S.C. 1a.

the "dealer" definition. Separately, the Dodd-Frank Act has revised the definition of "eligible contract participant,"[17] and some market participants have raised concerns as to the proper interpretation of the revised "eligible contract participant" definition, and hence the proper interpretation of the new exclusion from the "dealer" definition.[18]

The expansion of the "security" definition, and hence the expansion of the scope of the regulatory provisions of the Exchange Act to security-based swaps, further raises other complex questions of interpretation that could warrant additional guidance by the Commission. These include questions as to how particular Exchange Act requirements may apply to security-based swap activities of registered broker-dealers.[19] We believe that it is appropriate to provide market participants with additional time to consider the potential impact on their businesses and the interpretive questions raised, and to provide the Commission with any related requests for guidance or relief, along with the underlying analysis.[20] Also, as is discussed below, application

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17 Most significantly, the Dodd-Frank Act revised paragraph (A)(xi) of the "eligible contract participant" definition in the Commodity Exchange Act (which the Exchange Act cross-references). Prior to its amendment, one portion of that definition encompassed individuals with "total assets" in excess of $10 million (or $5 million in the case of certain risk management agreements). As revised, that portion of the "eligible contract participant" definition instead will apply to individuals with those same amounts "invested on a discretionary basis." See Commodity Exchange Act section 1a(18)(A)(xi), 7 U.S.C. 1a(18)(A)(xi) (as amended and redesignated by section 721(a)(9) of the Dodd-Frank Act).

18 See Trade Association Letter, note 14, supra (particularly citing issues as to the interpretation of the term "discretionary basis" in the definition of "eligible contract participant").

19 See id. (citing, among other aspects, issues related to the application of certain margin and customer protection rules to security-based swap activities of registered broker-dealers).

20 In granting this relief, the Commission notes in particular that the signatories to the Trade Association Letter, note 14, supra, have represented that within three months of the Effective Date they will provide the Commission with a request for permanent exemption from the application of securities laws that they believe are particularly inapposite in connection with security-based swap activities. The signatories to that letter also anticipated that Commission guidance would be necessary with respect to some of the issues that would arise from the change to the scope of the Exchange Act.

The Commission expects that any industry request for guidance or relief will also address implementation issues related to the applicable requirements. The Commission invites all interested persons to submit views about whether specific relief would be necessary or appropriate in the public interest, and consistent with the protection of investors.

of the exchange registration requirements of sections 5 and 6[21] of the Exchange Act to security-based swap activities will not be practical until certain rulemaking has been completed.[22]

In furtherance of the Dodd-Frank Act's stated objective of promoting financial stability in the U.S. financial system, the Commission intends to move forward deliberately in implementing the requirements of the Dodd-Frank Act, while minimizing unnecessary disruption and costs to the markets. Those include the disruptions and costs that may be expected to result if, as of the Effective Date, existing Exchange Act provisions were in general deemed to apply to security-based swap activities without additional time to consider the potential impact of the revision to the "security" definition.

Accordingly, for the reasons discussed in this Order, the Commission is granting temporary exemptive relief that is necessary or appropriate in the public interest, and consistent with the protection of investors, from compliance with certain provisions of the Exchange Act that otherwise would apply to security-based swap activities as of the Effective Date. Generally, section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt, by rule, regulation, or order, 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 any rule or regulation thereunder, to the extent such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.[23]

The temporary exemptive relief we are granting today in part combines an exemption from the application of the Exchange Act in connection with security-based swaps with specific

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21 15 U.S.C. 78e, 78f.

22 See parts II.C and II.D, infra.

23 15 U.S.C. 78mm. The Commission's exemptive authority under Exchange Act section 36 is not available for certain specified provisions of the Exchange Act added by Title VII that relate to security-based swaps, see section 36(c) of the Exchange Act, 15 U.S.C. 78mm(c). That limitation does not apply to the provisions for which the Commission is granting relief.

exceptions from that exemption. As a result of these exceptions, certain provisions of the Exchange Act and underlying rules and regulations will apply to security-based swap activities.

For example, the instruments that (after the Effective Date) will constitute security-based swaps already are generally subject to certain antifraud and anti-manipulation provisions under the Exchange Act. This is because those instruments generally constitute "security-based swap agreements" under current law,[24] and the Exchange Act already provides that those security-based swap agreements are subject to certain specific antifraud and anti-manipulation provisions (including Exchange Act section 10(b)).[25] Accordingly, under the exemption, instruments that (before the Effective Date) were security-based swap agreements and (after the Effective Date)

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[24] Under the existing (pre-Dodd-Frank) framework, a "security-based swap agreement" is defined as a "swap agreement" in which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein. See section 206B of the Gramm-Leach-Bliley Act. Under existing law, moreover, the term "swap agreement" subsumes certain types of agreements for which certain "material terms" are "subject to individual negotiation." See section 206A of the Gramm-Leach-Bliley Act. Thus, instruments that will be "security-based swaps" following the Effective Date in general currently are "security-based swap agreements" for purposes of the Exchange Act.

[25] Currently (prior to amendment by the Dodd-Frank Act), the Exchange Act provides that instruments that meet the definition of "security-based swap agreement" are subject to the following antifraud and anti-manipulation provisions: (a) paragraphs (2) through (5) of Exchange Act section 9(a), 15 U.S.C. 78i(a), prohibiting the manipulation of security prices; (b) Exchange Act section 10(b), 15 U.S.C. 78j(b), (c) Exchange Act section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices; (d) Exchange Act section 20(d), 15 U.S.C. 78t(d), providing for antifraud liability in connection with certain derivative transactions; and (e) Exchange Act section 21A(a)(1), 15 U.S.C. 78u-1(a)(1), related to the Commission's authority to impose civil penalties for insider trading violations. In addition, Exchange Act sections 16(a) and (b), 15 U.S.C. 78p(a) and (b) specifically apply to security-based swap agreements under current law.

Underlying rules prohibiting fraud, manipulation and insider trading (such as Exchange Act rule 10b-5, 17 CFR 240.10b-5, which prohibits the employment of manipulative or deceptive devices), also apply to security-based swap agreements. However, as currently (prior to amendment by the Dodd-Frank Act) provided by Exchange Act section 3A, 15 U.S.C. 78c-1, as well as provided by Exchange Act section 10(b), prophylactic reporting or recordkeeping requirements (such as Exchange Act rule 10b-10, 17 CFR 10b-10, regarding confirmation of transactions) do not apply to security-based swap agreements.

As of the Effective Date, Exchange Act antifraud and insider trading provisions still will apply to "security-based swap agreements." The definition of "security-based swap agreement," as revised by the Dodd-Frank Act, however, will no longer encompass those instruments that satisfy the "security-based swap" definition.

constitute security-based swaps will continue to be subject to the application of those Exchange Act antifraud and anti-manipulation provisions, as well as Securities Act antifraud provisions,[26] following the Effective Date. As discussed below, the exemption also is subject to certain other exceptions which will provide for the application of particular Exchange Act provisions to security-based swap activities (e.g., "broker" and "dealer" registration provisions in certain circumstances, as well as Commission authority to act against broker-dealers and associated persons).[27]

In addition, we are providing targeted exemptive relief in connection with the application of Exchange Act requirements to registered broker-dealers,[28] as well as in connection with the exchange registration requirements of Exchange Act sections 5 and 6.[29] To promote legal certainty, moreover, we are providing temporary relief from the rescission provisions of Exchange Act section 29(b)[30] in connection with these exemptions.[31] Finally, we are providing additional guidance in connection with provisions of part I of subtitle A of Title VII.[32] The following tables summarize the scope – and limitations – of the relief we are granting (apart from the Exchange Act section 29(b) relief and the guidance related to part I of subtitle A of Title VII):

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26 The antifraud provisions of Securities Act section 17(a), 15 U.S.C. 77q(a), also apply to "security-based swap agreements" under current law.

27 Also, as addressed below, the exemption does not address certain other Exchange Act provisions.

28 See part II.B, infra.

29 See parts II.C and II.D, infra.

30 15 U.S.C. 78cc(b).

31 See part II.E, infra.

32 See part III, infra.

Part II.A – Exchange Act provisions that will apply to persons engaging in security-based swap activities notwithstanding the temporary exemption[33]	
Nature of provisions	**Exchange Act sections**
Antifraud and anti-manipulation	Paragraphs (2) through (5) of section 9(a), and sections 10(b), 15(c)(1), 20(d) and 21A(a)(1)[34]
Dealer registration requirements	15(a)(1), but only in connection with security-based swaps with counterparties that are not eligible contract participants[35]
Broker registration requirements	15(a)(1), but only with regard to members of central counterparties holding customer funds and securities in connection with security-based swaps
Authority to take actions against broker-dealers and associated persons	15(b)(4), 15(b)(6)

33 The general temporary exemption provided in this Order does not address the following additional provisions: securities registration, reporting, proxy, short-swing profits and related requirements (Exchange Act sections 12, 13, 14, 15(d) and 16); clearing agency registration requirements (Exchange Act section 17A); and certain provisions added by subtitle B of Title VII. We separately have addressed or are addressing certain of those other requirements in the context of security-based swaps. In addition, this exemption does not address certain provisions related to government securities (Exchange Act sections 3(a)(42)-(45) and 15C).

Exchange registration provisions are the subject of separate exemptions in this Order. In particular, persons other than clearing agencies acting as central counterparties will be exempt from the exchange registration requirements of Exchange Act sections 5 and 6 solely in connection with security-based swap activities, while broker-dealers effecting or reporting security-based swap transactions on those exempt exchanges will be exempt from Exchange Act section 5. In addition, three existing central counterparties that clear CDS will be exempt from Exchange Act sections 5 and 6 (in connection with their "forced trade" procedures) subject to certain conditions, and members that use those central counterparties' clearance and risk management process to effect or report Cleared CDS transactions will be exempt from section 5 unconditionally.

34 Underlying rules prohibiting fraud, manipulation or insider trading, such as Exchange Act rule 10b-5, also remain applicable (but not prophylactic reporting or recordkeeping requirements, such as Exchange Act rule 10b-10). This is consistent with the current application of antifraud and anti-manipulation provisions to security-based swap agreements, as provided by Exchange Act sections 3A and 10(b) (which generally prohibit the application of "reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading" with respect to any security-based swap agreement"). In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions also remain applicable.

35 This will be based on whether a person is an "eligible contract participant" as set forth in the definition of that term in effect on July 20, 2010 (prior to the Dodd-Frank Act).

Part II.B – Additional Exchange Act provisions that will apply to security-based swap activities and positions of registered broker-dealers notwithstanding the temporary exemption[36]	
Nature of provisions	**Exchange Act section or rule**
Extension of credit	Section 7(c)
Extension of credit	Regulation T (12 CFR 220.1 et seq.)
Rulemaking authority over broker-dealers	Section 15(c)(3)
Net capital	Rule 15c3-1
Reserves and custody of securities	Rule 15c3-3
Books and records	Sections 17(a)-(b)
Records and reports	Rules 17a-3, 17a-4, 17a-5, 17a-8
Quarterly security counts	Rule 17a-13

II. Temporary exemption in connection with certain Exchange Act requirements

The Commission is issuing temporary exemptions to address the issues and concerns arising from the revision of the Exchange Act "security" definition and the application of the Exchange Act to security-based swaps. These include a temporary exemption for certain persons, along with a temporary exemption specific to broker-dealers; both of those exemptions will remain in effect until the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant."[37] These also include temporary exemptions related to Exchange Act sections 5 and 6, and related to Exchange Act section 29(b), which, as addressed below, will have other durations.

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36 In general, these provisions will apply to security-based swap activities or positions of registered broker-dealers only to the extent that they are applicable to those activities and positions as of July 15, 2011. Exchange Act rule 15c3-3, however, also will fully apply to the activities and positions of a registered broker-dealer related to cleared security-based swaps, to the extent that the registered broker-dealer is a member of a clearing agency that functions as a central counterparty for security-based swaps, and holds customer funds or securities in connection with cleared security-based swaps.

37 See SEC and CFTC joint proposing releases defining those terms, note 3, supra.

A. Temporary exemption from certain Exchange Act requirements in connection with security-based swaps

As the first part of the relief provided by this Order, the Commission is temporarily exempting certain persons from the application of certain Exchange Act provisions in connection with security-based swaps. As discussed below, this exemption will be subject to certain key exceptions by which particular statutory provisions (or underlying rules or regulations) or particular activities will not be exempted.

The temporary exemption will be available to any person that meets the definition of "eligible contract participant" that was in effect as of July 20, 2010 (the day prior to the enactment of the Dodd-Frank Act), other than a registered broker-dealer[38] or, except in limited circumstances, a self-regulatory organization.[39] The availability of this temporary exemption will be limited to persons that meet the "eligible contract participant" definition in order to provide relief to persons currently participating in the security-based swap markets.[40]

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38 A separate temporary exemption addresses the security-based swap activities of registered broker-dealers. See part II.B, infra.

39 Registered securities associations can take advantage of this exemption in certain limited circumstances. In particular, the exemption will be available to any registered securities association solely with respect to its obligations under Exchange Act section 19(g)(1)(B), 15 U.S.C. 78s(g)(1)(B), to enforce compliance in connection with security-based swaps with provisions of its rules (and with provisions of the rules of the Municipal Securities Rulemaking Board) that do not apply to positions or activities involving security-based swaps as of July 15, 2011. Section 19(g)(1)(B) in relevant part requires national securities associations to enforce compliance with their own rules. As discussed below, see part II.B, infra, under the Commission's exemption registered broker-dealers will be required to comply with certain Exchange Act requirements in connection with security-based swaps, but not to the extent that those provisions or rules do not apply to the broker's or dealer's security-based swap positions or activities as of July 15, 2011. The application of this exemption to national securities associations is consistent with that approach.

Also, we expect the Financial Industry Regulatory Authority ("FINRA"), a national securities association that is a self-regulatory organization for registered broker-dealers, to file a proposed rule change related to the application of FINRA's rules to security-based swaps.

40 The exemption relies on the pre-Dodd-Frank Act definition of "eligible contract participant" due to outstanding issues discussed above, see note 17, supra, and accompanying text, regarding the meaning of "eligible contract participant" under the Dodd-Frank Act.

Subject to exclusions discussed below, persons covered by the temporary exemption will be exempt from the provisions of the Exchange Act, and the applicable rules and regulations thereunder, solely in connection with their activities involving security-based swaps. The temporary exemption's scope is to be construed narrowly, and does not apply to a person's activities involving securities other than security-based swaps, even if those other securities-related activities also involve security-based swaps.[41]

As noted above, however, this temporary exemption does not extend to certain Exchange Act provisions and underlying rules and regulations.

First, for the reasons discussed above, the temporary exemption applicable to security-based swaps does not extend to the antifraud and anti-manipulation provisions of the Exchange Act, and underlying rules or regulations, that already apply to "security-based swap agreements" under current law. Thus, even with the temporary exemption, paragraphs (2) through (5) of section 9(a), section 10(b), section 15(c)(1), section 20(d) and section 21A(a)(1) of the Exchange Act[42] will apply to security-based swaps. Underlying rules prohibiting fraud, manipulation or insider trading, such as Exchange Act rule 10b-5 (but not prophylactic reporting or recordkeeping requirements such as the confirmation requirements of Exchange Act rule 10b-10) also will apply to security-based swaps. Consistent with the Commission's current authority,

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41 In other words, for example, if a person were to enter into an arrangement involving the purchase of a debt security in conjunction with the purchase of credit protection in the form of a credit default swap referencing that debt security, the person's credit default swap transaction would be subject the temporary exemption, but the person's purchase of the debt security would not.

42 See note25, supra.

moreover, the temporary exemption will not affect the Commission's investigative, enforcement, and procedural authority related to those provisions and rules.[43]

The temporary exemption also does not extend to Exchange Act provisions related to security-based swaps that were added or amended by Subtitle B of Title VII of the Dodd-Frank Act. The Commission separately has addressed those new provisions and amendments[44] (apart from the change to the "security" definition that underpins the exemptions that are the subject of this Order).

In addition, even under the temporary exemption, the Exchange Act "broker" registration requirements will apply to broker activities involving security-based swaps by persons that are members of a clearing agency that functions as a central counterparty[45] ("CCP") for security-based swaps, and that hold customer funds and securities in connection with security-based swaps. Based on the Commission's experience in granting, and representations made by recipients of, previous exemptive orders for CCPs, the Commission understands that there currently are no CCPs offering customer clearing of security-based swaps.[46] Apart from that

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[43] Thus, for example, the Commission retains the ability to investigate potential violations and bring enforcement actions in the federal courts as well as in administrative proceedings, and to seek the full panoply of remedies available in such cases.

[44] See Effective Date Release, note 2, supra.

[45] For these purposes, a "central counterparty" means a clearing agency that interposes itself between the counterparties to security-based swap transactions, acting functionally as the buyer to every seller and the seller to every buyer.

[46] The Commission has granted temporary conditional exemptions to facilitate CDS clearing in connection with requests on behalf of ICE Clear Europe Limited; Eurex Clearing AG; Chicago Mercantile Exchange Inc.; ICE Trust US LLC; and LIFFE A&M and LCH.Clearnet Ltd. See notes 71 and 76, infra.

To the extent that CCPs plan to offer customer clearing of security-based swaps during the duration of this exemption, the Commission will consider requests for relief from broker-related requirements by such CCPs on behalf of their participants, based on the applicable facts and circumstances.

limitation, and for the reasons discussed above, the exemption from registration requirements will extend to broker activity involving security-based swaps.[47]

Moreover, even under the temporary exemption, the Exchange Act "dealer" registration requirements will apply to security-based swap dealing activities unless those activities involve counterparties that meet the definition of "eligible contract participant" that was in effect as of July 20, 2010 (the day prior to the enactment of the Dodd-Frank Act). Accordingly, conducting security-based swap activities with counterparties that do not meet that July 20, 2010 definition of "eligible contract participant" could, depending on the facts and circumstances, still cause an entity to be a "dealer" under the Exchange Act. In light of market participants' concerns regarding interpretive issues resulting from the statutory changes to the "eligible contract participant" definition, the exemption is intended to appropriately implement the legislative goal of applying the "dealer" definition to security-based swap activities involving counterparties that are not eligible contract participants, while maintaining the status quo with respect to activities involving "eligible contract participants" as that term was defined on July 20, 2010.[48]

This temporary exemption further does not excuse compliance with certain additional provisions under the Exchange Act. The exemption does not apply to the exchange registration

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47 In light of the exemption from broker registration requirements and from the dealer registration requirements addressed below (but subject to the exemption's limitations associated with those requirements), non-U.S. persons that act as brokers or dealers solely in connection with security-based swaps involving U.S. counterparties need not rely on the exemptions from broker-dealer registration requirements that are set forth in Exchange Act rule 15a-6, 17 CFR 240.15a-6. Thus, non-U.S. persons will not have to comply with the requirements and conditions of rule 15a-6, including, for example, the requirement to use a registered U.S. broker-dealer to effect a transaction in a security-based swap, as provided in paragraph (a)(3) of the rule.

48 In a similar way, the Commission has targeted the exemptive relief it previously granted in connection with section 6(l) of the Exchange Act, 15 U.S.C. 78f(l), which was added by the Dodd-Frank Act. This relief will permit persons that currently participate in the security-based swap markets, but that potentially may not be considered eligible contract participants under the definition as amended by Title VII of the Dodd-Frank Act, to continue to do so until the term "eligible contract participant" is further defined in final rulemaking. See Effective Date Release, note 2, supra.

requirements of Exchange Act sections 5 and 6, as those provisions instead are being addressed by a separate conditional exemption described below.[49] This exemption further does not extend to: the requirements of Exchange Act sections 12, 13, 14, 15(d), and 16[50]; the Commission's administrative proceeding authority under Exchange Act sections 15(b)(4) and (b)(6)[51]; or to certain provisions related to government securities.[52] The temporary exemption further does not extend to the clearing agency registration requirement of Exchange Act section 17A,[53] as the Commission separately intends to provide targeted exemptive relief in connection with that requirement.

B. Temporary exemption from certain Exchange Act requirements in connection with security-based swap activities by registered broker-dealers

In addition to the temporary exemption addressed above, the Commission separately is providing exemptive relief to registered broker-dealers in connection with the revised "security" definition and the application of existing Exchange Act provisions to security-based swaps. In

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49 See parts II.C and II.D, infra.

50 15 U.S.C. 78l; 78m, 78n, 78o(d), 78p. These provisions address, among other things, securities registration, reporting by issuers and other persons, proxies and short-swing profits.

51 Exchange Act sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission authority to take action against brokers and dealers and associated persons in certain situations. Accordingly, while this exemption extends to certain persons that may otherwise act as brokers or dealers in the market for security-based swaps, such brokers or dealers may still be subject to actions under sections 15(b)(4) and (b)(6) of the Exchange Act.

In addition, such brokers or dealers may be subject to actions under Exchange Act section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices. Sections 15(b)(4), 15(b)(6) and 15(c)(1), of course, would not apply to persons subject to this exemption who do not act as broker-dealers or associated persons of broker-dealers.

52 The exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in section 15C, 15 U.S.C. 78o-5, and its underlying rules and regulations. The exemption also does not extend to related definitions found at paragraphs (42) through (45) of section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under section 36 to issue exemptions in connection with those provisions. See Exchange Act section 36(b), 15 U.S.C. 78mm(b).

53 15 U.S.C. 78q-1.

granting this relief, we have sought to recognize concerns raised by market participants – e.g., the application of current broker-dealer margin rules to security-based swap activities – while also being mindful that certain regulations applicable to broker-dealers play a critical role in promoting market integrity and protecting customers (including broker-dealer customers that are not involved in security-based swap transactions).

This temporary exemption will be available to any registered broker-dealer solely with respect to its activities and positions involving security-based swaps. In general – and subject to the additional provisions addressed below – this temporary exemption has the same scope as the temporary exemption addressed above, and is subject to the same exclusions. Thus, for example, security-based swap activity by registered broker-dealers will be subject to the same Exchange Act antifraud and anti-manipulation provisions as will be effective under the temporary exemption addressed above.

Moreover, we are limiting the scope of the exemption for registered broker-dealers in connection with certain Exchange Act provisions and rules that apply specifically to registered broker-dealers. In particular (and subject to additional limitations in connection with Exchange Act rule 15c3-3 as addressed below), registered broker-dealers will solely be exempt from those provisions and rules to the extent that those provisions or rules do not apply to the broker's or dealer's security-based swap positions or activities as of July 15, 2011 – the day before the effectiveness of the change to the "security" definition. In other words, during the exemptive period the application of current law will remain unchanged, and those particular Exchange Act requirements will continue to apply to registered broker-dealers' security-based swap activities and positions to the same extent they apply currently. This approach is intended to help avoid undue market disruptions resulting from the change to the "security" definition, while at the same time preserving the current application of those particular provisions or rules to security-based swap activity by registered broker-dealers.

Thus, under this approach of preserving the status quo, no exemption will be provided in connection with the following requirements under the Exchange Act to the extent that those requirements currently apply to registered broker-dealer activities or positions involving instruments that will be security-based swaps (but registered broker-dealers will be exempted in connection with those requirements to the extent that the requirements do not already apply to activities or positions involving those instruments):[54]

- Section 7(c),[55] regarding the extension of credit by broker-dealers; and Regulation T,[56] a Federal Reserve Board regulation regarding broker-dealer extension of credit.
- Section 15(c)(3),[57] which provides the Commission with rulemaking authority in connection with broker-dealer financial responsibility; Exchange Act rule 15c3-1,[58] regarding broker-dealer net capital; and Exchange Act rule 15c3-3,[59] regarding broker-dealer reserves and custody of securities. In the case of Exchange Act rule 15c3-3, moreover, the exemption will not be applicable to the activities and positions of a registered broker-dealer related to cleared security-based swaps, to the extent that the registered broker-dealer is a member of a clearing agency that functions as a central

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[54] Solely for purposes of this temporary exemption, in addition to the general requirements under the referenced Exchange Act sections, registered broker-dealers shall only be subject to the enumerated rules under the referenced Exchange Act sections in connection with security-based swaps.

[55] 15 U.S.C. 78g(c).

[56] 12 CFR 220.1 et seq.

[57] 15 U.S.C. 78o(c)(3).

[58] 17 CFR 240.15c3-1.

[59] 17 CFR 240.15c3-3.

counterparty for security-based swaps, and holds customer funds or securities in connection with cleared security-based swaps.[60]

- Section 17(a),[61] regarding broker-dealer obligations to make, keep and furnish information; section 17(b),[62] regarding broker-dealer records subject to examination; Exchange Act rules 17a-3 through 17a-5,[63] regarding records to be made and preserved by broker-dealers and reports to be made by broker-dealers; Exchange Act rule 17a-8,[64] regarding broker-dealer recordkeeping and reporting under the Bank Secrecy Act; and Exchange Act rule 17a-13,[65] regarding quarterly security counts to be made by certain exchange members and broker-dealers.

C. Temporary exemptions from sections 5 and 6 of the Exchange Act for brokers, dealers and exchanges

Section 5 of the Exchange Act states that "[i]t shall be unlawful for any broker, dealer, or exchange,[66] directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange . . . to effect any

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60 . This is consistent with the exclusion from the temporary exemption addressed above with regard to the broker registration requirement. See note 45, supra, and accompanying text.

61 15 U.S.C. 78q(a).

62 15 U.S.C. 78q(b).

63 17 CFR 240.17a-3 through 17a-5

64 17 CFR 240.17a-8.

65 17 CFR 240.17a-13.

66 Section 3(a)(1) of the Exchange Act, 15 U.S.C. 78c(a)(1), defines "exchange" to mean "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such an exchange." Rule 3b-16 under the Exchange Act, 17 CFR 240.3b-16, defines certain terms used in the statutory definition of exchange. See Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998) ("Regulation ATS Adopting Release") (adopting Rule 3b-16 in addition to Regulation ATS).

transaction in a security, or to report any such transactions, unless such exchange (1) is registered as a national securities exchange under section 6 of [the Exchange Act], or (2) is exempted from such registration . . . by reason of the limited volume of transactions effected on such exchange…." Section 6 of the Exchange Act sets forth a procedure whereby an exchange may register as a national securities exchange.[67]

Certain persons, particularly those that would meet the statutory definition of security-based swap execution facility ("SB SEF"),[68] may today engage in activities that would subject them to the restrictions and requirements of sections 5 and 6 of the Exchange Act as of the Effective Date, once security-based swaps are included within the definition of "security." The Commission has proposed, but not acted on, registration requirements for SB SEFs. Therefore, the Commission is using its authority under section 36 of the Exchange Act to provide a temporary exemption from the requirement to register as a national securities exchange in sections 5 and 6 of the Exchange Act to any person, other than a clearing agency acting as a central counterparty in security-based swaps,[69] that, solely due to its activities relating to security-based swaps, would fall within the definition of exchange and thus be required to register as an exchange. Persons who can take advantage of this exemption include those entities that would meet the statutory SB SEF definition,[70] but that otherwise would not be subject to the requirements under sections 5 and 6 of the Exchange Act.

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67 See generally Exchange Act section 6(a) and the rules thereunder. Section 6 of the Exchange Act also sets forth various requirements to which a national securities exchange is subject. See, e.g., Exchange Act section 6(b).

68 See Exchange Act section 3(a)(77), 15 U.S.C. 78c(a)(77).

69 The status of central counterparties in security-based swaps is addressed in part II.D, infra.

70 While the Exchange Act currently does not prohibit registered alternative trading systems from trading security-based swaps, after the Effective Date any alternative trading system that meets the definition of SB SEF would no longer be permitted to do so absent an exemption or registration as a national securities exchange or SB SEF. See section 763 of the Dodd-Frank Act, adding Exchange Act

This temporary exemption will remain in effect until the earliest compliance date set forth in any of the final rules regarding the registration of SB SEFs. It specifically will permit security-based swaps to continue to be traded on or through entities (other than central counterparties) following the Effective Date, until the registration requirements and other provisions applicable to SB SEFs have been implemented. As noted above, this temporary exemption is available to persons (other than central counterparties) that meet the definition of exchange solely because of their activities relating to transactions in security-based swaps. Thus, to the extent that a person otherwise satisfies the definition of "exchange" in section 3(a)(1) of the Exchange Act and the criteria of rule 3b-16 under the Exchange Act, it must register with the Commission as a national securities exchange under section 6 of the Exchange Act and the rules and regulations thereunder or comply with the terms of another exemption.

In addition, absent an exemption, section 5 of the Exchange Act would prohibit brokers and dealers from effecting transactions in security-based swaps on an exchange that is not a national securities exchange, even if that exchange was operating in reliance on the exemption addressed above. The Commission therefore is using its authority under section 36 of the Exchange Act to provide a temporary exemption to brokers and dealers that effect transactions in security-based swaps on an exchange that is operating without registering as a national securities exchange in reliance on that exemption. Temporarily exempting brokers and dealers that effect

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section 3D(a)(1), 15 U.S.C. 78c-4(a)(1) ("[n]o person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section") and Securities Exchange Act Release No. 34-63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) ("SB SEF Proposing Release") at note 10 ("The Commission views [Section 3D(a)(1) of the Exchange Act] as applying only to facilities that meet the definition of "security-based swap execution facility" in Section 3(a)(77) of the Exchange Act). The Commission has granted temporary relief from the requirements of section 3D(a)(1) of the Exchange Act to allow alternative trading systems and other entities trading security-based swaps to continue to trade security-based swaps until the exemption expires. See Effective Date Release, note 2, supra. Following the expiration of the temporary exemption, any entity trading security-based swaps that meets the definition of SB SEF would be required to register as a national securities exchange or a SB SEF.

transactions in security-based swaps on such an exchange from this restriction in section 5 will facilitate brokers' and dealers' continued use of such facilities without the disruptions and costs that might be expected to result from the application of those provisions prior to the earliest compliance date of final rules regarding the registration of SB SEFs. Without also exempting brokers and dealers from this section 5 requirement, the Commission's temporary exemption of persons that meet the definition of exchange with respect to the trading of security-based swaps would be ineffective, because brokers and dealers would not be permitted to effect transactions on those exchanges. A broker or dealer is exempt from the prohibition in section 5 pursuant to this temporary exemption solely to the extent that it effects transactions in security-based swaps on an exchange operating in reliance on the exemption addressed above, or reports security-based swap transactions on such an exempted exchange.

D. Exemption from sections 5 and 6 for certain CCPs

The Commission is also exercising its authority under section 36 of the Exchange Act to extend specific existing exemptions from the exchange registration requirements of sections 5 and 6 of the Exchange Act provided to three central counterparties – ICE Trust U.S. LLC ("ICE Trust"), Chicago Mercantile Exchange Inc. ("CME"), and ICE Clear Europe, Limited ("ICE Clear Europe") (collectively, "CDS CCPs")[71] – that clear "Cleared CDS."[72] These exemptions

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[71] See generally Securities Exchange Act Release Nos. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009); 61973 (April 23, 2010), 75 FR 22656 (April 29, 2010); and 63389 (November 29, 2010), 75 FR 75520 (December 3, 2010) (temporary exemptions in connection with CDS clearing by ICE Clear Europe); 59578 (March 13, 2009), 74 FR 11781 (March 19, 2009); 61164 (December 14, 2009), 74 FR 67258 (December 18, 2009); 61803 (March 30, 2010), 75 FR 17181 (April 5, 2010); and 63388 (November 29, 2010), 75 FR 75522 (December 3, 2010) (temporary exemptions in connection with CDS clearing by CME); 59527 (March 6, 2009), 74 FR 10791 (March 12, 2009); 61119 (December 4, 2009), 74 FR 65554 (December 10, 2009); 61662 (March 5, 2010), 75 FR 11589 (March 11, 2010), 63387 (November 29, 2010), 75 FR 75502 (December 3, 2010) (temporary exemptions in connection with CDS clearing by ICE Trust) (collectively, "Temporary Cleared CDS Exemptions").

[72] "Cleared CDS" means a credit default swaps that is a security-based swap that is submitted (or offered, purchased, or sold on terms providing for submission) to a CDS CCP, and that is offered only to,

will remain in effect until the earliest compliance date set forth in any of the final rules regarding the registration of SB SEFs.

As described in the Temporary Cleared CDS Exemptions,[73] as part of the clearing and risk management processes, each CDS CCP calculates, based on prices or quotations submitted by its participants, an end-of-day settlement price for each contract in which any of its participants has a cleared position.[74] As part of this process, each CDS CCP has periodically used a "forced trade" mechanism to require clearing members at randomly selected times to execute certain CDS trades.[75] This mechanism, which is designed to promote the integrity of the price-submission process, involves bringing together buyers and sellers of CDS. Therefore, absent an exemption, this activity would cause each CDS CCP to meet the definition of "exchange" under the Exchange Act, thereby triggering the applicability of sections 5 and 6.

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purchased only by, and sold only to persons that meet the pre Dodd-Frank definition of eligible contract participant. In addition, to be a Cleared CDS, either: (i) the reference entity, the issuer of the reference security, or the reference security is one of the following: (A) an entity reporting under the Exchange Act, providing Securities Act rule 144A(d)(4) (17 CFR 230.144A(d)(4)) information, or about which financial information is otherwise publicly available; (B) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States; (C) a foreign sovereign debt security; (D) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or (E) an asset-backed security issued or guaranteed by the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Government National Mortgage Association; or (ii) the reference index is an index in which 80% or more of the index's weighting is comprised of the entities or securities described in subparagraph (i).

[73] See, e.g., 74 FR at 37748 (ICE Clear Europe); 74 FR at 65560 (ICE Trust); 74 FR at 67262 (CME).

[74] As part of the clearing process, eligible trades are submitted to the CDS CCP for novation, which results in the bilateral contract being extinguished and replaced by two new contracts where the CDS CCP is the buyer to the seller and the seller to the buyer. "Novation" is a process through with the original obligation between a buyer and seller is discharged through the substitute of the CCP as functionally the seller to buyer and buyer to seller, creating new substitute contracts. See, e.g., Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners, Recommendations for Central Counterparties (Nov. 2004) at 66.

[75] See Letter from Russell D. Sacks, on behalf of ICE Clear Europe, to Elizabeth Murphy, Secretary, Commission, Nov. 29, 2010; Letter from Ann K. Shuman, Managing Director and Deputy General Counsel, CME, to Elizabeth Murphy, Secretary, Commission, Nov. 29, 2010; See Letter from Kevin McClear, ICE Trust, to Elizabeth Murphy, Secretary, Commission, Nov. 29, 2010.

Accordingly, the Commission, in connection with previous exemptions from clearing agency registration under section 17A of the Exchange Act, also provided each CDS CCP a temporary conditional exemption from the exchange registration requirements of Sections 5 and 6 of the Exchange Act. Following the Effective Date, the CDS CCPs will not require further exemptions from section 17A.[76]

As part of these Temporary Cleared CDS Exemptions, the Commission also temporarily exempted each CDS CCP's participants that were brokers or dealers from the prohibitions of Section 5, to the extent that they use a CDS CCP to effect or report any transaction in Cleared CDS in connection with the CDS CCP's calculation of settlement prices for open positions in

[76] Title VII of the Dodd-Frank Act provides that a depository institution or derivatives clearing organization registered with the Commodity Futures Trading Commission under the Commodity Exchange Act that is required to be registered as a clearing agency is deemed to be registered as a clearing agency solely for the purpose of clearing security-based swaps to the extent that, before July 21, 2010: (A) the depository institution cleared swaps as a multilateral clearing organization, or (B) the derivative clearing organization cleared swaps pursuant to an exemption from registration as a clearing agency. See section 763(b) of the Dodd-Frank Act (adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q-1(1)) ("Deemed Registered Provision"). The Deemed Registered Provision, along with other general provisions of Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011. See Effective Date Release, note 2, supra.

CME, ICE Clear Europe, and ICE Trust satisfy the requirements of the Deemed Registered Provision and thus will no longer need temporary exemptions from registration as a clearing agency under Section 17A of the Exchange Act. However, because the Deemed Registered Provision does not apply with respect to sections 5 and 6 of the Exchange Act, the CDS CCPs would, absent an exemption, have to either register as national securities exchanges or discontinue use of their forced trading mechanisms.

A fourth CCP, Eurex Clearing AG ("Eurex"), also received from the Commission temporary exemptions from sections 5, 6, and 17A of the Exchange Act in relation to its CDS clearing activities. See, e.g., Exchange Act Release No. 63390 (November 29, 2010). Unlike the CDS CCPs, Eurex will not be deemed registered with the Commission because it is neither a depository institution nor a derivatives clearing organization registered with the Commodity Futures Trading Commission under the Commodity Exchange Act. Eurex will not be registered with the Commission as a clearing agency for security-based swaps as of July 16, 2011. Thus, the Commission is not granting Eurex an exemption from sections 5 and 6 of the Exchange Act with respect to any activities relating to security-based swaps. In addition, the Commission previously extended a temporary exemption from section 17A (but not sections 5 and 6) in connection with CDS clearing by LIFFE A&M and LCH.Clearnet Ltd., but that exemption has since expired. See Securities Exchange Act Release No. 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009).

Cleared CDS. The definition of "Cleared CDS" used here is consistent with the Temporary Cleared CDS Exemptions.[77]

Consistent with our findings in previous exemptive orders, and with the discussion in this Order, and particularly in light of the risk management and systemic benefits in continuing to facilitate CDS clearing by CDS CCPs during the transition period before full implementation of Title VII, the Commission is extending the temporary conditional exemptions of the CDS CCPs from the registration requirements of sections 5 and 6 of the Exchange Act. The Commission also finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to extend the temporary exemption of any broker or dealer effecting any transaction in a security, or reporting any such transaction, on a CDS CCP with respect to section 5 of the Exchange Act. These exemptions are solely with respect to the "forced trade" mechanism used to calculate settlement prices for Cleared CDS. The exemption for CDS CCPs, moreover, is subject to the following terms and conditions:[78]

First, each CDS CCP, in order to rely on the exemption, is required to report to the Commission the following information with respect to its calculation of settlement prices for Cleared CDS within 30 days of the end of each quarter, and to preserve such reports during the life of the enterprise and of any successor enterprise: (a) the total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and (b) the total unit volume and/or notional amount executed during the quarter, broken down by reference

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77 See, e.g., Securities Exchange Act Release No. 63387 (Nov. 29, 2010), 75 FR 75502, 75504 n. 18 (Dec. 3, 2010).

78 These terms and conditions are the same as the terms and conditions of the existing exemptive relief that is being extended. Therefore, the CDS CCPs should already be complying with these conditions.

entity, security, or index. Reporting of this information will assist the Commission in carrying out its responsibility to supervise and regulate the securities markets.

Second, each CDS CCP, as a condition to relying on the exemption, is required to establish and maintain adequate safeguards and procedures to protect participants' confidential trading information. Such safeguards and procedures include: (a) limiting access to the confidential trading information of participants to those employees of the CDS CCP who are operating the systems or are responsible for their compliance with this exemption or any other applicable rules; and (b) establishing and maintaining standards controlling employees of the CDS CCP trading for their own accounts. The CDS CCP is required to establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed. This condition is designed to prevent any misuse of trading information that may be available to a CDS CCP in connection with the "forced trade" mechanism. This should strengthen confidence in CCPs, thus promoting participation.

Third, each CDS CCP, as a condition to relying on the exemption, is required to directly or indirectly make available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (a) all end-of-day settlement prices and any other prices with respect to Cleared CDS that it may establish to calculate mark-to-market margin requirements for its clearing members; and (b) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by the CDS CCP. This condition is appropriate to maintain transparency by continuing to make this useful pricing data available to the public on terms that are fair and reasonable and not unreasonably discriminatory.

Finally, each CDS CCP, as a condition to relying on the exemption, is required to implement policies and procedures designed to ensure compliance with these terms and conditions, and to conduct periodic internal reviews related to its compliance program.

E. Section 29(b) of the Exchange Act

Section 29(b) of the Exchange Act generally provides that contracts made in violation of any provision of the Exchange Act, or the rules thereunder, shall be void "(1) as regards the rights of any person who, in violation of any such provision, . . . shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contracts, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contracts in violation of any such provision . . . ." The Commission does not believe that section 29(b) would apply to provisions for which the Commission has provided exemptive relief. To make this clear to all market participants, however, and to eliminate any possible legal uncertainty or market disruption, the Commission is granting temporary exemptive relief from section 29(b).

In particular, the Commission is exercising its authority under section 36 of the Exchange Act to temporarily exempt any security-based swap contract entered into on or after the Effective Date from being void or considered voidable by reason of section 29 of the Exchange Act on the basis that any person that is a party to the security-based swap contract is alleged to have violated any of the provisions for which the Commission has provided exemptive relief herein, until the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant." This temporary exemption will remain in effect until the time the underlying exemptive relief expires.[79]

The legal uncertainty that would result if, for the period in which these temporary exemptions are effective, contracts entered into after the Effective Date could be voided under section 29(b), would undermine the purposes of these exemptions and lead to unnecessary disruption and wasteful litigation.

As previously discussed, as of the Effective Date, persons effecting transactions in security-based swaps, or engaged in acts, practices, and courses of business involving security-based swaps, will be subject to the general antifraud and anti-manipulation provisions of the federal securities laws that were in place before the enactment of the Dodd-Frank Act. Persons would retain all available rights as a result of any violation of these general antifraud and anti-manipulation provisions.

III. Guidance related to Part I of Subtitle A

We also are providing guidance regarding the status, as of the Effective Date, of certain provisions of part I of subtitle A of Title VII ("Part I") that address security-based swaps. Our recent Effective Date Release[80] separately provided guidance and targeted exemptive relief in connection with the status of those Exchange Act provisions related to security-based swaps that were added or amended by subtitle B of Title VII.

As discussed in the Effective Date Release, while certain Title VII provisions applicable to security-based swaps in general will be effective as of the Effective Date, there are a number

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79 The temporary exemption and the broker-dealer specific exemption addressed above will remain in effect until the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant." The exemption from the exchange registration requirements of sections 5 and 6 will remain in effect until the earliest compliance date set forth in any of the final rules regarding registration of SB SEFs.

80 See note 2, supra.

of reasons why – as of that date – particular provisions will not be effective or compliance with particular provisions will not be required. For example, if a provision requires a rulemaking, that provision will not go into effect until after the final rulemaking.[81] If a provision expressly or implicitly applies only to "registered" persons, then persons will not have to comply with the provision until the related registration processes for such persons have been established by final Commission rules, and such persons have become registered.[82] Other Title VII provisions require or permit compliance by market participants as a result of, or in response to, Commission action other than rulemaking, and thus do not impose a compliance obligation upon market participants in the absence of such Commission action.[83] Also, certain Title VII provisions authorize or direct the Commission or another agency to take specified action that may impose compliance obligations upon market participants;[84] thus, while these provisions will become effective on the Effective Date, they will not require compliance by market participants until the relevant action has been undertaken.

The table below lists each provision of Part I, and identifies provisions for which compliance will be required on the Effective Date. The table also identifies provisions for which compliance is predicated on some other action (e.g., registration, adoption of final rules, or other

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81 See section 754 of the Dodd-Frank Act. In particular, the Dodd-Frank Act provides that if a Part I provision requires a rulemaking, the provision will go into effect the later of "not less than" 60 days after publication of the related final rule or July 16.

82 See, e.g., section 716(b)(2) of the Dodd-Frank Act (providing that the term "swaps entity" means any swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant that is registered under the Commodity Exchange Act or the Exchange Act).

83 See, e.g., section 714 of the Dodd-Frank Act (permitting, pursuant to an exemption or rule, a dually registered futures commission merchant and broker-dealer to hold futures, and options on futures, in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the CFTC and to hold cash and securities in a portfolio margining account carried as a futures account pursuant to a portfolio margining program approved by the Commission).

84 See, e.g., section 712(a)(8) of the Dodd-Frank Act (requiring the Commission and the CFTC, after consultation with the Board of Governors, to prescribe jointly such regulations regarding mixed swaps as may be necessary to carry out the purposes of Title VII).

action by the Commission or another agency) and thus will not be required as of that date. The table further addresses certain provisions with which compliance will be required on a date other than the Effective Date, as specified by law.

The Commission does not believe it is necessary to grant, and thus is not granting, temporary relief from compliance with those Part I provisions for which compliance will be required on the Effective Date, for the reasons discussed below.

Table: Part I of Subtitle A of Title VII of the Dodd-Frank Act.

Dodd-Frank Act Section	Compliance Date		Authorizes/ Directs / Limits Commission and/or CFTC Action[85]	Relief Granted
	Upon Effective Date (July 16, 2011)	Upon Registration, Publication of Final Rules, or Other Action[86]		
711: Definitions	✓			No[87]

[85] These provisions do not require compliance by market participants on the Effective Date unless the relevant Commission action already has been undertaken.

[86] A number of Title VII provisions expressly (or implicitly) apply only to "registered" persons. As discussed above, until the related registration processes for such persons have been established by final Commission or other rules, and such persons have become registered pursuant to such rules, they will not be required to comply with these Title VII provisions. Similarly, if a Title VII provision requires a rulemaking, such provision will not necessarily go into effect on the Effective Date, but instead will go into effect "not less than" 60 days after publication of the related final rule or on July16, 2011, whichever is later. See section 754 of the Dodd-Frank Act, 7 U.S.C. 1a note. Provisions for which compliance is not required as of the Effective Date for some other reason, such as another effective date specified by law, are also included in this column and noted below.

[87] Section 711 of the Dodd-Frank Act provides that certain definitions in subtitle A of Title VII have the meaning given in section 1a of the Commodity Exchange Act, 7 U.S.C. 1a.

Dodd-Frank Act Section	Compliance Date		Authorizes/ Directs / Limits Commission and/or CFTC Action[85]	Relief Granted
	Upon Effective Date (July 16, 2011)	Upon Registration, Publication of Final Rules, or Other Action[86]		
712(a): Review of regulatory authority - consultation			✓	N/A[88]
712(b)(1)-(2): Review of regulatory authority – consultation; limitation			✓	N/A[89]
712(b)(3): Review of regulatory authority – consultation; prohibitions	✓			No[90]
712(c): Objection to Commission regulation			✓	N/A[91]

88 Section 712(a) of the Dodd-Frank Act requires the Commission and the CFTC to consult and coordinate with each other before commencing rulemaking or issuing orders in certain Title VII areas and also specifies certain requirements and parameters regarding such activity by the Commission and the CFTC.

89 Sections 712(b)(1) and (2) of the Dodd-Frank Act relate to the authority of the Commission and the CFTC under Title VII.

90 Section 712(b)(3) of the Dodd-Frank Act provides that, unless otherwise authorized by Title VII and except for enforcement of, and examination for compliance with, its rules on capital adequacy, no futures association registered under section 17 of the Commodity Exchange Act, 7 U.S.C. 21, may regulate security-based swaps and no national securities associations registered under section 15A of the Exchange Act, 15 U.S.C. 78o-3, may regulate swaps. This provision will require compliance as of the Effective Date.

91 Section 712(c) of the Dodd-Frank Act outlines a process by which the Commission and the CFTC may request by filing a petition in court, under certain circumstances, that a rule published by the other be set aside.

Dodd-Frank Act Section	Compliance Date		Authorizes/ Directs / Limits Commission and/or CFTC Action[85]	Relief Granted
	Upon Effective Date (July 16, 2011)	Upon Registration, Publication of Final Rules, or Other Action[86]		
712(d): Joint rulemaking			✓	N/A[92]
712(e): Global rulemaking timeframe			✓	N/A[93]
712(f): Rules and registration before final effective dates			✓	N/A[94]
713(a)-(b): Portfolio margining conforming changes		✓		N/A[95]

92 Section 712(d) of the Dodd-Frank Act requires certain joint rulemaking by the Commission and the CFTC and prescribes certain requirements for such joint rulemaking, as well as for interpretations and guidance by the Commission and the CFTC. It also requires the CFTC to share information with the Commission about security-based swap agreements that are not cleared.

93 Section 712(e) of the Dodd-Frank Act requires the Commission and the CFTC, unless otherwise provided in Title VII or an amendment thereto, to promulgate rules required under Title VII not later than the Effective Date.

94 Section 712(f) of the Dodd-Frank Act details actions the Commission and the CFTC are permitted to take to prepare for the effective dates of the provisions of the Dodd-Frank Act.

95 Sections 713(a) and (b) of the Dodd-Frank Act provide that, pursuant to an exemption or rule, a dually registered futures commission merchant and broker-dealer may hold futures, and options on futures, in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the CFTC and may hold cash and securities in a portfolio margining account carried as a futures account pursuant to a portfolio margining program approved by the Commission. Persons cannot comply with this provision in the absence of an appropriate exemption or rule.

Dodd-Frank Act Section	Compliance Date: Upon Effective Date (July 16, 2011)	Compliance Date: Upon Registration, Publication of Final Rules, or Other Action[86]	Authorizes/ Directs / Limits Commission and/or CFTC Action[85]	Relief Granted
713(c): Portfolio margining conforming changes – duty of CFTC			✓	N/A[96]
714: Abusive swaps			✓	N/A[97]
715: Authority to prohibit participation in swaps activities			✓	N/A[98]

[96] Section 713(c) of the Dodd-Frank Act amends the Commodity Exchange Act to require to CFTC to exercise its authority to ensure that securities held in a portfolio margining account carried as a futures account are customer property and the owners of those accounts are customers for the purposes of the Bankruptcy Code, 11 U.S.C. 1 et seq.

[97] Section 714 of the Dodd-Frank Act provides that the Commission, the CFTC, or both may collect information as may be necessary concerning the markets for swaps and security-based swaps and issue a report regarding abusive swaps and security-based swaps that the Commission or the CFTC determine are detrimental to the stability of a financial market or participants in a financial market.

[98] Section 715 of the Dodd-Frank Act provides that, if the Commission or the CFTC determine that a foreign country's swap or security-based swap regulation undermines the stability of the United States financial system, either the Commission or the CFTC, in consultation with the Secretary of the Treasury, may prohibit an entity domiciled in the foreign country from participating in the United States in swap or security-based swap activities.

Dodd-Frank Act Section	Compliance Date		Authorizes/ Directs / Limits Commission and/or CFTC Action[85]	Relief Granted
	Upon Effective Date (July 16, 2011)	Upon Registration, Publication of Final Rules, or Other Action[86]		
716(a)-(j): Prohibition against federal government bailouts of swaps entities		✓		N/A[99]
716(k)-(l): Prohibition against federal government bailouts of swaps entities; rules and authority			✓	N/A[100]

99 Section 716(a) of the Dodd-Frank Act prohibits any "swaps entity" from receiving Federal assistance with respect to any swap, security-based swap, or other activity of the swaps entity. Section 716(h) of the Dodd-Frank Act provides that the prohibition in section 716(a) of the Dodd-Frank Act "shall be effective 2 years following the date on which this Act is effective." In addition, the term "swaps entity" is defined in section 716(b)(2) of the Dodd-Frank Act to mean a swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant that is registered under the Commodity Exchange Act or the Exchange Act, meaning that the prohibition in section 716(a) of the Dodd-Frank is not applicable unless a registration regime exists for such persons under either the Commodity Exchange Act or Exchange Act.

Many of the other provisions of section 716 of the Dodd-Frank Act relate to the prohibition in section 716(a) of the Dodd-Frank Act and thus will not require compliance until such prohibition is in effect. See, e.g., section 716(c) of the Dodd-Frank Act (limiting the scope of the prohibition in section 716(a) of the Dodd-Frank Act). Other provisions of section 716 of the Dodd-Frank Act relate to the applicability of the term "swaps entity" and thus will not require compliance until persons can become "swaps entities," which requires registration regimes to be in place. See, e.g., sections 716(g) and (l) of the Dodd-Frank Act (limiting the applicability of the term "swaps entity" and detailing certain liquidation and other requirements for certain swaps entities, respectively).

100 Section 716(k) of the Dodd-Frank Act states that, "[i]n prescribing rules, the prudential regulator for a swaps entity shall consider" certain factors. Section 716(l) of the Dodd-Frank Act provides the Financial Stability Oversight Council authority to make certain determinations regarding swaps entities.

Dodd-Frank Act Section	Compliance Date: Upon Effective Date (July 16, 2011)	Compliance Date: Upon Registration, Publication of Final Rules, or Other Action[86]	Authorizes/ Directs / Limits Commission and/or CFTC Action[85]	Relief Granted
716(m): Prohibition against federal government bailouts of swaps entities; ban on proprietary trading		✓		No[101]

[101] Section 716(m) of the Dodd-Frank Act requires insured depository institutions to comply with the prohibition on proprietary trading in derivatives in section 619 of the Dodd-Frank Act, which adds new section 13 to the Bank Holding Company Act of 1956, 12 U.S.C. 1841 et seq. ("BHC Act"). Section 13 of the BHC Act, 12 U.S.C. 1851, pursuant to section 13(c)(1) thereof, 12 U.S.C. 1851(c)(1), takes effect on the earlier of 12 months after final rules are issued under section 13(b) of the BHC Act, 12 U.S.C. 1851(b), or 2 years after the date of enactment of the Dodd-Frank Act. As a general matter, a banking entity must bring its activities and investments into compliance with section 13 of the BHC Act not later than 2 years after that section becomes effective. Section 716(m) of the Dodd-Frank Act thus does not impose any compliance obligations until insured depository institutions are required to comply with section 13 of the BHC Act.

Dodd-Frank Act Section	Compliance Date: Upon Effective Date (July 16, 2011)	Compliance Date: Upon Registration, Publication of Final Rules, or Other Action[86]	Authorizes/ Directs / Limits Commission and/or CFTC Action[85]	Relief Granted
717(a)-(b): New product approval CFTC – SEC process – amendments to the Commodity Exchange Act			✓	N/A[102]
717(c)-(d), 718: Determining the Status of Novel Derivative Products	✓			N/A[103]

102 Section 717(a) of the Dodd-Frank Act amends section 2(a)(1)(C) of the Commodity Exchange Act, 7 U.S.C. 2a(1)(C), to provide that the CFTC shall have jurisdiction over certain accounts, agreements, and transactions that the Commission has exempted under section 36(a)(1) of the Exchange Act, 15 U.S.C. 78mm(a)(1), with the condition that the CFTC exercise concurrent jurisdiction over such accounts, agreements, and transactions. Section 717(b) of the Dodd-Frank Act adds new section 3B of the Exchange Act, 15 U.S.C. 78c-2, which provides that an agreement, contract, or transaction (or class thereof) that is exempted by the CFTC pursuant to section 4(c)(1) of the Commodity Exchange Act, 7 U.S.C. 6(c)(1), with the condition that the Commission exercise concurrent jurisdiction over it shall be deemed a security for purposes of the securities laws and includes certain details regarding the applicability of the federal securities laws to such deemed securities. These provisions relate to the jurisdiction and authority of the Commission and the CFTC and do not themselves impose compliance obligations upon market participants. Action by the Commission or the CFTC to which these provisions are applicable however, could result in compliance obligations for market participants. For example, an agreement, contract, or transaction that is deemed a security as a result of section 717(b) of the Dodd-Frank Act would, as a security, be subject to the requirements of the federal securities laws.

103 Section 718 of the Dodd-Frank Act creates a process through which a person filing a proposal to list or trade a novel derivative product that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities) may concurrently provide notice and a copy of such filing to the Commission and the CFTC and details the specific requirements of the process and obligations of the Commission and the CFTC pursuant to the process. Market participants are not obligated to make submissions pursuant to this provision. Sections 717(c) and (d) of the Dodd-Frank Act make related amendments to section 19(b) of the Exchange Act, 15 U.S.C. 78s(b), and section 5c(c)(1) of the Commodity Exchange Act, 7 U.S.C. 7a-2(c)(1), respectively.

Dodd-Frank Act Section	Compliance Date: Upon Effective Date (July 16, 2011)	Compliance Date: Upon Registration, Publication of Final Rules, or Other Action[86]	Authorizes/ Directs / Limits Commission and/or CFTC Action[85]	Relief Granted
719: Studies			✓	N/A[104]
720: Memorandum			✓	N/A[105]

IV. Solicitation of Comments

The Commission intends to monitor closely the transition of the derivatives markets to regulated markets and to determine to what extent, if any, additional regulatory action may be necessary. The Commission is soliciting public comment on all aspects of these exemptions, including:

1. Does the approach set forth by these exemptions – including the approach of continuing to apply certain regulatory requirements that already are applicable to instruments that will be security-based swaps following the Effective Date, but not adding new regulatory requirements in connection with those instruments – appropriately serve the goals of providing for the effective implementation of the Dodd-Frank Act without causing unwarranted market disruption during the implementation process? Would alternative approaches be more effective?

2. Are there other provisions of the Exchange Act as amended by the Dodd-Frank Act for which temporary exemptive relief should be granted? Alternatively, are there particular provisions, for which relief has been granted here, that do not warrant an exemption? Please

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[104] Section 719 of the Dodd-Frank Act requires the Commission and the CFTC to undertake a number of studies.

[105] Section 720 of the Dodd-Frank Act includes two provisions requiring the CTFC and the Federal Energy Regulatory Commission to negotiate a memorandum of understanding.

provide section references and provide a detailed explanation of why granting such an exemption, or terminating an existing exemption, would be necessary or appropriate in the public interest, and consistent with the protection of investors.

3. What should be the appropriate duration of the temporary exemptions granted in this Order?

4. Should any additional conditions be placed on any of these exemptions, or should any conditions that have been placed on any of these exemptions be removed or modified? If so, which exemptions? Please explain and provide specific examples.

V. Conclusion

For the reasons discussed above, the Commission finds that the temporary exemptions provided in this Order are necessary or appropriate in the public interest, and are consistent with the protection of investors, to avoid unnecessary disruption and uncertainty among participants in activities involving security-based swaps, and to provide for the orderly implementation of the requirements of the Dodd-Frank Act. Accordingly,

IT IS HEREBY ORDERED, pursuant to section 36 of the Exchange Act, that, until the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant," the following exemptions from Exchange Act requirements will apply:

(a) Temporary exemption in connection with security-based swap activity:

(1) Persons eligible. The exemption in paragraph (a)(2) of this exemption is available to any person that meets the definition of eligible contract participant as set forth in section 1a(12) of the Commodity Exchange Act (as in effect on July 20, 2010), other than:

(i) a broker or dealer registered under section 15(b) of the Exchange Act (other than paragraph (11) thereof);[106] or

(ii) a self-regulatory organization, as defined in section 3(a)(26) of the Exchange Act; provided, however, that this temporary exemption shall be available to a registered securities association solely with respect to its obligations under section 19(g)(1)(B) of the Exchange Act to enforce compliance with provisions of its rules (and provisions of the rules of the Municipal Securities Rulemaking Board) that do not apply to positions or activities involving security-based swaps as of July 15, 2011.

(2) General scope of exemption. Subject to the exclusions in paragraph (a)(3) of this exemption, such person shall be exempt from the provisions of the Exchange Act, and the rules and regulations thereunder, solely in connection with the person's activities involving security-based swaps.

(3) Exclusions from exemption. The exemption in paragraph (a)(2) of this exemption does not extend to the following provisions under the Exchange Act, and the applicable rules or regulations thereunder:

(i) Antifraud and anti-manipulation provisions. The antifraud and anti-manipulation provisions of sections 9(a)(2)-(5), 10(b), 15(c)(1), 20(d) and 21A(a)(1) of the Exchange Act, as well as underlying rules prohibiting fraud, manipulation or insider trading (but not prophylactic reporting or recordkeeping requirements), and any provision of the Exchange Act related to the

106 Registered broker-dealers are addressed in paragraph (b) of this exemption.

Commission's enforcement authority in connection with violations or potential violations of such provisions.

(ii) Provisions added or amended by the subtitle B of Title VII of the Dodd-Frank Act. All Exchange Act provisions related to security-based swaps added or amended by subtitle B of Title VII of the Dodd-Frank Act, including the amended definition of "security" in section 3(a)(10) of the Exchange Act.

(iii) Provisions applicable to certain securities brokers. The broker registration requirements of section 15(a)(1) of the Exchange Act, and the other requirements of the Exchange Act and the rules and regulations thereunder that apply to a broker that is not registered with the Commission; provided, however, that this exclusion shall apply only to broker activities by persons that are members of a clearing agency that functions as a central counterparty for security-based swaps and that hold customer funds or securities in connection with security-based swaps. Otherwise, paragraph (a)(2) of this exemption will be available in connection with broker activities involving security-based swaps by persons other than registered broker-dealers or self-regulatory organizations. For these purposes, the term "central counterparty" means a clearing agency that interposes itself between the counterparties to security-based swap transactions, acting functionally as the buyer to every seller and the seller to every buyer.

(iv) Provisions applicable to certain securities dealers. The dealer registration requirements of section 15(a)(1) of the Exchange Act, and the other requirements of the Exchange Act and the rules and regulations thereunder that apply to a dealer that is not registered with the Commission; provided, however, that this exclusion shall not apply, and paragraph (a)(2) of this exemption will be available, in connection with dealing activities involving security-based swaps with counterparties that meet the definition of eligible contract participant as set forth in section 1a(12) of the Commodity Exchange Act (as in effect on July 20, 2010).

(v) Additional provisions. The following additional provisions under the Exchange Act, or the rules and regulations thereunder:

(A) Paragraphs (42), (43), (44), and (45) of Section 3(a);

(B) Section 5;

(C) Section 6;[107]

(D) Section 12;

(E) Section 13;

(F) Section 14;

(G) Paragraphs (4) and (6) of Section 15(b);

(H) Section 15(d);

(I) Section 15C;

(J) Section 16; and

(K) Section 17A.

[107] Exchange Act sections 5 and 6 are addressed in a separate exemption in this Order.

(b) Temporary exemption specific to security-based swap activities by registered brokers and dealers.

(1) In general. Subject to paragraph (b)(2) of this exemption, a broker or dealer registered under section 15(b) of the Exchange Act (other than paragraph (11) thereof) shall be exempt from the provisions of the Exchange Act and the rules and regulations thereunder specified in paragraph (a)(2) (subject to the exclusions in paragraph (a)(3) of this exemption) solely with respect to security-based swaps.

(2) Limited exemption in connection with certain provisions and rules. A registered broker or dealer shall be exempt from the following provisions and rules in connection with security-based swaps solely to the extent that those provisions or rules do not apply to the broker's or dealer's security-based swap positions or activities as of July 15, 2011; provided, however, that the exemption from rule 15c3-3 under the Exchange Act shall not be available for activities and positions of the registered broker or dealer related to cleared security-based swaps, to the extent that the registered broker or dealer is a member of a clearing agency that functions as a central counterparty for security-based swaps, and holds customer funds or securities in connection with cleared security-based swaps:[108]

(i) Section 7(c);

(ii) Section 15(c)(3);

(iii) Section 17(a);

(iv) Section 17(b);

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108 Solely for purposes of this temporary exemption, in addition to the general requirements under the referenced Exchange Act sections, registered broker-dealers shall only be subject to the enumerated rules under the referenced Exchange Act sections in connection with security-based swaps.

(v) Regulation T, 12 CFR 220.1 et seq.;

(vi) Rule 240.15c3-1;

(vii) Rule 240.15c3-3;

(viii) Rule 240.17a-3;

(ix) Rule 240.17a-4;

(x) Rule 240.17a-5;

(xi) Rule 240.17a-8; and

(xii) Rule 240.17a-13.

IT IS HEREBY FURTHER ORDERED, pursuant to section 36 of the Exchange Act, that, until the earliest compliance date set forth in any of the final rules regarding registration of security-based swap execution facilities, the following exceptions from Exchange Act requirements will apply:

(a) Temporary exemption from sections 5 and 6 of the Exchange Act.

(1) Any person other than a clearing agency acting as a central counterparty in security-based swaps shall be exempt from the requirements to register as a national securities exchange under sections 5 and 6 of the Exchange Act and the rules and regulations thereunder solely in connection with the person's activities involving security-based swaps.

(2) A broker or dealer shall be exempt from section 5 of the Exchange Act solely in connection with the broker's or dealer's activities involving security-based swaps that it effects or reports on an exchange that is exempted from registration pursuant to paragraph (a)(1) of this exemption.

(3) Each CDS CCP shall be exempt from the requirements of sections 5 and 6 of the Exchange Act and the rules and regulations thereunder solely in connection with its calculation of mark-to-market prices for open positions in Cleared CDS, subject to the following conditions:

(i) Each CDS CCP shall report the following information with respect to the calculation of mark-to-market prices for Cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise:

(A) The total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and

(B) The total unit volume and/or notional amount executed during the quarter, broken down by reference entity, security, or index;

(ii) The CDS CCP shall establish and maintain adequate safeguards and procedures to protect members' confidential trading information. Such safeguards and procedures shall include:

(A) Limiting access to the confidential trading information of members to those employees of the CDS CCP who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and

(B) Establishing and maintaining standards controlling employees of the CDS CCP trading for their own accounts. The CDS CCP must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed; and

(iii) Each CDS CCP shall directly or indirectly make available to the public on terms that are fair and reasonable and not unreasonably discriminatory:

(A) All end-of-day settlement prices and any other prices with respect to Cleared CDS that it may establish to calculate mark-to-market margin requirements for its clearing members; and

(B) Any other pricing or valuation information with respect to Cleared CDS as is published or distributed by the CDS CCP.

(4) Any member of an CDS CCP shall be exempt from the requirements of section 5 of the Exchange Act solely to the extent such member uses any facility of the CDS CCP to effect any transaction in Cleared CDS, or to report any such transaction, in connection with the CDS CCP's clearance and risk management process for Cleared CDS.

(b) Definitions.

(1) For purposes of this exemption, the term "central counterparty" means a clearing agency that interposes itself between the counterparties to security-based swap transactions, acting functionally as the buyer to every seller and the seller to every buyer.

(2) For purposes of this exemption, the term "CDS CCP" shall mean ICE Trust U.S. LLC, Chicago Mercantile Exchange Inc., and ICE Clear Europe, Limited.

(3) For purposes of this exemption, the term "Cleared CDS" shall mean a credit default swap that is a security-based swap that is submitted (or offered, purchased, or sold on terms providing for submission) to a CDS CCP, that is offered only to, purchased only

by, and sold only to persons that meet the definition of eligible contract participant as set forth in section 1a(12) of the Commodity Exchange Act (as in effect on July 20, 2010) , and in which:

(i) The reference entity, the issuer of the reference security, or the reference security is one of the following:

(A) An entity reporting under the Exchange Act, providing Securities Act rule 144A(d)(4) information, or about which financial information is otherwise publicly available;

(B) A foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States;

(C) A foreign sovereign debt security;

(D) An asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or

(E) An asset-backed security issued or guaranteed by the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Government National Mortgage Association; or

(ii) The reference index is an index in which 80% or more of the index's weighting is comprised of the entities or securities described in subparagraph (i).

IT IS HEREBY FURTHER ORDERED, pursuant to section 36 of the Exchange Act, that no contract entered into on or after July 16, 2011 shall be void or considered voidable by reason of section 29(b) of the Exchange Act because any person that is a party to the contract violated a provision of the Exchange Act for which the Commission has provided exemptive relief herein, until such time as the underlying exemptive relief expires.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: July 1, 2011

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64811 / July 5, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14453

In the Matter of SFH II Acquisition Corp., Sforza Enterprises, Inc., Silver Star Capital Holdings, Inc., Silverzipper.com, Inc., Sky Scientific, Inc., Snake Eyes Golf Clubs, Inc. (f/k/a Golf Technology Holding, Inc.), and Soccer Concepts, Inc., Respondents.	CORRECTED 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 SFH II Acquisition Corp., Sforza Enterprises, Inc., Silver Star Capital Holdings, Inc., Silverzipper.com, Inc., Sky Scientific, Inc., Snake Eyes Golf Clubs, Inc. (f/k/a Golf Technology Holding, Inc.), and Soccer Concepts, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. SFH II Acquisition Corp. (CIK No. 1398730) is a void Delaware corporation located in North Miami Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SFH II 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, 2008, which reported a net loss of $62,631 since the company's November 20, 2006 inception.

2. Sforza Enterprises, Inc. (CIK No. 1042988) is a dissolved Florida corporation located in West Palm Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sforza 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.

3. Silver Star Capital Holdings, Inc. (CIK No. 1412339) is an inactive Florida corporation located in Orlando, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Silver Star 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 reported a net loss of $29,339 for the prior three months. As of April 27, 2011, the company's stock (symbol "SSTA") was traded on the over-the-counter markets.

4. Silverzipper.com, Inc. (CIK No. 866491) is a permanently revoked Nevada corporation located in Boca Raton, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Silverzipper.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2000, which reported a net loss of over $4.6 million for the prior nine months.

5. Sky Scientific, Inc. (CIK No. 845572) is a suspended California corporation located in Boca Raton, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sky Scientific 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, 1995, which reported a net loss of over $2.85 million for the prior nine months.

6. Snake Eyes Golf Clubs, Inc. (f/k/a Golf Technology Holding, Inc.) (CIK No. 938605) is a void Delaware corporation located in Ponte Vedra Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Snake Eyes 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 over $2.28 million for the prior nine months. On September 8, 1998, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Middle District of Florida, and the case was terminated on November 22, 1999. As of July 1, 2011, the company's stock (symbol "SNKEQ") was traded on the over-the-counter markets.

7. Soccer Concepts, Inc. (CIK No. 1043387) is a dissolved Florida corporation located in Miami, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Soccer Concepts is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on August 6, 1997, which reported a net loss of $7,188 from the company's October 21, 1980 inception to June 30, 1997.

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.

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

III.

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

A. Whether the allegations contained in Section II 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64810 / July 5, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14452

In the Matter of **Interactive Telesis, Inc.,** **Intercontinental Technologies Group, Inc.,** **Interglobal Waste Management, Inc.,** **International Energy Consultants, Inc.,** **International Thermal Packaging, Inc.,** **Internet Culinary Corp. (f/k/a Capitol Silver Mines, Inc.),** **IRT Corp., and** **i2corp.com (f/k/a PCG Media, Inc.),** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Interactive Telesis, Inc., Intercontinental Technologies Group, Inc., Interglobal Waste Management, Inc., International Energy Consultants, Inc., International Thermal Packaging, Inc., Internet Culinary Corp. (f/k/a Capitol Silver Mines, Inc.), IRT Corp., and i2corp.com (f/k/a PCG Media, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Interactive Telesis, Inc. (CIK No. 1027377) is a forfeited Delaware corporation located in Carlsbad, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Interactive Telesis is delinquent in its periodic

filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended October 31, 2001, which reported a net loss of over $241,000 for the prior three months. On March 8, 2002, Interactive Telesis filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of California, and the case was terminated on February 17, 2005.

2. Intercontinental Technologies Group, Inc. (CIK No. 753282) is a revoked Nevada corporation located in Carson City, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Intercontinental Technologies Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 1997.

3. Interglobal Waste Management, Inc. (CIK No. 1136329) is a suspended California corporation located in Camarillo, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Interglobal is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10/A registration statement on August 24, 2001, which reported a net loss of over $23 million for the prior six months.

4. International Energy Consultants, Inc. (CIK No. 1074378) 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). International Energy Consultants is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2001, which reported a net loss of over $1.2 million for the prior six months.

5. International Thermal Packaging, Inc. (CIK No. 880591) is a suspended California corporation located in Glendale, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). International Thermal Packaging is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended January 31, 2001, which reported a net loss of over $2.8 million for the prior twelve months.

6. Internet Culinary Corp. (f/k/a Capitol Silver Mines, Inc.) (CIK No. 1096008) is a revoked Nevada corporation located in Laguna Beach, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Internet Culinary 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 May 4, 2000, which reported a net loss of over $1.9 million from its May 16, 1967 inception through March 31, 2000. On March 15, 2002, Internet Culinary filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Arizona, which was converted to Chapter 7, and the case was terminated on September 23, 2003.

7. IRT Corp. (CIK No. 52589) is a void Delaware corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IRT 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 March 31, 1994, which reported a net loss of over \$4.9 million for the period from January 4, 1994 to July 26, 1994. The Form 10-K's financial statements were unaudited and, accordingly, did not comply with Rules 3-01 through 3-04 of Regulation S-X. On July 27, 1994, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of California, and the case was terminated on December 7, 2000.

8. i2corp.com (f/k/a PCG Media, Inc.) (CIK No. 1096025) is a Nevada corporation located in Solvang, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). i2corp.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2002, which reported a net loss of over \$330,000 for the prior six months.

B. DELINQUENT PERIODIC FILINGS

9. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, 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.

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 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

Chairman Schapiro
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITES EXCHANGE ACT OF 1934
Release No. 64808 / July 5, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3300 / July 5, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14451

In the Matter of

Lawrence Collins, CPA

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Lawrence Collins ("Respondent") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

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

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. Respondent, age 61, a resident of Maine, was hired by Cabletron Systems, Inc. ("Cabletron") and thereafter Enterasys Networks, Inc. ("Enterasys") and worked in the finance department from March 2000 through December 2001. Respondent was licensed as a certified public accountant ("CPA") in Maine from 1984 through 1987.

2. At all relevant times, Cabletron was a Delaware corporation with its principal place of business in Rochester, New Hampshire. Cabletron was a holding company that provided worldwide telecommunications and networking services and products through four operating subsidiaries, including Enterasys. Cabletron's common stock was registered pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"). The company filed annual, quarterly, and current reports with the Commission on Forms 10-K, 10-Q, and 8-K, respectively. At all relevant times, Cabletron stock was traded on the New York Stock Exchange. On August 6, 2001 Cabletron was merged into Enterasys and Cabletron ceased to exist.

3. On February 9, 2007, the Commission filed its complaint against Respondent in the United States District Court for New Hampshire (Civil Action No. 1:07-cv-00039). An Amended Complaint was filed on October 15, 2008. On June 24, 2011, the court entered an order permanently enjoining Collins, by consent, from future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 and Section 13(b)(5) of the Exchange Act and Rule 13b2-1, thereunder. By consent, the court further ordered that Respondent pay $12,000 in disgorgement; $2,443.54 in prejudgment interest; and a $10,000 civil money penalty.

4. The Commission's amended complaint alleged, among other things, that Respondent and others at Cabletron and Enterasys reported revenues of the companies that did not qualify as revenue under generally accepted accounting principles ("GAAP"), while representing to the public that the companies reported revenue according to GAAP. The conduct hid from the investing public the true financial state of the company by filing materially false and misleading

statements in the company's annual reports on Forms 10-K, quarterly reports on Forms 10-Q, and current reports on Forms 8-K for fiscal years 2001 and 2002.

IV.

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

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

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

B. After two (2) 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 Casey not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64807 / July 5, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14450

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

RESPONDENT

1. Basin Water, Inc. ("Basin" or "Respondent") is a forfeited Delaware corporation formerly headquartered in Rancho Cucamonga, California with a class of equity securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. Basin's common stock (ticker "BWTRQ") is quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc.

DELINQUENT FILINGS

2. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers with classes of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires issuers to file quarterly reports.

3. Basin filed its last Form 10-K/A for the year ended December 31, 2008 on April 30, 2009, and its last Form 10-Q for the three months ended March 31, 2009 on May 22, 2009. Since then, Basin has not submitted its required periodic filings.

4. As discussed above, Basin is delinquent in its periodic filings with the Commission. The following periodic filings are delinquent.

Form	Period Ended	Due on or about
10-Q	June 30, 2009	August 14, 2009
10-Q	September 30, 2009	November 14, 2009
10-K	December 31, 2009	March 1, 2010
10-Q	March 31, 2010	May 15, 2010
10-Q	June 30, 2010	August 14, 2010
10-Q	September 30, 2010	November 14, 2010
10-K	December 31, 2010	March 1, 2011
10-Q	March 31, 2011	May 15, 2011

5. As a result of the conduct described above, Basin has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro
Commissioner Aguilar
Commissioner Paredes
not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3232 / July 5, 2011

INVESTMENT COMPANY ACT OF 1940
Rel. No. 29714 / July 5, 2011

Admin. Proc. File No. 3-12978

In the Matter of ROBERT L. BURNS	PARTIAL PROTECTIVE ORDER

On February 9, 2011, Robert L. Burns submitted to the Commission a petition for review of a law judge's initial decision and included with his petition a "Statement of Financial Condition." On March 14, 2011, we issued an order granting partial protection from disclosure to Burns' petition and to his Statement of Financial Condition because they contained sensitive financial information.[1] Burns submitted his reply brief on April 29, 2011. Attached to that brief is an updated Statement of Financial Condition which, like his earlier submission, contains personal financial data that Burns seeks to protect from disclosure. The Division has not responded to Burns' request.

Under Commission Rule of Practice 322, any party "may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information."[2] The rule further provides that "[a] motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure."[3]

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[1] *See Robert L. Burns*, Order Granting Partial Protective Order, Investment Advisers Act Rel. No. 3174 (Mar. 14, 2011), __ SEC Docket __.

[2] 17 C.F.R. § 201.322(a).

[3] 17 C.F.R. § 201.322(b).

The updated Statement of Financial Condition that Burns submitted contains sensitive information and, at this stage in the proceeding, the harm resulting from complete disclosure appears to outweigh the benefits. However, we have determined that disclosure of certain information included in the record will be necessary to the resolution of the issues before us.

Accordingly, IT IS ORDERED that:

1. Except as otherwise provided in this order, Burns' updated Statement of Financial Condition, and any further updates or additions to Burns' financial condition that might later be filed as part of this review proceeding ("the Confidential Information"), shall be disclosed only to the parties to this action, their counsel, the Commission, any staff advising the Commission in its deliberative processes with respect to this proceeding, and in the event of an appeal of the Commission's determination, any staff acting for the Commission in connection with that appeal.

2. All persons who receive access to the Confidential Information shall keep it confidential and, except as provided in this order, shall not divulge the Confidential Information to any person.

3. No person to whom the Confidential Information is disclosed shall make any copies or otherwise use such Confidential Information, except in connection with this proceeding or any appeal thereof.

4. The Office of the Secretary shall place the Confidential Information in sealed envelopes or other sealed containers marked with the title of this action, identifying each document, and marked "CONFIDENTIAL."

5. The requirements of sealing and confidentiality shall not apply to any reference to the existence of the Confidential Information or to citation of particular information contained therein in testimony, oral argument, briefs, opinions, or in any other similar use directly connected with this action or any appeal thereof.

6. The Commission expressly reserves the authority to reach a different conclusion regarding the confidentiality of the Confidential Information covered by this order at any time before it determines the issues raised in the proceeding.

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

INVESTMENT ADVISERS ACT OF 1940
Release No. 3231 / July 6, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14454

In the Matter of **CHRISTOPHER LOVE BLACKWELL,** **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 Christopher Love Blackwell ("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. Blackwell was an investment adviser, and an officer, director, fund manager, and majority owner of AV Bar Reg, Inc., and the "Fund Manager" for Millers A Game, LLC.

2. On March 23, 2011, an agreed judgment was entered by consent against Blackwell, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Christopher Love Blackwell, et al., Civil Action Number 3:11-CV-234-L, in the United States District Court for the Northern District of Texas, Dallas Division.

3. The Commission's complaint alleged, among other things, that Blackwell, while acting as an investment adviser, illegally raised more than $4 million from at least thirteen investors by offering and selling several fraudulent investments, including fixed income (or mid-term note) trading programs, hedge funds, movie distribution investment contracts, and related advisory services. As alleged, Blackwell made numerous false and misleading statements to investors, including representations about his investment offerings, profits, use of investor funds, academic pedigree, experience as a trader, and his purported prior employment at Goldman Sachs and The Bank of Madrid. The complaint also alleged that Blackwell did not purchase or trade any mid-term notes or other fixed income securities as he promised. Instead, the complaint alleged that he diverted the vast majority of the investors' funds to pay for personal and business expenses, and to make Ponzi payments to prior investors.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Blackwell be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 64813 / July 6, 2011

Admin. Proc. File No. 3-13998

In the Matter of

COBALIS CORPORATION
c/o Warren Nemiroff
The Law Offices of Warren Nemiroff
120 S. El Camino Drive, Ste. 206
Beverly Hills, CA 90212

OPINION OF THE COMMISSION

SECTION 12(j) PROCEEDING

Grounds for Remedial Action

Failure to Comply with Periodic Filing Requirements

Company failed to file periodic reports in violation of Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13. *Held*, it is necessary and appropriate for the protection of investors to revoke the registration of the company's securities.

APPEARANCES:

Warren Nemiroff, of The Law Offices of Warren Nemiroff, for Cobalis Corporation.

Paul W. Kisslinger, *Neil J. Welch, Jr.*, and *David S. Frye*, for the Division of Enforcement.

Appeal filed: December 14, 2010
Last brief received: March 4, 2011

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I.

Cobalis Corp. ("Cobalis" or the "Company") appeals from an administrative law judge's decision finding that the Company violated Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13 thereunder by failing to file required annual and quarterly reports and, on that basis, revoking the registration of the Company's securities.[1] We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

This case concerns repeated failures by the Company to file Exchange Act periodic reports beginning in 2008. The Company became subject to these reporting requirements based on the registration of its common stock pursuant to Exchange Act Section 12(g).[2] The relevant facts are as follows.

A. Background

The Company's predecessor, Togs for Tykes, Inc., registered its common stock in 2002. The Company's registration statement, on Form 10-SB, described Togs for Tykes as a development stage children's clothing manufacturing company, and the accompanying auditor's report disclosed that the "Company has no established source of revenue, which raises substantial doubt about its ability to continue as a going concern." The auditor's report for the Company's first annual report on Form 10-KSB[3] included a similar "going concern" qualification.

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[1] Exchange Act Section 13(a) requires issuers of securities registered pursuant to Exchange Act Section 12 to file periodic reports in accordance with Commission rules. 15 U.S.C. § 78m(a). Rule 13a-1, 17 C.F.R. § 240.13a-1, requires issuers to file annual reports, and Rule 13a-13, 17 C.F.R. § 240.13a-13, requires issuers to file quarterly reports.

[2] 15 U.S.C. § 78l(g).

[3] Exchange Act Rule 13a-1, 17 C.F.R. § 240.13a-1, provides that "[a]nnual reports shall be filed within the period specified in the appropriate form." During some of the periods at issue, Forms 10-KSB and 10-QSB could be filed in lieu of Forms 10-K and 10-Q by a company that was a "small business issuer." *See* 17 C.F.R. § 228.10(a)(1). A "small business issuer" was defined as a company that, among other requirements, had revenues of less than $25 million and was not an investment company. General Instruction A to Form 10-KSB required that "[a]nnual reports on this form shall be filed within 90 days after the end of the fiscal year covered by the report."

In July 2003, Togs for Tykes entered into a "reverse merger"[4] with Cobalis (then known as Biogentech Corporation), with Cobalis as the surviving entity. The Company's subsequent Form 10-KSB described Cobalis as a "development stage company dedicated to the development and commercialization of medical products, focused primarily in the fields of allergic disease" and described its plans to develop and market an anti-allergy medicine called PreHistin (TM). The auditor's reports accompanying the Company's Forms 10-KSB filed in 2004, 2005, and 2006, like the predecessor Togs for Tykes reports, were qualified by "going concern" statements.

In December 2006, the Company entered into a secured financing arrangement with Cornell Capital Partners, LP, n/k/a YA Global Investments LP ("YA Global"). In connection with this financing, in 2007, the Company registered more than seven million shares of common stock for sale to the public by YA Global.[5]

The Company filed a Form 10-KSB for the fiscal year ended March 31, 2007 on July 16, 2007. The accompanying financial statements reported that the Company had not earned any revenue and incurred a $39.6 million cumulative net loss from inception to March 31, 2007, and the auditor's report, like the reports included in the Company's previous filings, disclosed "substantial doubt about [the Company's] ability to continue as a going concern." These were the last audited financial statements filed by the Company.

B. Bankruptcy Proceedings and Subsequent Exchange Act Reporting Failures

On August 1, 2007, YA Global filed an involuntary Chapter 7 bankruptcy proceeding against the Company. On November 19, 2007, the proceeding was converted to a voluntary Chapter 11 proceeding.

Meanwhile, the Company filed quarterly reports on Forms 10-QSB for the periods ending June 30, 2007 and September 30, 2007 on August 20, and December 20, 2007, respectively. On January 28, 2008, bankruptcy counsel for our Los Angeles Regional office sent the Company a letter reminding it that it "should discharge its reporting obligations on a timely basis during the course of the Chapter 11 proceeding and . . . continue to comply with the reporting requirements of the Exchange Act upon release from Chapter 11."

On March 24, 2008, the Company filed a Form 10-QSB for the quarter ended December 31, 2007. The Company admits, and the record confirms, that this was the last periodic report filed by the Company. The Company disclosed that it had "not developed a substantial source of revenue" and incurred an operating loss of $593,524 for the nine months ended December 31, 2007. As of December 31, 2007, the Company had a deficit of approximately $11.2 million.

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[4] *See SEC v. Cavanagh*, 445 F.3d 105, 108 n.4 (2d Cir. 2006) (discussing mechanics of a reverse merger).

[5] This registration statement was declared effective on March 16, 2007.

More than a year later, on August 3, 2009, the Company filed a proposed bankruptcy plan. Acknowledging that it had never generated revenue from sales of its product, the Company proposed to repay its debt using revenue from product sales and the sale of its common stock. In a letter responding to the plan on August 25, 2009, Commission staff noted, among other things, that the Company was "delinquent in its SEC reporting obligations."

The Commission staff sent the Company a letter, dated September 30, 2009, warning that "if the [Company] has not filed all required reports within fifteen days . . . [the Company] may be subject, without further notice, to an administrative proceeding to revoke its registration under the Securities Exchange Act of 1934." A month later, in a letter dated October 30, 2009, the Company responded by stating that it was delaying "expendi[ture of its] limited resources for an audit" until the bankruptcy plan was approved.

The Company then initiated a separate adversary proceeding against YA Global in bankruptcy court (the "YA Global Litigation"). In its YA Global Litigation filings, the Company has alleged, among other things, that YA Global "demanded that Cobalis sign an[] understanding that the transfer agent for the entity be under [YA Global's] control" when it provided financing; that YA Global subsequently breached terms of the financing agreements; and that, before filing the involuntary bankruptcy petition on August 1, 2007, YA Global traded the Company's securities in violation of Rule 10b-5 under the Exchange Act.

On January 20, 2010, the Company acknowledged in another bankruptcy filing that it was "delinquent in its SEC reporting obligations," and represented that it intended to become "fully reporting" by the second quarter of 2010 if its plan were confirmed. It estimated the cost of compliance at $50,000. The bankruptcy court approved the Company's plan on April 7, 2010. One day before this approval, on April 6, the Company issued a press release announcing that it had retained accounting firm Silberstein Ungar, PLLC ("Silberstein") as part of its "commit[ment] to return to fully reporting status as quickly as possible."

C. Institution of Administrative Proceedings

Roughly four months after the approval of the Company's bankruptcy plan, on August 10, 2010, these proceedings were instituted against Cobalis. In its September 10, 2010 answer to the order instituting proceedings, the Company again acknowledged that it was not current in its filings, but stated that it would meet "all filing requirements . . . no later than October 1, 2010." On September 20, 2010, the law judge held a pre-hearing conference. Although Silberstein was no longer Cobalis' independent auditor, counsel for the Company assured the law judge that a new auditor was "in the process of being retained."[6] After the Company's self-imposed October 1 deadline had passed, the Company filed briefs opposing a

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[6] Although the bankruptcy court approved the plan proposed by the Company, at the pre-hearing conference the Company stated that it was appealing the bankruptcy plan. The basis for Cobalis's appeal is not clear from the record.

Division of Enforcement motion for summary disposition. Cobalis argued that "the violations of the past three years were beyond its control," that YA Global was "holding the controls and was out to undermine the ability of COBALIS to control stock transactions, and closet information crucial to company existence from its very principals," and that "[t]here will be future compliance, because now this entity once again controls the transfer agent and the records, and the means to properly report."

Cobalis's assertion that it had "the means to properly report," however, is undermined by evidence of difficulties in engaging new accountants to perform the audits required for its annual reports.[7] According to a declaration submitted by the Division, the Company had not paid its former auditor, Kabani & Company, Inc., for auditing work performed before Cobalis made its last periodic filing for the period ended December 31, 2007.[8] Hamid Kabani, a principal in the auditing firm who was contacted by the Division on March 2, 2011, stated that, as a result of this outstanding balance, the auditing firm had "not cooperated with any successor auditors, and ha[d] not provid[ed] working papers to any successor auditor." Professional auditing standards direct that, before accepting an audit engagement, a potential successor auditor should conduct and evaluate communications with the predecessor auditor.[9]

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[7] Exchange Act annual reports are required to include financial statements that have been audited by an independent accountant. *See* 17 C.F.R. § 210.8-02 (requiring "smaller reporting companies" to file an audited balance sheet with annual reports); 17 C.F.R. § 210.8-01 (preliminary note 2(a)) (stating that the "report and qualifications of the independent accountant [for smaller reporting companies] shall comply with the requirements of Article 2" of Regulation S-X).

[8] The Division has moved to include this declaration in the record pursuant to Commission Rule of Practice 452, which permits a party to adduce new evidence on appeal if the party shows "with particularity" that the evidence is "material" and that there were "reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. § 201.452. We find that this declaration satisfies the requirements of Rule 452. The declaration includes information regarding the Company's access to its workpapers and relationship with its previous auditor that is material to the Company's ability to return to compliance. The declaration also describes Kabani's actions and conversation with Division staff after the date of the initial decision, and we accordingly find reasonable grounds for the failure to adduce the declaration previously.

The declaration also authenticates an updated listing of the Company's EDGAR filings, which confirms the Company's continuing failure to file any reports since the date of the initial decision. We take official notice of the Company's EDGAR filings pursuant to Rule of Practice 323, 17 C.F.R. § 201.323.

[9] *See* Communications between the Predecessor and Successor Auditors, Statement on Auditing Standards No. 84, § 315 (Am. Inst. of Certified Pub. Accountants 1998), *available at* http://pcaobus.org/Standards/Auditing/Pages/AU315.aspx (stating that a new auditor should

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D. Initial Decision

Finding no genuine issue with regard to any material fact (including Cobalis's failure to file any periodic reports since 2008), the law judge granted summary disposition to the Division of Enforcement,[10] and revoked the Exchange Act registration of the Company's securities. The law judge observed that, "to whatever extent Cobalis has made efforts toward remedying its past violations and ensuring future compliance, the investing public still does not have access to complete past and current financial information, and the date when these deficiencies will be cured cannot be predicted." In assessing the public interest, the law judge also noted that the Company did not file Forms 12b-25 regarding its failure to file periodic reports due after its last filing in March 2008 or Forms 8-K to report changes in its auditors.[11]

III.

Exchange Act Section 12(j) authorizes us, "as [we] deem[] necessary or appropriate for the protection of investors," to suspend (for a period not exceeding twelve months) or revoke the registration of a security, if we find that an issuer has failed to comply with any provision of the Exchange Act or its rules and regulations.[12] Exchange Act Section 13(a) requires issuers of securities registered under Exchange Act Section 12 to file periodic and other reports with the

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9 (...continued)
make "specific and reasonable" inquiries of the predecessor auditor, and evaluate the predecessor's responses, before accepting an engagement).

10 *See* Commission Rule of Practice 250, 17 C.F.R. § 201.250 ("The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law").

11 *See* Exchange Act Rule 12b-25, 17 C.F.R. § 240.12b-25(a) (requiring issuers to provide notice of inability to file a periodic report, along with supporting reasons, by filing a Form 12b-25 "no later than one business day after the due date" for such report); Form 12b-25 17 C.F.R. § 249.322; 17 C.F.R. § 240.13a-11 (requiring issuers to file Form 8-K); Item 4.01 of Form 8-K, 17 C.F.R. § 249.308 (requiring issuers to disclose resignation, dismissal, or engagement of an independent accountant). Cobalis's EDGAR filings also do not include a Form 8-K regarding the court approval of its bankruptcy plan. *See* Item 1.03(b) of Form 8-K, 17 C.F.R. § 249.308 (stating that "if an order confirming a plan of reorganization, arrangement or liquidation has been entered" an issuer is required to disclose, among other things, "a summary of the material features of the plan" and "a copy of the plan as confirmed").

12 15 U.S.C. § 78l(j).

Commission.[13] Exchange Act Rules 13a-1 and 13a-13 require such issuers to file annual and quarterly reports.[14] The Company admits that it has failed to file annual or quarterly reports for any period after December 31, 2007. Accordingly, we find that the Company has violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

In determining the appropriate sanction under Exchange Act Section 12(j), we are guided by the analysis we first set forth in *Gateway International Holdings, Inc.*[15] In *Gateway,* we held that our sanctions determination "turns on the effect on the investing public, including both current and prospective investors, of the issuer's violations, on the one hand, and the Section 12(j) sanctions, on the other hand."[16] We set forth a list of non-exclusive factors to be considered in making this determination, including (i) the seriousness of the issuer's violations; (ii) the isolated or recurrent nature of the violations; (iii) the degree of culpability involved; (iv) the extent of the issuer's efforts to remedy its past violations and ensure future compliance; and (v) the credibility of its assurances, if any, against further violations.[17] Based on these factors, we believe that revocation of the registration of the Company's securities is appropriate for the protection of investors.

Cobalis's violations are serious. By failing to comply with its reporting obligations the Company "violate[d] a central provision of the Exchange Act." In so doing, it has deprived both existing and prospective holders of its registered stock of the ability to make informed investment decisions based on current and reliable information, including audited financial statements, about the Company's operations and financial condition.[18] In addition, Cobalis's violations were recurrent and have extended over a lengthy period. It has not filed audited financial statements or other required periodic or current reports for more than three years.

It is not necessary for us to find that the Company was aware of, or intentionally ignored, its reporting obligations as scienter is not necessary to establish grounds for revocation.[19] Nonetheless, the Company's failure to file was not inadvertent. The Company was informed of

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[13] 15 U.S.C. § 78m(a).

[14] 17 C.F.R. § 240.13a-1, 240.13a-13.

[15] Securities Exchange Act Rel. No. 53907 (May 31, 2006), 88 SEC Docket 430.

[16] 88 SEC Docket at 439.

[17] *Id.* at 438-39.

[18] *See Impax Lab., Inc.*, Exchange Act Rel. No. 57864 (May 23, 2008), 93 SEC Docket 6241, 6256.

[19] *See Ponce v. SEC*, 345 F.3d 722, 737 n.10 (9th Cir. 2003); *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998).

its ongoing obligation to file its Exchange Act reports by repeated reminders and warnings from Commission staff. Despite multiple warnings, the institution of these proceedings, and its asserted intention to return to compliance, the Company has not filed its increasingly delinquent reports. Such a "long history of ignoring . . . reporting obligations" under the Exchange Act evidences a "high degree of culpability."[20]

We find that the other relevant factors -- the Company's efforts, if any, to return to compliance and the credibility of management's assurances against further violations -- also support revocation. Despite its assurances during the September 2010 pre-hearing conference that a new auditor was "in the process of being retained," it appears that these efforts were not successful. As recently as December 2010, the Company stated that "most of the discussions with accountants have concerned fees, and a lack of ability to supply information" and suggested that information necessary to prepare the filings was "beyond the control of the Company." More recent evidence indicates that the Company's outstanding balance with its former auditor provided a potentially significant impediment to its ability to secure a successor auditor. The Company has not detailed steps it has taken to substantiate its other assertions regarding its intention to file the delinquent reports.[21] Cobalis's history of reporting violations, failure to clearly articulate any remedial measures it has taken to rectify its reporting difficulties, and pattern of missing its own deadlines casts serious doubt on its ability to prepare and file the delinquent reports and significantly undermines the credibility of its assurances against further violations.[22]

As noted in *Impax,* we consider a "recurrent failure to file periodic reports as so serious that only a strongly compelling showing with respect to the other factors . . . would justify a lesser sanction than revocation."[23] Cobalis has not made such a showing.[24] First, Cobalis argues

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[20] *America's Sports Voice*, Exchange Act Rel. No. 55511 (Mar. 22, 2007), 90 SEC Docket 879, 884.

[21] The Company claimed that it would return to compliance after the approval of the bankruptcy plan in April 2010, by the second quarter of 2010, by October 1, 2010, and most recently by February 28, 2011.

[22] *See Nature's Sunshine Products, Inc.*, Exchange Act Rel. No. 59268 (Jan. 21, 2009), 95 SEC Docket 13488, 13497 (revoking an issuer's registration after citing its pattern of "underestimat[ing] the amount of time needed to become compliant").

[23] *Impax*, 93 SEC Docket at 6252.

[24] The Company's petition for review argues that *Gateway* and three other Commission decisions cited by the law judge are "not controlling" because "their facts stand in contradiction or irrelevancy to Cobalis." The Company seeks to distinguish *Gateway* as involving an issuer with "significant issues of false filings," *America's Sports Voice* as involving

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that its reporting delinquencies are "excusable" and attributable to the actions of others and events beyond its control. According to Cobalis, "it should not be penalized [for its reporting failures] since it has been the victim of a creditor and stockholder, YA Global, that forced the Company into bankruptcy [and] rendered it unable to earn income, in an attempt to eventually convert the property of the Company." Cobalis claims that YA Global "had control of the transfer agent for a significant period of time, and this control made the filing of correct returns frankly impossible." Next, Cobalis argues that it declined to file any reports during this period because "any form of periodic report [during this period] . . . would have been done with incomplete information, and might have disseminated to the public misinformation that could have done lasting harm to any potential investor."

We reject Cobalis's arguments. As we have previously held, the "only matters relevant to [a 12(j)] proceeding" are "the fact of [an issuer's] failure to file its quarterly or annual reports" and "its present inability to cure these deficiencies."[25] An issuer's explanations for delinquent filings do not render such violations "excusable" as the Company claims. Rather we consider such explanations primarily to evaluate the issuer's past efforts to return to compliance and the credibility of any assurances against further violations. While we consider culpability as a factor under *Gateway*, we have previously rejected the argument that an issuer cannot be held accountable for filing delinquencies if the delinquencies resulted from the actions of a third party.[26]

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[24] (...continued)
favoritism to certain shareholders, and *Nature's Sunshine* as involving fraudulent foreign investment and criminal activities. Citing 88 SEC Docket at 443; 90 SEC Docket at 885-86; and 95 SEC Docket at 13500. While the facts in these decisions are not identical to those presented here, each of these cases turned on the issuers' failure to file timely Exchange Act reports. We accordingly find that they provide useful guidance in applying the public interest factors set forth in *Gateway*.

Cobalis further suggests that our decision to remand a revocation decision by a law judge in *e-Smart Technologies* "becomes positively relevant if, as planned, Cobalis does file and make full disclosure in the near future." Citing 57 S.E.C. 964 (2004). However, Cobalis has not filed delinquent reports and, in any event, in *e-Smart* we specifically cautioned that the remand in that case was "dependent on the particular facts and circumstances involved, and should not be construed as suggesting that a determination to revoke an issuer's registration will be reconsidered simply because the issuer has returned to reporting compliance and begun to submit long overdue filings. Other considerations, including the need for finality in Commission administrative proceedings, may justify a different result." *Id.* at 971 n.18.

[25] *Eagletech Commc'n, Inc.*, Exchange Act Rel. No. 54095 (July 5, 2006), 88 SEC Docket 1225, 1228.

[26] *See Eagletech*, 88 SEC Docket at 1228 (rejecting an issuer's claim that "criminal (continued...)

Nor do the Company's claims indicate that it is able to quickly return to compliance or to prevent further violations. Cobalis has not explained how YA Global prevented it from making its delinquent filings or demonstrated that any impediments to its compliance have been cured.[27] Indeed, rather than describing any steps it has taken to meet its obligations under the Exchange Act, the Company raises additional doubts about the likelihood of its future compliance.[28] Its latest brief acknowledged that the "litigation and victimization" that purportedly caused the filing delinquencies had "not yet been cured."[29] The evidence, and the Company's own statements, indicate that its filing failures are likely to continue.

IV.

Exchange Act reports are designed to provide the public with information that is "material, timely, and accurate."[30] For more than three years, the Company failed to file audited

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26 (...continued)
activity by third parties" that allegedly manipulated the issuer's stock excused the issuer's failure to file Exchange Act reports).

27 Despite the Company's contention that YA Global controlled its transfer agent, the record indicates that the transfer agent continued to issue and cancel common stock at the Company's direction both before and after the approval of the bankruptcy plan. The Company has not responded to this evidence or otherwise described how YA Global's purported control of the transfer agent was related to the Company's failure to file its Exchange Act reports. Similarly, the unproven allegations in Cobalis' Third Amended Complaint in the YA Global Litigation, which the Company urges us to "review in its entirety," do not demonstrate that it is able to quickly return to compliance or to prevent further violations. *See Eagletech*, 88 SEC Docket at 1228 *supra* note 26.

28 Asserting in its February 2, 2011 brief that it is "still attempting to prepare and finalize necessary financial documentation," the Company urged us to set a "definitive date" to make its filings current and suggested February 28, 2011 as the deadline. As indicated, the Company did not become current by that date or subsequently. In any case, because compliance with the requirements is mandatory, it may not be subject to conditions from the registrant. As long as an issuer's securities are registered under Exchange Act Section 12(g), Exchange Act Section 13(a) mandates that the issuer "shall file with the Commission" all required reports. 15 U.S.C. § 78m(a).

29 Cobalis predicts that its litigation with YA Global, *i.e.*, apparently part of the "litigation and victimization" referred to by the Company, will go to trial in fall or winter 2011.

30 *America's Sports Voice*, 90 SEC Docket at 885 (citing *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977) (stating that the reporting requirements are "the primary tool[s] which Congress has fashioned for the protection of investors from negligent, careless, and
(continued...)

financial statements or other information relevant to evaluating its current or future prospects, including the approval and appeal of its bankruptcy plan and changes in its independent auditors.[31] Nor, despite its purported willingness to return to compliance, has the Company provided a credible basis to conclude that it is in fact capable of doing so. Revocation under such circumstances "further[s] the public interest by reinforcing the importance of full and timely compliance with the Exchange Act's reporting requirements."[32] The public interest in finality in our administrative proceedings further supports "our conclusion that revocation is necessary and appropriate in the public interest to protect investors."[33] Under the circumstances, we believe

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[30] (...continued)
deliberate misrepresentations in the sale of stock and securities.")); *see also United States v. Arthur Young & Co.*, 465 U.S. 805, 810 (1984) (observing that "[c]orporate financial statements are one of the primary sources of information available to guide the decisions of the investing public").

[31] Like the law judge, in assessing the sanction we also consider Cobalis's failure to file Forms 12b-25 in connection with delays in its periodic reports and Forms 8-K in connection with changes in its auditors, which the Company does not deny. *See Nature's Sunshine*, 95 SEC Docket at 13497 n.27 (noting that the Commission may consider subsequent filing failures and other "matters that fall outside the [order instituting proceedings], in assessing appropriate sanctions"). As noted, Cobalis also failed to file a Form 8-K regarding court approval of its bankruptcy plan. *See supra* note 11.

[32] *Nature's Sunshine*, 95 SEC Docket at 13503. Even when delinquent filings are made prior to our decision on appeal, a decision to dismiss revocation proceedings "despite . . . numerous filing delinquencies and unresolved deficiencies," would undermine the reporting requirements and ultimately:

> reward those issuers who fail to file required periodic reports when due over an extended period of time, become the subject of Exchange Act Section 12(j) revocation proceedings, and then, on the eve of hearings before the law judge or . . . on appeal, make last-minute filings in an effort to bring themselves current with their reporting obligations, while prolonging indefinitely the period during which public investors would be without accurate, complete, and timely reports . . . to make informed investment decisions. *Id.* at 13501.

[33] *Id.* at 13499. If, after revocation, the Company is able to meet the applicable requirements, it may file a Form 10 to re-register its securities under Exchange Act Section 12(g). 15 U.S.C. § 78l(g); *see also Nature's Sunshine*, 95 SEC Docket at 13502 n.47; *Impax*, 93 SEC Docket at 6256.

that revoking the Section 12(g) registration of the Company's common stock is warranted for the protection of investors.

An appropriate order will issue.[34]

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

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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[34] 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. 64813 / July 6, 2011

Admin. Proc. File No. 3-13998

In the Matter of

COBALIS CORPORATION
c/o Warren Nemiroff
The Law Offices of Warren Nemiroff
120 S. El Camino Drive, Ste. 206
Beverly Hills, CA 90212

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the registration of all classes of the registered securities of Cobalis Corporation under Section 12(g) of the Securities Exchange Act of 1934, be, and it hereby is, revoked pursuant to Exchange Act Section 12(j).

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. 64837 / July 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14456

In the Matter of

BLAKE G. WILLIAMS,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Blake G. Williams ("Williams" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Williams, age 27, is a resident of Dallas, Texas. From 2006 and through at least 2008, Williams was employed by TBeck Capital, Inc. and was its corporate secretary. Williams is not, nor has he ever been, registered with the Commission as a broker, dealer, investment adviser or in any other capacity. For a portion of the time in which he engaged in the conduct underlying the complaint below, however, Williams acted as an unregistered broker. Moreover, Williams participated in an offering of Axium Technologies, Inc., Packaged Home Solutions, Inc., Straight Up Brands, Inc., Remote Surveillance Technologies, Inc., and Riverdale Oil and Gas Corporation, which are penny stocks.

B. ENTRY OF THE INJUNCTION

2. On May 27, 2011, a final judgment was entered by default against Williams, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Blake G. Williams, et al., Civil Action Number 3:10-cv-10681, in the United States District Court for the Northern District of Texas.

3. The Commission obtained the above judgment stemming from its complaint alleging that Williams engaged in a fraudulent scheme to sell stock in unregistered, non-exempt public offerings and to manipulate the markets for those stocks beginning in or about the middle of 2006 and continuing through at least 2008. Through this conduct, the complaint alleges that Williams violated the securities registration and anti-fraud provisions of the federal securities laws. The complaint also alleges that Williams' conduct was part of a pervasive fraudulent scheme involving the stocks of at least a dozen microcap issuers. Moreover, the complaint alleges that Williams, in connection with these offerings, acted as an unregistered broker by, among other things, soliciting investors to invest in these offerings and providing investors with confirmation statements of their investments.

III.

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

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

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

IV.

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

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

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

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

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

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

For the Commission, by its Secretary, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Paredes
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64831 / July 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14455

In the Matter of

JAMES L. HERTZ,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTIONS 15(b) AND 15B(c) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 15B(c) of the Securities Exchange Act of 1934 ("Exchange Act") against James L. Hertz ("Hertz" 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 Sections 15(b) and 15B(c) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Hertz, from 1994 through December 2007, was an employee of J.P. Morgan Securities Inc. ("JPMSI"), a Delaware corporation with its principal place of business in New York,

New York. JPMSI has been registered with the Commission, pursuant to Section 15(b) of the Exchange Act, as a broker-dealer since 1986, and is also, pursuant to Section 15B(a) of the Exchange Act, a registered municipal securities dealer. During the relevant time period, Hertz worked in JPMSI's municipal derivatives group, in New York City, as a vice president and marketer of investment agreements and other municipal finance contracts. In that capacity, Hertz was authorized to act as an agent for J.P. Morgan Chase, N.A. ("JPMC Bank"), in marketing investment agreements and other municipal finance contracts. JPMC Bank is a federally-chartered bank, whose primary regulator is the Office of the Comptroller of the Currency. Hertz, age 53, is a resident of Cranford, New Jersey.

2. On November 30, 2010, in United States v. James L. Hertz, Criminal No. 10-cr-1178, Hertz pled guilty to two counts of conspiracy in violation of 15 U.S.C. § 1 and 18 U.S.C. § 371, respectively, and to one count of wire fraud in violation of 18 U.S.C. § 1343 before a United States Magistrate Judge in the United States District Court for the Southern District of New York; his plea allocution was subsequently accepted by the District Court on December 6, 2010. Hertz is currently scheduled to be sentenced on September 16, 2011.

3. The criminal information to which Hertz pled guilty charged, among other things, that Hertz engaged in fraudulent misconduct in connection with the competitive bidding process for the selection of the firms to provide instruments in which municipal issuers, in accordance with federal tax laws and regulations, temporarily invested the proceeds of tax-exempt municipal bonds. More specifically, the information charged that, from as early as October 2001 until at least November 2006, Hertz conspired to allocate and rig bids for investment agreements or other municipal finance contracts, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The information further charged that, from as early as 1998 until at least November 2006, Hertz, in violation of 18 U.S.C. § 371, conspired to defraud the United States and an agency thereof, the Internal Revenue Service of the United States Department of Treasury ("IRS"), by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS in the ascertainment, computation, assessment, and collection of revenue due and owing from municipal issuers and in exercising its responsibilities to monitor compliance with Treasury regulations related to tax-exempt municipal bonds. In addition, the information charged that, as a part and an object of the latter conspiracy, Hertz and other persons devised a scheme and artifice to defraud municipal issuers that used a certain unnamed broker and to obtain money and property from these municipal issuers by means of false and fraudulent pretenses, representations and promises, namely a scheme to deprive municipal issuers of money by causing them to award investment agreements and other municipal finance contracts brokered by the unnamed broker at artificially determined or suppressed rates, and to deprive municipal issuers that used the unnamed broker of the property right to control their assets by causing them to make economic decisions based on false and misleading information, and for the purposes of executing such scheme and artifice transmitted and caused to be transmitted certain false and misleading information by means of wire, radio or television communication in interstate or foreign commerce any writings, signs, signals, pictures or sounds, in violation of 18 U.S.C. § 1343.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Sections 15(b)(6) and 15B(c)(4) of the Exchange Act, Respondent Hertz be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in any offering of penny stock.

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

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Rel. No. 29718 / July 7, 2011

Admin. Proc. File No. 3-14055

In the Matter of DAXOR CORPORATION	ORDER GRANTING EXTENSION

I.

The Chief Administrative Law Judge has moved, pursuant to Commission Rule of Practice 360(a)(3),[1] for an extension of time to issue an initial decision in this proceeding. For the reasons set forth below, we have decided to grant the motion.

On September 17, 2010, we issued an Order Instituting Cease-and-Desist Proceedings ("OIP") pursuant to Section 9(f) of the Investment Company Act of 1940[2] against Daxor Corporation ("Daxor" or the "Company"), a publically-traded company based in New York, New York. The OIP alleges, among other things, that Daxor is, and has been for many years, an investment company as defined by Section 3(a)(1)(C) of the Investment Company Act,[3] because Daxor engages in the business of investing and trading in securities and 40% or more of its total assets (other than Government securities and cash items) consist of investment securities, but that the Company has never registered with the Commission as an investment company and is not exempted or excluded from the requirements of the Investment Company Act. The OIP concludes that, as a result of the Company's conduct, Daxor violated Section 7(a) of the Investment Company Act, which makes it unlawful for an unregistered investment company to, among other things, "directly or indirectly . . . offer for sale, sell or deliver after sale, by use of

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1 17 C.F.R. § 201.360(a)(3).

2 15 U.S.C. § 80a-9(f).

3 15 U.S.C. § 80a-3(a)(1)(C).

the mails or any means or instrumentality of interstate commerce, any security or interest in a security" or "engage in any business in interstate commerce."[4]

The OIP directs the presiding law judge, in this case Judge Robert G. Mahony, to hold a public hearing to take evidence regarding the allegations and the appropriate sanctions, and to issue an initial decision no later than 300 days from the date of service of the OIP, *i.e.*, by July 20, 2011. On June 9, 2011, Chief Judge Murray filed a motion requesting an extension of time until September 6, 2011 to issue an initial decision. Daxor filed a consent to the Chief Judge's motion for extension.

II.

We adopted Rules of Practice 360(a)(2) and 360(a)(3) as part of an effort to enhance the timely and efficient adjudication and disposition of Commission administrative proceedings,[5] setting mandatory deadlines for completion of administrative hearings. We further provided for the granting of extensions to those deadlines under certain circumstances, if supported by a motion from the Chief Law Judge.

Here, the Chief Law Judge supports her request for an extension by noting that the record in the case is extensive, consisting of three days of hearing transcripts and approximately 400 exhibits. She further supports her request by citing an unusually heavy workload combined with the Office of Administrative Law Judges having only two law clerks instead of the customary four. Under the circumstances, we believe it is appropriate to grant the Chief Law Judge's request and to extend the deadline for issuance of a decision in this matter.

Accordingly, IT IS ORDERED that the deadline for filing the initial decision in this matter be, and it hereby is, extended until September 6, 2011.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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[4] 15 U.S.C. § 80a-7(a).

[5] *See Adopting Release*, Securities Act Rel. No. 8240 (June 11, 2003), 80 SEC Docket 1463.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-64832; File No. S7-29-11

RIN 3235-AL18

Amendment to Rule Filing Requirements for Dually-Registered Clearing Agencies

AGENCY: Securities and Exchange Commission.

ACTION: Interim final rule; request for comment.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") is adopting an interim final rule to amend Rule 19b–4 under the Securities Exchange Act of 1934 ("Exchange Act"). The amendment expands the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act to include any matter effecting a change in an existing service of a clearing agency registered with the Commission ("Registered Clearing Agency") that both primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service. The Commission also is making a corresponding technical modification to the General Instructions for Form 19b-4 under the Exchange Act. The amendments to Rule 19b-4 and Form 19b-4 are intended to streamline the rule filing process in areas involving certain activities concerning non-security products that may be subject to overlapping regulation as a result of, in part, certain provisions under Section 763(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") that would deem some clearing agencies to be registered with the Commission as of July 16, 2011.

DATES: Effective Date: July 15, 2011.

17 of 80

Comment Date: Comments on the interim final rule should be submitted on or before September 15, 2011.

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-29-11 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 St., NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-29-11. 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 website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission'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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Jeffrey S. Mooney, Assistant Director; Joseph P. Kamnik, Senior Special Counsel; and Andrew R. Bernstein, Attorney-Adviser, Office of Clearance and Settlement, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010 at (202) 551-5710.

SUPPLEMENTARY INFORMATION: The Commission is adopting an amendment to Rule 19b-4 under the Exchange Act as an interim final rule to expand the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act. The Commission also is making a corresponding technical modification to the General Instructions for Form 19b-4 under the Exchange Act. We will carefully consider the comments that we receive and intend to respond as necessary or appropriate.

I. Introduction

A. Background on Commission Process for Proposed Rule Changes

Section 19(b)(1) of the Exchange Act[1] requires each self-regulatory organization ("SRO"), including any Registered Clearing Agency,[2] to file with the Commission copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such SRO (collectively, "Proposed Rule Change"),[3] which must be submitted on Form 19b-4[4] in

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1 15 U.S.C. 78s(b)(1).

2 See Section 3(a)(26) of the Exchange Act, 15 U.S.C. 78c(a)(26) (defining the term "self-regulatory organization" to mean any national securities exchange, registered securities association, registered clearing agency, and, for purposes of Section 19(b) and other limited purposes, the Municipal Securities Rulemaking Board) (emphasis added).

3 15 U.S.C. 78s(b)(1). Section 3(a)(27) of the Exchange Act defines "rules" to include "the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing… and such of the stated policies, practices, and interpretations of such exchange, association, or clearing agency 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 of such exchange, association, or clearing agency." 15 U.S.C. 78c(a)(27). Rule 19b-4(b) under the Exchange Act defines "stated policy, practice, or interpretation" to mean, in part, "[a]ny material aspect of the operation of the facilities of

accordance with the General Instructions thereto. Once a Proposed Rule Change has been filed, the Commission is required to publish it in the Federal Register to provide an opportunity for public comment.[5] A Proposed Rule Change generally may not take effect unless the Commission approves it,[6] or it is otherwise permitted to become effective under Section 19(b).[7]

Section 19(b)(2) of the Exchange Act sets forth the standards and time periods for Commission action either to approve, disapprove or institute proceedings to determine whether the Proposed Rule Change should be disapproved.[8] The Commission must approve a Proposed Rule Change if it finds that the underlying rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the SRO proposing the rule change.[9]

The SRO rule filing process for Registered Clearing Agencies serves two important policy goals. First, the notice and comment requirement helps assure that interested persons have an opportunity to provide input on proposed actions by Registered Clearing Agencies that

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the self-regulatory organization" or "[a]ny statement made generally available" that "establishes or changes any standard, limit, or guideline" with respect to the "rights, obligations, or privileges" of persons or the "meaning, administration, or enforcement of an existing rule." 17 CFR 240.19b-4(b).

4 See 17 CFR 249.819.

5 See 15 U.S.C. 78s(b)(1). The SRO is required to prepare the notice of its Proposed Rule Change on Exhibit 1 of Form 19b-4 that the Commission then publishes in the Federal Register.

6 See 15 U.S.C. 78s(b)(2). However, as provided in Section 19(b)(2)(D) of the Exchange Act, 15 U.S.C. 78s(b)(2)(D), a Proposed Rule Change may be "deemed to have been approved by the Commission" if the Commission fails to take action on a proposal that is subject to Commission approval within the statutory time frames specified in Section 19(b)(2).

7 See, e.g., 15 U.S.C. 78s(b)(3)(A).

8 See 15 U.S.C. 78s(b)(2).

9 15 U.S.C. 78s(b)(2).

could have a significant impact on the market, market participants (both professionals and individual investors) and others.[10] Second, the rule filing process allows the Commission to review Registered Clearing Agencies' Proposed Rule Changes to determine whether they are consistent with the Exchange Act, including the goals of prompt and accurate clearance and settlement of securities transactions and the safeguarding of investors' securities and funds.[11]

At the same time, Section 19(b)(3)(A) of the Exchange Act provides that a Proposed Rule Change may become effective upon filing with the Commission, without notice and opportunity for hearing, if it is appropriately designated by the SRO as: (i) constituting a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO; (ii) establishing or changing a due, fee, or other charge imposed by the SRO (on any person, whether or not the person is a member of the SRO) or (iii) concerned solely with the administration of the SRO.[12] The Commission has the power summarily to temporarily suspend the change in rules of the SRO within sixty days of its filing if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[13] If the Commission takes such action, it is then required to institute proceedings to determine whether the Proposed Rule Change should be approved or disapproved.[14]

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10 See Securities Exchange Act Release No 49505 (Mar. 30, 2004), 69 FR 17864 (Apr. 4, 2004) (Proposed Rules Regarding Proposed Rule Changes of Self-Regulatory Organizations) (noting that SROs "exercise certain quasi-governmental powers over members through their ability to impose disciplinary sanctions, deny membership, and require members to cease doing business entirely or in specified ways.").

11 See 15 U.S.C. 78q-1(a)(1).

12 15 U.S.C. 78s(b)(3)(A).

13 15 U.S.C. 78s(b)(3)(C).

14 Id. Temporary suspension of a Proposed Rule Change and any subsequent action to approve or disapprove such change shall not affect the validity or force of the rule change

In addition to the matters expressly set forth in the statute, Section 19(b)(3)(A) also provides the Commission with the authority, by rule and consistent with the public interest, to designate other types of Proposed Rule Changes that may be effective upon filing with the Commission.[15] The Commission has previously utilized this authority to designate, under Rule 19b-4 of the Exchange Act, certain rule changes that qualify for summary effectiveness under Section 19(b)(3)(A).[16]

B. Clearing Agencies Deemed Registered Under the Dodd-Frank Act

Section 763(b) of the Dodd-Frank Act[17] provides that (i) a depository institution registered with the Commodity Futures Trading Commission ("CFTC") that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act and (ii) a

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during the period it was in effect and shall not be reviewable under Section 25 of the Exchange Act, nor shall it be deemed to be "final agency action" for purposes of 5 U.S.C. 704.

15 15 U.S.C. 78s(b)(3)(A).

16 For example, Rule 19b-4(f) under the Exchange Act currently permits SROs to declare rule changes to be immediately effective pursuant to Section 19(b)(3)(A) if properly designated by the SRO as: (i) effecting a change in an existing service of a Registered Clearing Agency that: (A) does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible; and (B) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service; (ii) effecting a change in an existing order-entry or trading system of a SRO that: (A) does not significantly affect the protection of investors or the public interest; (B) does not impose any significant burden on competition; and (C) does not have the effect of limiting the access to or availability of the system or (iii) effecting a change that: (A) does not significantly affect the protection of investors or the public interest; (B) does not impose any significant burden on competition and (C) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the SRO has given the Commission written notice of its intent to file the Proposed Rule Change, along with a brief description and text of the Proposed Rule Change, at least five business days prior to the date of filing of the Proposed Rule Change, or such shorter time as designated by the Commission. See 17 CFR 240.19b-4(f).

17 The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat.1376 (2010).

derivatives clearing organization ("DCO") registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act will be deemed registered with the Commission as a clearing agency solely for the purpose of clearing security-based swaps ("Deemed Registered Provision").[18] The Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.[19] Once a clearing agency is deemed to be a Registered Clearing Agency, it will be required to comply with all requirements of the Exchange Act, and the rules and regulations thereunder, applicable to Registered Clearing Agencies to the extent it clears security-based swaps after the effective date of the Deemed Registered Provision, including, for example, the obligation to file Proposed Rule Changes under Section 19(b) of the Exchange Act.[20] Clearing of futures and options on futures is generally regulated by the CFTC in connection with its oversight and supervision of DCOs. DCOs are generally permitted to implement rule changes by self-certifying that the new rule complies with the Commodity Exchange Act ("CEA") and the CFTC's regulations.[21] The change effected by this interim final

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[18] See Section 763(b) of the Dodd-Frank Act (adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q-1(l)). Under this Deemed Registered Provision, each of the Chicago Mercantile Exchange Inc. ("CME"), ICE Clear Europe Limited ("ICE Clear Europe") and ICE Trust US LLC, or a successor entity of ICE Trust ("ICE Trust") will become Registered Clearing Agencies solely for the purpose of clearing security-based swaps.

[19] Section 774 of the Dodd-Frank Act states, "[u]nless otherwise provided, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle."

[20] The Commission anticipates that as of July 16, 2011, OCC (formerly known as The Options Clearing Corporation), CME and ICE Clear Europe will be the only Registered Clearing Agencies that will be subject to new Rule 19b-4(f)(4)(ii). Although it also will be a dually-registered clearing agency, ICE Trust does not have an existing futures clearing business for which it would file Proposed Rule Changes.

[21] See 7 U.S.C. 7a-2(c) and 17 CFR 40.6.

rule is intended to eliminate any burdens resulting from delays that could arise due to the differences between the Commission's rule filing process and the CFTC's self-certification process, which generally allows rule changes to become effective immediately upon or shortly after filing.[22]

The Commission has limited time to act without exposing certain dually registered clearing agencies to potential legal uncertainty and market disruption caused by delays that could result from the requirement that the Commission undertake a full review of Proposed Rule Changes related to a Registered Clearing Agency's futures clearing operations before these Proposed Rule Changes may be made effective. Specifically, and as discussed in greater detail in Section IV, the Commission only recently received urgent requests for the relief to be provided by the interim final rule. Accordingly, and in the interest of adopting the changes to Rule 19b-4 and the General Instructions for Form 19b-4 prior to effective date of the Deemed Registered Provision of the Dodd-Frank Act on July 16, 2011, the Commission finds that it has good cause to adopt the interim final rule immediately and without the notice and public comment procedures that would ordinarily apply to this type of rulemaking.

II. Interim Final Rule

A. Amendment to Rule 19b-4

The Commission is amending Rule 19b-4 to expand the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act to include Proposed Rule Changes made by Registered Clearing Agencies with respect to certain futures clearing operations.[23] Specifically, new Rule 19b-4(f)(4)(ii) will allow a Proposed Rule Change

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22 See 7 U.S.C. 7a-2(c) and 17 CFR 40.6.

23 When an SRO submits a Proposed Rule Change to the Commission pursuant to Section 19(b)(3)(A) of the Exchange Act, the Commission still reviews the filing and has the

concerning futures clearing operations filed by a Registered Clearing Agency to take effect upon filing with the Commission pursuant to Section 19(b)(3)(A) so long as it is properly designated by the Registered Clearing Agency as effecting a change in a service of the Registered Clearing Agency that meets two conditions.[24] The first condition, contained in new Rule 19b-4(f)(4)(ii)(A), is that the Proposed Rule Change primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures.[25] For purposes of this requirement, a Registered Clearing Agency's "futures clearing operations" would generally include any activity that would require the Registered Clearing Agency to register with the CFTC as a DCO in accordance with the CEA.[26] In addition, to "primarily affect" such futures clearing operations would mean that the Proposed Rule Change is targeted to affect matters related to the clearing of futures specifically and that any effect on other clearing operations

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power summarily to temporarily suspend the change in rules of the SRO within sixty days of its filing if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. If the Commission takes such action, it is then required to institute proceedings to determine whether the Proposed Rule Change should be approved or disapproved. Temporary suspension of a Proposed Rule Change and any subsequent action to approve or disapprove such change shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under Section 25 of the Exchange Act, nor shall it be deemed to be "final agency action" for purposes of 5 U.S.C. 704. See 15 U.S.C. 78s(b)(3)(A).

24 17 CFR 240.19b-4(f)(4)(ii) (as amended by this interim final rule).

25 17 CFR 240.19b-4(f)(4)(ii)(A) (as amended by this interim final rule).

26 See 7 U.S.C. 7a-1 (providing that it shall be unlawful for a DCO, unless registered with the CFTC, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a DCO (as described in 7 U.S.C. 1a(9)) with respect to a contract of sale of a commodity for future delivery (or option on such a contract) or option on a commodity, in each case unless the contract or option is (i) otherwise excluded from registration in accordance with certain sections of the CEA or (ii) a security futures product cleared by a Registered Clearing Agency).

would be incidental in nature and not significant in extent.[27] However, because a security futures product is a security for purposes of the Exchange Act,[28] a Registered Clearing Agency will not be permitted to file Proposed Rule Changes related to its security futures business pursuant to Section 19(b)(3)(A) of the Exchange Act in reliance on new Rule 19b-4(f)(ii). Instead, such clearing agency will continue to be required to file Proposed Rule Changes with the Commission related to its respective security futures operations in accordance with Section 19(b)(1) of the Exchange Act, which the Commission will review in accordance with Section 19(b)(2), unless there is another basis for the Proposed Rule Change to be filed under Section 19(b)(3)(A).

The second condition, contained in new Rule 19b-4(f)(4)(ii)(B), is that the Proposed Rule Change does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service.[29] The Commission notes that the phrase "significantly affect" currently is used elsewhere in Rule 19b-4 in the context of defining other categories of Proposed Rule Changes that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act.[30] Accordingly,

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27 For example, rules of general applicability that would apply equally to securities clearing operations, including security-based swaps, would not be considered to primarily affect such futures clearing operations. In addition, changes to general provisions in the constitution, articles, or bylaws of the Registered Clearing Agency that address the operations of entire clearing agency would not be considered to primarily affect such futures clearing operations.

28 15 U.S.C. 78c(a)(10).

29 17 CFR 240.19b-4(f)(4)(ii)(A) (as amended by this interim final rule).

30 See e.g., 17 CFR 240.19b-4(f)(4)(i) (as amended by this interim final rule) (in respect of a Proposed Rule Change in an existing service of a Registered Clearing Agency that: (1) does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and (2) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service); 17 CFR 240.19b-4(f)(5) (in respect of a Proposed Rule Change in an existing order-entry or trading system of a SRO that: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on

"significantly affect" has the same meaning and interpretation as that phrase has in Rules 19b-4(f)(4)(i) (as amended by this interim final rule), 19b-4(f)(5) and 19b-4(f)(6). Also for purposes of this requirement, a Registered Clearing Agency's "securities clearing operations . . . or any related rights or obligations of the clearing agency or persons using such service" would generally include any activity that would require the Registered Clearing Agency to register as a clearing agency in accordance with the Exchange Act.

The Commission believes that permitting clearing agencies to submit Proposed Rule Changes that meet the two conditions referenced above (i.e., (A) primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and (B) does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service) for immediate effectiveness pursuant to Section 19(b)(3)(A) of the Exchange Act is consistent with the public interest and the purposes of the Exchange Act. In particular, this approach should help limit the potential for delays by providing a streamlined process for allowing rule changes to become effective that primarily concern the futures clearing operations of a clearing agency which, unless such operations were linked to securities clearing operations, would not be subject to regulation by the Commission. In addition, the information provided to the Commission by the Registered Clearing Agency in a filing made pursuant to Section 19(b)(1) of the Exchange Act is

competition; and (3) does not have the effect of limiting the access to or availability of the system); and 17 CFR 240.19b-4(f)(6) (in respect of a Proposed Rule Change that (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the SRO has given the Commission written notice of its intent to file the Proposed Rule Change, along with a brief description and text of the Proposed Rule Change, at least five business days prior to the date of filing of the Proposed Rule Change, or such shorter time as designated by the Commission).

virtually identical to the information required to be included in a filing made pursuant to Section 19(b)(3)(A). At the same time, the Commission would retain the power summarily to temporarily suspend the change in rules of the Registered Clearing Agency within sixty days of its filing if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[31] Finally, and as discussed more fully in Section IV of this release, changes to a clearing agency's futures clearing operations will continue to be subject to the CFTC's normal process for reviewing rule changes.

B. Amendment to the General Instructions for Form 19b-4

In order to accommodate the amendment to Rule 19b-4 being adopted today, the Commission also is making a corresponding technical modification to the General Instructions for Form 19b-4 under the Exchange Act. Specifically, the Commission is amending Item 7(b) of the General Instructions for Form 19b-4 (Information to be Included in the Completed Form), which requires the respondent SRO to cite to the statutory basis for filing a Proposed Rule Change pursuant to Section 19(b)(3)(A) in accordance with the existing provisions of Rule 19b-4(f). This amendment would revise Item 7(b)(iv) to include the option to file the form in accordance with new Rule 19b-4(f)(4)(ii), which provides for situations where a Registered Clearing Agency is effecting a change in an existing service that both (i) primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and (ii) does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service.

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[31] 15 U.S.C. 78s(b)(3)(C). If the Commission takes such action, it is then required to institute proceedings to determine whether the Proposed Rule Change should be approved or disapproved.

C. Effective Date

The amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 will be effective as of July 15, 2011.

III. Request for Comment

We are requesting comments from all members of the public. We will carefully consider the comments that we receive. We seek comment generally on all aspects of the interim final rule. In addition, we seek comment on the following:

1. Do the amendments contemplated by this interim final rule adequately address concerns regarding the application of the Commission's process for reviewing Proposed Rule Changes once the Deemed Registered Provision becomes effective?
2. Given that the objectives and statutory authority of the CFTC differ from the Commission's, does the degree to which the interim final rule uses a process that is similar to the CFTC's process for reviewing rule changes by a Registered Clearing Agency that primarily affect its futures clearing operations and do not significantly affect its securities clearing operations provide for sufficient protection for investors and the securities markets? Why or why not?
3. Are there other amendments the Commission should consider making to Rule 19b-4, such as further expanding the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act? If so, please describe any amendments the Commission should consider and reasons why.
4. Should any additional restrictions be placed on the ability of a Registered Clearing Agency to file Proposed Rule Changes under Exchange Act Section 19(b)(3)(A)?

IV. Other Matters

The Administrative Procedure Act ("APA")[32] generally requires an agency to publish, before adopting a rule, notice of a proposed rulemaking in the Federal Register.[33] This requirement does not apply, however, if the agency "for good cause finds . . . that notice and public procedure are impracticable, unnecessary, or contrary to the public interest."[34] Further, the APA also generally requires that an agency publish a rule in the Federal Register 30 days before the rule becomes effective.[35] This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.[36]

The Commission finds that it has good cause to have these rules take effect on July 15, 2011, on an interim final basis and that notice and solicitation of comment before the effective date of the proposed amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 is impracticable, unnecessary, or contrary to the public interest.

Specifically, Section 763(b) of the Dodd-Frank Act provides that both (i) a depository institution registered with the CFTC that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act and (ii) a DCO registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act will be deemed registered with the Commission as a clearing agency solely for the purpose of clearing security-based swaps.[37] The Deemed

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32 5 U.S.C. 551 et seq.

33 See 5 U.S.C. 553(b).

34 Id.

35 See 5 U.S.C. 553(d).

36 Id.

37 See Section 763(b) of the Dodd-Frank Act (adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q-1(l)).

Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011.[38]

The Commission recognizes that the differences between the Commission's rule filing process for Registered Clearing Agencies and the CFTC's process for reviewing rule changes by DCOs could result in additional burdens on certain clearing agencies subject to the Deemed Registered Provision, which are discussed in greater detail below.[39] Specifically, DCOs are generally permitted to implement new rules or rule amendments by filing with the CFTC a certification that the new rule or rule amendment complies with the CEA and the CFTC's regulations.[40] Alternatively, DCOs may request direct CFTC approval of a rule or amendment thereunder after it has been filed with the CFTC pursuant either to its self-certification process or as a request for direct approval of a rule or amendment.[41] Because of the differences between the CFTC's process and the Commission's rules for reviewing Proposed Rule Changes, a rule or

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38 Section 774 of the Dodd-Frank Act states, "[u]nless otherwise provided, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle."

39 The CFTC's requirements and procedures for self-certification filings and approval requests for new and amended rules and the clearing of new products are set forth in 17 CFR 40.6, 17 CFR 40.5 and 17 CFR 40.2.

40 See 7 U.S.C. 7a-2(c). Unless designated by the DCO as an emergency rule certification, rule changes submitted to the CFTC pursuant to the self-certification process may take effect immediately so long as the CFTC receives the submission by the open of business on the business day preceding implementation of the rule. See 17 CFR 40.6. However, Section 745 of the Dodd-Frank Act amended Section 5c(c) of the CEA to include a new 10-day certification review period for all rules and rule amendments submitted to the CFTC and to permit the CFTC to stay the certification of rules or rule amendments that, among other things, present novel or complex issues that require additional time to analyze. Pursuant to Section 754 of the Dodd-Frank Act, this change to the timing of the self-certification process takes effect on the later of 360 days after the date of the enactment of the statute or not less than 60 days after publication of the final rule or regulation implementing such provision.

41 See 7 U.S.C. 7a-2(c) and 17 CFR 40.5.

rule amendment proposed by a dually-registered clearing agency related exclusively to its futures clearing operations could be delayed by the Commission's rule filing process despite being permitted to become effective by the CFTC immediately upon or shortly after filing.[42]

This interim final rule takes effect on July 15, 2011. For several reasons, including those discussed above, we have acted on an interim final basis. Specifically, affected clearing agencies requested action with respect to Registered Clearing Agencies' obligations under Section 19(b) of the Exchange Act only shortly before the effective date of the Deemed Registered Provision. Based on discussions with these affected clearing agencies, the Commission understands that market participants believe that the Commission needs to provide relief prior to the effective date of the Deemed Registered Provision of the Dodd-Frank Act on July 16, 2011 in order to avoid operational problems, legal uncertainty and market disruptions.

Specifically, one clearing agency subject to the Deemed Registered Provision contacted staff in late April 2011 to alert the Commission that it had determined that, absent the approach set out in the interim final rule we are adopting today, the clearing agency would encounter a number of negative consequences.[43] For example, delays resulting from the requirement that the

42 During 2010, CME self-certified 11 rule changes with the CFTC related to its activities as a DCO. ICE Clear Europe, which became a registered DCO on January 22, 2010, did not self-certify any rule changes during 2010, but has self-certified 11 rule changes with the CFTC since January 1, 2011. Currently, OCC, which is registered with the Commission as a clearing agency with respect to its clearing services for options and security futures listed and traded on its participant exchanges, also is registered with the CFTC as a DCO with respect to its clearing services for transactions in futures and options on futures. During 2010, OCC filed 19 Proposed Rule Changes with the Commission and 19 rule changes with the CFTC, of which 15 were resolved through the CFTC's self-certification process and four were resolved or are pending pursuant to the CFTC's direct approval process.

43 The Commission's staff discussed with this clearing agency in late February 2011, among other things, the regulatory requirements for Registered Clearing Agencies under the Exchange Act in light of the Deemed Registered Provision including with respect to Proposed Rule Changes. Subsequently, in late April 2011, that clearing agency

Commission undertake a full review of Proposed Rule Changes related to a Registered Clearing Agency's futures clearing operations before these Proposed Rule Changes may be made effective could impair a clearing agency's ability to bring beneficial enhancements or other changes into the futures markets, such as those related to improving the operational efficiency of its futures clearing business. These delays could also lead to legal uncertainty regarding the status of Proposed Rule Changes after they have been self-certified with the CFTC but prior to the date on which the Commission makes a final determination in accordance with Section 19(b) of the Exchange Act. As a result, both the clearing agency and market participants could potentially be required to develop contingency plans with alternative approaches related to the clearing of futures which would likely result in substantial operational burdens and increased costs. As a result, the clearing agency requested that the Commission provide relief on the basis that subjecting Proposed Rule Changes that relate primarily to its futures clearing operations to the routine Commission approval process would needlessly delay effectiveness of these Proposed Rule Changes and could affect the clearing agency's operations as well as ability to provide enhancements that promote efficiencies with respect to its futures related activities. In May 2011 another clearing agency contacted the Commission to convey the need for urgent rulemaking by the Commission to address these same issues.

Notwithstanding the limited amount of time before the Deemed Registered Provision becomes effective, and therefore the limited time the Commission has to act, these clearing agencies expressed their strong view that the Commission should provide relief immediately in order to prevent the above-described potential operational problems, legal uncertainty and

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articulated an urgent need for relief prior to the effectiveness of the Deemed Registered Provision.

market disruptions from manifesting into actual issues for Registered Clearing Agencies once the Deemed Registered Provision becomes effective on July 16, 2011.

In light of the concerns raised by these clearing agencies, the Commission believes that adopting an interim final rule to immediately amend Rule 19b-4 in the manner as set forth above would benefit the public interest by eliminating any undue delays and operational inefficiencies that could result from the requirement that the Commission review changes to rules primarily concerning futures clearing operations before they become effective. This could potentially benefit market participants (including investors) by, among other things, preventing delays to beneficial enhancements within the futures markets. Accordingly, the Commission finds that there is good cause to have the rule effective as an interim final rule on July 15, 2011, and that notice and public procedure in advance of effectiveness of the interim final rule are impracticable, unnecessary and contrary to the public interest.[44] The Commission is requesting comments on the interim final rule and will carefully consider any comments received and respond to them as necessary or appropriate.

V. Paperwork Reduction Act

The Commission does not believe that the amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 adopted pursuant to the interim final rule contain any "collection of information" requirements as defined by the Paperwork Reduction Act of 1995, as amended ("PRA").[45] The interim final rule amends Rule 19b-4 under the Exchange Act to expand the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange

[44] This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rules to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are "impractical, unnecessary or contrary to the public interest," a rule "shall take effect at such time as the federal agency promulgating the rule determines.")

[45] 44 U.S.C. 3501, et seq.

Act to include any matter effecting a change in an existing service of a Registered Clearing Agency that both primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service. The interim final rule also makes a corresponding technical modification to the General Instructions for Form 19b-4 under the Exchange Act. The Commission does not believe that these amendments would require any new or additional collection of information, as such term is defined in the PRA.[46]

VI. Cost-Benefit Analysis

As noted above, the Deemed Registered Provision, along with other general provisions under Title VII of the Dodd-Frank Act, becomes effective on July 16, 2011. At such time, the Commission expects that there will be three Registered Clearing Agencies that maintain a futures clearing business regulated by the CFTC.[47] Accordingly, these entities will be required to file Proposed Rule Changes with the Commission under Section 19(b) of the Exchange Act, and to comply separately with the CFTC's process for self-certification or direct approval of rules or rule amendments. The Commission is sensitive to the increased burdens these obligations will

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46 The PRA defines a "collection of information" as "the obtaining, causing to be obtained, soliciting or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for . . . answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons . . .." 44 U.S.C. 3502(3)(A). The Commission preliminarily does not believe that the reporting and recordkeeping provisions in this interim final rule contain "collection of information requirements" within the meaning of the PRA because fewer than ten persons are expected to rely on Rule 19b-4(f)(4)(ii). Based on discussions with market participants, the Commission believes that only three Registered Clearing Agencies will maintain a futures clearing business regulated by the CFTC as of the effective date of the Deemed Registered Provision.

47 These include OCC, CME and ICE Clear Europe.

impose and agrees that it is in the public interest to eliminate any potential inefficiencies and undue delays that could result from the requirement that the Commission review changes to rules primarily concerning futures clearing operations before they may be considered effective.

A. Benefits

New Rule 19b-4(f)(4)(ii) will eliminate the requirement for Registered Clearing Agencies to submit a significant number of Proposed Rule Changes that primarily affect their futures clearing operations with the Commission for pre-approval pursuant to Section 19(b)(1) of the Exchange Act. As a result, the rule would eliminate any potential inefficiencies and undue delays that could result from the requirement that the Commission review the Proposed Rule Change before it may be considered effective. At the same time, the Commission would retain the power summarily to temporarily suspend the change in rules of the Registered Clearing Agency within sixty days of its filing if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[48]

As a result, the Commission would be providing the Registered Clearing Agency with the ability to declare the Proposed Rule Change immediately effective, thereby limiting potential delays to activities related to its futures operations that may be beneficial to both the clearing agency and market participants, in a manner that does not impair the Commission's ability to review the filing and to determine whether it would be necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act, to conduct a more thorough analysis of the issues.

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48 15 U.S.C. 78s(b)(3)(C). If the Commission takes such action, it is then required to institute proceedings to determine whether the Proposed Rule Change should be approved or disapproved.

B. Costs

As noted above, the amendments to Rule 19b-4 would expand the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act. These amendments will not materially increase or decrease the costs of complying with Rule 19b-4, nor will they modify an SRO's obligation to submit a Proposed Rule Change to the Commission; rather, the amendments will change the statutory basis under which a rule change is filed. As a result, new Rule 19b-4(f)(4)(ii) would impose minimal, if any, costs on a Registered Clearing Agency, which would consist solely of the time spent determining whether a Proposed Rule Change qualifies for summary effectiveness pursuant to new Rule 19b-4(f)(4)(ii).

The Commission requests that commenters provide views and supporting information regarding the costs and benefits associated with the proposals. The Commission seeks estimates of these costs and benefits, as well as any costs and benefits not already identified.

VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)[49] of the Exchange Act requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) of the Exchange Act 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. Section 3(f) of the Exchange Act[50] requires the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.

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[49] 15 U.S.C. 78w(a).

[50] 15 U.S.C. 78c(f).

As discussed above, the amendment to Rule 19b-4 will expand the list of categories that qualify for summary effectiveness under Section 19(b)(3)(A) of the Exchange Act to include any matter that both (i) primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and (ii) does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service. Specifically, new Rule 19b-4(f)(4)(ii) is intended to avoid undue delays that could result from the requirement that the Commission review changes to rules primarily concerning futures clearing operations before they may be considered effective. Without new Rule 19b-4(f)(4)(ii), certain clearing agencies would be required to submit a significant number of Proposed Rule Changes to the Commission for consideration and approval pursuant to Section 19(b)(1) that relate primarily to their futures clearing operations. Accordingly, the Commission believes such changes would not result in any burden to competition and would instead contribute to a better capital formation and more efficient markets by limiting the potential for any undue delays for services or changes that may benefit market participants.

VIII. Regulatory Flexibility Certification

The Regulatory Flexibility Act ("RFA")[51] requires the Commission, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the APA,[52] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules to determine the impact of such rulemaking on "small entities."[53]

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51 5 U.S.C. 601 et seq.

52 5 U.S.C. 603(a).

53 Section 601(b) of the RFA permits agencies to formulate their own definitions of "small entities." The Commission has adopted definitions for the term "small entity" for the

Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule which, if adopted, would not have a significant economic impact on a substantial number of small entities.[54]

For the purposes of Commission rulemaking in connection with the RFA, a small entity includes, when used with reference to a clearing agency, a clearing agency that: (i) compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year, (ii) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter) and (iii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[55] Under the standards adopted by the Small Business Administration, small entities in the finance industry include the following: (i) for entities engaged in investment banking, securities dealing and securities brokerage activities, entities with $6.5 million or less in annual receipts; (ii) for entities engaged in trust, fiduciary and custody activities, entities with $6.5 million or less in annual receipts and (iii) funds, trusts and other financial vehicles with $6.5 million or less in annual receipts.[56]

The amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 would apply to all Registered Clearing Agencies. As of July 16, 2011, there likely will be seven clearing agencies with active operations registered with the Commission. Of the seven Registered Clearing Agencies with active operations, three currently maintain a futures clearing business. Based on the Commission's existing information about these three Registered Clearing

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purposes of rulemaking in accordance with the RFA. These definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10, 17 CFR 240.0-10.

54 See 5 U.S.C. 605(b).

55 17 CFR 240.0-10(d).

56 13 CFR 121.201, Sector 52.

Agencies, as well as on the entities likely to register with the Commission in the future, the Commission preliminarily believes that such entities will not be small entities, but rather part of large business entities that exceed the thresholds defining "small entities" set out above.

For the reasons stated above, the Commission certifies that the proposed amendments to Rule 19b-4 and to the General Instructions for Form 19b-4 would not have a significant economic impact on a substantial number of small entities for the purposes of the RFA. The Commission encourages written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, including clearing agencies, and provide empirical data to support the extent of the impact.

IX. Statutory Basis and Text of Amendments

Pursuant to the Exchange Act, and particularly Section 19(b) thereof, 15 U.S.C. §78s(b), the Commission proposes to amend Rule 19b-4 as set forth below.

List of Subjects in 17 CFR Parts 240 and 249

Brokers, Reporting and recordkeeping requirements, Securities.

Text of Rule

In accordance with the foregoing, Title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

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

1. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7210 et seq., 18 U.S.C. 1350, and 12 U.S.C. 5221(e)(3), unless otherwise noted.

*   *   *   *   *

2. Amend Section 240.19b-4 by:

a. Adding the word "either" before the colon in the introductory text in paragraph (f)(4);

b. Redesignating paragraph (f)(4)(i) as (f)(4)(i)(A);

c. Redesignating paragraph (f)(4)(ii) as (f)(4)(i)(B);

d. Adding the word "or" after the semicolon after paragraph (f)(4)(i)(B);

e. Adding new paragraph (f)(4)(ii)(A); and

f. Adding new paragraph (f)(4)(ii)(B).

3. The additions read as follows:

§ 240.19b-4 Filings with respect to proposed rule changes by self-regulatory organizations.

*   *   *   *   *

(f) *   *   *

(4) *   *   *

(ii)(A) Primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures; and

(B) Does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service;

*   *   *   *   *

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

4. The general authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq. and 7201et seq.; and 18 U.S.C. 1350, unless otherwise noted.

*   *   *   *   *

5. Amend Form 19b-4 (referenced in §249.819) by:

a. Amending paragraph (b)(iv) in Item 7 of the General Instructions (Information to be Included in the Completed Form ("Form 19b-4 Information")) as follows:

Note: The text of Form 19b-4 does not, and the amendments will not, appear in the Code of Federal Regulations.

Form 19b-4

*   *   *   *   *

GENERAL INSTRUCTIONS FOR FORM 19b-4

*   *   *   *   *

Information to be Included in the Completed Form ("Form 19b-4 Information")

*   *   *   *   *

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)

*   *   *   *   *

(b) *   *   *

(iv) effects a change in an existing service of a registered clearing agency that either (A)(1) does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and (2) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service or (B)(1) primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and (2) does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service, and set forth the basis on which such designation is made,

*   *   *   *   *

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: July 7, 2011

By: Cathy Ahn
Deputy Secretary

Commissioner Aguilar Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64839 / July 8, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3233 / July 8, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14176

In the Matter of **FONTANA CAPITAL, LLC AND FORREST FONTANA** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTIONS 203(e) AND 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940**

I.

On January 7, 2011, the Securities and Exchange Commission ("Commission") instituted administrative and cease-and-desist proceedings pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Fontana Capital, LLC ("Fontana Capital") and Forrest Fontana ("Fontana") (collectively, the "Respondents").

II.

In response to these proceedings, Respondents have submitted Offers of Settlement ("Offers"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 as to Fontana Capital, LLC and Forrest Fontana ("Order") as set forth below.

III.

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

Summary

These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by Fontana Capital and Fontana. Fontana Capital was at all relevant times, the investment adviser to as many as five hedge funds. On three occasions from July 2008 through November 2008, Fontana Capital and Fontana violated Rule 105 of Regulation M by participating in public offerings by XL Group PLC ("XL Group"), Merrill Lynch and Company ("Merrill Lynch") and Wells Fargo and Company ("Wells Fargo") after having shorted each of these securities during the five business days prior to the pricing of the offerings. By participating in these offerings, Fontana Capital obtained profits of $816,184.

Respondents

1. Fontana Capital is a limited liability company incorporated in Delaware in January 2005. At all relevant times, its principal place of business was in Boston, Massachusetts. Fontana Capital was registered with the Commission as an investment adviser from November 29, 2004 until it withdrew its registration effective April 28, 2010. The firm does not presently have any revenues.

2. Fontana is the sole owner of Fontana Capital. He served as the firm's Chief Investment Officer and portfolio manager from the firm's inception until April 2010. He is currently Fontana Capital's only employee. Fontana, 45 years old, is a resident of Winchester, Massachusetts.

Other Relevant Entities

3. XL Group is a holding company domiciled in Ireland. XL Group's stock is registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange and the Bermuda Stock Exchange. XL Group is a global insurance and reinsurance company. XL Group was at all relevant times known as XL Capital Ltd. ("XL Capital"). The company changed its name to XL Group effective July 1, 2010.

4. Merrill Lynch was at all relevant times a financial services company headquartered in New York, New York and registered with the Commission as a broker-dealer. Merrill Lynch's stock was at all relevant times registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange. Merrill Lynch is now a wholly owned subsidiary of Bank of America Corporation.

5. Wells Fargo is a financial services company headquartered in San Francisco, California. Wells Fargo's stock is registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange.

Respondents' Participation in Follow-on Offerings

6. Rule 105 of Regulation M of the Exchange Act provides, in pertinent part:

> In connection with an offering of equity securities for cash pursuant to a registration statement. . . filed under the Securities Act of 1933 ("offered securities"), it shall be unlawful for any person to sell short . . . the security that is the subject of the offering and purchase the offered securities from an underwriter or broker or dealer participating in the offering if such short sale was effected during the period ("Rule 105 restricted period") that is the shorter of the period: (1) Beginning five business days before the pricing of the offered securities; or (2) Beginning with the initial filing of such registration statement . . . and ending with the pricing.

17 C.F.R. § 242.105(a)(1) and (a)(2) (effective October 9, 2007)

7. Rule 105 of Regulation M is designed to protect the independent pricing mechanism of the securities market shortly before follow-on or secondary offerings. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent. Pursuant to amendments that became effective in October 2007, it is not required that the shares purchased in the offering be used to "cover" the restricted period short sales. Short Selling in Connection with a Public Offering, Rel. No. 34-56206, 72 Fed. Reg. 45094 (August 10, 2007) (effective October 9, 2007).

8. On Friday, July 25, 2008, hedge funds advised by Fontana Capital, at Fontana's direction, sold short a total of 60,000 XL Capital shares at $18.98 per share.

9. On Monday, July 28, 2008, XL Capital stock closed at $18.37. On Tuesday, July 29, 2008, before the trading markets opened, XL Capital priced a follow-on offering of its securities at $16 per share (the "XL Capital Offering"). The registered shares were offered to the public through an underwriter on a firm-commitment basis. Accordingly, the Rule 105 restricted period was from Tuesday, July 22, 2008 through Monday, July 28, 2008.

10. On Tuesday, July 29, 2008, hedge funds advised by Fontana Capital, at Fontana's direction, purchased 50,000 shares in the XL Capital Offering. Fontana Capital did not "cover" its short position in XL Capital's stock with the shares bought in the offering. Fontana Capital realized a profit of $149,000 by participating in the XL Capital Offering after having shorted XL Capital's stock during the Rule 105 restricted period.

11. On Friday, July 25, 2008, hedge funds advised by Fontana Capital, at Fontana's direction, sold short a total of 40,000 Merrill Lynch shares at $27.30 per share.

12. On Monday, July 28, 2008, Merrill Lynch's stock closed at $25.31. On Tuesday, July 29, 2008, before the trading markets opened, Merrill Lynch priced a follow-on offering of its securities at $22.50 per share (the "Merrill Lynch Offering"). The registered

shares were offered to the public through an underwriter on a firm-commitment basis. Accordingly, the Rule 105 restricted period was from Tuesday, July 22, 2008 through Monday, July 28, 2008.

13. On Tuesday, July 29, 2008, hedge funds advised by Fontana Capital, at Fontana's direction, purchased 200,000 Merrill Lynch shares in the Merrill Lynch Offering. Fontana Capital did not "cover" its short position in Merrill Lynch's stock with the shares bought in the offering. Fontana Capital realized a profit of $507,184 by participating in the Merrill Lynch offering after having shorted Merrill Lynch's stock during the Rule 105 restricted period.

14. On Thursday, November 6, 2008, hedge funds advised by Fontana Capital, at Fontana's direction, sold short a total of 100,000 Wells Fargo shares at $28.60. That day, Wells Fargo stock closed at $28.77.

15. After the close of the trading markets on Thursday, November 6, 2008, Wells Fargo priced a follow-on offering of its securities at $27 per share (the "Wells Fargo Offering"). The registered shares were offered to the public through an underwriter on a firm-commitment basis. Accordingly, the Rule 105 restricted period was from Friday October 31, 2008 through Thursday November 6, 2008.

16. On Friday, November 7, 2008, hedge funds advised by Fontana Capital, at Fontana's direction, purchased 100,000 shares in the Wells Fargo Offering. Fontana Capital did not "cover" its short position in Wells Fargo's stock with the shares bought in the offering. Fontana Capital realized a profit of $160,000 by participating in the Wells Fargo offering, after having shorted Wells Fargo's stock during the Rule 105 restricted period.

Violations

17. As a result of the conduct described above, Fontana Capital and Fontana willfully[1] committed violations of Rule 105 of Regulation M.

IV.

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

Accordingly, pursuant to Section 21C of the Exchange Act and Sections 203(e) and 203(f) of the Advisers Act, it is hereby ORDERED that:

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

A. Respondent Fontana Capital shall cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M under the Exchange Act.

B. Respondent Fontana shall cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M under the Exchange Act.

C. Respondent Fontana Capital is censured.

D. Respondent Fontana is censured.

E. Respondents shall, jointly and severally, pay disgorgement of $816,184, prejudgment interest of $3,606 and a civil penalty of $165,000 to the United States Treasury. Payment shall be made in the following installments: $196,958 within thirty (30) days of the entry of this Order and $787,832 plus accrued post-judgment interest of $1,590 or a total second payment of $789,422 within one year of the entry of this Order. If payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalty, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. § 3717, shall be due and payable immediately, without further application. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F. Street, NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Fontana Capital LLC and Forrest N. Fontana as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to John T. Dugan, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 23rd Floor, Boston, MA 02210.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro, Commissioner Aguilar not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 64852 / July 11, 2011

Admin. Proc. File No. 3-14015

In the Matter of the Application of

FCS SECURITIES
and
DALE EDWARD KLEINSER
417 E. 90th Street Suite 8C
New York, NY 10128-5175

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Failure to File Audited Annual Reports

Registered securities firm, acting by and through its sole proprietor, failed to file audited annual reports for fiscal years 2006 and 2007, in violation of Section 17(e) of the Securities Exchange Act of 1934, Exchange Act Rule 17a-5, and NASD Rule 2110. *Held*, association's findings of violations and sanctions imposed are *sustained*.

APPEARANCES:

Dale Edward Kleinser, *pro se* and for FCS Securities.

Marc Menchel, Alan Lawhead, and *Leavy Mathews III*, for FINRA.

Appeal filed: August 20, 2010
Last brief received: December 10, 2010

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I.

Dale Edward Kleinser and FCS Securities ("FCS" or the "Firm"), of which Kleinser is the sole proprietor (together, "Applicants"), appeal from disciplinary action taken by the Financial Industry Regulatory Association ("FINRA").[1] FINRA found that FCS, by and through Kleinser, failed to file audited annual reports for fiscal years 2006 and 2007, in violation of Section 17(e) of the Securities Exchange Act of 1934, Exchange Act Rule 17a-5, and NASD Rule 2110.[2] FINRA additionally found that Applicants failed to establish that they were relieved of the obligation to file audited financial statements by virtue of the exemption contained in Exchange Act Rule 17a-5(e)(1)(i)(B) (the "Exemption"), which permits a broker or dealer to file unaudited financial statements if "[i]ts securities business has been limited to buying and selling evidences of indebtedness secured by mortgage, deed or trust, or other lien upon real estate or leasehold interests."[3] FINRA fined Applicants $5,000 and suspended FCS for four months; it further ordered that the suspension would convert to an expulsion from membership if FCS did not file audited annual reports for 2006 and 2007 during the four months of the suspension.[4] We base our findings on an independent review of the record.

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1 Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice* 08-57 (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, FINRA applied the procedural rules that existed on December 14, 2008. The applicable conduct rules are those that existed at the time of the conduct at issue.

2 Section 17(e), 15 U.S.C. § 78q(e), and Rule 17a-5(d), 17 C.F.R. § 240.17a-5(d), require registered brokers and dealers to file audited financial information with the Commission on an annual basis unless an exemption applies. NASD Conduct Rule 2110 requires NASD members to observe high standards of commercial honor and just and equitable principles of trade. A violation of any Exchange Act rule also constitutes a violation of Conduct Rule 2110. *See, e.g., Paul Joseph Benz*, 58 S.E.C. 34, 41 n.15 (2005) (holding that a violation of the net capital rule, Exchange Act Rule 15c3-1, 17 C.F.R. § 240.15c3-1, is also a violation of Conduct Rule 2110); *see also, e.g., William M. Gerhauser, Sr.*, 53 S.E.C. 933, 942 (1998) ("We have consistently maintained that a violation of another SEC . . . rule or regulation constitutes a violation of the requirement to adhere to 'just and equitable principles of trade' embodied in the NASD Rules of Fair Practice . . . .").

3 17 C.F.R. § 240.17a-5(e)(1)(i)(B).

4 FINRA also ordered Applicants to pay costs. Pursuant to Procedural Rule 9370, the sanctions were automatically stayed when Applicants filed their petition for review with the Commission.

II.

A. Background

Kleinser entered the securities industry in 1986. In 1997, he formed FCS as a sole proprietorship. At all relevant times, Kleinser was FCS's sole owner, and was registered as a financial and operations principal, general securities representative, and general securities principal. Kleinser was also, at all relevant times, the sole officer, sole director, and sole common shareholder of FCS Ventures, Inc. ("Ventures"), which he also controlled. Ventures has approximately twelve preferred shareholders, among whom are Kleinser's sister and his parents. Ventures is not a member firm.

Kleinser originally intended to engage in proprietary principal trading through FCS. When he applied for FINRA membership for the Firm, however, the Firm did not have enough capital to trade on a proprietary basis; so, in April, 1997, he signed a membership agreement that limited FCS's operations to investment advisory services, an arrangement not hindered by the Firm's level of capital.[5] FCS has remained a FINRA member since 1997, although it has conducted little if any securities business during that time.[6]

B. FCS's Filings of Financial Information, 2000-2005

Exchange Act Section 17(e) requires registered brokers and dealers to file audited financial information with the Commission on an annual basis unless an exemption applies. For fiscal years 2000-2003 inclusive, FCS filed unaudited annual reports. Kleinser testified that FCS filed an unaudited annual report for fiscal year 2000 because the accountant he had engaged failed to complete an audit as agreed. For fiscal years 2001-2003, Kleinser testified that he filed unaudited annual reports in reliance on the Exemption.

After a routine examination of FCS in 2004, FINRA staff determined that FCS did not qualify for the Exemption and issued FCS a letter of caution, dated January 11, 2005, for FCS's failure to file audited annual reports for fiscal years 2000-2003. Kleinser wanted to continue

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[5] Applicants appear to complain about the limitations of the 1997 membership agreement. However, that agreement is not at issue in this proceeding.

[6] Under Article III, Section 1(a) of FINRA's By-Laws, registered brokers or dealers "authorized to transact, and whose regular course of business consists in actually transacting, any branch of the investment banking or securities business in the United States," are eligible for membership in FINRA. In 2004, NASD staff issued a notice of intention to suspend FCS's membership "based on [FCS's] failure to meet the standards for eligibility to be an NASD member set forth in . . . the NASD By-Laws, *i.e.*, failure to engage in an investment banking or securities business." However, the notice was subsequently withdrawn based on "new information and certain representations made by" FCS.

filing unaudited reports, and repeatedly sought the guidance of FINRA staff as to how FCS could qualify for the Exemption. In February 2006, FINRA staff arranged a conference call among Kleinser, FINRA staff members, and a Commission staff member to discuss whether FCS could file annual reports in reliance on the Exemption. Both FINRA staff and Commission staff opined that FCS had not shown that it qualified for the Exemption. Kleinser disagreed, but nonetheless filed an audited annual report on behalf of FCS for fiscal year 2005.

C. FCS's Filings of Financial Information, 2006-07

Despite his filing of the audited annual report for fiscal year 2005, Kleinser still hoped to take advantage of the Exemption so as to avoid having to file audited annual reports in future years. In an attempt to structure the Firm's activities to bring the Firm within the Exemption, Kleinser prepared a series of documents in 2006 and 2007 pertaining to a debt identified in a promissory note dated April 16, 2001 (the "2001 Note"). In Kleinser's view, the transactions described in the 2006 and 2007 documents demonstrate that FCS limited its business to "buying and selling evidences of indebtedness secured by mortgage, deed or trust, or other lien upon real estate or leasehold interests," thus qualifying for the Exemption.

The 2001 Note evidences a loan in the amount of $185,398, with annual interest of 9%, from Ventures to Kleinser's sister and brother-in-law (the "Borrowers"). Before the Hearing Panel, Kleinser confirmed that "Ventures was the one that gave the money to Borrowers." Kleinser testified that the Borrowers used the loan proceeds to buy a home (the "Home"), and the 2001 Note recites that it was secured by the Home. The 2001 Note required the Borrowers to make monthly payments of $1300 until "as late as September 2002" and $1500 thereafter,[7] and provided that in the event of a default, Ventures could elect to sell the Home and apply the proceeds to satisfy the Note. Financing statements pursuant to the Uniform Commercial Code ("UCC Financing Statements") filed with the Ohio Secretary of State list the Borrowers as debtors, Ventures as the secured party, and the Home as the property covered by the statement.[8] Kleinser claims that, at some point between the execution of the 2001 Note and 2006, the Borrowers fell behind on their payments.[9]

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[7] The 2001 Note refers to a payment schedule set forth in a spreadsheet which is not included in the record.

[8] UCC Financing Statements covering the Home were filed on January 2, 2001 and March 29, 2006 (nine months before the First "Buy-Sell" Agreement discussed below). Although the first promissory note in the record is dated April 16, 2001, Kleinser testified that Ventures loaned the money to Borrowers in "2000 or 2001."

[9] The record does not establish how much had been paid on the 2001 Note by 2006. Kleinser testified that there were "no payments at all" on the 2001 Note for "a couple of years or a substantial period of time."

1. Activity in Fiscal Year 2006

Kleinser testified that he wanted to "get that note off the books from a risk standpoint of FCS Ventures and the other FCS shareholders." Kleinser also said he thought that, if he involved the Firm in selling the 2001 Note, he could satisfy the Exemption and be relieved of the obligation to file audited financial statements. Kleinser further testified that he thought the 2001 Note should be "restructured" to make it more likely that the Borrowers would pay it off, and Kleinser thought the "restructuring" could be more easily accomplished if payments were owed to an entity that involved fewer people than Ventures. Accordingly, it was decided that the 2001 Note should be sold.[10]

Kleinser wrote to an NASD staff member on November 26, 2006, stating that the 2001 Note "requir[ed] a title change in 2006" and that "[t]he title change, buy and sell, has not yet taken place per my desire to give you every opportunity to review such pursuant to my intent to adhere to the [E]xemption rule." The NASD staff member responded by letter dated December 12, 2006 that, based on Kleinser's representations, "it would appear that . . . [the title change] . . . may not occur or will only occur if the event would permit FCS to qualify for the [Exemption]." The letter also stated that "the 2005 and 2006 activities of FCS are fairly similar," and that Kleinser had been informed that:

> [I]t was the view of the staff that the proposed conduct of FCS does not qualify for the [E]xemption. The [E]xemption was not intended to permit a firm that is otherwise dormant to not provide audited financial statements, and yet to somehow appear to engage in a 'securities business' in order to maintain on-going registration with the SEC. . . . We continue to be of the view that a re-titling of a promissory note between your affiliate and the obligor, whether or not facilitated by FCS, does not rise to the level of activity as described in the [E]xemption. Nor would acting as facilitator in such regard qualify FCS for NASD membership.

Undeterred by this response, Kleinser wrote to NASD staff on December 26, 2006: "I am not asking for a yes or no – do I qualify. I am asking how do I qualify for this [E]xemption." Kleinser objected that the staff's December 12 letter rejected the use of "re-titling" as a basis for claiming the Exemption, but "overlooks essentials stated by me: buy and sell."

On December 27, 2006, Kleinser individually signed a document that purported to involve purchases and sales related to the 2001 Note (the "First 'Buy-Sell' Agreement").[11] The First "Buy-Sell" Agreement recites that Ventures "hereby buys," and Kleinser's parents (the

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10 Kleinser does not make clear who was involved in reaching this decision. As FINRA observed, "[m]uch of Kleinser's testimony and supporting documentation lacked specificity."

11 The First "Buy-Sell" Agreement made no reference to a title change.

"Parents") "hereby sell," "all interest" in the 2001 Note, and further, that Kleinser and Kathy Keller (whom Kleinser identified as a family friend), "hereby buy," and Ventures "hereby sells, same." The First "Buy-Sell" Agreement also stated that "[p]ayment is a $185398 transfer in account 6032241" to the Parents, "which they can do with as they see fit without any restriction."[12]

The record does not show that Ventures endorsed the 2001 Note to Kleinser and Keller, purportedly the new holders. Nor does it show that Kleinser and Keller paid, or Ventures paid or received, any consideration in the purported transaction. The record does not show any payments on the 2001 Note after December 2006.

The First "Buy-Sell" Agreement also stated that "FCS Securities earned $2000 from FCS Ventures and/or [its] shareholders for this activity," without further elaboration. FCS's unaudited annual report for fiscal year 2006 shows that FCS's only income was $315 in interest income, and that it had no income attributable to investment advisory fees. In testimony and correspondence, Kleinser represented that he signed a $345 check to FCS from Ventures for FCS's involvement in the 2006 activities discussed above on December 31, 2006;[13] that an additional $1655 had been promised, but not received, by the end of 2006; and that he reported only the $315 in interest income because it was "the only income received with certainty in 2006."

Kleinser testified that he brokered the sale of the 2001 Note in his capacity as sole owner and principal of FCS. He does not allege that FCS held any interest in the 2001 Note at any time. Other than its involvement in the alleged sale of the 2001 Note, FCS conducted no business activity in fiscal 2006.

2. Activity in Fiscal Year 2007

There is no evidence in the record of any further activity by FCS until December 2007.[14] Kleinser testified that he turned his attention to "restructuring" the loan evidenced by the 2001 Note in order to reach "terms that the [Borrowers] could somehow live with." However, the newly "restructured" note, executed on December 29, 2007 (the "2007 Note"; together with the 2001 Note, the "Notes"), included terms that were virtually identical to those of the 2001 Note: like the 2001 Note, the 2007 Note evidences a loan in the amount of $185,398, with annual interest of 9%, from Ventures to the Borrowers, secured by the Home. The only change from the 2001 Note that arguably made it more likely that the Borrowers would pay off the 2007 Note was

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12 The record does not include a UCC Financing Statement for this transaction.

13 This check is not in the record.

14 On January 12, 2007, Kleinser wrote to an NASD senior vice president, asking again, "HOW DO I QUALIFY FOR THE EXEMPTION?" (emphasis in original). He received no response.

the addition of a provision whereby the Borrowers agreed "to limit any increase in debt, unrelated in any way to this Promissory Note, to $8,000."[15]

Kleinser testified that once the 2001 Note had been "restructured," "the [Ventures] shareholders wanted to attempt to do the right thing and take some of the burden and so they decided that they wanted to try and buy back this thing that was restructured to get [Borrowers] the best chance of getting out of this in one piece." To this end, Kleinser testified, and in hopes of bringing FCS's business for fiscal year 2007 within the Exemption, Kleinser prepared a document dated December 30, 2007 (the "Second 'Buy-Sell' Agreement"; together with the First "Buy-Sell" Agreement, the "'Buy-Sell' Agreements"), which recited that Kleinser and Keller were selling, and Ventures was buying, "all interest in" the 2007 Note, and that Ventures was selling, and the Parents were buying, that interest.[16] The Second "Buy-Sell" Agreement also stated that payment was in the form of a transfer of $185,398 in the same account specified in the First "Buy-Sell" Agreement "from [the Parents] without any restriction," and that FCS "received $1655.00 from [Ventures] and/or [its] shareholders for this activity."[17] FCS's financial statements for fiscal year 2007 indicate that FCS received $2,000 in investment advisory fees.[18]

The record does not show that Ventures endorsed the 2007 Note to the Parents, purportedly the new holders. Nor does it show that Ventures paid or received, or Kleinser and Keller received, any consideration in the purported transaction. The record does not show that Borrowers made any payments on the 2007 Note.

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15 Kleinser testified that the Borrowers' non-payment problems appeared to be exacerbated by their incurring additional debt unrelated to the 2001 Note. Kleinser further testified that the 2007 Note differed from the 2001 Note in that "the whole payment schedule changed." However, neither payment schedule is included in the record.

Although it appears that the 2007 Note was intended to supercede the 2001 Note, the 2007 Note does not mention the 2001 Note. From the face of the documents, it would appear that the obligations under the 2001 Note are still in effect.

16 It is not clear from the record what, if any, interest Kleinser and Keller had in the 2007 Note. Kleinser and Keller were not named anywhere in the 2007 Note.

17 In testimony and correspondence, Kleinser represented that he signed a check for $1655 to FCS, on behalf of Ventures, on December 31, 2007. This check is not in the record. The relationship between this $1655 and the $1655 that was allegedly promised to FCS in 2006, but not received in that year, is unclear.

18 The $2,000 in investment advisory fees reported for fiscal year 2007 apparently includes the $345 check that was allegedly received on December 31, 2006, but not deposited until 2007, plus the $1655 check that was allegedly written on December 31, 2007. *See supra* notes 13 & 17 and accompanying text.

Kleinser does not allege that FCS held any interest in the 2007 Note at any time. Other than its involvement in the alleged sale of the 2007 Note, FCS conducted no business activity in fiscal 2007.

III.

On July 25, 2008, FINRA's Department of Enforcement ("Enforcement") filed a complaint charging that FCS violated Exchange Act Section 17(e), Exchange Act Rule 17a-5, and NASD Rule 2110, and that Kleinser violated NASD Rule 2110, based on the failure to file audited annual reports for 2006 and 2007. After a hearing, the Hearing Panel found the violations as charged. The Hearing Panel fined Applicants $5,000, jointly and severally, and ordered that FCS be suspended for four months, with the suspension to convert to an expulsion if Applicants did not file audited annual reports for 2006 and 2007 before the suspension ended. Applicants appealed, and FINRA's National Adjudicatory Council affirmed the Hearing Panel's findings of violations and sanctions. This appeal followed.

IV.

A. Analysis of the Exemption

Applicants admit that FCS did not file audited annual reports for fiscal years 2006 and 2007. Thus, the question in this proceeding is whether Applicants established that they were exempt from the requirement to file such reports because the securities business of FCS was "limited to buying and selling evidences of indebtedness secured by mortgage, deed or trust, or other lien upon real estate or leasehold interests."[19] Applicants bore the burden of establishing that they were entitled to the Exemption.[20] We find that Applicants did not establish that they were entitled to the protection of the Exemption.

In the first place, Applicants did not establish that anything was bought or sold. With respect to the First "Buy-Sell" Agreement, no evidence in the record establishes that the Parents

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19 The Exemption also states that a broker or dealer may not file unaudited financial statements if it has carried any margin account, credit balance or security for any securities customer. FINRA does not contend, and the record does not show, that the Firm failed to satisfy this aspect of the Exemption.

20 *See generally FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (recognizing that "the general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits"); *cf. SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953) (acknowledging "the broadly remedial purposes of federal securities legislation" in holding that the burden of proof lies with an issuer when it claims an exemption from registration under the Securities Act of 1933).

owned any interest in the 2001 Note that they could sell to anyone, much less to Ventures, which already owned the note. The 2001 UCC Financing Statement confirms Ventures as the secured party. Ventures theoretically could have sold to Kleinser and Keller, but the only suggestion in the record of any consideration given in connection with the First "Buy-Sell" Agreement is the recitation in that Agreement that the Parents, who did not own the 2001 Note and therefore could not have sold it, received $185,398. As noted, there is nothing in the record indicating that any such transfer of funds actually occurred. We conclude that the transactions purportedly effected by the First "Buy-Sell" Agreement lacked any economic reality.

As for the Second "Buy-Sell" Agreement, since there is nothing in the First "Buy-Sell" Agreement supporting a valid sale to Kleinser and Keller, both their purported sale back to Ventures and the ensuing sale from Ventures to the Parents are similarly sham transactions. Moreover, although the Second "Buy-Sell" Agreement references a payment from the Parents, it does not say to whom the payment was made, and there is no record of any such payment.

Applicants' efforts to explain the transactions are not supported by the record. For example, Kleinser testified that, with respect to the First "Buy-Sell" Agreement, the Parents stepped in to act on behalf of Ventures in order to avoid any conflict of interest that might have arisen if Kleinser had both acted on behalf of Ventures and participated in the sale as a buyer. No documentary record evidence shows that the Parents, who were two of Ventures's twelve preferred shareholders, had the authority to act on behalf of Ventures. Nor does the First "Buy-Sell" Agreement say that the Parents are acting on behalf of Ventures. In fact, it says they are selling to Ventures. In any event, such involvement by the Parents would not have eliminated any such conflict of interest, because Kleinser was still a controlling person of Ventures when Ventures "sold" to Kleinser and Keller. Finally, the results ostensibly created by the First "Buy-Sell" Agreement make no sense: the Parents purportedly end up with the $185,398 and Kleinser and Keller are purportedly given the right to collect on the Note, while Ventures arguably retains the secured interest in the Home.

Kleinser argued before FINRA's National Adjudication Committee ("NAC") that Ventures could not have loaned the Borrowers the money because its money was tied up in litigation. That assertion, however, is contradicted by the Notes, the UCC Financing Statements identifying Ventures as the secured party, and Kleinser's testimony before the Hearing Panel that Ventures loaned the Borrowers the money. Additionally, if Ventures's money were tied up in litigation, there would be no apparent way for Ventures to have "bought" the interests (from the Parents in 2006 or Kleinser and Keller in 2007) before turning around and "selling" them (to Kleinser and Keller in 2006 or the Parents in 2007).

Kleinser also argued that the term "FCS Ventures, Inc." in the "Buy-Sell" Agreements did not indicate that Ventures was acting as a corporate entity, but rather that Ventures shareholders, maintaining separate "accounts" at Ventures, were buying and selling separately held interests.[21] This claim is inconsistent with the references to "FCS Ventures, Inc." in the Notes and the UCC Financing Statements; it is also inconsistent with the nature of a corporation, which acts as a single "person."[22] Moreover, no documentary evidence shows that the Ventures shareholders held separate transferable interests in the Notes.[23]

Applicants argue that they provided "prima facie proof" of "buy and sell activity" (the "Buy-Sell" Agreements), "promissory notes" (the Notes), and "secured debt records" (the UCC Financing Statements). They argue that this alleged proof "is what [the Exemption] requires and . . . is what [Applicants] demonstrated." We disagree. As discussed above, the evidence provided by Applicants does not show that any transactions of economic substance occurred.

Moreover, even if we concluded that the "Buy-Sell" Agreements reflected genuine sales and purchases, FCS was not a party to either of the Notes or either of the "Buy-Sell"

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[21] Before the NAC, Kleinser stated that the Parents "were basically the signers because they were in the majority. There's like, as a guess, ten accounts involved." No documentary record evidence shows that such individual accounts existed, that the Parents "were in the majority," or that the Parents had the authority to act on behalf of Ventures's preferred shareholders.

[22] *See, e.g.*, Ballantine's Law Dictionary, 3d edition 2010 (defining "corporation" as, in part, "an association of persons to whom the sovereign has offered a franchise to become an artificial juridical person, with a name of its own, under which they can act and contract and sue and be sued.")

[23] Applicants appear to be arguing that the use of such phrases as "FCS Ventures and/or its shareholders" in the "Buy-Sell" Agreements show that the shareholders can act independently from the corporate entity. However, the Notes unambiguously identify "FCS Ventures, Inc." as the holder and do not contain any references to Ventures shareholders. Moreover, Applicants state in their brief that "FCS Ventures Inc is the PROMISSORY NOTE HOLDER" (emphasis in original).

Applicants assert in their briefs that "[t]he relevant parties signed per FCS Ventures normal protocol," that "FCS Ventures is 'pledgee' per shareholder agreement", and that "[s]hareholders retain full legal and beneficial ownership." The record does not contain any evidence as to Ventures's "normal protocol," or the shareholder agreement. *See infra* notes 31-35 and accompanying text (denying motion to adduce new evidence on appeal).

Under these circumstances, we find that Applicants failed to establish that the preferred shareholders of Ventures had separately transferable interests in the Notes.

Agreements,[24] and there is no suggestion that FCS bought or sold any instrument. Any notion that FCS was somehow involved in brokering the purported transactions is inconsistent with the membership agreement that has been in effect since 1997, which limits FCS's activity to the provision of investment advisory services.[25]

Applicants argue that they should be permitted to file unaudited financial statements because, in a situation involving what they characterize as "previous activity virtually identical" to theirs, a person received no-action letters stating that the staff would not recommend that the Commission take action based on the filing of unaudited financial statements.[26] Because their

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[24] Kleinser signed the "Buy-Sell" Agreements as an individual, not on behalf of FCS.

[25] *Compare* Exchange Act Section 3(a)(4)(A) (defining "broker" as "any person engaged in the business of effecting transactions in securities for the account of others").

FINRA found that Applicants "presented no evidence that FCS's 'securities business' consisted of buying and selling evidences of indebtedness" as set forth in the Exemption. FINRA found that the Notes were not securities (citing *Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990) (holding that "'the note secured by a mortgage on a home'" is not a security (citation omitted)), and it questioned whether the level of activity in which FCS engaged was sufficient to constitute the level of "business" contemplated by the Exemption. *See* Louis Loss & Joel Seligman, *Securities Regulation* 3009 (3d ed. 2002) (suggesting that the phrase "engaged in the business," which is common to the definition of broker and dealer, "connotes a certain regularity of participation in purchasing and selling activities rather than a few isolated transactions). Because we dispose of the matter on the grounds set forth above, we do not reach these issues.

[26] Applicants base their contention that the circumstances are virtually identical in part on telephone conversations that Kleinser claims he had with the requester. However, Kleinser's testimony about what the requester allegedly told him about his activities is extremely limited. Kleinser testified that "[the requester's] business . . . involved nothing more than having . . . some old lady sell her house, give a note to somebody, money exchanged hands and [the requester] bought and sold that note from a woman that had the note and gave away the house to one of his buddies, literally."

While we have held that hearsay evidence, such as Kleinser's testimony about what the requester told him, may be admitted in administrative proceedings, such evidence must be probative and reliable. *See, e.g., Scott Epstein*, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13853. We find, however, that Kleinser's testimony about the requester's business has little if any probative value. Despite Applicants' conclusory assertions, the testimony does not establish that Kleinser's circumstances were virtually identical, or even

(continued...)

situation is similar, Applicants argue, they should also be permitted to file unaudited financial statements without repercussions.

No-action letters express the views of Commission staff. They do not constitute Commission precedent, nor do they limit subsequent Commission action.[27] We are not bound by the statements of Commission staff in the letters on which Applicants rely. Moreover, the cited no-action letters do not support Applicants' assertions. The requester stated: "My entire business during [the applicable year] was limited to buying and selling land contracts and mortgages (evidences of indebtedness) secured by mortgage, deed, or trust, or other lien upon real estate or leasehold interest." The requester thus repeated the language of the Exemption, without providing further details about the enumerated activities.[28] Four of the no-action letters simply state, tautologically, that "if [the requester's] activities fall within the purview of the (e)(1)(i) exemption, the [staff] will not recommend any action to the Commission" based on the filing of unaudited annual reports. The fifth states that, "[b]ased on the representations" made about the requester's activities (representations that, as noted, simply repeated the language of the Exemption), it would appear that they come within the Exemption. Given the dearth of information about the requester's activities, the no-action letters provide no basis for comparison with the facts at issue here.

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[26] (...continued)
similar, to the requester's. Additionally, Kleinser does not assert, and the record does not show, that Commission staff, in writing the no-action letters, had any information about the requester's activities beyond statements tracking the language of the exemption, as discussed below.

[27] *Cf. Lowell Listrom*, 50 S.E.C. 883, 886 n.3 (1992) (noting that letter sent by Division of Enforcement to New York Stock Exchange and NASD "does not necessarily reflect the views of this Commission, nor does it have the force of law . . . . The Commission may choose to adopt or reject the staff's previously-stated reasoning with respect to the application of the particular regulation at issue, or the necessity of adherence to any particular conditions placed by the staff on the conduct of persons receiving no-action positions."); *see also George C. Salloum*, 52 S.E.C. 208, 212 n.18 (1995) (admitting into the record an internal memorandum prepared by Commission staff, but noting "that it merely expresses the views of our staff, to which we are not bound").

[28] The requester did, however, state that "I have no margin account, securities, or credit balance for my customers. I do not have any agreements with any other Brokers or Dealers concerning my securities business." This language tracks other requirements for the Exemption that are not at issue in this proceeding. *See supra* note 19.

B. Applicants' Procedural Arguments

1. Objections to FINRA Staff Conduct

Applicants argue that FINRA has been "playing games" and engaging in "underhanded tactics" and that FINRA is "actively impeding FCS" and is "not neutral." They complain that FINRA staff failed to tell Kleinser in precise detail how to structure FCS's activities so as to come within the terms of the Exemption.[29]

It was Applicants' responsibility to comply with Section 17(e) and Rule 17a-5, either by filing audited annual reports or by showing that they were not required to do so. We have repeatedly held that members of self-regulatory organizations and their associated persons cannot shift their responsibility for compliance to those organizations.[30] We reject Applicants' attempt to blame FINRA staff for Applicants' statutory and regulatory violations.

2. Introduction of New Evidence on Appeal

Applicants seek to introduce additional evidence on appeal. This evidence, they argue, supports their contention that the preferred shareholders of Ventures could engage independently or collectively in transactions using separately identifiable assets held at Ventures.[31] Establishing

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[29] Applicants also complain of other alleged misconduct unrelated to the failure to file audited annual reports that is the sole issue in this proceeding (for example, that NASD "forced [Kleinser] to apply for a B/D earlier than I would have otherwise").

[30] *See, e.g., Leslie A. Arouh*, Exchange Act Rel. No. 62898 (Sept. 13, 2010), 99 S.E.C. Docket 32306, 32329 n.73 (citing additional cases); *see also, e.g., Frank L. Palumbo*, 52 S.E.C. 467, 478 n.60 (1995) (rejecting argument that applicants should not be sanctioned for markup violations because they "approached the NASD staff on a number of occasions for guidance as to a working definition of domination and control, and were rebuffed on each occasion"); *G.K. Scott & Co.*, 51 S.E.C. 961, 966 n.21 (1994) (rejecting contention that applicants should not be sanctioned for markup violations where applicants asserted "that the firm routinely passed numerous markup exam reviews and that at no time was the firm's practice of determining the prevailing market price questioned"), *petition denied*, 56 F.3d 1531 (D.C. Cir. 1995).

[31] Applicants' Motion to Adduce Additional Evidence (the "Additional Evidence Motion") does not identify with particularity the evidence Applicants seek to adduce. Instead, it cross-references filings made before FINRA in furtherance of Applicants' motion to adduce additional evidence after the hearing (the "Post-Hearing Evidence Motion").

As best we can tell from the Additional Evidence Motion, the only point Applicants now (continued...)

this point would, they argue, support their argument that the purported "buy-sell" transactions were legitimate business undertakings. Applicants sought to adduce this evidence after the hearing, when the matter was under review by the NAC, but the motion was denied.[32]

Our Rule of Practice 452 provides that a party seeking to adduce additional evidence must "show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously."[33] We find that Applicants have not met this standard.

First, Applicants have not shown that there were reasonable grounds for their failure to adduce the evidence previously.[34] Applicants bore the burden of establishing their entitlement to the Exemption. To succeed, they needed to introduce evidence sufficient to show that the purported transactions on which they relied were actual transactions, with economic substance, and that those transactions qualified the Firm for the Exemption. If additional evidence pertaining to the structure of Ventures would have helped to make this showing, Applicants should have introduced it during the hearing as part of their affirmative case.

Applicants contend that, until closing argument, they had no reason to foresee that Enforcement would argue that the transactions at issue were shams and that they therefore had no

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[31] (...continued)
hope to make with newly adduced evidence is that the preferred shareholders of Ventures could engage in separate transactions with the assets they had invested in Ventures. Because Applicants do not press arguments pertaining to other evidence FINRA refused to allow after the hearing, we deem those arguments abandoned. We have, however, reviewed FINRA's denial of the Post-Hearing Evidence Motion, and we see no error in FINRA's disposition of that motion.

[32] The record does not contain copies of the evidence about Ventures that Applicants sought to adduce in the Post-Hearing Evidence Motion. Applicants contended that providing the evidence would disclose information about third parties (Ventures shareholders) that those parties did not want disclosed. Applicants therefore provided only descriptions and characterizations of the evidence. We are thus unable to determine whether the evidence, if timely submitted, would have supported Applicants' assertions.

[33] 17 C.F.R. § 201.452. Similarly, FINRA Procedural Rule 9346 permits the introduction of additional evidence before the NAC upon a showing that "extraordinary circumstances" exist, that the evidence is material to the proceeding, and that there was good cause for failing to introduce it below.

[34] Although, as subsequently discussed, we find that Applicants did not show the proposed additional evidence to be material, our finding that Applicants did not show reasonable grounds for failing to adduce the evidence previously is itself a sufficient basis for our denial of the Additional Evidence Motion.

reason to introduce at the hearing evidence showing that Ventures shareholders could buy and sell separately held interests through separate accounts they maintained at Ventures. They contend that they were prepared to explain FCS's business during the years 2006 and 2007, but had "no warning" that they would need to provide evidence about earlier activity, such as documents setting forth details of Ventures's relationship with its shareholders.

We disagree. Applicants consistently based their argument that they were entitled to rely on the Exemption on only two purported transactions. Applicants knew that FINRA staff did not agree that this activity allowed Applicants to utilize the exemption, even if the staff had not previously characterized the transactions as a sham. Under these circumstances, Applicants should have foreseen that these transactions would be a subject of scrutiny at the hearing, and they should have introduced evidence that would have supported their assertions about the transactions, including whatever background information was necessary to understand the transactions.

Second, we question whether the additional evidence Applicants sought to adduce was material. Applicants have failed to show that FCS was in the business of buying and selling evidences of indebtedness. Moreover, the Notes, the "Buy-Sell" Agreements, and the UCC Financing Statements all state on their face that Ventures, a corporate entity, is a party to the transactions in question.

For these reasons, we deny the Additional Evidence Motion.[35]

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[35] We also deny Applicant's request for a hearing on the Additional Evidence Motion.

In the Additional Evidence Motion, Applicants refer to a motion they filed on October 31, 2008 (the "2008 Motion"), which sought "[a]ny and all documents FINRA has, or is aware of, pertaining to the multiple year review by FINRA" of the membership of the requester of the no-action letters discussed above. *See supra* notes 26-28 and accompanying text. Applicants filed the 2008 Motion pursuant to FINRA Rule 9251, which, in relevant part, requires Enforcement to "make available for inspection and copying by any Respondents, Documents prepared or obtained by interested FINRA staff in connection with the investigation that led to the institution of proceedings," and which further precludes Enforcement from withholding any documents or parts thereof that contain material exculpatory evidence.

Enforcement staff responded that Enforcement was "not in possession of these documents nor were they prepared or obtained during the course of the investigation that led to the institution of this proceeding. Moreover, Enforcement is not aware of any exculpatory documents applicable to the present matter." The hearing officer denied the 2008 Motion based on Enforcement's response and Applicants' failure to demonstrate that the requested documents were relevant to the issue in the proceeding.

(continued...)

* * *

For the reasons set forth above, we sustain FINRA's findings that Applicants failed to file audited annual reports for fiscal years 2006 and 2007, and failed to show that the Exemption permitted them to file unaudited annual reports for those years.

V.

Exchange Act Section 19(e)(2) directs us to sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[36] FINRA fined Applicants $5,000, jointly and severally, and suspended FCS for four months, ordering that the suspension would convert to an expulsion if FCS did not file audited annual reports for 2006 and 2007 before the suspension ended.

We initially observe that the sanctions imposed by FINRA were consistent with its Sanction Guidelines.[37] The Guidelines contain no specific guideline applicable to the failure to file audited annual reports. The Guidelines for the late filing of FOCUS reports, however, recommend a fine between $10,000 and $50,000 for a failure to file as well as a suspension of the firm for up to thirty business days and a suspension of the responsible principal for up to two years.[38] Those Guidelines also recommend taking into consideration whether the respondents delayed filing the report to prevent disclosure of a recordkeeping, operational, or financial deficiency. The Guidelines also generally recommend considering whether the respondents engaged in the misconduct notwithstanding prior warnings from FINRA or another regulator that the conduct violated FINRA rules or applicable securities laws or regulations.

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35 (...continued)
It is unclear whether Applicants seek review of the denial of the 2008 Motion or whether they seek some other type of relief. However, Applicants point to no evidence contradicting the staff's representation that Enforcement had no documents responsive to the request and knew of no applicable exculpatory documents. To the extent Applicants object to this ruling, we see no basis for reversing it.

36 15 U.S.C. § 78s(e)(2). Applicants do not allege, and the record does not show, that FINRA's action imposed an undue burden on competition.

37 *See* FINRA Sanction Guidelines (2007). Although the Commission is not bound by the Sanction Guidelines, it uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2). *E.g., Mission Sec. Corp.*, Exchange Act Rel. No. 63453 (Dec. 7, 2010), 99 SEC Docket 35510 A1, 35510 A21 n.44.

38 The Guidelines recommend that, when a violation is not specifically addressed, Guidelines for analogous violations should be considered in formulating sanctions.

We find the sanctions imposed by FINRA appropriately remedial. The prompt filing of audited annual reports is an important requirement that provides FINRA and the Commission with "an important means of timely oversight of the financial health of broker-dealers and of protecting public investors."[39] Applicants refused to file audited annual reports despite repeated warnings that their operations did not satisfy the Exemption, and, more than three and four years later, they have still not filed the audited reports at issue. The fine imposed is lower than the bottom of the recommended range, in keeping with the small size and lack of business of FCS.[40]

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39 *See Clinger & Co.*, 51 S.E.C. 924, 926 (1993) (requiring that reports be not just timely mailed, but timely received).

40 The General Principles Applicable to All Sanctions Determinations state that adjudicators "should consider firm size with a view toward ensuring that the sanctions imposed are not punitive but are sufficiently remedial to achieve deterrence."

The suspension allows FCS ample time to file audited annual reports, given the extremely limited nature of its business in 2006 and 2007. The conversion of the suspension into expulsion is also an appropriate remedial measure if Applicants' failure to comply continues. We also conclude that the sanctions imposed on Applicants will have the salutary effect of deterring others from engaging in the same serious misconduct. [41]

An appropriate order will issue. [42]

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

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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[41] In making this determination, we note that although "'general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry.'" *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)); *see also Boruski v. SEC*, 289 F.2d 738, 740 (2d Cir. 1961) ("The public interest requires that appropriate sanctions be imposed to secure compliance with the rules, regulations, and policies of both NASD and SEC.").

[42] We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein. Because the issues have been thoroughly briefed and can be adequately determined on the basis of the record filed by the parties, Applicants' request for oral argument is denied. Rule of Practice 451, 17 C.F.R. § 201.451.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 64852 / July 11, 2011

Admin. Proc. File No. 3-14015

In the Matter of the Application of

FCS SECURITIES
and
DALE EDWARD KLEINSER
417 E. 90th Street Suite 8C
New York, NY 10128-5175

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

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

ORDERED that FINRA's findings that FCS Securities and Dale Edward Kleinser violated Section 17(e) of the Securities Exchange Act of 1934, Exchange Act Rule 17a-5, and NASD Rule 2110 be, and they hereby are, sustained; and it is further

ORDERED that the sanctions imposed by FINRA be, and they hereby are, sustained.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Walter
Commissioner Paredes
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9234 / July 11, 2011

In the Matter of

J.P. MORGAN SECURITIES LLC

ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE DISQUALIFICATION PROVISIONS OF RULES 602(b)(4) AND 602(c)(2)

J.P. Morgan Securities LLC ("JPMS") has submitted a letter, dated June 17, 2011, requesting a waiver of the disqualification from the exemption from registration under Regulation E arising from the settlement with the Commission of a civil injunctive proceeding.

On July 7, 2011, the Commission filed a civil injunctive complaint against JPMS in the United States District Court for the District of New Jersey alleging that JPMS violated Section 15(c)(1)(A) of the Securities Exchange Act of 1934 ("Exchange Act").

Pursuant to an Offer of Settlement from JPMS, JPMS simultaneously filed a "Consent of JP Morgan Securities LLC" in which it agreed, without admitting or denying the allegations of the Commission's complaint, to the entry of a Final Judgment against it. Among other things, the Final Judgment permanently enjoins JPMS from violating Section 15(c)(1)(A) of the Exchange Act, orders JPMS to pay $51,186,349 in disgorgement, penalties and interest. In its complaint the Commission alleges that JPMS was involved a bid-rigging scheme related to tax-exempt municipal securities.

Rule 602(b)(4) makes the Regulation E exemption unavailable to an issuer if, among other things, such issuer or any of its affiliates is subject to any "order, judgment, or decree of any court of competent jurisdiction, entered within five years prior to the filing of such [Regulation E] notification, temporarily or permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of securities." Rule 602(c)(2) also makes the exemption unavailable to an issuer if, among other things, any underwriter of the securities to be issued is "temporarily or permanently restrained or enjoined by any court from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser." Rule 602(e) provides, however, that the disqualification "shall not apply . . . if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied."

Based on the representations set forth in JPMS's June 17, 2011, request, the Commission has determined that, pursuant to Rule 602(e), a showing of good cause has been made and that it is not necessary under the circumstances that the exemption be denied as a result of the Final Judgment or as a result of any related injunction entered by a U.S. state or territorial court addressing the same activities as the settled injunctive proceeding.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver of the disqualification provision of Rules 602(b)(4) and 602(c)(2) under the Securities Act resulting from the entry of the Final Judgment is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Paredes
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9233 / July 11, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 64854 / July 11, 2011

In the Matter of **J.P. MORGAN SECURITIES LLC**	**ORDER UNDER SECTION 27A(b) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b) OF THE SECURITIES EXCHANGE ACT OF 1934, GRANTING WAIVERS OF THE DISQUALIFICATION PROVISIONS OF SECTION 27A(b)(1)(A)(ii) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b)(1)(A)(ii) OF THE SECURITIES EXCHANGE ACT OF 1934**

JPMorgan Chase & Co., the parent company of J.P. Morgan Securities LLC ("JPMS"), has submitted a letter on behalf of themselves and any of their current and future affiliates, dated June 9, 2011, for a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 ("Securities Act") and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 ("Exchange Act") arising from its settlement of an injunctive action instituted by the Commission.

On July 8, 2011, pursuant to a consent filed by JPMS, the Honorable William J. Martini, United States District Court Judge for the District of New Jersey in Securities and Exchange Commission v. J.P. Morgan Securities LLC. (Case No. 11-cv-03877-WJM-MF) entered a final judgment against JPMS (the "Final Judgment"). The Final Judgment enjoined JPMS from violating, directly or indirectly, Exchange Act Section 15(c)(1)(A) and required that JPMS pay disgorgement plus prejudgment interest and civil money penalties in the total amount of $51,186,349.

The safe harbor provisions of Section 27A(c) of the Securities Act and Section 21E(c) of the Exchange Act are not available for any forward looking statement that is "made with respect to the business or operations of an issuer, if the issuer . . . during the 3-year period preceding the date on which the statement was first made . . . has been made the subject of a judicial or administrative decree or order arising out of a governmental action that (I) prohibits future violations of the antifraud provisions of the securities laws; (II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or (III) determines that the issuer violated the antifraud provisions of the securities laws[.]" Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act. The disqualifications may be waived "to the extent otherwise specifically provided by rule, regulation, or order of the Commission." Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act.

Based on the representations set forth in JPMorgan Chase & Co's June 9, 2011 request, the Commission has determined that, under the circumstances, the request for a waiver of the disqualifications resulting from the entry of the Final Judgment is appropriate and should be granted.

Accordingly, IT IS ORDERED, pursuant to Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act, that a waiver from the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act as to JPMS and any current or future affiliates resulting from the Final Judgment is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64855 / July 11, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14459

In the Matter of

Janney Montgomery Scott LLC,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Janney Montgomery Scott LLC ("Janney" or "Respondent").

II.

In anticipation of the institution of these proceedings, Janney has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

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III.

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

Summary

1. From at least January 2005 through July 2009, Janney, a dually-registered broker-dealer and investment adviser, failed to adequately establish, maintain and enforce policies and procedures reasonably designed, taking into consideration the nature of its business, to prevent the misuse of material, nonpublic information.

2. In September 2005, Janney distributed separate written policies and procedures for its Equity Capital Markets ("ECM") division, which oversaw its equity sales, trading, syndicate and research. Those policies and procedures known as the ECM Compliance and Supervisory Manual ("ECM Manual") also governed Janney's Investment Banking group, which is part of the Capital Markets division. As late as July 2009, parts of the ECM Manual, as posted for the use of Janney's employees, were incomplete.

3. Janney's implementation of its policies and procedures was deficient in a number of ways. In some instances, Janney did not enforce the policies and procedures in the ECM Manual and therefore, employees and managers did not understand their responsibilities or what policies were actually in place. In other instances, Janney did not follow the policies and procedures as written. These failures led to inadequate implementation and enforcement of the firm's written compliance policies and procedures.

4. In January 2009, the Commission's examination staff began conducting a review of Janney ("2009 examination"). In the course of conducting the examination, the exam staff found additional compliance areas in which certain other ECM policies and procedures were not being fully followed, enforced or maintained.

Respondent

5. Janney Montgomery Scott LLC is a limited liability corporation with its principal place of business in Philadelphia, Pennsylvania. Janney has been registered with the Commission as an investment adviser since 1971 and as a broker-dealer since 1936. Janney is an independently operated subsidiary of one of the largest mutual insurance companies in the United States. Janney is one of Philadelphia's oldest broker-dealers. Janney has over 100 branch offices with the majority in various locations along the East Coast.

Facts

A. Janney's ECM Policies and Procedures

6. As of October 2004, Janney had no written policies and procedures for ECM, which encompassed its equity sales, trading, syndicate and research departments, separate from

those applicable to Janney's other departments. At that time, the then-Chief Compliance Officer asked Compliance Counsel who had been hired to draft Janney's retail policies and procedures also to draft the first ECM Manual that would separate and improve the procedures applicable to ECM. This ECM Manual would among other things, govern the information barrier between the Investment Banking and Research departments, which is designed to prevent the possible exposure to, and disclosure of, material nonpublic information.

7. When she began to draft the ECM Manual in January 2005, the Compliance Counsel sought input from the former head of Investment Banking, the former head of ECM and the head of Research. ECM Compliance Counsel also asked the heads of these departments to review and comment on her draft of the ECM Manual. They did so throughout the process.

8. The Compliance Counsel held at least one informational and question and answer session with employees of ECM to familiarize them with the new policies and procedures in the ECM Manual.

9. The Compliance Counsel resigned in August 2005, prior to completing the ECM Manual.

10. In September 2005, the ECM Manual was placed on Janney's internal website, The Source, for its employees. In pertinent part, the ECM Manual contained two key sections, which were complete and operational. The first, "Managing Conflicts of Interest: Between Research, Investment Banking and Trading Desk," governed analyst-banker communications, the firewall policy and gatekeeper procedure, the prohibition of investment banking services in connection with pitches, solicitations, marketing and/or road shows by Research. The second, "Chinese Wall Policy and Procedure to Prevent Misuse of Material Nonpublic Information," governed the Watch List procedure, the Information Wall between Investment Banking and Research and the trading surveillance and review procedure. The Watch List was a nonpublished, nondistributed list that, among other things, enumerated the companies that Investment Banking was actively advising and was used to identify those securities where the potential for insider trading existed.

B. Janney Did Not Enforce or Maintain the Policies and Procedures in the ECM Manual

1. Janney's Chaperone Process

11. The ECM Manual provided that, "Investment Banking personnel may seek, in the presence of the Designated Legal/Compliance Personnel" the view of the Research Department on the merits of a proposed transaction, a potential candidate for a transaction, and market and industry trends, conditions or developments. Individual companies could be discussed if the request was not made for the purpose of the analyst identifying a specific potential transaction or it was consistent with the type of communications an analyst could have with investing customers. Research had to provide any responses in the presence of the "Designated Legal/Compliance Personnel." "Designated Legal/Compliance Personnel" meant a member of

the Compliance Department or the Legal Department. No other personnel were permitted to chaperone meetings.

12. Beginning in January 2005, the Compliance Counsel required any banker who wanted to speak with an analyst to send her an email requesting a chaperoned meeting and detailing the substance of the proposed discussion. She used the substance described in the email as parameters for what she expected would be discussed at the meetings (and allowed for discussion) and as a way to memorialize the meeting. She also prepared for the meeting by familiarizing herself with the companies to be discussed in the chaperoned meeting and the companies in the market segments that the analyst covered.

13. In May 2005, in contravention of the ECM Manual, and without the required approval of the Compliance Counsel, the heads of the Janney Research and Investment Banking departments held at least one meeting with other Janney banking and research personnel to discuss business strategy without a compliance person present. There also was at least one instance where Compliance Counsel reprimanded investment banking personnel for repeatedly disregarding the ECM Manual by contacting research personnel directly, and outside of the chaperoned process, for information.

14. Following the Compliance Counsel's departure in August 2005, another compliance member (the "Former Compliance Chaperone") assumed responsibility for chaperoning meetings.

15. The Former Compliance Chaperone also was in charge of compiling the Watch List during his tenure. The Former Compliance Chaperone's practices were less rigorous than those of his predecessor: he did not take any steps to learn about the deals on the Watch List, was generally unaware of what industry segments the analysts covered and did not gather any information about the potential companies to be discussed before the meeting.

2. Janney Did Not Follow the Chaperone Process Set Forth in the ECM Manual

16. In the fall of 2005, Janney began using research analysts' expertise to help investment bankers explore new business opportunities. In addition, members of Investment Banking and Research met every two weeks to compare notes regarding personal relationships with companies, the historic relationship between the company and the analyst who covered it, and "personal color" on the company.

17. The ECM Manual was not revised to take into consideration the new uses of analysts in these roles, the impact it had on the nature of Janney's business and what policies and procedures were necessary to prevent the possible misuse of material, nonpublic information.

18. In January 2006, a junior Janney investment banker advising a biometric company on a pending merger had a chaperoned conversation with a Janney analyst who covered this company. During the conversation, the investment banker asked for "color" regarding two companies' quarter-to-quarter earnings history so that he could test his projections against that

history. One of those companies was the company that Janney was advising, and the other was a company in that biometric space. Although his responsibilities included monitoring the Watch List on which the company in the merger transaction appeared, the Former Compliance Chaperone was not aware that Investment Banking was advising this company in the pending merger and acquisition and was not aware that the analyst specifically covered both companies.

19. Firm telephone records show that during the pendency of the deal, the analyst and members of Investment Banking had at least one 14 minute call outside of the previous documented chaperoned meeting. No one could recall whether this call was chaperoned. Due to the Former Compliance Chaperone's poor documentation of the meetings, there are no notes or emails memorializing any request for a chaperoned meeting for this call.

20. During the pendency of the deal, the same analyst was also making phone calls to, and having conversations with, senior employees of the two companies involved in the merger as part of his analyst duties.

21. The analyst was not brought over the Information Wall and/or segregated at any point during the pendency of the deal.

22. In early 2006, Janney implemented a new strategic marketing plan in which it used its research analysts to help to solicit trading business by having the analysts attend meetings with institutional salespersons and customers. As a result, four business days after the chaperoned meeting and three business days after the 14 minute telephone call, the analyst recommended the stock of the company advised by Janney in the pending merger and acquisition to at least three institutional clients. These clients bought the stock of the company immediately after the meeting. The following day, there was a public announcement of a merger, and the stock price of the company acquired (and advised by Janney) increased.

23. In February 2006, Janney hired a new Capital Markets Compliance Manager (the "Former Compliance Manager"). Beginning in February 2006, the Former Compliance Manager added to the Former Compliance Chaperone's practices. Specifically, he educated the Former Compliance Chaperone about "Watch List candidates, Watch List entries, chaperoning and a determination as to what the purpose of the meeting was." The Former Compliance Chaperone left the firm in December 2006.

24. At times, in contravention of the ECM Manual, the former head of Investment Banking and the head of Research chaperoned meetings. The Former Compliance Manager, the Former Compliance Chaperone and the Compliance Counsel denied awareness of this practice.

25. In addition, Janney failed to properly maintain and enforce its email communication firewall procedures. In at least one instance, over a several year period, investment bankers were able to breach the firewall and directly email research department employees, posing a risk that material nonpublic information could be exchanged and misused. Specifically, in January 2005, investment bankers were able to email individuals in Research. Janney was aware of this breach of the firewall by at least June 2008, when the staff raised the

concern with the firm. Referring to tests of the firewall, the Former Compliance Manager testified in 2009 that its firewall "wasn't as efficient as [Janney] had thought" and that he believed that there were still breaches occurring in the firewall in 2009 because it was "still not fully implemented."

C. Janney Failed to Establish Adequate Policies and Procedures Reasonably Designed to Prevent the Misuse of Material, Nonpublic Information

26. Beginning in approximately 2006 or 2007, ECM Compliance updated and circulated the Watch List within ECM Compliance once a week to monitor Janney's proprietary trading in any of the stocks of the companies on the Watch List, as well as any employee trading. ECM Compliance monitored proprietary trading and employee trading by running an exception report to identify trading in companies on the Watch List on a T+1 basis.

27. During this same time period, unless a formal chaperoned meeting was requested, no one within ECM Compliance monitored contacts between investment bankers and research analysts.

28. Janney failed to adequately monitor trading in the securities of firms on the Watch List. Janney's stated policy was that all employees must keep their trading accounts at Janney; however, as late as 2009, the Former Compliance Manager admitted that granting permission to keep accounts away from the firm was "too frequent." He further acknowledged that this practice made monitoring of improper trading activity more difficult than if the accounts were required to be kept at the firm, as was the policy, because trading activity could not be monitored as quickly.

29. After February 2006, Janney required certain employees to get pre-clearance before they could trade in any stock. The 2009 examination revealed, however, that in contravention of the firm's procedures, Janney permitted an ECM Compliance employee to conduct the supervisory reviews of the pre-clearance trades without being a registered principal. The 2009 examination also revealed that investment bankers were able to trade without pre-clearance as late as July 2009.

30. The 2009 examination also found that Janney's Capital Markets Employee and Principal Compliance Manual ("CMEPC Manual"), one of many other manuals used within ECM, required its employees to submit an "Annual Employee Questionnaire" and an "Employee and Employee-Related Account Initial and Annual Disclosure Form" which would disclose the existence of employee outside accounts. In contravention of the firm's procedures, in several instances, Janney failed to obtain and/or failed to timely obtain completed questionnaires and disclosure forms. As a result, the firm was not aware of, and could not review, certain employees' outside account transactions.

31. The 2009 examination likewise found that in several instances, despite being aware of outside accounts held by employees, Janney failed to request and review the account activity.

32. Until 2007, the Private Client Group/Retail Compliance – a separate compliance function within Janney – received trade confirmations for outside accounts of people who worked in ECM. Janney could not establish that ECM Compliance regularly compared these trade confirmations with the Watch List to see if any improper trading occurred. ECM Compliance also did not receive the account statements and therefore, there was no monitoring of overall trading strategy or trading patterns.

33. It was not until 2008, and then only at the end of each month, that someone from ECM Compliance gathered the account statements of the ECM employees who had accounts away from Janney from the Private Client Group and performed a comparison of any trades in the stocks of companies on the Watch List. The 2009 examination also revealed that a business supervisor, who did not have access to the Watch List, reviewed retail registered representatives' outside accounts. He, therefore, was unable to determine if improper trading occurred.

34. As a result of the conduct described above, Janney willfully violated Section 15(g) of the Exchange Act of the 1934[1] which requires every registered broker or dealer to establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of the broker's or dealer's business, to prevent the misuse of material nonpublic information.

Legal Discussion

35. Section 15(g) of the of the Exchange Act requires brokers and dealers registered with the Commission to establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse, in violation of the Exchange Act or the rules or regulations thereunder, of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer.

36. Section 15(g) was originally enacted as Section 15(f) of the Exchange Act in 1988 as part of the Insider Trading and Securities Fraud Enforcement Act. Broker-dealers must be cognizant of their duties under Section 15(g), particularly as their businesses evolve and as they experience personnel changes in compliance and management. The Commission has made clear that the requirement that broker-dealers implement and maintain policies and procedures consistent with the nature of its business "is critical to effectively preventing the misuse of material, nonpublic information." See, e.g., In re Gabelli & Co., Inc., Exchange Act Rel. No. 35057, 1994 SEC LEXIS 3744 at *11 (Dec. 8, 1994). The Commission also has consistently made clear that broker-dealers must take seriously their responsibilities to design and enforce sufficiently robust policies and procedures to prevent the misuse of material, nonpublic information. Where they have failed to do so, the Commission has repeatedly issued sanctions against the firms. See, e.g., In re The Buckingham Research Group, Inc., Exchange Act Rel. No.

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1 Section 15(g) of the Exchange Act was formerly Section 15(f). The provision changed following the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act in July 2010.

63323, SEC LEXIS 3830 (Nov. 17, 2010) (finding 15(f) violation where Buckingham and its subsidiary failed to enforce procedures requiring its senior portfolio analysts, who had strong relationships with industry insiders, to report "all business, financial or personal relationships that may result in access to material, nonpublic information."); In re Merrill Lynch, Pierce, Fenner & Smith, Inc., Exchange Act Rel. No. 59555, SEC LEXIS 613541 (March 11, 2009) (finding 15(f) violation where Merrill Lynch failed to limit or monitor traders' access to the equity squawk box which broadcast material, nonpublic information); In re Morgan Stanley & Co., Exchange Act Rel. No. 54047, SEC LEXIS 1465 (Jun. 27, 2006) (finding 15(f) violation where Morgan Stanley failed to conduct Watch List surveillance over a 4 year period); In re Banc of America Securities LLC, Exchange Act Rel. No. 55466, SEC LEXIS 492 (March 14, 2007) (finding 15(f) violation where Banc of America failed to establish and enforce policies and procedures to protect against the misuse of material, nonpublic research information); In re Goldman Sachs & Co., Exchange Act Rel. No. 48436, SEC LEXIS 2100 (Sept. 4, 2003) (finding 15(f) violation where Goldman Sachs failed to prevent the misuse of material, nonpublic information potentially obtained by its paid outside consultants); In re Gintel Asset Management, Inc., Investment Advisers Rel. No. 2079, SEC LEXIS 2868 (Nov. 8, 2002) (finding 15(f) violation where the broker-dealer owned by Gintel failed to have adequate procedures to prevent Gintel from trading while in possession of material nonpublic information); In re Guy P. Wyser-Pratte, Exchange Act Rel. No. 44283, SEC LEXIS 885 (May 9, 2001) (finding 15(f) violation where broker-dealer failed to establish policies and procedures reasonably designed to prevent the misuse of material, nonpublic information where the owner of the firm was exposed to material, nonpublic information on a regular basis and made all of the trading decisions for the investment management company); In re Certain Market Making Activities on NASDAQ, Exchange Act Rel. No. 40910, SEC LEXIS 59 (Jan. 11, 1999) (finding 15(f) violation where J.P. Morgan Securities, Inc. failed to establish policies and procedures reasonably designed to prevent the misuse of material, nonpublic information where traders were required to make their own determination as to whether they had been exposed to material, nonpublic information); In re Friedman, Billings and Ramsey & Co., Exchange Act Rel. No. 19950, SEC LEXIS 3009 (December 20, 2006) (finding 15(f) violation where FBR's policies and procedures were not appropriately tailored to FBR's business, in connection with serving as placement agent for PIPE offerings and were not enforced); and In re Fox-Pitt Kelton, Inc., Exchange Act Rel. No. 37940, SEC LEXIS 3219 (Nov. 12, 1996) (finding 15(f) violation where Fox-Pitt failed to have and enforce procedures reasonably designed to prevent sales persons and analysts from trading or recommending trading on material, nonpublic information).

37. Accordingly, as a result of its failure, from at least 2005 through July 2009, to adequately establish, enforce or maintain written policies and procedures reasonably designed, given the nature of its business, to prevent the misuse of material, nonpublic information, Janney willfully violated Section 15(g) of the Exchange Act.

Undertakings

38. Janney has undertaken to:

A. Retain, at Janney's expense and within sixty (60) days of the issuance of this

Order, a qualified independent consultant (the "Consultant") not unacceptable to the staff of the Division of the Enforcement (the "staff") to conduct a comprehensive review of Janney's policies, practices and procedures relating to Section 15(g) of the Exchange Act , including: (1) the prevention of the misuse of material, nonpublic information as required, for Janney, by Section 15(g) of the Exchange Act, taking into consideration the nature of Janney's ECM business; (2) Janney's ECM policies and procedures relating to: (i) the nature of its equity capital markets business; (ii) its training procedures for chaperones and its chaperoning processes; (iii) its Information Wall policies and procedures and when parties should be brought over the Information Wall; and (iv) its use of a Watch or Restricted List;

B. Ensure that Consultant prepares written reports, referenced below, reviewing the adequacy of Janney's policies, practices and procedures and making recommendations regarding how Janney should modify or supplement its policies, practices and procedures, taking into consideration the nature of its business, to prevent the misuse of material, nonpublic information in compliance with Section 15(g) of the Exchange Act;

C. Provide a copy of the engagement letter detailing the Consultant's responsibilities to Colleen K. Lynch, Assistant Regional Director, Philadelphia Regional Office, U.S. Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106;

D. Cooperate fully with the Consultant, including providing the Consultant with access to its files, books, records, and personnel as reasonably requested for the above-mentioned review, and obtaining the cooperation of its employees or other persons under its control;

E. Require the Consultant to report to the Commission staff on his/her activities as the staff shall request;

F. Permit the Consultant to engage such assistance, clerical, legal or expert, as necessary and at reasonable cost, to carry out his/her activities, and the cost, if any, of such assistance shall be borne exclusively by Janney;

G. Within one hundred and twenty (120) days of the issuance of the Order, unless otherwise extended by the staff for good cause, Janney shall require the Consultant to complete the review, described in subparagraph A. above, and prepare a written Preliminary Report, described in subparagraph B. above, that: (i) evaluates the adequacy under Section 15(g) of the Exchange Act of Janney's policies, practices, and procedures, taking into consideration the nature of its business to prevent the misuse of material, nonpublic information; and (ii) makes any recommendations about modifications thereto or additional or supplemental procedures deemed necessary to remedy any deficiencies described in the Preliminary Report. The Consultant shall provide the Preliminary Report simultaneously to both the staff (at the address set forth above) and Janney;

H. Within one hundred and twenty (120) days of Janney's receipt of the Preliminary Report, Janney shall adopt and implement all recommendations set forth in the Report; provided, however, that as to any recommendation that Janney considers to be, in whole or in part, unduly burdensome or impractical, Janney may submit in writing to the Consultant and the staff (at the address set forth above), within thirty (30) days of receiving the Preliminary Report, an alternative policy, practice, or procedure designed to achieve the same objective or purpose. Janney and the Consultant shall then attempt in good faith to reach an agreement relating to each recommendation that Janney considers unduly burdensome or impractical and the Consultant shall reasonably evaluate any alternative policy, practice, or procedure proposed by Respondent. Within fourteen (14) days after the conclusion of the discussion and evaluation by Janney and the Consultant, Janney shall require that the Consultant inform Janney and the staff (at the address set forth above) of his/her final determination concerning any recommendation that Janney considers to be unduly burdensome or impractical. Janney shall abide by the determinations of the Consultant and, within sixty (60) days after final agreement between Janney and the Consultant or final determination by the Consultant, whichever occurs first, Janney shall adopt and implement all of the recommendations that the Consultant deems appropriate;

I. Within fourteen (14) days of Janney's adoption of all of the recommendations that the Consultant deems appropriate, Janney shall certify in writing to the Consultant and the staff (at the address set forth above) that Janney has adopted and implemented all of the Consultant's recommendations and that Janney has established policies, practices, and procedures pursuant to Section 15(g) of the Exchange Act that are consistent with the findings of the Order;

J. Within one hundred and eighty days (180) days from the date of the certifications, described in subparagraph I. above, Janney shall require the Consultant to have completed a review of Janney's revised policies and procedures and practices and submit a written Final Report to Janney and the staff. The Final Report shall describe the review made of Janney's revised policies, practices and procedures and describe how Janney is implementing, enforcing and auditing the enforcement and implementation of those policies, practices and procedures. The Final Report shall include an opinion of the Consultant as to whether the revised policies, practices and procedures and their implementation and enforcement by Janney's auditing of the implementing and enforcement of those policies, practices and procedures are reasonably adequate under Section 15(g) of the Exchange Act;

K. Janney may apply to the staff for an extension of the deadlines described above before their expiration, and upon a showing of good cause by Janney, the staff may, in its sole discretion, grant such extensions for whatever time period it deems appropriate;

L. To ensure the independence of the Consultant, Janney shall not have the authority to terminate the Consultant without prior written approval of the staff, and shall compensate the Consultant and persons engaged to assist the Consultant for services rendered pursuant to the Order at their reasonable and customary rates;

M. Janney shall require the Consultant to enter into an agreement that provides that, for the period of engagement and for a period of two years from completion of the engagement, the Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Janney or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Consultant in the performance of his/her duties under this Order shall not, without the prior written consent of the staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Janney, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such, for the period of the engagement and for a period of two years after the engagement; and

N. Janney agrees to certify in writing to the staff (at the address set forth above), at the end of the calendar year ended December 31, 2012, that Janney has established and continues to maintain policies, practices, and procedures pursuant to Section 15(g) of the Exchange Act that are consistent with the findings of the Order.

IV.

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

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

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Section 15(g) of the Exchange Act.

B. Respondent is censured.

C. Respondent shall, within ten (10) days of the entry of the Order, pay a civil money penalty in the amount of $850,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Office of Financial Management, 100 F. Street, NE, Stop 6042, Washington, D.C. 20549; and (D) submitted under cover letter that identifies Janney Montgomery Scott LLC as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Associate Director, Philadelphia Regional Office, U.S. Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

D. Respondent shall comply with the undertakings enumerated in Paragraph 38.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9235 / July 11, 2011

Administrative Proceeding
File No. 3-14459

In the Matter of **Janney Montgomery Scott LLC** **Respondent.**	**ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(c)(3) DISQUALIFICATION PROVISION**

I.

Janney Montgomery Scott LLC ("Janney") has submitted a letter, dated June 23, 2011, requesting a waiver of the Rule 602(c)(3) disqualification from the exemption from registration under Regulation E arising from Janney's settlement of an administrative proceeding commenced by the Commission.

II.

On July 11, 2011, pursuant to Janney's Offer of Settlement, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order against Janney. Under the Order, the Commission found that Janney failed to "establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse of material nonpublic information" in violation of Section 15(g) of the Securities Exchange Act of 1934 ("Exchange Act"). In the Order, the Commission ordered Janney to cease and desist from committing or causing any violations and any future violations of Section 15(g) of the Exchange Act, ordered Janney censured, ordered Janney to pay $850,000 in civil penalties and comply with undertakings.

III.

Rule 602(c)(3) makes the Regulation E exemption unavailable for the securities of small business investment company issuers or business development company issuers if such issuer or any of its affiliates, among other things, is subject to an order of the Commission entered pursuant to Section 15(b) of the Securities Exchange Act of 1934. 17 C.F.R. § 230.602(c)(3). Rule 602(e) provides, however, that the disqualification "... shall not apply ... if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption from registration pursuant to Regulation E be denied." 17 C.F.R. § 230.602(e).

IV.

Based upon the representations set forth in Janney's request, the Commission has determined that pursuant to Rule 602(e) under the Securities Act a showing of good cause has been made that it is not necessary under the circumstances that the exemption be denied as a result of the Order.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver from the application of the disqualification provision of Rule 602(c)(3) under the Securities Act resulting from the entry of the Order is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230, 240 and 260

Release Nos. 33-9232; 34-64800; 39-2476; File No. S7-02-09

RIN 3235-AK26

EXTENSION OF TEMPORARY EXEMPTIONS FOR ELIGIBLE CREDIT DEFAULT SWAPS TO FACILITATE OPERATION OF CENTRAL COUNTERPARTIES TO CLEAR AND SETTLE CREDIT DEFAULT SWAPS

AGENCY: Securities and Exchange Commission.

ACTION: Final temporary rules; extension.

SUMMARY: We are extending the expiration dates in our temporary rules that provide exemptions under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Trust Indenture Act of 1939 for certain credit default swaps in order to continue facilitating the operation of one or more central counterparties for those credit default swaps as we consider rules implementing the clearing provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

DATES: Effective Date: These amendments are effective [insert date of publication in the Federal Register], and the expiration dates in the temporary rules and amendments published January 22, 2009 (74 FR 3967), extended in a release published on September 17, 2009 (74 FR 47719), and further extended in a release published on November 26, 2010 (75 FR 72660), are further extended from July 16, 2011 to April 16, 2012. If the Commission adopts permanent exemptions for security-based swaps issued by certain clearing agencies before April 16, 2012, the Commission will terminate the effectiveness of the temporary rules as part of that rulemaking.

FOR FURTHER INFORMATION CONTACT: Andrew Schoeffler, Special Counsel, Office of Capital Market Trends, Division of Corporation Finance, at (202) 551-3860, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are adopting amendments to the following rules: temporary Rule 239T and Rule 146 under the Securities Act of 1933 ("Securities Act"),[1] temporary Rule 12a-10T and Rule 12h-1(h)T under the Securities Exchange Act of 1934 ("Exchange Act"),[2] and temporary Rule 4d-11T under the Trust Indenture Act of 1939 ("TIA").[3]

I. BACKGROUND

In January 2009, we adopted interim final temporary Rule 239T and a temporary amendment to Rule 146 under the Securities Act, interim final temporary Rules 12a-10T and 12h-1(h)T under the Exchange Act, and interim final temporary Rule 4d-11T under the TIA (collectively, the "Temporary Rules"), and in September 2009, we extended the expiration dates in these rules from September 25, 2009 to November 30, 2010 and in November 2010, we further extended the expiration dates in these rules to July 16, 2011.[4] We adopted these rules in connection with temporary exemptive orders[5] we issued to clearing agencies acting as central

1 15 U.S.C. 77a et. seq.

2 15 U.S.C. 78a et. seq.

3 15 U.S.C. 77aaa et. seq.

4 See Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009) (the "Temporary CDS Exemptions Release"); Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009); and Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9158 (Nov. 19, 2010), 75 FR 72660 (Nov. 26, 2010).

5 See Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request on Behalf of ICE Clear Europe Limited Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-60372 (Jul. 23, 2009), 74 FR 37748 (Jul. 29, 2009), Order

counterparties ("CCP"), which exempted the CCPs from the requirement to register as clearing agencies under Section 17A of the Exchange Act[6] solely to perform the functions of a clearing agency for certain credit default swap ("CDS") transactions. The CCP exemptive orders also

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Extending Temporary Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of ICE Clear Europe, Limited Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010), and Order Extending Temporary Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Request on Behalf of ICE Clear Europe, Limited Related to Central Clearing of Credit Default Swaps and Request for Comment, Release No. 34-63389 (Nov. 29, 2010), 75 FR 75520 (Dec. 3, 2010); Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request on Behalf of Eurex Clearing AG Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009), Order Extending and Modifying Temporary Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of Eurex Clearing AG Related to Central Clearing of Credit Default Swaps, and Request for Comment, Release No. 34-61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010), and Order Extending Temporary Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Request on Behalf of Eurex Clearing, AG Related to Central Clearing of Credit Default Swaps and Request for Comment, Release No. 34-63390 (Nov. 29, 2010), 75 FR 75518 (Dec. 3, 2010); Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request of Chicago Mercantile Exchange Inc. and Citadel Investment Group, L.L.C. Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), Order Extending and Modifying Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request of Chicago Mercantile Exchange Inc. Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009), Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request of Chicago Mercantile Exchange Inc. Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010), and Order Extending Temporary Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Request of Chicago Mercantile Exchange Inc. Related to Central Clearing of Credit Default Swaps and Request for Comment, Release No. 34-63388 (Nov. 29, 2010), 75 FR 75522 (Dec. 3, 2010); Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of ICE US Trust LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), Order Extending and Modifying Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request from ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009); Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request of ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010), and Order Extending and Modifying Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request of ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps and Request for Comment, Release No. 34-63387 (Nov. 29, 2010), 75 FR 75502 (Dec. 3, 2010); and Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with Request of LIFFE Administration and Management and LCH.Clearnet Ltd. Related to Central Clearing Of Credit Default Swaps, and Request for Comments, Release No. 34-59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009). LIFFE A&M and LCH.Clearnet Ltd. allowed their order to lapse without seeking renewal.

6 15 U.S.C. 78q-1.

exempted certain eligible contract participants[7] and others from certain Exchange Act requirements with respect to certain CDS.[8] Also at that time, we temporarily exempted any exchange that effects transactions in certain CDS from the requirements under Sections 5 and 6 of the Exchange Act[9] to register as a national securities exchange, and any broker or dealer that effects transactions on an exchange in certain CDS from the requirements of Section 5 of the Exchange Act.

We adopted the Temporary Rules and the CCP exemptive orders to help foster the prompt development of CCPs for CDS because we believed and continue to believe that the existence of CCPs for CDS would be important in helping to reduce counterparty risks inherent in the CDS market. Today, CDS agreements generally are negotiated and entered into bilaterally, but eligible trades may be submitted to the CCP for novation, which results in the bilateral contract being extinguished and replaced by two new contracts where the CCP is the buyer to the original seller and the seller to the original buyer.[10] The operation of a well-regulated CCP can significantly reduce counterparty risks by preventing the failure of a single-market participant from having a disproportionate effect on the overall market, since bilateral counterparty risk is eliminated as the creditworthiness of the original counterparties is replaced by the creditworthiness of the CCP.

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7 See 7 U.S.C. 1a(12).

8 See generally the actions noted in footnote 5, supra.

9 15 U.S.C. 78e and 78f.

10 "Novation" is a "process through which the original obligation between a buyer and seller is discharged through the substitution of the CCP as seller to buyer and buyer to seller, creating two new contracts." Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners, Recommendations for Central Counterparties (Nov. 2004) at 66.

At the time of the adoption of the Temporary Rules and the CCP exemptive orders, the OTC market for CDS was a source of concern to us and other financial regulators due to the systemic risk posed by CDS, the possible inability of parties to meet their obligations as counterparties under the CDS, and the potential resulting adverse effects on other markets and the financial system.[11] In response, in January 2009, we took action to help foster the prompt development of CCPs for CDS, including granting conditional exemptions from certain provisions of the federal securities laws. Since the adoption of the Temporary Rules and the CCP exemptive orders, several clearing agencies have been actively engaged as CCPs in clearing CDS transactions in accordance with our exemptions.

We subsequently extended the expiration dates in the Temporary Rules from September 30, 2009 to November 30, 2010[12] and then from November 30, 2010 to July 16, 2011.[13] The latter extension was adopted to enable the CCPs to continue to clear eligible CDS in accordance with the Temporary Rules and the CCP exemptive orders pending implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[14] Title VII of the Dodd-Frank Act ("Title VII") is intended to address regulatory gaps in the existing regulatory

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11 In addition to the potential systemic risks that CDS pose to financial stability, we were concerned about other potential risks in this market, including operational risks, risks relating to manipulation and fraud, and regulatory arbitrage risks.

12 See Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009). In September 2009, we extended the expiration dates in the Temporary Rules to November 30, 2010 because, among other reasons, a number of legislative initiatives relating to the regulation of derivatives, including CDS, had been introduced by members of Congress and recommended by the United States Department of the Treasury ("Treasury"), and Congress had not yet taken definitive action with respect to any of the legislative initiatives or the Treasury proposals.

13 See Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9158 (Nov. 19, 2010), 75 FR 72660 (Nov. 26, 2010).

14 The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

structure for the over-the-counter ("OTC") derivatives markets by providing the Commission and the Commodity Futures Trading Commission ("CFTC") with the authority to regulate OTC derivatives. The primary goals of Title VII, among others, are to increase the transparency, efficiency and fairness of the OTC derivatives markets, improve investor protection and to reduce the potential for counterparty and systemic risk.[15] To this end, Title VII imposes a comprehensive regime for the regulation of "swaps" and "security-based swaps" (as those terms are defined in Title VII), including the clearing, exchange trading, and reporting of transactions in security-based swaps.[16] Certain CDS are security-based swaps as defined under Title VII.

Title VII amends the Exchange Act to require, among other things, that security-based swaps be cleared through a clearing agency that is registered with the Commission or that is exempt from registration if the security-based swap is of a type that the Commission determines is required to be cleared, unless an exception from mandatory clearing applies.[17] Title VII also provides that a depository institution registered with the CFTC that cleared swaps as a multilateral clearing organization or a derivatives clearing organization registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act is deemed registered as a clearing agency for the purposes of clearing security-based swaps (the "Deemed Registered Provision").[18] The Deemed

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15 Id. at preamble.

16 Section 761(a)(6) of the Dodd-Frank Act defines a "security-based swap" as any agreement, contract, or transaction that is a swap based on a narrow-based security index, a single security or loan, including any interest therein or on the value thereof; or the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.

17 See Pub L. No. 111-203, § 763(a) (adding Exchange Act Section 3C(a)(1)).

18 See Pub L. No. 111-203, § 763(b) (adding Exchange Act Section 17A(l)). Section 763(b) of the Dodd-Frank Act provides that certain security-based swap clearing agencies will be deemed registered as clearing agencies for the purpose of clearing security-based swaps. Currently, four security-based swap clearing

Registered Provision and the other general provisions of Title VII become effective on July 16, 2011.[19]

The Dodd-Frank Act also directs us to adopt regulations regarding, among other things clearing agencies for, and the clearing of, security-based swaps, which include CDS. Under Title VII, all security-based swaps, including certain types of CDS, are defined as securities under the Securities Act and the Exchange Act. As part of our review of the applications of the Securities Act, the Exchange Act and the TIA to security-based swaps and the implications for the clearing and exchange trading provisions of the Dodd-Frank Act and our rules implementing them, we are evaluating the necessity and appropriateness of exemptions from the registration requirements of the Securities Act and Exchange Act and the indenture qualification provisions of the TIA for security-based swaps that will be cleared by clearing agencies. To this end, we have proposed exemptions under the Securities Act, the Exchange Act, and the TIA for security-based swaps issued by certain clearing agencies satisfying certain conditions.[20] The Temporary Rules are an interim measure pending final action on the proposed permanent exemptions. However, the Temporary Rules are needed upon the effective date of Title VII to continue

agencies have temporary conditional exemptions from clearing agency registration under Section 17A solely to perform the functions of a clearing agency for certain CDS, and three of these security-based swap clearing agencies will be subject the Deemed Registered Provision. While the Deemed Registered Provision eliminates the need to extend our temporary exemptive orders relating to registration of clearing agencies, it does not resolve other issues addressed by our temporary exemptive orders relating to Sections 5 and 6 of the Exchange Act.

19 Pub L. No. 111-203, § 774 states "[u]nless otherwise provided, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle."

20 See Exemptions For Security-Based Swaps Issued By Certain Clearing Agencies, Release No. 33-9222 (June 9, 2011), 76 FR 34920 (June 15, 2011). The permanent exemptions would exempt transactions by clearing agencies in security-based swaps from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provisions, as well as exempt these security-based swaps from Exchange Act registration requirements and from the provisions of the TIA, provided certain conditions are met.

facilitating the operation of the CCPs in clearing eligible CDS as we consider rules implementing the clearing provisions of Title VII, including any applicable permanent exemptions.

The implementation of Title VII is a substantial undertaking and we are working toward fulfilling its requirements in a thorough and deliberative manner that includes significant public input and coordination with other regulators. To date, we have adopted an interim final rule regarding the reporting of outstanding security-based swaps entered into prior to the date of enactment of the Dodd-Frank Act[21] and proposed thirteen other rulemakings required by Title VII, including the permanent exemptions noted above,[22] rules regarding standards for the operation and governance of clearing agencies,[23] the obligations of security-based swap data repositories,[24] the registration and regulation of security-based swap execution facilities,[25] the confirmation of security-based swap transactions,[26] trade reporting, data elements, and public dissemination of trade information for security-based swaps,[27] the exception to the mandatory clearing requirement for end users,[28] the mandatory clearing of security-based swaps,[29]

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21 See Reporting of Security-Based Swap Transaction Data, Release No. 34-63094 (Oct. 13, 2010), 75 FR 64643 (Oct. 20, 2010).

22 See footnote 20, supra.

23 See Clearing Agency Standards for Operation and Governance, Release No. 34-64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011).

24 See Security-Based Swap Data Repository Registration, Duties, and Core Principles, Release No. 34-63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010).

25 See Registration and Regulation of Security-Based Swap Execution Facilities, Release No. 34-63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011).

26 See Trade Acknowledgment and Verification of Security-Based Swap Transactions, Release No. 34-63727 (Jan. 14, 2011), 76 FR 3859 (Jan. 21, 2011).

27 See Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, Release No. 34-63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010).

28 See End-User Exception to Mandatory Clearing of Security-Based Swaps, Release No. 34-63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010).

definitions and interpretive guidance for key terms in Title VII,[30] and the mitigation of conflicts of interest involving security-based swaps.[31] We have also proposed anti-fraud and anti-manipulation rules regarding security-based swaps.[32] Title VII also calls for additional rulemakings regarding the registration procedures and external business conduct standards for security-based swap dealers and major security-based swap participants.

At the time of adoption of the Temporary Rules in January 2009, we requested comment on various aspects of the Temporary Rules. We received a total of 15 letters, only two of which commented specifically on the Temporary Rules.[33] Although those two letters generally supported allowing CCPs to clear and settle CDS transactions in accordance with the terms of the Temporary Rules, neither of the commenters specifically addressed the duration of the Temporary Rules and temporary amendments.[34] The other commenters raised issues not directly

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29 See Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Release No. 34-63557 (Dec. 15, 2010), 75 FR 82490 (Dec. 30, 2010).

30 See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", Release No. 34-63452 (Dec. 7, 2010), 75 FR 80174 (Dec. 21, 2010); and Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Release No. 33-9204 (Apr. 29, 2011), 76 FR 29818 (May 23, 2011), corrected in Release No. 33-9204A (June 1, 2011), 76 FR 32880 (June 7, 2011).

31 See Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC, Release No. 34-63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010).

32 See Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps, Release No. 34-63236 (Nov. 3, 2010), 75 FR 68560 (Nov. 8, 2010).

33 The public comments we received are available for website viewing and printing at the Commission's Public Reference Room at 100 F St. N.E., Washington, DC 20549 in File No. S7-02-09. They are also available online at http://www.sec.gov/comments/s7-02-09/s70209.shtml.

34 See letters from the Yale Law School Capital Markets and Financial Instruments Clinic (Mar. 23, 2009) and from IDX Capital (Mar. 23, 2009).

related to this rulemaking. No comments have been submitted to us regarding the Temporary Rules since that time.

Throughout the entire Title VII implementation process, we have sought to engage in an open and transparent implementation process, seeking input on the various rulemakings from interested parties even before issuing formal rule proposals. We have enhanced our public consultative process by expanding the opportunity for public comment beyond what is required by law. For instance, we have made available to the public a series of e-mail boxes to which interested parties can send preliminary comments before rules are proposed and the official comment periods begin.[35] These e-mail boxes are on the Commission's website, organized by topic. We also specifically solicited comment, along with the CFTC, on the definitions contained in Title VII.[36] In addition, our staff has sought the views of affected parties. This approach has resulted in meetings with a broad cross-section of interested parties. To further this public outreach effort, our staff has held joint public roundtables and hearings with the CFTC staff on select key topics, including most recently discussing the schedule for implementing final rules for swaps and security-based swaps under Title VII.[37]

We are still in the process of proposing and adopting numerous rulemakings relating to the implementation of Title VII, including the provisions relating to the clearing of security-

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35 See Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act, available at http://www.sec.gov/spotlight/regreformcomments.shtml.

36 See Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, Release No. 34-62717 (Aug. 13, 2010), 75 FR 51429 (Aug. 20, 2010) (advance joint notice of proposed rulemaking regarding definitions).

37 Roundtable on Clearing and Listing of Swaps and Security-Based Swaps (Aug. 20, 2010); Roundtable on Swap and Security-Based Swap Matters (Sep. 14-15, 2010); Roundtable to Discuss Issues Related to Clearing of Credit Default Swaps (Oct. 22, 2010); Roundtable to Discuss Issues Related to Capital and Margin for Swaps and Security-Based Swaps (Dec. 10, 2010); and Roundtable on Implementation Phasing for Final Rules for Swaps and Security-Based Swaps Under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (May 2-3, 2011).

based swaps. While we have taken significant steps to implement the rulemaking required by Title VII, we do not expect to complete the rulemaking we are directed to carry out under Title VII before July 16, 2011, the current termination date for the Temporary Rules. Due to the uncertainty of the timing regarding the adoption of final rules implementing the clearing provisions of Title VII, including any applicable permanent exemptions, we believe that it is important that the CCPs continue to be able to clear eligible CDS without concern that the Temporary Rules are unavailable. As such, we have determined that it is necessary and appropriate to extend the expiration dates in the Temporary Rules to April 16, 2012. If the Commission adopts permanent exemptions for security-based swaps issued by certain clearing agencies before April 16, 2012, the Commission will terminate the effectiveness of the temporary rules as part of that rulemaking.

We are only extending the expiration dates in the Temporary Rules; we are not making any other changes to the Temporary Rules. The Temporary Rules were modeled on other exemptions we have provided in the past to facilitate trading in certain securities.[38] They are limited in scope; in general, they facilitate the operation of the CCPs in clearing eligible CDS.

II. AMENDMENT OF EXPIRATION DATES IN THE TEMPORARY RULES

In January 2009, we adopted the Temporary Rules on a temporary basis until September 25, 2009. We subsequently extended the expiration dates in the Temporary Rules to November 30, 2010 and we further extended the expiration dates to July 16, 2011 to allow CCPs that were clearing and settling CDS transactions in the U.S. and in Europe to continue to clear and settle CDS transactions. Since the adoption of the Temporary Rules and the issuance of the CCP

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[38] See, e.g., Securities Act Section 3(a)(14) [15 U.S.C. 77c(a)(14)], Securities Act Rule 238 [17 CFR 230.238]; Exchange Act Section 12(a) [15 U.S.C. 78l(a)], and Exchange Act Rules 12h-1(d) and (e) [17 CFR 240.12h-1(d) and (e)] (providing similar exemptions from provisions of the federal securities laws for standardized options and securities futures products).

exemptive orders, several clearing agencies have been actively engaged as CCPs in clearing CDS transactions in reliance on our exemptions. We believe that the clearing of CDS transactions by these clearing agencies has contributed and we anticipate it will continue to contribute to increased transparency and the reduction of systemic risk in the CDS market.

Since the adoption of the Temporary Rules and issuance of the CCP exemptive orders, ICE Trust U.S. LLC ("ICE Trust") and ICE Clear Europe, Ltd. ("ICE Clear Europe") have been actively engaged as CCPs in clearing CDS transactions in reliance on our exemptions. Most cleared CDS transactions have cleared at ICE Trust or ICE Clear Europe.[39] However, Eurex Clearing AG and the Chicago Mercantile Exchange Inc. are also authorized to operate as CCPs pursuant to the CCP exemptive orders.[40] We believe that the clearing of CDS transactions by the CCPs subject to the CCP exemptive orders has contributed and we anticipate will continue to contribute to increased transparency and the reduction of systemic risk in the CDS market.

The extension of the Temporary Rules is designed to facilitate the continued operation of CCPs for eligible CDS, which we believe is in the public interest. Once we adopt final rules implementing the clearing provisions of Title VII, including any applicable permanent exemptions, the Temporary Rules affecting solely eligible CDS will no longer be necessary. However, until such time, the Temporary Rules are needed to continue facilitating the operation of the CCPs in clearing eligible CDS without being required to comply with the registration requirements of the Securities Act and Exchange Act and the indenture qualification provisions of the TIA. Therefore, due to the limited time the Temporary Rules will be needed, and our

39 As of June 3, 2011, ICE Trust U.S. LLC has cleared 249,249 CDS transactions with a notional value of $11.1 trillion. As of June 3, 2011, ICE Clear Europe, Ltd. has cleared 272,612 CDS transactions with a notional value of €5.5 trillion. See https://www.theice.com/marketdata/reports/ReportCenter.shtml.

40 See footnote 5, supra.

ongoing efforts to implement the provisions of Title VII, we are extending the expiration dates in the Temporary Rules to April 16, 2012. If the Commission adopts permanent exemptions for security-based swaps issued by certain clearing agencies before April 16, 2012, the Commission will terminate the effectiveness of the temporary rules as part of that rulemaking.

III. CERTAIN ADMINISTRATIVE LAW MATTERS

Section 553(b) of the Administrative Procedure Act ("APA")[41] generally requires an agency to publish notice of a proposed rule making in the Federal Register. This requirement does not apply, however, if the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[42] For the reasons we discuss throughout this release, we believe that there is good cause to extend the expiration dates in the Temporary Rules to April 16, 2012. If the Commission adopts permanent exemptions for security-based swaps issued by certain clearing agencies before April 16, 2012, the Commission will terminate the effectiveness of the temporary rules as part of that rulemaking.

We sought comment on the Temporary Rules and as noted above, we received little comment when they were originally promulgated. In addition to the specific comments that we sought and received in connection with the Temporary Rules in January 2009, we have sought public input on implementing the provisions of Title VII, which requires extensive public notice and comment rulemaking regarding proposals that will supplant and subsume the exemptive rules we have crafted as a temporary measure.[43] Further, we have sought and will continue to

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41 5 U.S.C. 553(b).

42 5 U.S.C. 553(b)(B).

43 See footnote 35, supra. None of these comments addressed the Temporary Rules.

seek public comment in connection with proposed rulemakings to implement the specific provisions of Title VII relating to the treatment of security-based swaps under the Securities Act and the Exchange Act, including any applicable permanent exemptions. Commenters have full opportunity to provide their views on this new comprehensive regulatory regime.

Absent an extension, the Temporary Rules will expire on July 16, 2011. The Temporary Rules have been in place since January 2009, and CCPs have relied on them in clearing eligible CDS. Extending the expiration dates in the Temporary Rules will not affect the substantive provisions of the Temporary Rules. Extending the expiration dates in the Temporary Rules will allow CCPs to continue to clear eligible CDS without compliance with the registration requirements of the Securities Act and Exchange Act and indenture qualification provisions of the TIA as we consider rules implementing the clearing provisions of Title VII, including any applicable permanent exemptions. Therefore, we believe there is good cause to extend the expiration dates in the Temporary Rules and find that notice and solicitation of comment on the extension to be impracticable, unnecessary, or contrary to the public interest.[44]

The APA also generally requires that an agency publish an adopted rule in the Federal Register 30 days before it becomes effective.[45] However, this requirement does not apply if the agency finds good cause not to delay the effective date.[46] For reasons similar to those explained above, the Commission finds good cause not to delay the effective date.

IV. PAPERWORK REDUCTION ACT

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[44] This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rule amendments to become effective notwithstanding the requirements of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are "impractical, unnecessary or contrary to the public interest," a rule "shall take effect at such time as the federal agency promulgating the rule determines.").

[45] 5 U.S.C. 553(d).

[46] 5 U.S.C. 553(d)(3).

The Temporary Rules do not impose any new "collections of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[47] nor do they create any new filing, reporting, recordkeeping, or disclosure reporting requirements for a CCP that is or will be issuing or clearing eligible CDS. Accordingly, we did not submit the Temporary Rules to the Office of Management and Budget for review in accordance with the PRA when we adopted them in January 2009.[48] We requested comment on whether our conclusion that there are no collections of information is correct, and we did not receive any comment. The extension of the expiration dates in the Temporary Rules does not change our analysis.

V. COST-BENEFIT ANALYSIS

In January 2009, we adopted the Temporary Rules, which exempt eligible CDS that are or will be issued or cleared by a CCP and offered and sold only to eligible contract participants from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provision, as well as from the registration requirements under Section 12 of the Exchange Act and from the provisions of the TIA. In September 2009, we adopted amendments to such rules to extend their expiration date to November 30, 2010. We subsequently adopted amendments to such rules to further extend their expiration date from November 30, 2010 to July 16, 2011. The Temporary Rules were intended to facilitate the operation of one or more CCPs to act as a clearing agency in the CDS market to reduce some of the risks in the CDS market. Today, we are adopting amendments to the Temporary Rules to further extend the expiration dates. Since the adoption of the Temporary Rules and the issuance of the exemptive orders, ICE Trust and ICE Clear

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47 44 U.S.C. 3501 et seq.

48 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Europe have been actively engaged as a CCP in clearing CDS transactions in accordance with our exemptions.

The Dodd-Frank Act was enacted on July 21, 2010. Among other things, the Dodd-Frank Act amends the Exchange Act to require that transactions in security-based swaps be cleared through a clearing agency that is either registered with the Commission or exempt from registration if the transactions are of a type that the Commission determines must be cleared, unless an exemption from mandatory clearing applies. As noted above, the Dodd-Frank Act directs us to regulate, among other things, clearing agencies for, and the clearing of, security-based swaps, which include certain CDS, and in separate rulemakings we have and will propose rules to implement the clearing provisions of the Dodd-Frank Act, among others. Extending the expiration dates in the Temporary Rules will continue to facilitate the operation of the CCPs in clearing eligible CDS as we consider rules implementing the clearing provisions of Title VII, including any applicable permanent exemptions.

A. Benefits

Absent the exemptions provided by the Temporary Rules, a CCP may have to file a registration statement covering the offer and sale of eligible CDS that are security-based swaps, may have to satisfy the applicable provisions of the TIA, and may have to register the class of eligible CDS that are security-based swaps that it has issued or cleared under the Exchange Act. The Temporary Rules and the CCP exemptive orders have facilitated the operation of CCPs in the CDS market. Since the adoption of the Temporary Rules, several clearing agencies have been actively engaged as CCPs in clearing CDS transactions in accordance with our exemptions. We believe that extending the expiration dates in the Temporary Rules will continue to facilitate the operation of CCPs[49] and the use by eligible contract participants of CDS CCPs. We believe that the operation of the CCPs in accordance with our exemptions has increased transparency,[50] increased available information about exposures to particular reference entities or reference securities,[51] and reduced risks to participants in the market for CCP-cleared CDS.[52] Not extending the expiration dates in the Temporary Rules could cause significant disruptions in this market. Therefore, we believe that extending the expiration dates in the Temporary Rules provides important benefits to CDS market participants.

B. Costs

We recognize that a consequence of extending the exemptions will be the unavailability of certain remedies under the Securities Act and the Exchange Act and certain protections under the TIA. While an investor will be able to pursue an antifraud action in connection with the purchase and sale of eligible CDS under Exchange Act Section 10(b),[53] it will not be able to pursue civil remedies under Sections 11 or 12 of the Securities Act.[54] We could still pursue an antifraud action in the offer and sale of eligible CDS issued or cleared by a CCP.[55] We believe

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49 See Karen Brettell, Banks to submit 95 pct of eligible CDS for clearing (Sep. 1, 2009), available at http://www.reuters.com/article/euRegulatoryNews/idUSN01508144200909012pageNumber=1&virtualBrandChannel=10522.

50 See Testimony of Mark Lenczowski, Managing Director and Assistant General Counsel at JPMorgan Chase & Co., to the Senate Agriculture Committee (Jun. 4, 2009) (In his testimony, Mr. Lenczowski indicated, in the context of CDS clearing by ICE Trust, that "[c]learing is a highly transparent process…").

51 See footnote 35, supra. None of these comments addressed the Temporary Rules.

52 See Press Release, IntercontinentalExchange, ICE Clear Europe Clears Euro 51 Billion in Third Week of European CDS Processing; Announces New CDS Clearing Member (Aug. 17, 2009), available at http://ir.theice.com/releasedetail.cfm?ReleaseID=403509. See also, Press Release, Eurex Clearing AG, Eurex Credit Clear Clears First Single Name CDS Worldwide (Aug. 28, 2009), available at http://www.eurexclearing.com/about/press/press_647_en.html.

53 15 U.S.C. 78j(b).

54 15 U.S.C. 77k and 77l.

55 See 15 U.S.C. 77q and 78j(b).

that the incremental costs from the extension of the expiration dates in the Temporary Rules will be minimal because the amendments are merely an extension of the expiration dates in the Temporary Rules and such extension will not affect information and remedies available to investors as a result of the Temporary Rules.

VI. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 23(a)(2) of the Exchange Act[56] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b)[57] of the Securities Act and Section 3(f)[58] of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider, in addition to protection of investors, whether the action will promote efficiency, competition, and capital formation.

The Temporary Rules we are extending today exempt eligible CDS issued or cleared by a CCP from all provisions of the Securities Act, other than the Section 17(a) antifraud provision, as well as from the registration requirements under Section 12 of the Exchange Act and the provisions of the TIA. Because these exemptions are available to any registered or deemed registered CCP offering and selling eligible CDS, we do not believe that extending the exemptions imposes a burden on competition. We also anticipate that extending the ability to

56 15 U.S.C. 78w(a)(2).

57 15 U.S.C. 77b(b).

58 15 U.S.C. 78c(f).

settle CDS through CCPs will continue to improve the transparency of the CDS market and provide greater assurance to participants as to the capacity of the eligible CDS counterparty to perform its obligations under the eligible CDS. ICE Trust, for example, makes available on its website information about open interests, or net exposure, volume and pricing of CDS transactions. We believe that increased transparency in the CDS market could help to minimize market disruption and thereby facilitate the capital formation process.

VII. REGULATORY FLEXIBILITY ACT CERTIFICATION

The Commission hereby certifies pursuant to 5 U.S.C. 605(b) that extending the Temporary Rules will not have a significant economic impact on a substantial number of small entities. The Temporary Rules exempt eligible CDS that are or will be issued or cleared by a CCP. None of the entities that are eligible to meet the requirements of these exemptions is a small entity.

VIII. STATUTORY AUTHORITY AND TEXT OF THE RULES AND AMENDMENTS

The amendments described in this release are being adopted under the authority set forth in Sections 18, 19 and 28 of the Securities Act; Sections 12(h), 23(a) and 36 of the Exchange Act; and Section 304(d) of the TIA.

List of Subjects in 17 CFR Parts 230, 240 and 260

Reporting and recordkeeping requirements, Securities.

TEXT OF THE RULES AND AMENDMENTS

We are temporarily amending 17 CFR parts 230, 240, and 260 as follows and the expiration dates in the temporary rules and amendments published January 22, 2009 (74 FR 3967), extended in a release published on September 17, 2009 (74 FR 47719), and further extended in a release published on November 26. 2010 (75 FR 72660), are further extended from July 16, 2011 to April 16, 2012.

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.

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§§ 230.146 and 230.239T [Amended]

2. In §230.146(c)T, in the last sentence, remove the words "July 16, 2011" and add, in their place, the words "April 16, 2012".

3. In §230.239T(e), remove the words "July 16, 2011" and add, in their place, the words "April 16, 2012".

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

4. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3) unless otherwise noted.

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§§ 240.12a-10T and 240.12h-1 [Amended]

5. In §240.12a-10T(b), remove the words "July 16, 2011" and add, in their place, the words "April 16, 2012".

6. In §240.12h-1(h)T, in the last sentence, remove the words "July 16, 2011" and add, in their place, the words "April 16, 2012".

PART 260 - GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

7. The authority citation for Part 260 continues to read as follows:

Authority: 15 U.S.C. 77eee, 77ggg, 77nnn, 77sss, 78ll(d), 80b-3, 80b-4, and 80b-11.

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§ 260.4d-11T [Amended]

8. In §260.4d-11T, in the last sentence, remove the words "July 16, 2011" and add, in their place, the words "April 16, 2012".

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: July 1, 2011

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230, 240 and 260

Release Nos. 33-9231; 34-64794; 39-2475; File No. S7-26-11

RIN 3235-AL17

EXEMPTIONS FOR SECURITY-BASED SWAPS

AGENCY: Securities and Exchange Commission.

ACTION: Interim final rules; request for comments.

SUMMARY: We are adopting interim final rules providing exemptions under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Trust Indenture Act of 1939 for those security-based swaps that under current law are security-based swap agreements and will be defined as "securities" under the Securities Act and the Exchange Act as of July 16, 2011 due solely to the provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The interim final rules will exempt offers and sales of these security-based swaps from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provisions, as well as exempt these security-based swaps from Exchange Act registration requirements and from the provisions of the Trust Indenture Act, provided certain conditions are met. The interim final rules will remain in effect until the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant."

DATES: Effective Date: The interim final rules are effective [insert date of publication in the Federal Register]. Comments should be received on or before [insert date that is 45 days after website posting].

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

Electronic Comments:

SUPPLEMENTARY INFORMATION: We are adopting interim final Rule 240 under the Securities Act of 1933 ("Securities Act"),[1] interim final Rule 12a-11 and Rule 12h-1(i) under the Securities Exchange Act of 1934 ("Exchange Act"),[2] and interim final Rule 4d-12 under the Trust Indenture Act of 1939 ("Trust Indenture Act").[3]

I. BACKGROUND

On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") into law.[4] The Dodd-Frank Act was enacted, among other reasons, to promote the financial stability of the United States by improving accountability and transparency in the financial system.[5] The recent financial crisis demonstrated the need for enhanced regulation of the over-the-counter ("OTC") derivatives markets, which have experienced dramatic growth in recent years[6] and are capable of affecting significant sectors of the U.S. economy.[7] Title VII of the Dodd-Frank Act ("Title VII") establishes a regulatory regime applicable to the OTC derivatives markets by providing the Securities and Exchange Commission ("Commission" or "we") and the Commodity Futures Trading Commission ("CFTC") with the tools to oversee these heretofore largely unregulated markets. Title VII provides that the CFTC will regulate "swaps," the Commission will regulate

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1 15 U.S.C. 77a et. seq.

2 15 U.S.C. 78a et. seq.

3 15 U.S.C. 77aaa et. seq.

4 The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

5 See, e.g., Pub. L. No. 111-203, Preamble.

6 From their beginnings in the early 1980s, the notional value of these markets has grown to almost $600 trillion globally. See Monetary and Econ. Dep't, Bank for Int'l Settlements, Triennial and Semiannual Surveys – Positions in Global Over-the-Counter (OTC) Derivatives Markets at End-June 2010 (Nov. 2010), available at http://www.bis.org/publ/otc_hy1011.pdf.

7 See 156 Cong. Rec. S5878 (daily ed. July 15, 2010) (statement of Sen. Dodd).

agency that is exempt from registration[12] if such security-based swaps are of a type that the Commission determines is required to be cleared, unless an exemption or exception from such mandatory clearing applies;[13] and (4) if a security-based swap is subject to the clearing requirement,[14] execution of the security-based swap transaction on an exchange, on a security-based swap execution facility ("security-based SEF") registered under the Exchange Act,[15] or on a security-based SEF that has been exempted from registration by the Commission under the Exchange Act,[16] unless no security-based SEF or exchange makes such security-based swap available for trading.[17] Title VII also amends the Securities Act and the Exchange Act to include "security-based swaps" in the definition of "security" for purposes of those statutes.[18] As a result, "security-based swaps" will be subject to the provisions of the Securities Act and the Exchange Act and the rules thereunder applicable to "securities."

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12 See subparagraphs (i) and (j) to Section 17A of the Exchange Act, 15 U.S.C. 78q-1. See also Clearing Agency Standards for Operation and Governance, Release No. 34-64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011)(proposed rules).

13 See section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c-3(a)(1). See also Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Release No. 34-63557 (Dec. 15, 2010), 75 FR 82490 (Dec. 30, 2010)(proposed rules).

14 See section 3C(g) of the Exchange Act, 15 U.S.C. 78c-3(g) (providing an exception to the clearing requirement for certain persons).

15 15 U.S.C. 78c-4.

16 15 U.S.C. 78c-4(e).

17 See section 3C(g) of the Exchange Act, 15 U.S.C. 78c-3(g). See section 3C(h) of the Exchange Act, 15 U.S.C. 78c-3(h). See also section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(77) (defining the term "security-based swap execution facility"). See also Registration and Regulation of Security-Based Swap Execution Facilities, Release No. 34-63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011)("Security-Based SEF Proposing Release").

18 See sections 761(a)(2) and 768(a)(1) of the Dodd-Frank Act (amending sections 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10), and 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1), respectively).

related proposed rulemakings.[22] As part of our recent action providing guidance as to which of the requirements of Title VII will apply to security-based swap transactions as of the Effective Date and granting temporary relief to market participants from compliance with certain of these requirements, we granted certain temporary exemptions relating to security-based swap transactions with persons who are eligible contract participants as that term is defined today and relating to the operation of trading platforms for security-based swaps.[23] The exemption relating to eligible contract participants will allow persons currently participating in the security-based swap markets, who could potentially be considered non-eligible contract participants under the definition of "eligible contract participant" as amended by Title VII, to continue to do so until the term "eligible contract participant" is further defined in final rulemaking.[24] We also provided a temporary exemption to allow an entity that trades security-based swaps and is not currently registered as a national securities exchange or that cannot yet register as a security-based SEF because final rules for such registration have not yet been adopted, to continue trading security-

22 See, e.g., Letter from American Bankers Association, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, Securities Industry and Financial Markets Association, U.S. Chamber of Commerce (June 10, 2011)("Trade Association Letter"). ("The definition of [eligible contract participant] was amended by [the Dodd-Frank Act], and the [Commission and the CFTC] have sought comments in [the SBS Participant Definition Proposing Release] on how to further define such term, including how to interpret the phrase "discretionary basis." Until the term [eligible contract participant] is further defined in a final rulemaking, market participants will not know whether they are dealing with an [eligible contract participant], and where the line is between their institutional and retail businesses. As a result, they will not know . . . whether certain transactions are subject to the new requirement for [non-eligible contract participant] transactions to be executed on an exchange . . . . As a result, market participants may cease or severely limit their business with counterparties that could potentially be considered [non-eligible contract participants] under the Dodd-Frank statutory definition of [eligible contract participant].").

23 See Effective Date Order, supra note19.

24 See Id.

security-based swaps, including credit default swaps, not involving a clearing agency. We also note that while the Temporary CDS Rules will be in place on the Effective Date, the Proposed SBS exemptions will not.

As a result, because security-based swaps will become securities on the Effective Date, absent the action we take in this release, counterparties entering into transactions in security-based swaps that are not within the scope of the Temporary CDS Rules will either need to rely on other available exemptions from the requirements of the Securities Act, the Exchange Act, and, if applicable, the Trust Indenture Act, or to consider whether to register such transactions or class of security.[29]

We note that under current law, certain security-based swaps – specifically those within the pre-Dodd-Frank Act definition of "security-based swap agreement" entered into between eligible contract participants and subject to individual negotiation – are outside the scope of the federal securities laws, other than the anti-fraud and certain other provisions.[30] Up until now, these security-based swaps have been traded or otherwise transacted without concerns about complying with the registration requirements of the Securities Act, the registration requirements of the Exchange Act applicable to classes of securities, or the indenture provisions of the Trust Indenture Act. We understand that there are several types of trading platforms currently being used to effect transactions in security-based swaps that would likely register as security-based

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Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9158 (Nov. 19, 2010), 75 FR 72660 (Nov. 26, 2010).

29 See SBS Exemptions Proposing Release, supra note 27.

30 See Section 2A of the Securities Act (15 U.S.C. 77b(b)-1) and Section 3A of the Exchange Act (15 U.S.C. 78c-1). The definition of "security-based swap agreement" includes the definition of "swap agreement," which requires that the agreement, contract or transaction be "subject to individual negotiation" and be between eligible contract participants.

implement necessary policies and procedures. Furthermore, some of these changes cannot be undertaken until certain rules are finalized.

We are concerned about disrupting the operation of the security-based swap markets until the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant." In our view, it is appropriate to permit those security-based swap transactions that, prior to the Effective Date, would be transactions in security-based swap agreements between eligible contract participants (and, therefore, not subject to the registration requirements of the Securities Act, the registration requirements of the Exchange Act applicable to classes of securities, and the indenture provisions of the Trust Indenture Act) to continue to be entered into as they are today until the compliance date for such final rules. Thus, we believe that it is necessary and appropriate in the public interest and consistent with the protection of investors, pending the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant," to provide interim exemptions from all provisions of the Securities Act (other than the Section 17(a) antifraud provisions), the registration requirements of the Exchange Act relating to classes of securities, and the indenture provisions of the Trust Indenture Act for those security-based swaps that would have been, prior to the Effective Date, within the definition of "security-based swap agreement" under Securities Act Section 2A[35] and Exchange Act Section 3A[36] and are entered into solely between eligible contract participants (as defined prior to the Effective Date).

II. DISCUSSION OF THE INTERIM FINAL RULES

We are adopting interim final rules to provide certain conditional exemptions under the Securities Act, the Exchange Act and the Trust Indenture Act.

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35 15 U.S.C. 77b(b)-1.

36 15 U.S.C. 78c-1.

exemption. certain counterparties may not be able to offer or sell such security-based swaps without compliance with the registration requirements of the Securities Act.[39] As a result of such differences, to avoid uncertainty as to the applicability of the Securities Act registration requirements pending the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant" and to allow transactions between persons who are eligible contract participants today, we believe it is appropriate to provide an exemption that will allow market participants to continue to enter into transactions that come within the pre-Dodd-Frank Act definition of "security-based swap agreements."

Under Securities Act Rule 240, a security-based swap will be exempt from the registration requirements of the Securities Act if it would have been a "security-based swap agreement" under the Securities Act prior to the Effective Date and is entered into between eligible contract participants (as that term was defined prior to the Effective Date).[40] The purpose of these conditions is to allow those types of security-based swaps that were not defined as a "security" under the Securities Act prior to the Effective Date to continue to be transacted following the Effective Date until the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant."[41]

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[39] See Pub. L. No. 111-203 § 768(b) (adding Section 5(d) of the Securities Act). Under Section 5(d), no offers or sales of security-based swaps may be made to non-eligible contract participants unless there is an effective registration statement under the Securities Act covering transactions in such security-based swap and any security-based swap transaction with a non-eligible contract participant must be effected on a national securities exchange. In our Effective Date Order, we have provided an exemption, under certain circumstances, to allow transactions to continue with persons who today are eligible contract participants. See Effective Date Order, supra note 19.

[40] See 7 U.S.C. 1a(12). As we note above, the exemption applies only to those persons who are within the definition of "eligible contract participant" contained in the definition of "swap agreement" under Securities Act Section 2A. See 15 U.S.C. 77b(b)-1 and Pub. L. No. 106-554, 114 Stat. 2763, 2763A-378 (2001).

[41] We note that the exemption will not cover credit-default swaps that are covered by the Temporary CDS Rules, as such cleared credit default swaps may not come within the definition of "security-

enforce their rights with respect to the debt. We do not believe that the protections contained in the Trust Indenture Act are needed at this time to protect eligible contract participants to whom a sale of security-based swaps is made in reliance on Securities Act Rule 240. At this point, we believe that the identified problems that the Trust Indenture Act is intended to address do not occur in the offer and sale of these security-based swaps. For example, these security-based swaps are contracts between two parties and, as a result, do not raise the same problem regarding the ability of parties to enforce their rights under the instruments as would, for example, a debt offering to the public. Moreover, enforcement of contractual rights and obligations under these security-based swaps would occur directly between such parties, and it appears that the Trust Indenture Act provisions would not provide any additional meaningful substantive or procedural protections.

Accordingly, due to the nature of those security-based swaps that may be sold in reliance on Securities Act Rule 240, we do not believe the protections contained in the Trust Indenture Act are currently needed with respect to those instruments. Therefore, we believe the exemption is necessary and appropriate in the public interest, consistent with the protection of investors and the purposes fairly intended by the Trust Indenture Act.

D. Request for Comment

We request and encourage any interested person to submit comments regarding the interim final rules. In particular, we solicit comment on the following questions:

1. How will the exemptions affect, if at all, the manner in which security-based swaps are transacted today and are expected to be transacted following the Effective Date?
2. Will the counterparties to security-based swaps be able to rely on other available exemptions from registration under the Securities Act and the Exchange Act? If not,

Effective Date? If not, how should the interim final exemptions be revised such that these other security-based swaps would be included within the interim final exemptions?

8. The interim final Securities Act exemption contains particular conditions. Should the Securities Act exemption in Securities Act Rule 240 be conditioned in this manner? If not, why not?

9. Are the exemptions from the Securities Act, the Exchange Act and the Trust Indenture Act appropriate? If not, why not? Should we take a different approach?

III. TRANSITION AND EXPIRATION DATE OF INTERIM FINAL RULES

The interim final rules will remain in effect until the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participants." We anticipate that this term of the exemptions will provide us with time to evaluate the market for security-based swaps, and consider whether there are other exemptions that we should consider regarding security-based swap transactions between eligible contract participants.

Adoption of the interim final rules, which will be effective on [effective date], will minimize disruptions and costs to the security-based swap markets that could occur on the Effective Date as a result of the effectiveness of the definitions of "security-based swap" and "eligible contract participant" on the Effective Date prior to the completion of rulemakings to further define these terms. We have included several requests for comment in this release. We will consider the public comments we receive in determining whether we should revise the interim final rules in any respect, as well as other actions we should take with respect to such exemptions.

IV. OTHER MATTERS

may be encompassed in the definition of "security-based swap."[46] Moreover, we have requested comment on trading activities in our recent SBS Exemption Proposing Release.[47] We emphasize that we are requesting comments on the interim final rules and will carefully consider any comments that we receive in determining whether we should revise the interim final rules in any respect, as well as other actions we should take with respect to such exemptions.

The interim final rules will remain in effect until the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant." We find that there is good cause to have the new rules effective as interim final rules and that notice and public procedure in advance of effectiveness of the interim final rules is impracticable, unnecessary and contrary to the public interest.[48]

V. PAPERWORK REDUCTION ACT

The interim final rules do not impose any new "collections of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA"),[49] nor do they create any new filing, reporting, recordkeeping, or disclosure reporting requirements. Accordingly, we are not submitting the interim final rules to the Office of Management and Budget for review in accordance with the PRA.[50] We request comment on whether our conclusion that there are no collections of information is correct.

VI. COST-BENEFIT ANALYSIS

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46 See Trade Association Letter, supra note 22.

47 See SBS Exemption Proposing Release, supra note 27.

48 This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rule amendment to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are "impractical, unnecessary or contrary to the public interest," a rule "shall take effect at such time as the federal agency promulgating the rule determines").

49 44 U.S.C. 3501 et seq.

50 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Absent the exemptions, following the Effective Date, the offer and sale of those security-based swaps that under current law are defined as security-based swap agreements may have to be registered under the Securities Act, certain of those security-based swaps may have to be registered as a class under the Exchange Act, and the provisions of the Trust Indenture Act may need to be complied with. We believe that requiring compliance with these provisions likely would disrupt and impose unnecessary costs on this segment of the security-based swap markets. Absent the exemptions, we believe that certain market participants would incur additional costs due to compliance with the registration requirements of the Securities Act and the Exchange Act, as well as compliance with the provisions of the Trust Indenture Act. It also is possible that without the exemptions, a market participant may not continue to participate in these types of transactions if compliance with these provisions were infeasible (economically or otherwise).

A market participant will benefit from the exemptions because it will not have to file a registration statement covering the offer and sale of these security-based swaps or evaluate the availability of another existing exemption from such registration requirements. If the market participant is not required to register the offer and sale of these security-based swaps, it will not have to incur the additional costs of such registration, including legal and accounting costs. The availability of the exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act also would mean that market participants would not incur the costs of preparing disclosure documents describing these security-based swaps and from preparing indentures and arranging for the services of a trustee.

B. Costs

The interim final rules are exemptions, and thus do not impose new requirements on market participants. We recognize that a consequence of the exemptions would be the

Section 2(b)[52] and Exchange Act Section 3(f)[53] require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We are adopting interim final rules that would provide exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act for those security-based swaps that under current law are security-based swap agreements and will be defined as "securities" under the Securities Act and the Exchange Act as of the Effective Date due solely to the provisions of Title VII. Because these exemptions would maintain the status quo with respect to the ability of market participants to engage in transactions in these security-based swaps, we do not believe that our actions today will impose a burden on competition. We also believe that the interim final rules will promote efficiency by minimizing disruptions and costs to the security-based swap markets that could occur as a result of the effectiveness of the definitions of "security-based swap" and "eligible contract participant" on the Effective Date prior to the completion of rulemakings to further define these terms. By allowing transactions in security-based swaps that under current law are security-based swap agreements to continue to be entered into between eligible contract participants as they are today until the compliance date for final rules that we may adopt further defining the terms "security-based swap" and "eligible contract participant," and to the extent that such security-based swaps are used to hedge risks, including those related to the issuance of the referenced securities (as occurs with equity swaps and the issuance of convertible bonds, for example), the interim final rules will prevent potential impairment of the capital formation process.

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52 15 U.S.C. 77b(b).

53 15 U.S.C. 78c(f).

The rules described in this release are being adopted under the authority set forth in Sections 19 and 28 of the Securities Act; Sections 12(h), 23(a) and 36 of the Exchange Act; and Section 304(d) of the Trust Indenture Act.

List of Subjects in 17 CFR Parts 230, 240 and 260

Reporting and recordkeeping requirements, Securities.

TEXT OF THE RULES AND AMENDMENTS

For the reasons set out in the preamble, the Commission amends 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.

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2. Section 230.240 is added to read as follows:

§230.240 Exemption for certain security-based swaps.

(a) Except as expressly provided in paragraph (b) of this section, the Act does not apply to the offer or sale of any security-based swap that is:

(1) A *security-based swap agreement*, as defined in Section 2A of the Act (15 U.S.C. 77b(b)-1) as in effect prior to July 16, 2011; and

(2) Entered into between eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act (7 U.S.C. 1a(12)) as in effect prior to July 16, 2011, other than

*   *   *   *   *

(i) Any security-based swap offered and sold in reliance on Rule 240 under the Securities Act of 1933. This rule will expire on the compliance date for final rules that the Commission may adopt further defining both the terms *security-based swap* and *eligible contract participant*.

PART 260 – GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

6. The authority citation for Part 260 continues to read as follows:

Authority: 15 U.S.C. 77eee, 77ggg, 77nnn, 77sss, 78ll(d), 80b-3, 80b-4, and 80b-11.

*   *   *   *   *

7. Section 260.4d-12 is added to read as follows:

§ 260.4d-12 Exemption for security-based swaps offered and sold in reliance on Securities Act of 1933 Rule 240 (§230.240).

Any security-based swap offered and sold in reliance on Rule 240 of this chapter (17 CFR § 230.240), whether or not issued under an indenture, is exempt from the Act. This rule will expire on the compliance date for final rules that the Commission may adopt further defining both the terms *security-based swap* and *eligible contract participant*.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: July 1, 2011

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-64796; File No. S7-28-11)

July 1, 2011

Order Pursuant to Section 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions from Clearing Agency Registration Requirements under Section 17A(b) of the Exchange Act for Entities Providing Certain Clearing Services for Security-Based Swaps

I. Introduction

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"),[1] amends the Securities Exchange Act of 1934 ("Exchange Act") to provide for the comprehensive regulation of security-based swaps[2] by the Securities and Exchange Commission ("Commission").[3] Among other things, Title VII seeks to ensure that, wherever possible and appropriate, derivatives contracts formerly traded exclusively in the over-the-

1 Pub. L. No. 111-203.

2 Section 761(a)(6) of the Dodd-Frank Act defines a "security-based swap" as any agreement, contract, or transaction that is a "swap," as defined in section 1a(47) of the Commodity Exchange Act, 7 U.S.C. § 1a(47), that is based on an index that is a narrow-based security index, a single security, or a loan, including any interest therein or on the value thereof; or the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer. See section 3(a)(68) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(68) (as added by section 761(a)(6) of the Dodd-Frank Act). Section 712(d) of the Dodd-Frank Act provides that the Commission and the Commodity Futures Trading Commission ("CFTC"), in consultation with the Board of Governors of the Federal Reserve System, shall, among other things, jointly further define the terms "swap" and "security-based swap." See SEC Release No. 9204 (April 29, 2011), 76 FR 32880 (June 7, 2011) (proposing product definitions contained in Title VII of the Dodd-Frank Act).

3 Section 761(a)(2) of the Dodd-Frank Act includes security-based swaps in the definition of "security" in section 3(a)(10) of the Exchange Act, 15 U.S.C. § 78c. See also section 768(a)(1) of the Dodd-Frank Act (amending section 2(a)(1) of the Securities Act of 1933, 15 U.S.C. 77b(a)(1), to include security-based swaps in the definition of "security").

counter ("OTC") market are centrally cleared.[4] One of the key ways in which the Dodd-Frank Act seeks to mitigate risk in the security-based swap market is by requiring that entities that clear and settle security-based swaps be registered with the Commission. Specifically, section 763(b) of the Dodd-Frank Act adds a new section 17A(g) to the Exchange Act, which directs entities that use instrumentalities of interstate commerce to perform clearing agency functions for security-based swaps to register with the Commission.[5]

Section 763(b) of the Dodd-Frank Act also directs the Commission, by adding new sections 17A(i) and (j) of the Exchange Act, to adopt rules for the implementation of the registration requirement in new section 17A(g). The Title VII amendments for which rules are not required generally are effective on July 16, 2011 (360 days after enactment of the Dodd-Frank Act, referred to herein as the "Effective Date"). Provisions that require rules for implementation become effective not less than 60 days after publication of the related final rule or on July16, 2011, whichever is later.[6]

Section 17A(j) of the Exchange Act requires the Commission to adopt rules governing persons that are registered as clearing agencies for security-based swaps under the Exchange

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4 See, e.g., Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176 at 34 (stating that "[s]ome parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.").

5 Pub. L. No. 111-203 § 763(b).

6 See section 774 of the Dodd-Frank Act, 15 U.S.C. 77b note. See also Exchange Act Release No. 64678 (June 15, 2011), granting temporary exemptions and other temporary relief, together with information on compliance dates for new provisions of the Exchange Act applicable to security-based swaps.

Act.[7] Section 17A(i) of the Exchange Act provides that, to be registered and to maintain registration as a clearing agency that clears security-based swap transactions, a clearing agency must comply with such standards as the Commission may establish by rule.[8] Consistent with these provisions, as well as provisions in Title VIII of the Dodd-Frank Act,[9] the Commission on March 3, 2011 proposed rules regarding registration of clearing agencies and the operation and governance of clearing agencies, including clearing agencies that clear security-based swaps.[10] Pursuant to section 774 of the Dodd-Frank Act, discussed above, compliance with section 17A(g) of the Exchange Act will not be required as of the Effective Date because sections 17A(i) and (j) require rulemaking to implement the registration requirement pursuant to section 17A(g) of clearing agencies that clear security-based swap transactions.[11] Instead compliance with section 17A(g) of the Exchange Act will be required not less than 60 days after the publication of

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7 Pub. L. No. 111-203 § 763(b).

8 Id.

9 Title VIII of the Dodd-Frank Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act"), establishes an enhanced supervisory and risk control system for systemically important clearing agencies and other financial market utilities ("FMUs"). It provides that the Commission may prescribe regulations containing risk management standards, taking into consideration relevant international standards and existing prudential requirements, for any designated clearing entities it regulates. See section 805(a)(2) of the Clearing Supervision Act. Those regulations may govern: "(A) the operations related to payment, clearing, and settlement activities of such designated clearing entities; and (B) the conduct of designated activities by such financial institutions." 12 U.S.C. 5464(a)(2).

10 Securities Exchange Act Release No. 64017 (March 3, 2011), 76 FR 14472 (March 16, 2011) (File No. S7-08-11) (the "Clearing Agency Proposing Release").

11 Securities Exchange Act Release No. 64678 (June 15, 2011) 76 FR 36287 (June 22, 2011) (File No. S7-24-11) (Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps).

final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 17A(i) and (j) of the Exchange Act.

In contrast to section 17A(g) of the Exchange Act, the registration requirement of section 17A(b) of the Exchange Act, which applies to all clearing agencies, will apply to security-based swap clearing agencies when the provision of the Dodd-Frank Act that amends the definition of "security" under the Exchange Act to include security-based swaps becomes effective, i.e., on the Effective Date.[12] Accordingly, absent relief by the Commission, any entity that functions as a clearing agency for security-based swaps would be required to register with the Commission pursuant to section 17A(b)(1) of the Exchange Act as of the Effective Date.[13]

The Commission notes that the term "clearing agency" under section 3(a)(23)(A) of Exchange Act is defined broadly to include any person who:

- acts as an intermediary in making payments or deliveries or both in connection with transactions in securities;
- provides facilities for the comparison of data regarding the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities;
- acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer

12 See section 761(a)(2) of the Dodd-Frank Act (amending section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10)).

13 Section 17A(b)(1) provides (with limited exceptions) that it shall be unlawful for any clearing agency, unless registered in accordance with this subsection, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to any security. 15 U.S.C. 78q-1(b)(1). Upon the effective date of section 761(a)(2), security-based swaps will be included in the definition of a security in section 3(a)(10). See supra note 3.

deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry, without physical delivery of securities certificates (such as a securities depository); or

- otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates (such as a securities depository).[14]

Based on this broad definition, the Commission indicated in the "Clearing Agency Proposing Release" that it preliminarily believes that certain service providers that facilitate security-based swap contract management may meet the clearing agency definition.[15] The Clearing Agency Proposing Release has only recently been issued and the Commission is still considering these services in the context of the Clearing Agency Proposing Release and the comments received on the proposing release. Specifically, the Commission indicated it preliminarily believes that Collateral Management Services, Trade Matching Services, and Tear Up and Compression Services (as defined below), if engaged in by security-based swap market participants, would qualify these participants as clearing agencies and therefore trigger the statutory requirement to register as clearing agencies:[16]

- "Collateral Management Services": Collateral management generally involves calculating collateral requirements and facilitating the transfer of collateral between counterparties. In the Clearing Agency Proposing Release, the Commission stated

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14 15 U.S.C. 78c(a)(23)(A).

15 See Securities Exchange Act Release No. 64017, supra note 9.

16 The Commission stresses that the functions highlighted herein and in the Clearing Agency Proposing Release are not an exhaustive list and urges each security-based swap service provider to consider whether its functions place it within the clearing agency definition.

that entities that calculate net payment obligations among counterparties for security-based swaps and provide instructions for payments, including with respect to quarterly interest, credit events, and upfront fees, are likely acting as intermediaries in making payments or deliveries or both in connection with transactions in securities.

- "Trade Matching Services": Trade matching generally is the process whereby an intermediary compares each market participant's trade data regarding the terms of settlement of securities transactions, in order to reduce the number of settlements of securities transactions, or to allocate securities settlement responsibilities. This includes activities of an intermediary that captures trade information regarding a securities transaction and performs an independent comparison of that information that results in the issuance of binding matched terms to the transaction.[17]

- "Tear Up and Compression Services":[18] Based on discussions between the Commission staff and market participants, the Commission understands that tear up and compression service providers generally operate in the following manner:

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17 See also Exchange Act Release No. 39829 (April 6, 1998), 63 FR 17943 (April 13, 1998) (File No. S7-10-98) ("A vendor that provides a matching service will actively compare trade and allocation information and will issue the affirmed confirmation that will be used in settling the transaction.").

18 Tear-up or multilateral portfolio trade compression services for OTC derivatives seek to eliminate unnecessary or duplicative trades from the market while maintaining a market participant's overall exposure or risk in the market. This allows dealers to reduce operational risk, freeing up liquidity and capital. By reducing the gross notional outstanding of OTC derivatives in normal times, portfolio trade compression provides effective measures to address the risk to individual dealers associated with uncoordinated, disorderly close-out transactions of the positions of a defaulting major dealer. Compression is offered by several vendors, and major market participants are now engaged in regular compression exercises. See Financial Stability Board, Implementing OTC Derivatives Market Reforms, (October 25, 2010), available at http://www.Financialstabilityboard.org/publications/r_101025.pdf.

- The providers execute an algorithm seeking to reduce the gross notional value of trades and the total number of trades but do not alter the counterparty risk or market risk associated with the trades beyond specified parameters.
- When using a tear up and compression service, the users send all transactions they are willing to terminate to the service. Each user sets tolerances for counterparty exposures it is willing to absorb and how much money it is willing to pay in trade termination costs. The submitted transactions are matched using an algorithm and tolerances specified by the user.
- The service then proposes terminations across all parties who participated, including payments for termination. The users consider the proposal, check their own records, and, if they choose to accept the proposal, fax or otherwise notify their acceptance to the service. If the service receives acceptances from all users, the transaction is considered binding, and the relevant transactions are considered terminated.
- The users generally exchange payments and confirmations outside the service. The tear up and compression service provider sends the completed files to a third party service provider for matching, and the "torn up" transactions are terminated in bulk at the security-based swap data repository, which maintains a record of which parties terminated the "torn up" trades.

The Commission is using its authority under section 36 of the Exchange Act[19] to provide a conditional temporary exemption, until the compliance date for the final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 17A(i) and

19 15 U.S.C. 78mm.

(j) of the Exchange Act, from the registration requirement in section 17A(b)(1) of the Exchange Act to any clearing agency that may be required to register with the Commission solely as a result of providing Collateral Management Services, Trade Matching Services, Tear Up and Compression Services, and/or substantially similar services for security based swaps (the "Exempted Activities"). As discussed below, the Commission believes that such action is necessary and appropriate in the public interest and consistent with the protection of investors because this conditional temporary exemption would avoid the potential for disruption of these important services to investors pending the implementation of the registration framework and related standards and operational requirements contemplated under sections 17A(g), (i), and (j) of the Exchange Act, and pending further consideration of the appropriate regulatory treatment of persons conducting Exempted Activities. The Commission also believes that the temporary conditional exemption is necessary and appropriate because it will provide legal certainty to the security-based swap market and security-based swap market participants.

II. Discussion

Our action today provides a temporary exemption, until the compliance date for the final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 17A(i) and (j) of the Exchange Act, from section 17A(b)(1) of the Exchange Act to persons conducting Exempted Activities. This temporary exemption is subject to a condition that is designed to provide greater information regarding persons that are using this exemption to conduct Exempted Activities and the nature of these activities.[20] Specifically, entities relying on

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20 The Paperwork Reduction Act of 1993 ("PRA"), 44 U.S.C. 3501 et seq. defines a "collection of information" as "the obtaining, causing to be obtained, soliciting or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for … answers to identical questions posed

the temporary exemption must provide notice to the Commission with identifying information consisting of the full legal name of the person, a description of the person's corporate structure, contact person and contact information. Such indentifying information is needed to provide the Commission with information regarding who is seeking to use the exemption and how to contact such persons. In addition, they must provide the Commission with a detailed description of the Exempted Activities they conduct, including the nature of services performed, number and nature of parties to whom services are provided, and the volume of transactions conducted in connection with the services performed for each of the last two years. The Commission is requiring this information in order to better understand the types of services that are being provided pursuant to this exemption and the role such services play in the security-based swap market. The notice must be provided to the Commission within twenty-one days of relying on this exemption. The Commission believes twenty-one days should provide sufficient time for an entity to prepare the information required in the notice, including a detailed description of the Exempted Activities it provides.

In light of the condition to this exemptive order and the temporary duration of the relief, the Commission believes this exemption should help to facilitate the aim of the Dodd-Frank Act to ensure that clearing functions are appropriately utilized to reduce risk in the OTC market for derivatives.[21] Entities that conduct Exempted Activities can play an important role in facilitating risk reduction in the security-based swap market, including by helping to reduce the outstanding

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to, or identical reporting or recordkeeping requirements imposed on, ten or more persons ...." 44 U.S.C. 3502(3)(A). The Commission preliminarily does not believe that the reporting and recordkeeping provisions in this Order contain "collection of information requirements" within the meaning of the PRA because fewer than ten persons are expected to rely on the exemption based on our discussions with industry participants regarding entities engaged in Exempted Activities.

21 See supra note 4 and accompanying text.

number of trades and providing useful operational functions for clearing security-based swaps. Persons conducting Exempted Activities, to the extent they are required to register under section 17A(g), will need time to consider and come into compliance with requirements yet to be adopted by the Commission pertaining to clearing agencies that clear security-based swaps. As a result, absent the exemption granted by this order, the ability of such entities to continue to provide these services may be disrupted, resulting in potential lapses in the provision of these services.[22]

The exemption will be effective until the compliance date for the final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 17A(i) and (j) of the Exchange Act. This limited duration will permit the Commission to implement the statutory provisions pertaining to the registration of clearing agencies that clear security-based swaps without disrupting existing services. It will also permit the Commission to gain more information concerning the number and types of entities that conduct Exempted Activities, to learn more about how those activities contribute to a national system for the clearance and settlement of security-based swap transactions, and to evaluate the appropriate regulatory treatment of those entities. The limited duration of the exemption will also permit the entities conducting Exempted Activities to review their operations, procedures and processing requirements in the context of the new requirements stemming from the Dodd-Frank Act.

III. Solicitation of Comments

The Commission requests comment on this exemption for clearing agencies that may be

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22 Entities that act as central counterparties for security-based swaps will need to be registered with the Commission as clearing agencies. However, the entities that currently perform the vast majority of central counterparty services with respect to security-based swaps will be deemed registered with the Commission pursuant to Exchange Act section 17A(l). See Pub. L. No. 111-203 § 763(b).

required to register with the Commission solely as a result of their conducting the Exempted Activities. The Commission is soliciting public comment on all aspects of this exemption, including whether the condition to the temporary exemption is appropriate or alternatively whether the Commission should consider modifying this condition in the future. Why or why not? Should other conditions apply? If so, what conditions and why?

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);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-28-11 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov/). Follow the instructions for submitting comments.

Paper Comments:

A. Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-28-11. 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 also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

IV. Conclusion

IT IS HEREBY ORDERED, pursuant to section 36(a) of the Exchange Act, that, until the compliance date for final rules issued by the Commission pursuant to sections 17A(i) and (j) of the Exchange Act relating to registration of clearing agencies that clear security-based swaps:

Any person that would otherwise be required to register with the Commission as a clearing agency under section 17A(b)(1) of the Exchange Act solely as a result of conducting Exempted Activities with respect to security based swaps shall be exempt from section 17A(b)(1) of the Exchange Act, provided that such person shall submit, within twenty-one days of relying on this exemption, a notice to the Commission[23] that includes the full legal name of the person, a description of the person's corporate structure, contact person and contact information, and a detailed description of the Exempted Activities for security-based swaps conducted by the person, including the nature of services performed, number and nature of parties to whom services are provided, and the volume of transactions conducted in connection with the services performed for each of the last two years.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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[23] Any such notice should be sent to: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, and be noted as regarding this "File No. S7-28-11."

Commissioner Walter
Commissioner Paredes
not participating

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC -29719; 812-13919]

J.P. Morgan Securities LLC, et al.; Notice of Application and Temporary Order

July 11, 2011

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

Action: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against J.P. Morgan Securities LLC ("JPMS") on July 8, 2011 by the United States District Court for the District of New Jersey ("Injunction") until the Commission takes final action on an application for a permanent order. Applicants also have applied for a permanent order.

Applicants: JPMS; Bear Stearns Asset Management Inc. ("BSAM"), Bear Stearns Health Innoventures Management, L.L.C. ("BSHIM"), BSCGP Inc. ("BSGCP"), Constellation Growth Capital LLC ("Constellation"), Constellation Ventures Management II, LLC ("Constellation II"), Highbridge Capital Management, LLC ("Highbridge"), JF International Management Inc. ("JFIMI"), JPMorgan Asset Management (UK) Limited ("JPMAMUK"), JPMorgan Distribution Services, Inc. ("JPMDS"), J.P. Morgan Institutional Investments, Inc. ("JPMII"), J.P. Morgan Investment Management Inc. ("JPMIM"), J.P. Morgan Latin America Management Company, LLC ("JPMLAM"), J.P. Morgan Partners, LLC ("JPMP"), J.P. Morgan Private Investments Inc. ("JPMPI"), OEP Co-Investors Management II, Ltd. ("OEP II"), OEP Co-Investors Management III, Ltd. ("OEP III," and together with OEP II, the "OEP Entities"), Security Capital Research & Management Incorporated ("Security Capital"), Sixty Wall Street GP Corporation ("Sixty Wall GP"), Sixty Wall Street Management Company, LLC ("Sixty Wall Management") and

Technology Coinvestors Management, LLC ("TCM") (each an "Applicant" and collectively, the "Applicants").[1]

Filing Date: The application was filed on July 7, 2011 and amended on July 11, 2011.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 5, 2011, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicants: JPMS, 338 Madison Avenue, New York, NY 10179; BSAM, BSHIM, BSCGP, Constellation II, JPMII, JPMIM, JPMLAM, JPMP, JPMPI, Sixty Wall GP, Sixty Wall Management and TCM, 270 Park Avenue, New York, NY 10017; Constellation and Highbridge, 49 West 57th Street, 32nd Floor, New York, NY 10019; JFIMI, 21st Floor, Chater House, 8 Connaught Road Central, Hong Kong; JPMAMUK, 125 London Wall, London, UK, EC2Y5AJ; JPMDS, 1111 Polaris Parkway, Columbus, OH 43240; OEP Entities, 320 Park Avenue, 18th Floor, New York, NY 10022; and Security Capital, 10 South Dearborn Street, Suite 1400, Chicago, IL 60603.

[1] Applicants request that any relief granted pursuant to the application also apply to any other company of which JPMS is or may become an affiliated person within the meaning of section 2(a)(3) of the Act (together with the Applicants, the "Covered Persons").

For Further Information Contact: Jean E. Minarick, Senior Counsel, at 202-551-6811 or Daniele Marchesani, Branch Chief, at 202-551-6821 (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a temporary order and summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or an applicant using the Company name box, at http://www.sec.gov/search/search.htm, or by calling (202) 551-8090.

Applicants' Representations:

1. JPMS, a limited liability company organized under the laws of Delaware, is registered as a broker-dealer under the Securities Exchange Act of 1934, as amended (the "Exchange Act") and is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). JPMS does not currently serve as investment adviser, sub-adviser, or depositor of any registered investment company, or principal underwriter for any registered open-end investment company, registered unit investment trust ("UIT") or registered face amount certificate company, or investment adviser of any employees' securities company, as defined in section 2(a)(13) of the Act ("ESC") ("Fund Service Activities"). "Funds" refers to the registered investment companies or ESCs for which a Covered Person provides Fund Service Activities. The ultimate parent of JPMS is J.P. Morgan Chase & Co. ("JPMC"). JPMC is a financial services holding company whose businesses provide a broad range of financial services to consumer and corporate customers. JPMC is also the ultimate parent of the other Applicants, who, as subsidiaries of the same ultimate parent, are under common control with JPMS.

2. BSAM is registered as an investment adviser under the Advisers Act and serves as investment adviser or sub-adviser to various Funds, including as a general partner that provides investment advisory services to various ESCs, which provide investment opportunities

for highly compensated key employees, officer, directors and current consultants of JPMC and its affiliates.[2] BSHIM, BSCGP, Constellation II, the OEP Entities and TCM serve as general partners that provide investment advisory services to various ESCs. Constellation serves as a sub-adviser to various ESCs. Highbridge, JFIMI, JPMAMUK, JPMIM, JPMPI, and Security Capital are registered as investment advisers under the Advisers Act and serve as investment advisers or sub-advisers to various Funds. JPMLAM, JPMP, Sixty Wall GP, Sixty Wall Management are registered as investment advisers under the Advisers Act and serve as investment advisers or sub-advisers to ESCs. JPMDS is registered as a broker-dealer under the Exchange Act and serves as principal underwriter to various Funds. JPMII is registered as a broker-dealer under the Exchange Act and serves as placement agent to various Funds.[3]

3. On July 8, 2011, the United States District Court for the District of New Jersey entered a judgment, which included the Injunction, against JPMS ("Judgment") in a matter brought by the Commission.[4] The Commission alleged in the complaint ("Complaint") that prior to at least 2005, JPMS engaged in fraudulent practices and made misrepresentations and omissions in connection with bidding on municipal reinvestment instruments. The Complaint alleged that JPMS engaged in fraudulent practices, misrepresentations, and omissions that affected the prices of certain reinvestment instruments, deprived certain municipalities of a presumption that their reinvestment instruments were purchased at fair market value, and/or

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[2] Every Applicant that is a general partner that provides investment advisory services to one or more ESCs believes, for purposes of the application, that it is performing a function that falls within the definition of "investment adviser" in section 2(a)(20) of the Act.

[3] JPMII serves as placement agent to JPMorgan Institutional Trust ("Trust") with respect to three of its series. The Trust is an open-end investment company registered under the Act, but its shares are not registered under the Securities Act of 1933, as amended. JPMII believes, for purposes of the application, that it is performing a function that falls within the definition of principal underwriter in section 2(a)(29) of the Act.

[4] U.S. Securities and Exchange Commission v. J.P. Morgan Securities LLC, Case No. 2:11-cv-03877-WJM (D.N.J. July 8, 2011).

jeopardized the tax-exempt status of certain securities. Based on the alleged misconduct described above, the Complaint alleged that JPMS violated section 15(c)(1)(A) of the Exchange Act. Without admitting or denying any of the allegations in the Complaint (other than those relating to the jurisdiction of the District Court over it and the subject matter, solely for purposes of this action), JPMS consented to the entry of the Injunction and other relief, including disgorgement, prejudgment interest, and civil monetary penalties.

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security, or in connection with activities as an underwriter, broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered UIT, or registered face-amount certificate company or as investment adviser of an ESC. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include, among others, any person directly or indirectly controlling, controlled by, or under common control, with the other person. Applicants state that JPMS is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3) of the Act. Applicants state that, as a result of the Injunction, they would be subject to the prohibitions of section 9(a) of the Act.

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) of the Act if it is established that these provisions, as applied to the Applicants, are unduly or disproportionately severe or that the conduct of the Applicants has been such as not to make it against the public interest or the

protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting them and other Covered Persons from the disqualification provisions of section 9(a).

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the alleged conduct giving rise to the Injunction did not involve any of the Applicants engaging in Fund Service Activities. Applicants also state to the best of their knowledge (i) none of the current directors, officers, or employees of the Applicants (other than JPMS) that are involved in providing Fund Service Activities (or any other persons in such roles during the time period covered by the Complaint) participated in the conduct alleged in the Complaint to have constituted the violations that provided a basis for the Injunction; and (ii) the personnel at JPMS who participated in the conduct alleged in the Complaint to have constituted the violations that provided a basis for the Injunction have had no, and will not have any, involvement in providing Fund Service Activities to the Funds on behalf of the Applicants or other Covered Persons.

5. Applicants state that the inability of the Applicants to engage in Fund Service Activities would result in potentially severe financial hardships for the Funds they serve and the Funds' shareholders or unitholders. Applicants state that they will distribute written materials, including an offer to meet in person to discuss the materials, to the boards of directors of the Funds (excluding for this purpose the ESCs) (the "Boards"), including the directors who are not "interested persons," as defined in section 2(a)(19) of the Act, of such Funds, and their independent legal counsel as defined in rule 0-1(a)(6) under the Act, if any, describing the

circumstances that led to the Injunction, any impact on the Funds, and the application. Applicants state that they will provide the Boards with the information concerning the Injunction and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also state that, if they were barred from providing Fund Service Activities to registered investment companies and ESCs, the effect on their businesses and employees would be severe. Applicants state that they have committed substantial resources to establish an expertise in providing Fund Service Activities. Applicants further state that prohibiting them from providing Fund Service Activities would not only adversely affect their businesses, but would also adversely affect approximately 940 employees that are involved in those activities. Applicants also state that disqualifying certain Applicants from continuing to provide investment advisory services to ESCs is not in the public interest or in furtherance of the protection of investors. Because the ESCs have been formed for the benefit of key employees, officers, directors and current consultants of JPMC and its affiliates, it would not be consistent with the purposes of the ESC provisions of the Act to require another entity not affiliated with JPMC to manage the ESCs. In addition, participating employees of JPMC and its affiliates likely subscribed for interests in the ESCs with the expectation that the ESCs would be managed by an affiliate of JPMC.

7. Applicants state that Applicants and certain other affiliated persons of the Applicants have previously received orders under section 9(c) of the Act, as the result of conduct that triggered section 9(a), as described in greater detail in the application.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order:

The Commission has considered the matter and finds that the Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

IT IS HEREBY ORDERED, pursuant to section 9(c) of the Act, that Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a), solely with respect to the Injunction, subject to the condition in the application, from July 8, 2011, until the Commission takes final action on their application for a permanent order.

By the Commission.

Elizabeth M. Murphy
Secretary

Cathy Ahn

By: Cathy Ahn
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION

Investment Advisers Act of 1940
Release No. 3236 /July 12, 2011

Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205-3 under the Investment Advisers Act of 1940

I. Background

Section 205(a)(1) of the Investment Advisers Act of 1940 ("Advisers Act") generally prohibits an investment adviser from entering into, extending, renewing, or performing any investment advisory contract that provides for compensation to the adviser based on a share of capital gains on, or capital appreciation of, the funds of a client (also known as "performance compensation" or "performance fees").[1] Section 205(e) authorizes the Securities and Exchange Commission ("Commission") to exempt any advisory contract from the performance fee prohibition if the contract is with persons that the Commission determines do not need the protections of the prohibition, on the basis of certain factors described in that section.[2]

Rule 205-3 under the Advisers Act exempts an investment adviser from the prohibition against charging a client performance fees in certain circumstances, including when the client is a "qualified client." The rule allows an adviser to charge performance fees if the client has at least $750,000 under the management of an investment adviser immediately after entering into the advisory contract ("assets-under-management test") or

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1 15 U.S.C. 80b-5(a)(1).

2 Under section 205(e), the Commission may determine that persons do not need the protections of section 205(a)(1) on the basis of such factors as "financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser, and such other factors as the Commission determines are consistent with [section 205]." 15 U.S.C. 80b-5(e).

if the adviser reasonably believes the client has a net worth of more than $1,500,000 at the time the contract is entered into ("net worth test"). The Commission last revised the level of these dollar amount thresholds to account for the effects of inflation in 1998.[3]

II. Adjustment of Dollar Amount Thresholds Under the Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act[4] ("Dodd-Frank Act") amended section 205(e) of the Advisers Act to provide that, by July 21, 2011 and every five years thereafter, the Commission shall adjust for inflation the dollar amount thresholds included in rules issued under section 205(e), rounded to the nearest $100,000.[5] As discussed above, there are two dollar amount thresholds in rules issued under section 205(e), and they are in the assets-under-management and net worth tests in rule 205-3's definition of "qualified client."

On May 10, 2011, the Commission published a notice of intent to issue an order revising the dollar amount thresholds of the assets-under-management test and the net worth test.[6] We stated that, based on calculations of inflation since 1998 when the dollar amount thresholds were last revised, we intended to revise the threshold in the assets-under-management test from $750,000 to $1 million, and in the net worth test from

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3 *See* Exemption To Allow Investment Advisers To Charge Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client's Account, Investment Advisers Act Release No. 1731 (July 15, 1998) [63 FR 39022 (July 21, 1998)].

4 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

5 *See* section 418 of the Dodd-Frank Act.

6 *See* Investment Adviser Performance Compensation, Investment Advisers Act Release No. 3198 (May 10, 2011) [76 FR 27959 (May 13, 2011)] ("Proposing Release"). The Commission also proposed for public comment certain amendments to rule 205-3 that would reflect any inflation adjustments to the rule that we issue by order, as well as other rule amendments that would (i) provide that the Commission will issue an order every five years adjusting for inflation the dollar amount tests, (ii) exclude the value of a person's primary residence from the test of whether a person has sufficient net worth to be considered a "qualified client," and (iii) add certain transition provisions to the rule. The deadline for comments on the proposed rule amendments was July 11, 2011. *Id.*

$1.5 million to $2 million.[7] We also stated that these revised dollar amounts would take into account the effects of inflation by reference to the historic and current levels of the Personal Consumption Expenditures Chain-Type Price Index, which is published by the Department of Commerce and often used as an indicator of inflation in the personal sector of the U.S. economy.[8] The revised dollar amounts would reflect inflation from 1998 to the end of 2010, and are rounded to the nearest $100,000 as required by section 205(e) of the Advisers Act, as amended by section 418 of the Dodd-Frank Act.

The Commission's notice established a deadline of June 20, 2011 for submission of requests for a hearing. No requests for a hearing have been received by the Commission.[9]

III. Effective Date of the Order

This Order is effective as of September 19, 2011.

IV. Conclusion

Accordingly, pursuant to section 205(e) of the Investment Advisers Act of 1940 and section 418 of the Dodd-Frank Act,

IT IS HEREBY ORDERED that, for purposes of rule 205-3(d)(1)(i) under the Investment Advisers Act of 1940 [17 CFR 275.205-3(d)(1)(i)], a qualified client means a

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7 *See id.* at nn.17-18 and accompanying text.

8 *See id.* at nn.19-21 and accompanying text.

9 The Commission has received comments on the rule amendments that it proposed in May 2011, and those comments are available in the public rulemaking file S7-17-11 (available on the Commission's website at http://www.sec.gov/comments/s7-17-11/s71711.shtml). Several commenters expressed concern about the Commission's expressed intent to raise the dollar amount thresholds of rule 205-3. The Dodd-Frank Act clearly mandates that the Commission adjust the dollar amount thresholds that are the subject of this Order. The Commission intends to evaluate the comments it receives on the rulemaking proposal in its consideration of any adoption of the proposed amendments. *See* Proposing Release, *supra* note 6.

natural person who or a company that immediately after entering into the contract has at least $1,000,000 under the management of the investment adviser; and

IT IS FURTHER ORDERED that, for purposes of rule 205-3(d)(1)(ii)(A) under the Investment Advisers Act of 1940 [17 CFR 275.205-3(d)(1)(ii)(A)], a qualified client means a natural person who or a company that the investment adviser entering into the contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than $2,000,000 at the time the contract is entered into.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Aguilar
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64862 / July 12, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14460

In the Matter of **JENNIFER KIM,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Jennifer Kim ("Kim" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that

Summary

These proceedings arise out of the misconduct of Respondent and her supervisor Larry Feinblum ("Feinblum"), two traders at Morgan Stanley & Co., Inc. ("MS & Co." or the "firm"), that had the effect of concealing from risk managers the extent of the risk associated with their proprietary trading and that ultimately contributed to millions of dollars of losses in their trading books. From at least October through December 2009, Kim and Feinblum executed numerous trades in certain securities that they traded for MS & Co. that created net risk positions substantially in excess of limits that could be exceeded only with supervisory approval. To conceal from the firm that their trading exceeded the firm's limitations (the "excessions"), on at least thirty-two occasions Kim and Feinblum entered in MS & Co.'s risk management system swap orders that they had no intention of executing and that they promptly canceled after entering the orders in the system. Kim and Feinblum entered those orders for the sole purpose of temporarily and artificially reducing the net risk positions in the securities, as recorded in certain of the firm's risk management systems, in order to pursue a strategy that sought to profit from price differences between U.S. and foreign markets. Kim and Feinblum cancelled the swap orders after they knew that the risk management systems had captured false and misleading information about their net risk positions and continued to execute their arbitrage trading strategy at positions beyond certain of MS & Co.'s net risk limits. As a result of Kim's and Feinblum's misconduct, MS & Co. unwound the unauthorized trading positions, ultimately sustaining a loss of approximately $24.47 million.

Respondent

1. **Kim,** age 31, is a Canadian citizen and a resident of Brooklyn, N.Y. From August 2006, until her termination effective January 4, 2010, Kim was associated with MS & Co., which is dually registered with the Commission as a broker-dealer and as an investment adviser. At termination, Kim was a Financial Associate assigned to the Swaps Desk and reported directly to Feinblum. During the relevant period, Kim held Series 3, 7, 55, and 63 licenses.

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

Relevant Individual and Entity

2. **Feinblum**, age 35, is a resident of New York, N.Y. From May 1999, until his termination effective January 4, 2010, Feinblum was associated with MS & Co. as a trader. During the period of the misconduct at issue, Feinblum was a supervisor of the Swaps Desk, where he headed the desk's principal financing strategy and executed his arbitrage trading strategy. Feinblum was Kim's immediate supervisor. During the relevant period, Feinblum held Series 3, 7, 24, 55, and 63 licenses.

3. **MS & Co.** is a Delaware corporation with its principal place of business in New York, N.Y. It is a wholly-owned subsidiary of Morgan Stanley, the global investment bank. Morgan Stanley has securities registered pursuant to Section 12 of the Exchange Act and is required to file reports with the Commission pursuant to Section 15(d) of the Exchange Act. MS & Co. is dually registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act and as an investment adviser pursuant to Section 203(a) of the Advisers Act. MS & Co. conducts global equity sales and trading, in part, through its Trade Desk. During the relevant period, the Trade Desk facilitated, as principal, emerging market structured product trading with customers. The Trade Desk also entered financing and index arbitrage transactions as principal while sourcing potential inventory for customer or other financing transactions. The Swaps Desk, part of the Trade Desk, conducted customer equity swap trading, principal financing, and index arbitrage trading.

Background

A. The Swaps Desk

4. In 2009, Kim worked on the Swaps Desk with as many as seven other traders, all of whom Feinblum supervised. As Kim's supervisor, Feinblum trained Kim in the functions of the Swaps Desk in general, and with respect to the arbitrage trading strategy (described below).

5. During the relevant period, traders on the Swaps Desk traded in over 600 accounts that held, or were authorized to hold, a variety of instruments including, but not limited to, American Depositary Receipts ("ADRs"), equity swaps and Exchange Traded Funds ("ETFs"). Kim managed her own trading account and assisted Feinblum in managing his proprietary account. Kim acted as the risk manager for both accounts. Kim also helped Feinblum execute an arbitrage trading strategy that sought to profit by shorting ADRs (traded in U.S. markets), while taking a long position in the related common stock (traded overnight in certain Asian markets). The strategy was profitable overall and MS & Co. authorized and supported it.

B. Risk Management Processes

6. As part of its overall risk management system, MS & Co. had risk limits for each trader and for the trading desk where the trader was assigned. During the trading day, MS & Co. electronically monitored on a real time basis the risk positions of

each trader's accounts. Shortly after the close of U.S. markets, MS & Co. required its traders to review and verify an end-of-day summary of the individual trader's positions. After they verified their positions, MS & Co. required traders to certify those positions in the firm's risk system, known as "ER," and the firm essentially took a 'snap shot' of positions as reported and certified. On trade date plus one ("T+1"), ER notified the trader's supervisor if a trader had exceeded the risk limits or that the trader had failed to certify as required.

7. During the relevant period, either Kim or Feinblum verified and certified to ER the positions in accounts that each traded.

8. MS & Co. used another control to report and to manage risk on a firm-wide basis. The firm consolidated information from ER and fed that information to a proprietary system that notified MS & Co.'s Risk Management Group ("Risk Management") on T+1 if it detected a risk excession, and identified the specific trade desk, the securities involved, and the related traders whose trade positions contributed materially to the excession. If Risk Management determined the risk unacceptable, it would direct the trader to reduce the risk to appropriate levels. Where appropriate, supervisors could authorize risk excessions, and Risk Management could increase the risk limits.

C. The Swap Transactions

9. As part of their trading and hedging strategy, Kim and Feinblum generally traded equity swaps -- synthetic agreements to buy or sell economic exposure (risk) to particular shares. MS & Co. had pre-arranged agreements with a counterparty to take contra-positions pursuant to a "Master Agreement." During the relevant period, Kim and Feinblum executed real swap transactions for two emerging market securities, Wipro Limited ("Wipro") and United Microelectronics Corp. ("UMC") pursuant to the Master Agreement and in two ETF baskets.[2] Kim and Feinblum used the same Master Agreement to enter swap transactions that they intended to cancel almost immediately, which had the effect of tricking MS & Co.'s risk management systems into recording reduced net risk positions, below MS & Co.'s limits. The two traders knew that the system recognized the fake trades as real.

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[2] Wipro is an India-based provider of internet technology services. Its ADRs trade on the NYSE and its common stock trades on the Bombay Stock Exchange and the National Stock Exchange of India. UMC is a global semiconductor manufacturer based in the Republic of China that provides advanced technology and manufacturing services. Its ADRs trade on the NYSE and its common stock trades on the Taiwan Stock Exchange. Both ETFs (MSCI Emerging Markets Index and MSCI South Korea Index) trade on the NYSE.

D. **Execution of the Trading Strategy**

10. Kim and Feinblum executed an arbitrage strategy that sought to profit from differences between the prices of ADRs and common stock. Feinblum's strategy, specifically, was to sell short ADRs of the two emerging market securities, Wipro and UMC, and hold the common stock long, effectively hedging the two positions against each other. The ADRs in both securities had limited supply available to trade, compared to the number of common shares, and generally the ADRs traded at a significant premium. Feinblum believed, however, that this premium would in time collapse due to a number of potential reasons, chief among them that Wipro and UMC eventually would increase the supply of ADRs in U.S. markets. Therefore, Feinblum amassed significant short positions in the ADRs, hoping to profit when the price of the ADRs eventually dropped. On the long side of the trade, Feinblum believed that with the availability of new ADRs, the price of the common stock, which was low, would increase. Therefore, he maintained a long position in the common stock, expecting to profit from selling the common stock at a higher price. MS & Co. approved of Feinblum's overall strategy with respect to Wipro and UMC.

E. **Kim's Misconduct**

11. By September 2009, however, Kim's and Feinblum's net risk positions in the proprietary accounts in Wipro, and to a lesser extent UMC, began to increase. On or about September 28, 2009, one of Feinblum's supervisors spoke to Feinblum about the nature and size of his net risk position in Wipro. At the time that position was U.S. $20 million. The supervisor told Feinblum not to increase the size of the net risk position unless he had significant conviction about the position and had discussed it with the supervisor first. Nevertheless, over the following week, Kim and Feinblum increased the net risk position in Wipro in these accounts. By October 6, 2009, the firm's net aggregate risk position in Wipro had exceeded the limit -- U.S. $50 million -- that the firm had placed on any single-name emerging market security. A member of Risk Management informed Kim that the accounts she and Feinblum traded -- which were aggregated with proprietary positions of other traders in computing the firm's net risk positions -- had caused the firm to breach the U.S. $50 million net limit with respect to a single-name security, and that they needed to reduce the net risk position in Wipro. Kim notified Feinblum and, as directed, they brought their Wipro exposure down so that the firm's aggregate Wipro exposure was within the firm's limit.

12. Around the beginning of November, Kim's and Feinblum's net risk position in Wipro increased to U.S. $30 million ($10 million more than it was approximately one month earlier). Rather than discussing an increase of the risk limits with his supervisor as Feinblum could have done, Feinblum, acting with Kim, continued to increase their net risk position in Wipro, but devised and executed a scheme to make it appear as though they were staying within MS & Co.'s risk limits. Specifically, on thirty-two separate occasions between October and December 2009, Kim, and/or Feinblum entered swaps with respect to Wipro or UMC, sometimes doing so on consecutive days. Kim booked the swaps to artificially reduce the book's net risk position with respect to Wipro and/or UMC so that it remained under MS & Co.'s limits. Kim then falsely verified

and certified the position in ER. Minutes later Kim cancelled the swaps, effectively returning the risk level to its true position on the security. Neither Kim nor Feinblum requested or filled any orders for these swaps. While engaged in this conduct, Feinblum misrepresented to Risk Management that he had reduced his net risk position in Wipro and that his objective was to continue to reduce his net risk position in Wipro as the prices of the ADRs and common stock converged. In fact, however, Kim and Feinblum continued to increase the Wipro net risk position.

13. In early December, unrelated to these events, MS & Co. reallocated certain proprietary accounts from Kim to Feinblum. Kim and Feinblum modified their method of recording trades in the ER in order to artificially reduce the risk across both of their books. Typically, one of the two books held most of the risk, while the other did not. Kim and Feinblum booked a swap between the two books, specifically from the book holding the higher risk position, to the other book, thereby artificially reducing the risk position in the first book. The two traders then published the reduced position for the first book to ER, certified that position, and then minutes later cancelled that swap. The cancellation had the effect of moving the risk back to the first book, where it belonged, and reducing the risk in the second book to its true position. Kim and Feinblum then published the second book's risk to ER and certified the risk position. The two booked the fake swaps only to reduce the books' risk positions in ER.

F. **The Misconduct is Exposed**

14. Kim's and Feinblum's deceptive entries in the ER system came to light between December 15 and 16, 2009, when the market moved against Feinblum's positions. By close of the market on December 16, Feinblum's trade book recorded a significant notional loss. When Feinblum left work, he told his supervisor that he had lost $7 million that day. The next morning, Feinblum admitted to the supervisor that he and Kim had exceeded the risk limits repeatedly over the relevant period and had concealed such excessions in the manner described above. Ultimately, MS & Co. terminated Kim and Feinblum.

15. As a result of the conduct described above, Kim willfully violated Section 13(b)(5) of the Exchange Act, which prohibits persons from knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record, or account.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions and cease-and-desist order agreed to in Respondent Kim's Offer.

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

A. Respondent Kim cease and desist from committing or causing any violations and any future violations of Section 13(b)(5) of the Exchange Act.

B. Respondent Kim be, and hereby is barred from association with any broker-dealer with the right to apply for reentry after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

D. Respondent shall pay a civil money penalty in the amount of $25,000 to the United States Treasury. Payment shall be made in the following installments: $10,000 within thirty (30) days of the entry of this Order, $10,000 within ninety (90) days of the entry of this Order, and $5,000 within one-hundred eighty (180) days of the entry of this Order. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, 100 F Street, N.E., Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Jennifer Kim as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and wire transfer, money order or check shall be sent to Ken C. Joseph, Assistant Director, Division of Enforcement, New York Regional Office, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, New York 10281.

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. 64865 / July 12, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3237 / July 12, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29722 / July 12, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-11701

In the Matter of **Invesco Funds Group, Inc., AIM Advisors, Inc., and AIM Distributors, Inc.,** **Respondents.**	**ORDER MODIFYING ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

On October 8, 2004, the United States Securities and Exchange Commission (the "Commission") instituted administrative and cease-and desist proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act"), Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Order (the "2004 Order") against Invesco

Funds Group, Inc., AIM Advisors, Inc., and AIM Distributors, Inc. ("IFG," "AIM Advisors," and "ADI," respectively, or individually, "Respondent"; collectively, "Respondents").[1]

II.

In anticipation of the institution of these proceedings, the Respondents consented to the 2004 Order. Among other things, the 2004 Order required the Respondents to cease and desist from further violations of the federal securities laws, directed the Respondents to pay disgorgement and civil money penalties, and directed the Respondents to comply with various undertakings. In 2009, Invesco Advisers, Inc. ("Invesco Advisers") merged with AIM Advisors, and Invesco Advisers became subject to the undertakings in the 2004 Order.

III.

Invesco Advisers has submitted an Amended Offer of Settlement (the "Offer") proposing to relieve it of the obligations to continue to: (1) undertake a periodic compliance review in accordance with paragraph 54 of the 2004 Order; (2) establish and maintain an Internal Compliance Controls Committee in accordance with paragraph 52(a) of the 2004 Order; and (3) hold a shareholder's meeting at which the Board of Trustees for each registered investment company is elected not less than every fifth calendar year in accordance with paragraph 50(c) of the 2004 Order. Solely for purposes of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Invesco Advisers consents to the entry of this Order Modifying Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act, Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

IV.

The Commission deems it appropriate and in the public interest to modify the 2004 Order as agreed to in Invesco Advisers' Offer.

Accordingly, IT IS HEREBY ORDERED that:

A. Paragraph 54 of the 2004 Order is modified as follows:

54. Periodic Compliance Review. Commencing in 2007, and at least once every other year thereafter through 2009, AIM Advisors shall undergo a compliance review by a third party, who is not an interested person, as defined in the Investment Company Act, of AIM Advisors. At the conclusion of the review, the third party shall issue a report of its findings and recommendations concerning AIM Advisors' supervisory, compliance,

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1 See Advisers Act Rel. No. IA-2311, October 8, 2004, Admin. Proc. File No. 3-11701.

and other policies and procedures designed to prevent and detect breaches of fiduciary duty, breaches of the Code of Ethics and federal securities law violations by AIM Advisors and their employees in connection with their duties and activities on behalf of and related to AIM Funds. Each such report shall be promptly delivered to AIM Advisors' Internal Compliance Controls Committee and to the independent members of the AIM Funds board of directors.

B. Paragraph 52(a) of the 2004 Order is modified as follows:

a. Until at least May 2011, AIM Advisors shall maintain an internal controls committee (the "Committee"), which shall be chaired by a senior AIM Advisors executive and shall also comprise at least AIM Advisors' chief compliance officer ("CCO"), senior representatives from the other internal control functions of AIM Advisors, and AIM Advisors' senior business executives responsible for the conduct of AIM Advisors' investment advisory services for AIM Funds. The Committee shall meet at least quarterly, and notice of all of its meetings shall also be given to the chief compliance officer appointed by AIM Funds (if different from the CCO), who (in such circumstance) shall be invited to attend and participate at such meetings.

C. Paragraph 50(c) of the 2004 Order is modified as follows:

c. In 2008, AIM Funds will each hold a meeting of shareholders at which a board or boards of directors will be elected.

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

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

July 13, 2011

In the Matter of **Maxicare Health Plans, Inc.,** **MetroConnect Inc.,** **Microislet, Inc.,** **Mobicom Corp.,** **MTI Technology Corp., and** **North American Scientific, 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 Maxicare Health Plans, Inc. because it has not filed any periodic reports since the period ended September 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of MetroConnect Inc. because it has not filed any periodic reports since the period ended December 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Microislet, Inc. because it has not filed any periodic reports since the period ended June 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities Mobicom Corp. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of MTI Technology Corp. because it has not filed any periodic reports since it filed a registration statement on July 7, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of North American Scientific, Inc. because it has not filed any periodic reports since it filed a registration statement on January 31, 2009.

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 July 13, 2011, through 11:59 p.m. EDT on July 26, 2011.

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

July 13, 2011

In the Matter of	
Aqua Society, Inc., **Centurion Gold Holdings, Inc., and** **PowerRaise, 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 Aqua Society, Inc. because it has not filed any periodic reports since the period ended June 30, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Centurion Gold Holdings, 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 PowerRaise, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

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 July 13, 2011, through 11:59 p.m. EDT on July 26, 2011.

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. 64867 / July 13, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14461

In the Matter of **Columbus Geographic Systems (GIS) 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 Columbus Geographic Systems (GIS) Ltd.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Columbus Geographic Systems (GIS) Ltd. ("CGSE") (CIK No. 1419931) is a revoked Nevada corporation located in Timorim, Israel with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CGSE 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, 2008, which reported a net loss of $219,447 for the prior six months. As of July 8, 2011, the common shares of CGSE were quoted on OTC Link, had five market makers, and were 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 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, and Rule 13a-13 requires issuers to file quarterly reports.

4. As a result of the foregoing, the Respondent 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 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 the 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 the 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. 64873 / July 13, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14464

In the Matter of **Gregory D. Wood,** **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 Gregory D. Wood ("Respondent").

II.

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

III.

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

1. Wood, age 41, is a resident of Salt Lake City, Utah. Wood was the President of an entity known as Mason Hill. Wood was not registered with the Commission in accordance with Section 15(b) nor was he associated with a broker or dealer. From at least October 2010, Wood was acting as an unregistered broker. Wood sold Mason Hill securities in the form of investment contracts.

2. On April 20, 2011, a judgment was entered by consent against Wood, permanently enjoining him from future violations of Sections 17(a), 5(a) and (c) of the Securities Act of 1933 ("Securities Act") and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Art Intellect, Inc., et al., Civil Action Number 2:11-cv-00357, in the United States District Court for the District of Utah.

3. The Commission's Complaint alleged that since approximately April 2009, Mason Hill fraudulently raised at least $2.5 million through an ongoing offering fraud and Ponzi scheme from approximately 75 investors. The Complaint further alleged that Wood made numerous misrepresentations to investors at the time they made their investments, including that investor funds would be used to purchase distressed real estate at discounted prices, to rehabilitate the properties and secure tenants, and to pay for the managing of the properties by Mason Hill, Wood's company. In reality, investor funds were used to pay Mason Hill's operating expenses, to pay sales commissions, for personal use by two other parties involved in the scheme, and to make putative profit payments to earlier investors. The Complaint also alleged that Wood sold unregistered securities in the form of investment contracts and acted as an unregistered broker.

IV.

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

Accordingly, it is hereby ORDERED that:

Respondent Wood be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

SECURITIES EXCHANGE ACT OF 1934
Release No. 64871 / July 13, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14463

In the Matter of **Aqua Society, Inc.,** **Centurion Gold Holdings, Inc., and** **PowerRaise, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Aqua Society, Inc., Centurion Gold Holdings, Inc., and PowerRaise, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Aqua Society, Inc. ("AQAS") [1] (CIK No. 1213111) is a Nevada corporation located in Herten, Germany with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AQAS 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, 2007, which reported a net loss of $3,950,496 for the prior nine months. As of July 8, 2011, the common stock of AQAS was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Centurion Gold Holdings, Inc. ("CGHI") (CIK No. 1164538) is a dissolved Florida corporation located in Primrose, South Africa with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CGHI is

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

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 $16,113,674 for the prior nine months. As of July 8, 2011, the common stock of CGHI was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. PowerRaise, Inc. ("PORS") (CIK No. 1374718) is a Nevada corporation located in Ramat Gan, Israel with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PORS 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 reported a net loss of $255,830 for the prior nine months. As of July 8, 2011, the common stock of PORS was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

4. As described 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.

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

6. 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64869 / July 13, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14462

In the Matter of **Maxicare Health Plans, Inc.,** **MetroConnect, Inc.,** **Microislet, Inc.,** **Mobicom Corp.,** **MTI Technology Corp., and** **North American Scientific, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Maxicare Health Plans, Inc., MetroConnect, Inc., Microislet, Inc., Mobicom Corp., MTI Technology Corp., and North American Scientific, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Maxicare Health Plans, Inc. (CIK No. 722573) is a void Delaware corporation located in La Mirada, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Maxicare Health Plans 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 $639,000 for the prior nine months. On March 15, 1989, Maxicare Health Plans filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California,

and the case was terminated on January 30, 1998. As of July 8, 2011, the company's stock (symbol "MAXI") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. MetroConnect, Inc. (CIK No. 1003933) is a defaulted Nevada corporation located in Yorba Linda, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MetroConnect 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, 2008, which reported a net loss of over $4.1 million for the prior nine months. As of July 8, 2011, the company's stock (symbol "MTCI") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Microislet, Inc. (CIK No. 1092050) is a revoked Nevada corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Microislet 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, 2008, which reported a net loss of over $5.7 million for the prior six months. On November 10, 2008, Microislet filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of California, which was converted to a Chapter 7 proceeding, and the case was still pending as of July 8, 2011. As of July 8, 2011, the company's stock (symbol "MIIS") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Mobicom Corp. (CIK No. 1084088) is a revoked Nevada corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Mobicom 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 reported a net loss of over $1 million for the prior three months. As of July 8, 2011, the company's stock (symbol "MBIC") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. MTI Technology Corp. (CIK No. 901696) is a delinquent Delaware corporation located in Tustin, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MTI Technology is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for period ended July 7, 2007, which reported a net loss of over $2.4 million for the prior three months. On October 15, 2007, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, which was still pending as of July 8, 2011. As of July 8, 2011, the company's stock (symbol "MTICQ") was traded on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. North American Scientific, Inc. (CIK No. 949876) is a Delaware corporation located in Chatsworth, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). North American Scientific 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, 2009, which reported a net loss of over $2.6 million for the prior three months. On March 11, 2009, North American Scientific filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, and the case was still pending as of July 8, 2011. As of July 8, 2011, the company's stock (symbol "NASMQ") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

July 13, 2011

In the Matter of **Columbus Geographic Systems (GIS) 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 Columbus Geographic Systems (GIS) Ltd. because it has not filed any periodic reports since the period ended June 30, 2008.

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 July 13, 2011 through 11:59 p.m. EDT on July 26, 2011.

By the Commission.

Elizabeth M. Murphy
Secretary

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

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9236 / July 13, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 64877 / July 13, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3238 / July 13, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29724 / July 13, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14304

In the Matter of **ROMAN LYNIUK,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b)(6) AND 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**

I.

On March 23, 2011, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b)(6) and 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 Roman Lyniuk ("Respondent" or "Lyniuk").

II.

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 Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 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 ("Order"), as set forth below.

III.

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

A. <u>SUMMARY</u>

1. This matter concerns fraudulent conduct by Roman Lyniuk, the founder and manager of Atlantis Capital Management, L.P. (the "Fund"), a small hedge fund located in New York and New Jersey. Respondent created the Fund in late 1996 and managed it through its investment adviser, Atlantis Capital Markets, LLC. From approximately late 1996 through the middle of 2004, the Fund consisted solely of capital provided by Respondent and his friends and family members. By 2004, all or most of that capital had been withdrawn and/or lost through trading. In 2004, Respondent began successfully marketing the Fund to potential outside investors, in part by providing misleading historical trading results to third-party hedge fund information providers.

2. After attracting outside capital, Respondent engaged in egregious self-dealing by obtaining undisclosed compensation of at least $400,000, including rebates on brokerage commissions that were generated through the Fund's trading, and a referral fee of $40,000 in connection with his investment of $500,000 of the Fund's assets in a start-up venture that offered limited liquidity.

3. In August and September 2006, the Fund lost approximately 29% and 57% of its net asset value, respectively. The August losses were trading losses. The September losses resulted from a combination of factors, including a) a write-down of the Fund's investment in the start-up venture, which previously had been carried at face value; b) the transfer of Fund assets to cover losses in Respondent's personal trading accounts; and c) additional trading losses.

4. Most of the Fund's investors sought redemption of their interests shortly after they learned of the disastrous August 2006 losses. Instead of promptly calculating the investors' net asset values and redeeming them, however, Respondent misappropriated most of the remaining funds by transferring money into a new fund and by making unauthorized payments to himself and his friends. Investors eventually received only about 10% of the amount in their capital accounts as of July 31, 2006.

5. Since approximately mid-2006 and as recently as December 2010, Respondent has been attempting to obtain investors for a new fund, Pacific Capital Markets Cayman LDC ("Pacific"). From mid-2007 through December 2010, Respondent had been

promoting Pacific through a third-party hedge fund information provider, based on false and misleading information concerning the history, assets under management, and performance of the fund.

B. RESPONDENT

6. Respondent, age 54, resides in Rumson, New Jersey and was the founder and manager of Atlantis Capital Management, L.P. and Atlantis Capital Markets N.A., LLC. Respondent holds Series 3, 7, and 63 licenses and held a variety of positions in the financial industry prior to starting the Fund. From approximately November 1996 through September 2006 (the "Relevant Period"), Respondent managed Atlantis Capital Management L.P. and Atlantis Capital Markets N.A., LLC. During that period, Respondent was a registered representative associated with a variety of broker-dealers registered with the Commission. From June 2009 to October 2010, Respondent was employed by Tullett Prebon Financial Services LLC, a broker-dealer registered with the Commission, as a registered representative.

C. OTHER RELEVANT ENTITIES

7. At all relevant times, the Fund, Atlantis Capital Management, L.P., was a limited partnership registered in the State of Delaware that was formerly based in New York, New York and Rumson, New Jersey. Respondent founded the partnership in November 1996.

8. At all relevant times, Atlantis Capital Markets N.A., LLC ("Atlantis Capital Markets") was a Delaware limited liability company based in New York, New York and was the General Partner of, and unregistered investment adviser to, the Fund. Respondent was the principal and sole owner of Atlantis Capital Markets.

9. From approximately August 2000 through at least December 31, 2006, Atlantis Capital Markets Securities, LLC ("ACM Securities") was a Delaware limited liability company based in New York, New York. From approximately March 2002 through October 2003, ACM Securities was a registered broker-dealer. Its registration was canceled by Commission order in October 2003. Respondent was the principal and sole owner of ACM Securities.

10. At all relevant times, Respondent made virtually all decisions concerning the management of Atlantis Capital Markets and ACM Securities, exercised complete control over their bank and brokerage accounts, and supervised all trading decisions on behalf of these entities and the Fund.

D. RESPONDENT SOLICITED INVESTORS USING FALSE AND MISLEADING INFORMATION ABOUT THE FUND AND ITS HISTORICAL PERFORMANCE

11. Although the Fund was registered as a partnership in November 1996, it did not become fully operational until 2005. Prior to July 2004, the Fund's trading

accounts contained only money provided by the Respondent and his family members. By early 2004, most of the Fund's assets had been withdrawn and/or lost through trading.

12. In 2003, Respondent became acquainted with an individual residing in California. The individual suggested that Respondent market his fund through third-party hedge fund information providers that collect performance information from hedge funds and make that information, together with analysis of that information, available to investors through internet sites and newsletters. The individual also suggested that Respondent establish an internet site of his own and make information available to investors through that site. In early 2004, Respondent entered into an agreement by which the individual, through a newly-formed corporation ("Marketer A"), would provide marketing services to Respondent and his fund.

13. From approximately July 2004 through March 2006 (the "Relevant Period"), Respondent offered and sold partnership interests in the Fund to at least 12 investors. Respondent obtained at least $6 million from these investors, most of which were entities or individuals residing in the United States. Some of the early investors withdrew their capital in or before July 2006, receiving the amount of their investment and, in some cases, a small profit.

14. By July 31, 2006, the Fund had nine investors, not including Respondent, who had invested approximately $168,000 of Respondent's own capital. The total net asset value of the Fund as of that date was approximately $10 million.

15. During the Relevant Period, Respondent solicited the investors by means of material misrepresentations and omissions. Respondent (together with Marketer A, which acted at Respondent's direction) provided these investors with documents containing material misstatements concerning the Fund and its history.

16. Respondent (or Marketer A, acting at Respondent's direction) falsely informed potential investors that the Fund had an "eight year track record" of strong performance in both good and bad markets. Among other documents, Respondent made this representation in a due diligence report and questionnaire (the "Due Diligence Report"), which was created in approximately late 2004 and updated in approximately June 2005. In fact, although Respondent may have achieved the referenced results for himself and his family, the reported results included assets maintained in non-Fund accounts. Respondent knew, or was reckless in not knowing, that the representation concerning the Fund's "eight year track record" was materially misleading.

17. Respondent (or Marketer A, acting at Respondent's direction) falsely informed potential investors, through the Due Diligence Report, that the Fund had had $20 million of assets under management in 1999. In fact, the Fund's assets (which consisted solely of the Respondent's family's capital) at the time were a fraction of that amount.

18. Respondent (or Marketer A, acting at Respondent's direction) falsely informed potential investors, through the Due Diligence Report, that the Fund was audited annually. In fact, as Respondent knew, the Fund had never been audited.

19. The Fund's marketing materials also specifically stated that the Fund would be audited for 2004. At some point after the marketing materials were distributed, Respondent determined that an audit should not be performed for 2004, because its cost would be excessive. Respondent continued to represent that the Fund would be audited.

20. Respondent (or Marketer A, acting at Respondent's direction) falsely assured potential investors, through the Due Diligence Report, that the Fund had a fund administrator, and that funds could not be withdrawn from the Fund without approval from the fund administrator or auditor. In fact, as Respondent knew, the Fund had never had a fund administrator prior to late 2005, and Respondent had sole signing authority for the Fund's accounts.

21. Respondent (or Marketer A, acting at Respondent's direction) falsely informed potential investors that the Fund would have a "team of traders," including a specific trader who had exercised investment discretion over Respondent's account at certain times during the 2000-2002 period. In fact, as Respondent knew, that trader had stopped trading for the Fund years before and had repeatedly declined Respondent's requests to resume trading for the Fund.

22. Despite the fact that this individual had previously instructed Respondent to remove his name from the Fund's marketing materials, Respondent distributed materials in 2004, including a version of the Due Diligence Report, that falsely described this individual as "Director of Stock Arbitrage" for the Fund. The marketing materials also falsely represented that a second individual, who also had stopped trading for the Fund years before, would be employed as "stock arbitrageur" for the Fund.

23. Respondent's misrepresentations concerning the participation of the two individuals referenced in paragraphs 21 and 22 above were material to investors. The misrepresentations falsely suggested that the Fund would employ, and had years of experience employing, a risk-averse stock arbitrage strategy overseen by experienced trading professionals. In fact, the Fund had no such employees and had limited, if any, experience employing that strategy.

24. Respondent (or Marketer A, acting at Respondent's direction) provided investors with a chart, included in the Due Diligence Report, that purported to represent the Fund's monthly returns since 1997. Respondent knew that this chart was false and misleading in that, among other things, it failed to disclose that: a) the returns referenced (if they had been achieved at all) were not exclusively the returns of the Fund, but included those of other accounts that were traded primarily by Respondent and at times by other traders; b) the returns had been achieved (if at all) using riskier strategies and higher leverage than Respondent expected to use for the Fund; and c) the returns did not reflect any expenses other than trading costs, while the Fund would bear substantial costs

for administrator's fees, legal fees, accountants' fees, and marketing expenses – expenses that would materially decrease the Fund's returns, particularly if shared among only a few investors.

25. Respondent also manipulated the report of monthly returns in the Due Diligence Report to make his trading strategy appear less risky and more consistent than it was.

26. Respondent knowingly provided false and misleading information about the Fund's historical performance to Marketer A. Marketer A, acting at Respondent's direction, relayed the false and misleading information to at least two third-party hedge fund information providers, which made the information available to investors through newsletters and over the internet. This information included the same materially misleading information about the Fund's historical returns described in paragraphs 1 through 25 above.

27. Respondent knowingly provided false information to Hedge Fund Information Provider A concerning the Fund's assets under management. For example, he represented that the Fund had $5 million dollars in assets under management from January to July 2002. In reality, the Fund had little or no assets under management that year. Respondent also represented that the Fund had $10 million of assets under management in April 2004. The Fund's true assets under management at the time, if any, were a fraction of that amount.

E. <u>RESPONDENT MADE MATERIAL MISREPRESENTATIONS CONCERNING THE NATURE OF THE FUND'S INVESTMENTS</u>

28. Respondent (or Marketer A, acting at Respondent's direction) provided potential investors with a document that summarized the Fund's fourteen "layers of risk control" and emphasized the consistent performance of the "fund" during both bull and bear markets.

29. In March 2005, Respondent invested $500,000 of the Fund's assets in a newly-formed, private company named Insured Development Equity Advisors LLC ("IDEA") through execution of a promissory note payable to "Atlantis Capital Group." Atlantis Capital Group was a name used by Respondent to refer to all of the entities he operated.

30. The IDEA investment was inconsistent with the Due Diligence Report. Both versions of the report stated that <u>all</u> investments were in liquid, listed issues and could be exited at "the click of a mouse," and that "[b]ecause only listed securities are traded, there is virtually no counter party credit risk."

31. The Due Diligence Report further stated that "[n]either the fund management nor the basic investment strategy (in place for nearly eight years) is expected to change," and that if and when any such change occurred, investors would be given "advance written notice and an opportunity to reduce or withdraw their investment within 30 days." Despite this assurance, Respondent did not provide written notice to investors

before making the IDEA investment, even though the investment was inconsistent with several aspects of the Fund's advertised strategy, including its "risk-averse" investment approach, its limitation on the size of individual positions, and its focus on listed, liquid securities.

F. RESPONDENT FAILED TO DISCLOSE SIGNIFICANT CONFLICTS OF INTEREST CONCERNING HIS INVESTMENT DECISIONS FOR THE FUND

32. In late 2004 and 2005, Respondent (or Marketer A, acting at Respondent's direction) represented to potential investors through the Due Diligence Report that there were no "conflicts of interest by any owner, principal, manager or advisor of [the] fund not disclosed in [the] subscription documents."

33. Respondent did not make the IDEA investment because he believed it was in the Fund's interest. He made the investment because he expected that IDEA would hire him and/or his defunct broker-dealer, ACM Securities, to provide "asset management" services.

34. In March and April 2005, Respondent personally received $40,000 from IDEA. Respondent had done little or no work for IDEA at the time the payments were made, and the payments were not made pursuant to a written agreement setting forth the anticipated goods or services for which he received them.

35. Respondent's acceptance of the IDEA payment and expectation of financial benefits if IDEA became operational made it impossible for him to fairly evaluate the risky IDEA investment.

36. From at least May 2005 through at least September 2006, Respondent also received rebates on brokerage commissions, or similar undisclosed compensation, from many of the broker-dealers at which he traded the Fund's other assets. The compensation from each broker-dealer was based on the aggregate volume of trading in all accounts managed by Respondent at that broker-dealer, including both the Fund accounts and other accounts that Respondent traded.

37. From 2005 through September 2006, Respondent accepted undisclosed volume-based compensation totaling at least $400,000.

38. In approximately June 2005, Respondent updated the Due Diligence Report, in which he had previously represented that there were no undisclosed conflicts of interest. Despite the significant conflicts of interest presented by his compensation from IDEA and his receipt of volume-based compensation in connection with the Fund's trading, Respondent continued to represent that the Fund's advisers had no undisclosed conflicts of interest.

G. RESPONDENT USED THE FUND'S ASSETS AS COLLATERAL FOR HIS PERSONAL TRADING

39. During the relevant period, Respondent established accounts for the Fund at several broker-dealers. Some of the broker-dealers were set up as limited liability companies, referred to in the industry as "proprietary trading firms," in which the Fund participated as a member rather than as a "customer." In these limited liability companies (the "LLCs"), all assets deposited became assets of the firm, and the depositor's "capital contribution" was placed in a sub-account of the firm's account with its clearing broker. At the LLCs, the members effectively pooled their capital for purposes of meeting margin requirements. Respondent signed agreements with each LLC on behalf of the Fund and deposited Fund assets into sub-accounts set up for the Fund.

40. Without executing a separate agreement in the name of Respondent or another entity, Respondent set up additional member sub-accounts at the same LLCs in which the Fund's assets were held. Respondent traded his and his family's assets in these additional sub-accounts (the "Personal Accounts"), which were established in the name of Atlantis Capital Markets NA, LLC, Atlantis Capital Markets Securities, or other entities owned and controlled by Respondent.

41. Respondent explicitly agreed in writing with at least one of the LLCs ("Firm A") that the Fund's sub-account could be "cross margined" with Respondent's Personal Accounts. This meant that the Fund's assets would be considered in determining how much Respondent could borrow from the proprietary trading firm to support his securities transactions. It also meant that the assets in the Fund's sub-account could be used to cover margin calls issued with respect to the Personal Accounts.

42. In August 2006, the Fund suffered trading losses of approximately 29%. In September 2006, the Fund suffered additional losses.

43. In September 2006, the Fund's fund administrator concluded that the IDEA investment, which previously had been carried on the Fund's books at the face value of the promissory note, should be written down to zero.

44. In August and September 2006, Respondent also experienced trading losses in his Personal Accounts, which resulted in significant negative balances in his accounts at two proprietary trading firms. In September 2006, a second proprietary trading firm ("Firm B") transferred approximately $970,000 from the Fund's sub-account to offset the negative balance in Respondent's Personal Accounts.

45. The fund administrator calculated that these September events resulted in an additional 57% decrease in the value of the Fund.

46. In September 2006, after learning of the August and early September 2006 losses, most of the Fund's domestic investors requested redemptions of their interests in the Fund.

47. In September 2006, the fund administrator resigned. Respondent and his accountant assumed responsibility for calculating and paying redemptions.

48. On September 26, 2006, Respondent received notice that at the end of October, Firm A intended to "reflect the offset we have in our books" in the Fund sub-account and one of the Personal Accounts. Respondent was advised that "[t]his gives you until the end of October for capital to come in to clean this up before we go ahead and do the journal entry."

49. In October 2006, Firm A transferred approximately $1.8 million from the Fund's sub-account to offset the negative balance in Respondent's Personal Accounts.

50. Respondent knew that assets had been transferred from the Fund's accounts to cover his personal losses, but he did not disclose this material fact to each of the Fund's investors.

51. From October 2006 through March 2007, while the Fund's accountant was calculating the assets remaining in the Fund for the purpose of paying redemptions, Respondent advised investors that their redemptions were delayed because of an arbitration against the Fund's broker-dealer. Respondent failed to disclose to each investor that the arbitration involved the use of Fund assets to cover losses in his Personal Accounts at Firm B.

H. RESPONDENT BLATANTLY MISAPPROPRIATED ASSETS

52. In July 2006, Respondent registered a limited liability company named Pacific Capital Markets LLC in the state of Delaware. He also had drafted, and shared with a potential Australian investor, an offering memorandum for a fund named Pacific Capital Markets Cayman LDC, a Cayman Islands exempted limited duration company. The documents reflected that a long-time friend of Respondent who had helped to market Atlantis ("Marketer B"), was to share responsibility with Respondent for managing the new fund and trading its investments.

53. In November 2006 and February 2007, before redemptions had been made to all of those Fund investors who had requested them, Respondent transferred over $850,000 from the Fund's bank accounts to a bank account in the name of Pacific Capital Markets, L.P.

54. Respondent also used the Fund's assets to pay substantial compensation to himself and his business partner, Marketer B, before the redemptions were made. From September 2006 through March 2007, Respondent wrote $74,000 in checks from the Fund's bank account to himself, to cash, and to entities he controlled. Respondent knew, or was reckless in not knowing, that these payments were not authorized by the Fund's offering documents. From September 2006 through March 2007, Respondent wrote $22,500 in checks from the Fund's bank account to Marketer B. These payments were made in exchange for Marketer B's promise to obtain $20 million in capital for Respondent's new hedge fund, Pacific Capital Markets. Respondent knew, or was reckless

in not knowing, that the Fund's offering documents did not authorize the use of Fund assets to solicit investors for other hedge funds.

55. In February and March 2007, the investors who had requested redemptions in September 2006 received redemptions in the amount of approximately 10% of their accounts' values as of July 31, 2006.

56. Respondent failed to disclose to the redeeming investors the material fact that their redemptions had been reduced by Respondent's unauthorized payments to himself and Marketer B. Respondent also failed to disclose to each of the redeeming investors that their redemptions had been reduced by the amount of the LLCs' transfers to cover losses in Respondent's Personal Accounts.

57. Some investors did not seek redemptions in September 2006. From October 2006 to at least March 2007, Respondent provided false monthly statements to these investors. Respondent reported to one institutional investor that the monthly return for its investment in September 2006 was zero percent. In fact, as Respondent knew, the Fund lost approximately 57% in September 2006 and lost additional amounts in subsequent months. Two investors requested redemption later, in December 2007, but to date have not received any portion of their investment.

I. RESPONDENT CONTINUES TO SOLICIT CAPITAL BASED ON FALSE INFORMATION

58. From approximately September 2007 to December 13, 2010, Respondent provided materially misleading information and marketing materials to a third-party hedge fund information provider ("Hedge Fund Information Provider B") concerning the history and performance results of Pacific Capital Markets Cayman LDC ("Pacific").

59. Respondent initially marketed Pacific under the name "Pacific Capital Markets Preservation of Capital Plus" and provided marketing materials to Hedge Fund Information Provider B stating that the "centerpiece of the program is the Collateralized Guaranteed Real Estate Note Program."

60. The marketing materials claimed that Pacific has "never had a negative month" since its inception in June 2002. In fact, as Respondent knew, Pacific did not exist until 2006.

61. In September 2007, Respondent informed Hedge Fund Information Provider B that Pacific had assets under management of $701 million onshore and $107 million offshore. Respondent knew that Hedge Fund Information Provider B would provide that information to potential investors. In fact, as Respondent knew, the only assets in Pacific at that time were the remainder of the approximately $850,000 that Respondent had transferred from the Fund to Pacific in November 2006 and February 2007.

62. In July 2009, Respondent began to market Pacific under the name "Pacific Capital Markets Preservation of Capital Absolute Alpha No Beta," and he updated

its marketing materials to reflect that the fund was engaged in the facilitation of private energy trades.

63. On September 29, 2010, Respondent provided updated marketing materials to Hedge Fund Information Provider B that hid his true identity and instead held himself out as an individual named "John RWL Adams." In October 2010, Respondent changed the name under which his mobile phone was registered to "John Adams."

64. In November 2010, Respondent instructed Hedge Fund Information Provider B to change Pacific's name to "Pacific Capital Markets Cayman LDC Absolute Alpha No Beta" and represented that it managed assets of $100 million. Respondent knew that Hedge Fund Information Provider B would provide that information to potential investors. In fact, as Respondent knew, no investor contributions had been made to Pacific.

J. RESPONDENT FABRICATED EXCULPATORY EVIDENCE

65. In October 2010, Respondent received a validly issued investigative subpoena (the "Subpoena") that called for all documents relating to the Fund for the time period January 1, 2004 through the present, among other things.

66. On October 29, 2010, Respondent produced documents to the Division staff in response to the Subpoena.

67. At approximately the same time, Division staff received several similar versions of the Due Diligence Report described above from several investors in the Fund (the "Original Report"). The document appeared to be one that Lyniuk provided to prospective investors in late 2004 and 2005.

68. Lyniuk never produced a copy of the Original Report – or any similar document – to the Division staff in response to the Subpoena.

69. On December 8 and 10, 2010, Respondent appeared for testimony before the Division staff. On December 10, 2010, the staff marked as an exhibit a version of the Original Report that was dated December 2004. The staff questioned Respondent about the exhibit, in particular certain representations that appeared to be false or misleading.

70. On January 14, 2011, the Division staff sent a Wells notice to Respondent. The notice advised Respondent that the Division intended to recommend charges against him. It further invited him to make a submission to the Commission explaining any reasons the Commission should not subject him to legal action. Respondent retained counsel shortly thereafter. The Division staff orally advised Respondent's counsel that it had concerns about certain representations in the Original Report.

71. On January 31, 2011, Respondent's counsel made a Wells submission on Respondent's behalf. Respondent's counsel attached an exculpatory version of the Due Diligence Report that neither Respondent nor any investor had ever produced to the staff (the "Exculpatory Report"). It differed materially from the Original Report in

certain respects. For example, the Exculpatory Report deleted a chart of purported historical returns that had been in the Original Report, it eliminated the Original Report's claims about historical assets under management, and it deleted references to the Fund's eight-year track record. The Division forwarded the Wells submission and attachments to the Commission.

72. On or about February 23, 2011, the United States District Court for the District of New Jersey issued a warrant for a search of Respondent's home for computers and electronic storage media, among other things.

73. On or about March 1, 2011, the Federal Bureau of Investigation ("FBI") executed the search warrant. The FBI seized an external storage device from Respondent's house containing at least one version of the Original Report and one version of the Exculpatory Report. Information on the seized storage device shows that Respondent created and/or modified the Exculpatory Report on December 12, 2010, just two days after Division staff questioned Respondent about potential misrepresentations in the Original Report.

74. Respondent appears to have fabricated the Exculpatory Report and presented it to the Commission in his Wells submission in an attempt to exculpate himself.

K. VIOLATIONS

75. The misstatements and omissions of fact found in this Order were material.

76. Respondent knew, or was reckless in not knowing, that his statements (and those of Marketer A, acting at his direction) were false and misleading.

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

78. As a result of the conduct described above, Respondent willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser with respect to its clients.

Disgorgement and Civil Penalties

79. Respondent has submitted a sworn Statement of Financial Condition dated May 24, 2011 and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest and a civil penalty.

IV

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b)(6) and 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 Lyniuk cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act.

B. Respondent Lyniuk be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;
>
> 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; and
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

D. Respondent shall pay disgorgement of $4,072,500 and prejudgment interest of $1,181,606, but that payment of such amount is waived based upon Respondent's sworn representations in his Statement of Financial Condition dated May 24, 2011 and other documents submitted to the Commission.

E. Based upon Respondent's sworn representations in his Statement of Financial Condition dated May 24, 2011 and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent.

F. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and pre-judgment interest, and the maximum penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; (5) assert that payment of a penalty should not be ordered; (6) contest the imposition of the maximum penalty allowable under the law; or (7) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Cathy Ahn
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-64874; File No. S7-30-11

RIN 3235-AL19

Retail Foreign Exchange Transactions

AGENCY: Securities and Exchange Commission.

ACTION: Interim final temporary rule; request for comments.

SUMMARY: Under section 742(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), certain foreign exchange transactions with persons who are not "eligible contract participants" (commonly referred to as "retail forex transactions," and as further defined below) with a registered broker or dealer ("broker-dealer") will be prohibited as of July 16, 2011, in the absence of the Commission adopting a rule to allow such transactions under terms and conditions prescribed by the Commission. The Commission is adopting interim final temporary Rule 15b12-1T to allow a registered broker-dealer to engage in a retail forex business until July 16, 2012, provided that the broker-dealer complies with the Securities Exchange Act of 1934 ("Exchange Act"), the rules and regulations thereunder, and the rules of the self-regulatory organization(s) of which the broker-dealer is a member ("SRO rules"), insofar as they are applicable to retail forex transactions.

DATES: Effective Date: Rule 15b12-1T is effective on July 15, 2011 and will remain in effect until July 16, 2012.

Comment Date: Comments on the interim final temporary rule should be received on or before [insert date 60 days after publication in Federal Register].

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/interim-final-temp.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-30-11 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 Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number S7-30-11. This file number should be included on the subject line if e-mail is used. To help the Commission to process and review your comments more efficiently, please use only one method. The Commission will post all comments on its website: (http://www.sec.gov/rules/interim-final-temp.shtml). Comments are also available for website 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 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Jo Anne Swindler, Assistant Director; Richard Vorosmarti, Special Counsel; or Angie Le, Special Counsel, at (202) 551-5777, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting new Rule 15b12-1T under the Exchange Act as an interim final temporary rule. The rule will expire and no longer be effective on July 16, 2012. The Commission is soliciting comments on all aspects of this interim final temporary rule. The Commission will carefully consider any comments received and intends to take further action if it determines that further action is necessary or appropriate, either prior to or following the expiration of the rule. In making this determination, the Commission may consider a number of alternative approaches with respect to retail forex transactions, including proposing new rules for public comment; issuing a final rule amending the interim final temporary rule; issuing a final rule adopting the interim final temporary rule as final; or allowing the interim final temporary rule to expire without further action, which would allow the statutory prohibition to take effect.

I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.[1] As amended by the Dodd-Frank Act,[2] the Commodity Exchange Act ("CEA") provides that a person for which there is a Federal regulatory agency,[3] including a broker-dealer registered under section 15(b) (except pursuant to paragraph (11) thereof) or 15C of the Exchange Act,[4] shall not enter into, or offer to enter into, a transaction described in section 2(c)(2)(B)(i)(I) of the CEA with a

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1 Public Law 111–203, 124 Stat. 1376.

2 Public Law 111–203, § 742(c)(2) (to be codified at 7 U.S.C. 2(c)(2)(E)).

3 7 U.S.C. 2(c)(2)(E)(i), as amended by § 742(c) of the Dodd-Frank Act, defines a "Federal regulatory agency" to mean the Commodity Futures Trading Commission ("CFTC"), the Securities and Exchange Commission, an appropriate Federal banking agency, the National Credit Union Association, and the Farm Credit Administration.

4 7 U.S.C. 2(c)(2)(B)(i)(II).

person who is not an "eligible contract participant"[5] except pursuant to a rule or regulation of a Federal regulatory agency allowing the transaction under such terms and conditions as the Federal regulatory agency shall prescribe[6] ("retail forex rule").[7] Transactions described in CEA section 2(c)(2)(B)(i)(I) include "an agreement, contract, or transaction in foreign currency that . . . is a contract of sale of a commodity for future delivery (or an option on such a contract) or an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a))."[8] A Federal regulatory agency's retail forex rule must treat all agreements, contracts, and transactions in foreign currency described in CEA section 2(c)(2)(B)(i)(I) and all agreements, contracts, and transactions in foreign currency that are functionally or economically similar to agreements, contracts, or transactions described in CEA section 2(c)(2)(B)(i)(I), similarly.[9] Any retail forex

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5 "Eligible contract participant" ("ECP") is defined in CEA section 1a(18), as re-designated and amended by section 721 of the Dodd-Frank Act. See Public Law 111-203, § 721 (amending CEA section 1a). The CEA's definition of ECP generally is comprised of regulated persons; entities that meet a specified total asset test (e.g., a corporation, partnership, proprietorship, organization, trust, or other entity with total assets exceeding $10 million) or an alternative monetary test coupled with a non-monetary component (e.g., an entity with a net worth in excess of $1 million and engaging in business-related hedging; or certain employee benefit plans, the investment decisions of which are made by one of four enumerated types of regulated entities); and certain governmental entities and individuals that meet defined thresholds. The Commission and the CFTC recently have proposed rules under the CEA that further define "eligible contract participant" with respect to transactions with major swap participants, swap dealers, major security-based swap participants, security-based swap dealers, and commodity pools. See Exchange Act Release No. 63452 (Dec. 7, 2010), 75 FR 80174 (Dec. 21, 2010). Because transactions that are the subject of this release are commonly referred to as "retail forex transactions," this release uses the term "retail customer" to describe persons who are not ECPs.

6 7 U.S.C. 2(c)(2)(E)(ii)(I).

7 As used in this release, "retail forex rule" refers to any rule proposed or adopted by a Federal regulatory agency pursuant to section 742(c)(2) of the Dodd-Frank Act.

8 7 U.S.C. 2(c)(2)(B)(i)(I).

9 7 U.S.C. 2(c)(2)(E)(iii)(II).

rule also must prescribe appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation, and may include such other standards or requirements as the Federal regulatory agency determines to be necessary.[10]

This amendment to the CEA takes effect on July 16, 2011, which is 360 days from the date of enactment of the Dodd-Frank Act.[11] After that date, for purposes of CEA section 2(c)(2)(B), broker-dealers for which the Commission is the "Federal regulatory agency" may not engage in off-exchange retail forex futures and options with a customer except pursuant to a retail forex rule issued by the Commission.[12] This prohibition will not apply to (1) forex transactions with a customer who qualifies as an ECP, or (2) transactions that are spot forex contracts or forward forex contracts irrespective of whether the customer is an ECP.[13] However, consistent with other Federal regulatory agencies' retail forex rules, Rule 15b12-1T applies to "rolling spot" transactions in foreign currency by broker-dealers.[14] The discussion of the

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10 7 U.S.C. 2(c)(2)(E)(iii)(I).

11 See Public Law 111-203, § 754.

12 See 7 U.S.C. 2(c)(2)(B)(i)(II) and 7 U.S.C. 2(c)(2)(E)(ii)(I). On September 10, 2010, the CFTC adopted a retail forex rule for persons subject to its jurisdiction. See Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 FR 55410 (Sept. 10, 2010) ("Final CFTC Retail Forex Rule"). The CFTC had proposed its rules regarding retail forex transactions prior to the enactment of the Dodd-Frank Act. See Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 FR 3282 (Jan. 20, 2010) ("Proposed CFTC Retail Forex Rule"). The Federal Deposit Insurance Corporation ("FDIC") and the Office of the Comptroller of the Currency ("OCC") subsequently proposed similar rules. See Retail Foreign Exchange Transactions, 76 FR 28358 (May 17, 2011); Retail Foreign Exchange Transactions, 76 FR 22633 (Apr. 22, 2011) ("Proposed OCC Retail Forex Rule"). On July 6, 2011, the FDIC adopted final retail forex rules. See Retail Foreign Exchange Transactions, 76 FR 40779 (July 12, 2011) ("Final FDIC Retail Forex Rule").

13 See 7 U.S.C. 2(c)(2)(C)(i)(I) and 7 U.S.C. 2(c)(2)(C)(i)(II); see also Final FDIC Retail Forex Rule, supra note 12; Proposed OCC Retail Forex Rule, supra note 12.

14 See Final FDIC Retail Forex Rule, supra note 12 (explaining that its retail forex rule applies to rolling spot forex transactions); Proposed OCC Retail Forex Rule, supra note 12 (stating that rolling spot forex transactions should be regulated as retail forex

definition of "retail forex transaction" below addresses the distinctions between rolling spot forex transactions and spot and forward forex contracts.

Prior to June 2011, the Commission had not been made aware of industry concerns with respect to the operation of section 742 of the Dodd-Frank Act in the absence of Commission rulemaking. In mid-June 2011, however, market participants for the first time brought to the attention of Commission staff the possibility that section 742 of the Dodd-Frank Act may have serious adverse consequences for certain securities markets in the absence of rulemaking by the Commission before the impending effective date of the provision (i.e., July 16, 2011).[15] Although this correspondence from market participants brought this issue to the attention of Commission staff, the Commission understands that this is in fact a wider concern shared by several other market participants. One potential consequence concerns the ability of broker-dealers to facilitate the settlement of foreign securities transactions for retail customers. For example, a broker-dealer may purchase a foreign currency or exchange a foreign currency for U.S. dollars on behalf of a retail customer in connection with the customer's purchase or sale of a security listed on a foreign exchange and denominated in the foreign currency. In particular, a representative of certain market participants informed the staff that section 742 could operate to preclude broker-dealers from continuing to engage in certain foreign exchange transactions that

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transactions); Final CFTC Retail Forex Rule, supra note 12 (stating that the CFTC has the authority to fully regulate "look-alike," leveraged forex contacts, also called off-exchange Zelener contracts; as discussed below, Zelener contracts are also called rolling spot transactions); Proposed CFTC Retail Forex Rule, supra note 12 ("The [CFTC Reauthorization Act of 2008] amends the [CEA] to require that certain intermediaries for forex futures and options and for look-alike contracts (i.e., those at issue in Zelener) register in such capacity as the Commission shall determine . . . .").

15 See Memorandum from P. Georgia Bullitt, Morgan Lewis, on Pershing LLC – Proposed Relief regarding transactions in Retail Foreign Exchange to James Brigagliano et al. (June 17, 2011) (available at http://www.sec.gov/comments/other/other-initiatives/otherinitiatives-56.pdf) ("Morgan Lewis Memo").

are inherent in certain of their customers' securities transactions, and that serve to minimize their customers' risk exposure to changes in foreign currency rates.[16]

The Commission further understands that there may be other situations in which broker-dealers engage in foreign exchange transactions in connection with facilitating the ordinary execution, clearance, or settlement of customers' securities transactions and that may warrant rulemaking by the Commission in order to avoid market disruption due to the potential application of section 742 of the Dodd-Frank Act. At the same time, the Commission notes that media coverage over the past few years has highlighted potentially abusive practices by some intermediaries in connection with retail forex transactions.[17] The Commission also notes that other regulators have expressed concerns with regard to the retail forex practices of the entities that they regulate.[18]

In order to provide the Commission with the opportunity to receive comments regarding practices in this area and to consider prescribing additional rules to address investor protection concerns (e.g., abusive sales practices, volatility and riskiness of the forex market)[19] as they

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16 See id.

17 See Gregory Zuckerman, Carrick Mollenkamp & Lingling Wei, Suspicion of Forex Gouging Spreads, The Wall Street Journal (Feb. 10, 2011) at A1 (describing allegations of overcharging of customers by custody banks in currency trades).

18 See, e.g., Press Release, CFTC, CFTC Releases Final Rules Regarding Retail Forex Transactions (Aug. 30, 2010) (available at http://www.cftc.gov/PressRoom/PressReleases/pr5883-10.html?dbk) (noting that retail forex is the largest area of retail fraud that the CFTC oversees); see also the Financial Industry Regulatory Authority's ("FINRA") Regulatory Notice 08-66, (Retail Foreign Currency Exchange) (November 2008) ("FINRA Forex Notice") (describing the retail forex market as opaque, volatile, and risky).

19 In one of its notices to members, FINRA identified several investor protection concerns, including, among other things, the following: "[t]he retail customer typically does not having pricing information and cannot determine whether the price quoted by the dealer is fair"; "the dealer acts as counterparty and establishes the price, which means that the dealer has a conflict of interest in the transaction"; "[p]rice comparisons are also

affect the regulatory treatment of retail forex transactions by broker-dealers – while also preserving potentially beneficial market practices identified to the Commission only weeks before the July 16, 2011 effective date for section 742 of the Dodd-Frank Act – the Commission today is adopting interim final temporary Rule 15b12-1T under the Exchange Act to enable broker-dealers to engage in a retail forex business under the existing regulatory regime for one year. By receiving comments regarding practices in this area, the Commission will be better positioned to determine, for example, the scope of retail forex business conducted by broker-dealers that may be beneficial and poses limited risk to customers and any aspects of the business that may pose substantial undue risks to customers. The Commission will carefully consider comments on what additional rulemaking may be necessary, if any.

II. Discussion

The Commission is adopting interim final temporary Rule 15b12-1T to maintain the ability of broker-dealers to engage in a retail forex business during a one-year period under the existing regulatory framework that now applies to broker-dealers providing these services. The Commission solicits comment on each aspect of the rule and the nature and circumstances surrounding retail forex business conducted by broker-dealers. The Commission intends to carefully consider comments received to determine what further regulatory action, if any, would be appropriate. In making this determination, the Commission may consider a number of alternatives with respect to retail forex transactions, including proposing new rules for public comment; issuing a final rule amending the interim final temporary rule; issuing a final rule

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complicated by different compensation structures"; and "[t]he currency market is extremely volatile and retail forex customers are exposed to substantial currency risk." See FINRA Forex Notice, supra note 18.

adopting the interim final temporary rule as final; or allowing the interim final temporary rule to expire without further action, which would allow the statutory prohibition to take effect.

A. Rule 15b12-1T(a): Definitions

Rule 15b12-1T(a) sets forth the definitions of terms specific to the interim final temporary rule. Many of the terms (i.e., broker, dealer, person, registered broker or dealer, and self-regulatory organization) have the same meanings as in the Exchange Act. The term "Act," as used in the rule, refers to the Exchange Act.[20] The Commission chose these terms and definitions because their meanings are readily understood in the industry.

The term "retail forex business" is defined as "engaging in one or more retail forex transactions with the intent to derive income from those transactions, either directly or indirectly."[21] This definition mirrors the definition contained in the FDIC's final retail forex rules and the OCC's proposed rules.[22] This term is intended to include retail forex transactions that may not generate income to the broker-dealer or a retail forex business that is ultimately not profitable. The Commission chose this definition because it focuses on the intent to engage in a series of forex transactions with a business purpose, whether or not the transactions result in income or profits.

The term "retail forex transaction" is defined as "any account, agreement, contract or transaction in foreign currency that is offered or entered into by a broker or dealer with a person that is not an eligible contract participant as defined in section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18)) and that is: (i) a contract of sale of a commodity for future

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20 Exchange Act Rule 15b12-1T(a)(1).

21 Exchange Act Rule 15b12-1T(a)(2).

22 See Final FDIC Retail Forex Rule, supra note 12; Proposed OCC Retail Forex Rule, supra note 12 (each defining "retail forex business").

delivery or an option on such a contract; (ii) an option, other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78(f)(a)); or (iii) offered, or entered into, on a leveraged or margined basis, or financed by a broker or dealer or any person acting in concert with the broker or dealer on a similar basis, other than: (A) a security that is not a security futures product as defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)); or (B) a contract of sale that: (1) results in actual delivery within two days: or (2) creates an enforceable, obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business."[23] This definition is based on the CEA, incorporates the terms described in CEA sections 2(c)(2)(B) and 2(c)(2)(C),[24] and is substantially the same as the definition in the FDIC's final section 349.2[25] and the OCC's proposed section 48.2.[26] This definition has at least two important features.

First, certain transactions in foreign currency are excluded from the definition of the term "retail forex transaction." For example, the CEA expressly excludes "a contract of sale [in foreign currency] that . . . results in actual delivery within 2 days."[27] As defined by court decisions as well as the retail forex rules of other Federal regulatory agencies, this term refers to a "spot" forex transaction, in which one currency is purchased for another, the transaction is settled within two days, and actual delivery occurs as soon as practicable.[28] Similarly, based

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23 Exchange Act Rule 15b12-1T(a)(3).

24 7 U.S.C. 2(c)(2)(B) and 7 U.S.C. 2(c)(2)(C).

25 See Final FDIC Retail Forex Rule, supra note 12 (defining "retail forex transaction").

26 See Proposed OCC Retail Forex Rule, supra note 12 (defining "retail forex transaction").

27 See 7 U.S.C. 2(c)(2)(C)(i)(II).

28 See generally CFTC v. Int'l Fin. Servs. (New York), Inc., 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (distinguishing between foreign exchange futures contracts and spot

upon the language in the CEA,[29] a "retail forex transaction" does not include a contract of sale that creates an enforceable obligation to deliver between a buyer and seller that have the ability to deliver and accept delivery, respectively, in connection with their line of business.[30] This statutory language refers to a retail forex forward contract with a commercial entity that creates an enforceable obligation to make or take delivery, provided the commercial counterparty has the ability to make delivery and accept delivery in connection with its line of business.[31] In addition, consistent with the approach of other Federal regulatory agencies' retail forex rules, the

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contracts in foreign exchange, and noting that spot transactions – unlike futures contracts – ordinarily call for settlement within two days); see also Bank Brussels Lambert v. Intermetals Corp., 779 F. Supp. 741, 748 (S.D.N.Y. 1991) (noting that the spot market is essentially the current market rather than the market for future delivery); Final FDIC Retail Forex Rule, supra note 12 (explaining that its retail forex rule does not apply to spot forex contracts); Proposed OCC Retail Forex Rule, supra note 12 (explaining that its retail forex rule does not apply to spot forex contracts); Final CFTC Retail Forex Rule, supra note 12 (defining "retail forex transaction" as any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the CEA; as discussed above, by its terms, CEA section 2(c)(2)(C)(i)(II) excludes what are referred to as spot forex transactions).

29 See 7 U.S.C. 2(c)(2)(C)(i)(II).

30 Exchange Act Rule 15b12-1T(a)(3)(iii)(B)(2).

31 See generally CFTC v. Int'l Fin. Servs. (New York), Inc., 323 F. Supp. 2d at 495 (distinguishing between forward contracts in foreign exchange and foreign exchange futures contracts); see also William L. Stein, The Exchange-Trading Requirement of the Commodity Exchange Act, 41 Vand. L. Rev. 473, 491 (1988). In contrast to forward contracts, futures contracts generally include several or all of the following characteristics: (i) standardized nonnegotiable terms (other than price and quantity); (ii) parties are required to deposit initial margin to secure their obligations under the contract; (iii) parties are obligated and entitled to pay or receive variation margin in the amount of gain or loss on the position periodically over the period the contract is outstanding; (iv) purchasers and sellers are permitted to close out their positions by selling or purchasing offsetting contracts; and (v) settlement may be provided for by either (a) cash payment through a clearing entity that acts as the counterparty to both sides of the contract without delivery of the underlying commodity; or (b) physical delivery of the underlying commodity. See Edward F. Greene et al., U.S. Regulation of International Securities and Derivatives Markets § 14.08[2] (8th ed. 2006). See also Final FDIC Retail Forex Rule, supra note 12; Proposed OCC Retail Forex Rule, supra note 12 (each explaining that their retail forex rule would not apply to forex forward contracts).

definition does not include forex transactions executed or traded on an exchange or designated contract market.[32]

Second, a "rolling spot" forex transaction (also known as a Zelener contract),[33] including without limitation such a transaction traded on the Internet, through a mobile phone, or on an electronic platform, falls within the definition of "retail forex transaction,"[34] and thus is not excluded from the definition as a "spot" transaction. This interpretation is consistent with the approach of other Federal regulatory agencies acting pursuant to section 742 of the Dodd-Frank Act to treat all agreements, contracts, and transactions in foreign currency described in CEA section 2(c)(2)(B)(i)(I) and all agreements, contracts, and transactions in foreign currency that are functionally or economically similar to agreements, contracts, or transactions described in

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32 See Final CFTC Retail Forex Rule, supra note 12; Final FDIC Retail Forex Rule, supra note 12; Proposed OCC Retail Forex Rule, supra note 12.

33 See CFTC v. Zelener, 373 F.3d 861 (7th Cir. 2004); see also CFTC v. Erskine, 512 F.3d 309 (6th Cir. 2008) (discussing Zelener contracts).

34 CEA section 2(c)(2)(E)(ii) refers to agreements, contracts, or transactions described in CEA section 2(c)(2)(B)(i)(I) (which is incorporated into subparts (i) and (ii) of the Commission's definition of "retail forex transaction"). In addition, CEA section 2(c)(2)(E)(iii)(II) requires the Commission to treat similarly all agreements, contracts, and transactions in foreign currency described in CEA section 2(c)(2)(B)(i)(I) and all agreements, contracts, and transactions that are functionally or economically similar to agreements, contracts, or transactions described in CEA section 2(c)(2)(B)(i)(I). The Commission preliminarily believes that agreements, contracts, and transactions described in CEA section 2(c)(2)(C)(i) (including rolling spot forex transactions) are functionally or economically similar to agreements, contracts, or transactions described in CEA section 2(c)(2)(B)(i)(I). Therefore, the Commission is defining "retail forex transaction" to encompass the types of agreements, contracts, and transactions described in CEA section 2(c)(2)(C)(i), such as rolling spot forex transactions, and is reflected in subpart (iii) of the Commission's definition. See also Final FDIC Retail Forex Rule, supra note 12; Proposed OCC Retail Forex Rule, supra note 12 (both concluding that rolling spot forex transactions are more like futures than spot contracts). Some courts have held these contracts to be spot contracts in form. See, e.g., CFTC v. Erskine, 512 F.3d 309, 326 (6th Cir. 2008); CFTC v. Zelener, 373 F.3d 861, 869 (7th Cir. 2004).

CEA section 2(c)(2)(B)(i)(I), similarly.[35] Like a spot forex transaction, a rolling spot forex transaction with a retail customer may initially require delivery of currency within two days. In practice, however, contracts with a retail customer for a rolling spot forex transaction may be indefinitely renewed every other day, and no currency is actually delivered until one party affirmatively closes out the position.[36] The Commission preliminarily believes that a contract with a retail customer for a rolling spot forex transaction is economically more similar to a retail forex future, as described in CEA section 2(c)(2)(B)(i)(I), than a spot forex contract.

B. Rule 15b12-1T(b): Broker-dealers Engaged in a Retail Forex Business

Rule 15b12-1T(b) allows any registered broker or dealer to engage in a retail forex business provided that such broker or dealer complies with the Exchange Act, the rules and regulations thereunder, and the SRO rules, including, but not limited to, the disclosure, recordkeeping (or documentation), capital and margin, reporting, and business conduct requirements, insofar as they are applicable to retail forex transactions. In order for broker-dealers to engage in retail forex transactions after July 16, 2011, the Commission must adopt rules prescribing appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, documentation,[37] and such other standards or requirements that the Commission determines to be necessary.[38] Because broker-dealers engaging in a retail

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35 7 U.S.C. 2(c)(2)(E)(iii)(II); see also Final FDIC Retail Forex Rule, supra note 12; Proposed OCC Retail Forex Rule, supra note 12.

36 For example, in Zelener, the retail forex dealer retained the right, at the date of delivery of the currency, to deliver the currency, roll the transaction over, or offset all or a portion of the transaction with another open position held by its customer. See CFTC v. Zelener, 373 F.3d 861, 868 (7th Cir. 2004).

37 The Commission considers the documentation requirements as a subset of recordkeeping requirements. To avoid confusion, the Commission will refer to these requirements collectively as recordkeeping requirements.

38 See Public Law 111-203, § 742(c)(2) (amending CEA section 2(c)(2)).

forex business are already subject to numerous regulatory requirements with respect to this business under the Exchange Act, the rules and regulations thereunder, and SRO rules, the Commission does not intend to create any new obligations under this interim final temporary rule for broker-dealers that are engaged in a retail forex business. The Commission provides below illustrative examples of obligations, including certain SRO requirements, applicable to broker-dealers' retail forex transactions.[39]

Disclosure Requirements

Broker-dealers that engage in a retail forex business must comply with the disclosure requirements in NASD Rule 2210.[40] NASD Rule 2210 requires all communications with the public by members of FINRA – including forex-related communications – to be based on principles of fair dealing and good faith, to be fair and balanced, and to provide a sound basis for evaluating the facts regarding the market generally and a customer's specific transaction.[41] NASD Rule 2210 further prohibits broker-dealers from making "any false, exaggerated, unwarranted or misleading statement or claim in any communication with the public." As stated in the FINRA Forex Notice, a broker-dealer's communications with the public "must adequately disclose the risks associated with forex trading, including the risks of highly leveraged trading," and a broker-dealer "must also make sure that [its] communications with the public are not misleading regarding, among other things: [t]he likelihood of profits or the risks of forex trading, including leveraged trading; [t]he firm's role in or compensation from the trade; [t]he firm's or the customer's access to the interbank currency market; or [t]he performance or accuracy of

39 In this connection, the Commission notes that in the FINRA Forex Notice, FINRA described specific FINRA rules that apply to retail forex activities of broker-dealers, which are referenced below. See FINRA Forex Notice, supra note 18.

40 See id.

41 See id.

electronic trading platforms or software sold or licensed by or through the firm to customers in connection with forex trading, including falsely advertising claims regarding slippage rates."[42]

Further, FINRA stated in its regulatory notice to members that FINRA Rule 2010 (formerly NASD Rule 2110), which requires broker-dealers, in the conduct of their business, to observe high standards of commercial honor and just and equitable principles of trade, applies to all of a broker-dealer's business, including its retail forex business.[43] FINRA stated, for example, that to comply with FINRA Rule 2010, a member firm must adequately disclose to its retail customers that the firm is acting as a counterparty to a transaction, the risks associated with forex trading, and the risks and terms of leveraged trading.[44]

Recordkeeping Requirements

Exchange Act Rules 17a-3 and 17a-4 require a broker-dealer to make, keep current, and preserve records regarding its business. For example, Exchange Act Rules 17a-3(a)(2) and 17a-3(a)(11) require a broker-dealer to make and keep current a general ledger, which provides details relating to all assets, liabilities, and nominal accounts.

A broker-dealer is also required to preserve, for a period of not less than three years, originals of all communications received and copies of all communications (and any approvals thereof) sent by the broker-dealer relating to its business as such, including all communications that are subject to SRO rules regarding communications with the public.[45] As discussed above,

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42 Id.

43 Id.

44 Id.

45 Exchange Act Rule 17a-4(b)(4). See Exchange Act Release No. 44992 (Oct. 26, 2001), 66 FR 55818 (Nov. 23, 2001).

communications with the public regarding retail forex are subject to NASD Rule 2210.[46] In addition, Exchange Act Rule 17a-4(b)(7) requires a broker-dealer to preserve, for a period of not less than three years, all written agreements (or copies thereof) entered into by the broker-dealer relating to its business as such, including agreements with respect to any account. Accordingly, broker-dealers must preserve, for a period of not less than three years, originals of all communications received and copies of all communications (and any approvals thereof) sent by the broker-dealer and any written agreements with respect to retail forex transactions.

Another example of recordkeeping requirements applicable to retail forex transactions derives from the Bank Secrecy Act ("BSA"), as amended by the USA PATRIOT Act and implemented under rules promulgated by the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN"), which requires broker-dealers to make, keep, retain, and report certain records that have a high degree of usefulness for the purposes of criminal, tax, or regulatory matters.[47] Exchange Act Rule 17a-8 requires broker-dealers to comply with the reporting, recordkeeping, and record retention requirements of the BSA's implementing regulations.[48]

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46 See supra note 40 and accompanying text regarding NASD Rule 2210 (communications with the public).

47 See 31 C.F.R. Chapter X (formerly 31 C.F.R. Part 103); see also 67 FR 44048 (July 1, 2002) (amendments to BSA regulations requiring that a broker-dealer report suspicious transactions).

48 See Exchange Act Release No. 18321 (Dec. 10, 1981); 46 FR 61454 (Dec. 17, 1981); see also FINRA Rule 3310 (formerly NASD Rule 3011) (requiring FINRA member firms to establish and implement policies and procedures that can be reasonably expected to detect and cause the reporting of suspicious transactions). As FINRA noted, "FINRA member firms engaging in retail forex activities should ensure their Anti-Money Laundering Program addresses the risks associated with the business and includes procedures for monitoring, detecting, and reporting suspicious transactions associated with their retail forex activities." FINRA Forex Notice, supra note 18.

Net Capital and Margin Requirements

Each broker-dealer must comply with Exchange Act Rule 15c3-1, which prescribes minimum regulatory net capital requirements for broker-dealers and is applicable to all business activities of the broker-dealer, including forex. The Commission notes that, under Exchange Act Rule 15c3-1, any uncollateralized current exposure by a broker-dealer to retail forex transactions must be deducted when computing the firm's net capital. The provisions of the net capital rule dealing with contractual commitment charges under Rule 15c3-1(c)(2)(viii) also apply to commitments with respect to foreign currency. Further, pursuant to Exchange Act section 7, broker-dealer margin requirements are generally set according to Regulation T[49] and SRO margin rules.[50]

Reporting Requirements

A broker-dealer is required to file with the Commission periodic financial and operational reports (i.e., FOCUS Reports), as prescribed in Exchange Act Rule 17a-5, that include relevant information regarding the broker-dealer, including information regarding its retail forex business,

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49 12 C.F.R. Part 220.

50 In 2009, FINRA solicited comment on proposed FINRA Rule 2380 to establish a leverage limitation for retail forex. Specifically, proposed FINRA Rule 2380, as modified by Amendment No. 2, would prohibit any member firm from permitting a customer to: (1) initiate any forex position with a leverage ratio of greater than 4 to 1: and (2) withdraw money from an open forex position that would cause the leverage ratio for such position to be greater than 4 to 1. In addition, it would exempt from the proposed leverage limitation any security as defined in Exchange Act section 3(a)(10). See FINRA Regulatory Notice 09-06 (Retail Forex) (January 2009). FINRA filed Amendment No. 1 to the proposed rule change on August 27, 2009. See Letter from Gary L. Goldsholle, Vice President and Associate General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission (Aug. 27, 2009). On November 12, 2009, FINRA filed Amendment No. 2 to the proposed rule. Amendment No. 2 replaced and superseded Amendment No. 1 in its entirety. The proposed rule change, as modified by Amendment No. 2, was published for comment in the Federal Register on December 8, 2009. Exchange Act Release No. 61090 (Dec. 1, 2009), 74 FR 64776 (Dec. 8, 2009).

if any. In addition, FINRA has advised its member firms that a broker-dealer's expansion of its business to include retail forex transactions constitutes a material change in business operations pursuant to NASD Rule 1017(a), and broker-dealers must first apply for and receive approval from FINRA to conduct this activity.[51] Additionally, as discussed above, Exchange Act Rule 17a-8 requires broker-dealers to report to FinCEN certain enumerated types of transactions, including suspicious transactions in foreign currencies and foreign currency futures and options.[52]

Business Conduct Requirements

In the course of complying with certain Exchange Act requirements, rules and regulations thereunder, and SRO rules relating to business conduct, broker-dealers must address their retail forex business. For example, as discussed above, FINRA Rule 2010 (formerly NASD Rule 2110), which requires broker-dealers, in the conduct of their business, to observe high standards of commercial honor and just and equitable principles of trade, applies to all of a broker-dealer's business, including its retail forex business.[53] FINRA has noted that the following examples of conduct in relation to a retail forex business are prohibited under FINRA Rule 2010, including: misappropriating or mishandling customer funds; using, selling, or leasing electronic trading platforms that allow "slippage" of trade executions in a manner that disproportionately or unfairly affects the customer; manipulating or displaying false quotes; offering mock, or "demonstration," accounts that do not accurately reflect the risks of forex trading; making post-execution price adjustments that are inappropriate and unfavorable to the customer; soliciting

[51] See FINRA Forex Notice, supra note 18 (emphasizing that a broker-dealer's expansion of business into retail forex constitutes a material change in business operations under NASD rules).

[52] See supra note 48 and accompanying text.

[53] See FINRA Forex Notice, supra note 18.

business for and introducing customers to a forex dealer without conducting adequate due diligence on the forex dealer, or in a way that misleads the customer about the forex dealer or forex trading, including how customer funds will be held; failing to conduct due diligence on any solicitors that introduce forex customers to the broker-dealer; and accepting forex-related trades from an entity or individual that solicits retail forex business on behalf of the firm in a misleading or deceptive way.[54]

Broker-dealers also need to address retail forex transactions in connection with the customer reserve bank account requirements under Exchange Act Rule 15c3-3. In calculating what amount, if any, a broker-dealer must deposit on behalf of its customers in a reserve bank account pursuant to Exchange Act Rule 15c3-3(e), the broker-dealer must use the formula set forth in Exchange Act Rule 15c3-3a. Specifically, the Commission staff has interpreted Exchange Act Rule 15c3-3 to require that the broker-dealer must include the net balance due to customers in non-regulated commodity accounts, reduced by any deposits of cash or securities with any clearing organization or clearing broker in connection with the open contracts in such accounts.[55]

Furthermore, Exchange Act section 15(b)(4)(E) authorizes the Commission to impose sanctions against a broker-dealer for failing reasonably to supervise another person subject to the firm's supervision who committed a violation of specified laws, including the CEA, unless the broker-dealer established procedures, and a system for applying such procedures, that would

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54 See id.

55 See Division of Market Regulation's Interpretations of Rule 15c3-3 under the Securities Exchange Act of 1934, Exchange Act Release No. 9922 (Jan. 2, 1973); see also FINRA Forex Notice, supra note 18 (stating that the requirement in Exchange Act Rule 15c3-3 applies to forex transactions).

reasonably be expected to prevent and detect, insofar as practicable, the violation of law.[56] Thus, broker-dealers engaged in a retail forex business should include in their policies and procedures mechanisms to prevent and detect potential violations of applicable laws and regulations in connection with that business.

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The examples provided above are not inclusive of all regulatory requirements administered by the Commission that are implicated by retail forex business conducted by broker-dealers. By providing these examples, the Commission does not intend to suggest that other provisions, rules and regulations, including antifraud provisions and SRO rules, may not apply to retail forex business. At the same time, this interim final temporary rule is not intended to impose new regulatory obligations for broker-dealers, in connection with such business.

C. Rule 15b12-1T(c): Broker-dealers Deemed to be Acting Pursuant to a Commission Rule

Rule 15b12-1T(c) provides that any registered broker or dealer that engages in a retail forex business in compliance with paragraph (b) of this rule on or after the effective date of this rule will be deemed, until July 16, 2012, to be acting pursuant to rule or regulation described in CEA section 2(c)(2)(E)(ii)(I), as amended by section 742 of the Dodd-Frank Act. This rule will allow broker-dealers that engage in a retail forex business to do so until July 16, 2012, subject to compliance with existing applicable requirements.

Rule 15b12-1T(c) applies to broker-dealers that prior to the effective date of the rule had entered into retail forex transactions that continue after the effective date. The rule also applies to broker-dealers that begin after the rule's effective date to engage in retail forex transactions. As the Commission explained above, FINRA has advised its member firms that a broker-dealer

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56 See 15 U.S.C. 78o(b)(4)(E).

that expands into a retail forex business must first apply for and receive approval to conduct this activity, as a change in business operations pursuant to NASD Rule 1017(a).[57]

D. Rule 15b12-1T(d): Expiration

Rule 15b12-1T(d) provides that the rule will expire and no longer be effective on July 16, 2012. The Commission believes that the sunset date is appropriate because it will allow the existing regulatory framework for a retail forex business to continue for a defined period and thereby give the Commission sufficient time to determine what further appropriate steps, if any, to take with respect to a retail forex business.

III. Request for Comment

The Commission is requesting comments from all members of the public regarding all aspects of the interim final temporary rule and the current market practices involving retail forex transactions, as well as any investor protection or other concerns that should be addressed by Commission rulemaking. The Commission particularly requests comments from the point of view of broker-dealers that are presently engaged in a retail forex business, broker-dealers that plan to engage in such a business, customers that use retail forex transactions, and ECPs. Together with continued discussions with market participants and other regulators, the Commission considers this rulemaking to be an important avenue for gathering more information from affected parties about the current scope and nature of retail forex transactions. Such information will inform the Commission's thoughtful review of the appropriate regulatory framework for retail forex transactions before or beyond the expiration of the interim final rule. The Commission also seeks comment on the particular questions below, which have been designed to elicit a robust discussion of the uses and reasons for such transactions as they occur

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[57] See FINRA Forex Notice, supra note 18.

today, as well as the potential need for additional regulation. The Commission will carefully consider all comments received, and will benefit especially from detailed comments and comments responding to other commentary in the public file for this rulemaking.

Interim Final Temporary Rule

1. Should the Commission clarify or modify any of the definitions included in Rule 15b12-1T? If so, which definitions and what specific modifications are appropriate or necessary?

2. Are the requirements in Rule 15b12-1T sufficiently clear? Is additional guidance from the Commission necessary?

3. Rule 15b12-1T is an interim final temporary rule that is set to expire on July 16, 2012. Should the Commission extend the expiration date of the rule and if so, for how long?

Possible Permanent Rule Regulating a Retail Forex Business

4. Should the Commission propose new rules relating to the retail forex business operated by broker-dealers for public comment, issue a final rule amending the interim final temporary rule, issue a final rule adopting the interim final temporary rule as final, or allow the interim final temporary rule to expire without further action, which would allow the statutory prohibition to take effect? If further rulemaking is appropriate, what should those rules provide?

5. Should the Commission prohibit a broker-dealer from engaging in retail forex transactions altogether? Alternatively, should the Commission prohibit a broker-dealer from engaging in retail forex transactions other than forex transactions engaged in solely (1) to effect the purchase or sale of a foreign security or in order to

clear or settle such purchase or sale, or (2) to facilitate distribution to customers of monies or securities received through corporate actions (e.g., coupons, dividends, class action settlements, and rights offerings) with respect to foreign securities? Should the Commission permit other retail forex transactions that otherwise facilitate customers' securities transactions and minimize risk exposure to customers from changes in foreign currency rates? Do investors have adequate recourse against broker-dealers for any misconduct related to retail forex transactions? Would retail forex customers be harmed if broker-dealers were unable to provide them with certain forex-related services? Which services? What benefits might retail forex customers receive in connection with forex-related services offered by broker-dealers, as compared to other intermediaries? Would the benefits outweigh potential harm?

6. Should the Commission adopt rules modeled on the Final CFTC Retail Forex Rule, the Final FDIC Retail Forex Rule, or the Proposed OCC Retail Forex Rule? If so, which aspects of those rules should the Commission consider adopting? What would be the associated costs and benefits?

7. Should the Commission adopt final permanent rules governing retail forex transactions? If so, what should those rules address?

8. Are there any requirements or prohibitions not covered in the Final CFTC Retail Forex Rule, the Final FDIC Retail Forex Rule, or the Proposed OCC Retail Forex Rule that the Commission should address? Do existing Exchange Act provisions, rules and regulations thereunder, and SRO rules governing broker-dealers appropriately protect retail forex customers of broker-dealers? Should the

Commission consider rulemaking to address any concerns that are not adequately addressed under the current regulatory framework?

9. What distinctive characteristics of retail forex transactions should the Commission take into consideration if it were to engage in further rulemaking relating to such transactions? Are there certain types of retail forex transactions (e.g., rolling spot transactions) that warrant Commission rulemaking to address specific disclosure and other investor protection concerns?[58]

Business Practices of Broker-dealers Engaged in Retail Forex Transactions

10. What is the extent of the retail forex business currently conducted by broker-dealers? Does the retail forex business currently conducted by broker-dealers consist solely or primarily of forex transactions to facilitate customers' securities transactions and minimize risk exposure to customers from changes in foreign currency rates? In general, what proportion of the retail forex business currently conducted by broker-dealers do such transactions account for? Please provide as comprehensive of a description as possible of the retail forex activities of broker-dealers.

11. For what other reasons do broker-dealers engage in retail forex transactions and what proportion of the retail forex business currently conducted by broker-dealers do such transactions account for? What benefits do these transactions provide to customers? What risks do customers face by engaging in such transactions?

12. Provide estimates of the absolute size of the retail forex business (in both dollar amounts and numbers of transactions) conducted by the broker-dealer. What does

58 See, e.g., Gregory Zuckerman, Carrick Mollenkamp & Lingling Wei, Suspicion of Forex Gouging Spreads, The Wall Street Journal (Feb. 10, 2011) at A1 (describing allegations of overcharging of customers by custody banks in currency trades).

this business represent as an estimated percent of the broker-dealer's total business? As an estimated percent of its total forex business?

13. What is the estimated absolute size of the retail forex business (in both dollar amounts and numbers of transactions) conducted by broker-dealers overall? What does this business represent as a percent of their total business? As a percent of their total forex business?

14. What types of customers engage in retail forex transactions, including rolling spot forex transactions?

15. Is the existing regulatory framework for retail forex business as currently conducted by broker-dealers consistent with the protection of investors, the maintenance of fair, orderly, and efficient markets, and the facilitation of capital formation?

16. What disclosures do broker-dealers provide to their customers regarding forex transactions that are conducted to facilitate settlement of securities transactions? What disclosures do broker-dealers provide to customers regarding forex transactions that are conducted for other purposes (e.g., at the customer's request to hedge against currency exchange risk exposure associated with securities transactions, or to engage in speculative activity)? Do broker-dealers adequately and fully disclose the risks associated with forex trading? Do broker-dealers provide information to customers regarding pricing of forex transactions (e.g., pricing methodology, exchange rates for foreign currencies, how the price was calculated)? If so, is this information provided in advance of or following the forex transactions?

17. On what basis do broker-dealers price retail forex transactions? For example, do broker-dealers use the end-of-day currency exchange rate or some other benchmark?

Do broker-dealers maintain policies and procedures that govern how forex transactions are handled and priced for retail forex customers? If broker-dealers do not provide pricing information to retail customers, what documentation does the broker-dealer maintain to demonstrate the price provided in retail forex transactions?

18. Are transaction-time records for retail forex transactions currently created and provided to retail customers? If not, what would be the cost to create transaction-time records for retail forex transactions? What would be the cost to report to customers the transaction time and/or the source or basis for the currency exchange rate provided on retail forex transactions?

19. For broker-dealers that provide custody services to retail customers, please describe any retail forex business conducted with respect to these custody services. What disclosures are provided to retail customers in connection with custody services? What pricing information is provided to retail customers in connection with forex transactions conducted in relation to custody services (e.g., pricing methodology, exchange rates for foreign currencies, how the price was calculated)? If pricing information is provided, is this information provided in advance of or following the forex transactions? On what basis do broker-dealers price retail forex transactions conducted in connection with custody services? Do broker-dealers maintain policies and procedures that govern how forex transactions are handled and priced in connection with custody services for retail forex customers? If broker-dealers do not provide pricing information to retail customers in connection with their custody business, what documentation do broker-dealers maintain to demonstrate to examiners the price provided in retail forex transactions?

20. Do broker-dealers provide retail customers alternatives for obtaining prevailing prices on retail forex transactions? For example, do broker-dealers inform customers that the customer can choose whether the broker-dealers will handle retail forex transactions at rates set under a "standing instruction" (i.e., non-negotiated trades, where a customer provides the broker-dealer discretion with respect to handling the forex transaction) or as a negotiated trade? Where a broker-dealer provides a "standing instruction" process for customers, what methods are used to determine the appropriate exchange rate? Do retail customers receive the interbank rate or some other rate?

21. What conflicts of interest exist in connection with broker-dealers handling and pricing of retail forex transactions? How do broker-dealers manage these conflicts of interest? Do broker-dealers disclose when they are acting as a counterparty to a forex transaction with a retail customer?

22. What compensation structures do broker-dealers apply to retail forex transactions (e.g., per trade commissions, spreads, both)? Do broker-dealers charge retail forex customers rolling fees or additional transaction fees, such as maintenance charges, software licensing fees, commissions paid to introducing brokers or other third-party service providers? Are there breakpoints offered to retail customers based on, for example, volume or number of trades? If so, are the breakpoints available to all retail customers?

23. What fees are charged by broker-dealers for each type of retail forex trade? What is the prevailing market rate for retail forex transactions? How does this differ from the

prevailing market rate for forex transactions with ECPs? Does the prevailing market rate differ for standing instruction fees and negotiated trade fees?

24. Do broker-dealers disclose all compensation charged to retail customers? At what point during the customer relationship are compensation disclosures made (e.g., prior to any forex transactions, following a forex transaction)? What is the scope and breadth of those disclosures? Should the Commission consider rules that would expand broker-dealers' disclosure obligations?

25. In light of the authority provided under section 742 of the Dodd-Frank Act for the Commission to consider any other standards or requirements in connection with retail forex transactions that it determines to be necessary, when a broker-dealer solicits business for and introduces customers to a forex dealer, what due diligence does the broker-dealer conduct about the forex dealer? What policies and procedures do broker-dealers have in place, if any, regarding supervision of unregistered solicitors that introduce forex customers to the broker-dealer and that are employees or agents of the broker-dealer?

26. What policies and procedures do broker-dealers have in place regarding advertisements and marketing materials related to forex services offered to retail customers?

27. Do broker-dealers provide information to customers regarding access to the interbank currency market?

28. What disclosures do broker-dealers make to retail customers regarding the performance and accuracy (including slippage rates) of electronic trading platforms or

software sold or licensed by or through the firm to customers in connection with forex trading?

29. What information do retail customers believe is important for them to receive from broker-dealers regarding their forex transactions?

30. What business conduct concerns do retail customers have regarding the manner in which their broker-dealers handle and price forex transactions?

31. Do broker-dealers provide structured products to retail customers that require forex transactions at maturity? In connection with these types of products, how are the foreign exchange conversion fees calculated and disclosed? Is the cost of the conversion embedded in the transaction itself, or must investors pay additional fees for conversion?

32. What alternatives for handling forex transactions outside of broker-dealers are available to retail investors? Would a transition of retail forex business out of broker-dealers be efficient or costly from the standpoint of customers?

IV. Other Matters

The Administrative Procedure Act generally requires an agency to publish notice of a proposed rulemaking in the Federal Register.[59] This requirement does not apply, however, if the agency "for good cause finds . . . that notice and public procedure are impracticable, unnecessary, or contrary to the public interest."[60] Further, the Administrative Procedure Act also generally requires that an agency publish an adopted rule in the Federal Register 30 days before it becomes effective.[61] This requirement, however, does not apply if the agency finds good cause

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59 See 5 U.S.C. 553(b).

60 Id.

61 See 5 U.S.C. 553(d).

for making the rule effective sooner.[62] The Commission, for the reasons discussed above and below, finds that notice and solicitation of comment before the effective date of Rule 15b12-1T is impracticable, unnecessary, and contrary to the public interest.[63]

It was not until mid-June 2011 that market participants first informed the Commission of a possible disruption of a potentially important forex service provided by broker-dealers to retail investors if the Commission did not act swiftly to adopt a rule allowing retail forex transactions by July 16, 2011, the effective date of section 742 of the Dodd-Frank Act.[64] As noted above, one representative of certain market participants stated that "it would expose both broker-dealers and their retail customers to needless operational, price, credit and other risks if the [Commission did] not allow broker-dealers to engage in foreign exchange activity that is ancillary to the broker-dealer's ordinary securities execution, clearing, settlement and booking activity."[65] The Commission believes that Congress, in enacting section 742 of the Dodd-Frank Act, may not have intended to prohibit certain types of foreign exchange activity, which might be beneficial to retail investors. To allow the existing regulatory framework for retail forex transactions to continue for a defined period, to avoid potentially unintended consequences from broker-dealers immediately discontinuing their retail forex business, and to provide the Commission sufficient time to determine the appropriate regulatory framework regarding retail forex transactions, the Commission is adopting on an interim final temporary basis Rule 15b12-1T. The Commission

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62 Id.

63 This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rules to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are "impractical, unnecessary or contrary to the public interest," a rule "shall take effect at such time as the federal agency promulgating the rule determines").

64 See Morgan Lewis Memo, supra note 15.

65 Id.

does not intend to create new regulatory obligations for broker-dealers in adopting this interim final temporary rule. The Commission further emphasizes that it is requesting comment on all aspects of the rule. The Commission will carefully consider the comments it receives.

V. Paperwork Reduction Act

The Commission notes that interim final temporary Rule 15b12-1T does not create new regulatory obligations for broker-dealers, and therefore does not impose any new "collections of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA"),[66] nor does it create any new filing, reporting, recordkeeping, or disclosure reporting requirements for broker-dealers that are or plan to be engaged in a retail forex business. Accordingly, the Commission did not submit the interim final temporary rule to the Office of Management and Budget for review in accordance with the PRA. The Commission requests comment on its conclusion that there are no collections of information.

VI. Economic Analysis

A. Introduction

Exchange Act section 23(a)(2) requires the Commission, when 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 that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, section 2(b) of the Securities Act of 1933 and Exchange Act section 3(f) require the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider, in addition to the

66 44 U.S.C. 3501 et seq.

protection of investors, whether the action will promote efficiency, competition, and capital formation.

As noted above, section 742(c) of the Dodd-Frank Act amended the CEA to prohibit broker-dealers from engaging in retail forex transactions after July 16, 2011, absent rulemaking by the Commission to allow such transactions. If there is no such rulemaking in place, then certain transactions that may be considered beneficial to retail investors, such as hedging transactions and securities conversion trades that take more than two days to settle, may no longer be conducted by broker-dealers. Retail investors who transact in foreign securities through a broker-dealer may find it difficult to minimize their currency risk exposure if risk-minimizing hedging transactions are moved outside the broker-dealer.

The Commission is adopting interim final temporary Rule 15b12-1T to allow broker-dealers to engage in a retail forex business for one year. This rule keeps in place the regulatory framework that currently exists for broker-dealers, and preserves the ability of broker-dealers to provide, among other services, hedging and conversion trades, to retail investors while the Commission considers what further appropriate steps to take, if any.

B. Benefits and Impact on Efficiency, Competition, and Capital Formation

Rule 15b12-1T is intended to minimize market disruptions that may occur when section 724(c) of the Dodd-Frank Act goes into effect. Absent rulemaking by the Commission, broker-dealers would be required to exit the retail forex business. Consequently, retail customers who transact with a broker-dealer for their foreign investments may need to find another service provider for their foreign exchange transactions, which could interrupt the customers' ability to trade in forex, depending on the availability of retail forex-related services outside of broker-dealers.

The interim final temporary rule preserves retail customers' access to the forex markets through broker-dealers. To the extent that this provides hedging opportunities for foreign investments or otherwise promotes an efficient investment opportunity set by, for example, permitting the continued use of forex in connection with clearing trades in foreign securities, economic benefits accrue to retail investors, assuming that no close substitutes exist or that retail access to forex is not easily available elsewhere.

Furthermore, by preserving a channel for retail customers to access forex transactions, the interim final temporary rule prevents any loss of competition in the retail forex space that could result if broker-dealers were required to exit the business. Potential effects of reduced competition include, but are not limited to, higher customer fees for retail forex transactions charged by remaining service providers, as well as reduced availability of forex services to retail customers if customers no longer have access to these transactions through broker-dealers.

C. Costs and Impact on Efficiency, Competition, and Capital Formation

Because Rule 15b12-1T preserves the regulatory regime that is in place prior to the effective date of section 742(c) of the Dodd-Frank Act, the rule imposes no new regulatory burdens beyond those that already exist for broker-dealers engaged in a retail forex business. The Commission recognizes, however, that broker-dealers will face regulatory costs and requirements associated with operating in the retail forex market, which are costs and requirements that they already shoulder from doing business. These include costs related to disclosure, recordkeeping and documentation, capital and margin, reporting, and business conduct. For example, a broker-dealer that presently engages in forex transactions with retail customers incurs costs associated with establishing, maintaining, and implementing policies and procedures to comply with regulatory requirements; preparing disclosure documents;

establishing and maintaining forex-related business records; and preparing filings with the Commission, which may include legal and accounting fees.

As discussed above, the Commission is aware of potentially abusive practices that may be occurring in the retail forex market. To the extent that such practices continue, for example, lack of disclosure about fees and forex pricing, or insufficient capital or margin requirements, the retail forex market may bear costs associated with the inefficient provision of retail forex services. The Commission believes, however, that the cost of market disruption that may occur if the Commission does not promulgate the interim final temporary rule is greater than the cost of maintaining the current regulatory regime while the Commission seeks comment and evaluates whether a more comprehensive regulatory regime is necessary.

Because the regulatory requirements for broker-dealers operating in the retail forex market will remain unchanged, Rule 15b12-1T will impose no new burden on competition. Similarly, since the rule preserves an existing regulatory structure, the Commission does not expect any potential impairment of the capital formation process. Finally, because the rule allows hedging transactions, securities conversions, and other transactions that allow investors to continue to have access to these vehicles, the Commission believes that the interim temporary final rule will promote efficiency.

VII. Regulatory Flexibility Certification

The Commission hereby certifies that pursuant to 5 U.S.C. 605(b) the interim final temporary rule contained in this release will not have a significant economic impact on a substantial number of small entities. The interim final temporary rule applies to broker-dealers that may engage in retail forex transactions. However, the Commission does not intend for the interim final temporary rule to impose new regulatory obligations, costs, or burdens on such broker-dealers. While the rule applies to broker-dealers that may be small businesses, any costs or regulatory burdens incurred as a result of the rule are the same as those incurred by small broker-dealers prior to the effective date of section 742 of the Dodd-Frank Act. Broker-dealers have already incurred those costs and regulatory burdens through establishing compliance with the rules adopted by the Commission under the Exchange Act applicable to broker-dealers. Further, the interim final temporary rule does not change the burdens on small broker-dealers relative to large broker-dealers. Accordingly, the interim final temporary rule should not have a significant economic impact on a substantial number of small entities. The Commission requests comment on its conclusion that Rule 15b12-1T should not have a significant economic impact on a substantial number of small entities.

VIII. Statutory Basis and Text of Amendments

The Commission is adopting Exchange Act Rule 15b12-1T pursuant to section 2(c)(2) of the Commodity Exchange Act, as well as pursuant to the Exchange Act, as amended.

List of Subjects in 17 CFR Part 240

Brokers, Consumer protection, Currency, Reporting and recordkeeping requirements.

In accordance with the foregoing, the Securities and Exchange Commission is amending Title 17, chapter II of the Code of Federal Regulations as follows:

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

1. The general authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et. seq.; 18 U.S.C. 1350; 12 U.S.C. 5221(e)(3); and 7 U.S.C. 2(c)(2)(E), unless otherwise noted.

* * * * *

2. Add § 240.15b12-1T to read as follows:

§ 240.15b12-1T Brokers or dealers engaged in a retail forex business.

(a) Definitions. In addition to the definitions in this section, the following terms have the same meaning as in the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.): "broker," "dealer," "person," "registered broker or dealer," and "self-regulatory organization."

(1) Act means the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).

(2) Retail forex business means engaging in one or more retail forex transactions with the intent to derive income from those transactions, either directly or indirectly.

(3) Retail forex transaction means any account, agreement, contract or transaction in foreign currency that is offered or entered into by a broker or dealer with a person that is not an eligible contract participant as defined in section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18)) and that is:

(i) A contract of sale of a commodity for future delivery or an option on such a contract;

(ii) An option, other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78(f)(a)); or

(iii) Offered, or entered into, on a leveraged or margined basis, or financed by a broker or dealer or any person acting in concert with the broker or dealer on a similar basis, other than:

(A) A security that is not a security futures product as defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)); or

(B) A contract of sale that:

(1) Results in actual delivery within two days; or

(2) Creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business.

(b) Any registered broker or dealer may engage in a retail forex business provided that such broker or dealer complies with the Act, the rules and regulations thereunder, and the rules of the self-regulatory organization(s) of which the broker or dealer is a member, including, but not limited to, the disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation requirements. insofar as they are applicable to retail forex transactions.

(c) Any registered broker or dealer that is engaged in a retail forex business in compliance with paragraph (b) of this section on or after the effective date of this section shall be deemed, until the date specified in paragraph (d) of this section, to be acting pursuant to a rule or regulation described in section 2(c)(2)(E)(ii)(I) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(E)(ii)(I)).

(d) This section will expire and no longer be effective on July 16, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: July 13, 2011

Cathy Ahn

By: Cathy Ahn
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3240 / July 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14468

In the Matter of

ROBERT C. BROWN, JR.,

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 Robert C. Brown, Jr. ("Brown" 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.2 and III.4 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.

III.

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

1. Since at least 2001, Brown has held himself out as an investment adviser while operating an unlicensed investment entity called Trebor Company. Brown was an investment adviser to his clients in that, for compensation, he engaged in the business of advising his clients as to the advisability of investing in, purchasing, or selling securities. Brown, age 58 years old, resides in Vallejo, California. He is not currently registered, nor was he ever registered, with the Commission.

2. On July 1, 2011, a final judgment was entered by consent against Brown, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Robert C. Brown, Jr., et al., Civil Action Number C 08-03517 EMC, in the United States District Court for the Northern District of California.

3. The Commission's complaint alleged, inter alia, that Brown defrauded clients by means of materially false and misleading statements promising clients extraordinary returns on their investments, and that he misappropriated his clients' assets by taking for personal use assets to which he was not entitled.

4. On April 6, 2010, Brown pleaded guilty to one count of wire fraud in violation of Title 18 United States Code Section 1343 before the United States District Court for the Eastern District of California, in United States of America v. Robert Cephas Brown and Duane Allen Eddings, Criminal Action Number CR-S 09-0074 JAM.

5. The count of the criminal indictment to which Brown pled guilty alleged, inter alia, that Brown defrauded investors and obtained money and property by means of materially false and misleading statements, that he used wire and radio communication to falsely promise investors extraordinary returns on their investments, and that he misappropriated his clients' assets by taking for personal use assets to which he was not entitled.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Brown be, and hereby is, barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9237 / July 14, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3239 / July 14, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3303 / July 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14467

In the Matter of

Joseph F. Sofo, CPA,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Joseph F. Sofo ("Sofo" 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 8A of the Securities Act of 1933 and Section 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Introduction

1. Sofo, age 49, is a certified public accountant who resides in Roslyn Heights, New York, and is licensed to practice in New York and the U.S. Virgin Islands. Sofo was the audit engagement partner for Kurcias, Jaffe & Co. LLP ("Kurcias Jaffe"), a Great Neck, New York accounting firm that conducted yearly audits of the North American Globex Fund, L.P. ("Fund" or "Globex Fund"). Sofo was responsible for the Fund's audits from 2001 through February 2009. These proceedings arise out of Sofo's false statements that the 2005 and 2006 year-end audits of the Globex Fund were conducted in accordance with Generally Accepted Auditing Standards ("GAAS") and that the financial statements had been presented in accordance with Generally Accepted Accounting Principles ("GAAP").

Findings

2. Northstar International Group, Inc. ("Northstar") is a Nevada corporation located in Oceanside, New York. It is the general partner and, thus, the investment adviser of the Globex Fund, a Nevada limited partnership and a pooled investment vehicle through which the assets of its limited partners are invested in a wide variety of securities and other financial instruments. The Globex Fund purported to keep the vast majority of its holdings in a related entity known as the North American Globex Group, Inc. ("Group" or "Globex Group"). James M. Peister founded Northstar in 2000 and has served as its president and CEO since then.

3. From 2003 until April 2009, Peister and Northstar intentionally overstated the assets of the Globex Fund, resulting in the dissemination of materially false and misleading asset values and performance figures to investors and prospective investors. Peister and Northstar concealed the true state of the Fund's finances by maintaining the Fund's assets in the Globex Group, and keeping the Group's bank and brokerage statements secret from the auditors. Peister controlled all of the operations and activities of the Globex Fund, Northstar and the Globex Group. Sofo was aware of Peister's control of these three entities, and that the Fund and the Group were related parties. Sofo also knew that the vast majority of the Fund's assets were purportedly held by the Globex Group. Neither Peister nor any of the entities mentioned here have been registered as an investment company or investment adviser with the Commission or any state.

4. During the relevant period, Peister and Northstar made claims of extraordinarily consistent returns and provided this information to investors and potential investors through reports, account statements, audited financial statements and internet hedge fund websites. These returns were based in large part on the assets the Fund claimed to hold in the Group.

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

5. The chart below shows the assets the Fund claimed were held at Globex Group and the verifiable approximate total investments actually held by the Group.

Year	Assets the Fund Claimed to Hold at the Globex Group	Total Investment Assets Actually Held By the Globex Group
2004	$9,551,802 (85% of the Fund's total assets)	$455,000
2005	$10,842,625 (70% of the Fund's total assets	$65,000
2006	$13,213,249 (89% of the Fund's total assets)	$73,000
2007	$14,564,461 (94% of the Fund's total assets)	$6,000
2008	$6,129,486 (87% of the Fund's total assets)	$8,000

6. As a result of the overstatement of assets held at the Globex Group, investors received materially false account statements about the Globex Fund's value and performance. These inflated assets and performance calculations were reflected in audited year-end financial statements, among other places.

7. On the basis of this conduct, Peister and Northstar are the subject of an enforcement action by the Commission and have agreed to be enjoined from future violations of certain provisions of the securities laws.

8. Kurcias Jaffe was hired to audit the financial statements of the Globex Fund for the year ended December 31, 2001. They issued an unqualified opinion on that year and every year thereafter, ending with their opinion on the 2006 financial statements, which were issued on December 11, 2007. Before taking on this engagement, Kurcias Jaffe did not have any expertise in auditing hedge funds. In fact, the Globex Fund was its only hedge fund client.

9. As the engagement partner for Kurcias Jaffe, Sofo represented that the audits were conducted in accordance with GAAS, and was required, among other things, to ensure that the audit work was adequately performed and supported the conclusions presented in Kurcias Jaffe's audit opinions.

10. Kurcias Jaffe's audit opinions stated that the financial statements were prepared in conformity with GAAP and had been audited in accordance with GAAS. In fact, the Globex Fund's financial statements were not prepared in conformity with GAAP and had not been audited in accordance with GAAS. The audit reports were nonetheless provided to investors and prospective investors, and thus permitted Peister's and Northstar's fraud to continue.

Audit of the North American Globex Fund for 2004-05

11. In conducting the audits in question, Sofo ignored the requirements of GAAS and relied on a flawed confirmation process. Though Sofo understood the Fund and the Group were related parties and that both entities were controlled by Peister, the audits in years 2004-2005 were quite limited. Sofo merely obtained representations from Peister, in his role as the Group's president, "confirming" the value of the Fund's assets being held by the Group. Sofo did no further work to verify these balances.

12. These confirmations were of almost no value from an audit perspective because GAAS requires that "[t]he auditor should direct the confirmation request to a *third party* who the auditor believes is knowledgeable about the information to be confirmed." AU § 330.26, *The Confirmation Process* (emphasis added). The confirmation requests to the Group were sent to a related party—in substance, the very same party—in clear contravention of GAAS.

13. Though Sofo understood that Peister controlled both the Fund and the Group and that the Fund and the Group were related parties, he accepted the assertions of Peister as the only audit evidence for the balance of the Fund's assets held by the Group. GAAS requires that "[a]fter identifying related party transactions, the auditor should apply the procedures . . . directed toward obtaining and evaluating sufficient appropriate audit evidence and should extend beyond inquiry of management." AU § 334.09, *Related Parties*. But relying solely on an assertion from the Fund management is precisely what Sofo did, without obtaining any other audit evidence.

14. For the 2004-05 audit, Sofo failed to exercise due care, appropriate professional skepticism, or obtain sufficient competent evidential matter. In the planning phases of the audit, Globex Group was identified as a fraud risk yet the additional steps listed in the audit workpapers for the 2005 audit to combat this risk were not taken.

15. The result was the Fund's audited financial statements were materially misstated. The statements for 2004 and 2005 show the balance in the "Due from North American Globex Group" line item to be $9,551,802 for 2004 and $10,842,625 for 2005. In reality, the actual verifiable investment assets held by the Group were about $455,000 at the end of 2004 and $65,000 at the end of 2005 — much less than what were reported in the audited statements.

Audit of the North American Globex Fund for 2005-06

16. For the 2005-06 audit, Sofo again failed to exercise due care, appropriate professional skepticism, or to obtain sufficient competent evidential matter. Once again, in the planning phases of the audit, Globex Group was identified as a fraud risk yet the additional steps listed in the audit workpapers for the 2006 audit to combat this risk were not taken.

17. In 2006, Sofo changed his approach in form but not in substance as to the confirmation of the Fund's assets held at the Group. Sofo attempted to get confirmation of the Fund's balance held at the Group from the Group's accountant, who was also Peister's personal

accountant. Under GAAS, confirmation from the accountant did not constitute sufficient audit evidence because the accountant was not a third party as required by GAAS. AU § 330.26.

18. Still, Kurcias Jaffe staff first reached out to the accountant on May 2, 2007. After several exchanges between Kurcias Jaffe and the accountant spanning five months, Sofo had still not received what he considered to be a sufficient confirmation from the accountant.

19. On October 16, 2007 the accountant wrote with respect to the supposed $13,213,249 balance due to the Fund from the Group: "The balance is correct based on statements provided to me by North American Globex Group. I have not audited nor reviewed this information and therefore cannot make any opinion on it." Sofo was aware he could not rely on this statement as a confirmation.

20. On November 13, 2007, the accountant slightly revised his October 16 statement regarding the supposed $13,213,249: "The balance is correct based on statements provided to me by North American Globex Group. These statements from [the Group] that I provide for [the Fund] are generated from the electronic online printout of the consolidated online brokerage statements provided by Technicom." Sofo understood from Fund insiders that Technicom was an on-line consolidation of all the brokerage accounts at the Group and that the accountant had access to this. However, Technicom was not an on-line consolidation of all the brokerage accounts held at the Group. Regardless of what he was told, Sofo should have learned for himself what Technicom was, but he did not. Auditing guidance states that "the auditor should perform audit procedures in addition to the use of inquiry to obtain sufficient appropriate audit evidence." AU § 326.35, *Audit Evidence*.

21. On November 15, 2007, Sofo emailed Peister and others stating that he wanted the year-end statements for the Group accounts that were holding the Fund's assets. He also requested the contact information for the brokers of the accounts so he could get confirmation from them directly. Sofo noted that "[d]ue to the relationship between Globex Fund and Globex Group, as well as the fact that the majority of the Funds [sic] assets are held with the Group, these audit procedures are necessary in order for us to issue an audit opinion on the Fund." However, Peister declined to give these items to Sofo, and Sofo did not pursue the matter further.

22. On December 11, 2007, the accountant sent Kurcias Jaffe a compilation report along with the Group's balance sheet, which showed $13,213,249 was due to the Fund. The accountant also sent a list of brokerage accounts with corresponding dollar figures that totaled $13,213,249. Even though the accountant stated in his compilation report that "[a] compilation is . . . the representation of management" and that he did "not express an opinion or any other form of assurance on [the accompanying balance sheet]," Sofo was satisfied with this audit evidence, and that day issued an unqualified opinion of the financial statements for 2006 and 2005.

23. In the end the accountant's "confirmation" was inadequate, and the compilation of the Group's balance sheet the accountant prepared did not offer any audit assurance. In sum, Sofo failed to exercise due professional care, professional skepticism, and failed to obtain sufficient competent evidential matter to support Kurcias Jaffe's unqualified audit opinions.

24. The result was the Fund's audited financial statements were materially misstated. The 2006 audited financial statements showed the balance in the "Investments held by North American Globex Group Inc." line item to be $13,213,249 for 2006. In fact, the total verifiable investment assets actually held by the Group were approximately $73,000 as of December 2006—much less than what was reported in the statements.

25. Sofo also allowed the Fund to make materially false representations in the footnotes to the 2006 financial statements. Note J of those statements stated, "NAGG [the Group] is not independently audited. However, our auditors have received confirmation from NAGG's independent accountant confirming NAGG's assets and liabilities as of December 31, 2006 and the changes in NAGG's net assets for the year ended December 31, 2006." Sofo allowed the language "independent accountant" and "confirmation" even though (1) the accountant was not independent of the Group, and (2) the accountant had not *confirmed* anything. Kurcias Jaffe did not receive a confirmation of the Group's assets and liabilities but a compilation, which explicitly offered no assurance to the reader of the financial statements.

26. Sofo also added an emphasis-of-a-matter paragraph to the unqualified audit opinion drawing attention to Note J. This action, in effect, gave the appearance that the information contained in Note J was particularly informative when in fact, the information was materially inaccurate.

27. Sofo was aware that the Fund's private placement memorandum, which names Sofo explicitly and which Kurcias Jaffe had a copy of in its audit workpapers, stated that the limited partners were supposed to receive a copy of the audited financial statements. Also, in at least one instance Sofo himself sent the 2006 audit opinion and audited financial statements to a limited partner.

28. As a result of the conduct described above, Sofo was a cause of Peister's and Northstar's violations of Sections 17(a)(2) and (3) of the Securities Act. Section 17(a)(2) of the Securities Act specifically prohibits any untrue statements of material fact or material omissions in the offer or sale of securities. Section 17(a)(3) of the Securities Act prohibits engaging in a course of business which operates as a fraud or deceit in the offer or sale of securities.

29. As a result of the conduct described above, Sofo was a cause of Peister's and Northstar's violations of Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder which prohibits fraudulent conduct and makes it fraudulent, deceptive, or manipulative act, practice, or course of business for any investment adviser to a pooled investment vehicle to make false or misleading statements to investors or prospective investors in the pooled investment vehicle.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Respondent Sofo cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and (3) of the Securities Act, and pursuant to Section 203(k) of the Advisers Act, Respondent Sofo cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.

B. Respondent shall, within 14 days of the entry of this Order, pay disgorgement of $4,521 and prejudgment interest of $1,117 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Sofo as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and wire transfer, money order or check shall be sent to Thomas Sporkin, Chief of the Office of Market Intelligence, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5990.

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. 64881 / July 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14466

In the Matter of M.B.A. Holdings, Inc., Medicor Ltd., MidgardXXI, Inc., MidNet, Inc., Nettel Holdings, Inc., and Nexicon, Inc., Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents M.B.A. Holdings, Inc., Medicor Ltd., MidgardXXI, Inc., MidNet, Inc., Nettel Holdings, Inc., and Nexicon, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. M.B.A. Holdings, Inc. (CIK No. 1097273) is a Nevada corporation located in Scottsdale, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). M.B.A. 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 July 31, 2006, which reported a net loss of over $515,000 for the prior nine months. As of July 8, 2011, the company's stock (symbol "MBAH") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Medicor Ltd. (CIK No. 1143799) is a delinquent Delaware corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Medicor 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, 2006, which reported a net loss of over $12.7 million for the prior three months. On June 29, 2007, Medicor filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which was still pending as of July 8, 2011. As of July 8, 2011, the company's stock (symbol "MDCRQ") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. MidgardXXI, Inc. (CIK No. 855109) is a dissolved Delaware corporation located in Boulder, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MidgardXXI 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, 2006, which reported a net loss of over $7 million for the prior nine months. On December 15, 2006, an involuntary Chapter 7 petition was filed against MidgardXXI in the U.S. Bankruptcy Court for the District of Colorado, and the case was still pending as of July 8, 2011. As of July 8, 2011, the company's stock (symbol "MGXX") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. MidNet, Inc. (CIK No. 1080313) is a void Delaware corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MidNet is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB/A for the period ended September 30, 2006, which reported a net loss of over $1 million for the prior nine months. On January 20, 2009, a cease trade order was instituted by the British Columbia Securities Commission against MidNet, Inc. barring it from trading in Canadian markets because of delinquent filings. As of July 8, 2011, the company's stock (symbol "MIDX") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Nettel Holdings, Inc. (CIK No. 1084883) is a dissolved Florida corporation located in Beaverton, Oregon with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Nettel 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 March 31, 2008, which reported a net loss of over $255,000 for the prior three months. As of July 8, 2011, the company's stock (symbol "NTTL") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Nexicon, Inc. (CIK No. 1053113) is a revoked Nevada corporation located in Albuquerque, New Mexico with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Nexicon is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB

for the fiscal year ended December 31, 2005, which reported a net loss of over $3.1 million for the prior fiscal year. As of July 8, 2011, the company's stock (symbol "NXCO") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities 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: Cathy Ahn
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64880 / July 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14465

In the Matter of **bioMETRX, Inc.,** **Biopure Corp.** **(n/k/a PBBPC, Inc.),** **Distributed Energy Systems Corp.,** **Fortified Holdings Corp.,** **Knobias, Inc., and** **One IP Voice, Inc.** **(n/k/a Indian Hill Holdings Corporation),** **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 bioMETRX, Inc., Biopure Corp. (n/k/a PBBPC, Inc.), Distributed Energy Systems Corp., Fortified Holdings Corp., Knobias, Inc., and One IP Voice, Inc. (n/k/a Indian Hill Holdings Corporation).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. bioMETRX, Inc. ("BTRX") [1] (CIK No. 774657) is a void Delaware corporation located in Jericho, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BTRX 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 reported a net loss of $5,183,611

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

for the prior nine months. As of July 8, 2011, the common stock of BTRX was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Biopure Corp. (n/k/a PBBPC, Inc.) ("BPURQ") (CIK No. 815508) is a delinquent Delaware corporation located in Cambridge, Massachusetts with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BPURQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended April 30, 2009, which reported a net loss of $4,149,000 for the prior six months. On July 16, 2009, BPURQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts, and was still pending as of July 8, 2011. As of July 8, 2011, the common stock of BPURQ was quoted on OTC Link, had eleven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Distributed Energy Systems Corp. ("DESCQ") (CIK No. 1261482) is a delinquent Delaware corporation located in Wallingford, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DESCQ 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, 2008, which reported a net loss of $8,433,341 for the prior three months. On June 4, 2008, DESCQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which was closed as of May 24, 2011. As of July 8, 2011, the common stock of DESCQ was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Fortified Holdings Corp. ("FFDH") (CIK No. 1316578) is a revoked Nevada corporation located in Norwalk, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FFDH 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 reported a net loss of $3,023,926 for the prior nine months. As of July 8, 2011, the common stock of FFDH was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Knobias, Inc. ("KBAS") (CIK No. 1161979) is a void Delaware corporation located in Pleasantville, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). KBAS 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 reported a net loss of $3,875,772 for the prior nine months. As of July 8, 2011, the common stock of KBAS was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. One IP Voice, Inc. (n/k/a Indian Hill Holdings Corporation) ("OIVO") (CIK No. 804331) is a Delaware corporation located in East Hartford, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). OIVO 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, 2006, which reported a net loss of $3,698,000 for the prior nine months. On December 13, 2006, OIVO filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Connecticut, which was still pending as of July 8, 2011. As of July 8, 2011, the common stock of OIVO was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

7. As described 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.

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

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

III.

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

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

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

Cathy Ahn

By: Cathy Ahn
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

July 14, 2011

In the Matter of **bioMETRX, Inc.,** **Biopure Corp.** **(n/k/a PBBPC, Inc.),** **Distributed Energy Systems Corp.,** **Fortified Holdings Corp.,** **Knobias, Inc., and** **One IP Voice, Inc.** **(n/k/a Indian Hill Holdings Corporation),** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of bioMETRX, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Biopure Corp. (n/k/a PBBPC, Inc.) because it has not filed any periodic reports since the period ended April 30, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Distributed Energy Systems Corp. because it has not filed any periodic reports since the period ended March 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Fortified Holdings Corp. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Knobias, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of One IP Voice, Inc. (n/k/a Indian Hill Holdings Corporation) because it has not filed any periodic reports since the period ended September 30, 2006.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on July 14, 2011, through 11:59 p.m. EDT on July 27, 2011.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Cathy Ahn
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

July 14, 2011

In the Matter of **M.B.A. Holdings, Inc.,** **Medicor Ltd.,** **MidgardXXI, Inc.,** **MidNet, Inc.,** **Nettel Holdings, Inc., and** **Nexicon, 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 M.B.A. Holdings, Inc. because it has not filed any periodic reports since the period ended July 31, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Medicor Ltd. because it has not filed any periodic reports since the period ended September 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of MidgardXXI, Inc. because it has not filed any periodic reports since the period ended September 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities MidNet, Inc.. because it has not filed any periodic reports since the period ended September 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Nettel Holdings, Inc. because it has not filed any periodic reports since it filed a registration statement on March 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Nexicon, Inc. because it has not filed any periodic reports since it filed a registration statement on 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 July 14, 2011, through 11:59 p.m. EDT on July 27, 2011.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Cathy Ahn
Deputy Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9238 / July 14, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 64890 / July 14, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3241 / July 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14145

In the Matter of

PRISCILLA G. SABADO,

Respondent.

ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b)(6) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940

I.

On November 30, 2010, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings against Priscilla G. Sabado ("Sabado" or "Respondent") pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act").

II.

In connection with these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the

Commission's jurisdiction over her and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, and Section 203(f) of the Advisers Act ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

A. RESPONDENT

Sabado, 61, resides in Irvine, California and worked as both a broker-dealer and investment adviser representative at AXA Advisors, LLC until April 1, 2010. Currently, Sabado is unemployed.

B. RELEVANT ENTITIES

1. **AXA Advisors, LLC ("AXA")** is a Delaware limited liability company headquartered in New York, New York. AXA, which is a subsidiary of AXA Financial, Inc., became a Commission-registered broker or dealer on December 30, 1973, and a Commission-registered investment adviser on July 19, 1999.

2. **Halek Energy, LLC** is a Texas limited liability company located in Southlake, Texas, that purports to drill and operate oil and gas wells in Texas. On August 31, 2010, the Commission filed a partially settled civil injunctive action alleging that between June 2007 and September 2009, Halek Energy, CBO Energy, Inc., and Jason Halek fraudulently sold investments in Texas oil and gas projects, raising approximately $22 million from 300 investors nationwide. *SEC v. Halek Energy, LLC, et al.*, Civil Action No. 3:10-cv-0719-K (N.D. Tex.), Lit. Release No. 21637 (Sept. 1, 2010).

C. MATERIAL MISREPRESENTATIONS AND OMISSIONS

1. From August 2008 to November 2009, Sabado offered and sold Halek Energy, LLC and CBO Energy, Inc. (collectively "Halek Energy") oil and gas working interests to several of her clients. While soliciting her clients, Sabado made material misrepresentations and omissions regarding the risks of the returns, the projected returns and her family's investment. As a result of Sabado's recommendations, six of her clients purchased working interests in Halek Energy oil and gas leases in the aggregate amount of $491,880.

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

2. Sabado, who had no experience in selling or investing in oil and gas working interests, did no meaningful due diligence on Halek Energy or the investments it was selling. Halek Energy agreed to pay Sabado an 8% to 10% commission for each working interest sold, which it paid in the form of working interests in one of its projects.

3. Sabado offered and sold Halek Energy working interests to her AXA clients. In doing so, she violated AXA's compliance policies and procedures prohibiting selling away and requiring disclosure to, and approval by, the firm of all outside business. Sabado was aware of AXA's requirement that she obtain AXA's approval prior to selling oil and gas working interests and failed to obtain the required approval. She also failed to disclose her Halek Energy sales on her annual outside business activities forms.

4. In addition, she made several material misrepresentations and omissions while offering the oil and gas working interests to her clients. For example, Sabado told some of her clients to expect monthly "dividends" of $1,200 to $2,500, beginning within three months of their initial investment. Sabado also falsely represented to some investors that her family invested in Halek Energy. In reality, her relatives received their working interests as compensation for Sabado's sales. Further, Sabado falsely told certain investors that her family was receiving $5,000 a month from their Halek Energy investment.

5. Sabado also failed to adequately disclose the risks involved in the oil and gas investments, telling her clients that the project included a proven well and that they would "most likely" receive the promised returns. Sabado assured one of her clients, a financially unsophisticated 24-year-old blind man, that he would receive $2,500 to $5,000 from his Halek Energy investment. She even instructed him to represent in Halek Energy subscription documents that he was a sophisticated, accredited investor, when he was not. In reality, he was an unaccredited investor seeking a safe, income-producing product for over $139,000 he received as part of the settlement of a lawsuit over the accident that caused his blindness.

6. Sabado continued to solicit new sales of Halek Energy oil and gas projects even after her earlier clients complained that they were not receiving the promised returns. In particular, in November 2009, Sabado recommended that two clients, one of whom was unaccredited, buy another Halek Energy oil and gas project, telling these clients that they would receive significant monthly income. She failed to tell them, however, that her other clients had yet to receive their projected returns from similar Halek Energy investments.

D. VIOLATIONS

Based on the foregoing, the Commission finds that Respondent willfully violated:

1. Sections 5(a) and 5(c) of the Securities Act, which prohibit the offer or sale of any security, absent an exemption, when no registration statement has been filed or is in effect as to the security.

2. Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

3. Section 15(a) of the Exchange Act, which prohibits persons or entities, while acting as a broker or dealer, from effecting transactions in or attempting to induce the purchase or sale of securities when such person or entity was not registered with the Commission as a broker or dealer or when such person was not associated with an entity registered with the Commission as a broker or dealer.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, and Section 203(f) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Sabado shall cease and desist from committing or causing any violations and any future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent Sabado be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock,

with the right to apply for reentry after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

D. Respondent shall, within ten (10) days of the entry of this Order, pay disgorgement of $2,341 and prejudgment interest of $275 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Sabado as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and wire transfer, money order or check shall be sent to Stephen Korotash, Division of Enforcement, Securities and Exchange Commission, Burnett Plaza, Suite 1900, 801 Cherry Street, Unit 18, Fort Worth, TX, 76102.

E. Respondent shall pay a civil penalty of $25,000 to the United States Treasury. Payment shall be made in the following installments:

1. $10,000 on August 1, 2011 or ten (10) days following the entry of this order, whichever is earlier;
2. $1,363.63 on or before August 15, 2011;
3. $1,363.63 on or before September 15, 2011;
4. $1,363.63 on or before October 15, 2011;
5. $1,363.63 on or before November 15, 2011;
6. $1,363.63 on or before December 15, 2011;
7. $1,363.63 on or before January 15, 2012;
8. $1,363.63 on or before February 15, 2012;
9. $1,363.63 on or before March 15, 2012;
10. $1,363.63 on or before April 15, 2012;
11. $1,363.63 on or before May 15, 2012; and
12. $1,363.63 on or before June 15, 2012.

If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Penalty payments shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Sabado as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and wire transfer, money order or check shall be sent to Stephen Korotash, Division of Enforcement, Securities and Exchange Commission, Burnett Plaza, Suite 1900, 801 Cherry Street, Unit 18, Fort Worth, TX, 76102.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
not participating

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-29726; 812-13910]

BAC Home Loans Servicing, LP, et al.; Notice of Application and Temporary Order

July 18, 2011

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

Action: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against BAC Home Loans Servicing, LP ("HLS") on May 31, 2011 by the United States District Court for the Central District of California (the "Injunction"), until the Commission takes final action on an application for a permanent order. Applicants have requested a permanent order.

Applicants: HLS, BofA Advisors, LLC ("BofA Advisors"), BofA Distributors, Inc. ("BofA Distributors"), Bank of America Capital Advisors LLC ("BACA"), KECALP Inc. ("KECALP"), Merrill Lynch Ventures, LLC ("Ventures") and Merrill Lynch Global Private Equity Inc. ("MLGPE") (collectively, other than HLS, the "Fund Servicing Applicants," and, together with HLS, the "Applicants").[1]

Filing Date: The application was filed on May 27, 2011 and amended it on June 1, 2011.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally

1 Applicants request that any relief granted pursuant to the application also apply to any other company of which HLS is an affiliated person or may become an affiliated person in the future (together with the Applicants, the "Covered Persons").

or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 12, 2011, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. Applicants, HLS, 6400 Legacy Drive, Plano, TX 75024; BofA Advisors, BofA Distributors and BACA, 100 Federal Street, Boston, MA 02110; and KECALP, Ventures and MLGPE, 767 Fifth Avenue, 7th Floor, New York, NY 10153.

For Further Information Contact: Jaea F. Hahn, Senior Counsel, at (202) 551-6870, or Daniele Marchesani, Branch Chief, at (202) 551-6821 (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a temporary order and a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or an applicant using the Company name box, at http://www.sec.gov/search/search.htm or by calling (202) 551-8090.

Applicants' Representations:

1. Each of the Applicants is a direct or indirect wholly-owned subsidiary of Bank of America Corporation ("BAC"). HLS is an entity that services mortgage loans and provides mortgage services, including conducting foreclosures on mortgages, on behalf of holders of residential mortgages and mortgage loan asset-backed certificates. HLS is not

registered as a broker-dealer under the Securities Exchange Act of 1934 or as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act").

2. BofA Advisors is a registered investment adviser that serves as investment adviser and subadviser to certain money market funds registered under the Act. BofA Distributors, a limited purpose broker-dealer registered with the Commission, serves as principal underwriter of some of the same money market funds. BACA is a registered investment adviser that serves as investment adviser to certain closed-end investment companies also registered under the Act.

3. KECALP, Ventures and MLGPE each serves as investment adviser to certain employees' securities corporations within the meaning of section 2(a)(13) of the Act ("ESCs"). Of these three ESC advisers, only KECALP is registered as an investment adviser under the Advisers Act.

4. On May 31, 2011, the United States District Court for the Central District of California entered the Injunction against HLS, formerly Countrywide Home Loans Servicing LP, in a matter brought by The United States Department of Justice ("DOJ"). The complaint filed by DOJ ("Complaint") alleged that, between 2006 and 2009, HLS wrongfully foreclosed without court orders on approximately 160 properties owned by servicemembers protected by the Servicemembers Civil Relief Act ("SCRA"). Additionally, the Complaint alleged that HLS, from 2006 through May 31, 2009, failed to consistently determine the military status of mortgage loan borrowers in foreclosure. Denying any wrongdoing as alleged by the United States or otherwise, HLS consented to the entry of the Injunction against violating the SCRA.

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from acting as a bank, or from engaging in or continuing any conduct or practice in connection with such activity, from acting, among other things, as an investment adviser or depositor of any registered investment company, or a principal underwriter for any registered open-end investment company, registered unit investment trust ("UIT") or registered face-amount certificate company. Section 9(a)(3) of the Act extends the prohibitions of section 9(a)(2) to a company any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include, among others, any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicants state that HLS is, or may be considered to be, under common control with and therefore an affiliated person of each of the other Applicants. Applicants state that the entry of the Injunction may result in Applicants being subject to the disqualification provisions of section 9(a) of the Act because HLS is permanently enjoined from engaging in or continuing particular conduct or practice in connection with banking activity.[2]

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) if it is

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[2] See In the Matter of Bank of America, N.A., The Office of the Comptroller of the Currency Stipulation & Consent Order No. AA-EC-11-12 (Apr. 13, 2011) and In the Matter of Bank of America Corporation, The Board of Governors of the Federal Reserve Consent Order, No. 11-029-B-HC (Apr. 13, 2011). Applicants state that the OCC Order deemed certain loan servicing activity as banking activity, and the loan servicing activity specified in the Injunction is a subset of the loan servicing activity deemed banking activity by the OCC Order. Therefore, Applicants believe that HLS is permanently enjoined from engaging in or continuing particular conduct or practice in connection with banking activity.

established that these provisions, as applied to Applicants, are unduly or disproportionately severe or that the Applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting the Applicants and the other Covered Persons from the disqualification provisions of section 9(a) of the Act. On June 1, 2011 the Applicants received a temporary conditional order from the Commission exempting them from section 9(a) of the Act with respect to the Injunction until the Commission takes final action on an application for a permanent order or, if earlier, July 29, 2011.[3]

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the conduct giving rise to the Injunction did not involve any of the Applicants acting in the capacity as investment adviser, sub-adviser, or principal underwriter (as defined in section 2(a)(29) of the Act) for any registered investment companies ("RIC") or ESCs (together, the "Funds"). Applicants state that to the best of their knowledge none of the Applicants' current directors, officers or employees who is involved in providing services as investment adviser, subadviser or depositor for any Funds or principal underwriter (as defined in section 2(a)(29) of the Act) for any registered open-end company, UIT or registered face amount certificate company

3 Investment Company Act Release No. 29688 (June 1, 2011).

(collectively, the "Fund Servicing Activities") (or any other persons in such roles during the time period covered by the Complaint) participated in the conduct alleged in the Complaint that constitutes the violations that provide a basis for the Injunction. Applicants also state that the alleged conduct giving rise to the Injunction did not involve any Fund for which an Applicant provided Fund Servicing Activities.

5. Applicants further represent that the inability of Applicants (except for HLS) to continue providing Fund Servicing Activities would result in potentially severe financial hardships for both the Funds and their shareholders. Applicants state that they will distribute written materials, including an offer to meet in person to discuss the materials, to the board of directors (the "Boards") of each Fund (excluding the ESCs), including the directors who are not "interested persons," as defined in section 2(a)(19) of the Act, of such Fund, and their independent legal counsel as defined in rule 0-1(a)(6) under the Act, if any, regarding the Injunction, any impact on the Funds, and the application. The Applicants will provide the Funds with all information concerning the Injunction and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also assert that, if the Applicants were barred from engaging in Fund Servicing Activities, the effect on their businesses and employees would be severe. The Applicants state that they have committed substantial resources to establishing expertise in providing Fund Servicing Activities.

7. Applicants also state that disqualifying KECALP, Ventures and MLGPE from continuing to provide investment advisory services to their ESCs is not in the public interest or in furtherance of the protection of investors and would frustrate the expectations

of eligible employees who invest in the ESCs that the ESCs would be managed by an affiliate of their employer.

8. Applicants state that several Applicants and certain of their affiliates have previously received orders under section 9(c), as described in greater detail in the application.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

> Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application, or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order:

The Commission has considered the matter and finds that Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

IT IS HEREBY ORDERED, pursuant to section 9(c) of the Act, that the Applicants and the other Covered Persons are granted a temporary exemption from the provisions of section 9(a), effective forthwith, solely with respect to the Injunction, subject to the condition in the application, until the date the Commission takes final action on their application for a permanent order.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9239 / July 18, 2011

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 64898 / July 18, 2011

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3242 / July 18, 2011

INVESTMENT COMPANY ACT OF 1940
Rel. No. 29725 / July 18, 2011

Admin. Proc. File No. 3-14081

In the Matter of JOHN P. FLANNERY and JAMES D. HOPKINS	ORDER GRANTING EXTENSION

I.

The Chief Administrative Law Judge, who is presiding over this proceeding, has moved, pursuant to Commission Rule of Practice 360(a)(3),[1] for an extension of time to issue her initial decision. For the reasons set forth below, we have determined to grant the law judge's motion.

On September 30, 2010, we issued an Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") against John P. Flannery and James D. Hopkins, who were, during the period at issue, employees of State Street Bank and Trust Company ("State Street"), and associated with SSgA Funds Management, Inc., a registered investment adviser and affiliate of State Street. The OIP alleges, among other things, that, during the subprime mortgage crisis in 2007, State Street, Hopkins and Flannery engaged in a course of business and made material misrepresentations and omissions that misled investors about the extent of subprime

[1] 17 C.F.R. § 201.360(a)(3).

mortgage-backed securities held in certain unregistered funds under State Street's management in violation of antifraud provisions of the securities laws.[2]

The OIP directs the presiding law judge to hold a public hearing to take evidence regarding the allegations and the appropriate sanctions, and to issue an initial decision no later than 300 days from the date of service of the OIP, *i.e.*, by August 1, 2011. On June 28, 2011, the Chief Administrative Law Judge filed a motion pursuant to Commission Rule of Practice 360(a)(3)[3] requesting an extension of time until October 31, 2011 to issue such decision.

II.

We adopted Rules of Practice 360(a)(2) and 360(a)(3) as part of an effort to enhance the timely and efficient adjudication and disposition of Commission administrative proceedings,[4] setting mandatory deadlines for completion of administrative hearings. We further provided for the granting of extensions to those deadlines under certain circumstances, if supported by a motion from the Chief Law Judge.

The Chief Administrative Law Judge supports her extension request by stating that the initial decision cannot be issued within the specified time "because of the size of this particular record and the Office workload," noting that the "record consists of over 3,000 transcript pages reflecting eleven days of hearing, approximately 500 exhibits, and lengthy briefs." The law judge further states that her office currently is assigned a "record number of proceedings" and that their resources are strained because they currently have just two law clerks instead of the customary four. Under the circumstances, we believe it is appropriate in the public interest to grant the Chief Law Judge's request and to extend the deadline for issuance of a decision in this matter.

Accordingly, IT IS ORDERED that the deadline for filing the initial decision in this matter be, and it hereby is, extended until October 31, 2011.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secret

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[2] Specifically, the OIP alleges violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5.

[3] 17 C.F.R. § 201.360(a)(3).

[4] *See Adopting Release*, Securities Act Rel. No. 8240 (June 11, 2003), 80 SEC Docket 1463.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 64897 / July 18, 2011

Admin. Proc. File No. 3-13881

In the Matter of

AMERICAN STELLAR ENERGY, INC.
(n/k/a TARA GOLD RESOURCES CORP.)
c/o William T. Hart
Hart & Trinen, LLP
1624 Washington Street
Denver, CO 80203

OPINION OF THE COMMISSION

SECTION 12(j) PROCEEDING

Grounds for Remedial Action

Failure to Comply with Periodic Filing Requirements

Company failed to file periodic reports in violation of Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13. *Held*, it is necessary and appropriate for the protection of investors to revoke the registration of the company's securities.

APPEARANCES:

William T. Hart, of Hart & Trinen, LLP, for American Stellar Energy, Inc. (n/k/a Tara Gold Resources Corp.)

Frederick L. Block, *Neil J. Welch, Jr.*, and *David S. Frye*, for the Division of Enforcement.

Appeal filed: September 28, 2010
Last brief received: December 15, 2010

I.

American Stellar Energy, Inc. (n/k/a Tara Gold Resources Corp.) ("Tara Gold" or the "Company") appeals from an administrative law judge's decision finding that the Company violated Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13 by failing to file required annual and quarterly reports and, on that basis, revoking the registration of the Company's securities.[1] We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

This case concerns repeated failures by Tara Gold to file Exchange Act periodic reports. The Company became subject to these reporting requirements based on the registration of its common stock pursuant to Exchange Act Section 12(g).[2] The relevant facts are as follows.

A. Background

Tara Gold is a Nevada corporation located in Wheaton, Illinois. Tara Gold, then known as Westnet Communications Group, Inc., filed a registration statement to register its common stock under Section 12(g) of the Exchange Act, which registration statement became effective on April 18, 2000. In 2003, the Company changed its name to American Stellar Energy, Inc.

From the time of the initial registration of the Company's securities in April 2000 until the date of its quarterly report on Form 10-QSB for the period ending March 31, 2002,[3] the Company remained current in its periodic filings with one exception.[4] On August 14, 2002, the Company filed a notice on Form 12b-25 of its inability to file timely its quarterly report for the period ended June 30, 2002, but it ultimately never made this filing.[5] The Company made no

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[1] Exchange Act Section 13(a) requires issuers of securities registered pursuant to Exchange Act Section 12 to file periodic reports in accordance with Commission rules. 15 U.S.C. § 78m(a). Rule 13a-1, 17 C.F.R. § 240.13a-1, requires issuers to file annual reports, and Rule 13a-13, 17 C.F.R. § 240.13a-13, requires issuers to file quarterly reports.

[2] 15 U.S.C. § 78*l*(g).

[3] From the time of its initial registration to present, Tara Gold operated on a calendar year fiscal year basis.

[4] The Company's initial quarterly report for the first quarter of fiscal year 2000 was due on May 15, 2000, but the Company did not make this filing until January 24, 2002. Otherwise, all of the Company's filings were timely until the second quarter of fiscal year 2002.

[5] *See* Exchange Act Rule 12b-25, 17 C.F.R. § 240.12b-25(a) (requiring issuers to (continued...)

filings between August 14, 2002, and December 16, 2004. The Company filed delinquent annual reports on Form 10-KSB for fiscal years 2002 and 2003 on December 16 and 21, 2004, respectively. The Company filed delinquent quarterly reports for the first three quarters of fiscal year 2003 in March 2005.

By October 2005, the Company had not filed: (1) quarterly reports for the second and third quarters of 2002; (2) quarterly reports for the first three quarters of fiscal year 2004; (3) its annual report for fiscal year 2004: and (4) quarterly reports for the first two quarters of fiscal year 2005. On October 24, 2005, the Commission's Division of Corporation Finance ("Corporation Finance") sent the Company a notice informing it that the Company appeared to be out of compliance with its periodic reporting requirements under the Exchange Act and that, if it failed to come into compliance within fifteen days, it could be subject to an administrative proceeding to revoke the registration of its securities. On November 3, 2005, the Company requested from Corporation Finance that it not be required to file its Forms 10-QSB for 2004 because the Company had "changed its direction" and those reports "would not be meaningful," but Corporation Finance denied this request. The Company initially proposed a schedule under which it would have filed the 2004 annual report by December 15, 2005. The Company subsequently revised the proposed date by which it would file the annual report to "no later than December 30, 2005," and stated that it would file the 2004 quarterly reports by January 31, 2006.

After further discussions between the Company and Corporation Finance, the Company filed its annual report for fiscal year 2004 on Form 10-KSB on December 16, 2005, which was more than eight months past its due date.[6] During the period covered by the 2004 Form 10-KSB, the Company described its business as "the acquisition, development, production, exploration for, and sale of oil and gas productions in Texas." In January and February 2006, the Company filed its delinquent quarterly reports for the first three quarters of fiscal year 2004 on Form 10-QSB. On March 17, 2006, the Company filed a current report on Form 8-K disclosing that it had amended its Articles of Incorporation to change the Company's name to Tara Gold Resources Corp.

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[5] (...continued)
provide notice of inability to file a periodic report, along with supporting reasons, by filing a Form 12b-25 "no later than one business day after the due date" for such report); 17 C.F.R. § 249.322 (Form 12b-25). By filing a timely Form 12b-25, an issuer automatically receives an additional five calendar days to file quarterly reports and an additional fifteen calendar days to file annual reports.

[6] Rule 13a-1 provides that "[a]nnual reports shall be filed within the period specified in the appropriate form." At the time, Forms 10-KSB and 10-QSB could be filed in lieu of Forms 10-K and 10-Q, by a company that is a "small business issuer." A "small business issuer" is defined as a company that, among other requirements, has revenues of less than $25 million and is not an investment company. General Instruction A to Form 10-KSB requires that "[a]nnual reports on this form shall be filed within 90 days after the end of the fiscal year covered by the report." *See* 17 C.F.R. § 228.10(a)(1).

By August 2006, Tara Gold had not filed: (1) its annual report for fiscal year 2005: (2) its quarterly reports for the first three quarters of fiscal year 2005; and (3) its quarterly report for the first quarter of fiscal year 2006. On August 4, 2006, Tara Gold informed Corporation Finance that: (1) it expected to file its delinquent annual report for fiscal year 2005 by October 31, 2006; (2) it expected to file its delinquent quarterly reports for the first three quarters of fiscal year 2005 by December 31, 2006;[7] (3) it expected to file its quarterly reports for 2006 by March 31, 2007; and (4) it expected to file its annual report for 2006 timely. Although the Company ultimately made all of its required filings for fiscal years 2005 and 2006, it failed to follow the schedule set forth in its proposal. The Company's Form 10-KSB for fiscal year 2005 was filed on March 22, 2007, almost one year past its due date. It stated that the Company "sold its oil and gas properties after it determined that these properties were not economical" and that the Company's new business involved the acquisition of "low-cost [mining] properties that have the potential to yield high returns." Tara Gold subsequently filed its delinquent Forms 10-QSB for the first three quarters of fiscal year 2005 during April and May 2007. On August 16, October 18, and November 1, 2007, respectively, Tara Gold filed its delinquent Forms 10-QSB for the first three quarters of fiscal year 2006. The Company did not file its annual report for fiscal year 2006 until April 4, 2008.[8]

On April 22, May 12, and July 10, 2008, Tara Gold filed its delinquent Forms 10-QSB for the first three quarters of fiscal year 2007. These were the last filings the Company made prior to the institution of the current proceedings.

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[7] In its November 2005 letter requesting that the Company not be required to file quarterly reports for the first three quarters of 2004, the Company stated that it would file the quarterly reports for the first three quarters of 2005 by December 31, 2005. It subsequently revised that date to February 28, 2006. The next communication from the Company regarding the still-delinquent 2005 quarterly reports was the August 4, 2006 letter discussed above.

[8] On March 29, 2007, the Company filed a timely Notification of Late Filing for the 2006 annual report, using Form 12b-25. However, this notice only provided the Company an additional fifteen calendar days to file the Form 10-KSB, and it did not do so for more than a year.

B. Institution of Administrative Proceedings

On May 6, 2010, the Commission issued an Order Instituting Proceedings ("OIP") against Tara Gold and six other issuers.[9] The OIP stated, "American Stellar 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." As a result, the OIP alleged that Tara Gold "failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder."

In its May 14, 2010, answer to the OIP, Tara Gold stated that it "intend[ed] to file all delinquent reports required by the Exchange Act." During a pre-hearing conference on June 11, 2010, Tara Gold stated that it would file its delinquent Form 10-KSB for fiscal year 2007 "by the end of next week, no later than the end of the month." The Company further stated that, by September 30, 2010, "all of the delinquent reports will be brought current." After the law judge stated that the proposed September 30 date was "too late," the Company's auditor stated that he believed the delinquent filings could be made by the end of August 2010.

On July 2, 2010, Tara Gold filed its annual report for fiscal year 2007 on Form 10-K. Corporation Finance reviewed the 2007 Form 10-K and found no material deficiencies. This was the last filing made by the Company prior to September 7, 2010, when the law judge issued his Initial Decision. Finding no genuine issue with regard to any material fact, the law judge granted summary disposition to the Division of Enforcement[10] and revoked the Exchange Act registration of Tara Gold's securities. The law judge found that "Tara Gold is delinquent in filing two annual reports (for the calendar years ended 2008 and 2009) and eight quarterly reports (for the periods ended March 31, June 30, and September 30, 2008; March 31, June 30, and September 30, 2009;

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[9] The six other issuers in the OIP were Alyn Corp., American Holding Investments, Inc., American Midland Corp., American Millennium Corp., American Pallet Leasing, Inc., and Amwest Environmental Group, Inc. On June 10, 2010, the Commission issued orders, pursuant to settlement agreements, revoking the registration of the securities of American Midland Corp. and American Millennium Corp. Securities Exchange Act Rel. No. 62253 (June 10, 2010), 98 SEC Docket 28996, 28997, and Exchange Act Rel. No. 62254 (June 10, 2010), 98 SEC Docket 28998, 28999, respectively. On June 23, 2010, an administrative law judge made findings and entered an order revoking the registration of the securities of Alyn Corp., American Pallet Leasing, Inc., and Amwest Environmental Group, Inc., due to their failure to file answers to the OIP. Exchange Act Rel. No. 62360 (June 23, 2010), 98 SEC Docket 29432. Although American Holding Investments, Inc. filed an answer to the OIP, it failed to respond to the Division of Enforcement's motion for summary disposition before the law judge. Accordingly, the law judge entered an order revoking the registration of its securities. Exchange Act Rel. No. 62696, 99 SEC Docket 31240, 31241 (Aug. 12, 2010).

[10] *See* Commission Rule of Practice 250, 17 C.F.R. § 201.250 ("The hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law").

and March 31 and June 30, 2010)." As a result, the law judge found that "Tara Gold has proven incapable of meeting its obligations as a Section 12 registrant."

C. Filings During the Pending Appeal

On September 28, 2010, Tara Gold appealed the Initial Decision to the Commission. In its initial brief on appeal, Tara Gold stated that it "plans on filing all delinquent reports as soon as possible and plans to remain current." The Company did not, however, propose dates by which its filings would be made current.

On December 9, 2010, the Company filed its delinquent annual report for fiscal year 2009 on Form 10-K. On December 23, 2010, January 3, 2011, and January 14, 2011, respectively, the Company filed its delinquent quarterly reports on Form 10-Q for the first three quarters of fiscal year 2010. On April 19, 2011, the Company filed its delinquent quarterly report on Form 10-Q for the quarter ended March 31, 2009. On April 19, 2011, Tara Gold also filed a delinquent Form 10-K for fiscal year 2010.[11] As of the date of this opinion, Tara Gold has not filed an annual report for fiscal year 2008, nor has it filed any quarterly reports for the first three quarters of fiscal year 2008 or for the quarters ended June 30 and September 30, 2009.[12] On May 23, 2011, Tara Gold timely filed its quarterly report for the quarter ended March 31, 2011, after obtaining an automatic five-calendar-day extension by filing a timely Form 12b-25 on May 16, 2011.[13]

III.

Exchange Act Section 13(a) requires issuers of securities registered under Exchange Act Section 12 to file periodic and other reports with the Commission. Exchange Act Rules 13a-1 and 13a-13 require such issuers to file annual and quarterly reports. The Company does not deny that, as of the date of the Initial Decision, it had failed to file the periodic reports specified in the OIP (with the exception of the 2007 Form 10-K). To date, Tara Gold has not filed an annual report for fiscal year 2008, nor has it filed any of its required quarterly reports for the first three

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[11] The 2010 Form 10-K was due on March 31, 2011, but the Company filed a timely Form 12b-25 stating that it would be unable to prepare the annual report by that date. This notice provided the Company with an additional fifteen calendar days to file its 2010 10-K. Under Rule 12b-25, the report was due on April 15, 2011, but Tara Gold did not file the 10-K until April 19. Thus, the 2010 10-K was not filed timely.

[12] On January 26, 2011, the Company filed a Form 8-K, stating that it intended to file its quarterly reports for the first three quarters of fiscal year 2009 "shortly." The Form 8-K made no mention of Tara Gold's other delinquent filings.

[13] The attached Appendix lists all of the Company's filings since its initial delinquent filing in 2002, including the due dates, the dates (if any) by which Tara Gold promised to make the filing, and the date (if any) that the filing was ultimately made.

quarters of fiscal year 2008 and for the second and third quarters of 2009. In addition, all of the reports it has filed after the issuance of the OIP have been delinquent, with the exception of the March 2011 quarterly report. Accordingly, we find that the Company has violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

Exchange Act Section 12(j) authorizes us, "as [we] deem[] necessary or appropriate for the protection of investors," to suspend (for a period not exceeding twelve months) or revoke the registration of a security, if we find that an issuer has failed to comply with any provision of the Exchange Act or its rules and regulations.[14] In determining the appropriate sanction under Exchange Act Section 12(j), we are guided by the analysis set forth in *Gateway International Holdings, Inc.*[15] In *Gateway*, we held that our sanctions determination "turns on the effect on the investing public, including both current and prospective investors, of the issuer's violations, on the one hand, and the Section 12(j) sanctions, on the other hand."[16] We set forth a list of non-exclusive factors to be considered in making this determination, including (i) the seriousness of the issuer's violations; (ii) the isolated or recurrent nature of the violations; (iii) the degree of culpability involved; (iv) the extent of the issuer's efforts to remedy its past violations and ensure future compliance; and (v) the credibility of its assurances, if any, against further violations.[17]

Tara Gold's violations of its reporting obligations are serious. Corporation Finance informed the Company of its delinquencies and provided it with repeated opportunities to become current, yet the Company failed to file two delinquent annual reports and eight quarterly reports as of the date of the Initial Decision. By failing to make the required filings, it deprived both existing and prospective holders of its registered stock of the ability to make informed investment decisions based on current and reliable information, including audited financial statements, about the Company's operations and financial condition.[18]

Tara Gold's violations were recurrent and have extended over a lengthy period. Although the OIP and the Initial Decision only made reference to the delinquency of the Company's filings since the time Tara Gold filed its September 30, 2007 Form 10-QSB, the delinquency extends even farther back. Tara Gold did not make a timely periodic filing between May 16, 2002 (when it filed a timely quarterly report for the first quarter of fiscal year 2002), and May 23, 2011 (when it filed a timely quarterly report for the first quarter of fiscal year 2011). For significant periods

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14 15 U.S.C. § 78*l*(j).

15 Exchange Act Rel. No. 53907 (May 31, 2006), 88 SEC Docket 430.

16 *Id.* at 439.

17 *Id.*

18 *See Impax Labs., Inc.*, Exchange Act Rel. No. 57864 (May 23, 2008), 93 SEC Docket 6241, 6251 (finding issuer's failure to file six quarterly and two annual reports over the course of eighteen months to be serious and recurrent violations).

during this time (*e.g.*, May 16, 2002 -December 16, 2004; February 9, 2006 - March 22, 2007; and July 10, 2008 - July 2, 2010), the Company failed to file any periodic reports. The Company was aware of its ongoing obligation to file its Exchange Act reports, having received multiple reminders and warnings from Corporation Finance staff. Despite these warnings, the institution of these proceedings, and its asserted intention to return to compliance, the Company did not file its delinquent annual report for 2009 until after briefing commenced in this appeal, and it continues not to have filed its annual report for 2008 and certain of its required quarterly reports. This pattern of filing delinquencies establishes that Tara Gold's violations are recurrent. We have held that a respondent's recurrent failure to file its periodic reports on time is "so serious" a violation of the Exchange Act that only a "strongly compelling showing" regarding the other *Gateway* factors would justify a sanction less than revocation.[19] Moreover, such a "long history of ignoring . . . reporting obligations" under the Exchange Act evidences a "high degree of culpability."[20]

Tara Gold's efforts to remedy its past violations and ensure future compliance have yet to bring the Company into compliance with its reporting obligations. Although Tara Gold has made some of its delinquent filings since the issuance of the Initial Decision, the Company has still not made a number of the filings specified in the OIP. Further, the Company's current filings since the date of the Initial Decision have all been delinquent, with the exception of the March 2011 quarterly report. Tara Gold's continued delinquency indicates that it has not made the "strongly compelling showing" necessary under *Gateway* to justify a lesser sanction than revocation.

In determining whether an issuer's assurances against future violations are credible, one factor we consider is whether the issuer is able to adhere to reasonable schedules that the issuer has proposed for the fulfillment of delinquent filing obligations.[21] Tara Gold has repeatedly provided assurances that it would become current with its filing obligations by specific dates, but has failed to adhere to the schedules that the Company itself set, often missing the proposed dates by months or, in some cases, years. After Corporation Finance's October 2005 delinquency notice, the Company provided assurances on several occasions that it would become current with its filings for fiscal years 2004 through 2007 according to schedules proposed by the Company, but repeatedly failed to make its filings by the proposed dates. After the issuance of the OIP, during the pre-hearing conference before the law judge, Tara Gold made assurances that it would

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[19] *Nature's Sunshine Products, Inc.*, Exchange Act Rel. No. 59268 (Jan. 21, 2009), 95 SEC Docket 13488, 13500; *Impax*, 93 SEC Docket at 6252.

[20] *America's Sports Voice, Inc.*, Exchange Act Rel. No. 55511 (Mar. 22, 2007), 90 SEC Docket 879, 884.

[21] *See Nature's Sunshine*, 95 SEC Docket at 13499 ("[T]he Company has yet to return to full compliance . . . and has needed 'substantially more time than anticipated' to remedy its many delinquencies, 'making us unconvinced that it is realistic to expect that the Company can become current entirely in its reporting obligations in the foreseeable future.'" (quoting *Impax*, 93 SEC Docket at 6254)).

become current with its delinquent filings by the end of August 2010, but the Company filed only its 2007 Form 10-K by that date. The Company also filed a Form 8-K in January 2011, stating that it intended to file its quarterly reports for the first three quarters of 2009 "shortly," but the only such report it has filed is the Form 10-Q for the first quarter of 2009, on April 19, 2011.

Despite the Company's continued assertions on appeal that it intends to become current with its filing obligations, Tara Gold remains delinquent in the filing of its fiscal year 2008 audited annual report, two of its 2002 quarterly reports, all of its 2008 quarterly reports, and two of its 2009 quarterly reports. Its Form 10-Q for the third quarter of 2010 and its annual report for 2010, which were due after Tara Gold had filed this appeal, were filed late. Further, the Company has provided no specific dates in its briefs on appeal by which it intends to come into full compliance by filing all of its delinquent reports. Such a pattern of repeated non-compliance undermines the credibility of the Company's claims that it intends to comply by making timely periodic reports in the future.

We also have found revocation of registration to be in the public interest where an issuer's subsequent filings contained material deficiencies.[22] According to Tara Gold, "[T]he 2009 10-K report contains Tara Gold's audited financial statements for the years ended December 31, 2009 and 2008." However, the Company's inclusion of 2008 audited financial statements in the 2009 Form 10-K does not satisfy Tara Gold's obligation under Rule 13a-1 to file a separate annual report for fiscal year 2008,[23] which it has not done. The 2009 annual report did not provide important information that would have been included in a properly filed 2008 Form 10-K, including a comparison of the Company's audited 2008 financials against its audited 2007 financials; required certifications by the Company as to the accuracy of the report, including these comparisons; and certifications by management as to the effectiveness of the Company's disclosure controls and procedures, as well as of its internal controls over financial reporting, as of December 31, 2008. The 2009 Form 10-K also did not include 2009 quarterly financial data for the Company, even though two of the required 2009 quarterly reports were never filed. The purpose of the periodic reporting requirements is to supply the investing public with current, accurate financial information about an issuer so that investors may make informed decisions.[24] The Company's continuing failure to file its audited annual report for fiscal year 2008 leaves investors lacking critical information necessary to make informed investment decisions, and its inclusion of 2008 financial information in the 2009 Form 10-K does not cure this deficiency. Tara Gold's failure to recognize the importance of providing this information to its investors undermines the credibility of its assurances of future compliance with its reporting obligations.

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22 *Nature's Sunshine*, 95 SEC Docket at 13498 (identifying material deficiencies in reports filed during the pendency of appeal).

23 *e-Smart Techs., Inc.*, 57 S.E.C. 964, 965 n.3 (2004) (stating that the "rules do not provide for the filing of consolidated annual reports").

24 *Id.* at 968 n.13 (citing *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977)).

Tara Gold also failed to include certain required information in the other filings that it has made after the date of the OIP. For example, the Forms 10-Q for the first quarter of 2009, all three 2010 quarterly reports, and the Form 10-Q for the first quarter of 2011 do not include a statement of stockholders' equity from the Company's inception, as required by the Commission's Regulation S-X and Statement of Financial Accounting Standards No. 7 ("SFAS 7").[25] Further, the Company's quarterly report for the third quarter of 2010 indicated a significant increase in operating, general, and administrative expenses during this period, but failed to provide an adequate explanation of the reason for this increase. Tara Gold's failure to include required information in its most recent periodic filings further supports our finding that the Company's assurances against future violations are not credible.

Tara Gold's arguments in its briefs also cause us to question the credibility of its assurances to us of future compliance. In its initial brief on appeal (submitted before the Company filed its 2009 and 2010 Forms 10-K), the Company asserted that the 2007 Form 10-K provided investors with adequate information to make an investment decision because "Tara Gold's current financial statements are meaningless" and that its investors "have the most current information available regarding Tara Gold." On the contrary, Exchange Act reports are designed to provide the public with information that is "material, timely, and accurate."[26] We further reject the Company's assertion that Tara Gold's investors do not require the protections afforded by the delinquent periodic reports because Tara Gold's stock is no longer quoted on the Over-the-Counter Bulletin Board ("OTCBB") and the Pink Sheets. It appears, in fact, that Tara Gold's stock was traded on the over-the-counter market as recently as November 30, 2010.[27] The

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25 *See* 17 C.F.R. § 210.10-01(a)(7) (requiring issuers to include in all financial statements filed with the Commission all disclosures required by SFAS 7 "to the date of the last balance sheet presented"); Statement of Financial Accounting Standards No. 7, "Accounting and Reporting Standards by Development Stage Enterprises," paragraph 11(d) (requiring development stage enterprise issuers to include in all periodic reports, including quarterly reports, a statement of stockholders' equity from the enterprise's inception and specifying what information must be included in such a statement).

26 *America's Sports Voice*, 90 SEC Docket at 885 (citing *Beisinger*, 552 F.2d at 18 (stating that the reporting requirements are "the primary tool[s] which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities")); *see also United States v. Arthur Young & Co.*, 465 U.S. 805, 810 (1984) (observing that "[c]orporate financial statements are one of the primary sources of information available to guide the decisions of the investing public").

27 On December 1, 2010, the Division of Enforcement filed a Motion for Leave to Adduce Additional Evidence (the "Motion"), which Tara Gold has not opposed. The Motion attached an "Exhibit 23," consisting of a print-out from the website www.otcquote.com, a commercial database, which indicated that Tara Gold's stock was traded on the over-the-counter markets as recently as November 30, 2010. Pursuant to Commission Rule of Practice 452, 17

(continued...)

Company admits that its stock still can be traded on an unsolicited basis while it is delinquent in its periodic filings. As the law judge found, "[c]urrent and prospective investors are entitled to have access to all of Tara Gold's periodic reports."[28]

Tara Gold contends that a suspension of its registration is a more appropriate sanction than revocation for its violations. At the time of the OIP, Tara Gold had failed to file any quarterly or annual reports covering reporting periods between 2007 and 2010, and only began efforts to return to compliance after proceedings were initiated. The Company only filed its delinquent annual report for fiscal year 2009 after briefing had commenced in this appeal, and it remains delinquent on one annual report and several quarterly reports.[29] Throughout these proceedings, both before the law judge and during this appeal, Tara Gold has insisted that it intends to return to full compliance, yet its efforts repeatedly fall short.

Under the circumstances, we believe that a suspension would be insufficient to protect investors. A sanction other than revocation would "reward those issuers who fail to file required periodic reports when due over an extended period of time" and "make last-minute filings [only after becoming the subject of Exchange Act Section 12(j) proceedings] in an effort to bring themselves current with their reporting obligations."[30] Such conduct prolongs "indefinitely the

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27 (...continued)
C.F.R. § 201.452, we hereby grant the Division's Motion with respect to Exhibit 23. Consistent with the requirements of Rule 452, the Division established that this evidence is material (insofar as it contradicts Tara Gold's assertion that its investors are protected because its shares were no longer quoted by the OTCBB) and that it was not available prior to the time of the Motion.

The Division's Motion also sought introduction of "Exhibit 22," a print-out showing all of the Company's filings in the Commission's EDGAR database, as of the date of the Motion. Rule of Practice 323, 17 C.F.R. § 201.323, permits us to take official notice of information in the EDGAR database. Pursuant to Rule 323, we take official notice of all of Tara Gold's filings subsequent to the Initial Decision and, therefore, deny the Division's Motion with respect to Exhibit 22 as moot.

28 *See Nature's Sunshine*, 95 SEC Docket at 13500-01 ("both existing and prospective investors are harmed by the continuing lack of current and reliable information for the Company" (quoting *America's Sports Voice*, 90 SEC Docket at 885-86)); *see also Impax*, 93 SEC Docket at 6256; *Eagletech Commc'ns. Inc.*, Exchange Act Rel. No. 54095 (Jul. 5, 2006), 88 SEC Docket 1225, 1230-31.

29 Although the missing quarterly reports for the second and third quarters of fiscal year 2002 do not serve as a basis for the OIP, the Company's failure to make these required filings supports our finding that revocation of the Company's registration is in the public interest.

30 *Nature's Sunshine*, 95 SEC Docket at 13501.

period during which public investors would be without accurate, complete, and timely reports"[31] and significantly detracts from the Exchange Act's reporting requirements.[32] The need for finality in administrative proceedings provides further justification for our conclusion that revocation is necessary to protect the investing public.[33]

Accordingly, we find that revocation of the registration of Tara Gold's securities is necessary and appropriate in the public interest.

An appropriate order will issue.[34]

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

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

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31 *Id.*; *see also Impax*, 93 SEC Docket at 6256 n.34 (declining to order a suspension instead of a revocation where the "hope that Impax would return to compliance within that period would very likely result in the necessity for another proceeding under Exchange Act Section 12(j) at the end of that period"); *America's Sports Voice*, 90 SEC Docket at 885 & nn.16-17 (rejecting respondent's request for a ninety-day grace period).

32 *Nature's Sunshine*, 95 SEC Docket at 13501.

33 *e-Smart*, 57 S.E.C. at 970 n.18; *see Nature's Sunshine*, 95 SEC Docket at 13499.

34 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.

APPENDIX

Document	Date Due	Date Promised (if any)	Date Filed	How Late
Form 10-SB (Initial Registration)	n/a	n/a	2/18/00, effective 4/18/00	n/a
Form 10-QSB for period ended 3/31/00	5/15/00	n/a	1/24/02	More than 20 months
Form 10-QSB for period ended 6/30/02	8/15/02 (Company filed timely Form 12b-25 on 8/14/02)	n/a	n/a	Never filed
Form 10-QSB for period ended 9/30/02	11/15/02	n/a	n/a	Never filed
Form 10-KSB for fiscal year 2002	3/31/03	n/a	12/16/04	More than 20 months
Form 10-QSB for period ended 3/31/03	5/15/03	n/a	3/2/05	More than 21 months
Form 10-QSB for period ended 6/30/03	8/15/03	n/a	3/7/05	More than 18 months
Form 10-QSB for period ended 9/30/03	11/17/03	n/a	3/9/05	More than 15 months
Form 10-KSB for fiscal year 2003	3/31/04	n/a	12/21/04	Nearly 9 months
Corporation Finance initial delinquency notice	n/a	n/a	10/24/05	n/a
Form 10-QSB for period ended 3/31/04	5/17/04	Requested permission not to file on 11/3/05, which Corporation Finance denied; subsequently promised by 1/31/06	1/18/06	More than 20 months

Form 10-QSB for period ended 6/30/04	8/16/04	Requested permission not to file on 11/3/05, which Corporation Finance denied; subsequently promised by 1/31/06	1/31/06	More than 17 months
Form 10-QSB for period ended 9/30/04	11/15/04	Requested permission not to file on 11/3/05, which Corporation Finance denied; subsequently promised by 1/31/06	2/9/06	Nearly 15 months
Form 10-KSB for fiscal year 2004	3/31/05	12/15/05; subsequently revised to "no later than 12/30/05"	12/16/05	Nearly 9 months
Form 10-QSB for period ended 3/31/05	5/16/05	Initially 12/31/05; revised to 2/28/06 after Corporation Finance denied request not to file 2004 quarterly reports; subsequently revised to 12/31/06	4/11/07	Nearly two years
Form 10-QSB for period ended 6/30/05	8/15/05	Initially 12/31/05; revised to 2/28/06 after Corporation Finance denied request not to file 2004 quarterly reports; subsequently revised to 12/31/06	4/26/07	More than 20 months
Form 10-QSB for period ended 9/30/05	11/15/05	Initially 12/31/05; revised to 2/28/06 after Corporation Finance denied request not to file 2004 quarterly reports; subsequently revised to 12/31/06	5/16/07	More than 18 months

Form 10-KSB for fiscal year 2005	3/31/06	10/31/06	3/22/07	Nearly 12 months
Form 10-QSB for period ended 3/31/06	5/15/06	3/31/07	8/16/07	More than 15 months
Form 10-QSB for period ended 6/30/06	8/15/06	3/31/07	10/18/07	More than 14 months
Form 10-QSB for period ended 9/30/06	11/15/06	3/31/07	11/1/07	More than 11 months
Form 10-KSB for fiscal year 2006	4/2/07 (Company filed timely Form 12b-25 on 3/29/07)	4/2/07	4/4/08	More than 12 months
Form 10-QSB for period ended 3/31/07	5/15/07	n/a	4/22/08	More than 11 months
Form 10-QSB for period ended 6/30/07	8/15/07	n/a	5/12/08	Nearly 9 months
Form 10-QSB for period ended 9/30/07	11/15/07	n/a	7/10/08	Nearly 8 months
Commission issues OIP	n/a	n/a	5/6/10	n/a
Form 10-K for fiscal year 2007	3/31/08	"By 6/18/10, no later than 6/30/10"	7/2/10	More than 28 months
Form 10-Q for period ended 3/31/08	5/15/08	8/31/10	n/a	Never filed
Form 10-Q for period ended 6/30/08	8/15/08	8/31/10	n/a	Never filed
Form 10-Q for period ended 9/30/08	11/17/08	8/31/10	n/a	Never filed
Form 10-K for fiscal year 2008	3/31/09	8/31/10	n/a	Never filed
ALJ's Decision	n/a	n/a	9/7/10	n/a
Tara Gold appeals Initial Decision	n/a	n/a	9/28/10	n/a

Form 10-Q for period ended 3/31/09	5/15/09	8/31/10	4/19/11	More than 23 months
Form 10-Q for period ended 6/30/09	8/17/09	8/31/10	n/a	Never filed
Form 10-Q for period ended 9/30/09	11/16/09	8/31/10	n/a	Never filed
Form 10-K for fiscal year 2009	3/31/10	8/31/10	12/9/10	More than 8 months
Form 10-Q for period ended 3/31/10	5/17/10	8/31/10	12/23/10	More than 7 months
Form 10-Q for period ended 6/30/10	8/16/10	n/a	1/3/11	More than 4 months
Form 10-Q for period ended 9/30/10	11/15/10	n/a	1/14/11	Nearly 2 months
Form 10-K for fiscal year 2010	4/15/11 (Company filed timely Form 12b-25 on 3/31/11)	n/a	4/19/11	4 days
Form 10-Q for period ended 3/31/11	5/23/11 (Company filed timely Form 12b-25 on 5/16/11)	n/a	5/23/11	Timely

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 64897 / July 18, 2011

Admin. Proc. File No. 3-13881

In the Matter of

AMERICAN STELLAR ENERGY, INC.
(n/k/a TARA GOLD RESOURCES CORP.)
c/o William T. Hart
Hart & Trinen, LLP
1624 Washington Street
Denver, CO 80203

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the registration of all classes of the registered securities of American Stellar Energy, Inc. (n/k/a Tara Gold Resources Corp.) under Section 12(g) of the Securities Exchange Act of 1934, be, and it hereby is, revoked pursuant to Section 12(j).

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. 64912 / July 18, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14469

In the Matter of **KADAR M. JOSEY,** **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 Kadar M. Josey ("Josey" or "Respondent").

II.

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

III.

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

1. Josey was the secretary and chief financial officer of Elite Resources LLC ("Elite") and the secretary of Elite3 Holding Corp ("Elite3"). Josey acted as unregistered broker-dealer by representing to investors that they could acquire bank guarantees in exchange for a percentage of the face value of the guarantee or for a fee. Josey, 36 years old, is a resident of Tucker, Georgia.

2. On June 23, 2011, a judgment was entered by consent against Josey, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 15(a) of the Exchange Act, in the civil action entitled Securities and Exchange Commission v. Elite Resources, et al., Civil Action Number 1:10-CV-3522, in the United States District Court for the Northern District of Georgia.

3. The Commission's complaint alleged the following facts: From at least April 8, 2010 through at least August 20, 2010, Josey, along with his co-defendant Patricia Diane Gruber, and the companies they operated, Elite and Elite3, raised approximately $2.85 million from at least nine investors. In raising these funds, the defendants represented that investors could draw upon bank issued guarantees worth millions of dollars, in one case representing a 40,000% return on investment, without having to repay the withdrawn funds. The defendants further represented that investor funds would be held in escrow until the bank guarantees were issued. Both of these representations were false in that no such bank guarantees existed and that defendants used almost all of the funds for several undisclosed purposes immediately upon receipt. When investors demanded performance, the defendants provided them with a fictitious guarantee certificate purportedly issued by Barclays Bank.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Josey shall be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Josey shall be, and hereby is, barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by Josey 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 Josey, 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. 64920 / July 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14470

In the Matter of **M (2003) PLC (f/k/a Marconi PLC), Mayfair Mining & Minerals, Inc., MM2 Group, Inc., Nayna Networks, Inc., NCT Group, Inc., and Neptune Industries, Inc. (f/k/a Move Films, Inc.),** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents M (2003) PLC (f/k/a Marconi PLC), Mayfair Mining & Minerals, Inc., MM2 Group, Inc., Nayna Networks, Inc., NCT Group, Inc., and Neptune Industries, Inc. (f/k/a Move Films, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. M (2003) PLC (f/k/a Marconi PLC) (CIK No. 1122133) is an England and Wales company located in London, England with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). M (2003) is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the fiscal year ended March 31, 2006, which reported a net loss of $448,000 for the prior twelve months. As of July 12, 2011, the company's stock (symbol

"MTWOY") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Mayfair Mining & Minerals, Inc. (CIK No. 1211526) is a Nevada corporation located in Lindfield, West Sussex, United Kingdom with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Mayfair Mining & Minerals is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K/A for the fiscal year ended March 31, 2009, which reported a net loss of over $1.4 million for the prior twelve months. As of July 12, 2011, the company's stock (symbol "MFMM") was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. MM2 Group, Inc. (CIK No. 1141500) is a New Jersey corporation located in Livingston, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MM2 Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2009, which reported a net loss of $1.1 million for the prior nine months. As of July 12, 2011, the company's stock (symbol "MMGP") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Nayna Networks, Inc. (CIK No. 769591) is a defaulted Nevada corporation located in Shelton, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Nayna Networks 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 $818,000 for the prior three months. As of July 12, 2011, the company's stock (symbol "NAYN") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. NCT Group, Inc. (CIK No. 722051) is a void Delaware corporation located in Shelton, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). NCT Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2006, which reported a net loss of over $22 million for the prior six months. On May 12, 2009, an involuntary Chapter 7 petition was filed against NCT Group in the U.S. Bankruptcy Court for the District of Connecticut, and the case was terminated on July 20, 2009. As of July 12, 2011, the company's stock (symbol "NCTI") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Neptune Industries, Inc. (f/k/a Move Films, Inc.) (CIK No. 1138659) is a Florida corporation located in Homestead, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Neptune Industries is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which

reported a net loss of over $533,000 for the prior three months. On February 13, 2009, an involuntary Chapter 11 petition was filed against Neptune Industries in the U.S. Bankruptcy Court for the Southern District of Florida, and the case was terminated on December 17, 2009. As July 12, 2011, the company's stock (symbol "NPDI") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

A. Whether the allegations contained in Section II 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

July 20, 2011

In the Matter of **M (2003) PLC (f/k/a Marconi PLC),** **Mayfair Mining & Minerals, Inc.,** **MM2 Group, Inc.,** **Nayna Networks, Inc.,** **NCT Group, Inc., and** **Neptune Industries, Inc. (f/k/a Move Films, 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 M (2003) PLC (f/k/a Marconi PLC) because it has not filed any periodic reports since the period ended March 31, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Mayfair Mining & Minerals, Inc. because it has not filed any periodic reports since the period ended March 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of MM2 Group Inc. because it has not filed any periodic reports since the period ended March 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Nayna Networks, 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 NCT Group, Inc. because it has not filed any periodic reports since the period ended June 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Neptune Industries, Inc. (f/k/a Move Films, Inc.) because it has not filed any periodic reports since the period ended September 30, 2008.

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 July 20, 2011, through 11:59 p.m. EDT on August 2, 2011.

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. 64927 / July 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14476

In the Matter of International Butec Industries Corp. (n/k/a Websmart.com Communications, Inc.), International Colin Energy Corp. (n/k/a Morgan Hydrocarbons, Inc.), International En-R-Tech, Inc. (n/k/a National Telcom Solutions, Inc.), International Menu Solutions Corp. (n/k/a Dunwynn Exploration, Inc.), International Nesmont Industrial Corp., International Petroleum Corp., and Internet Cable 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 International Butec Industries Corp. (n/k/a Websmart.com Communications, Inc.), International Colin Energy Corp. (n/k/a Morgan Hydrocarbons, Inc.), International En-R-Tech, Inc. (n/k/a National Telcom Solutions, Inc.), International Menu Solutions Corp. (n/k/a Dunwynn Exploration, Inc.), International Nesmont Industrial Corp., International Petroleum Corp., and Internet Cable Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. International Butec Industries Corp. (n/k/a Websmart.com Communications, Inc.) (CIK No. 1034329) 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). International Butec is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F/A registration statement on September 6, 1997, which reported a net loss of more than $1.7 million (Canadian) for the nine-month period ended September 30, 1996.

2. International Colin Energy Corp. (n/k/a Morgan Hydrocarbons, Inc.) (CIK No. 871981) is an Alberta corporation located in Calgary, Alberta, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). International Colin Energy 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, 1996, which reported a net loss of over $236,000 (Canadian) for the prior three months.

3. International En-R-Tech, Inc. (n/k/a National Telcom Solutions, Inc.) (CIK No. 895440) is a Yukon Territory corporation located in Delta, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). International En-R-Tech is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F/A registration statement on September 8, 2000, which reported a net loss of over $781,000 (Canadian) for the twelve-month period ended December 31, 1999.

4. International Menu Solutions Corp. (n/k/a Dunwynn Exploration, Inc.) (CIK No. 1067766) is a revoked Nevada corporation located in Concord, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). International Menu Solutions 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 $6.7 million for the prior nine months.

5. International Nesmont Industrial Corp. (CIK No. 883908) is a British Columbia corporation located in Ladner, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). International Nesmont Industrial is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 1992.

6. International Petroleum Corp. (CIK No. 51442) 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). International Petroleum 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 September 30, 1996, which reported a net loss of over $10.5 million for the prior twelve months.

7. Internet Cable Corp. (CIK No. 1075202) is a permanently revoked Nevada corporation located in Markham, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Internet Cable 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.

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 file 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 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

Commissioner Casey not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64936 / July 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14478

In the Matter of **THOMAS F. PIERSON,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Thomas F. Pierson ("Respondent" or "Pierson") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

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

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[1] Rule 102(e)(3)(i) provides, in relevant part, that:

The Commission, with due regard to the public interest and without preliminary hearing, may, by order, . . . suspend from appearing or practicing before it any 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.

III.

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

1. Thomas F. Pierson, age 62, is an attorney licensed to practice in Colorado.

2. On May 17, 2011, a judgment was entered by consent against Respondent, permanently enjoining him from future violations of Section 5 of the Securities Act of 1933, as amended (the "Securities Act"), Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act of 1934, as amended, and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Greenstone Holdings, Inc., et al., 10 civ. 1302 (MGC), in the United States District Court for the Southern District of New York. The judgment also (a) bars Pierson permanently from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock; and (b) requires Pierson to pay disgorgement, prejudgment interest thereon, and a civil money penalty in amounts to be determined by the Court.

3. The Commission's complaint alleges that (a) from late 2005 to early 2007, Respondent authored, signed, and obtained multiple opinion letters that falsely concluded that Greenstone Holdings, Inc., formerly known as Auto Centrix, Inc. ("Greenstone"), could issue shares of stock to certain entities and individuals (including Respondent), in compliance with Section 5 of the Securities Act, without the need to register the offering; (b) these false opinion letters were predicated upon a number of false statements contained therein; and (c) Respondent further agreed with Greenstone and other defendants to use a portion of the shares that he (and entities he controlled) received to pay for certain services on Greenstone's behalf.

IV.

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

SECURITIES AND EXCHANGE COMMISSION

17 CFR Chapter II

[Release No. 34-64939; File No. 4-636]

Joint Public Roundtable on International Issues relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

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

ACTION: Notice of roundtable discussion; request for comment.

SUMMARY: On Monday, August 1, 2011, commencing at 9:00 a.m. and ending at 4:00 p.m., staff of the Agencies will hold a public roundtable meeting at which invited participants will discuss various international issues related to the implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The discussion will be open to the public with seating made available on a first-come, first-served basis. Members of the public may also listen to the meeting by telephone. Call-in participants should be prepared to provide their first name, last name and affiliation. The information for the conference call is set forth below.

- U.S. toll-free: (866) 844-9416
- International toll: (203) 369-5026
- Passcode: 4316057

A transcript of the public roundtable discussion will be published on the CFTC's website at http://www.cftc.gov/PressRoom/Events/2011/index.htm and on the SEC's website at http://www.sec.gov/news/press/2011/2011-151.htm. The roundtable discussion will take place in the Conference Center at the CFTC's headquarters, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: The CFTC's Office of Public Affairs at (202) 418-5080 or the SEC's Office of Public Affairs at (202) 551-4120.

SUPPLEMENTARY INFORMATION: The roundtable discussion will take place on Monday, August 1, 2011, commencing at 9:00 a.m. and ending at 4:00 p.m. Members of the public who wish to comment on the topics addressed at the discussion, may do so via:

- Paper submission to David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581, or Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; or
- Electronic submission via visiting http://comments.cftc.gov/PublicComments/ReleasesWithComments.aspx and submitting comments through the CFTC's website; and/or by email to rule-comments@sec.gov (all emails must reference the file number 4-636 in the subject field) or through the comment form available at http://www.sec.gov/news/press/2011/2011-151.htm.

All submissions will be reviewed jointly by the Agencies. All comments must be in English or be accompanied by an English translation. All submissions provided to either Agency in any electronic form or on paper will be published on the website of the respective Agency, without review and without removal of personally identifying information. Please submit only information that you wish to make publicly available.

By the Commodity Futures Trading Commission.

David A. Stawick

David A. Stawick
Secretary

July 21, 2011

By the Securities and Exchange Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

July 21, 2011

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3249 / July 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14479

In the Matter of **MICHAEL CARDILLO,** **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 Michael Cardillo ("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.

III.

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

1. Cardillo, age 34, resides in New York, New York. During the relevant time period, Cardillo was a trader at Galleon Management, LP ("Galleon"), which was a registered hedge fund investment adviser based in New York, New York.

2. On July 18, 2011, a final judgment was entered by consent against Cardillo permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, in the civil action entitled SEC v. Michael Cardillo, Civil Action No. 11-CV-0549, in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged that Cardillo, on behalf of a Galleon hedge fund, traded in the securities of 3Com Corp. and Axcan Pharma Inc. based on inside information misappropriated by two attorneys, and tipped to him by another individual. The complaint further alleged that Cardillo knew, or should have known, that this material, nonpublic information was obtained in breach of a fiduciary or other duty of trust and confidence owed to the source of the information.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Cardillo be, and hereby is barred from association with any investment adviser, broker, dealer, municipal securities dealer or transfer agent.

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

SECURITIES EXCHANGE ACT OF 1934
Release No. 64932 / July 20, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3248 / July 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14477

In the Matter of **CARLO G. CHIAESE,** **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 Carlo G. Chiaese ("Chiaese" 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.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Chiaese, age 38, resides in Springfield, New Jersey. Between June 1994 and February 2008, he worked as a registered representative for several registered broker-dealers. Between February 22, 2008 and June 28, 2010, he was associated with a registered broker-dealer, working at an office in Westfield, New Jersey. He holds Series 7 and 63 securities licenses, but is not currently associated with any broker-dealer.

2. C.G.C. Advisors, LLC ("CGC"), a New York limited liability corporation incorporated by Chiaese on December 22, 2003, had offices in Westfield, New Jersey and New York, New York. Chiaese is CGC's principal member and its controlling person. Although not registered with the Commission, CGC acted as an investment adviser.

3. On March 31, 2011, Chiaese pled guilty to one count of fraud in violation of Title 15, United States Code, Sections 78j(b) & 78ff, Title 17, Code of Federal Regulations, Section 240.10b-5, and Title 18, United States Code, Section 2 before the United States District Court for the District of New Jersey, in United States v. Carlo G. Chiaese, Crim. Information No. 11-CR-00193.

4. The count of the criminal information to which Chiaese pled guilty alleged, inter alia, that Chiaese defrauded investors and obtained approximately $2.4 million in money and property by means of materially false and misleading statements and that he used the means and instrumentalities of interstate commerce, United States mails, and facilities of national securities exchanges to defraud investors.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Chiaese be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any application for re-entry 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

COMMODITY FUTURES TRADING COMMISSION

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64926; File No. 4-635]

Acceptance of Public Submissions for a Study on International Swap Regulation Mandated by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Commodity Futures Trading Commission; Securities and Exchange Commission.

ACTION: Request for Comment.

SUMMARY: Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) requires the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC and, together with the CFTC, the Commissions) jointly to study and then report to Congress on swap regulation and clearinghouse regulation in the United States, Asia, and Europe and to identify areas of regulation that are similar and other areas of regulation that could be harmonized. The report also must identify major dealers, exchanges, clearinghouses, clearing members, and regulators in each geographic area and describe the major contracts (including trading volumes, clearing volumes, and notional values), methods for clearing swaps, and the systems used for setting margin in each geographic area. In connection with the study and report, the CFTC and SEC are issuing this request for information through public comment.

established in § 145.9 of the Commission's regulations.[1] The CFTC reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all of your submission from http://www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments will be retained in the public comment file and may be accessible under FOIA.

SEC:

Electronic Comments

- Use the agency's Internet comment form at http://www.sec.gov/rules/other.shtml; or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 4-635 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number 4-635. This file number should be included on the subject line if e-mail is used. To help the SEC process and review your comments more efficiently, please use only one method. Comments will be posted on the SEC's Internet website at http://www.sec.gov. Comments also are available for website viewing and printing in the SEC's Public Reference Room, Station Place, 100 F

[1] CFTC regulations referred to herein are found at 17 CFR Ch. 1 (2010). They are accessible on the Commission's website at http://www.cftc.gov.

comprehensive regulation of swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants; (2) imposes clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (3) creates rigorous recordkeeping and real-time reporting regimes; and (4) enhances the Commissions' rulemaking and enforcement authorities with respect to certain registered entities and intermediaries subject to the Commissions' oversight.

Section 719(c)(1) of the Dodd-Frank Act requires the CFTC and SEC jointly to conduct a study on swap regulation and clearinghouse regulation in the United States, Asia, and Europe and to identify areas of regulation that are similar and other areas of regulation that could be harmonized.[6] Pursuant to Section 719(c)(2) of the Dodd-Frank Act, the Commissions must submit a report to Congress within 18 months after the Dodd-Frank Act's enactment (i.e., on or before Monday, January 23, 2012) that describes the results of the study and includes: (1) the identification of the major dealers, exchanges, clearinghouses, and regulators in each geographic area; (2) lists of the major swap contracts (including trading volumes, clearing volumes, and notional values) in each geographic area; and (3) a description of the methods for clearing swaps and the systems used for setting margin in each geographic area.[7]

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[6] Section 719(c)(1) provides:

> (1) IN GENERAL.–The Commodity Futures Trading Commission and the Securities and Exchange Commission shall jointly conduct a study–
>
> (A) relating to–
>
> (i) swap regulation in the United States, Asia, and Europe; and
>
> (ii) clearing house and clearing agency regulation in the United States, Asia, and Europe; and
>
> (B) that identifies areas of regulation that are similar in the United States, Asia and Europe and other areas of regulation that could be harmonized[.]

[7] Section 719(c)(2) provides:

comment process will, as needed, be supplemented by other means of gathering the comprehensive range of information requested by Congress.[9]

The Commissions also are mindful of differences in regulatory development across jurisdictions. In the United States and under the Dodd-Frank Act, many of the required regulations with regard to swaps already have been proposed and made available for public comment.[10] Other jurisdictions, however, are proceeding under different time frames. For example, the Japanese Diet amended the Financial Instruments and Exchange Act by adopting legislation on over-the-counter (OTC) derivatives on July 10, 2009, and on May 12, 2010. These amendments are expected to be implemented by November 2012. The European Commission (EC), in turn, proposed legislation on clearing and trade repositories on September 15, 2010.[11] This proposed legislation calls for the European Securities and Markets Authority to propose technical standards by June 30, 2012.[12]

In order to strike a balance between meeting the statutory deadline for the study and report and providing timely information to Congress, the Commissions have determined to publish the request at this time and to provide for a 60-day comment

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[9] For example, Commission staff will engage in ongoing consultation with regulatory authorities and others throughout the study.

[10] For more information, visit CFTC and SEC websites on implementation of the Dodd-Frank Act, respectively at http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm and http://www.sec.gov/spotlight/dodd-frank.shtml.

[11] On December 8, 2010, the EC also issued a public consultation to solicit views on revisions to the Markets in Financial Instruments Directive that are designed, among other things, to increase transparency for OTC derivatives and other instruments by setting requirements for trading venues and investment firms, and to enhance business conduct standards applicable to all investment firms. The EC is expected to publish a proposal further to this consultation during summer 2011.

[12] See various provisions of the EC's proposed European Markets Infrastructure Regulation, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0484:FIN:EN:PDF.

While all commenters are welcome to respond to the items below in their entirety, in order to provide more focus, the requests for comment have been divided into three groups. The first group, items A-E, inquires about information to which foreign regulators may have the most efficient access. Item F, by contrast, inquires about information that may be available to a wider range of commenters, while item G inquires about information that exchanges and clearinghouses might be uniquely positioned to provide.

A. <u>Status of Regulation</u>

1. For each jurisdiction on which comment is being provided, please provide the name of the jurisdiction being commented upon.

2. Does the jurisdiction have a legal definition of the term "swap", "security-based swap", or other similar term or terms (hereinafter referred to as a "Swap" or "Swaps")? If so, please provide such definition(s).[15]

3. Are Swaps are included within the scope of any statute, regulation, or other legal requirement in the jurisdiction?

a. If not, is the jurisdiction planning to or considering whether to regulate, or to modify regulation of, Swaps?

b. Please further describe the present status of regulatory efforts and the anticipated timeline for such efforts.

4. What type of counterparty may enter into a Swap? Do any limitations apply?

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[15] These terms may include, but may not be limited to, OTC derivatives. The Dodd-Frank Act includes definitions of the terms "swap" and "security-based swap".

h. How are cross-border Swap transactions regulated? Does the Swap regulatory framework apply to persons located outside of the jurisdiction doing business with persons located within the jurisdiction, and, more generally, to cross-border Swap activities?

i. What enforcement authority exists over Swaps, and who may exercise such authority?

B. Regulatory Requirements for Market Participants

1. How does the regulatory framework address participants in the Swap market? What are the registration or licensing requirements for Swap-related dealers, market participants, intermediaries, or others (individually and collectively, "Participants")?

2. Are any types of Participants in the Swap market excluded or exempted from Swap-related registration or licensing requirements?

3. What is the process for updating, withdrawing, or terminating Swap-related registration or an exemption from Swap-related registration?

4. What are the Swap-related prudential regulatory requirements (e.g., capital, liquidity, margin, risk management, segregation, collateral)?

5. What are the requirements related to insolvency or bankruptcy in regard to Participants?

6. What are the Swap-related business conduct requirements (e.g., interaction with counterparties, disclosure, supervision, reporting, recordkeeping, documentation, confirmation, valuation, conflicts of interest, avoidance of fraud and other abusive practices)?

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[17] In particular, are there any legal or other barriers to the collection of information or to the sharing of information, e.g., client confidentiality protection or data privacy safeguards?

2. What are the registration or licensing requirements for such central counterparties?

3. Who is excluded or exempted from such registration or licensing requirements?

4. What is the process for updating, withdrawing, or terminating such registration or exempting from such registration?

5. What are the ongoing regulatory responsibilities of such central counterparties (e.g., financial resources, risk management, safeguards against member or participant default, authority in the event of a default, recordkeeping)?[18]

6. Do such central counterparties have the ability to share information with domestic and/or foreign regulatory authorities?

7. How are foreign central counterparties treated (e.g., a special recognition category, an exclusion or an exemption from registration)?

E. Regulatory Requirements for Data Repositories

1. Does the regulatory framework include requirements for data repositories for Swaps?[19]

2. What are the registration or licensing requirements for such data repositories?

3. Who is excluded or exempted from such registration or licensing requirements?

4. What is the process for updating, withdrawing, or terminating such registration or exempting from such registration?

5. What are the ongoing regulatory responsibilities of such data repositories (e.g., timing of reporting to the public, recordkeeping)?

[18] The Recommendations for Central Counterparties were published in November 2004 (and currently are being revised) by the Committee on Payment & Settlement Systems of the Bank for International Settlements and the Technical Committee of IOSCO. Links to this standard, as well as related standards and the consultative report for revising them, are available at http://www.bis.org/publ/cpss94.htm.

[19] If entities other than data repositories can fulfill this function, please describe the jurisdiction's requirements for such activity and provide the relevant information for each question on this topic.

consideration when assessing the degree to which cross-border regulatory harmonization has been implemented in practice?

5. Assuming that a theoretically "optimal" set of regulations for a particular jurisdiction might take into consideration elements unique to a specific market in ways that might make cross-border harmonization difficult, to what extent do the benefits of greater regulatory harmonization across borders outweigh the costs associated with having regulations that might be less tailored to a particular market's circumstances? In what areas do you believe the benefits of harmonization most outweigh any potential downsides?[20] Are there any areas where you believe the likely benefits of "optimal" market-specific regulation outweigh the likely benefits of harmonization?

6. In the United States, what steps should or could be taken to better harmonize statutory requirements under the Dodd-Frank Act with statutory requirements implemented in other jurisdictions?

7. In the United States, what steps could be taken to harmonize CFTC or SEC regulations with regulations promulgated by authorities in other jurisdictions?

G. <u>Swap Market Information</u>

1. Please identify major organized markets and electronic execution facilities (and the Swaps-related regulator(s) for each) for the trading of Swaps.

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[20] In particular, please identify any potential opportunities for regulatory arbitrage or impediments to the achievement of consistent regulatory standards across jurisdictions.

ii. A description of the systems used to establish margin on individual Swaps and on Swap portfolios; and

iii. The name of each major clearing member of the central counterparty (and the Swap-related regulator(s) for each).

Issued in Washington, DC on July 20, 2011, by the Commodity Futures Trading Commission.

David A. Stawick

David A. Stawick,
Secretary.

Issued in Washington, DC on July 20, 2011, by the Securities and Exchange 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. 64944 / July 21, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14483

In the Matter of **PATRICIA DIANE GRUBER,** **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 Patricia Diane Gruber ("Gruber" or "Respondent").

II.

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

III.

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

1. Gruber was the managing member of Elite Resources LLC ("Elite") and the director of Elite3 Holding Corp ("Elite3"). Gruber acted as unregistered broker-dealer by representing to investors that they could acquire bank guarantees in exchange for a percentage of the face value of the guarantee or for a fee. Gruber, 58 years old, is a resident of Dunwoody, Georgia.

2. On June 23, 2011, a judgment was entered by consent against Gruber, permanently enjoining her from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 15(a) of the Exchange Act, in the civil action entitled Securities and Exchange Commission v. Elite Resources, et al., Civil Action Number 1:10-CV-3522, in the United States District Court for the Northern District of Georgia.

3. The Commission's complaint alleged the following facts: From at least April 8, 2010 through at least August 20, 2010, Gruber along with her co-defendant Kadar M. Josey and the companies they operated, Elite and Elite3, raised approximately $2.85 million from at least nine investors. In raising these funds, the defendants represented that investors could draw upon bank issued guarantees worth millions of dollars, in one case representing a 40,000% return on investment, without having to repay the withdrawn funds. The defendants further represented that investor funds would be held in escrow until the bank guarantees were issued. Both of these representations were false in that no such bank guarantees existed and that defendants used almost all of the funds for several undisclosed purposes immediately upon receipt. When investors demanded performance, the defendants provided them with a fictitious guarantee certificate purportedly issued by Barclays Bank.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Gruber shall be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Gruber shall be, and hereby is, barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by Gruber 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 Gruber, 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. 64942 / July 21, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14481

In the Matter of **GLENN R. HARRIS,** **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 Glenn R. Harris ("Respondent" or "Harris").

II.

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

III.

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

1. From August 18, 2004 through December 31, 2008, Respondent was a registered representative at Advanced Planning Securities, Inc. ("Advanced Planning"), a broker-dealer that, from at least June 1, 2004 until December 31, 2008, was registered with the Commission pursuant to Section 15(b) of the Exchange Act. Harris was a registered representative with Waterford Investors Services, Inc., a broker-dealer registered with the Commission, from January 2, 2009 through March 26, 2009. Harris, age 34, resides in Santa Rosa, California.

2. On July 12, 2011, a final judgment was entered by consent against Harris, permanently enjoining him from future violations of Sections 5(a) and 5(c) of the Securities Act of 1933, in the civil action entitled Securities and Exchange Commission v. Charles C. Slowey, Jr., et al., Civil Action Number 09 Civ. 4547 (LDW) (ETB), in the United States District Court for the Eastern District of New York.

3. The Commission's complaint alleges that from approximately March 2004 through August 2006, Harris offered and sold securities for which there was no registration statement in effect and for which no exemption from the registration requirements applied.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Harris be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, with the right to apply for reentry after eighteen (18) months to the appropriate self-regulatory organization, or if there is none, to the Commission; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, with the right to apply for reentry after eighteen (18) months to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

By the Commission.

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. 64941 / July 21, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3305 / July 21, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14480

In the Matter of **JOHN N. IRWIN, CPA,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against John N. Irwin, CPA ("Respondent" or "Irwin") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

[1] Rule 102(e)(3)(i) provides, in relevant part, that:

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

II.

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

III.

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

1. Irwin, age 73, is and has been a certified public accountant licensed to practice in the Commonwealth of Pennsylvania.

2. On July 12, 2011, a judgment was entered against Irwin, permanently enjoining him from future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933, and granting other relief, in the civil action entitled SEC v. John N. Irwin, et al., Civil Action Number 11-CV-4429 (PD), in the United States District Court for the Eastern District of Pennsylvania.

3. The Commission's complaint (the "Irwin Complaint") alleged that Irwin made materially false and misleading statements to investors in connection with a Ponzi scheme orchestrated by Joseph Forte ("Forte"). From 1995 through 2008, Forte operated a Ponzi scheme through Forte, LP (the "Fund"), a limited partnership he established with Irwin's assistance. The Ponzi scheme ended in January 2009 following the Commission's filing of an emergency action, SEC v. Forte, et al., Civil Action Number 2:09-cv-00063-PD (filed Jan. 7, 2009), charging Forte and the Fund with fraudulently raising over $50 million from approximately 80 investors.

4. The Irwin Complaint alleged that, in connection with the scheme, Irwin made materially false and misleading statements to existing and potential investors about, among other things, the Fund's current value and growth, historical positive performance, and conservative trading strategy. In addition, the Irwin Complaint alleged that Irwin failed to disclose to investors that he was receiving a percentage of Forte's fees as compensation for helping to establish the Fund.

IV.

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

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

Irwin is suspended from 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9243 / July 22, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 64949 / July 22, 2011

In the Matter of AFFILIATED COMPUTER SERVICES, INC., Respondent.	**ORDER UNDER SECTION 27A(b) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b) OF THE SECURITIES EXCHANGE ACT OF 1934, DENYING WAIVERS OF THE DISQUALIFICATION PROVISIONS OF SECTION 27A(b)(1)(A)(ii) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b)(1)(A)(ii) OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO XEROX CORPORATION**

Xerox Corporation ("Xerox") has submitted a letter, dated July 8, 2011, for a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 ("Securities Act") and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 ("Exchange Act") arising from the settlement by Affiliated Computer Services, Inc. ("ACS") of a civil action against it. ACS is a wholly-owned subsidiary of Xerox. On September 9, 2010, the Commission filed a settled federal court action against ACS in the United States District Court for the Northern District of Texas. In its complaint, the Commission alleged that ACS violated (among other provisions) Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. Without admitting or denying the allegations, ACS consented to a final judgment that enjoins it from committing future violations of these (and other) provisions (the "Consent and Final Judgment"). On September 15, 2010, the court entered the Consent and Final Judgment.

The safe harbor provisions of Section 27A(c) of the Securities Act and Section 21E(c) of the Exchange Act are not available for any forward-looking statement that is "made with respect to the business or operations of an issuer, if the issuer . . . during the 3-year period preceding the date on which the statement was first made . . . has been made the subject of a judicial . . . order arising out of a governmental action that . . . prohibits future violations of the antifraud provisions of the federal securities laws." Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the

Exchange Act. The disqualifications apply except "to the extent otherwise specifically provided by rule, regulation, or order of the Commission." Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act.

In the underlying settled civil action, ACS was made the subject of a judicial order prohibiting future violations of the antifraud provisions. Nothing has come to the attention of the Commission that Xerox, the issuer that acquired ACS after the violations alleged in the civil action were committed, has been made the subject of the judicial order or subject to its prohibitions in this case. Thus, the Commission has determined that the Consent and Final Judgment with ACS do not cause the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act to be applicable to Xerox. For this reason, the Commission believes that Xerox's request for a waiver of those disqualification provisions is unnecessary as a matter of law and should be denied.

Accordingly, **IT IS ORDERED,** pursuant to Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act, that a waiver from the disqualification provisions of 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act as to Xerox resulting from the entry of the Consent and Final Judgment is hereby denied.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3251 / July 22, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14485

In the Matter of

DANIELLE CHIESI,

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 Danielle Chiesi ("Chiesi" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, and the findings contained in Section III.2 and III.4 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.

III.

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

1. Chiesi, age 45, resides in New York, New York. During the relevant time period, Chiesi was a consultant and a portfolio manager at New Castle Funds LLC ("New Castle"), a registered hedge fund investment adviser. Chiesi held Series 7 and 63 securities licenses.

2. On October 16, 2009, the Commission filed a civil action against Chiesi in SEC v. Galleon Management, LP, et al., Civil Action No. 1:09-CV-8811 (SDNY). On July 12, 2011, the Court entered an order permanently enjoining Chiesi, by consent, from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

3. The Commission's complaint alleged that, in connection with the purchase, offer or sale of securities, Chiesi knew, recklessly disregarded, or should have known, that the material non-public information she received from a tipper was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence, and Chiesi is liable for insider trading on the basis of that material non-public information.

4. On January 19, 2011, Chiesi pled guilty to three counts of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 before the United States District Court for the Southern District of New York in United States v. Danielle Chiesi, 09-CR-1184.

5. The counts of the criminal indictment to which Chiesi pled guilty alleged, inter alia, that Chiesi, and others, participated in a scheme to defraud by executing securities trades based on material, nonpublic information regarding certain inside information concerning public companies that had been misappropriated in violation of duties of trust and confidence, and that she unlawfully, willfully and knowingly did so, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and sale of 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 Chiesi's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Chiesi be, and hereby is barred from association with any investment adviser, broker, dealer, municipal securities dealer, or transfer agent.

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

Commissioner Walter,
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3250 / July 22, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14484

In the Matter of

JEFFREY YOKUTY,

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 Jeffrey Yokuty ("Yokuty" 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.

III.

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

1. Yokuty, age 37, resides in New York, New York. During the relevant period, Yokuty worked as an analyst at Trivium Capital Management, LLC ("Trivium"). Yokuty has held Series 7 and 63 securities licenses. Trivium, a Delaware limited liability company, was registered with the Commission as an investment adviser until March 31, 2009. At the relevant time, Trivium was a New York-based hedge fund investment adviser having approximately $600 million under management in multiple hedge funds.

2. On July 11, 2011, a final judgment was entered by consent against Yokuty, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Feinblatt, et al., Civil Action Number 1:11-CV-0170, in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged that Yokuty, on behalf of Trivium funds, traded while in possession of material, nonpublic information concerning the securities of Google Inc., Hilton Hotels Corp., Kronos Inc., and Polycom, Inc.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Yokuty be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; with the right to apply for reentry after 3 years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9240 / July 22, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-11950

In the Matter of **FORD MOTOR CREDIT COMPANY,** **Respondent.**	**ORDER MODIFYING ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933**

I.

On June 14, 2005, the Securities and Exchange Commission ("SEC" or "Commission") instituted cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order (the "2005 Order) pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") against Ford Motor Credit Company LLC, formerly known as Ford Motor Credit Company ("Respondent" or "Ford Credit").[1]

II.

In anticipation of the proceedings, Ford Credit consented to entry of the 2005 Order. Among other things, the 2005 Order required Ford Credit to cease and desist from violating Section 5 of the Securities Act, pay disgorgement plus prejudgment interest, and implement certain undertakings. Paragraph 18 of the 2005 Order requires that Ford Credit, on a yearly basis, deliver to each holder of its variable denomination floating rate demand notes ("Notes") a copy of Ford Credit's most recent Annual Report on Form 10-K ("Form 10-K"). Delivery of the Form 10-K may be made via e-mail or some other electronic means provided that the Note holder has consented in writing to such electronic delivery.

[1] See Securities Act Rel. No. 8582, June 14, 2005, Admin. Proc 3-11950

III.

Ford Credit has submitted an Amended Offer of Settlement (the "Offer") proposing to modify paragraph 18 of the 2005 Order to replace the requirement that Ford Credit provide Note holders with yearly delivery of its most recent Form 10-K with a requirement that it deliver an annual notice that informs such Note holders of the availability of the Form 10-K as well as the company's other SEC filings on Ford Credit's web site and on the Commission's EDGAR database and provides instructions on how Note holders can obtain a paper copy of the Form 10-K and the company's other SEC filings at no cost. 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, Ford Credit consents to the entry of this Order Modifying Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, as set forth below.

IV.

The Commission deems it appropriate to amend the 2005 Order as agreed to in Ford Credit's Offer.

Accordingly, it is hereby ORDERED that:

A. Paragraph 18 of the 2005 Order is amended as follows to order:

> 18. [Ford Credit has undertaken to:] On a yearly basis, notify all Note holders by mail or, in the case of Note holders who have previously given consent to electronic delivery, by e-mail or other electronic means, that its most recent Form 10-K as well as its other reports filed with the SEC are available on Ford Credit's web site and on the SEC's EDGAR database and provide instructions on how Note holders can obtain a paper copy of Ford Credit's Form 10-K and its other reports filed with the SEC at no cost.

B. All other provisions of the 2005 Order remain in effect.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9242 / July 22, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14421

In the Matter of **the Registration Statement of** **China Century Dragon Media, Inc.** **c/o Corporation Service Company** **2711 Centerville Road, Suite 400** **Wilmington, DE 19808,** **HO-11603**	**ORDER MAKING FINDINGS AND SUSPENDING THE EFFECTIVENESS OF REGISTRATION STATEMENT**

I.

The Securities and Exchange Commission (the "Commission") deems it appropriate and in the public interest to accept the Offer of Settlement (the "Offer") submitted by China Century Dragon Media, Inc. ("Respondent") pursuant to Rule 240(a) of the Rules of Practice of the Commission, 17 C.F.R. § 201.240(a), for the purpose of settlement of these proceedings initiated against Respondent on June 13, 2011, pursuant to Section 8(d) of the Securities Act of 1933 (the "Securities Act").

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Suspending the Effectiveness of Registration Statement (the "Order"), pursuant to Section 8(d) of the Securities Act of 1933, as set forth below.

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III.

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

A. Respondent (CIK No. 0001423242) is a Delaware corporation headquartered in Guangdong Province, People's Republic of China. Respondent's common stock is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and is traded on the NYSE-Amex. Trading in Respondent's securities has been halted by NYSE-Amex since March 21, 2011.

B. In February 2011, Respondent completed an initial public offering and sale of up to 1,610,000 shares of common stock to the public, pursuant to a registration statement on Form S-1 that became effective on February 7, 2011 (the "Registration Statement"). In addition to the initial public offering by the company, the S-1 also registered for resale up to 1,034,403 shares that were owned by selling shareholders.

C. On March 22, 2011, Respondent's independent auditor resigned and withdrew its audit report for Respondent's financial statements as of December 31, 2009 and 2008, which were included in the Registration Statement.

D. On March 28, 2011, Respondent filed a Form 8-K which disclosed that the company had received a letter of resignation from its independent auditor on March 22, 2011 (the "Resignation Letter"). As described in the 8-K:

> [Respondent's auditor] informed the Company in its resignation letter that due to discrepancies noted on customer confirmations and the auditor's inability to directly verify the Company's bank records, they believe these irregularities may be an indication that the accounting records have been falsified, which would constitute an illegal act. [Respondent's auditor] stated in its letter that the Company's management has not provided a satisfactory explanation of the discrepancies noted on the customer confirmations and was unwilling to provide authorization to the bank so that the auditor could obtain official bank records directly from the bank's record keeping system. Furthermore, [Respondent's auditor's] letter notes that the discrepancies could indicate a material error in previously issued financial statements. As a result, [Respondent's auditor] states that it is unable to rely on management's representations as they relate to previously issued financial statements and it can no longer support its opinions related to the financial statements as of December 31, 2009, and 2008.

E. As a result of the above, the Registration Statement is materially misleading and deficient. The Registration Statement includes an untrue statement of a material fact because it purports to contain audited financial statements and the report of an independent registered public accounting firm thereon when in fact the auditor has withdrawn its audit reports for the reasons described herein. The Registration Statement also omits to state the material facts that the company's auditor has resigned and withdrawn its audit report and the reasons for the auditor's resignation, and that the financial statements included in the Registration Statement cannot be relied upon. In addition, a Form S-1 must include audited financial statements. *See* Form S-1, Part 1–Information Required in Prospectus, Item 11(e) (requiring the inclusion of audited financial statements meeting the requirements of Regulation S-X).

IV.

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

Accordingly, it is hereby ORDERED, pursuant to Section 8(d) of the Securities Act, that the effectiveness of the Registration Statement filed by the Respondent is suspended.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9241 / July 22, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14418

In the Matter of the Registration Statements of China Intelligent Lighting and Electronics, Inc. c/o Corporation Service Company 2711 Centerville Road, Suite 400 Wilmington, DE 19808, HO-11603	ORDER MAKING FINDINGS AND SUSPENDING THE EFFECTIVENESS OF REGISTRATION STATEMENTS

I.

The Securities and Exchange Commission (the "Commission") deems it appropriate and in the public interest to accept the Offer of Settlement (the "Offer") submitted by China Intelligent Lighting and Electronics, Inc. ("Respondent") pursuant to Rule 240(a) of the Rules of Practice of the Commission, 17 C.F.R. § 201.240(a), for the purpose of settlement of these proceedings initiated against Respondent on June 10, 2011, pursuant to Section 8(d) of the Securities Act of 1933 (the "Securities Act").

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Suspending the Effectiveness of Registration Statements (the "Order"), pursuant to Section 8(d) of the Securities Act of 1933, as set forth below.

III.

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

A. Respondent (CIK No. 0001421525) is a Delaware corporation headquartered in Guangdong Province, People's Republic of China. Respondent's common stock is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and is traded on the NYSE-Amex. Trading in Respondent's securities has been halted by NYSE-Amex since March 24, 2011.

B. In June 2010, Respondent completed an initial public offering and sale of up to 3,852,500 shares of common stock to the public, pursuant to a registration statement on Form S-1 that became effective on June 17, 2010 (the "June Registration Statement"). The June Registration Statement also registered for resale by selling shareholders of up to 1,377,955 shares of common stock. In December 2010, Respondent filed a second registration statement on Form S-1 relating to the resale of up to 1,858,323 shares of common stock that became effective on December 15, 2010 (the "December Registration Statement").

C. On March 24, 2011, Respondent's independent auditor resigned and withdrew its audit report for Respondent's financial statements as of and for the year ended December 31, 2009, which were included in the June and December Registration Statements.

D. Respondent filed a Form 8-K on March 29, 2011 and an amended Form 8-K on April 12, 2011 that disclosed the company had received a letter of resignation from its independent auditor on March 24, 2011 (the "Resignation Letter"). Respondent further disclosed that the Resignation Letter stated that the auditor was unable to rely on management's representations as they relate to previously issued financial statements and it could no longer support its opinions related to Respondent's financial statements as of December 31, 2009 and condensed Parent Only financial statements, which were included in Respondent's June and December Registration Statements.

E. A Form S-1 must include audited financial statements. *See* Form S-1, Part 1– Information Required in Prospectus, Item 11(e) (requiring the inclusion of audited financial statements meeting the requirements of Regulation S-X). Because Respondent's auditor withdrew its audit report for Respondent's financial statements as of and for the year ended December 31, 2009, the June and December Registration Statements are not supported by audited financial statements and are thus materially deficient. Because the June and December Registration Statements state that they contain audited financial statements and the report of an independent registered public accounting firm thereon when in fact the auditor has withdrawn its audit report, each registration statement includes an untrue statement of a material fact.

IV.

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

Accordingly, it is hereby ORDERED, pursuant to Section 8(d) of the Securities Act, that the effectiveness of the June and December Registration Statements filed by the Respondent is suspended.

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. 64959 / July 25, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14487

In the Matter of **Circle Fine Art Corp.,** **Coachman, Inc.,** **Coachman Inns Income Ltd. Partnership,** **Columbia Western, Inc.,** **Comet Software International, Inc.,** **Commonwealth Industries Corp.,** **Comstock Industries, Inc.,** **Concentration, Inc.,** **Concordia Paper Holdings, Ltd., and** **ConnectAJet.com, Inc. (f/k/a Source Venture Capital, Inc.),** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Circle Fine Art Corp., Coachman, Inc., Coachman Inns Income Ltd. Partnership, Columbia Western, Inc., Comet Software International, Inc., Commonwealth Industries Corp., Comstock Industries, Inc., Concentration, Inc., Concordia Paper Holdings, Ltd., and ConnectAJet.com, Inc. (f/k/a Source Venture Capital, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Circle Fine Art Corp. (CIK No. 20356) is a forfeited Delaware corporation located in Chicago, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Circle Fine Art is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1996 which reported a net loss of over $18 million for the prior nine months. On February 8, 1996, Circle Fine Art filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Illinois, which was terminated on September 28, 2001.

2. Coachman, Inc. (CIK No. 816249) is a void Delaware corporation located in Guaynabo, Puerto Rico with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Coachman is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1999, which reported a net loss of over $1.5 million for the prior six months. Coachman also failed to file a Form 10-K for the period ended December 31, 1998.

3. Coachman Inns Income Ltd. Partnership (CIK No. 787494) is an inactive Oklahoma limited partnership located in Oklahoma City, Oklahoma with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Coachman Inns Income 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.

4. Columbia Western, Inc. (CIK No. 790704) is an inactive Oregon corporation located in Portland, Oregon with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Columbia Western is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1994. On May 17, 1995, Columbia Western filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Oregon, which was terminated on October 30, 1998.

5. Comet Software International, Ltd. (CIK No. 916833) is an Israeli corporation located in Tel Aviv, Israel with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Comet Software 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 $1.5 million for the prior twelve months.

6. Commonwealth Industries Corp. (CIK No. 22626) is a dissolved Delaware corporation located in Springfield, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Commonwealth Industries is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 1995.

7. Comstock Industries, Inc. (CIK No. 717410) is an inactive Florida corporation located in London, England with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Comstock Industries is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended April 30, 2006. On September 30, 2004, Comstock Industries filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Oregon, which was terminated on January 11, 1995.

8. Concentration, Inc. (CIK No. 1120829) is a dissolved Colorado corporation located in Colorado Springs, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Concentration is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on August 4, 2000.

9. Concordia Paper Holdings, Ltd. (CIK No. 932128) is a Bermuda corporation located in Hong Kong with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Concordia Paper Holdings 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 $16.4 million (Hong Kong) for the prior twelve months.

10. ConnectAJet.com, Inc. (f/k/a Source Venture Capital, Inc.) (CIK No. 757788) 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). ConnectAJet.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1991, which reported a net loss of over $65,000 for the prior three months. On October 1, 2007, the Commission entered a trading suspension in ConnectAJet.com's stock pursuant to Exchange Act Section 12(k) due to concerns over "manipulative or deceptive practices" in its stock activity.

B. DELINQUENT PERIODIC FILINGS

11. 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.

12. 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.

13. 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 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

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64965 / July 26, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3252 / July 26, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14488

In the Matter of

WILLIAM KEVIN HARRISON,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against William Kevin Harrison ("Harrison" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Harrison was associated with Wachovia Securities, Inc, a registered broker-dealer, as a registered representative from 2003 until his resignation on October 13, 2008. While at Wachovia, Harrison held Series 7 and 63 licenses. During the relevant time period, Harrison acted as an investment adviser to several of his Wachovia customers.

2. On April 15, 2011, a judgment was entered by consent against Harrison, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77 q(a)], Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], and Sections 206(1), 206(2), and 206(4) of the Advisers Act [15 U.S.C. §§ 80b-6(1), (2) & (4)] and Rule 206(4)-8, thereunder [17 C.F.R. § 275.206(4)-8], in the civil action entitled Securities and Exchange Commission v. William K. Harrison, et al., Civil Action Number 3:10-cv-00634, in the United States District Court for the Western District of North Carolina.

3. The Commission's complaint alleged the following facts: Between approximately December 2007 and October 2008, Harrison used misrepresentations and omissions of material fact to defraud at least forty-two Wachovia brokerage customers of at least $8 million in customer funds. On or around December 2007, Harrison began offering his Wachovia customers an investment opportunity outside of Wachovia through an advisory firm he owned. Harrison misrepresented to customers who became advisory clients that the investment opportunity was guaranteed to make a 35% return, with no risk of loss of principal. In those instances when investors were informed that their monies would be used for trading options, Harrison misrepresented the riskiness of his trading strategy by telling investors that he had a foolproof approach to trading options and that their principal investment was secure and would make handsome returns regardless of market volatility. Harrison pooled his customers' funds in an account opened with optionsXpress, Inc. ("optionsXpress") in Harrison's wife's name or in a joint account with optionsXpress in the name of Harrison and his wife. Clients of the advisory firm Harrison worked through also placed assets in the pooled vehicle based on misrepresentations. So as to not draw attention to his conduct, Harrison placed "limited trading authorizations" and other related documentation associated with his scheme in the name of Harrison's wife. Although the trading strategy that Harrison employed was initially successful, it soon resulted in substantial investor losses. By October 2008, he had depleted the vast majority of the money he had raised from investors. On October 13, 2008, Harrison submitted to Wachovia a resignation letter in which he confessed to "misdirecting" $6.6 million from 17 of his Wachovia customers in order to trade online. He also admitted that he had conducted this online trading without first securing the authorization of these 17 individuals.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Harrison shall be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Harrison shall be, and hereby is, barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Walter
Commissioner Paredes
not participating

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 29737 / July 26, 2011

In the Matter of

J.P. MORGAN SECURITIES LLC
338 Madison Avenue
New York, New York 10179

BEAR STEARNS ASSET MANAGEMENT INC.
270 Park Avenue
New York, New York 10017

BEAR STEARNS HEALTH INNOVENTURES
MANAGEMENT, L.L.C.
270 Park Avenue
New York, New York 10017

BSCGP INC.
270 Park Avenue
New York, New York 10017

CONSTELLATION GROWTH CAPITAL LLC
49 West 57th Street, 32nd Floor
New York, New York 10019

CONSTELLATION VENTURES MANAGEMENT II, LLC
270 Park Avenue
New York, New York 10017

HIGHBRIDGE CAPITAL MANAGEMENT, LLC
49 West 57th Street, 32nd Floor
New York, New York 10019

JF INTERNATIONAL MANAGEMENT INC.
21st Floor, Chater House
8 Connaught Road Central
Hong Kong

JPMORGAN ASSET MANAGEMENT (UK) LIMITED
125 London Wall
London, UK, EC2Y5AJ

JPMORGAN DISTRIBUTION SERVICES, INC.
1111 Polaris Parkway
Columbus, Ohio 43240

J.P. MORGAN INSTITUTIONAL INVESTMENTS, INC.
J.P. MORGAN INVESTMENT MANAGEMENT INC.
J.P. MORGAN LATIN AMERICA MANAGEMENT COMPANY, LLC
J.P. MORGAN PARTNERS, LLC
J.P. MORGAN PRIVATE INVESTMENTS INC.
270 Park Avenue
New York, New York 10017

OEP CO-INVESTORS MANAGEMENT II, LTD.
OEP CO-INVESTORS MANAGEMENT III, LTD.
320 Park Avenue, 18th Floor
New York, New York 10022

SECURITY CAPITAL RESEARCH & MANAGEMENT INCORPORATED
10 South Dearborn Street, Suite 1400
Chicago, Illinois 60603

SIXTY WALL STREET GP CORPORATION
SIXTY WALL STREET MANAGEMENT COMPANY, LLC
270 Park Avenue
New York, New York 10017

TECHNOLOGY COINVESTORS MANAGEMENT, LLC
270 Park Avenue
New York, New York 10017

File No. 812-13914

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

J.P. Morgan Securities LLC; Bear Stearns Asset Management Inc.; Bear Stearns Health Innoventures Management, L.L.C., BSCGP Inc.; Constellation Growth Capital LLC ; Constellation Ventures Management II, LLC ; Highbridge Capital Management, LLC ; JF

International Management Inc.; JPMorgan Asset Management (UK) Limited; JPMorgan Distribution Services, Inc.; J.P. Morgan Institutional Investments, Inc.; J.P. Morgan Investment Management Inc.; J.P. Morgan Latin America Management Company, LLC ; J.P. Morgan Partners, LLC ; J.P. Morgan Private Investments Inc.; OEP Co-Investors Management II, Ltd.; OEP Co-Investors Management III, Ltd.; Security Capital Research & Management Incorporated; Sixty Wall Street GP Corporation ; Sixty Wall Street Management Company, LLC ; and Technology Coinvestors Management, LLC (collectively, the "Applicants") filed an application on June 21, 2011, and amendments to the application on June 29, 2011 and July 5, 2011, requesting temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 ("Act") exempting Applicants and any other company of which J.P. Morgan Securities LLC is or hereafter becomes an affiliated person (together with Applicants, "Covered Persons") from section 9(a) of the Act with respect to an injunction entered by the United States District Court for the Southern District of New York on June 29, 2011.

On June 29, 2011, the Commission simultaneously issued a notice of the filing of the application and a temporary conditional order exempting the Covered Persons from section 9(a) of the Act (Investment Company Act Release No. 29711) until the Commission takes final action on the application for a permanent order. Subsequent to that notice, Applicants filed an amendment to the application on July 5, 2011 for the sole purpose of naming three additional open-end management investment companies for which applicant J.P. Morgan Investment Management Inc. acts as sub-adviser. The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

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

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application, as amended and filed by J.P. Morgan Securities LLC, et al. (File No. 812-13914) that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of an injunction, described in the application, as amended, entered by the United States District Court for the Southern District of New York on June 29, 2011.

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. 64971 / July 26, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14489

In the Matter of **Derand Real Estate Investment Trust,** **DeRose Industries, Inc.,** **Direct Connect International, Inc.,** **Directcom, Inc. (n/k/a Directcom Marketing, Inc.),** **Diversified Historic Investors II,** **Diversified Historic Investors III, and** **Domestic Fundings, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Derand Real Estate Investment Trust, DeRose Industries, Inc., Direct Connect International, Inc., Directcom, Inc. (n/k/a Directcom Marketing, Inc.), Diversified Historic Investors II, Diversified Historic Investors III, and Domestic Fundings, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Derand Real Estate Investment Trust (CIK No. 28238) is a Massachusetts trust located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Derand Real Estate Investment 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 no revenues and no income for the prior twelve months. The company did not file any periodic reports for the periods between September 30, 1997 and December 31, 1998.

2. DeRose Industries, Inc. (CIK No. 28262) is a dissolved Indiana corporation located in Chambersburg, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DeRose Industries 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 27, 1993, which reported a net loss of over $934,000 for the prior nine months. On December 8, 1993, DeRose Industries filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Middle District of Pennsylvania, and the case was terminated on February 27, 1997.

3. Direct Connect International, Inc. (CIK No. 840815) is a void Delaware corporation located in Wyckoff, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Direct Connect International is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A for the period ended January 31, 2000, which reported a net loss of over $256,000 for the prior nine months.

4. Directcom, Inc. (n/k/a Directcom Marketing, Inc.) (CIK No. 847388) is a void Delaware corporation located in Armonk, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Directcom is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2000, which reported a net loss of over $590,000 for the prior six months.

5. Diversified Historic Investors II (CIK No. 763566) is a cancelled Pennsylvania limited partnership located in Philadelphia, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Diversified Historic Investors II 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.

6. Diversified Historic Investors III (CIK No. 792979) is a Pennsylvania limited partnership located in Philadelphia, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Diversified Historic Investors III 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, 2004, which reported a net loss of over $249,000 for the prior twelve months.

7. Domestic Fundings, Inc. (CIK No. 1116939) is a void Delaware corporation located in Brooklyn, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Domestic Fundings 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 $565 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.

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

III.

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

A. Whether the allegations contained in Section II 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

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 230, 239 and 249

Release Nos. 33-9244; 34-64968; File No. S7-08-10

RIN 3235-AK37

Re-proposal of Shelf Eligibility Conditions for Asset-Backed Securities and Other Additional Requests for Comment

AGENCY: Securities and Exchange Commission.

ACTION: Re-proposed rule.

SUMMARY: We are revising and re-proposing certain rules that were initially proposed in April 2010 related to asset-backed securities in light of the provisions added by the Dodd-Frank Wall Street Reform and Consumer Protection Act and comments received on our April 2010 proposals. Specifically, we are re-proposing registrant and transaction requirements related to shelf registration of asset-backed securities and changes to exhibit filing deadlines. In addition, we are requesting additional comment on our proposal to require asset-level information about the pool assets. We continue to consider the other matters in our April 2010 proposing release.

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. Please include File Number S7-08-10 on the subject line; or

- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-08-10. 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 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: Rolaine Bancroft, Senior Special Counsel, Robert Errett, Special Counsel, or Jay Knight, Special Counsel, in the Office of Structured Finance, at (202) 551-3850, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Item 601[1] of Regulation S-K;[2] Items 1100, 1101, 1109, 1119, and 1121[3] of Regulation AB[4] (a subpart of

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[1] 17 CFR 229.601.

[2] 17 CFR 229.10 et al.

[3] 17 CFR 229.1100, 17 CFR 229.1101, 17 CFR 229.1109, 17 CFR 229.1119, 17 CFR 229.1121.

[4] 17 CFR 229.1100 through 17 CFR 229.1123.

Regulation S-K); Rules 401 and 415,[5] under the Securities Act of 1933 ("Securities Act");[6] and Form 10-D[7] under the Securities Exchange Act of 1934 ("Exchange Act").[8] We also are proposing to add Form SF-3[9] under the Securities Act.

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5 17 CFR 230.401 and 17 CFR 230.415.

6 15 U.S.C. 77a et seq.

7 17 CFR 249.312.

8 15 U.S.C. 78a et seq.

9 17 CFR 239.45.

I. Background

In April 2010, we proposed rules that would revise the disclosure, reporting and offering process for asset-backed securities ("ABS").[10] In light of the problems exposed by the financial crisis, we had proposed significant revisions to our rules governing offers, sales and reporting with respect to asset-backed securities. These 2010 ABS Proposals were designed to improve investor protection and promote more efficient asset-backed markets.

Among other things, in the 2010 ABS Proposing Release we proposed eligibility requirements to replace the current credit rating references in shelf eligibility criteria for asset-backed security issuers. We also proposed to require that, with some exceptions, prospectuses for public offerings of asset-backed securities and ongoing Exchange Act reports contain specified asset-level information about each of the assets in the pool in a standardized tagged data format. Our proposal also included disclosure requirements as conditions to exemptions from offering registration. Further, we proposed to require asset-backed issuers to provide investors with more time to consider transaction-specific information about the pool assets.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") was enacted in July 2010.[11] The April 2010 ABS proposals sought to address a number of concerns about the ABS offering process and ABS disclosures that were subsequently addressed in the Act, while others were not referenced in the Act. Specifically, two of the proposed requirements – risk retention[12] and continued Exchange Act reporting[13] – will be

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10 See Asset-Backed Securities, SEC Release No. 33-9117 (April 7, 2010) [75 FR 23328] (the "2010 ABS Proposing Release" or the "2010 ABS Proposals").

11 Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

12 In the 2010 ABS Proposing Release, we proposed to require sponsors of ABS transactions retain a specified amount of each tranche of the securitization, net of hedging. Section 941 of the Act added new

required for most registered ABS offerings as a result of changes mandated by provisions of the Act. We are re-proposing some of the 2010 ABS Proposals at this time in light of the changes made by the Act and comments we received.

Our re-proposals for ABS shelf registration eligibility are also part of several rule revisions we are considering in connection with Section 939A of the Act. Section 939A of the Act requires that we "review any regulation issued by [us] that requires the use of an assessment of the credit-worthiness of a security or money market instrument and any references to or requirements in such regulations regarding credit ratings." Once we have completed that review, the statute provides that we modify any regulations identified in our review to "remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness" as we determine to be appropriate. In that connection, we take into account the context and purposes of the affected rules.

Section 15G of the Exchange Act. Section 15G generally requires the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commission and in the case of the securitization of any "residential mortgage asset," together with the Department of Housing and Urban Development and the Federal Housing Finance Agency, to jointly prescribe regulations relating to risk retention. In March 2011, the agencies proposed rules to implement Section 15G of the Exchange Act. See Credit Risk Retention, SEC Release No. 34-64148 (March 30, 2011) [76 FR 24090] (the "Risk Retention Proposing Release" or "Risk Retention Proposals").

13 The Commission proposed in the 2010 ABS Proposals to require that an ABS issuer undertake to file Exchange Act reports with the Commission on an ongoing basis as a condition to shelf eligibility. The 2010 ABS Proposals also proposed to require an issuer to confirm, among other things, whether Exchange Act reports required pursuant to the undertaking were current as of the end of the quarter in order to be eligible to use the effective registration statement for takedowns. Section 942(a) of the Act eliminated the automatic suspension of the duty to file under Section 15(d) of the Exchange Act for ABS issuers, and granted authority to the Commission to issue rules providing for the suspension or termination of such duty. Due to the amendment to Section 15(d), the proposed shelf eligibility requirement to undertake to file Exchange Act reports is no longer necessary, including the quarterly evaluation by issuers of compliance with the undertaking. In January 2011, we proposed rules to provide for suspension of the reporting obligations for asset-backed securities issuers when there are no asset-backed securities of the class sold in a registered transaction held by non-affiliates of the depositor. See Suspension of the Duty to File Reports for Classes of Asset-Backed Securities Under Section 15(d) of the Securities Exchange Act of 1934, Release No. 34-63652 (Jan. 6, 2011) [76 FR 2049].

Our re-proposals today for shelf eligibility would require:

- A certification filed at the time of each offering off of a shelf registration statement, or takedown, by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor concerning the disclosure contained in the prospectus and the design of the securitization.
- Provisions in the underlying transaction agreements requiring the appointment of a credit risk manager to review assets upon the occurrence of certain trigger events and provisions requiring repurchase request dispute resolution;
- A provision in an underlying transaction agreement to include in ongoing distribution reports on Form 10-D a request by an investor to communicate with other investors; and
- An annual evaluation of compliance with the registrant requirements.

We are also re-proposing revised filing deadlines for exhibits in shelf offerings to require that the underlying transaction agreements, in substantially final form, be filed and made part of a registration statement by the date the preliminary prospectus is required to be filed under the 2010 ABS Proposal.[14]

We are requesting additional comment on our 2010 ABS Proposals relating to asset-level data in light of Section 942(b) of the Act and comments we received on the 2010 ABS Proposals. Section 942(b) of the Act adds Section 7(c) of the Securities Act to require the Commission to adopt regulations requiring an issuer of an asset-backed security to disclose, for each tranche or class of security, certain loan level information regarding the assets

[14] See discussion regarding proposed Rules 424(h) and 430D below in Section II.

backing that security.[15] Lastly, we are requesting additional comment on our 2010 ABS Proposals relating to privately-offered structured finance products.

II. Securities Act Shelf Registration

Securities Act shelf registration provides important timing and flexibility benefits to issuers. An issuer with an effective shelf registration statement can conduct delayed offerings "off the shelf" under Securities Act Rule 415 without staff action.[16] Under our current rules, asset-backed securities may be registered on a Form S–3 registration statement and later offered "off the shelf" if, in addition to meeting other specified criteria,[17] the

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[15] See Section 7(c) of the Securities Act.

[16] As discussed in the 2010 ABS Proposing Release, contemporaneous with the enactment of Secondary Mortgage Market Enhancement Act of 1984 (SMMEA), which added the definition of "mortgage related security" to the Exchange Act, we amended Securities Act Rule 415 to permit mortgage related securities to be offered on a delayed basis, regardless of which form is utilized for registration of the offering (Public Law 98–440, 98 Stat. 1689). SMMEA was enacted by Congress to increase the flow of funds to the housing market by removing regulatory impediments to the creation and sale of private mortgage-backed securities. An early version of the legislation contained a provision that specifically would have required the Commission to create a permanent procedure for shelf registration of mortgage related securities. The provision was removed from the final version of the legislation, however, as a result of the Commission's decision to adopt Rule 415, implementing a shelf registration procedure for mortgage related securities. See H.R. Rep. No. 994, 98th Cong., 2d Sess. 14, reprinted in 1984 U.S. Code Cong. & Admin. News 2827; see also Shelf Registration, Release No. 33–6499 (Nov. 17, 1983) [48 FR 52889], at n. 30 (noting that mortgage related securities were the subject of pending legislation). In 1992, in order to facilitate registered offerings of asset-backed securities and eliminate differences in treatment under our registration rules between mortgage related asset-backed securities (which could be registered on a delayed basis) and other asset-backed securities of comparable character and quality (which could not), we expanded the ability to use "shelf offerings" to other asset-backed securities. See Simplification of Registration Procedures for Primary Securities Offerings, Release No. 33– 6964 (Oct. 22, 1992) [57 FR 32461]. Under the 1992 amendments, offerings of asset-backed securities rated investment grade by an NRSRO (typically one of the four highest categories) could be shelf eligible and registered on Form S–3. The eligibility requirement's definition of "investment grade" was largely based on the definition in the existing eligibility requirement for non-convertible corporate debt securities.

[17] In addition to investment grade rated securities, an ABS offering is eligible for Form S–3 registration only if the following conditions are met: (i) Delinquent assets must not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date; and (ii) with respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date. See General Instruction I.B.5 of Form S–3. Moreover, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor are or were at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on Form S–3 subject to the requirements of Section 12 or 15(d) of the Exchange Act (15 U.S.C. 78l or 78o(d)) with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to Section 13, 14 or 15(d) of the Exchange

securities are rated investment grade by a nationally recognized statistical rating organization (NRSRO). As we explained in the 2010 ABS Proposing Release, we recognize that asset-backed issuers have expressed the need to use shelf registration to access the capital markets quickly.[18] Our re-proposed shelf eligibility requirements are designed to help ensure a certain quality and character for asset-backed securities that are eligible for delayed shelf registrations given the speed of these offerings. We discuss our proposed revisions to the registrant and transaction requirements for shelf eligibility below.[19]

A. Proposed Form SF-3

In the 2010 ABS Proposing Release, given the distinctions between ABS offerings and other registered securities offerings, we proposed to add new registration forms that would be used for any sale of a security that meets the definition of an asset-backed security,[20] as defined in Item 1101 of Regulation AB.[21] The proposed new forms, which would be named Form SF-1 and Form SF-3,[22] would require disclosure in accordance with

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Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such materials). Such material (except for certain enumerated items) must have been filed in a timely manner. *See* General Instruction I.A.4 of Form S–3. We are not proposing changes to these other eligibility conditions.

18 According to EDGAR, in 2006 and 2007, only three ABS issuers filed registration statements on Form S-1 that went effective. See the 2010 ABS Proposing Release at 23334.

19 In addition to the removal of references to ratings from the shelf eligibility requirements, we note that our 2010 ABS Proposing Release included proposals to increase the amount of time that investors are required to be provided to review information regarding a particular shelf takedown and, therefore, promote analysis of asset-backed securities in lieu of undue reliance on security ratings for shelf offerings. New Rule 424(h), as proposed in the 2010 Proposing Release, would require an ABS issuer using a shelf registration statement on proposed Form SF-3 to file a preliminary prospectus containing transaction-specific information at least five business days in advance of the first sale of securities in the offering. Proposed new Rule 430D would require the framework for shelf registration of ABS offerings and related Rule 424(h) filing requirements for a preliminary prospectus. Under proposed Rule 430D, the Rule 424(h) preliminary prospectus must contain substantially all the information for the specific ABS takedown previously omitted from the prospectus filed as part of an effective registration statement, except for pricing information. These proposals remain outstanding. See the 2010 ABS Proposing Release at 23335.

20 See the ABS 2010 ABS Proposing Release at 23337.

21 17 CFR 229.1101(c).

22 The proposed forms would be referenced in 17 CFR 239.44 and 17 CFR 239.45.

all the items applicable to ABS offerings that are currently required in Form S-1 and Form S-3 as modified by the 2010 ABS Proposals. Offerings that qualify for delayed shelf registration[23] would be registered on proposed Form SF-3, and all other ABS offerings would be registered on Form SF-1.[24]

With respect to proposed Form SF-3, we are only re-proposing certain registrant and transaction requirements contained in the instructions to the Form. The other parts of proposed Form SF-3, which include, among other things, disclosure requirements and instructions for signatures, remain unchanged and outstanding.[25]

B. Shelf Eligibility for Delayed Offerings

Under the 2010 ABS Proposals, ABS issuers would no longer establish shelf eligibility through an investment grade credit rating.[26] The proposals were part of our broad ongoing effort to remove references to NRSRO credit ratings from our rules in order to reduce the risk of undue ratings reliance and eliminate the appearance of an imprimatur that such references may create.[27] In place of credit ratings, we had proposed to establish four shelf eligibility criteria that would apply to mortgage-related securities and other asset-backed securities alike:

- A certification filed at the time of each offering off of a shelf registration statement, or takedown, by the chief executive officer of the depositor that the

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23 In this release, we also refer to such offerings on current Form S-3 and proposed Form SF-3 as "shelf offerings." Note that in the 2010 ABS Proposing Release, we proposed to limit the registration of continuous ABS offerings to "all or none" offerings on Form SF-3. That proposal remains unchanged and outstanding. See the 2010 ABS Proposing Release at 23350.

24 We are not re-proposing any part of Form SF-1 today. Therefore, our 2010 ABS Proposal for Form SF-1 remains outstanding.

25 The proposed text of the entire Form SF-3 is included in Section XI of this release, as proposed in the 2010 ABS Proposing Release and revised for the registrant and transaction requirements that we are re-proposing today.

26 <u>See</u> the 2010 ABS Proposing Release at 23338.

27 <u>See</u> the Security Ratings Release.

assets in the pool have characteristics that provide a reasonable basis to believe that they will produce, taking into account internal credit enhancements, cash flows to service any payments on the securities as described in the prospectus;

- Retention by the sponsor of a specified amount of each tranche of the securitization,[28] net of the sponsor's hedging (also known as "risk retention" or "skin-in-the-game");
- A provision in the pooling and servicing agreement that requires the party obligated to repurchase the assets for breach of representations and warranties to periodically furnish an opinion of an independent third party regarding whether the obligated party acted consistently with the terms of the pooling and servicing agreement with respect to any loans that the trustee put back to the obligated party for violation of representations and warranties and which were not repurchased; and
- An undertaking by the issuer to file Exchange Act reports so long as non-affiliates of the depositor hold any securities that were sold in registered transactions backed by the same pool of assets.[29]

Similar to the existing requirement that the securities must be investment grade, the 2010 ABS Proposals for registrant and transaction requirements were designed to provide that asset-backed securities that are eligible for delayed shelf-registrations have certain quality and character.

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[28] We use the term "sponsor" to mean the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity. See Item 1101(l) of Regulation AB.

[29] See the 2010 ABS Proposing Release at 23338-23348.

Our re-proposal for registrant and transaction requirements for shelf does not contain a requirement for risk retention because, as noted above in Section I, the Risk Retention Proposals are currently being considered by the joint regulators.[30] The Risk Retention Proposals would apply to both registered and non-registered ABS. Although we may consider whether additional risk retention requirements for shelf eligibility are appropriate after the risk retention rules are adopted by the joint regulators, at this point we believe that it would be preferable not to have different risk retention requirements for our shelf eligibility rules. We had proposed that the sponsor of any securitization retain risk in each tranche of the securitization as a partial replacement for the investment grade ratings requirement because we believe that securitizations with sponsors that have continuing risk exposure would likely be higher quality than those without, and we anticipate that the final risk retention rules adopted by the joint regulators should also promote that goal. In addition, we believe disparate risk retention requirements could be confusing and impose unnecessary burdens on the ABS markets. Consequently, we are eliminating the risk retention requirement from our proposal at this time.

Further, our re-proposal for registrant and transaction requirements for shelf does not contain a requirement to include an undertaking to provide Exchange Act reports because, as noted above in Section I, Section 942(a) of the Act eliminated the automatic suspension of the duty to file under Section 15(d) of the Exchange Act for ABS issuers and granted the Commission the authority to issue rules providing for the suspension or termination of such duty.[31] As a result, ABS issuers with Exchange Act Section 15(d) reporting obligations will continue to report without regard to the shelf eligibility requirements.

[30] See fn. 12.

[31] See fn. 13.

As noted above, our re-proposals are limited to certain registrant and transaction requirements contained in the instructions to the Form. The other parts of proposed Form SF-3, such as disclosure and instructions for signatures, remain unchanged and outstanding. We believe that the re-proposed transaction requirements described below would allow ABS issuers to access the market quickly, while providing improved investor protections that would be indicative of a higher quality security, making them appropriate replacements for the investment grade rating condition to eligibility for a delayed shelf offering.

1. Revised and Re-Proposed Transaction Requirements

We are revising and re-proposing certain transaction requirements for shelf to replace the current investment grade rating criterion. As noted above, in light of the Act, our re-proposal does not include a risk retention requirement or a requirement that the issuer undertake to continue Exchange Act reporting. As explained in further detail below, under the re-proposal, the proposed transaction requirements for shelf offerings would include:

- A certification filed at the time of each offering off of a shelf registration statement, or takedown, by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor concerning the disclosure contained in the prospectus and the design of the securitization;
- Provisions in the underlying transaction agreements requiring the appointment of a credit risk manager to review the underlying assets upon the occurrence of certain trigger events and provisions requiring repurchase request dispute resolution; and
- A provision in an underlying transaction agreement to include in ongoing distribution reports on Form 10-D a request by an investor to communicate with other investors.

In the 2010 ABS Proposing Release, we did not propose to change the other current ABS shelf offering transaction requirements related to the amount of delinquent assets in the asset pool and residual values of leases and we are not proposing to change these requirements in this release.[32]

a) Certification

We are re-proposing the transaction requirement, which partially replaces the investment grade ratings criterion for shelf eligibility, for ABS shelf offerings to require that a certification be provided by either the chief executive officer of the depositor or the executive officer in charge of securitization of the depositor. In the 2010 ABS Proposing Release, we proposed that the depositor's chief executive officer certify that to his or her knowledge, the assets have characteristics that provide a reasonable basis to believe they will produce, taking into account internal credit enhancements,[33] cash flows at times and in amounts necessary to service payments on the securities as described in the prospectus.[34]

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32 See fn. 17.

33 We note internal credit enhancement would include guarantees applicable to the underlying loans. See letter from Sallie Mae on the 2010 ABS Proposing Release (requesting that the Commission clarify that internal credit enhancement should include all guarantees applicable to government guaranteed student loans). The public comments we received are available on our website at http://www.sec.gov/comments/s7-08-10/s70810.shtml.

34 As we explained in the 2010 ABS Proposing Release, this condition is similar to the current disclosure requirements for asset-backed issuers in the European Union. Annex VIII, Disclosure Requirements for the Asset-Backed Securities Additional Building Block, Section 2.1 (European Commission Regulation (EC) No. 809/2004 (April 29, 2004). The EU requires asset-backed issuers to disclose in each prospectus that the securitized assets backing the issue have characteristics that demonstrate capacity to produce funds to service any payments due and payable on the securities. Similarly, under the North American Securities Administrator's Association (NASAA)'s guidelines for registration of asset-backed securities, sponsors are required to demonstrate that for securities without an investment grade rating, based on eligibility criteria or specifically identified assets, the eligible assets being pooled will generate sufficient cash flow to make all scheduled payments on the asset-backed securities after taking certain allowed expenses into consideration. The guidelines are available at *www.nasaa.org*. In the 2010 ABS Proposing Release, we explained that because the certification is framed as an ABS shelf eligibility condition instead of a disclosure requirement, we proposed slightly different language than a similar EU disclosure requirement in order to more precisely outline what the officer is certifying to. We proposed a certification rather than a disclosure requirement because we believe the potential focus on the transaction and the disclosure that may result from an individual providing a certification should lead to enhanced quality of the securitization.

This officer would also certify that he or she has reviewed the prospectus and the necessary documents for this certification.[35] We believe, as we did when we proposed the certification for Exchange Act periodic reports, that a certification may cause these officials to review more carefully the disclosure, and in this case, the transaction, and to participate more extensively in the oversight of the transaction, which is intended to result in shelf eligible ABS being of a higher quality than ABS structured without such oversight.[36] In response to the 2010 ABS Proposing Release, the investor members of one commentator agreed and emphasized that the certification would be a valuable and appropriate requirement for shelf eligibility, encouraging more careful issuer review of securitizations.[37] Other commentators, however, expressed concern regarding the certification and suggested that the certification instead just relate to disclosure.[38]

Although integrally related to the disclosure about the structure, assets and securities, we preliminarily believe the certification should not be limited to disclosure. An asset-backed security is the product of multiple and varied contracts. The certification is designed to encourage better oversight by an executive officer of the securitization process. The

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[35] As we noted in the 2010 ABS Proposing Release, a depositor's chief executive officer may conclude that in order to provide the certification, he or she must analyze a structural review of the securitization. Rating agencies also typically conduct a structural review of the securitization when issuing a rating on the securities.

[36] See Certification of Disclosure in Companies' Quarterly and Annual Reports, Release No. 34– 46079 June 14, 2002. *See also* Testimony Concerning Implementation of the Sarbanes-Oxley Act of 2002 by William H. Donaldson, Chairman U.S. Securities and Exchange Commission Before the Senate Committee on Banking, Housing and Urban Affairs (September 9, 2003) (noting that a consequence of "the combination of the certification requirements and the requirement to establish and maintain disclosure controls and procedures has been to focus appropriate increased senior executive attention on disclosure responsibilities and has had a very significant impact to date in improving financial reporting and other disclosure").

[37] See letter from Securities Industry Financial Markets Association (SIFMA) (investors) on the 2010 ABS Proposing Release.

[38] Several commentators offered, as an alternative, that the CEO of the depositor certify to the adequacy and accuracy of the disclosure in the offering documents. See letters from American Bar Assosciation (ABA); American Bankers Association and ABA Securities Association (ABASA); American Securitization Forum (ASF); Australian Securitisation Forum (AusSF); Bank of America (BOA); CNH Capital America (CNH); Financial Services Roundtable (FSR); J.P. Morgan Chase & Co. (JP Morgan); Mortgage Bankers Association (MBA); SIFMA (dealers and sponsors); Sallie Mae; and Wells Fargo on the 2010 ABS Proposing Release.

certification also is proposed as a partial substitute for the investment grade rating. As such, we believe it is appropriate to require that the depositor have some belief that the securities being offered and sold pursuant to a shelf registration are of a certain quality. The proposed certification is not a condition for selling or registering asset-backed securities and, in fact, as is the case today, securities that are part of the same transaction may be privately offered and sold and thus would not be subject to the certification. For these reasons, we are not limiting the proposed certification to disclosure as suggested by some commentators. However, we agree that having the certification address disclosure more directly may also improve the oversight and therefore the quality of the securities. Consequently, we are proposing to revise the certification to explicitly address disclosure matters, as described below.

We anticipate that in order to provide the proposed certification, a certifier could rely, in part, on the review that would already be required in order for an issuer to comply with recently adopted Rule 193.[39] Rule 193 implements Section 945 of the Act by requiring that any issuer registering the offer and sale of an ABS perform a review of the assets underlying the ABS. Under the rule, at a minimum, such review must be designed and effected to provide reasonable assurance that the disclosure regarding the pool assets in the prospectus is accurate in all material respects. In addition to a review of the assets, the proposed certification, however, would require a review of the structure of the securitization.

Several commentators on the 2010 ABS Proposing Release opposed the certification requirement because they argued, in general, that the depositor's chief executive officer could not be expected to have the knowledge necessary to certify the performance of the

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[39] 17 CFR 230.193. In that rulemaking, we also added new Item 1111(a)(7) to Regulation AB [17 CFR 229.1111(a)(7)] to require disclosure in prospectuses of the nature of the review of the assets performed by an issuer, including whether the issuer of any ABS engaged a third party for purposes of performing the review of the pool assets underlying an ABS and the findings and conclusions of the review of the assets. See Issuer Review of Assets in Offerings of Asset-Backed Securities, Release No. 33-9176 (Jan. 20, 2011) [76 FR 4231] the "January 2011 ABS Issuer Review Release").

securities.[40] We understand that an executive officer of the depositor may rely on the work of other parties to assist him or her with structuring an ABS transaction. We do believe however, that the chief executive officer of a depositor should provide appropriate oversight so that he or she would be able to make the certification.

In the 2010 ABS Proposing Release, we also explained that the certification would be a statement of what is known by the signatory at the time of the offering and would not serve as a guarantee of payment of the securities. However, we received comment letters expressing general concern that the text of the proposed certification could be viewed as a guarantee of the future performance of the assets underlying the ABS.[41] In contrast, one investor commentator noted that the certification would not serve as a guarantee, but instead would serve to create accountability and align interests, much like other certification requirements that already exist in the securities regulation and accounting practices.[42] To address commentators' concerns, we are re-proposing the requirement to revise the text of the certification to state that the securitization is not guaranteed by this certification to produce cash flows at times and amounts sufficient to service the expected payments on the asset-backed securities. Furthermore, we have revised the language so that it no longer addresses how the securities "will" pay or perform but instead focuses on the design of the transaction.

We are also re-proposing the requirement in order to allow either the chief executive officer of the depositor or the executive officer in charge of securitization of the depositor to

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40 See letters from ABA; ABASA; Association of Mortgage Investors (AMI); ASF; BOA; CNH; Discover Financil Services (Discover); FSR; JP Morgan; Sallie Mae; SIFMA (dealers and sponsors); and Wells Fargo on the 2010 ABS Proposing Release.

41 See letters from ASF (issuer members), ABASA, CRE Finance Council (CREFC) and Wells Fargo on the 2010 ABS Proposing Release.

42 See letter from Vanguard on the 2010 ABS Proposing Release.

sign the certification. In the 2010 ABS Proposing Release, we had proposed that the chief executive officer of the depositor sign the certification. We explained that the chief executive officer of the depositor is already responsible as signatory of the registration statement for the issuer's disclosure in the prospectus and is subject to liability for material misstatements or omissions under the federal securities laws.[43] We would expect that chief executive officers of depositors, as signatories to the registration statement, would have reviewed the necessary documents regarding the assets, transactions and disclosures.[44] We believe that requiring the chief executive officer of the depositor to sign the certification is consistent with other signature requirements for asset-backed securities.[45]

In the 2010 ABS Proposing Release, we asked whether an individual in a different position should be required to provide the certification, and in particular, whether the senior officer in charge of securitization for the depositor should sign the certification. Moreover, the 2010 ABS Proposals included a requirement that the senior officer in charge of the securitization of the depositor sign the registration statement for ABS issuers, instead of the principal accounting officer or controller of the depositor.[46] Several commentators suggested that the proposed certification be signed by the senior officer in charge of securitization of

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[43] See Securities Act Section 11 (15 U.S.C. 77k(a)) and Exchange Act Section 10(b) (15 U.S.C. 78j(b)).

[44] We also noted that an officer providing a false certification potentially could be subject to Commission action for violating Securities Act Section 17 (15 U.S.C. 77q(a)).

[45] See, e.g., Item 601(b)(31)(ii) of Regulation S–K (exhibit requirement for ABS regarding certification required by Exchange Act Rules 13a–14(d) and 15d–14(d)).

[46] In the 2010 ABS Proposing Release, we recognized that providing signatures of the principal accounting officer or controller of the depositor appears to serve no purpose because ABS issuers are not required to file financial statements under our rules or pursuant to their governing documents, and ABS issuers do not employ a principal accounting officer or controller. Thus, we stated our belief that requiring the senior officer in charge of the securitization to sign the registration statement would be more meaningful in the context of ABS offerings because it is more consistent with our other signature requirements for ABS issuers for Form 10-K. See the 2010 ABS Proposing Release at 23354.

the depositor in order to provide consistency with our outstanding signature page proposal.[47] We agree with commentators' suggestions and believe that requiring such individual to sign the certification would serve the goal of encouraging more extensive oversight of ABS transaction as well as being consistent with our other signature requirements for ABS issuers. However, we believe the officer signing the certification should be an executive officer. The definition of "executive officer" is already provided in Securities Act Rule 405.[48] "Executive officer in charge of securitization" rather than "senior officer in charge of securitization" is more consistent with our other regulations requiring executive officers be signators and our view that more extensive oversight by an executive officer may improve the quality of the securities. Therefore, we are proposing to require that an executive officer in charge of securitization be permitted to sign the certification.

Similar to the 2010 ABS Proposal, under the re-proposal, the statements required in the certification would be made based on the knowledge of the certifying person. We would expect that a chief executive officer and executive officer in charge of securitization of the depositor would have reviewed the necessary documents regarding the assets, transactions and disclosures. Under current requirements, the registration statement for an ABS offering is required to include a description of the material characteristics of the asset pool,[49] as well as information about the flow of funds for the transaction, including the payment allocations, rights and distribution priorities among all classes of the issuing entity's securities, and

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47 See letters from ABA; ABASA; ASF; JP Morgan; MBA and Wells Fargo on the 2010 ABS Proposing Release.

48 The term executive officer, when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant. [17 CFR 230.405].

49 See Item 1111 of Regulation AB [17 CFR 229.1111].

within each class, with respect to cash flows, credit enhancement and any other structural features in the transaction.[50] The proposed certification would be an explicit representation by the certifying person of what is implicit in what should already be disclosed in the registration statement.[51] If the certifying person did not believe the securitization was designed to produce cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities being registered, disclosure about such insufficiency would be required under Securities Act Rule 408 and Exchange Act Rule 10b-5.[52] Similarly, the executive officer would not be able to sign the certification if he or she knew or expected that the design of the securitization would not produce cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities.

Commentators also were concerned about the scope of the certification because, as proposed, the certification would apply to "any payments of the securities as described in the prospectus." A few commentators raised the point that the lower or junior tranches of a securitization are offered at steep discounts because investors expect that the assets will not produce the cash flows necessary to service any payments of those securities.[53] Those lower tranches typically have not been sold in registered transactions because they did not satisfy the current investment grade ratings transaction requirement. In order to provide clarity, we are re-proposing the text of the certification so that the certification would apply to the securities offered and sold pursuant to the registration statement and thus would not apply to

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50 See Item 202 of Regulation S-K [17 CFR 229.202] and Item 1113 of Regulation AB [17 CFR 229.1113].

51 This approach is somewhat similar to the approach we took with Regulation AC, which requires certifications from analysts. We noted there that Regulation AC makes explicit the representations that are already implicit when an analyst publishes his or her views—that the analysis of a security published by the analyst reflects the analyst's honestly held views. Section II of Regulation Analyst Certification, Release No. 33-8193 (Feb. 23, 2003) [68 FR 9482].

52 17 CFR 230.408 and 17 CFR 240.10b-5.

53 See letters from ABA, ASF, and Sallie Mae on the 2010 ABS Proposing Release.

privately offered and sold securities even if issued by the same issuing entity. Under our re-proposal, this certification would be an additional exhibit requirement for the shelf registration statement that would not be applicable to the non-shelf registration statement, proposed Form SF–1. We are proposing the certification be dated as of the date of the final prospectus under Rule 424 and would be required to be filed by the time the final prospectus is required to be filed under Rule 424.[54]

Reflecting revisions in response to comments, as described above, the revised proposed certification would be required to be provided by the CEO or the executive officer in charge of securitization for the depositor and would state that,

- the executive officer has reviewed the prospectus and is familiar with the structure of the securitization, including without limitation the characteristics of the securitized assets underlying the offering, the terms of any internal credit enhancements, and the material terms of all contracts and other arrangements entered in to effect the securitization;
- based on the executive officer's knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading;
- based on the executive officer's knowledge, the prospectus and other information included in the registration statement of which it is a part, fairly present in all material respects the characteristics of the securitized assets underlying the offering described therein and the risks of ownership of the asset-backed securities described therein, including all credit enhancements

[54] See proposed revision to Item 601(b) of Regulation S–K.

and all risk factors relating to the securitized assets underlying the offering that would affect the cash flows sufficient to service payments on the asset-backed securities as described in the prospectus; and

- based on the executive officer's knowledge, taking into account the characteristics of the securitized assets underlying the offering, the structure of the securitization, including internal credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, the securitization is designed to produce, but is not guaranteed by this certification to produce, cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities offered and sold pursuant to the registration statement.[55]

Request for comment:

1. Is our proposal to require a certification by the chief executive officer of the depositor or the executive officer in charge of securitization appropriate as a condition to shelf eligibility? Would the proposed certification encourage more extensive oversight of the transaction, and, therefore, be a partial indicator of an ABS that is a higher quality security?

2. Does the re-proposed language clarify that the certification does not constitute a guarantee?

[55] We note that an executive officer in delivering the certificate is precluded from taking into account external credit enhancements because the certification is expressly directed to the design of the securitization and whether or not taking into account the characteristics of the securitized assets underlying the offering, the structure of the securitization, including internal credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, such securitization is designed to produce cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities offered and sold pursuant to the registration statement. An example of an external credit enhancement is a third party insurance to reimburse losses on the pool assets or the securities.

3. Are the chief executive officer of the depositor or the executive officer in charge of securitization of the depositor the appropriate parties that should provide the certification, as proposed? Some of our signature requirements related to ABS refer to "senior officer in charge of securitization."[56] Should we revise all of those references to conform so that they refer to executive officer in charge of securitization?

4. Is the text of the proposed certification appropriate? Would having an executive officer certify that taking into account the structure of the transaction, the disclosure in the prospectus, the exhibits to the registration statement, and the information currently known to the executive officer about the securitized assets backing the securities offered and sold pursuant to the registration statement, there is a reasonable basis to conclude that those assets will generate cash flows in amounts and at times that will permit those securities to make the payments described in the transaction documents, achieve the same result as the proposed certification? Would this certification be appropriate if it also stated that this certification is only an expression of the executive officer's current belief and is not a guarantee that those assets will generate such cash flows, and there may be current facts not known to the executive officer and there may be future developments that would cause his or her opinion to change or that would result in those assets not generating such cash flows?

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[56] The Form 10–K [17 CFR 249.310] report for ABS issuers must be signed either on behalf of the depositor by the senior officer in charge of securitization of the depositor, or on behalf of the issuing entity by the senior officer in charge of the servicing. In addition, the certifications for ABS issuers that are required under Section 302 of the Sarbanes-Oxley Act must be signed either on behalf of the depositor by the senior officer in charge of securitization of the depositor if the depositor is signing the Form 10–K report, or on behalf of the issuing entity by the senior officer in charge of the servicing function of the servicer if the servicer is signing the Form 10–K report.

5. Would it be more appropriate to tie the certification to current investment grade rating standards? For instance, should the executive officer certify that the securities being offered and sold under the registration statement have adequate capacity to meet financial commitments, similar to some definitions of investment grade securities?

6. Are there other certifications that would more effectively promote accountability and oversight of the transaction by the executive officer, resulting in shelf eligible ABS being of a higher quality?

7. Would a certification limited to the disclosure in the prospectus effectively promote accountability and oversight of the transaction by the executive officer resulting in shelf-eligible ABS being of higher quality? If so, would the following language be appropriate: I, [certifying individual], certify that:

   1. I have reviewed the prospectus relating to [title of securities the offer and sale of which are registered] and am familiar with the structure of the securitization, including the characteristics of the securitized assets underlying the offering, the terms of any internal credit enhancements and the material terms of all contracts and other arrangements entered in to the effect the securitization];

   2. Based on my knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading; and

   3. Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, fairly present in all material respects the characteristics of the securitized assets underlying the offering described therein

and the risks of ownership of the asset-backed securities described therein, including all credit enhancements and all risk factors relating to the securitized assets underlying the offering that would affect the cash flows sufficient to service payments on the asset-backed securities as described in the prospectus.

8. We note above that the proposed certification would be an explicit representation of the certifying person of what is already implicit in the disclosure contained in the registration statement and that as a signatory of the registration statement for the issuer's disclosure in the prospectus, the executive officer can be liable for material misstatements or omissions under the federal securities laws. Would the certification create new potential liability for the certifier?

9. If the CEO or executive officer in charge of securitization of the depositor provides the certification, as proposed, and obtains assistance from a third party, should we require disclosure about the third party? Should the disclosure requirement be the same as or similar to the possible disclosures regarding an independent evaluator that we describe below? If not the same, what disclosures about the third party should be required?

10. Is it appropriate to require the certification be made as of the date of the final prospectus, as proposed? Should it instead be made as of the when the securities are first sold?[57] Or should it be made as of the date of the Rule 424(h) preliminary prospectus?

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[57] [17 CFR 230.159]. Rule 159 provides the following: (a) For purposes of section 12(a)(2) of the Securities Act only, and without affecting any other rights a purchaser may have, for purposes of determining whether a prospectus or oral statement included an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account and (b) For purposes of section 17(a)(2) of the Act only, and without affecting any other rights the

11. Is it appropriate to require the certification be filed as an exhibit to the registration statement at the time of the final prospectus by means of a Form 8–K, as proposed? Or would it be more appropriate to require the certification be filed at the same time as the proposed Rule 424(h) preliminary prospectus?[58]

12. In lieu of the requirement that the chief executive officer or executive officer in charge of securitization of the depositor provide a certification, should we allow an opinion to be provided by an "independent evaluator" regarding the ABS that would provide the same assurances as the certification? Would permitting such an opinion encourage appropriate oversight of the transaction structure for purposes of determining shelf eligibility? Would allowing an opinion by an independent evaluator give issuers the flexibility to engage a third party to give the certification that would otherwise be required of the CEO or the executive officer in charge of securitization? If we permit an independent evaluator to provide an opinion in lieu of an officer certification, would it be appropriate for us to require that the text of the opinion be the same as the proposed text for the certification by the CEO or executive officer in charge of securitization of the depositor?

13. We note that if we permit an opinion to be provided, we anticipate that the opinion would need to be filed as an exhibit to the registration statement and the independent evaluator would need to consent to being named as an "expert" in the registration statement and be subject to the liability provisions of Section 11 of the

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Commission may have to enforce that section, for purposes of determining whether a statement includes or represents any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.

[58] See discussion below in Section III.A.

Securities Act.[59] Would these requirements be appropriate? Would third parties be willing to act as independent evaluators on this basis?

14. How would we define an independent evaluator for purposes of providing the opinion? For example, would it be appropriate to define an independent evaluator as a person who: (i) has expertise and experience in structuring and evaluating asset-backed securities; (ii) is not affiliated with the issuer or any person involved in the organization or operation of the issuer;[60] (iii) itself, and any of its affiliates, does not knowingly have, or does not have the intention to acquire, any direct or indirect beneficial interest in any securities issued or assets held by the issuer, and (iv) does not have any other material business or financial relationship with the issuer or any person involved in the organization or operation of the issuer.[61] Should we impose any additional or different requirements on an independent evaluator?

15. What steps should the issuer (or another person on behalf of the issuer) need to take to determine whether a prospective independent evaluator meets specified criteria? Should it be able to rely on a statement of the evaluator, for example, that it has the required expertise and experience?

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[59] Section 7 of the Securities Act requires the consent of any person, whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement. See also Securities Act Section 11 [15 U.S.C. 77k]

[60] An "affiliate" of, or a person "affiliated" with, a specified person, is defined in Commission rules to mean "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." See, e.g., Securities Act Rule 405 and Exchange Act Rule 12b-2. The term "control" also is defined in those rules as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

[61] This requirement would not preclude an independent evaluator to serve as an independent evaluator in other ABS transactions of the same sponsor or depositor.

16. Would a provision prohibiting ownership of beneficial interests in securities issued by the issuer or assets held by the issuer and any other material business or financial relationships facilitate the evaluator's independence?

17. Should we place limits on whether an independent evaluator in one transaction could serve as an independent evaluator in other ABS transactions of the same sponsor or depositor?

18. What types of entities are likely to serve as independent evaluators? We anticipate that firms, such as asset management firms, consultants, credit enhancement providers and rating agencies could serve as independent evaluators. Should any types of persons or entities be excluded from being independent evaluators?

19. Should rating agencies be permitted to serve as independent evaluators? If so, should a rating agency hired to issue a credit rating on an ABS also be able to serve as an independent evaluator on the same transaction?

20. Would it be appropriate for a duly authorized person of the independent evaluator to sign on behalf of the independent evaluator? Should the signature of an individual from the independent evaluator be required?

21. Should we require that if an opinion is provided by an independent evaluator, that the prospectus include specific information about the independent evaluator such as the name of the independent evaluator, its form of organization, its experience with evaluating ABS, the manner in which the independent evaluator was compensated for the certification, and to the extent material, any affiliations between the independent evaluator and the issuer as well as other transaction parties? In addition, should we add a requirement to describe the basis on which the person responsible for selecting the independent evaluator determined that the

evaluator selected has the requisite expertise and experience? Should we require disclosure regarding the process undertaken by the opinion provider and the factual and analytical bases for such opinion? Should we require any additional disclosure?

b) Credit Risk Manager and Repurchase Request Dispute Resolution Provisions

Commentators on the 2010 ABS Proposing Release suggested that a different third party mechanism for investigating and resolving breaches of representations and warranties concerning the pool assets would better serve the interests of investors than the proposed shelf eligibility criterion regarding representations and warranties.[62] Based on comments received on the 2010 ABS Proposing Release, we are proposing, as a second transaction requirement for ABS shelf offerings, that the underlying transaction documents of an ABS include provisions requiring that the trustee of the issuing entity appoint a credit risk manager to review the underlying assets upon the occurrence of certain trigger events and provide its report to the trustee of the findings and conclusions of the review of the assets. We are also proposing as a part of this shelf eligibility condition to require certain provisions in the underlying transaction agreements in order to resolve repurchase request disputes. As we explain further below, these proposals would be in lieu of the proposed shelf eligibility

[62] See letters from ABASA; ASF; BOA; JPMorgan; Metlife; Prudential Investment Management (Prudential); SIFMA; Group of 16 Vehicle ABS Issuers (Vehicle ABS Group); Vanguard; Wells Fargo on the 2010 ABS Proposing Release. As we noted in previous Commission releases, the effectiveness of the contractual provisions related to representations and warranties has been questioned and the lack of responsiveness by sponsors to potential breaches of representations and warranties in the pool assets has been the subject of investor complaint. Transaction agreements typically have not included specific mechanisms to identify breaches of representations and warranties or to resolve a question as to whether a breach of the representations and warranties has occurred. Thus, these contractual agreements have frequently been ineffective because, without access to documents relating to each pool asset, it can be difficult for the trustee, which typically notifies the sponsor of an alleged breach, to determine whether or not a representation or warranty relating to a pool asset has been breached. See the 2010 ABS Proposing Release and Disclosure for Asset Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, SEC Release No. 33-9175 (January 20, 2011) [76 FR 4489] (the "943 Release") at 4490.

condition to require a provision in the pooling and servicing agreement to require the party obligated to repurchase assets for breach of representations and warranties to periodically furnish an opinion of an independent third party. We believe that this revised proposal would better strengthen the enforceability of contract terms surrounding the representations and warranties regarding the pool assets for ABS shelf transactions and incentivize obligated parties to better consider the characteristics and quality of the assets underlying the securities, making it an appropriate partial replacement for investment grade ratings.

We have noted in previous Commission releases that in the underlying transaction agreements for an asset securitization, sponsors or originators typically make representations and warranties relating to the pool assets and their origination, including representations about the quality of the pool assets.[63] For instance, in the case of residential mortgage-backed securities, one typical representation and warranty is that each of the loans has complied with applicable federal, state and local laws, including truth-in-lending, consumer credit protection, predatory and abusive laws and disclosure laws. Another representation that may be included is that no fraud has taken place in connection with the origination of the assets on the part of the originator or any party involved in the origination of the assets. Upon discovery that a pool asset does not comply with the representation or warranty, under transaction covenants, an obligated party, typically the sponsor, must repurchase the asset or substitute a different asset that complies with the representations and warranties for the non-compliant asset.

In January 2011, we adopted new rules to implement Section 943 of the Act, requiring disclosure related to representations and warranties in ABS offerings (the "943 Release"). While our new rules under Section 943 require disclosure of fulfilled and

63 See the 2010 ABS Proposing Release. See also the 943 Release.

unfulfilled repurchase request activity, they do not directly address the enforceability, as a practical matter, of put back provisions in the underlying transaction agreements. As we noted in the 943 Release, the effectiveness of the contractual provisions related to representations and warranties has been questioned and lack of responsiveness by sponsors to potential breaches of the representations and warranties relating to the pool assets has been the subject of investor complaint.[64]

In order to address this investor concern, in the 2010 ABS Proposing Release, we proposed a condition to shelf eligibility that would require a provision in the pooling and servicing agreement that would require the party obligated to repurchase the assets for breach of representations and warranties to periodically furnish an opinion of an independent third party regarding whether the obligated party acted consistently with the terms of the pooling and servicing agreement with respect to any loans that the trustee put back to the obligated party for violation of representations and warranties and which were not repurchased.[65] Several commentators from both the issuer and investor community were concerned that this proposal was unduly complex, costly, and would not achieve its goals. Instead, commentators generally suggested that a better way to address the concern regarding enforceability of repurchase obligations related to breaches of representations and warranties would be to require a review of the underlying assets by an independent third party, or "credit risk manager".[66] After considering the comment letters received, we are proposing as the second transaction requirement for shelf offerings to replace investment grade ratings, in lieu of the proposed requirement for a third-party opinion, that the underlying transaction

[64] See the 943 Release at 4490.

[65] See the 2010 ABS Proposing Release at 23344.

[66] See letters from ASF, ABASA, BOA, Vanguard, SIFMA, Wells Fargo, Metlife, Prudential, JPMorgan on the 2010 ABS Proposing Release.

documents include provisions requiring a credit risk manager to review the underlying assets upon the occurrence of certain trigger events that are described below. Under the proposal, the credit risk manager[67] would be appointed by the trustee,[68] not be affiliated with any sponsor, depositor or servicer in the transaction, and would have authorization to access the underlying loan documents.[69] By requiring that the trustee appoint the credit risk manager and requiring that there be no affiliation with the sponsor, depositor or servicer, we are attempting to address any potential conflicts that could arise between the credit risk manager and the obligated party. In addition, we are requiring that the credit risk manager have access to copies of the underlying loan documents so it can perform its duties under the proposed requirement.

We are proposing that the credit risk manager review the underlying assets of the ABS for compliance with the representations and warranties on the underlying pool assets upon the occurrence of trigger events which would be specified in the transaction agreements. We are proposing to require that the transaction agreements require, at a minimum, review by the credit risk manager (1) when the credit enhancement requirements, such as required reserve account amounts or overcollateralization percentages, as specified in the underlying transaction agreements, are not met; and (2) at the direction of investors pursuant to the processes provided in the transaction agreement and disclosed in the prospectus. These two trigger events should facilitate the ability of transaction parties to pursue transaction remedies, which we believe would be a feature of a higher quality

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67 See proposed Item 1101(m) of Regulation AB.

68 See letter from Prudential on the 2010 ABS Proposing Release.

69 Under our proposal, the credit risk manager could also be the same party serving another role in the same transaction, such as the trustee, custodian or an operating advisor (as proposed in the Risk Retention Proposals) as long as it is not affiliated with the sponsor, depositor or servicer. See the Risk Retention Proposing Release at 24109. See also letters from ASF, BOA and SIFMA.

security, as well as directly address commentators' concerns related to representations, warranties and enforcement mechanisms in underlying transaction agreements for the reasons we describe below. At the same time, we are not proposing to mandate that transaction parties follow specific procedures related to the review or repurchase process because we preliminarily believe transaction parties should have the flexibility to tailor the procedures to each ABS transaction, taking into account the specific features of the transaction and/or asset class. Our proposal would require that the transaction agreements require a review by the credit risk manager, at a minimum, in certain specified instances described below. However, the transaction agreements could, at the election of the transaction parties, specify additional triggers for a credit risk manager review. We also expect that the transaction parties may develop more specific and robust procedures for monitoring and reviewing the assets that support the ABS.[70]

Credit enhancement or other structural support for asset-backed securities can be provided in a variety of ways, including both internally structured support as well as externally provided enhancement or support.[71] For example, internal credit enhancement is structured into the transaction to increase the likelihood that one or more classes of asset-backed securities will pay in accordance with their terms, such as subordination provisions, overcollateralization, reserve accounts, cash collateral accounts or spread accounts.

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70 Some commentators suggested that the credit risk manager be required to review the assets at other trigger events. ASF (investor members) and Metlife suggested that review be required at objectively defined trigger events such as when loans default shortly after origination, when loans become seriously delinquent (60 days), or when the servicer or trustee suspects a breach. ASF (sponsor members) suggested that review be required by terms of the transaction agreement only or when a bona fide and substantiated allegation of breach by a security holder is received. SIFMA suggested that review be required when the credit risk manager determines it is appropriate to assert a claim for breach on behalf of the securitization trust, in the interests of all investors in the aggregate, or as directed by an investor subject to certain standards. We request comment below on whether we should require any of these suggestions in addition to our proposals or as alternatives to our proposal.

71 See the 2004 ABS Adopting Release at 1548.

Accordingly, the underlying transaction agreements typically require that internal credit enhancement be maintained at a specified amount. We believe it would be appropriate for the credit risk manager to review defaulted assets when the credit enhancements (including structural supports, such as subordination), fall below the required target levels, as specified in the underlying transaction agreements, because if that happens, then losses may be higher than originally expected, thereby calling into question whether the defaulted assets met the representations and warranties provided in the underlying transaction documents. [72]

As we explained in the 943 Release, investors have demanded that trustees enforce repurchase covenants because transaction agreements do not typically contain a provision for an investor to directly make a repurchase demand.[73] However, many investors have been frustrated with the structure and process because, as discussed above, trustees have not enforced repurchase rights and investors have been unable to locate other investors in order to force trustees to do so.[74] In response to this concern, we are proposing as a part of the second shelf eligibility condition that the transaction agreements be required to provide a process whereby investors are able to direct the credit risk manager to review assets for potential breaches of a representation or warranty because we believe that such a requirement facilitates an investor's ability to pursue remedies under the transaction agreement, contributing to a higher quality security. As noted above, we are allowing for flexibility by not specifying the procedural requirements by which investors may make the request.

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72 For example, if the overcollateralization target amount specified in the transaction document is 3%, then the credit risk manager would be required to conduct a review of the defaulted assets for compliance with representations and warranties when it falls below 3%.

73 See the 943 Release at 4498.

74 Typically, investor rights require a minimum percentage of investors acting together in order to enforce the representation and warranty provisions contained in the underlying transaction agreements. We discuss our ABS shelf proposal related to investor communication in Section II.B.1.c. below. See also Alex Ulam, "Investors Try to Use Trustees as Wedge in Mortgage Put-Back Fight," American Banker (Jun. 27, 2011) (noting that investor votes are required in order to force a trustee to take action).

However, because commentators on the 2010 ABS Proposing Release suggested several mechanisms that could be appropriate for investor-directed review of assets and requests for repurchase, we are requesting comment on whether we should specify those procedures as conditions to shelf eligibility.[75] Under the proposal, transaction parties would retain the flexibility to determine the appropriate procedures and times for investor-directed review of underlying assets for each ABS and whatever mechanism is provided would be described in the prospectus.

We are also proposing to require as part of the second shelf eligibility condition that the underlying transaction agreements require that the credit risk manager provide its report to the trustee of the findings and conclusions of its review of the assets.[76] The trustee could then use the report to determine whether a repurchase request would be appropriate under the terms of the transaction agreements, thereby enhancing the effectiveness of the contract provisions of the ABS contributing to the higher quality of the securities. Although we are not proposing to specify the format of the report, we are requesting comment on whether specifying the format of the report is necessary.

We are proposing disclosure requirements in prospectuses and in ongoing reports about the credit risk managers. In prospectuses, we are proposing to require disclosure of the name of the credit risk manager, its form of organization, the extent of its experience serving

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75 See letter from Metlife on the 2010 ABS Proposing Release (suggesting that bondholders representing 5% or more of a transaction be able to direct the trustee to poll investors on whether to initiate a review of assets. Following such a vote, the sponsor would need to repurchase any non-compliant asset and if the sponsor did not comply, then disputes would be submitted to independent arbitration). See also letters from ASF and SIFMA on the 2010 ABS Proposing Release.

76 A "report of findings and conclusions" of a review is similar in concept to the requirements of new Rule 193 and Item 1111(a)(7) of Regulation AB. As discussed above, those new rules will require the issuer of an ABS to conduct a review of the pool assets underlying an ABS at the time of securitization and disclose of the findings and conclusions of the review of the assets. See Section II.B.1.a. and fn. 39. We note that the issuer review would be performed at the time of securitization, while the proposed credit risk manager review would be performed pursuant the processes provided in an underlying transaction agreement.

as a credit risk manager for ABS transactions involving similar pool assets, and the manner and amount in which the credit risk manager is compensated for its services.[77] In addition, disclosure would be required about the credit risk manager's duties and responsibilities under the governing documents and under applicable law, any limitations on the credit risk manager's liability under the transaction agreements, any indemnification provisions, and any contractual provisions or understanding regarding the credit risk manager's removal, replacement or resignation, as well as how any related expenses would be paid.[78] Further, disclosure would be required, to the extent material, about any affiliations and relationships between the credit risk manager and other transaction parties.[79] These disclosure requirements are similar to current disclosure requirements for trustees.[80]

In ongoing reports on Form 10-D, if during the distribution period the credit risk manager is required to review the assets, we are proposing to require disclosure of the event(s) that triggered the review by the credit risk manager during the distribution period. We are also proposing that if a report by the credit risk manager of the findings and conclusions of its review of assets that is provided to the trustee during the distribution period, that the full report be filed as an exhibit to the Form 10-D.[81] In addition, we are proposing that if, during the distribution period, a credit risk manager has resigned, or has been removed, replaced or substituted, or if a new credit risk manager has been appointed, disclosure would be required of the date the event occurred, and the circumstances

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77 See proposed Item 1109(c) of Regulation AB in the 2010 ABS Proposing Release.

78 See proposed Item 1109(c) of Regulation AB in the 2010 ABS Proposing Release.

79 See proposed Item 1119(a)(7) of Regulation AB in the 2010 ABS Proposing Release.

80 See Item 1109 of Regulation AB [17 CFR 229.1109].

81 The report would be filed as an additional exhibit under Exhibit 99. See Item 601(b)(99) of Regulation S-K [17 CFR 229.601(b)(99)].

surrounding the change. If a new credit risk manager has been appointed, disclosure required by proposed Item 1109(b) of Regulation AB would be required.

In order to provide a timely mechanism for enforcement of repurchase requirements, we are also proposing to require as a part of the second condition to shelf eligibility that the underlying transaction documents include repurchase request dispute resolution procedures. Under the proposal, the transaction agreements would be required to provide that if an asset, subject to a repurchase request pursuant to the terms of the transaction agreements, is not repurchased by the end of the 180-day period beginning when notice is received, then the party submitting such repurchase request shall have the right to refer the matter, at its discretion, to either mediation or third-party arbitration, and the party obligated to repurchase must agree to the selected resolution method.[82] Our proposal would give a requesting party the ability to compel the obligated party to submit to dispute resolution if the obligor did not repurchase the assets. However, because we understand that a party obligated to repurchase will need the time to investigate a repurchase request, our proposal would allow 180 days before a requesting party had the right to compel mediation or arbitration.[83] Of course, the transaction agreements could call for a period shorter than 180 days.

We believe that investors and issuers should both benefit from our proposals to require a credit risk manager and the proposed repurchase request dispute resolution provisions because they are designed to facilitate a timely resolution of repurchase claims. We also believe that these mechanisms are appropriate as one of the requirements for shelf

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[82] See, e.g.,letters from Center for Audit Quality (CAQ), Group of 14 CMBS investors (CMBS Investors), Ernst & Young (E&Y), Prudential on the 2010 ABS Proposing Release.

[83] See letter from Prudential on the 2010 ABS Proposing Release (suggesting that a sponsor should have a specified amount of time to challenge any third party claim). See also letter from SIFMA on the 2010 ABS Proposing Release (suggesting that arbitration be available if the parties do not resolve the repurchase request within 180 days).

eligibility because they provide enhanced mechanisms for transaction parties to pursue contract remedies, thereby contributing to the quality of the security. Our proposal does not specify whether mediation or arbitration must be agreed to by the obligated party in the dispute resolution provision. We preliminarily believe that the requesting party should have the flexibility to select the appropriate mechanism to resolve repurchase disputes, although we request comment on whether we should mandate one or the other.

Request for comment:

22. Is the requirement of a credit risk manager review of the underlying assets appropriate as a condition for shelf eligibility, as proposed? Is it appropriate to require certain terms requiring repurchase dispute resolution in the underlying transaction documents, as a condition for shelf eligibility, as proposed?

23. Is it appropriate to require that the trustee appoint the credit risk manager, as proposed? Should another party be able to appoint the credit risk manager? Should we specify terms for removal and re-appointment of the credit risk manager?

24. Is it appropriate to require that the credit risk manager not be an affiliate of any sponsor, depositor, or servicer, as proposed? Would an affiliate of the sponsor, depositor or servicer be able to objectively perform the credit risk manager review function? Should we require that the credit risk manager be required to represent that no conflict of interest exists between itself and any transaction party, including investors?[84] Would it be appropriate for the trustee to also be the credit risk manager?

84 See letter from Prudential on the 2010 ABS Proposing Release.

25. Is it appropriate to require that the credit risk manager be given access to copies of the underlying documents related to the pool assets, as proposed? Should the requirement be limited in any way? Are there any privacy considerations? If so, should we require a covenant in the underlying transaction documents that all information be kept confidential?

26. Should we specify an additional requirement that the credit risk manager be given access to all underwriting guidelines and any other documents necessary to evaluate the loans?[85]

27. What types of entities are likely to serve as credit risk managers? Should any types of persons or entities be excluded from being credit risk managers?

28. Are the proposed triggers for review by the credit risk manager appropriate? Is it appropriate to require review when a transaction's required credit enhancement falls below defined target levels, as proposed? Should we specify which types of credit enhancement would be subject to the requirement (e.g., overcollateralization, reserve account)? If so, what types of credit enhancement features should we specify and why? Are there any asset classes, or securitization structures, where no target credit enhancement is specified? Is it appropriate that triggers relating to credit enhancement include structural supports, such as subordination? Are there any other features that should be or should not be included as credit enhancement for purposes of triggering a credit risk manager review?

29. As noted above, we intend that shelf-eligible transaction agreements, at a minimum, provide for the specified trigger events for a credit risk manager review.

[85] See letter from SIFMA on the 2010 ABS Proposing Release.

Will market practice develop to add additional triggers, if any, as circumstances warrant?

30. Is it appropriate to require review by the credit risk manager at the direction of investors, pursuant to the processes provided in the transaction agreement and disclosed in the prospectus? Should we specify the procedures for the investor directed review process? If so, what should the requirements be and why? For example, should we require that investors representing 5% or more of investors in interest (i.e., investors that are not affiliates of the sponsor or servicer) be able to direct a review? Should the percentage of investors required to initiate a review be higher or lower? If the percentage is higher, such as 25%, should we require that investors representing 5% or more of investors in interest first be able to direct the trustee to poll investors on whether to initiate a review of assets?[86] As an alternative to specifying procedures, would it be appropriate to specify certain maximum conditions, where the percentage of investors required to direct review could be no more than a certain percentage, such as 5%, 10%, or 25%?

31. Is our proposal to require a provision that the credit risk manager provide its report to the trustee of the findings and conclusions of its review of the assets appropriate? Should we specify the format of the report?

32. Is our proposal to require the report of the credit risk manager be filed as an exhibit to the Form 10-D filing covering the period in which the report is given to the trustee appropriate? Should it be filed sooner, such as on a Form 8-K within four business days of receipt by the trustee? Should we also require that a

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[86] See letter from Metlife on the 2010 ABS Proposing Release.

summary of the report by the credit risk manager of the findings and conclusions of its review of assets be included in the Form 10-D?

33. Are the proposed disclosure requirements in prospectuses regarding credit risk managers appropriate? Should we require any additional disclosure?

34. Should our rules include any other specific triggers for review? Should we require review based on specific triggers, such as the occurrence of delinquency of a specified duration, such as 60, 90, or 120 days? Should we require review of early payment defaults, (e.g., loans that become delinquent within the first 60, 90 or 120 days past origination)?[87] Should we require review of all loans for which the servicer or trustee suspects a breach? If so, how should we define this trigger? Would any of these requirements be in addition to, or as an alternative to the proposed requirements?

35. Should we require that the credit risk manager have discretion to assert a claim for breach on behalf of the securitization trust, in the interests of all investors in the aggregate?[88] Would this requirement be in addition to, or as an alternative to the proposed requirements? Should we specify some or all of the procedures related to the review or repurchase process?

36. Is our proposal to require ongoing disclosure about the credit risk manager and its activities in Form 10-D appropriate? Is our proposal to require disclosure about the event(s) that triggered a credit risk manager review appropriate? Is it appropriate to require the disclosure only with respect to those triggers that are proposed for shelf eligibility (i.e., credit enhancement trigger and investor directed

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87 See letter from Metlife on the 2010 ABS Proposing Release.

88 See letter from SIFMA on the 2010 ABS Proposing Release.

review), as proposed? Or should disclosure be required with respect to any review undertaken by a credit risk manager, pursuant to the provisions in the agreement?

37. Is it appropriate to require disclosure in the Form 10-D of a change of credit risk manager as proposed?

38. In addition to the proposed shelf eligibility and disclosure requirements, should we require that each party with a repurchase obligation provide an annual certificate to the trustee and noteholders certifying that all loans required to be repurchased under the transaction documents have been repurchased or detail why any loans identified as breaching a representation or warranty were not removed.[89]

39. Is our proposal to require dispute resolution provisions in the underlying transaction documents as a shelf eligibility condition, appropriate? Is it appropriate to require that requesting parties wait 180 days until they can force the obligated part to submit to dispute resolution? Should the period be longer or shorter? Should we not specify a particular period, but instead require there to be a set time period in the transaction agreements? Is it appropriate to require that the obligated party agree to either mediation or arbitration, as proposed? Should we require that all the parties agree to either mediation or arbitration? Or should we require one or the other? Is it appropriate to require that the transaction documents provide that investors, in their sole discretion, may elect whether to refer a disputed repurchase request to arbitration or mediation? Would it be more appropriate to require that the transaction documents provide for a mandatory dispute resolution mechanism (specifying mediation or arbitration) after 180 days,

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89 See letter from Sallie Mae on the 2010 ABS Proposing Release.

and disclose the mandatory dispute resolution mechanism in the prospectus, without mandating the details of those provisions?

40. Should we specify who should pay the expenses for mediation or arbitration of the repurchase request? For example, should we require that expenses related to the mediation or arbitration of a repurchase request be paid by the obligated party, the person(s) requesting repurchase, or the issuing entity? Or should expenses be the responsibility of the losing party, or should costs be shared? Is it clear who the losing party would be in mediation? Or should costs be determined by the mediator or arbitrator? Would specifying that the obligated party is required to cover all costs associated with mediation or arbitration of the repurchase request provide further incentive for the obligated party to resolve the request within 180 days? If so, do the benefits of this additional incentive justify the potential costs imposed on the obligated party? If a trustee is the requesting party, and it is determined that the trustee is obligated to pay expenses (by the terms of transaction agreement, the outcome of the dispute resolution procedures, or otherwise) how would the trustee pay for the expenses? Would the possible obligation to pay for the expenses, be yet another disincentive for trustees so they would not initiate a repurchase request?

41. Should we require that if the obligated party fails to agree to mediation or arbitration of any unresolved repurchase dispute within such period, the obligated party would be required to honor the repurchase request?[90]

[90] See letter from Prudential on the 2010 ABS Proposing Release.

c) Investor Communication

As we discussed above, we are aware that investors have had difficulty enforcing rights contained in transactions agreements, and in particular, those relating to the repurchase of underlying assets for breach of representations and warranties. Investors have raised concerns regarding the inability to locate other investors in order to enforce these rights.[91] Frequently, these investor rights require a minimum percentage of investors acting together. In response to the 2010 ABS Proposing Release, one commentator noted that because most ABS are held by custodians or brokers in "street name" through the Depository Trust Company, as a practical matter it is very difficult for ABS investors to communicate with each other in order to jointly exercise any of their substantive protections or rights provided in the transaction documents.[92] Another commentator expressed that given the complexity of securitization structures and the underlying collateral it is important for investors who have identified concerns with the collateral or any structural issue to be able to effectively communicate with other investors in the transaction and to either prompt the trustee to take action or solicit further direction from investors.[93]

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91 See Alex Ulam, "Investors Try to Use Trustees as Wedge in Mortgage Put-Back Fight," American Banker (Jun. 24, 2011) (noting that many attempted put-backs have "flamed out after investor coalitions failed to get the 25% bondholder votes that pooling and servicing agreements require for a trustee to be forced to take action against a mortgage servicer"). See also Tom Hals and Al Yoon, "Mortgage Investors Zeroing in on Subprime Lender," Thomson Reuters (May 9, 2011) (noting that gathering the requisite number of investors needed to demand accountability for faulty loans pooled into investments is a "laborious" task).

92 See letter from Metlife on the 2010 ABS Proposing Release (suggesting that the Commission mandate that one ABS transaction party have real-time knowledge of the legal names and contact information of the beneficial owners of each of the bonds in the issuance so that bondholders could request that such transaction party (likely the trustee) send communications to the other bondholders notifying them of suspected breaches of representations and warranties, thus protecting investor identity, but also addressing the collective action problem). The Depository Trust Company provides custody and book-entry transfer services of securities transactions in the U.S. market involving equities, corporate and municipal debt, money market instruments, American depositary receipts, and exchange-traded funds. In accordance with its rules, DTC accepts deposits of securities from its participants (i.e., broker-dealers and banks), credits those securities to the depositing participants' accounts, and effects book-entry movements of those securities.

93 See letter from Prudential on the 2010 ABS Proposing Release (suggesting that a group of 10% investor interest should be able to initiate communication with others through the trustee).

In connection with these concerns, we are proposing, as a third shelf eligibility requirement, that an underlying transaction agreement include a provision to require the party responsible for making periodic filings on Form 10-D to include in the Form 10-D any request from an investor to communicate with other investors related to an investor's rights under the terms of the ABS that was made during the reporting period received by the party responsible for making the Form 10-D filings where the request is received on or before the end date of a reporting period.[94] By requiring the provision be included in an underlying agreement, the party responsible for making Form 10-D filings would be contractually obligated to disclose an investor's desire to communicate. We preliminarily believe this is an appropriate requirement for shelf eligibility because facilitating communication among investors enables them to exercise the rights included in the underlying transaction agreements, which we believe would address a specific concern about enforceability of representations and warranties raised in ABS transactions and would help to distinguish higher quality ABS from other ABS.

We are also proposing to revise Regulation AB and Form 10-D to include the disclosure requirements related to the investor communication shelf eligibility condition. The disclosure requirements would only apply if the transaction was a registered shelf offering. We are proposing that the disclosure on Form 10-D be required to include the name of the investor making the request; the date the request was received; and a description of the method by which other investors may contact the requesting investor.[95] Under the proposal,

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[94] Most ABS issuers report and distribute payments to investors on a monthly basis. The Form 10-D is required to be filed within fifteen days after a required distribution date, and a distribution date is typically two weeks after the end of a reporting period. For example, for the month of June, under our proposal a request from an investor would have to be received prior to the close of the reporting period on June 30, a distribution would be due to investors by July 15, and the Form 10-D filing due date would be July 30.

[95] See proposed Item 1121(f) and Item 1.B. of Form 10-D.

we are including an instruction to Item 1121(g) to define the type of communications that may be facilitated as a result of the required notices on Form 10-D. The Form 10-D would be required to include disclosure of only those notices of an investor's desire to communicate where the communication relates to investors exercising their rights under the terms of the ABS. Thus, an ABS investor would not be permitted to use this mechanism for other purposes, such as identifying potential customers, marketing efforts, or the like.[96]

We understand that transaction parties might want to specify procedures for verifying the identity of a beneficial owner in a particular ABS prior to including the proposed notice in a Form 10-D. While we are not proposing specific procedural requirements, we believe the procedures should be simple for an investor to follow so that the party responsible for making the disclosure could verify the interest of an investor in the ABS. Therefore, we are proposing an instruction to the shelf eligibility requirement to make clear that the verification requirements that could be contained in the transaction documents, may require no more than the following: (1) if the investor is a record holder of the securities at the time of a request to communicate, then the investor would not have to provide verification of ownership because the person obligated to make the disclosure will have access to a list of record holders and (2) if the investor is not the record holder of the securities at the time of the request to communicate, the person obligated to make the disclosure must receive a written statement from the record holder verifying that, at the time the request is submitted, the investor beneficially held the securities.

[96] To the extent an investor wishes to communicate with other investors about other matters, the investor must consider the potential applicability of other regulatory provisions under the federal securities laws. For example, an investor proposing to commence a tender offer for securities in the ABS class must evaluate whether such a communication is subject to Exchange Act Sections 14(d) and 14(e) and Regulations 14D and 14E thereunder.

Requests for Comment:

42. Is our proposal to require a provision in the transaction agreements to require an investor's request to communicate with other investors to be included on Form 10-D reports an appropriate condition to shelf eligibility? Would investors find the provision valuable?

43. Is the proposed disclosure requirement on Form 10-D appropriate? Should it require different information? Should we prescribe a pre-set list of objective categories that an investor could choose from for the purpose of indicating why it is requesting communication with other investors? If so, what should be the list of defined categories? Would the following be an appropriate list of present categories: servicing, trustee, representations and warranties, voting matters, pool assets, and other?

44. Under the proposal, the Form 10-D would be required to include requests received during the reporting period for the form. Are there any timing concerns? Should the request to communicate instead be required to be filed on Form 8-K?

45. Is the proposed instruction clarifying the maximum type of verification procedures that may be included in the underlying transaction documents appropriate? Are they reasonable requirements to demonstrate ownership? Is the limitation on requirements proving ownership, assuming the holder is not the record holder, necessary or appropriate? Are there other procedures that we should require, or limitations we should impose? Would those be in addition to or in lieu of those described in the proposed instruction? Are there procedures that would be easier for investors to meet but would have the same effect?

46. We understand that investors are often able to obtain reports related to an ABS they own by accessing a password protected website, usually maintained by the trustee. Should the list of investors that have access to the website be enough to verify the interest of an investor?

47. Relatedly, investors have advised us that they sometimes have difficulty receiving notices for investor votes, and, therefore, have not been able to participate in that process. Should we require a Form 8-K be filed to disclose that an investor vote has been noticed? Should the Form 8-K include a copy of the notice? Should the Form 8-K be filed within a specified minimum period of the notice, such as two days? Or would a shorter or longer due date be more appropriate? What other mechanisms would be appropriate to facilitate the ability of an investor to exercise their right to vote and at the same time be appropriate requirements for shelf eligibility?

48. We understand that a number of privately placed CMBS transactions have included more extensive means for investor communication. The following requests for comment are based on our understanding of those transactions. Are these types of arrangements prevalent in CMBS deals? Are they used with other asset classes?

49. Instead of allowing verification of an investor's interest at the time a request to communicate is made, should we instead require as a condition to shelf eligibility that an underlying transaction agreement require the trustee, or some other transaction party, to maintain a list of investors and require the request to be included in the Form 10-D only if the investor is included on the list? If so, how would the person responsible for maintaining the list of investors obtain and

maintain the information? Should a form of investor verification be required to be specified in the underlying transaction agreement in connection with this shelf eligibility condition? If so, when should the investor be required to provide the completed form?

50. Should we require, as a condition to shelf eligibility, that the investor communication notice be distributed in any other way, in addition to, or instead of the Form 10-D? For instance, should we require that the notice be posted on a designated website? If so, when should it be posted? Alternatively, should the notice be required to be distributed to investors by the trustee or some other transaction party? If so, should the notice be required to be distributed only to those investors that voluntarily provide their contact information to the trustee or a person responsible for maintaining an investor list? Would there be any reason that an investor would not provide their contact information? If all investors did not provide their contact information, we expect there would be a possibility that the list of investors would not be complete. Would that frustrate the purposes of this approach?

2. Revised and Re-Proposed Registrant Requirements

In the 2010 ABS Proposals, we proposed to add new registrant requirements related to compliance with the four proposed transaction requirements (i.e., risk retention, third party opinion provision in transaction agreements, officer certification, and an undertaking to file ongoing Exchange Act reports).[97] We also proposed to retain the existing registrant requirement in Form S-3 relating to delinquent filings of the depositor or an affiliate of the

[97] See proposed General Instructions I.A.1. to I.A.4. of proposed Form SF-3 in the 2010 ABS Proposing Release.

depositor for purposes of proposed Form SF-3. Similar to existing requirements, we proposed that prior to filing a registration statement on proposed Form SF-3, to the extent the depositor or any issuing entity previously established by the depositor or an affiliate of the depositor are or were at any time during the twelve month look-back period required to file Exchange Act reports with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed during the twelve months (or shorter period that the entity was required to have filed such materials).[98] Also, such material, other than certain specified reports on Form 8–K, must have been filed in a timely manner.[99] This proposal remains unchanged and outstanding. In the 2010 ABS Proposal, we also proposed to repeal the existing exception from the filing timeliness requirement for Item 6.05 Form 8-K reports. Item 6.05 Form 8-K reports are required to be filed if there is a change in the asset pool characteristics from the description of the asset pool provided in the final prospectus and, thereby, provide important information regarding the composition of the assets.[100] The proposal to require the timely filings of Item 6.05 Form 8-K reports remains unchanged and outstanding. The revised and re-proposed registrant requirements for shelf eligibility are described below.

In light of the changes to the proposed amendments to the transaction requirements described in Section II.B.1. above, we are revising and re-proposing the other registrant requirements to make conforming changes. Specifically, we are proposing to require that to

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98 For Form S-3, an issuer is not eligible for registration on the form if the depositor or an affiliate of the depositor, with respect to a class of asset-backed securities involving the same asset class, has not filed the Exchange Act reports required to be filed or has not filed such reports in a timely manner for a period of twelve months prior to the filing of the registration statement. See General Instruction I.A.4 of Form S-3.

99 See proposed General Instruction I.A.3 to Form SF–3.

100 In the 2010 ABS Proposing Release, we also proposed to lower the threshold amount of change that would trigger a filing requirement for Item 6.05 Form 8-K reports from five percent of any material pool characteristic to one percent. That proposal remains outstanding. See the 2010 ABS Proposing Release at 23392.

the extent the depositor or any issuing entity previously established by the depositor or an affiliate of the depositor is or was at any time during the twelve month look-back period required to comply with the proposed transaction requirements of Form SF-3, with respect to a previous offering of asset-backed securities involving the same asset class, the following requirements would apply:

- Such depositor and each such issuing entity must have timely filed all the required certifications of the depositor's chief executive officer or the depositor's executive officer in charge of securitization;
- Such depositor and each such issuing entity must have timely filed all the transaction agreements that contain the required provisions relating to the credit risk manager and repurchase request disputes; and
- Such depositor and each such issuing entity must have timely filed all the transaction agreements that contain the required provision relating to investor communication.

In addition, in the 2010 ABS Proposing Release, we proposed to include as a separate registrant requirement that there be disclosure in the registration statement stating that the proposed registrant requirements have been complied with. We continue to believe disclosure of compliance with the registrant requirements would provide a means for market participants (as well as the Commission and its staff) to better oversee compliance with the proposed shelf eligibility conditions of Form SF-3. We believe that the requirement is more appropriately located in the instructions to the requirements rather than as a registrant requirement and, therefore, are proposing to include this requirement as an instruction.

<u>Request for comment:</u>

51. Are our re-proposed registrant requirements appropriate?

52. Is the twelve-month look back period appropriate for compliance with the certification, credit risk manager and repurchase dispute resolution transaction requirements, and the investor communication provision? Should it be longer or shorter?

53. Is our proposed instruction to require disclosure in a registration statement of compliance with the registrant requirements appropriate? Should we specify a location in the registration statement for such disclosure?

54. Should we require that registrants provide a "yes" or "no" answer to whether it has complied with all the registrant requirements? If so, should the data be tagged in XML so that it could be an electronically searchable piece of data?[101]

3. Annual Evaluation of Form SF-3 Eligibility in Lieu of Section 10(a)(3) Update

a) Annual Compliance Check related to Timely Exchange Act Reporting

In the 2010 ABS Proposing Release, we proposed to require annual and quarterly evaluations of compliance with the registrant requirements for ABS shelf eligibility. For the evaluation of compliance with the Exchange Act reporting registrant requirement, we proposed to require an annual evaluation of whether the Exchange Act reporting registrant requirement has been satisfied in lieu of a Securities Act Section 10(a)(3) update.[102] Under the 2010 ABS Proposal, an ABS issuer wishing to conduct a takedown off an effective shelf registration statement would be required to evaluate whether the depositor and any affiliated

[101] We briefly discuss XML tagging below in Section III.B.

[102] As noted in the 2010 ABS Proposing Release, Form S–3 eligibility under the current rules is determined at the time of filing the registration statement and at the time of updating that registration statement under Securities Act Section 10(a)(3) [15 U.S.C. 77j(a)(3)] by filing audited financial statements. Because ABS registration statements do not contain financial statements of the issuer, a periodic determination of whether the issuer can continue to use the shelf would need to be specified by rule. See Securities Act Rule 401(b) [17 CFR 230.401(b)].

issuing entity of the depositor that were required to report under Sections 13(a) or 15(d) of the Exchange Act during the previous twelve months, have filed such reports on a timely basis, as of ninety days after the end of the depositor's fiscal year end.[103] This proposal remains unchanged and outstanding.

b) Annual Compliance Check related to the Fulfillment of the Transaction Requirements in Previous ABS Offerings

In the 2010 ABS Proposing Release, we also proposed to require that in order to conduct a takedown off an effective shelf registration statement, an ABS issuer would be required to conduct an evaluation at the end of the fiscal quarter prior to the takedown of whether the ABS issuer was in compliance with the previously proposed registrant requirements relating to risk retention, third party opinions, the depositor's chief executive officer certification, and the undertaking to file ongoing reports.[104] In response to our proposal, we received four comment letters that did not support the quarterly requirement.[105] One commentator urged us to consider whether penalty options less severe than the loss of shelf eligibility for a year would be appropriate for a single violation but did not suggest specific alternatives.[106] Another commentator suggested that shelf eligibility should be

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[103] As noted in the 2010 ABS Proposing Release, under this proposal the related registration statement could not be utilized for subsequent offerings for at least one year from the date the depositor or the affiliated issuing entity that had failed to file Exchange Act reports then became current in its Exchange Act reports (and the other requirements had been met).

[104] In the 2010 ABS Proposing Release, we had proposed that in order to conduct a takedown off an effective shelf registration statement, an ABS issuer would be required to evaluate at the end of the fiscal quarter prior to the takedown whether, during the previous twelve months, the depositor and its affiliates had filed on a timely basis all of the certifications and transaction agreements required by the shelf eligibility transaction requirements of a previous offering. If they had not, then the depositor could not utilize the registration statement or file a new registration statement on Form SF–3 until one year after the required filings were filed. See 2010 ABS Proposing Release at 23348.

[105] See letters from ASF, BOA, MBA and SIFMA on the 2010 ABS Proposing Release.

[106] See letter from MBA on the 2010 ABS Proposing Release.

suspended only if the staff determines it is appropriate, and only a full year in egregious cases.[107]

In light of the changes we are proposing to the transaction requirements to shelf eligibility described above, and taking into consideration the comments we received, we are revising and re-proposing the registrant requirement to require an annual evaluation of compliance with the transaction requirements of shelf registration. Under the re-proposal, notwithstanding that the registration statement may have been previously declared effective, in order to conduct a takedown off an effective shelf registration statement, an ABS issuer would be required to evaluate, as of ninety days after the end of the depositor's fiscal year end, whether it continues to meet the registrant requirements, which would be the same as our 2010 ABS Proposal for Exchange Act reporting described above. In order to make the provision more workable and to simplify the evaluation for shelf compliance we are revising our proposal from a quarterly evaluation to an annual evaluation.[108] Under the re-proposal, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor, is or was at any time during the previous twelve months, required to comply with the proposed new transaction requirements related to the certification, credit risk manager and repurchase dispute resolution provisions, and investor communication provision, with respect to a previous offering of ABS involving the same asset class, such depositor and each issuing entity must have filed on a timely basis, at the required time for each takedown, all transaction agreements containing the provisions that are required by the proposed transaction requirements as well as all certifications.

107 See letter from SIFMA on the 2010 ABS Proposing Release.

108 Although we are revising our proposal, we emphasize that failure to file the information required by the registrant requirements would be a violation of our rules, and subject to liability accordingly. Furthermore, failing to provide disclosure at the required time periods may raise serious questions about whether all required disclosure was provided to investors prior to investing in the securities.

In response to commentators' concerns that the one-year penalty for missed transaction requirements was too extreme, we are revising and re-proposing to allow depositors and issuing entities to cure any failure to meet the transaction requirements, or failure to file the required certification or transaction agreements at the required time for purposes of ABS shelf eligibility. Under the re-proposal, a depositor and issuing entity could cure the deficiency if it subsequently files the information that was required and after a waiting period, it would be permitted to continue to use its shelf registration statement.[109] Under the proposed cure mechanism, the depositor and issuing entity would be deemed to have met the registrant requirements, for purposes of this Form, 90 days after the date all required filings are filed.

For example, a depositor with a December 31 fiscal year end has an effective shelf registration statement. On March 30, it evaluates compliance with all registrant requirements under proposed Rule 401 (90 days after the last fiscal year end) and determines that it is in compliance. The depositor then offers ABS and does not timely file the required transaction agreements required to be filed on June 20. The depositor would be able to continue to use its existing shelf until it is required to perform the annual evaluation required by proposed Rule 401(g), on March 30 of the following year. After March 30 of Year 2 and until June 20 of Year 2, the depositor would not be able to offer ABS off of the shelf registration statement. Further, the depositor or its affiliates would not be permitted to file a new shelf registration statement after the missed filing on June 20, Year 1 because they could not meet the registrant requirement of timely filing of the transaction agreements containing the provisions required for any shelf offering for the prior twelve months. But, if the depositor

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[109] Curing the deficiency would also allow the depositor, or its affiliates to file a new registration statement, if it also meets the other registrant requirements. See proposed General Instruction I.A.1. to proposed Form SF-3.

had cured the defect, for example, on July 1 of Year 1, under the proposal, a new registration statement could be filed 90 days after July 1 of Year 1 (or September 29 of Year 1), instead of waiting until June 20 of Year 2 (when it otherwise would meet the twelve month timely filing requirement). Further, at the time of the next annual evaluation for the old shelf (noted above as March 30 of Year 2), the depositor would be deemed to have met the registrant requirements after 90 days after it had cured the defect on July 1 of Year 1, and the depositor could continue to use its old shelf registration statement (instead of waiting until June 20 of Year 2, as noted above).

Our approach is an attempt to strike a balance between encouraging issuers' compliance with the proposed shelf transaction requirements and commentator's concerns that the one-year penalty period was too long.

<u>Requests for Comment:</u>

55. Should we add, as proposed, registrant requirements that would require, as a condition to form eligibility, affiliated issuers of the depositor that had offered securities of the same asset class that were registered on Form SF-3 to have complied with the certification, credit risk manager review and repurchase dispute resolution eligibility and investor communication conditions that replace the investment grade ratings requirement? Will these requirements lead to better compliance by ABS issuers with the new shelf eligibility conditions that we are proposing? If not, what other mechanisms can we use to ensure compliance?

56. Is it appropriate to require, as proposed, that the certifications and the transaction agreement(s) containing the credit risk manager and repurchase dispute provisions and investor communication provision be required to be filed pursuant to our proposed shelf eligibility conditions and also filed on a timely basis?

57. Should we revise Rule 401, as proposed, to require that as a condition to continued use of an existing shelf registration statement for takedowns, an issuer conduct a periodic evaluation of form eligibility? If not, how should we approach the updating issue since ABS issuers are not required to file amendments for purposes of Section 10(a)(3)?

58. Should we require that the annual evaluation of all the registrant requirements of affiliated issuers have been filed on a timely basis be made as of the 90 days after the depositor's fiscal year, as proposed? Should the evaluation be made on a different timeframe, such as the last day of the most recent fiscal quarter, consistent with our previous proposals?

59. Should we include, as proposed, an ability to cure an issuer's non-timely filing of the certification and agreements containing the credit risk manager review and repurchase dispute resolution and investor communication provisions? Should we require issuers to wait 90 days after curing the defect, as proposed, to be deemed to meet the registrant requirements? Should the period be shorter (e.g., 30 or 45 days) or longer (e.g., 180 or 270 days)?

60. Should we require additional requirements for evaluating compliance with registrant requirements, or an additional penalty for non-compliance with the registrant requirements?

4. General Requests for Comment on Shelf Eligibility

We request comment on our proposals for shelf-eligibility for asset-backed securities.

61. Are all of the proposed shelf eligibility conditions necessary? Would one condition or a combination of fewer conditions be sufficient? As noted above, the 2010 ABS Proposals included risk retention and continued Exchange Act reporting

as two of the four proposed requirements for shelf eligibility. In light of the fact that the Risk Retention proposals will apply to both registered and unregistered transactions, and ABS issuers with Exchange Act reporting obligations will continue to report without regard to shelf eligibility requirements, should we require the proposed requirements for shelf eligibility discussed above? Put another way, are risk retention and continued Exchange Act reporting together, sufficient replacements for the investment grade rating condition to eligibility for shelf offerings, so that no other conditions are necessary or appropriate?

62. We are also considering whether an additional or alternative shelf eligibility condition based on previous offerings should be included in our final rules. In this regard, would an ABS issuer having sufficient experience in the ABS market be an appropriate criterion for shelf registration? For example, would an additional or alternative shelf eligibility condition that would restrict shelf eligibility to depositors with a history of similar prior ABS issuances (e.g., a requirement based on the number of past ABS transactions within the same asset class and similar structure within a specified period of time) be appropriate? What would be the economic impact of such a shelf eligibility condition? Should such a shelf eligibility condition require the registrant and its affiliates, as of a date within 60 days prior to the filing of the registration statement, to have engaged in at least three primary offerings of asset-backed securities in the last three years, provided the following criteria are met: (i) at least one of the previous offerings was registered under the Securities Act of 1933; (ii) the asset-backed securities issued in the previous offerings are of the same asset class as the asset-backed securities registered on the registration statement; and (iii) the structures of the transactions

of the previous offerings are similar to the structure of each transaction registered on the registration statement. If so, should the requirement be an additional shelf eligibility condition, or should it replace one or more of the proposed conditions? Are the criteria described above appropriate? In particular, should we use a different measurement period than the 60 days prior to filing? Would a three year look-back time period be appropriate, or should it be less time (such as 2 years) or more time (such as 4 years)? What should be the required minimum number of transactions? Should all the transactions used for measuring be required to have been registered under the Securities Act? Are the requirements related to the same asset class and similar structure appropriate? Do we need to provide guidance on what is a similar structure, and if so, what kind of guidance? If private or offshore offerings are permitted to count for purposes of this possible shelf eligibility condition, should we require disclosure in the registration statement of these transactions for the purpose of monitoring compliance with the shelf eligibility condition? If so, what disclosure should be required? In order to prevent parties that may otherwise fail this shelf eligibility condition from simply using the registration statement of an unaffiliated eligible depositor (e.g., rent-a-shelf transactions), should the condition also require the registrant to be affiliated with a sponsor and depositor in each of the previous transactions as well as affiliated with a sponsor and depositor in the offerings conducted off the shelf registration statement? Commentators are requested to provide empirical data and other factual support for their views, if possible.

63. Asset-backed issuers may rely on the exclusion from the definition of investment company in Section 3(c)(5) of the Investment Company Act rather than on Rule

3a-7 under the Investment Company Act.[110] Section 3(c)(5) was intended to exclude from the definition of investment company certain factoring, discounting and mortgage companies. However, Rule 3a-7 contains substantive conditions designed to address, among other things, conflicts of interest concerning ABS and Section 3(c)(5) does not contain the same substantive conditions. Would it be appropriate to require, as an additional transaction requirement for ABS shelf eligibility, that the ABS issuer of the transaction meet the requirements of Rule 3a-7? We note that the practical effect of such a requirement would be that transactions excluded from the definition of investment company under Section 3(c)(5) of the Investment Company Act would not be eligible for shelf registration unless they satisfy Rule 3a-7. Would restricting shelf eligibility to those issuers that meet the requirements of Rule 3a-7 give equal access to shelf for all issuers of ABS across asset classes? Should we require disclosure of the basis for the exclusion from the definition of investment company in the prospectus?

III. Disclosure Requirements

A. Exhibits to be Filed with Rule 424(h) Filing

We are proposing to require ABS issuers to file copies of the underlying transaction agreements, including all attached schedules, and other agreements that are referenced (such

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110 Section 3(c)(5) of the Investment Company Act excludes from the definition of investment company any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance and services; (B) making loans to manufacturers, wholesalers and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate. Certain asset-backed issuers, including those that securitize retail automobile installment contracts, credit card receivables, trade receivables, boat loans or equipment leases, have sought to rely on the provisions of Section 3(c)(5)(A) or (B).

as those containing representations and warranties regarding the underlying assets), at the same time as a preliminary prospectus that would be required under proposed Rule 424(h).[111]

In the 2010 ABS Proposing Release, we proposed to revise the filing deadlines in shelf offerings to provide investors with additional time to analyze transaction-specific information prior to making an investment decision. Under the proposed ABS shelf procedures, an ABS issuer would be required to file a preliminary prospectus with the Commission for each takedown off of the proposed new shelf registration form for ABS (Form SF–3) at least five business days prior to the first sale in the offering.[112] We proposed to require that such information be filed at least five business days before the first sale of securities in the offering in an effort to balance the interest of ABS issuers in quick access to the capital markets and the need of investors to have more time to consider transaction-specific information. Given many ABS investors' stated desire for more time to consider the transaction and for more detailed information regarding the pool assets, the proposed new filing deadlines were designed to promote independent analysis of ABS by investors rather than reliance on credit ratings. While commentators generally either supported[113] or did not object to this proposed approach, some commentators asked that we shorten the five-day period. For example, several commentators generally suggested the period be reduced to two

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111 See Section II. above and fn. 19. See also the 2010 ABS Proposing Release at 23335.

112 We proposed new Rule 430D to provide the framework for shelf registration of ABS offerings and related Rule 424(h) filing requirements for a preliminary prospectus. Under proposed Rule 430D, the Rule 424(h) preliminary prospectus must contain substantially all the information for the specific ABS takedown previously omitted from the prospectus filed as part of an effective registration statement, except for pricing information. See the 2010 ABS Proposing Release at 23335.

113 See letters from AMI; California Public Employees' Retirement System (CalPERS); CREFC; Rylee Houseknecht; Jamie L. Larson; Investment Company Institute (ICI); AFL-CIO; CFA Institute; Metlife; Prudential and Realpoint on the 2010 ABS Proposing Release.

days.[114] We have not reached a conclusion on that aspect of the proposal and it remains outstanding.

Related to the proposal to require the preliminary prospectus be made available in time to facilitate independent analysis by investors, commentators on the 2010 ABS Proposal requested that investors also have access to copies of the underlying agreements on a more timely basis given the importance of the final documents to an investor's understanding of the actual contractual provisions.[115] In the staff's experience with the filing of these documents, ABS issuers have delayed filing such material agreements with the Commission until several days or even weeks after the offering of securities off of a shelf registration statement, even though these transaction agreements and other documents provide important information regarding the terms of the transactions, representations and warranties about the assets, servicing terms, and many other rights that would be material to an investor.[116] In light of these concerns, we had proposed to amend Item 1100(f) of Regulation AB[117] to clarify the existing exhibit filing requirements by making explicit that the exhibits filed with respect to an ABS offering, registered on proposed Form SF-3, must be on file and made part

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[114] See letters from ABA; AmeriCredit; ASF; BOA; CNH; Vanguard; Vehicle ABS Group; and Wells Fargo on the 2010 ABS Proposing Release.

[115] See letter from CMBS investors on the 2010 ABS Proposing Release (suggesting that the rules require that key disclosures, including the pooling and servicing agreement, be made available to investors during the marketing period so that investors have adequate time to review prior to making an investment decision). See also letter from Prudential on the 2010 ABS Proposing Release (stating that last minute financial engineering may occur, thereby contributing to poor understanding, and in some instances, misunderstanding of the transaction).

[116] In the 2004 ABS Adopting Release we stated that consistent with Item 601 of Regulation S-K, governing documents and material agreements for an ABS offering such as the pooling and servicing agreement, the indenture and related documents must be filed as an exhibit.

[117] Item 1100(f) of Regulation AB allows ABS issuers to file agreements or other documents as exhibits on Form 8-K and, in the case of offerings on Form S-3, incorporate the exhibits by reference instead of filing a post-effective amendment.

of the registration statement at the latest by the date the final prospectus is required to be filed pursuant to Rule 424.[118]

As noted above, commentators urged that we should ensure that the exhibits be available for investor review prior to making an investment decision.[119] In light of these concerns, we are re-proposing Item 1100(f) of Regulation AB to also require that the underlying transaction documents, in substantially final form, be filed and made part of the registration statement by the date the Rule 424(h) prospectus is required to be filed. This requirement, if adopted, would allow investors additional time to analyze the actual underlying agreements containing the specific structure, assets, and contractual rights regarding each transaction. If the exhibits filed with the Rule 424(h) prospectus remain unchanged at the time final prospectus under Rule 424(b) is required to be filed, then an issuer would not be required to re-file the same exhibits.[120]

Request for comment:

64. Is our proposed amendment to Item 1100(f) appropriate? Is there any reason that exhibits, in substantially final form, could not be filed by the time the preliminary prospectus is required to be filed under proposed Rule 424(h)?

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118 We stated in the 2010 ABS Proposing Release that ABS shelf offerings were designed to mirror non-shelf offerings in terms of filing exhibits and final prospectuses. We also noted that the filing requirements for Form S-3 are consistent with Form S-1 because all exhibits to Form S-1 must be filed by the time of effectiveness. See 2010 ABS Proposing Release at 23388.

119 See fn. 116.

120 Under this proposal, any change to the agreement could only be minor. As we explained in the 2010 ABS Proposing Release, a material change in the information provided in the Rule 424(h) filing, other than offering price, would require a new Rule 424(h) filing. See the 2010 ABS Proposing Release at 23335. Finalized agreements at the time of the offering may be filed as provided by Instruction 1 to Item 601 of Regulation S-K. The filing requirement for an exhibit (other than opinions and consents) may be satisfied by filing the final form of the document to be used; the final form must be complete, except that prices, signatures and similar matters may be omitted. See Elimination of Certain Pricing Amendments and Revision of Prospectus Filing Procedures, Release No. 33-6714 (June 5, 1987) [52 FR 21252]. We also note that filing of final agreements at the time the final prospectus is due will be after the time of sale of the security for purposes of Rule 159 and Securities Act Section 12(a)(2), and that information conveyed to the investor after the time of sale will not be taken into account for purposes of Section 12(a)(2) of the Securities Act. See Rule 159.

65. Is it appropriate to require that exhibits be filed in "substantially final form" at the time of filing the Rule 424(h) prospectus, as proposed? If we require something other than "substantially final form" what information should we require, and what information may be omitted?

66. Should we require the final form of the exhibits to be filed at the same time as the Rule 424(b) prospectus, if the exhibits have not changed since the 424(h) filing?

67. One commentator also suggested that we require issuers provide investors with a copy of the representations, warranties, remedies and exceptions marked to show how it compares with model provisions developed by the Commercial Real Estate Finance Council (CREFC).[121] Should we require that issuers file as an exhibit a copy of the representations, warranties, remedies and exceptions marked to show how it compares to an industry developed model provisions? If so, should we require that the industry developed model provisions be developed by an industry group whose membership includes issuers, investors, and other market participants? Do such model provisions exist for other asset classes? Should we require that the marked copy be filed at the same time as the Rule 424(h) prospectus? Should we require an updated marked copy be filed at the same time as the Rule 424(b) prospectus if they have not changed since the 424(h) filing?

B. Requests for Comment on Asset-Level Information

1. Section 7(c) of the Securities Act

Section 942(b) of the Act added Section 7(c) to the Securities Act requiring the Commission to adopt regulations requiring an issuer of an asset-backed security to disclose,

[121] See letter from CMBS investors on the 2010 ABS Proposing Release. CREFC is a trade organization for the commercial real estate finance industry.

for each tranche or class of security, information regarding the assets backing that security.[122] It specifies that in adopting regulations, the Commission shall:

(A) set standards for the format of the data provided by issuers of an asset-backed security, which shall, to the extent feasible, facilitate the comparison of such data across securities in similar types of asset classes; and

(B) require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence including –

(i) data having unique identifiers relating to loan brokers and originators;

(ii) the nature and extent of the compensation of the broker or originator of the assets backing the security; and

(iii) the amount of risk retention by the originator and the securitizer of such assets.[123]

In the 2010 ABS Proposing Release, to augment our current principles-based pool-level disclosure requirements, we had proposed new requirements to disclose asset-level information in prospectuses and in periodic reports. We believe that our proposal for asset-level data for registered offerings, which remains outstanding, would implement the requirements of Section 7(c) because our proposal would set standards that would facilitate the comparison of data across asset classes, and within the same asset class. Further, our proposals require issuers to disclose asset-level data, which we believe are necessary for investors to independently perform due diligence.

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122 See Section 7(c) of the Securities Act, as added by Section 942(b) of the Act.

123 See Section 7(c)(2) of the Securities Act, as added by Section 942(b) of the Act.

In the 2010 ABS Proposing Release, we explained that investors, market participants, policy makers and others have increasingly noted that asset-level information is essential to evaluating an asset-backed security.[124] We proposed to require, with some exceptions, that prospectuses for public offerings of asset-backed securities and ongoing Exchange Act reports contain specified asset-level information about each of the assets in the pool.[125] Because we believe that issuers should provide transparent and comparable data, we proposed to require asset-level information in a standardized format to be included in the prospectus and periodic reports and filed on EDGAR. Our proposal specifies and defines each item that must be disclosed for each asset in the pool and requires that the asset-level information be provided in a tagged data format using Extensible Markup Language (XML) in order to facilitate data analysis, consistent with the requirements of Section 7(c).[126]

Section 7(c) also requires that we require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence, including data having unique identifiers relating to loan brokers and originators. The 2010 ABS Proposal would require disclosure of the name of the

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124 See the 2010 ABS Proposing Release at 23355.

125 We proposed that all asset classes, except for stranded cost and credit cards issuers, provide asset-level data. For credit card and charge card ABS, we proposed that issuers be required to provide grouped account data. See 2010 ABS Proposing Release at 23355.

126 By proposing to require the asset-level data file in XML, a machine-readable language, we anticipate that users of the data will be able to download the disclosure directly into spreadsheets and databases, analyze it using commercial off-the-shelf software, or use it within their own models in other software formats. As we explained in the 2010 ABS Proposing Release, XML is an open standard that defines or "tags" data using standard definitions. The term ''open standard'' is generally applied to technological specifications that are widely available to the public, royalty-free, at minimal or no cost. The tags establish a consistent structure of identity and context. This consistent structure can be recognized and processed by a variety of different software applications. In the case of XML, software applications, such as databases, financial reporting systems, and spreadsheets recognize and process tagged information. Some issuers already file loan schedules on EDGAR as part of the pooling and servicing exhibit or a free writing prospectus. However, the data is currently filed on EDGAR in ASCII or HTML, both of which do not facilitate data analysis. See the 2010 ABS Proposing Release at 23374.

originator of an asset for all asset classes.[127] If the asset is a residential mortgage, and a MERS number for the originator is available, we proposed to require that the MERS number for the originator be provided.[128]

In addition, for residential mortgages only, we proposed that issuers be required to disclose unique identifiers related to loan originators and company, as required by the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, otherwise known as the NMLS numbers.[129] We note that the NMLS numbers for "originator" and company refer to the individual and company taking the loan application, which would include loan brokers and the company that the broker works for.[130] Therefore, we believe that our proposal to require NMLS numbers would implement the requirements of Section 7(c) with respect to mortgages by requiring a unique numerical identifier for a loan broker.

We are unaware of any standardized unique identifying system used for the purpose of identifying brokers or originators of other asset classes, across all asset classes or within an asset class.[131] Further, we believe that asset classes, other than RMBS and CMBS, do not

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127 See proposed Item 1(a)(4) of Schedule L of Regulation AB in the 2010 ABS Proposing Release.

128 Mortgage Electronic Registration Systems, Inc. (MERS) is affiliated with the Mortgage Industry Standards Maintenance Organization (MISMO), a not-for profit subsidiary of the Mortgage Bankers Association. MERS has developed a unique numbering system and reporting packages to capture and report data at different times during the life of the underlying residential or commercial loan.

129 See proposed Items 2(a)(11) and (12) of Schedule L of Regulation AB in the 2010 ABS Proposing Release. In 2008, Congress passed The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the "SAFE Act") which required the creation of a Nationwide Mortgage Licensing System and Registry and unique identifiers for loan originators and company (NMLS numbers). The SAFE Act is designed to enhance consumer protection and reduce fraud by encouraging states to establish minimum standards for the licensing and registration of state-licensed mortgage loan originators and for the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) to establish and maintain a nationwide mortgage licensing system and registry for the residential mortgage industry. The SAFE Act was enacted as part of the Housing and Economic Recovery Act of 2008, Public Law 110–289, Division A, Title V, sections 1501–1517, 122 Stat. 2654, 2810–2824 (July 30, 2008), codified at 12 U.S.C. 5101–5116.

130 In contrast, note that for purposes of Regulation AB, we have generally interpreted an originator to be the person or entity that extends the credit to the borrower. See the 2004 Adopting Release at 1538.

131 See also Joint Study on the Feasibility of Mandating Algorithmic Descriptions for Derivatives (April 7, 2011), available at http://www.sec.gov/news/studies/2011/719b-study.pdf (also concluding that before

typically use brokers to originate loans; however we request comment on whether brokers are used in other asset classes. We are also requesting comment on whether unique identifiers for loan brokers and originators exist for other asset classes (or a system of unique identifiers could reasonably be established), and if so, whether the data is necessary to independently perform due diligence for other asset classes.

Section 7(c) also requires that we require issuers to disclose asset-level data on the nature and extent of the compensation of the broker or originator of the assets backing the security, if such data are necessary for investors to independently perform due diligence. The 2010 ABS Proposals did not include requirements to provide asset-level data regarding fees to brokers or originators. However, with respect to RMBS, our proposal did include an asset-level disclosure requirement to indicate whether a broker originated a loan.[132] In addition, disclosure of the origination channel for each loan is also required under the 2010 ABS Proposals (i.e., was the loan originated through a bank's own retail operation, a broker, a correspondent lender, etc.).[133] We are not proposing asset-level disclosure requirements for broker's compensation at this time because we believe that the proposed data points may provide the information necessary to perform due diligence on an RMBS pool with respect to broker involvement because investors can analyze the method in which a loan was underwritten based on these data points. We request comment on whether the specific compensation paid to brokers or originators would be useful in performing due diligence for RMBS and for other asset classes and should be required under our final rules. In light of the fact that compensation may be paid in many different forms and calculated in different ways

mandating the use of standardized descriptions for all derivatives a universal entity identifier and product or instrument identifiers, among other things, are needed).

132 See proposed Item 2(a)(9) of Schedule L of Regulation AB in the 2010 ABS Proposing Release.

133 See proposed Item 2(a)(10) of Schedule L of Regulation AB in the 2010 ABS Proposing Release.

we are requesting comment about the forms of compensation. We also request comment on how to define these data points so that the information provided is standardized and comparable across asset classes or within an asset class.

In addition, Section 7(c) requires that we require issuers to disclose asset-level data related to the amount of risk retention by the originator and securitizer of such assets, if such data are necessary for investors to independently perform due diligence. The 2010 ABS Proposals include a requirement to disclose any interest the sponsor has retained in the transaction, including the amount and nature of that interest.[134] Also, as discussed above, the joint regulators proposed risk retention requirements as required by Section 15G of the Exchange Act and that proposal also includes disclosure requirements concerning the risk retention option selected.[135] The outstanding Risk Retention Proposals do not require originators to retain risk in individual assets of the pool.[136] In light of the outstanding Risk Retention Proposals and 2010 ABS Proposal for sponsor risk retention disclosure, at this time we are not proposing additional disclosure requirements but we are requesting comment on whether risk retention disclosure on an asset-level basis is necessary for investors to independently perform due diligence.

Requests for Comment:

68. Do the 2010 ABS Proposals implement Section 7(c) effectively? Are there any changes or additions that would better implement Section 7(c)?

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134 See proposed Item 1104(e) of Regulation AB in the 2010 ABS Proposing Release.

135 See fn. 12.

136 See the Risk Retention Proposing Release at 24114.

69. Is the proposed XML format an adequate standard for the format of data that, to the extent feasible, facilitates the comparison of data across securities in similar types of asset classes? If not, how could it be improved?

70. Are unique identifiers for loan brokers and/or originators necessary to permit investors to independently perform due diligence for asset classes other than RMBS or CMBS? If so, is there a unique system of identifiers for brokers and originators for other asset classes?

71. Do asset classes other than RMBS or CMBS use brokers?

72. Would it be appropriate to require an originator's tax ID number, RSSD ID number, FDIC Certificate Number or Routing Transit Number (RTN) as a unique identifier?[137] Would any of these identifiers be an appropriate unique identifier across asset classes? Do originators have multiple tax ID numbers, RSSD IDs, FDIC Certificate Numbers, or RTNs? If so, how should we specify which one to use? With respect to tax ID numbers, should we specify that social security numbers should not be provided? Are there any other existing unique identifiers that would be appropriate for these purposes? Should new identification systems be developed? If so, by whom?

73. Is asset-level disclosure related to the nature and extent of the compensation of the broker or originator necessary to independently perform due diligence across all asset classes?

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137 A tax ID number is a unique number assigned by the Internal Revenue Service. An RSSD ID is a unique identifying number assigned by the Federal Reserve for all financial institutions, main offices, as well as branches. An FDIC Certification Number is a unique number assigned by the FDIC used to identify institutions and to issue insurance certificates. An RTN, or a routing transit number, is a nine-digit unique bank identifier originally designed by the American Bankers Association.

74. How are the brokers and originators compensated? Should we require the fee to be expressed as a dollar amount, a percentage or both? If percentage, what should be the basis for calculating the percentage? Is it appropriate for RMBS or CMBS only? Any other asset classes?

75. How should the asset-level data points for broker or originator compensation be defined so that the information provided will be standardized and comparable across asset classes or within an asset class?

76. Is it more useful if the broker or originator compensation disclosure is provided in a format other than at the asset-level?[138] Could it be provided in the prospectus in narrative form or some other tabular format?

77. Is the amount of risk retention, on an asset-level basis, necessary to independently perform due diligence? If so, how should we require it be calculated in light of the outstanding Risk Retention Proposal requiring risk retention in the securities and not the asset? Should we require the amount of risk retention be expressed as a dollar amount, a percentage or both? If percentage, what should be the basis for calculating the percentage?

78. Is it more useful to provide disclosure regarding risk retention in a format other than asset-level? Could it be provided in the prospectus in a narrative form or

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138 The Federal Deposit Insurance Corporation (''FDIC'') recently amended its ''safe harbor'' rule from the FDIC's statutory authority to disaffirm or repudiate contracts of an insured depository institution (''IDI'') with respect to transfers of financial assets by an IDI in connection with a securitization or a participation (the ''FDIC Safe Harbor Rule''). Under the FDIC Safe Harbor Rule the securitization documents must require disclosure to investors of the nature and amount of compensation paid to any mortgage or other broker, noting that this disclosure should enable investors to assess potential conflicts of interests and how the compensation structure affects the quality of the assets securitized or the securitization as a whole. We note, however, that the FDIC Safe Harbor Rule requires disclosure of compensation for RMBS only. See Federal Deposit Insurance Corporation, Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After September 30, 2010 (Sep. 27, 2010) [70 FR 60287].

some other tabular format? Is the 2010 ABS Proposal to require disclosure of any interest the sponsor has retained in the transaction, sufficient to address the purpose of the asset-level risk retention disclosure requirements in Section 7(c)?

79. In light of the joint Risk Retention Proposals, and the servicing standards included in the proposal, we are requesting comment on whether additional data points related to loss mitigation and RMBS should be required.[139] In the case of borrower default, most pooling and servicing agreements require a servicer, among other things, to take loss mitigation actions in the event the net present value (NPV) of loss mitigation exceeds the estimated NPV of recovery through foreclosure. Should the estimated NPV in both cases be required to be disclosed as an asset-level data point? Should the method of calculation be required to be disclosed as an asset-level data point? Are there standard methods of calculating NPV? Are the formulas for calculating NPV included in the underlying transaction agreements? If not, who determines the method used and should that method be required to be disclosed? Should the assumptions used be required to be disclosed? If not, how can an investor evaluate the NPV? Is it appropriate to require disclosure of the method of calculation and assumptions on an asset-level with Schedule L? Or is it more appropriate to require the disclosure in some other form, such as in narrative form within a periodic report on Form 10-D or Form 8-K?

80. Also related to loss mitigation, should we require additional data points related to compensation paid to servicers related to an individual loan? The 2010 ABS Proposals included certain asset-level data point requirements related to fees

[139] See the Risk Retention Proposing Release at 24127.

earned by the servicer (e.g., servicing fees claimed and performance incentive fees).[140] Are there other ways that servicers are compensated with respect to loss mitigation? Are there any fees that servicers or their affiliates may earn related to loss mitigation of a particular asset? Are there any fees paid to any other parties related to loss mitigation of a particular asset? If so, should we require disclosure of those fees, even if the fees are not paid directly through the issuing entity? Should that disclosure be provided on Schedule L-D, or within the Form 10-D in a narrative form, or both? Would it be appropriate to require this type of disclosure across asset classes? Or should it only be required for certain asset classes, such as RMBS and CMBS?

As we noted in the 2010 ABS Proposing Release, we are sensitive to the possibility that certain asset-level disclosure may raise concerns about the personal privacy of the underlying obligors. In particular, we noted that data points requiring disclosure about the geographic location of the obligor or the collateralized property, credit scores, income and debt may raise privacy concerns. However, information about credit scores, employment status and income would permit investors to perform better credit analysis of the underlying assets. In light of privacy concerns, instead of requiring issuers to disclose a specific location, credit score, or exact income and debt amounts, we proposed ranges, or categories of coded responses.[141] Several commentators noted that our asset-level requirements, as

140 See proposed Item 2(m)(1)(iii) and Item 2(m)(1)(xvi) of Schedule L-D for RMBS in the 2010 ABS Proposing Release.

141 For instance, instead of exact zip code, we proposed that issuers provide an MSA code, a regional geographic locator. For asset-level disclosure data points that require disclosure of obligor credit scores, we proposed coded responses that represent ranges of credit scores (e.g., 500-549, 550-599, etc.). The ranges were based on the ranges that some issuers already provide in pool-level disclosure. For monthly income and debt

proposed, would still raise privacy concerns.[142] Those commentators were generally concerned that asset-level disclosures, despite our attempts to require that certain information be provided in ranges (instead of exact amounts), would not mitigate the possibility that information, including "personally identifiable financial information" or information that would constitute a "consumer report"[143] could be linked to an obligor on an underlying asset.[144] On the other hand, several commentators suggested that asset-level data should be required, and some commentators specifically noted that exact data points, instead of ranges, are needed to evaluate risk and appropriately price the securities.[145] In light of comment letters received and the requirements of new Section 7(c) of the Securities Act, we are soliciting additional comment on privacy concerns raised by the proposed asset-level disclosure requirements.

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ranges, we developed the ranges based on a review of statistical reporting by other governmental agencies (e.g., \$1,000-\$1,499, \$1500-\$1,999, etc.). See 2010 ABS Proposing Release at 23357.

142 See, e.g., letters from ABA, Consumers Union, MBA, Vehicle ABS Group, and World Privacy Forum.

143 Personally identifiable financial information generally means any information: that a consumer provides to obtain a financial product or service; about a consumer resulting from any transaction involving a financial product or service; or is otherwise obtained about a consumer in connection with providing a financial product or service to that consumer. See Rule 3(u)(1) of Regulation S-P [17 CFR 248.3(u)(1)]. A consumer report, as defined in the Fair Credit Reporting Act, in general means any information about a consumer bearing on his/her credit or other personal characteristics which will be used to establish a consumer's eligibility for credit, employment and other authorized purposes under the statute. [15 U.S.C.§ 1681a].

144 Commentators were also concerned that it may be possible to identify an individual obligor by matching asset-level data about the underlying property or asset with data available through other public or private sources about assets and their owners (a process known as "reverse engineering"). If an obligor was identified, then the obligor's non-public personal financial status would be discoverable. See, e.g., letter from ABA on the 2010 ABS Proposing Release (explaining concerns related to the goals of the Gramm-Leach-Bliley Act to limit disclosure of personal financial information for marketing purposes without giving individuals an opportunity to opt out of the use of such information).

145 See letters on the 2010 ABS Release from ASF (requesting disclosure of exact credit score and noting that requiring ranges would be a step back in terms of transparency), Interactive Data (noting that asset-level granularity is essential for robust evaluation of loss, default and prepayment risk associated with RMBS); Prudential (suggesting that ranges of FICO score bands are not sufficient to appreciate the linkages between collateral characteristics); and Wells Fargo (expressing concern that restricting information available to investors could result in substantially lower pricing for new RMBS offerings).

Request for comment:

81. How should we require asset-level data, both initially and on an ongoing basis, to implement Section 7(c) effectively, yet also address commentators' privacy concerns?

82. What particular data elements could be revised or eliminated for each particular asset class in order to address commentator's privacy concerns, yet still enable an investor to independently perform due diligence? For instance, if we do not require information about an obligor's credit score and income, while still requiring the other proposed asset data points, are concerns about obligor privacy alleviated while also implementing the requirements of Section 7(c)?

83. Would it be appropriate to require an obligor's credit score and income be provided on a grouped basis in a format similar to our credit card proposal in the 2010 ABS Proposing Release,[146] in addition to requiring all of the other proposed asset-level data points with the prospectus? What would be appropriate groupings (i.e., should the columns or ranges be different than our credit card proposal)? Would that approach alleviate privacy concerns and also implement the requirements of Section 7(c)?

84. Would any of these approaches be appropriate for RMBS, as well as other asset classes?

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146 The 2010 ABS Proposals proposed that issuers of ABS backed by credit cards provide disclosure more granular than pool-level disclosure by creating "grouped account data." As we explain the 2010 ABS Proposing Release, grouped account data would be created by compressing the underlying asset-level data into combinations of standardized distributional groups using asset-level characteristics and providing specified data about these groups. Like the asset-level data proposals, the grouped account data would be provided in XML to facilitate data analysis. See the 2010 ABS Proposing Release at 23372.

85. Are there other ways to present data that is useful to investors but helps to address privacy concerns? How else can we implement Section 7(c) and also address commentators' privacy concerns related to asset-level reporting?

2. Additional Requests for Comment on Asset-Level Data

As discussed above, in the 2010 ABS Proposing Release, we proposed to require asset-level disclosures for ABS backed by residential mortgages; commercial mortgages; automobile loans or leases; equipment loans or leases; student loans; floorplan financings; corporate debt; and resecuritizations. For ABS backed by credit and charge card receivables we proposed requiring disclosure of grouped account data in lieu of asset-level data. We received many helpful and detailed suggestions regarding many of the proposed asset data points. We received a mixed response to our proposal, with some commentators supporting asset-level disclosure across asset classes and some commentators suggesting that asset-level data would not be appropriate. For several asset classes we received various recommendations for either grouped account disclosures or grouped account and pool-level disclosures in lieu of asset-level disclosures.[147] Some of the letters included detailed suggestions for group data. We will consider these letters along with all the letters on the original proposal. We have at this time made no determination regarding the final rules for any asset class. However for two discrete asset classes, namely Equipment ABS[148] and Equipment Floorplan ABS,[149] we are requesting more information on possible data points.

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[147] See, e.g., letters on the 2010 ABS Proposing Release from ASF's auto ABS issuer members and certain investor members (submitting a recommendation for grouped account and pool-level disclosures for ABS backed by auto loans and leases); ASF issuer and investor members (submitting a recommendation for grouped account disclosures for auto floorplan ABS); Sallie Mae (submitting an "aggregated and grouped representative line" proposal for ABS backed by student loans).

[148] For purposes of this discussion, we refer to ABS backed by equipment loans and leases as "Equipment ABS."

[149] For purposes of this discussion, we refer to ABS backed by equipment floorplan financings as "Equipment Floorplan ABS."

For Equipment ABS, our proposal to require asset-level disclosure, like other asset classes, received a mixed response from commentators. Some commentators supported asset-level data for Equipment ABS, while others suggested that asset-level data was not appropriate.[150] The Captive Equipment ABS Issuer Group, CNH, ELFA and Navistar each suggested that asset-level data would create privacy issues, risk dissemination of competitively sensitive information and increase costs. The Captive Equipment ABS Issuer Group, CNH and ELFA also suggested that asset-level data goes beyond what investors need or require for Equipment ABS. Some commentators individually recommended that Equipment ABS issuers should be permitted to present grouped account disclosure similar to what we proposed for credit and charge card issuers. CNH and Navistar also suggested that some of the proposed asset-level data points are inapplicable to Equipment ABS.

We appreciate that Equipment ABS may share some characteristics with other asset classes for which commentators have suggested grouped account data may be appropriate. For example, commentators for the Auto ABS asset class[151] suggested grouped data was more appropriate due to the privacy and competition concerns, and other concerns, raised by asset-level disclosures,[152]and one of these commentators submitted a grouped data and pool-level disclosure format for the Commission to consider as an alternative to asset-level reporting.[153] Our proposal did not include grouped account data for Equipment ABS, and it

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150 See, e.g., letters on the 2010 ABS Proposing Release from MetLife and SIFMA (investors) (each letter suggesting support for asset-level disclosures and revisions to the Commission's asset-level proposal for Equipment ABS); CalPers (expressing general support for asset-level disclosures for Equipment ABS). But see letters on the 2010 ABS Release from CNH, Navistar Financial Corporation (Navistar) and Equipment Leasing and Financing Association (ELFA) and from a group of five captive equipment ABS issuers (Captive Equipment ABS Issuer Group) (each suggesting that asset-level data was not appropriate for Equipment ABS).

151 For purposes of this discussion, we refer to ABS backed by auto loans and leases as "Auto ABS."

152 See letters from Americredit, ASF (auto ABS issuers), Vehicle ABS Group on the 2010 ABS Proposing Release.

153 See letter on the 2010 ABS Proposing Release from ASF's auto ABS issuer members and certain investors members. The auto ABS issuer members and certain investor members submitted a recommendation

is unclear whether the suggestions we received on a possible grouped account approach for this asset class continued to be supported by commentators based on the comments received.[154] A group of issuers through a trade association submitted a suggestion for standardized pool-level disclosures, but we preliminarily believe that more granular disclosure – either asset-level or grouped account data – is appropriate at the time of offering and on an ongoing basis for Equipment ABS than provided by only pool-level disclosures.[155] In order to better analyze comments received and formulate the appropriate disclosure requirements for Equipment ABS, we request additional comment below.

Request for comment:

86. Is it possible to require asset-level data, both initially and on an ongoing basis, and address commentators' privacy and competitive concerns applicable to the Equipment ABS sector? What particular data elements would need to be revised or eliminated?

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for grouped account and pool-level disclosures for ABS backed by auto loans and leases. The recommendation suggested that at the time of an Auto ABS offering and monthly thereafter an issuer would provide statistical information about the underlying pool in the form of grouped-asset representative data lines and prescribed stratification tables.

154 Navistar submitted a grouped account disclosure proposal for Equipment ABS, but Navistar subsequently was a signatory to a standardized pool-level format submitted by the Captive Equipment ABS Issuer Group. See letters about the 2010 ABS Proposing Release from Navistar and the Captive Equipment ABS Issuer Group (located in the memorandum to file dated March 8, 2011 covering the staff's meeting with members of the Financial Services Roundtable). It is unclear in light of their participation in the Captive Equipment ABS Issuer Group letter whether Navistar's grouped account suggestion still stands. Also, the Captive Equipment ABS Issuer Group submitted in their letter dated December 13, 2010 (located in the memorandum to filed dated December 15, 2010 covering the staff's meeting with members of the Roundtable) a grouped data proposal. However, as noted above, in March 2011 the Captive Equipment ABS Issuer Group later recommended standardized pool-level disclosures.

155 See letter regarding the 2010 ABS Proposing Release from members the Captive Equipment ABS Issuer Group contained in the memorandum to file dated March 8, 2011 (suggesting that their recommended pool-level disclosure format was based on feedback they received from investors. However, we did not receive any comment letters from investors that supported this position).

87. Is asset-level data necessary for investors to independently perform due diligence for Equipment ABS?[156] Or would a grouped account disclosure requirement along with pool-level disclosures be sufficient for investors to independently perform due diligence and also address commentators' privacy and competition concerns? If so, would it be appropriate to require for Equipment ABS similar disclosure requirements that were recommended by commentators for Auto ABS?[157]

88. Could the grouped account and pool-level disclosures that commentators recommended for initial and ongoing reporting of Auto ABS be used for Equipment ABS? Would commentators' recommended disclosure requirements for Auto ABS need to be altered to fit the Equipment ABS sector? If so, how would it need to change? Is there a more appropriate grouped account format for Equipment ABS? Please be specific in your response.

For Equipment Floorplan ABS, some commentators suggested that asset-level data was not appropriate.[158] We recognize that Equipment Floorplan ABS, as revolving assets, may share some characteristics with other asset classes for which grouped account data may be appropriate; for instance, credit cards are typically structured as revolving asset master trusts and Equipment Floorplan ABS are also typically structured as revolving asset master trusts. Like Equipment ABS, however, we did not receive a recommendation for a grouped

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156 See Section 7(c) of the Securities Act.

157 See letter on the 2010 ABS Proposing Release from ASF's auto ABS issuer members and certain investors members (submitting a recommendation for grouped account and pool-level disclosures for ABS backed by auto loans and leases.)

158 See letters from Captive Equipment ABS Issuer Group, CNH and Navistar on the 2010 ABS Proposing Release (expressing concerns that asset-level reporting for floorplan receivables ABS was not appropriate due to obligor privacy concerns, concerns over the release of proprietary information and increased costs.)

account data approach.[159] A group of issuers through a trade association recommended that we require standardized pool-level disclosures, but we preliminarily believe that more granular disclosure is appropriate at the time of offering and on an ongoing basis than is provided by only pool-level disclosures.[160] In order to better analyze comments and formulate the appropriate disclosure requirements for Equipment Floorplan ABS, we request additional comment below.

Request for comment:

89. Is it possible to require asset-level data, both initially and on an ongoing basis, and address commentators' privacy and competitive concerns applicable to the Equipment Floorplan ABS sector? What particular data elements would need to be revised or eliminated?

90. Is asset-level data necessary for investors to independently perform due diligence for Equipment Floorplan ABS? Or would a grouped account disclosure requirement be sufficient for investors to independently perform due diligence and also address commentator's privacy and competition concerns? If so, would it be appropriate to require for Equipment Floorplan ABS[161] similar disclosure

159 Navistar expressed support in their comment letter for the floorplan grouped data disclosure proposal proposed in a letter from the Vehicle ABS Group. See letters from Navistar and the Vehicle ABS Group about the 2010 ABS Proposing Release. However, the Vehicle ABS Group later withdrew support for their recommendation in favor of the grouped account disclosure recommended by ASF's issuer and investor members for ABS backed by auto floorplans. See letter from the Vehicle ABS Group about the 2010 ABS Release dated November 8, 2010. ASF submitted a grouped account recommendation for vehicle floorplan ABS, but it was not clear that this proposal covered Equipment Floorplan ABS. See the letter on the 2010 ABS Proposing Release from ASF issuer and investor members (submitting a recommendation for grouped account disclosures for auto floorplan ABS).

160 See letter regarding the 2010 ABS Proposing Release from members the Captive Equipment ABS Issuer Group contained in the memorandum to file dated March 8, 2011 (suggesting that their recommended pool-level disclosure format was based on feedback they received from investors. However, we did not receive any comment letters from investors that supported this position).

161 See letter from ASF on the auto sector setting forth the alternative disclosure regime recommended by ASF's auto ABS grouped-asset investor members and issuer members.

requirements that were recommended for Auto Floorplan ABS?[162] Would it resolve commentators' privacy and competitive concerns?

91. Could the grouped account disclosures that commentators recommended for initial and ongoing reporting for Auto Floorplan ABS also be used for Equipment Floorplan ABS? Would commentators' recommended disclosure requirements for Auto Floorplan ABS need to be altered to fit the Equipment Floorplan ABS sector? If so, how would it need to change? Is there a more appropriate grouped account format for Equipment Floorplan ABS? Please be specific in your response.

3. Additional Requests for Comment on When to Require Schedule L

In our 2010 ABS Proposing Release under our proposed requirements for when asset-level data would be required in a prospectus, we proposed to require that issuers provide for each asset in the pool all of the asset-level data points enumerated in proposed Schedule L of Regulation AB as of a recent practicable date, defined as the "measurement date," at the time of a Rule 424(h) prospectus.[163] We also proposed that an updated Schedule L, as of the cut-off date for the securitization, be provided with the final prospectus under Rule 424(b). Finally, we proposed that if issuers are required to report changes to the pool under Item 6.05 of Form 8-K, then an updated Schedule L would be required.[164]

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162 For purposes of this discussion, we refer to ABS backed by auto floorplans as "Auto Floorplan ABS."

163 See proposed Item 1111A of Regulation AB and the 2010 ABS Proposing Release at 23356.

164 In footnote 235 of the 2010 ABS Proposing Release we stated that if a new asset is added to the pool during the reporting period, an issuer would be required to provide the asset-level information for each additional asset as required by our proposed revisions to both Item 1111 of Regulation AB and Item 6.05 of Form 8-K. See the 2010 ABS Proposing Release at 23356.

Under our proposed revisions to Item 6.05 of Form 8-K, however, we proposed that a new Schedule L be required to be filed if any material pool characteristic of the actual asset pool at the time of issuance of the asset backed securities differs by 1% or more than the description of the asset pool in the prospectus filed for the offering pursuant to Securities Act Rule 424.[165] In our discussion of asset-level ongoing reporting requirements, we stated that if assets are added to the pool during the reporting period, either through prefunding periods, revolving periods or substitution, disclosure would be required under our proposed revisions to Item 6.05 on Form 8-K along with the Schedule L data contained in proposed Item 1111A of Regulation AB.[166]

One investor, in response to our 2010 ABS Proposing Release, recommended that if assets are added to the pool through prefunding periods or revolving periods during the month a new Schedule L should be provided.[167] This commentator suggested that such a requirement will allow investors to evaluate the risk layering introduced by any new collateral that is added to securitizations after issuance. This comment seemed to indicate that it was not clear an Item 6.05 Form 8-K was required when prefunding or revolving assets increased or changed the pool by 1% or more, although that was the intention of the language in the proposal. Therefore, we are requesting additional comment to determine whether we should clarify this proposed requirement by specifying in Item 6.05 that the filing of a Schedule L is required when assets are added to the pool after the issuance of the

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165 See the 2010 ABS Proposing Release at 23392. As proposed, if any material pool characteristic of the actual asset pool at the time of issuance of the asset backed securities differs by 1% or more than the description of the asset pool in the prospectus filed for the offering pursuant to Securities Act Rule 424 an issuer would be required to file an Item 6.05 of Form 8-K and provide the disclosures required under Item 1111 and Item 1112 of Regulation AB. Under the proposed Item 1111(h) of Regulation AB issuers would be required to provide a Schedule L. In addition, the item, as proposed to be revised, also requires a description of the changes that were made to the asset pool, including the number of assets substituted or added to the asset pool.

166 See the 2010 ABS Proposing Release at 23368.

167 See letter from Prudential (suggesting that for securitizations with prefunding periods or revolving transactions a new Schedule L should be filed monthly when new collateral is added.)

securities, either through prefunding periods, revolving periods or substitution and the triggers in that item are met.

Request for comment:

92. Should we specify in Item 6.05 of Form 8-K that a new Schedule L must be filed when assets are added to the pool after issuance, either through prefunding periods, revolving periods or substitution and the triggers in that item are met?

93. Instead, should we require that filing of a new Schedule L be triggered when assets are added to the pool during a month, distribution period or some other timeframe?

94. Rather than require that Schedule L be filed with [or as an exhibit to] a current report on Form 8-K, under Item 6.05, should it be required to be filed under a new requirement as an exhibit to Form 10-D? Please be specific in your response.

95. Should the Schedule L data include information about all assets in the pool, including the new assets? If so, should we clarify in an instruction this will just be repeating the original schedule or should we require that it be updated? Could any of the information be updated? If so, should we require that? Or should Schedule L data only be required for the assets added during the reporting period?

96. Could investors evaluate risk layering introduced by new assets if a new Schedule L is required only for the new assets added during the relevant period?

97. Current disclosure requirements under Item 1121(b) of Regulation AB require that during a prefunding or revolving period, or if there has been a new issuance of asset-backed securities backed by the same pool under a master trust, during the fiscal year of the issuing entity, updated pool composition information in the Form 10-D report is required to be provided in the last required distribution report of the fiscal year of the issuing entity in accordance with Items 1110, 1111 and 1112 of

Regulation AB.[168] If, as proposed in the 2010 ABS Proposing Release, updated asset-level information would be required to be provided with an Item 6.05 Form 8-K when prefunding or revolving assets change the pool by 1% or more, would the information required by Item 1121(b) be necessary? Should Item 1121(b) be revised to specifically require updated asset-level information be provided in the last required distribution report of the fiscal year of the issuing entity?

4. Additional Requests for Comment on Privately-Issued Structured Finance Products

In the 2010 ABS Proposing Release, we proposed amendments to our safe harbors for exempt offerings and resales and new related rules regarding the information that must be made available to investors in privately-issued asset-backed securities.[169] We proposed to require that, in order for a reseller of a "structured finance product," as proposed to be defined,[170] to sell a security in reliance on Securities Act Rule 144A,[171] or in order for an issuer of a structured finance product to sell a security in reliance on Rule 506 of Regulation D,[172] certain conditions had to be met.[173]

For sales of structured finance products made in reliance on Rule 144A or Rule 506, first, under our proposal the underlying transaction agreement of the issuer would have to grant any purchaser, any security holder and any prospective purchaser of the securities

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168 Also, updated information is required in the first Form 10-D report for the period in which the prefunding or revolving period ends (if applicable).

169 See the 2010 ABS Proposing Release at 23393.

170 The 2010 ABS Proposals would apply to any "structured finance product," which would be more broadly defined than in the Regulation AB Item 1101(c) definition of "asset-backed security" in order to reflect the wide range of securitization products that are sold in the private markets.

171 17 CFR 230.144A.

172 17 CFR 230.506.

173 See proposed revisions toRule 144A(a)(8), Rule 192, Rule 501 and Rule 502 in the 2010 ABS Proposing Release.

designated by the holder the right to obtain, upon request of the purchaser or security holder, information that would be required if the offering were registered on Form S-1 or proposed Form SF-1 under the Securities Act and any ongoing information regarding the securities that would be required by Section 15(d) of the Exchange Act, if the issuer were required to file reports under that section. Second, the issuer would have to represent that it would provide such information to the purchaser, security holder, or prospective purchaser upon request of the purchaser or security holder.[174]

As discussed above, in the 2010 ABS Proposing Release, we also proposed an amendment to Regulation AB that would require issuers of registered ABS offerings to disclose in the prospectus asset-level information in a standardized format.[175] Thus, together with the proposed asset-level requirements, the proposed amendments for privately issued structured finance products would require that issuers in offers and sales of structured finance products in reliance on Rule 144A or Rule 506 would need to provide, upon request, asset-level disclosures, along with other disclosures required by Regulation AB.

In the 2010 ABS Proposing Release, we requested comment on whether we should provide more specificity in the rules for privately issued structured finance products covering what disclosure would be required to be provided and, if so, what types of disclosure we should specifically require and whether the required disclosures should differ by type of security and, if so, in what way. We also requested comment on whether our proposal with respect to ongoing information regarding the securities was appropriate.

174 See the 2010 ABS Proposing Release at 23396

175 See the ABS 2010 ABS Proposing Release at 23355.

In response to our 2010 ABS Proposals, several commentators expressed concern regarding the disclosure standards for privately issued structured finance products.[176] Commentators noted that there are not clear information requirements for certain types of ABS that are not typically offered under Regulation AB, such as CDOs, CLOs, asset-backed commercial paper or synthetic ABS.[177] Commentators expressed concerns regarding the standards for disclosure and noted that any novel asset type or structure would face uncertainty regarding their disclosure obligations.[178] In addition, some commentators asked the Commission to recognize the unique characteristics of different asset classes.[179]

In light of these comments, we are requesting comment on whether we should only require asset-level disclosures where the "structured finance product" being sold in reliance

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[176] See letters from ABA, ABAASA, Association of Financial Markets in Europe/European Securitisation Forum (AFME/ESF), ASF, Cleary Gottlieb Steen and Hamilton (Cleary), PPM America (PPM), Sallie Mae, SIFMA (dealers and sponsors), Wells Fargo on the 2010 ABS Proposing Release.

[177] See letters from ABA, ASF and SIFMA on the 2010 ABS Proposing Release. The ASF suggested that the proposed disclosure regime would be untenable because the safe harbor for securities that fall outside of the current Regulation AB definition would be subject to a hybrid of the corporate and Regulation AB disclosure requirements, without the benefit of detail on how those disclosure requirements would apply.

[178] See letters from AFME/ESF, SIFMA (dealers and sponsors), and Wells Fargo on the 2010 ABS Proposing Release. SIFMA (dealers and sponsors) suggested that the uncertainty over disclosure requirements could affect the ability of insurance-linked securities, whole business securitizations, future flow securitizations, securitizations of film rights, franchise fees, IP licensing fees, charged-off assets, leases exceeding the limits of the Reg. AB definition of ABS and non-revolving assets exceeding a year to rely upon Rule 144A. Wells Fargo expressed concern regarding the uncertainty in determining the applicable reporting requirements for future flow, film rights, franchise fees, patent royalties, certain lease transactions and novel asset classes and structures.

[179] See letters from ABASA, AFME/ESF and Cleary on the 2010 ABS Proposing Release. AFME/ESF suggested that it would be inappropriate to apply Regulation AB to UK mortgage master trust issuers without adjustment. Cleary urged the Commission to "acknowledge that some of the detailed, asset-level disclosure mandated by the Proposed Rules will simply not be possible for some issuers, in some asset classes, to compile without expending levels of time and expense that are simply not warranted." Cleary recommended revising the proposal to require "issuers to provide (in connection with the initial placements) the information that would be required if the offering were registered on Form S-1 or Form SF-1 under the Securities Act, and to provide (on an ongoing basis) the information that would be required by Section 15(d) of the Exchange Act, in each case if requested, only to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense." Cleary also suggested that "such required information in each case may differ as to format, presentation, or specific loan-level data points from the requirements of Regulation AB, and that loan-level information may be omitted for one or more portfolio components not exceeding a specified percentage of the relevant portfolio individually and a specified percentage of the relevant portfolio in the aggregate."

on Rule 144A, or Rule 506 of Regulation D, is backed by or collateralized by assets of an asset class for which there are prescribed asset-level reporting requirements in Regulation AB. As proposed, this would include: residential mortgage backed securities; commercial mortgage backed securities; automobiles loans or leases; equipment loans or leases; student loans; floorplan financings; corporate debt; and resecuritizations.

Request for comment:

98. Should we only require that the transaction agreements underlying structured finance products sold in reliance on Rule 144A or sold pursuant to Rule 506 be required to provide for asset-level disclosures if the particular asset class of the securities are of an asset class where asset-level disclosures are prescribed in Regulation AB (i.e., residential mortgage backed securities; commercial mortgage backed securities; automobiles loans or leases; equipment loans or leases; student loans; floorplan financings; corporate debt; and resecuritizations)? Should securities where the asset class is not of an asset class where asset-level disclosure is required under Regulation AB be exempted from providing asset-level disclosure?

99. Is there any reason that we should not require structured finance product issuers that utilize the safe harbors to comply with the proposed asset-level disclosure requirements for initial and/or ongoing information if asset-level disclosure for the particular asset class underlying the transaction is required under Regulation AB?

100. For securities that fall outside the Regulation AB definition of "asset-backed securities," how can the Commission address commentators' concern that those

securities would be subject to a hybrid of the corporate and Regulation AB disclosure requirements?[180]

101. If we do not require asset-level disclosures for certain "structured finance products" or "novel asset types or structures" that fall outside the Regulation ABS definition of "asset-backed securities," are there other types of disclosure that we should require the issuer to provide to investors or prospective purchasers? How should "novel asset types or structures" be defined? Is there any guidance that the Commission should provide for structured finance products that fall outside of Regulation AB's definition of ABS?

C. Waterfall Computer Program

In the 2010 ABS Proposing Release, we proposed to require that most ABS issuers file a computer program that gives effect to the flow of funds, or "waterfall," provisions of the transaction. The proposal was designed to make it easier for an investor to analyze the ABS offering at the time of its initial investment decision and to monitor ongoing performance of the ABS. In this way, market participants would be able to better conduct their own evaluations of ABS. Although several commentators supported the proposal because it would promote transparency and enable investors to make better decisions,[181] several commentators opposed the proposal for various reasons, such as the lack of clarity of

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[180] See letter from ASF on the 2010 ABS Proposing Release (expressing that the array of structured finance products offered and sold in the private placement market may technically fall outside the Regulation AB definition of "asset-backed securities," which would by default subject them to the corporate disclosure regime, together with some elements of the Regulation AB disclosure regime).

[181] See comment letters from AMI; Bank of New York Mellon; CalPERS; Keith G. Cascio; CoStar Group; Council of Institutional Investors; Knowledge Decision Securities; Risk Management Association/Securitization Risk Roundtable; and XBRL US on the 2010 ABS Proposing Release.

the requirements of our proposal,[182] the cost burden on issuers and/or investors,[183] and concern about liability under the federal securities laws.[184] We received many helpful and detailed suggestions regarding the proposed waterfall computer program requirement, and plan to re-propose the requirement separately from adopting requirements for ABS shelf eligibility, offering process and disclosures, including asset-level disclosures. We believe these requirements could be adopted and implemented together, separately from any waterfall disclosure component.

IV. Transition Period

As we explained in the 2010 ABS Proposing Release, we believe that compliance dates should not extend past a year after adoption of the new rules. We are considering the appropriate timing for implementation of the 2010 ABS Proposals and today's re-proposals, if adopted.

Request for comment:

102. Should implementation of any proposals be phased-in? If so, explain why and provide a reasonable timeframe for a phase-in (e.g., six months, one or two years)?

103. Should implementation be based on a tiered approach that relates to a characteristic other than the size of the sponsor? Is there any reason to structure implementation around the asset class of the securities?

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182 See comment letters from ABA; BOA; Discover; FSR; Vehicle ABS Group; JP Morgan; and Sallie Mae on the 2010 ABS Proposing Release.

183 See comment letters from ABASA; ABA; American Financial Services Association (AFSA); BOA; Business Software Alliance; Capital One Financial; Citigroup Global Markets (Citi); CREFC; Discover; FSR; Vehicle ABS Group; Intex Solutions; IPFS Corp; JP Morgan; MathWorks; MBA; Navistar; PPM; PricewaterhouseCoopers LLP; Sallie Mae; SIFMA; Trepp; UBmatrix; Wells Fargo; and Wyndham Worldwide on the 2010 ABS Proposing Release.

184 See comment letters from ABASA; ABA; AFSA; AmeriCredit Corp; BOA; (Citi); Discover; Intex Solutions; JP Morgan; MBA; Sallie Mae; SIFMA; Vehicle ABS Group; Wells Fargo on the 2010 ABS Proposing Release.

V. General Request for Comment

We request comment on the specific issues we discuss in this release, and on any other approaches or issues that we should consider in connection with the proposed amendments. We seek comment from any interested persons, including investors, asset-backed issuers, sponsors, originators, servicers, trustees, disseminators of EDGAR data, industry analysts, EDGAR filing agents, and any other members of the public.

VI. Paperwork Reduction Act

A. Background

Certain provisions of the proposed rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[185] The Commission is submitting these proposed amendments and proposed rules to the Office of Management and Budget (OMB) for review in accordance with the PRA.[186] An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:[187]

(1) "Form S-3" (OMB Control No. 3235-0073);

(2) "Form 10-D" (OMB Control No. 3235-0604);

(3) "Regulation S-K" (OMB Control No. 3235-0071); and

(4) "Form SF-3 (a proposed new collection of information).

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185 44 U.S.C. 3501 et seq.

186 44 U.S.C. 3507(d) and 5 CFR 1320.11.

187 The paperwork burden from Regulation S-K is imposed through the forms that are subject to the requirements in those regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulation S-K.

The forms listed in Nos. 1 through 3 were adopted under the Securities Act and the Exchange Act and set forth the disclosure requirements for registration statements and periodic reports filed with respect to asset-backed securities and other types of securities to inform investors. The form listed in No. 4 is a newly proposed collection of information under the Securities Act. Form SF-3, if adopted, would represent the registration form for offerings that meet certain shelf eligibility conditions and can be offered on a delayed basis under Rule 415.

Compliance with the proposed amendments would be mandatory, and responses to the information collections would not be kept confidential and there would be no mandatory retention period for proposed collections of information.

B. Revisions to PRA Reporting and Cost Burden Estimates

Our PRA burden estimate for the existing collection of information on Form S-3 is based on an average of the time and cost incurred by all types of public companies, not just ABS issuers, to prepare the collection of information. In contrast, Form 10-D is a form that is only prepared and filed by ABS issuers. In 2004, we codified requirements for ABS issuers in these regulations and forms, recognizing that the information relevant to asset-backed securities differs substantially from that relevant to other securities.

Our PRA burden estimates for the proposed amendments are based on information that we receive on entities assigned to Standard Industrial Classification Code 6189, the code used with respect to asset-backed securities, as well as information from outside data sources.[188] When possible, we base our estimates on an average of the data that we have available for years 2004 through 2010. In some cases, our estimates for the number of asset-

[188] We rely on two outside sources of ABS issuance data. We use the ABS issuance data from Asset-Backed Alert on the initial terms of offerings, and we supplement that data with information from Securities Data Corporation (SDC).

backed issuers that file Form 10-D with the Commission are based on an average of the number of ABS offerings in 2006 through 2010.[189]

1. Form S-3 and Form SF-3

Our current PRA burden estimate for Form S-3 is 243,927 annual burden hours. This estimate is based on the assumption that most disclosures required of the issuer are incorporated by reference from separately filed Exchange Act reports. However, because ABS issuers using Form S-3 often present all of the relevant disclosure in the registration statement rather than incorporate relevant disclosure by reference, our current burden estimate for ABS issuers using Form S-3 under existing requirements is similar to our current burden estimate for ABS issuers using Form S-1. During 2004 through 2010, we received an average of 90 Form S-3 filings annually related to asset-backed securities.

We are proposing to move the requirements for asset-backed issuers into new forms that would be solely for the registration by offerings of asset-backed securities. Under the proposal, proposed Form SF-3 would be the ABS shelf equivalent form of existing Form S-3. For purposes of our calculations, we estimate that the proposals relating to shelf eligibility would cause a 5% movement in the number of filers (i.e., a decrease of five registration statements) out of the shelf system due to the new requirements which include the proposed executive officer certification, the proposed transaction requirement for the credit risk manager, the proposed transaction requirement related to investor communications, and the proposed annual evaluations of compliance with timely Exchange Act reporting and timely filing of transaction agreements and certifications.[190] On the other hand, we estimate the

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[189] Form 10-D was not implemented until 2006. Before implementation of Form 10-D, asset-backed issuers often filed their distribution reports under cover of Form 8-K.

[190] We calculated the decrease of five Form SF-3s by multiplying the average number of Form S-3s filed (90) by 5 percent.

number of shelf registration statements for ABS issuers would increase by five as a result of the outstanding proposal from the 2010 ABS Proposing Release to eliminate the practice of providing a base prospectus and a prospectus supplement for these issuers.[191] Thus, we estimate that the annual number of shelf registration statements concerning ABS offerings would remain the same. Accordingly, since the proposals would shift all shelf eligible ABS filings from Form S-3 to Form SF-3, we estimate that the proposals would cause a decrease of 90 ABS filings on Form S-3 and a corresponding number of 90 ABS filings on Form SF-3s filed annually.[192]

In 2004, we estimated that an ABS issuer, under the 2004 amendments, would take an average of 1,250 hours to prepare a Form S-3 to register ABS.[193] Additionally, in the January 2011 ABS Issuer Review Release, we estimated that the requirements described in that release would increase the annual incremental burden to ABS issuers by 30 hours per form.[194] Therefore, we currently estimate that it would take an average of 1,280 hours to prepare a Form S-3 to register ABS. For registration statements, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden is carried by outside professionals retained by the registrant at an average cost of $400 per hour.[195]

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191 See Section II.D. of the 2010 ABS Proposing Release. Based on staff reviews, we believe it is very unusual to see ABS registration statements with multiple unrelated collateral types such as auto loans and student loans. There are occasionally multiple related collateral types such as HELOCs, subprime mortgages and Alt-A mortgages in ABS registration statements.

192 This is based on the number of registration statements for ABS issuers filed on Form S-3 and the four changes due to our rule proposal.

193 See 2004 ABS Adopting Release and 2004 ABS Proposing Release.

194 See January 2011 ABS Issuer Review Release at 4239.

195 See, e.g., Credit Ratings Disclosure, Release No. 33-9070 (Oct. 7, 2009) [74 FR 53086].

We are proposing new and revised disclosure requirements for ABS issuers that, if adopted, would be a cost to filing on Form SF-3. In particular, we are proposing to add a shelf eligibility condition that the registrant file a certification at the time of each offering off of a shelf registration statement, or takedown, by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor concerning the disclosure contained in the prospectus and the design of the securitization. We are also proposing a shelf eligibility condition that the underlying transaction agreement must provide for the appointment of a credit risk manager to review assets upon the occurrence of certain trigger events and provisions related to repurchase request dispute resolution. Additionally, we are proposing to require that registrants include disclosures concerning the credit risk manager in the prospectus in the registration statement. Lastly, we are proposing a shelf eligibility condition that the underlying transaction agreement include a provision requiring that the party responsible for making periodic filings on Form 10-D include any request received from an investor to communicate with other investors during the reporting period related to investors exercising their rights under the terms of the asset-backed security. We are also proposing changes to Form 10-D relating to disclosure regarding credit risk managers.

If the proposals are adopted, we estimate that the incremental burden for ABS issuers to complete the disclosure requirements in Form SF-3, prepare the information, and file it with the Commission would be 100 burden hours per response on Form SF-3. As a result, we estimate that each Form SF-3 would take approximately 1,380 hours to complete and file.[196] We estimate the total internal burden for Form SF-3 to be 31,050 hours and the total

[196] The total burden hours to file Form SF-3 are calculated by adding the existing burden hours of 1,280 that we estimate for Form S-3 and the incremental burden of 100 hours imposed by our proposals for a total of 1,380 total burden hours.

related professional costs to be $37,260,000.[197] This would result in a corresponding decrease in Form S-3 burden hours of 28,800 and $34,560,000 in professional costs.[198]

2. Form 10-D

In 2004, we adopted Form 10-D as a new form for only asset-backed issuers. This form is filed within 15 days of each required distribution date on the asset-backed securities, as specified in the governing documents for such securities. The form contains periodic distribution and pool performance information. We estimate that the yearly average number of Form 10-D filings is 10,000[199] and that the proposed new Regulation AB disclosure requirements that would be included in Form 10-D related to investor communications (Item 1121(g)) and credit risk managers (Item 1121(f)) would result in an additional burden of five hours per filing to prepare. Consistent with our estimate in 2004, we estimate that it currently takes 30 hours to complete and file a Form 10-D. Therefore, we estimate that the proposals would increase the number of hours to prepare, review, and file a Form 10-D to 35 burden hours; thus, increasing the total burden hours for all annual Form 10-D responses to an estimate of 350,000 hours.[200]

We allocate 75% of those hours (262,500 hours) to internal burden and the remaining 25% to external costs totaling $35,000,000 using a rate of $400 per hour.

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[197] To calculate these values, we first multiply the total burden hours per Form SF-3 (1,380) by the number of Form SF-3s expected under the proposal (90), resulting in 124,200 total burden hours. Then, we allocate 25 percent of these hours to internal burden, resulting in 31,050 hours. We allocate the remaining 75 percent of the total burden hours to related professional costs and use a rate of $400 per hour to calculate the external professional costs of $37,260,000.

[198] To calculate these values, we first multiply the total burden hours per Form S-3 (1,280) by the average number of Form S-3s over the period 2004-2010 (90), resulting in 115,200 total burden hours. Then, we allocate 25 percent of these hours to internal burden, resulting in 28,800 hours. We allocate the remaining 75 percent of the total burden hours to related professional costs and use a rate of $400 per hour to calculate the external professional costs of $34,560,000.

[199] Our estimate is based on 1,000 respondents per year multiplied by 10 filings per respondent.

[200] The burden hours are calculated by multiplying 10,000 Form 10-Ds by the 35 burden hours required to complete the form for a total of 350,000 hours.

3. Regulation S-K

Regulation S-K, which includes the item requirements in Regulation AB, contains the requirements for disclosure that an issuer must provide in filings under both the Securities Act and the Exchange Act. We assign one burden hour to Regulation S-K for administrative convenience to reflect that the changes to the regulation did not impose a direct burden on companies.

4. Summary of Proposed Changes to Annual Burden Compliance in Collection of Information

Table 1 illustrates the changes in annual compliance burden in the collection of information in hours and costs for existing reports and registration statements and for the proposed new registration statement for asset-backed issuers. Bracketed numbers indicate a decrease in the estimate.

Form	Current Annual Responses	Proposed Annual Responses	Current Burden Hours	Decrease or Increase in Burden Hours	Proposed Burden Hours	Current Professional Costs	Decrease or Increase in Professional Costs	Proposed Professional Costs
S-3	2,065	1,075	243,927	[28,800]	215,127	$292,711,500	[$34,560,000]	$258,151,500
SF-3	....	90	....	31,050	31,050	....	$37,260,000	$37,260,000
10-D	10,000	10,000	225,000	37,500	262,500	$30,000,000	$5,000,000	$35,000,000

5. Solicitation of Comments

We request comments in order to evaluate: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed collection of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.[201] We also specifically request comment regarding:

104. Whether and to what extent the proposed shelf eligibility requirements would cause a movement in filers that are currently eligible for shelf registration on Form S-3 out of shelf registration to proposed Form SF-3.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments 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 20549-1090, with reference to File No. S7-08-10. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-08-10, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE, Washington, DC 20549. OMB is required to make a decision concerning the collection 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 of publication.

VII. Economic Analysis

A. Background

In April 2010, we proposed rules that would revise the disclosure, reporting and offering process for ABS.[202] Among other things, in the 2010 ABS Proposing Release we

201 We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

proposed eligibility requirements to replace the current credit rating references in shelf eligibility criteria for asset-backed security issuers (i.e., a certification by the chief executive of the depositor, risk retention, third party opinion relating to representations and warranties, and ongoing Exchange Act reporting). We also proposed to require that, with some exceptions, prospectuses for public offerings of asset-backed securities and ongoing Exchange Act reports contain specified asset-level information about each of the assets in the pool in a standardized tagged data format. Further, we proposed to require asset-backed issuers to provide investors with more time to consider transaction-specific information about the pool assets.

In this release, we are re-proposing certain requirements for ABS shelf eligibility and filing deadlines for exhibits in ABS shelf offerings. We are also proposing new Form 10-D disclosure requirements related to investor communications and credit risk managers. Section 23(a) of the Exchange Act[203] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act[204] and Section 3(f) of the Exchange Act[205] require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. We have considered and discussed below the effects of the proposed rules

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202 See the 2010 ABS Proposing Release.

203 15 U.S.C. 78w(a).

204 15 U.S.C. 77b(b).

205 15 U.S.C. 78c(f).

on efficiency, competition, and capital formation, as well as the benefits and costs associated with the Commission's decisions in the proposed rulemaking. Except as noted below, our benefit-cost analysis included in the 2010 ABS Proposing Release remains unchanged and outstanding.

B. ABS Shelf Eligibility Proposals

We are re-proposing the registrant and transaction requirements for ABS shelf registration because two of the proposed transaction requirements in the April 2010 Proposing Release – risk retention and continued Exchange Act reporting – will be required for most registered ABS offerings as a result of changes mandated by provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Further, our re-proposals for ABS shelf registration eligibility are also made in connection with Section 939A of that Act which generally requires that we modify our regulations to remove any references to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness that we determine as appropriate for such regulations. Therefore, instead of the investment grade ratings requirement, under our re-proposal, taking into account the context and purposes of the affected rules, we are proposing a CEO or executive officer certification, provisions in the transaction agreements requiring the appointment of an independent credit risk manager under certain conditions and certain dispute resolution provisions, and provisions in the transaction agreements related to investor communications for any offering off the Form SF-3 shelf registration statement, which we believe would be indicative of a higher quality security.

We are also proposing to require that, in order to conduct a takedown off an effective shelf registration statement, an ABS issuer would be required to conduct an annual evaluation of compliance with the transaction requirements for shelf offerings conducted during the past year as well as compliance with timely Exchange Act reporting. Further, as re-proposed, issuers would be allowed to cure any failure to timely file the required certification or transaction agreements with required provisions. Specifically, under the re-proposal, the depositor would be deemed to satisfy the registrant requirements related to timely filing the certifications and transaction agreements 90 days after the date all required filings are filed.

1. Benefits

We believe a benefit of the re-proposed ABS shelf eligibility requirements is that they would replace the current investment grade rating condition while providing improved investor protections that would be indicative of a higher quality security. We believe that our proposal to require a certification by the depositor's chief executive officer or executive officer in charge of securitization may cause these officials to review more carefully the disclosure, and in this case, the transaction, and would encourage better oversight of the securitization process. As a result, certifiers may provide a more accurate review of the registration statement disclosures and the transaction. To the extent that a more careful review improves the securitization quality in the presence of such a certification, the proposed certification would be an appropriate eligibility requirement for shelf registration.

We believe that our proposal requiring provisions in the underlying transaction agreements requiring the appointment of a credit risk manager to review assets upon the occurrence of certain trigger events, requiring that the credit risk manager provide a report to the trustee of the findings and conclusions of the reviews of the assets, and requiring repurchase dispute resolution procedures should help the enforceability of contract terms surrounding representations and warranties regarding the pool assets. We are proposing to require that the transaction agreements require, at a minimum, review by the credit risk manager (1) when the credit enhancement requirements, as specified in the underlying transaction agreements, are not met; and (2) at the direction of investors pursuant to the process provided in the transaction agreement and disclosed in the prospectus. We believe specifying these two minimum trigger requirements should facilitate the ability of transaction parties to pursue transaction remedies, which we believe would be a feature of a higher quality security, while at the same time providing flexibility to transaction parties to develop more robust trigger requirements as they deem appropriate.

The requirement that the credit risk manager not be affiliated with the sponsor, depositor, or servicer helps assure investors that the review of assets is impartial. By not prescribing specific procedures for the review and repurchase process, we are providing the credit risk manager and ABS investors with the flexibility to determine the most appropriate and efficient procedures for each ABS transaction. We believe that taken together our transaction requirements related to the appointment of a credit risk manager would better strengthen the enforceability of contract terms surrounding the representations and warranties regarding the pool assets for ABS shelf transactions and incentivize obligated parties to better consider the characteristics and quality of the assets underlying the securities, thus making them appropriate criteria for shelf eligibility.

We believe that our proposal requiring a provision in an underlying transaction agreement to require the party responsible for making periodic filings on Form 10-D include in the Form 10-D any request from an ABS investor to communicate with other ABS investors related to investors exercising their rights under the terms of the asset-backed security would benefit ABS investors because facilitating communication among ABS investors enables them to exercise the rights included in the underlying transaction agreements. In this regard, as previously discussed in Part II.B.1(c) of this release, we are aware that ABS investors have had difficulty enforcing rights contained in transactions agreements, and in particular, those relating to the repurchase of underlying assets for breach of representations and warranties. We also believe the disclosure would benefit investors by helping solve collective action problems related to communication between investors and issuers. By decreasing the costs of communication among investors, this proposed requirement helps investors exercise the rights included in the underlying transaction agreements.

The above three shelf eligibility requirements are designed to improve the quality of the securities being offered by strengthening investor protections, so that the offerings may appropriately be conducted quickly. To the extent that better investor protection increases investors' trust in the fairness and security of the ABS markets, the result could be lower cost of capital and increased investor participation in ABS markets, which should facilitate capital formation.

We believe that requiring an annual evaluation of compliance with the registrant requirements in order to continue using an effective shelf registration statement would benefit investors because it would encourage issuers to file their Exchange Act reports and transaction documents in connection with prior offerings at the required time, and therefore, enhance informed investment decisions. We also believe that a 90-day cure period strikes an appropriate balance between monitoring issuers' compliance with the proposed shelf transaction requirements and commentator's concerns that the one-year penalty was too costly.

2. Costs

We believe that the certification transaction requirement could impose additional review and oversight costs, potential litigation costs, and disclosure costs on ABS issuers.

First, since the intent of the certification is to enhance the accountability and oversight of the ABS transaction, if effective, it will result in additional costs related to further verifying the characteristics of the asset pool, the payment and rights allocations, the distribution priorities and other structural features of the transactions. We note that these costs could be lessened to the extent that the certifier could rely in part on the review that would already be required in order for an issuer to comply with recently adopted Rule 193.[206] Ultimately, we believe that for shelf offerings the benefit of improving the accuracy of securitization disclosures and enhancing the accountability and oversight of the ABS transaction justifies these additional review and oversight costs incurred by the ABS issuers.

We have considered that the certification transaction requirement might also result in litigation costs for those signing the certification with the magnitude of the costs dependent on the scope of the certification. We received several comment letters indicating that the certification language included in our 2010 ABS Proposing release could be interpreted as a guarantee of the future performance of the assets underlying the ABS.[207] We realize that unexpected losses incurred by security holders may be the result of misrepresentation by the securitization parties but may also be the outcome of a negative realization. Since the distinction is typically difficult to discern, a certification misinterpreted as a guarantee could have increased the likelihood of litigation, and therefore expected litigation costs to the certifier. In an attempt to mitigate these costs, we are proposing revised certification

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[206] Rule 193 implemented Securities Act Section 7(d), as added by Section 945 of the Act, by requiring that any issuer registering the offer and sale of an ABS perform a review of the assets underlying the ABS.

[207] See letters from ASF (issuer members), ABASA, CREFC and Wells Fargo on the 2010 ABS Proposing Release. Several commentators offered, as an alternative, that the CEO of the depositor certify to the adequacy and accuracy of the disclosure in the offering documents. See letters from ABA; ABASA; ASF; AusSF; BOA; CNH; FSR; JP Morgan; MBA; SIFMA (dealers and sponsors); Sallie Mae; and Wells Fargo.

language, which we believe reduces a certifier's exposure to unnecessary litigation and limits litigation costs that the certification may create.

The proposed transaction requirements for shelf eligibility related to the credit risk manager would increase costs of securitization to ABS issuers to the extent a credit risk manager would not have otherwise been appointed in the transaction because they would be required to hire an additional participant in the transaction in order to maintain shelf eligibility. We have attempted to mitigate these costs by requiring that a credit risk manager be involved in the transaction only upon the occurrence of certain triggering events. We also recognize that not prescribing specific procedures for the review and repurchase process may impose a cost to investors if the transaction parties do not select appropriate procedures for such process. This transaction requirement would also result in some additional disclosure costs as information about the credit risk manager will have to be provided in the ABS prospectus.

The proposed disclosure requirements related to investor communications in distribution reports on Form 10-D would increase the disclosure costs of preparing these respective filings for ABS issuers. We also expect this requirement would impose additional costs on ABS issuers because the person responsible for making periodic filings on Form 10-D would need to design systems to receive investor requests to communicate and verify the identity of the investor making the request.

We believe that requiring an annual evaluation of compliance with the registrant requirements would impose additional costs on ABS issuers because of any systems needed to ensure and check compliance with the reporting and filing requirements. However, we believe these costs should be minimal because these issuers should already have in most instances systems designed to ensure that reports and transaction agreements are being filed timely in accordance with rules under the Exchange Act or Securities Act, respectively.

We recognize that some of the new shelf registration costs may be passed down the chain of securitization and ultimately to borrowers. The ability to pass costs on to borrowers would be constrained by competition from non-securitizing lenders, which would weaken the competitive ability of firms that solely rely on securitization for funding relative to other financial firms that have other sources of funding.

Finally, if ABS sponsors are forced to bear all or some of these new costs and if these new costs exceed the costs of obtaining a credit rating, then ABS sponsors might choose to avoid the shelf registration process by registering their ABS on the proposed Form SF-1. Alternatively, they might choose to bypass SEC registration altogether and issue in private markets instead. This will have the effect of reduced efficiency and impeded capital formation. We seek comments and empirical data to help us assess the macroeconomic impact of the costs associated with the new shelf registration requirements.

C. Disclosure Requirements

In addition to the shelf eligibility proposals, we are also proposing a disclosure requirement that would require disclosure in the prospectus concerning any party selected as a credit risk manager. We are also proposing to require ABS issuers to file copies of the underlying transaction agreements, including all attached schedules, and other agreements that are referenced (such as those containing representations and warranties regarding the underlying assets), at the same time as a preliminary prospectus that would be required under proposed Rule 424(h). We are also proposing to require in distribution reports filed on Form 10-D disclosure related to the review of pool assets by credit risk managers during the relevant distribution period as well as events involving a change in the credit risk manager.

1. Benefits

We believe that providing disclosure concerning credit risk managers will facilitate an informed assessment by investors as to the appropriateness of the selected credit risk manager. We also believe that providing in distribution reports disclosure related to the credit risk manager's review of assets and any change in the credit risk manager would be beneficial to investors because it would provide them material information concerning such matters on a timely basis. Finally, requiring underlying transaction agreements to be filed in substantially final form at the same time as the preliminary prospectus should benefit investors by allowing them necessary time to analyze the actual underlying agreements containing the specific structure, assets, and contractual rights regarding each transaction. To the extent that additional time for investment analysis results in investors making better informed decisions on how to allocate capital, this requirement could improve economic efficiency and facilitate capital formation.

2. Costs

The proposed disclosure requirements related to credit risk managers in prospectuses and distribution reports would increase the disclosure costs of preparing these filings for ABS issuers. The proposed requirement that ABS issuers file copies of the underlying transaction agreements at the same time as a preliminary prospectus that would be required under proposed Rule 424(h) may increase the costs associated with conducting an offering to the extent that such filing requirement exposes issuers to the risk of changing market conditions; however, such uncertainty is similar to that faced by other issuers of underwritten initial public offerings of debt whose final offer prices are not set for weeks or months after filing. To the extent the requirement requires that documents be completed earlier in the offering process, ABS issuers may face additional costs to accelerate drafting of the required documents. As noted earlier, for purposes of the PRA, we estimate that the incremental burden for ABS issuers to complete the disclosure requirements in Form SF-3, prepare the information, and file it with the Commission would be 100 burden hours per response on Form SF-3.

D. Requests for Comment

We seek comments on all aspects of this Economic Analysis including identification and quantification of any additional costs and benefits. We also request comments on whether our proposals would promote efficiency, competition, and capital formation. Commentators are requested to provide empirical data and other factual support for their views, if possible.

We further ask the following specific questions:

105. Would the proposed credit risk manager and certification transaction requirement for shelf eligibility impose costs in addition to those identified above? How much would a credit risk manager be compensated for these services? Would insurance costs increase for those providing credit risk manager services or providing a certification? If so, by how much? Are there other measurable costs associated with these proposed requirements?

106. Could the costs associated with the proposed shelf registration requirements be passed down the securitization chain? Would these costs affect an ABS issuer's choice between registering securities on proposed Form SF-3 or registering them on proposed Form SF-1? Would these costs affect an ABS issuer's willingness to register the securities altogether rather than issuing in the private markets?

107. Do you believe that the proposed disclosure requirements will impose costs on other market participants?

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[208] a rule is "major" if it has resulted, or is likely to result in:

- an annual effect on the U.S. 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 proposed amendments would be a "major rule" for purposes of the Small Business Regulatory Enforcement Fairness Act. 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. Regulatory Flexibility Act Certification

The Commission hereby certifies pursuant to 5 U.S.C. 605(b) that the proposals contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposals relate to the registration, disclosure and reporting requirements for asset-backed securities under the Securities Act and the Exchange Act. Securities Act Rule 157[209] and Exchange Act Rule 0-10(a)[210] defines an issuer, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. As the depositor and

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[208] Public Law 104-121, Title II, 110 Stat. 857 (1996).

[209] 17 CFR 230.157.

[210] 17 CFR 240.0-10(a).

issuing entity are most often limited purpose entities in an ABS transaction, we focused on the sponsor in analyzing the potential impact of the proposals under the Regulatory Flexibility Act. Based on our data, we only found one sponsor that could meet the definition of a small broker-dealer for purposes of the Regulatory Flexibility Act.[211] Accordingly, the Commission does not believe that the proposals, if adopted, would have a significant economic impact on a substantial number of small entities.

We encourage written comments regarding this certification. We request in particular that commentators describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

X. Statutory Authority and Text of Proposed Rule and Form Amendments

We are proposing the new rules, forms and amendments contained in this document under the authority set forth in Sections 6, 7, 10, 19(a), and 28 of the Securities Act, Sections 13, 23(a), and 36 of the Exchange Act.[212]

List of Subjects

17 CFR Parts 229, 230, 239, and 249

Advertising, Reporting and recordkeeping requirements, Securities.

For the reasons set out above, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 229 -- STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 -- REGULATION S-K

1. The authority citation for part 229 continues to read in part as follows:

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211 This is based on data from Asset-Backed Alert.

212 15 U.S.C. 777aaa et.seq.

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * *

2. Amend §229.601 by:

   a. Revising the exhibit table in paragraph (a); and

   b. Adding paragraph (b)(36).

§ 229.601 (Item 601) Exhibits.

(1) * * *

EXHIBIT TABLE

* * * * *

EXHIBIT TABLE

	Securities Act Forms										Exchange Act Forms				
	S-1	S-3	SF-1	SF-3	S-4[1]	S-8	S-11	F-1	F-3	F-4[1]	10	8-K[2]	10-D	10-Q	10-K
* * * * *															
(36) Depositor Certification for shelf offerings of asset-backed securities	---	---	---	X	---	---	---	---	---	---	---	---	---	---	---
(37) through (98) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

* * * * *

(b) * * *

(36) Certification for shelf offerings of asset-backed securities. For any offering of asset-backed securities (as defined in §229.1101) made on a delayed basis under §230.415(a)(1)(vii), provide the certification required by General Instruction I.B.i.a. of Form SF-3 (referenced in §239.45) exactly as set forth below:

Certification

I, [identify the certifying individual,] certify as of [the date of the final prospectus under Securities Act Rule 424 (17 CFR §239.424)] that:

1. I have reviewed the prospectus relating to [title of all securities, the offer and sale of which are registered] and am familiar with the structure of the securitization, including without limitation the characteristics of the securitized assets underlying the offering, the terms of any internal credit enhancements and the material terms of all contracts and other arrangements entered in to the effect the securitization;

2. Based on my knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading;

3. Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, fairly present in all material respects the characteristics of the securitized assets underlying the offering described therein and the risks of ownership of the asset-backed securities described therein, including all credit enhancements and all risk factors relating to the securitized assets underlying the offering that would affect the cash flows sufficient to service payments on the asset-backed securities as described in the prospectus; and

4. Based on my knowledge, taking into account the characteristics of the securitized assets underlying the offering, the structure of the securitization, including internal credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, the securitization is designed to produce, but is not guaranteed by this certification to produce, cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities offered and sold pursuant to the registration statement

Date:____

____

[Signature]

____

[Title]

The certification should be signed by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor, as required by General Instruction I.B.1(a) of Form SF-3.

* * * * *

3. Amend §229.1100 by revising paragraph (f) as follows:

§ 229.1100 (Item 1100) General.

* * * * *

(f) Where agreements or other documents in this Regulation AB are specified to be filed as exhibits to a Securities Act registration statement, such agreements or other documents, if applicable, may be incorporated by reference as an exhibit to the registration statement, such as by filing a Form 8-K in the case of offerings registered on Form SF-3

(§239.45 of this chapter). Exhibits, including agreements in substantially final form, must be filed and made part of the registration statement by the date the prospectus is required to be filed under Securities Act Rule 424(h) (§230.424 of this chapter). Final agreements must be filed and made part of the registration statement no later than the date the final prospectus is required to be filed under Securities Act Rule 424 (§230.424 of this chapter).

4. Amend §229.1101 by adding paragraph (m) to read as follows:

§ 229.1101 (Item 1101) Definitions.

* * * * *

(m) Credit Risk Manager means any person appointed by the trustee to review the underlying assets for compliance with the representations and warranties on the underlying pool assets and is not affiliated with any sponsor, depositor, or servicer.

5. Amend §229.1109 to read as follows:

§ 229.1109 (Item 1109) Trustees and other transaction parties.

(a) Trustees. Provide the following information for each trustee:

(1) State the trustee's name and describe the trustee's form of organization.

(2) Describe to what extent the trustee has had prior experience serving as a trustee for asset-backed securities transactions involving similar pool assets, if applicable.

(3) Describe the trustee's duties and responsibilities regarding the asset-backed securities under the governing documents and under applicable law. In addition, describe any actions required by the trustee, including whether notices are required to investors, rating agencies or other third parties, upon an event of default, potential event of default (and how defined) or other breach of a transaction covenant

and any required percentage of a class or classes of asset-backed securities that is needed to require the trustee to take action.

(4) Describe any limitations on the trustee's liability under the transaction agreements regarding the asset-backed securities transaction.

(5) Describe any indemnification provisions that entitle the trustee to be indemnified from the cash flow that otherwise would be used to pay the asset-backed securities.

(6) Describe any contractual provisions or understandings regarding the trustee's removal, replacement or resignation, as well as how the expenses associated with changing from one trustee to another trustee will be paid.

Instruction to Item 1109(a). If multiple trustees are involved in the transaction, provide a description of the roles and responsibilities of each trustee.

(b) Credit risk manager. Provide the following for each credit risk manager:

(1) State the credit risk manager's name and describe its form of organization.

(2) Describe to what extent the credit risk manager has had prior experience serving as a credit risk manager for asset-backed securities transactions involving similar pool assets.

(3) Describe the credit risk manager's duties and responsibilities regarding the asset-backed securities under the governing documents and under applicable law. In addition, describe any actions required by the credit risk manager, including whether notices are required to investors, rating agencies or other third parties, and any required percentage of a class or classes of asset-backed securities that is needed to require the credit risk manager to take action.

(4) Disclose the manner and amount in which the credit risk manager is compensated.

(5) Describe any limitations on the credit risk manager's liability under the transaction agreements regarding the asset-backed securities transaction.

(6) Describe any contractual provisions or understandings regarding the credit risk manager's removal, replacement or resignation, as well as how the expenses associated with changing from one credit risk manager to another credit risk manager will be paid.

6. Amend §229.1119 by adding paragraph (a)(7) as follows:

§ 229.1119 (Item 1119) Affiliations and certain relationships and related transactions.

* * * * *

(a) * * *

(7) Credit risk manager.

* * * * *

7. Amend §229.1121 by reserving paragraphs (d) and (e) and adding paragraphs (f) and (g) as follows:

§ 229.1121 (Item 1121) Distribution and pool performance information.

* * * * *

(d) *Reserved.*

(e) *Reserved.*

(f) Credit risk manager.

(1) Review by credit risk manager. If during the distribution period a credit risk manager is required to review the underlying assets for compliance with the representations and warranties on the underlying assets, provide the following information, as applicable:

(i) A description of the event(s) that triggered the review by the credit risk manager during the distribution period.

(ii) If the credit risk manager provided to the trustee during the distribution period a report of the findings and conclusions of its review of assets, file the full report as an exhibit to the Form 10-D.

(2) Change in credit risk manager. If during the distribution period a credit risk manager has resigned or has been removed, replaced or substituted, or if a new credit risk manager has been appointed, state the date the event occurred and the circumstances surrounding the change. If a new credit risk manager has been appointed, provide the disclosure required by Item 1109(b) (17 CFR 229.1109(b)), as applicable, regarding such credit risk manager.

(g) Investor communication. Disclose any request received from an investor to communicate with other investors during the reporting period received by the party responsible for making the Form 10-D filings on or before the end date of a distribution period. The disclosure regarding the request to communicate is required to include the name of the investor making the request, the date the request was received, and a description of the method by which other investors may contact the requesting investor.

Instruction. An investor would not be permitted to use the ability to request to communicate with other investors as a mechanism to communicate for purposes other than those related to investors exercising their rights under the terms of the asset-backed security.

PART 230 -- GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

8. 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.

* * * * *

9. Amend §230.401 by:

a. Revising the phrase "and (g)(3)" in paragraph (g)(1) to read ",(g)(3), and (g)(4)"; and

b. Adding paragraph (g)(4).

The addition reads as follows:

§ 230.401 Requirements as to proper form.

* * * * *

(g) * * *

(4) Notwithstanding that the registration statement may have become effective previously, requirements as to proper form under this section will have been violated for any offering of securities where the requirements of General Instruction I.A. of Form SF-3 has not been met as of ninety days after the end of the depositor's fiscal year end prior to such offering.

10. Amend §230.415 by revising paragraph (a)(1)(vii):

§ 230.415 Delayed or continuous offering and sale of securities.

(a) ** *

(1) * * *

(vii) Asset-backed securities (as defined in 17 CFR 229.1101) registered (or qualified to be registered) on Form SF–3 (§ 239.45 of this chapter) which are to be offered and sold on an immediate or delayed basis by or on behalf of the registrant;

Instructions to paragraph (a)(1)(vii): The requirements of General Instruction I.B.1 of Form SF–3 (§ 239.45 of this chapter) must be met for any offerings of an asset-backed security (as defined in 17 CFR 229.1101) registered in reliance on paragraph (a)(1)(vii).

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

11. The authority citation for Part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

12. Add §239.45 to read as follows:

§239.45 Form SF–3, for registration under the Securities Act of 1933 of asset-backed securities offered pursuant to certain types of transactions.

This form may be used for registration under the Securities Act of 1933 ("Securities Act") of offerings of asset-backed securities, as defined in 17 CFR 229.1101(c). Any registrant which meets the requirements of paragraph (a) may use this Form for the registration of asset-backed securities (as defined in 17 CFR 229.1101(c)) under the Securities Act which are offered in any transaction specified in paragraph (b) provided that the requirement applicable to the specified transaction are met. Terms used have the same meaning as in Item 1101 of Regulation AB.

(a) Registrant Requirements. Registrants must meet the following conditions in order to use this Form for registration under the Securities Act of asset-backed securities offered in the transactions specified in paragraph (b):

(1) To the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in Item 1101 of Regulation AB (17 CFR 229.1101)) is or was at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form required to comply with the transaction requirements in paragraphs (b)(1)(i), (b)(1)(ii), and (b)(1)(iii) with respect to a previous offering of asset-backed securities involving the same asset class, the following requirements shall apply:

(i) Such depositor and each such issuing entity must have filed on a timely basis all certifications required by paragraph (b)(1)(i); and

(ii) Such depositor and each such issuing entity must have filed on a timely basis all transaction agreements containing the provisions that are required by paragraphs (b)(1)(ii) and (iii).

If such depositor and issuing entity fail to meet the requirements of paragraphs (a)(1)(i) and (ii), such depositor and issuing entity will be deemed to satisfy such requirements for purposes of this Form 90 days after the date it files the information required by paragraphs (a)(1)(i) and (ii).

Instruction to (a)(1). The registrant must provide disclosure in a prospectus that is part of the registration statement that it has met the registrant requirements of paragraph (a)(1).

(2) To the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in Item 1101 of Regulation AB (17 CFR 229.1101)) is or was at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form subject to the requirements of section 12 or 15(d) of the Exchange Act (15 U.S.C. 78l or 78o(d)) with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such materials). In addition, such material must have been filed in a timely manner, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 6.01, or 6.03 of Form 8-K (17 CFR 249.308). If Rule 12b-25(b) (17 CFR 240.12b-25(b)) under the Exchange Act was used during such period with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule. Regarding an affiliated depositor that became an affiliate as a result of a business combination transaction during such period, the filing of any material prior to the business combination transaction relating to asset-backed securities of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded from this section, provided such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or the Exchange Act. See the definition of "affiliate" in Securities Act Rule 405 (17 CFR 230.405).

(b) Transaction Requirements. If the registrant meets the registrant requirements specified in paragraph (a) above, an offering meeting the following conditions may be registered on Form SF-3:

(1) Asset-backed securities (as defined in 17 CFR 229.1101) to be offered for cash where the following have been satisfied:

(i) Certification. The registrant files a certification in accordance with Item 601(b)(36) of Regulation S-K (§229.601(b)(36)) signed by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor with respect to each offering of securities that is registered on this form.

(ii) Appointment of a credit risk manager and repurchase request dispute resolution provisions. With respect to each offering of securities that is registered on this form, the pooling and servicing agreement or other transaction agreement, which shall be filed, must provide for the following:

(A) The selection and appointment by the trustee of the issuing entity of a credit risk manager that is not affiliated with any sponsor, depositor, or servicer of the transaction;

(B) The credit risk manager shall have authority to access copies of the underlying documents related to the pool assets;

(C) The credit risk manager shall be responsible for reviewing the underlying assets for compliance with the representations and warranties on the underlying pool assets. Reviews shall be required, at a minimum, when either (a) or (b) are met:

(a) The credit enhancement requirements, as specified in the underlying transaction agreements, are not met; or

(b) At the direction of investors, pursuant to the processes provided in the transaction agreement and disclosed in the prospectus.

(D) The credit risk manager shall provide a report to the trustee of the findings and conclusions of the review of the assets.

(E) If an asset subject to a repurchase request, pursuant to the terms of the transaction agreements, is not repurchased by the end of a 180-day period beginning when notice is received, then the party submitting such repurchase request shall have the right to refer the matter, at its discretion, to either mediation or third-party arbitration, and the party obligated to repurchase must agree to the selected resolution method.

(iii) Investor communication provision. With respect to each offering of securities that is registered on this form, the pooling and servicing agreement or other transaction agreement, which shall be filed, contains a provision requiring that the party responsible for making periodic filings on Form 10-D (§249.312) include any request received from an investor to communicate with other investors during the reporting period related to investors exercising their rights under the terms of the asset-backed security. The request to communicate, would be required to include the name of the investor making the request; the date the request was received; and a description of the method by which other investors may use to contact the requesting investor.

Instruction to (b)(1)(iii) If an underlying transaction agreement contains procedures in order to verify that an investor is, in fact, a beneficial owner, the verification procedures may require no more than the following: (1) if the investor is a record holder of the securities at the time of a request to communication, then the investor would not have to provide verification of ownership, and (2) if the investor is not the record holder of the securities, then the person obligated to make the disclosure must receive a written statement from the record holder verifying that, at the time the request is submitted, that the investor beneficially holds the securities.

(iv) Delinquent assets. Delinquent assets do not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date.

(v) Residual value for certain securities. With respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

(2) Securities relating to an offering of asset-backed securities registered in accordance with paragraph (b)(1) where those securities represent an interest in or the right to the payments of cash flows of another asset pool and meet the requirements of Securities Act Rule 190(c)(1) through (4) (17 CFR 240.190(c)(1) through (4)).

59. Add Form SF-3 (referenced in §239.45) to read as follows:

Note: The text of Form SF-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM SF-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

____
(Exact name of registrant as specified in its charter)

____
(State or other jurisdiction of incorporation or organization)

____
(I.R.S. Employer Identification Number)

Commission File Number of depositor: ____________________
Central Index Key Number of depositor: ____________________

____ (Exact name of depositor as specified in its charter)

Central Index Key Number of sponsor (if available): ____________________

________________________________ (Exact name of sponsor as specified in its charter)

____

(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)

____

(Name, address, including zip code, and telephone number, including area code, of agent for service)

____

(Approximate date of commencement of proposed sale to the public)

If any of the securities being registered on this Form SF-3 are to be offered on a delayed basis pursuant to Rule 415 under the Securities Act of 1933, check the following box: [ ]

If this Form SF-3 is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering: [ ]

If this Form SF-3 is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering: [ ]

CALCULATION OF REGISTRATION FEE

Title of each class of securities to be	Amount to be registered	Proposed maximum offering price	Proposed maximum aggregate	Amount of registration fee

registered			per unit	offering price	

Notes to the "Calculation of Registration Fee" Table ("Fee Table"):

1. Specific details relating to the fee calculation shall be furnished in notes to the Fee Table, including references to provisions of Rule 457 (§230.457 of this chapter) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the Fee Table.

2. If the filing fee is calculated pursuant to Rule 457(r) under the Securities Act, the Fee Table must state that it registers an unspecified amount of securities of each identified class of securities and must provide that the issuer is relying on Rule 456(b) and Rule 457(r). If the Fee Table is amended in a post-effective amendment to the registration statement or in a prospectus filed in accordance with Rule 456(b)(1)(ii) (§230.456(b)(1)(ii) of this chapter) , the Fee Table must specify the aggregate offering price for all classes of securities in the referenced offering or offerings and the applicable registration fee.

3. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 457 under the Securities Act.

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form SF-3.

This instruction sets forth registrant requirements and transaction requirements for the use of Form SF-3. Any registrant which meets the requirements of I.A. below ("Registrant Requirements") may use this Form for the registration of asset-backed securities (as defined in 17 CFR 229.1101(c)) under the Securities Act of 1933 ("Securities Act") which are offered in any transaction specified in I.B. below ("Transaction Requirement") provided that the requirement applicable to the specified transaction are met. Terms used in this form have the same meaning as in Item 1101 of Regulation AB.

A. **Registrant Requirements.** Registrants must meet the following conditions in order to use this Form SF-3 for registration under the Securities Act of asset-backed securities offered in the transactions specified in I.B. below:

1. To the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in Item 1101 of Regulation AB (17 CFR 229.1101)) is or was at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form required to comply with the transaction requirements in General Instructions I.B.1(a), I.B.1(b), and I.B.1(c) of this form with respect to a previous offering of asset-backed securities involving the same asset class, the following requirements shall apply:

   (a) Such depositor and each such issuing entity must have filed on a timely basis all certifications required by I.B.1(a); and

   (b) Such depositor and each such issuing entity must have filed on a timely basis all transaction agreements containing the provisions that are required by I.B.1(b) and I.B.1 (c);

If such depositor and issuing entity fail to meet the requirements of I.A.1(a) and I.A.1(b), such depositor and issuing entity will be deemed to satisfy such requirements for purposes of this Form SF-3 90 days after the date it files the information required by I.A.1(a) and I.A.1(b).

Instruction to General Instruction I.A.1: The registrant must provide disclosure in a prospectus that is part of the registration statement that it has met the registrant requirements of I.A.1.

2. To the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor or any affiliate of the depositor (as defined in Item 1101 of Regulation AB (17 CFR 229.1101)) is or was at any time during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form SF-3 subject to the requirements of section 12 or 15(d) of the Exchange Act (15 U.S.C. 78l or 78o(d)) with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed regarding such asset-backed securities pursuant to section 13, 14 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78n or 78o(d)) for such period (or such shorter period that each such entity was required to file such. In addition, such material must have been filed in a timely manner, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 6.01, or 6.03 of Form 8-K (17 CFR 249.308). If Rule 12b-25(b) (17 CFR 240.12b-25(b)) under the Exchange Act was used during such period with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule. Regarding an affiliated depositor that became an affiliate as a result of a business combination transaction during such period, the filing of any material prior to the business combination transaction relating to asset-backed securities of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded from this section, provided

such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or the Exchange Act. See the definition of "affiliate" in Securities Act Rule 405 (17 CFR 230.405).

B. **Transaction Requirements.** If the registrant meets the Registrant Requirements specified in I.A. above, an offering meeting the following conditions may be registered on this Form:

1. Offerings for cash where the following have been satisfied:

   (a) **Certification.** The registrant files a certification in accordance with Item 601(b)(36) of Regulation S-K (§229.601(b)(36)) signed by the chief executive officer of the depositor or executive officer in charge of securitization of the depositor with respect to each offering of securities that is registered on this form.

   (b) **Appointment of a credit risk manager and repurchase request dispute resolution provisions.** With respect to each offering of securities that is registered on this form, the pooling and servicing agreement or other transaction agreement, which shall be filed, must provide for the following:

      (A) The selection and appointment by the trustee of the issuing entity of a credit risk manager that is not affiliated with any sponsor, depositor, or servicer of the transaction;

      (B) The credit risk manager shall have authority to access copies of the underlying documents related to the pool assets;

(C) The credit risk manager shall be responsible for reviewing the underlying assets for compliance with the representations and warranties on the underlying pool assets. Reviews shall be required, at a minimum, when either (a) or (b) are met:

(a) The credit enhancement requirements, as specified in the underlying transaction agreements, are not met; or

(b) At the direction of investors, pursuant to the processes provided in the transaction agreement and disclosed in the prospectus.

(D) The credit risk manager shall provide a report to the trustee of the findings and conclusions of the review of the assets.

(E) If an asset subject to a repurchase request, pursuant to the terms of the transaction agreements, is not repurchased by the end of a 180-day period beginning when notice is received, then the party submitting such repurchase request shall have the right to refer the matter, at its discretion, to either mediation or third-party arbitration, and the party obligated to repurchase must agree to the selected resolution method.

(c) **Investor Communication Provision.** With respect to each offering of securities that is registered on this form, the pooling and servicing agreement or other transaction agreement, which shall be filed, contains a provision requiring that the party responsible for making periodic filings on Form 10-D (§249.312) include any request received from an investor to communicate with other investors during the reporting period related to investors exercising their rights under the terms of the asset-backed security. The request to communicate would be required to include the name of the investor making the request, the date the request was received, and a description of the method other investors may use to contact the requesting investor.

Instruction to I.B.1(c) If an underlying transaction agreement contains procedures in order to verify that an investor is, in fact, a beneficial owner, the verification procedures may require no more than the following: (1) if the investor is a record holder of the securities at the time of a request to communication, then the investor would not have to provide verification of ownership, and (2) if the investor is not the record holder of the securities, then the person obligated to make the disclosure must receive a written statement from the record holder verifying that, at the time the request is submitted, that the investor beneficially holds the securities.

(d) **Delinquent assets.** Delinquent assets do not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date.

(e) **Residual value for certain securities.** With respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

2. Securities relating to an offering of asset-backed securities registered in accordance with General Instruction I.B.1. where those securities represent an interest in or the right to the payments of cash flows of another asset pool and meet the requirements of Securities Act Rule 190(c)(1) through (4) (17 CFR 240.190(c)(1) through (4)).

II. Application of General Rules and Regulations.

A. Attention is directed to the General Rules and Regulations under the Securities Act, particularly Regulation C thereunder (17 CFR 230.400 to 230.494). That Regulation contains general requirements regarding the preparation and filing of registration statements.

B. Attention is directed to Regulation S-K (17 CFR Part 229) for the requirements applicable to the content of the non-financial statement portions of registration statements under the Securities Act. Where this Form SF-3 directs the registrant to furnish information required by Regulation S-K and the item of Regulation S-K so provides, information need only be furnished to the extent appropriate. Notwithstanding Items 501 and 502 of Regulation S-K, no table of contents is required to be included in the prospectus or registration statement prepared on this Form SF-3. In addition to the information expressly required to be included in a registration statement on this Form SF-3, registrants also may provide such other information as they deem appropriate.

C. Where securities are being registered on this Form SF-3, Rule 456(c) permits, but does not require, the registrant to pay the registration fee on a pay-as-you-go basis and Rule 457(s) permits, but does not require, the registration fee to be calculated on the basis of the aggregate offering price of the securities to be offered in an offering or offerings off the registration statement. If a registrant elects to pay all or a portion of the registration fee on a deferred basis, the Fee Table in the initial filing must identify the classes of securities being registered and provide that the registrant elects to rely on Rule 456(c) and Rule 457(s), but the Fee Table does not need to specify any other information. When the registrant amends the Fee Table in accordance with Rule 456(c)(1)(ii), the amended Fee Table must include either the dollar amount of securities being registered if paid in advance of or in connection with an offering or offerings or the aggregate offering price for all classes of securities referenced in the offerings and the applicable registration fee.

D. Information is only required to be furnished as of the date of initial effectiveness of the registration statement to the extent required by Rule 430D. Required information about a specific transaction must be included in the prospectus in the registration statement by means of a prospectus that is deemed to be part of and included in the registration statement pursuant to Rule 430D, a post-effective amendment to the registration statement, or a periodic or current report under the Exchange Act incorporated by reference into the registration statement and the prospectus and identified in a prospectus filed, as required by Rule 430D, pursuant to Rule 424(h) or Rule 424(b) (§230.424(h) or §230.424(b) of this chapter)

III. Registration of Additional Securities Pursuant to Rule 462(b). With respect to the registration of additional securities for an offering pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any price-related information omitted from the earlier registration statement in reliance on Rule 430A that the registrant chooses to include in the new registration statement. The information contained in such a Rule 462(b) registration statement shall be deemed to be a part of the earlier registration statement as of the date of effectiveness of the Rule 462(b) registration statement. Any opinion or consent required in the Rule 462(b) registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). *See* Rule 411(c) and Rule 439(b) under the Securities Act.

IV. Registration Statement Requirements. Include only one form of prospectus for the asset class that may be securitized in a takedown of asset-backed securities under the registration statement. A separate form of prospectus and registration statement must be presented for each country of origin or country of property securing pool assets that may be securitized in a discrete pool in a takedown of asset-backed securities. For both separate asset classes and jurisdictions of origin or property, a separate form of prospectus is not required for transactions that principally consist of a particular asset class or jurisdiction which also describe one or more potential additional asset classes or jurisdictions, so long as the pool assets for the additional classes or jurisdictions in the aggregate are below 10% of the pool, as measured by dollar volume, for any particular takedown.

PART I
INFORMATION REQUIRED IN PROSPECTUS

Item 1. Forepart of the Registration Statement and Outside Front Cover Pages of Prospectus.

Set forth in the forepart of the registration statement and on the outside front cover page of the prospectus the information required by Item 501 of Regulation S-K (17 CFR 229.501) and Item 1102 of Regulation AB (17 CFR 229.1102).

Item 2. Inside Front and Outside Back Cover Pages of Prospectus.

Set forth on the inside front cover page of the prospectus or, where permitted, on the outside back cover page, the information required by Item 502 of Regulation S-K (17 CFR 229.502).

Item 3. Transaction Summary and Risk Factors.

Furnish the information required by Item 503 of Regulation S-K (17 CFR 229.503) and Item 1103 of Regulation AB (17 CFR 229.1103).

Item 4. Use of Proceeds.

Furnish the information required by Item 504 of Regulation S-K (17 CFR 229.504).

Item 5. Plan of Distribution.

Furnish the information required by Item 508 of Regulation S-K (17 CFR 229.508).

Item 6. Information with Respect to the Transaction Parties.

Furnish the following information:

(a) Information required by Item 1104 of Regulation AB (17 CFR 229.1104), Sponsors;

(b) Information required by Item 1106 of Regulation AB (17 CFR 229.1106), Depositors;

(c) Information required by Item 1107 of Regulation AB (17 CFR 229.1107), Issuing entities;

(d) Information required by Item 1108 of Regulation AB (17 CFR 229.1108), Servicers;

(e) Information required by Item 1109 of Regulation AB (17 CFR 229.1109), Trustees;

(f) Information required by Item 1110 of Regulation AB (17 CFR 229.1110), Originators;

(g) Information required by Item 1112 of Regulation AB (17 CFR 229.1112), Significant Obligors;

(h) Information required by Item 1117 of Regulation AB (17 CFR 229.1117), Legal Proceedings; and

(i) Information required by Item 1119 of Regulation AB (17 CFR 229.1119), Affiliations and certain relationships and related transactions.

Item 7. Information with Respect to the Transaction.

Furnish the following information:

(a) Information required by Item 1111 of Regulation AB (17 CFR 229.1111), Pool Assets and Item 1111A of Regulation AB (17 CFR 229.1111A), Asset-level information, and Item 1111B of Regulation AB (17 CFR 229.1111B), Grouped account data for credit card pools;

(b) Information required by Item 202 of Regulation S-K (17 CFR 229.202), Description of Securities Registered and Item 1113 of Regulation AB (17 CFR 229.1113), Structure of the Transaction;

(c) Information required by Item 1114 of Regulation AB (17 CFR 229.1114), Credit Enhancement and Other Support;

(d) Information required by Item 1115 of Regulation AB (17 CFR 229.1115), Certain Derivatives Instruments;

(e) Information required by Item 1116 of Regulation AB (17 CFR 229.1116), Tax Matters;

(f) Information required by Item 1118 of Regulation AB (17 CFR 229.1118), Reports and additional information; and

(g) Information required by Item 1120 of Regulation AB (17 CFR 229.1120), Ratings.

Instruction: All registrants are required to file the information required by Item 1111A of Regulation AB (17 CFR 229.1111A), Asset-level information; Item 1111B of Regulation AB (17 CFR 229.1111B), Grouped account data for credit card pools; and Item 1113(h) of Regulation AB (17 CFR 229.1113(h)), Waterfall Computer Program; as exhibits to Form 8-K (17 CFR 249.308) that are filed with the Commission pursuant to Item 6.06 and Item 6.07, respectively, of that form. Incorporation by reference must comply with Item 11 of this Form SF-3.

Item 8. Static Pool.

Furnish the information required by Item 1105 of Regulation AB (17 CFR 229.1105).

Instruction: Registrants may elect to file the information required by this item as an exhibit to Form 8-K (17 CFR 249.308) that is filed with the Commission pursuant to Item 6.08 of that form. Incorporation by reference must comply with Item 11 of this Form SF-3.

Item 9. Interests of Named Experts and Counsel.

Furnish the information required by Item 509 of Regulation S-K (17 CFR 229.509).

Item 10. Incorporation of Certain Information by Reference.

(a) The prospectus shall provide a statement that all current reports filed pursuant to Items 6.06, 6.07 and if applicable, 6.08 of Form 8-K pursuant to Section Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus.

(b) If the registrant is structured as a revolving asset master trust, the documents listed in (1) and (2) below shall be specifically incorporated by reference into the prospectus by means of a statement to that effect in the prospectus listing all such documents:

(1) the registrant's latest annual report on Form 10-K (17 CFR 249.310) filed pursuant to Section 13(a) or 15(d) of the Exchange Act that contains financial statements for the registrant's latest fiscal year for which a Form 10-K was required to be filed; and

(2) all other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the annual report referred to in (1) above.

(c) The prospectus shall also provide a statement regarding the incorporation of reference of Exchange Act reports prior to the termination of the offering pursuant to one of the following two ways:

(1) a statement that all subsequently filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus; or

(2) a statement that all current reports on Form 8-K filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus.

Instruction. Attention is directed to Rule 439 (17 CFR 230.439) regarding consent to use of material incorporated by reference.

(d)(1) You must state

(i) that you will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the information that has been incorporated by reference in the prospectus but not delivered with the prospectus;

(ii) that you will provide this information upon written or oral request;

(iii) that you will provide this information at no cost to the requester; and

(iv) the name, address, and telephone number to which the request for this information must be made.

Note to Item 11(c)(1). If you send any of the information that is incorporated by reference in the prospectus to security holders, you also must send any exhibits that are specifically incorporated by reference in that information.

(2) You must:

(i) identify the reports and other information that you file with the SEC; and

(ii) state that the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 100 F Street, N.E., Washington, D.C. 20549, between the hours of 10:00 a.m. and 3:00 p.m. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet address, if available.

Item 11. Disclosure of Commission Position on Indemnification for Securities Act Liabilities.

Furnish the information required by Item 510 of Regulation S-K (17 CFR 229.510).

PART II
INFORMATION NOT REQUIRED IN PROSPECTUS

Item 12. Other Expenses of Issuance and Distribution.

Furnish the information required by Item 511 of Regulation S-K (17 CFR 229.511).

Item 13. Indemnification of Directors and Officers.

Furnish the information required by Item 702 of Regulation S-K (17 CFR 229.702).

Item 14. Exhibits.

Subject to the rules regarding incorporation by reference, file the exhibits required by Item 601 of Regulation S-K (17 CFR 229.601).

Item 15. Undertakings.

Furnish the undertakings required by Item 512 of Regulation S-K (17 CFR 229.512).

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form SF-3 and has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of __________________________, State of ___________________________________, on ____________________, 20____ .

____
(Registrant)

By ______________________________________
(Signature and Title)

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

____
(Signature)

____
(Title)

____
(Date)

Instructions.

1. The registration statement shall be signed by the depositor, the depositor's principal executive officer or officers, its principal financial officer, its senior officer in charge of securitization and by at least a majority of its board of directors or persons performing similar functions. If the registrant is a foreign person, the registration statement shall also be signed by its authorized representative in the United States. Where the registrant is a limited partnership, the registration statement shall be signed by a majority of the board of directors of any corporate general partner signing the registration statement.

2. The name of each person who signs the registration statement shall be typed or printed beneath his signature. Any person who occupies more than one of the specified positions shall indicate each capacity in which he signs the registration statement. Attention is directed to Rule 402 concerning manual signatures and to Item 601 of Regulation S-K concerning signatures pursuant to powers of attorney.

* * * * *

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

13. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq., 7201 et. seq.; and 18 U.S.C. 1350, unless otherwise noted.

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14. Amend Form 10-D (referenced in § 249.312) by reserving Item 1A in Part I and adding Item 1B in Part I as follows:

* * * * *

Item 1A. (Reserved)

Item 1B. Credit Risk Manager and Investor Communication.

For any transaction that included the provisions required by General Instructions I.B.1(b) and I.B.1(c) on Form SF-3 (referenced in § 239.45), provide the information required by Item 1121(f) and (g) of Regulation AB (17 CFR 229.1121(f) and (g)), as applicable.

* * * * *

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: July 26, 2011

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 229, 230, 232, 239, 240, and 249

[Release No. 33-9245; 34-64975; File No. S7-18-08]

RIN 3235-AK18

SECURITY RATINGS

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: In light of the provisions of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, we are adopting amendments to replace rule and form requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934 for securities offering or issuer disclosure rules that rely on, or make special accommodations for, security ratings (for example, Forms S-3 and F-3 eligibility criteria) with alternative requirements.

DATES: Effective Date: [insert date 30 days after publication in the Federal Register] except that the following amendments are effective December 31, 2012:

1. Amendment 2 amending 17 CFR 200.800;

2. Amendment 4 amending 17 CFR 229.10;

3. Amendment 10 amending 17 CFR 230.467;

4. Amendment 11 amending 17 CFR 230.473;

5. Amendment 13 amending 17 CFR 232.405;

6. Amendment 21 amending 17 CFR 239.38;

7. Amendment 22 amending Form F-8 [referenced in 17 CFR 239.38];

8. Amendment 23 removing Form F-9 [referenced in §239.39];

9. Amendment 24 amending 17 CFR 239.40;

10. Amendment 25 amending Form F-10 [referenced in 17 CFR 239.40];

11. Amendment 26 amending 17 CFR 239.41;

12. Amendment 27 amending Form F-80 [referenced in 17 CFR 239.41];

13. Amendment 28 amending 17 CFR 239.42;

14. Amendment 29 amending Form F-X [referenced in 17 CFR 239.42];

15. Amendment 33 amending 17 CFR 249.240f; and

16. Amendment 34 amending Form 40-F [referenced in 17 CFR 249.240f].

FOR FURTHER INFORMATION CONTACT: Blair Petrillo, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, or with respect to issuers of insurance contracts, Keith E. Carpenter, Senior Special Counsel in the Office of Disclosure and Insurance Product Regulation, Division of Investment Management, at (202) 551-6795, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to rules and forms under the Securities Act of 1933 ("Securities Act"),[1] and the Securities Exchange Act of 1934 ("Exchange Act").[2] Under the Securities Act, we are adopting amendments

[1] 15 U.S.C. 77a et seq.

[2] 15 U.S.C. 78a et seq.

to Rules 134,[3] 138,[4] 139,[5] 168,[6] Form S-3,[7] Form S-4,[8] Form F-3,[9] and Form F-4.[10] We are rescinding Form F-9[11] and adopting amendments to the Securities Act and Exchange Act forms and rules that refer to Form F-9 to eliminate those references.[12] We are also amending Schedule 14A[13] under the Exchange Act.

I. Introduction

We are adopting amendments today to remove references to credit ratings in rules and forms promulgated under the Securities Act and the Exchange Act. On February 9, 2011, we proposed amendments in light of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[14] to remove references to credit ratings in rules and forms under the Securities Act and the Exchange Act.[15] We proposed

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3 17 CFR 230.134.

4 17 CFR 230.138.

5 17 CFR 230.139.

6 17 CFR 230.168.

7 17 CFR 239.13.

8 17 CFR 239.25.

9 17 CFR 239.33.

10 17 CFR 239.34.

11 17 CFR 239.39.

12 We are removing references to Form F-9 in Securities Act Forms F-8 [17 CFR 239.38], F-10 [17 CFR 239.40], F-80 [17 CFR 239.41], and Form F-X [17 CFR 239.42]; in Exchange Act Form 40-F [17 CFR 249.240f], and in the following rules: 17 CFR 200.800, 17 CFR 229.10, 17 CFR 230.134, 17 CFR 230.467, 17 CFR 230.473, and 17 CFR 232.405.

13 17 CFR 240.14a-101.

14 Pub. L. No. 111-203, 124 Stat. 1376 (2010). Section 939A of the Dodd-Frank Act requires that we "review any regulation issued by [us] that requires the use of an assessment of the credit-worthiness of a security or money market instrument and any references to or requirements in such regulations regarding credit ratings." Once we have completed that review, the statute provides that we modify any regulations identified in our review to "remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness" as we determine to be appropriate.

15 See Security Ratings, Release No. 33-9186 (Feb. 9, 2011) [76 FR 8946] ("2011 Proposing Release").

similar changes in 2008, prior to the enactment of the Dodd-Frank Act, but did not act on those proposals.[16]

We have considered the role of credit ratings in our rules under the Securities Act on several previous occasions and even proposed removal of some references to credit ratings prior to the enactment of the Dodd-Frank Act.[17] While we recognize that credit ratings play a significant role in the investment decisions of many investors, we want to avoid using credit ratings in a manner that suggests in any way a "seal of approval" on the quality of any particular credit rating or rating agency, including any nationally recognized statistical rating organization ("NRSRO"). Similarly, the legislative history indicates that Congress, in adopting Section 939A, intended to "reduce reliance on credit ratings."[18] The rules we are adopting today seek to reduce our reliance on credit ratings for regulatory purposes while also preserving the use of Form S-3 (and similar forms) for issuers that we believe are widely followed in the market.

As discussed in more detail below, we are adopting the amendments with certain changes from the proposals. We received 48 comment letters on the 2011 Proposing

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16 See Security Ratings, Release No. 33-8940 (July 1, 2008) [73 FR 40106] ("2008 Proposing Release"). In 2009, we re-opened the comment period for the release for an additional 60 days. See References to Ratings of Nationally Recognized Statistical Rating Organizations, Release No. 33-9069 (Oct. 5, 2009) [74 FR 52374]. Public comments on both of these releases were published under File No. S7-18-08 and are available at http://www.sec.gov/comments/s7-18-08/s71808.shtml. Comments also are available for website 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 a.m. and 3:00 p.m.

17 See the 2008 Proposing Release for a discussion of the history and background of references to credit ratings in rules and regulations under the Securities Act. See also Credit Ratings Disclosure, Release No. 33-9070 (Oct. 7, 2009) [74 FR 53086], which includes a proposal to require disclosure regarding credit ratings under certain circumstances.

18 See Report of the House of Representatives Financial Services Committee to Accompany H.R. 4173, H. Rep. No. 111-517 at 871 (2010). The legislative history does not, however, indicate that Congress intended to change the types of issuers and offerings that could rely on the Commission's forms.

Release and have modified the final amendments in certain respects in response to the comments we received.

We are adopting amendments today to revise General Instruction I.B.2. of Form S-3 and Form F-3 to provide that an offering of non-convertible securities, other than common equity, is eligible to be registered on Form S-3 and Form F-3 if:

(i) the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) the issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) the issuer is a wholly-owned subsidiary of a well-known seasoned issuer ("WKSI") as defined in Rule 405 under the Securities Act;[19] or

(iv) the issuer is a majority-owned operating partnership of a real estate investment trust ("REIT") that qualifies as a WKSI; or

(v) the issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S-3 or Form F-3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such

[19] 17 CFR 230.405.

offering on or before the date that is three years from the effective date of the amendments.

As before today's amendments, issuers using Form S-3 or Form F-3 would also need to satisfy the other relevant requirements of Form S-3 and Form F-3, including the requirements in General Instruction I.A. of those forms.[20]

We are also rescinding Form F-9 under the Securities Act because we believe that regulatory changes have rendered the form unnecessary. Further, we are adopting amendments to Rules 138, 139 and 168 under the Securities Act and Schedule 14A under the Exchange Act so that they refer to the new eligibility criteria in Form S-3 and Form F-3. Finally, we are removing Rule 134(a)(17) under the Securities Act.

II. Discussion of the Amendments

A. Primary Offerings of Non-Convertible Securities Other than Common Equity

1. Background of Form S-3 and Form F-3

Form S-3 and Form F-3 are the "short forms" used by eligible issuers to register securities offerings under the Securities Act. These forms allow eligible issuers to rely on reports they have filed under the Exchange Act to satisfy many of the disclosure requirements under the Securities Act. Form S-3 and Form F-3 eligibility for primary offerings also enables eligible issuers to conduct primary offerings "off the shelf" under Securities Act Rule 415.[21] Rule 415 provides considerable flexibility in accessing the public securities markets in response to changes in the market and other factors. Issuers that are eligible to register these primary "shelf" offerings under Rule 415 are permitted

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20 We are also adopting a technical amendment to General Instruction I.B.5 of Form S-3.

21 17 CFR 230.415.

to register securities offerings prior to planning any specific offering and, once the registration statement is effective, offer securities in one or more tranches without waiting for further Commission action. To be eligible to use Form S-3 or Form F-3, an issuer must meet the form's eligibility requirements as to registrants, which generally pertain to reporting history under the Exchange Act,[22] and at least one of the form's transaction requirements.[23] One such transaction requirement permits registrants to register primary offerings of non-convertible securities, if they are rated investment grade by at least one NRSRO.[24] General Instruction I.B.2. provides that a security is "investment grade" if, at the time of sale, at least one NRSRO has rated the security in one of its generic rating categories, typically the four highest, which signifies investment grade.

General Instruction I.B.2. to Form S-3 provides issuers of non-convertible securities whose public float does not reach the required threshold, or that do not have a public float, with an alternate means of becoming eligible to register offerings on Form S-3. Consistent with Form S-3, the Commission also adopted a provision in Form F-3

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22 See General Instruction I.A. to Forms S-3 and F-3.

23 See General Instruction I.B to Forms S-3 and F-3. In addition to permitting offerings of investment grade securities, an issuer who meets the eligibility criteria in General Instruction I.A. may use Form S-3 or Form F-3 for primary offerings if the issuer has a public float in excess of $75 million, transactions involving secondary offerings, and rights offerings, dividend reinvestment plans, warrants and options. In addition, certain subsidiaries are eligible to use Form S-3 or Form F-3 for debt offerings if the parent company satisfies the eligibility requirements in General Instruction I.A. and provides a full and unconditional guarantee of the obligations being registered by the subsidiary. Pursuant to the revisions to Form S-3 and Form F-3 adopted in 2007, issuers also may conduct primary securities offerings registered on these forms without regard to the size of their public float or the rating of debt securities being offered, so long as they satisfy the other eligibility conditions of the respective forms, have a class of common equity securities listed and registered on a national securities exchange, and the issuers do not sell more than the equivalent of one-third of their public float in primary offerings over any period of 12 calendar months. See Revisions to Eligibility Requirements for Primary Offerings on Forms S-3 and F-3, Release No. 33-8878 (Dec. 19, 2007) [72 FR 73534].

24 See General Instruction I.B.2. to Forms S-3 and F-3.

providing for the eligibility of a primary offering of investment grade non-convertible securities by eligible foreign private issuers.[25]

Since the adoption of those rules relating to security ratings in Form S-3 and Form F-3, other Commission forms and rules relating to securities offerings or issuer disclosures have included requirements that likewise rely on securities ratings.[26] Among them are Form F-9,[27] Forms S-4 and F-4,[28] and Exchange Act Schedule 14A.[29]

2. The 2011 Proposing Release

In February 2011, we proposed to revise the instructions to Form S-3 and Form F-3 so that they would no longer refer to security ratings by an NRSRO as a transaction requirement to permit issuers to register primary offerings of non-convertible securities for cash. Instead, we proposed that these forms would be available to register primary offerings of non-convertible securities if the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) for cash at least $1 billion in non-convertible securities, other than common equity, in offerings registered under the Securities Act, over the prior three years. The proposals in the 2011 Proposing Release were substantially similar to amendments that were proposed in 2008.[30]

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25 General Instruction I.B.2. of Form F-3. See Adoption of Foreign Issuer Integrated Disclosure System, Release No. 33-6437 (Nov. 19, 1982) [47 FR 54764]. In 1994, the Commission expanded the eligibility requirement to delete references to debt or preferred securities and provide Form F-3 eligibility for other investment grade securities (such as foreign currency or other cash settled derivative securities). See Simplification of Registration of Reporting Requirements for Foreign Companies, Release No. 33-7053A (May 12, 1994) [59 FR 25810].

26 This release addresses rules and forms filed by issuers, disclosures made by issuers and relevant offering safe harbors under the Securities Act and Schedule 14A under the Exchange Act. In separate releases to be considered at a later date, the Commission intends to adopt rules to address other rules and forms that rely on an investment grade ratings component.

27 See General Instruction I. of Form F-9.

28 See General Instruction B.1 of Form S-4 and General Instruction B.1(a) of Form F-4.

29 See Note E and Item 13 of Schedule 14A.

30 See note 16 above.

3. Comments Received on the 2011 Proposing Release

We received 48 comment letters on the 2011 Proposing Release.[31] We received nine comment letters from law firms, nine comment letters from associations or industry groups, 16 comment letters from utility companies, one comment letter from an institutional investor, two comment letters from banks or bank holding companies and 11 comment letters from other interested parties. The majority of the comments focused on the proposals to amend the eligibility criteria for Form S-3 and Form F-3.

All of the commentators suggested modifications to the proposals to amend Form S-3 and Form F-3. Several commentators believed that Congress did not intend to change the pool of issuers eligible to use Form S-3 and Form F-3.[32] Commentators generally did not believe that the Form S-3 and Form F-3 criteria needed to mirror the standard for issuers to qualify as WKSIs.[33] In particular, commentators noted that the proposed non-convertible securities (other than common equity) offering standard in the 2011 Proposing Release was disproportionately higher than the standard for primary offerings on Form S-3 and Form F-3 by issuers that have an aggregate market value of

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31 The public comments we received on the 2011 Proposing Release are available on our website at http://www.sec.gov/comments/s7-18-08/s71808.shtml. In addition, to facilitate public input on the Dodd-Frank Act, we provided a series of e-mail links, organized by topic, on our website at http://www.sec.gov/spotlight/regreformcomments.shtml. The public comments we received on Section 939A of the Dodd-Frank Act are available on our website at http://www.sec.gov/comments/df-title-ix/credit-rating-agencies/credit-rating-agencies.shtml.

32 See letters from Securities Industry and Financial Markets Association dated March 18, 1011 (SIFMA), SCANA Corporation dated March 28, 2011 (SCANA), Public Service Enterprise Group dated March 28, 2011 (PSEG), Davis Polk & Wardwell dated March 25, 2011 (Davis Polk), Exelon Corporation dated March 28, 2011 (Exelon), National Association of Real Estate Investment Trusts dated March 28, 2011 (NAREIT), The Financial Services Roundtable dated March 28, 2011 (Roundtable), Pepco Holdings, Inc. dated March 28, 2011 (Pepco), Edison Electric Institute dated March 28, 2011 (EEI) and Society of Corporate Secretaries & Governance Professionals dated April 1, 2011 (SCSGP).

33 See letters from SIFMA, Debevoise & Plimpton LLP dated March 29, 2011 (Debevoise), Davis Polk, Cleary, Exelon, NAREIT, SCSGP, McGuire Woods LLP dated March 28, 2011 (McGuire Woods) and UnionBanCal Corporation dated March 28, 2011 (UnionBanCal).

$75 million or more for their voting and non-voting common equity held by non-affiliates.[34] As a result, commentators raised concerns that the proposals would result in issuers who are currently eligible to use Form S-3 or Form F-3 losing that eligibility.[35]

In the 2011 Proposing Release, we requested comment on whether we should adopt rules that would keep the pool of issuers currently eligible to use Form S-3 and Form F-3 substantially the same. Commentators suggested several alternatives to the proposals in the 2011 Proposing Release that may preserve Form S-3 and Form F-3 eligibility for certain issuers. The commentators generally believed that the alternatives suggested would reserve the use of Form S-3 and Form F-3 for issuers that were widely followed in the marketplace. Some of the alternatives suggested by commentators include:

- Allowing either wholly or majority-owned subsidiaries of WKSIs to use Form S-3 or Form F-3;[36]
- Basing the eligibility standard on having $1 billion of non-convertible securities other than common equity outstanding;[37]

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34 See letters from Davis Polk, Cleary, McGuire Woods, Debevoise, UnionBanCal, NAREIT, SCSGP and Exelon.

35 See letters from Boeing Capital Corporation dated March 25, 2011 (BCC), EEI, Central Hudson Gas & Electric Corporation dated March 16, 2011 (Central Hudson), PSEG, DTE Energy Company dated March 28, 2011 (DTE), Alliant Energy Corporation dated March 28, 2011 (Alliant), PNM Resources, Inc. dated March 28, 2011 (PNM), The Laclede Group, Inc. dated March 29, 2011 (Laclede), Vectren Corporation dated April 5, 2011 (Vectren), Sutherland Asbill & Brennan LLP dated March 28, 2011 (Sutherland), Roundtable, NAREIT, SCSGP and American Council of Life Insurers dated May 11, 2011 (ACLI).

36 See letters from BCC, Exelon, EEI, SCSGP, Southern, McGuire Woods, Dominion, Alliant, Laclede, Debevoise, Madison Gas and Electric Company dated March 29, 2011 (MGE), UnionBanCal and Vectren.

37 See letters from SIFMA, BCC, Cleary, AEP, SCANA, Oglethorpe, PSEG, EEI, DTE, UnionBanCal and ACLI. The letter from Debevoise indicates that they would support a debt outstanding test lower than $1 billion, but they did not specify a threshold. The letter from Sutherland supports using a non-convertible security (other than common equity) outstanding test with a $500 million threshold.

- Lowering the $1 billion threshold (commentators suggested various thresholds with some as low as $250 million);[38]
- Extending the measurement period for the $1 billion threshold to five years from three years;[39]
- Allowing securities issued in unregistered offerings of non-convertible securities other than common equity to be included in the calculation of the $1 billion threshold;[40]
- Allowing non-convertible securities other than common equity issued in registered exchange offerings to be included in the $1 billion calculation;[41]
- Allowing U.S. dollar denominated non-convertible securities other than common equity issued in Regulation S offerings to be included in the $1 billion calculation;[42]
- Adding an exception to allow regulated operating subsidiaries of utility companies to continue to use Form S-3 and Form F-3;[43]

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38 See letters from Davis Polk, Cleary Gottlieb Steen & Hamilton LLP dated March 28, 2011 (Cleary), McGuire Woods, Debevoise, UnionBanCal, NAREIT, SCSGP and Sutherland.

39 See letters from Cleary, McGuire Woods, Dominion, PSEG and EEI.

40 See letters from Central Hudson, SIFMA, Davis Polk, Exelon, NAREIT, McGuire Woods, Oglethorpe, PSEG, Debevoise, UnionBanCal and SCSGP.

41 See letters from SIFMA, Exelon, McGuire Woods, Oglethorpe, PSEG, Debevoise and SCSGP.

42 See letter from Davis Polk.

43 See letters from Central Hudson, Entergy Corporation dated March 21, 2011 (Entergy), American Electric Power dated March 28, 2011 (AEP), SCANA, Pepco, Roundtable, The Southern Company dated March 28, 2011 (Southern), Dominion Resources, Inc. dated March 28, 2011 (Dominion), Wisconsin Energy Corporation dated March 28, 2011 (Wisconsin Energy), Alliant, DTE, EEI, Laclede, American Gas Association dated March 28, 2011 (AGA) and Vectren.

- Adding an exception that would allow insurance company issuers of certain insurance contracts to continue to use Form S-3 and Form F-3;[44] and
- Adding an exception that would allow operating partnership subsidiaries of REITs to continue to use Form S-3 and Form F-3.[45]

Several commentators did not believe that the new eligibility criteria for Form S-3 and Form F-3 for primary offerings of non-convertible securities, other than common equity, should be based on the WKSI standard because it is disproportional to the criteria in Form S-3 and Form F-3 for primary offerings made in reliance on General Instruction I.B.1 of Form S-3 and Form F-3.[46] Commentators noted that the WKSI standard should be more stringent than the criteria for Form S-3 and Form F-3 eligibility because of the benefits, such as automatic shelf registration, that WKSI status confers.[47] Some commentators suggested that we should provide additional, alternative criteria for Form S-3 and Form F-3 eligibility.[48]

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44 See letters from Sutherland, Roundtable, and ACLI. Issuers of certain insurance contracts (e.g., contracts with so-called "market value adjustment" features and contracts that provide insurance benefits in connection with assets held in an investor's mutual fund, brokerage, or investment advisory account) are currently eligible to use Form S-3 and Form F-3 under General Instruction I.B.2. if these contracts have investment grade ratings. Market value adjustment ("MVA") features have historically been associated with annuity and life insurance contracts that provide a specified rate of return to purchasers. In order to protect the insurer against the risk that a purchaser may take withdrawals from the contract at a time when the market value of the insurer's assets that support the contract has declined due to rising interest rates, insurers sometime impose an MVA upon surrender. Under an MVA feature, the insurer adjusts the proceeds a purchaser receives upon early surrender to reflect changes in the market value of its portfolio securities supporting the contract.

45 See letter from NAREIT.

46 See letters from Davis Polk, Cleary, McGuire Woods, Debevoise, UnionBanCal and NAREIT.

47 Id.

48 See letters from SIFMA, BCC and Exelon.

In addition, some commentators believed the three-year look back for the $1 billion threshold in the 2011 Proposing Release was arbitrary and could have significant consequences. One commentator believed that the volume standard could be "volatile" particularly in times of financial uncertainty.[49] One commentator did not believe its following in the marketplace would be affected by the timing of its debt issuances and would not be significantly affected if it did not issue $1 billion in three years.[50] One commentator did not believe Form S-3 and Form F-3 eligibility should be based on the frequency of debt issuances and believed issuers would be followed on the basis of their debt outstanding.[51] Several utility company commentators noted that debt issuances within their industry are done on an irregular basis in connection with large capital projects, which would make the three-year test difficult to satisfy on a consistent basis.[52]

Commentators generally believed that if issuers were unable to satisfy the proposed standard, they would seek to raise capital in the private markets instead of registering offerings on Form S-1.[53] Commentators believed that private offerings would be more efficient and take less time than a registered offering on Form S-1.[54] Commentators noted that using the private markets would make it difficult for issuers to ever gain eligibility for Form S-3 because the amount of non-convertible securities (other than common equity) issued in private offerings is not included in calculating the $1

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49 See letter from Orchard Street Partners LLC dated February 10, 2011 (Orchard Street).

50 See letter from BCC.

51 See letter from Exelon.

52 See letters from Entergy, Exelon, Dominion, Wisconsin Energy, Alliant, Oglethorpe, DTE and EEI.

53 See letters from NAREIT, Davis Polk, Central Hudson, Entergy, Exelon, Oglethorpe, PSEG, DTE, Laclede and AGA.

54 See letters from Central Hudson, Entergy and Exelon.

billion threshold under the proposal.[55] Commentators also noted that if issuers were to use the private markets, it would be inconsistent with the Commission's policy preference for registered offerings.[56]

We have reviewed and considered all of the comments we received on the proposed amendments. The adopted amendments reflect changes made in response to many of these comments. These changes are discussed in more detail below.

4. Amendments

(i) Replace Investment Grade Rating Criterion with Alternative Criteria

(a) Overview

Today we are adopting amendments to revise the transaction eligibility criteria for registering primary offerings of non-convertible securities on Forms S-3 and F-3. After considering the comments we received on the 2011 Proposing Release, we believe that the amendments we are adopting today provide an appropriate and workable alternative to credit ratings for determining whether an issuer should be able to use Form S-3 and Form F-3 and have access to the shelf offering process.

The instructions to Forms S-3 and F-3 will no longer refer to security ratings by an NRSRO as a transaction requirement to permit issuers to register primary offerings of non-convertible securities for cash. Instead, these forms will be available to register primary offerings of non-convertible securities other than common equity if:

(i) the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities,

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55 See letters from Central Hudson, SIFMA, Oglethorpe and DTE.

56 See letters from Davis Polk, NAREIT and EEI.

other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) the issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) the issuer is a wholly-owned subsidiary of a WKSI as defined in Rule 405 under the Securities Act; or

(iv) the issuer is a majority-owned operating partnership of a REIT that qualifies as a WKSI; or

(v) the issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S-3 or Form F-3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments.[57]

We are modifying eligibility criteria for use of Form S-3 and Form F-3 from the proposal because we are persuaded by commentators' arguments that the criteria from the 2011 Proposing Release could result in some issuers who should be eligible to use Form

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57 See revised General Instruction I.B.2. of Forms S-3 and F-3. We are also deleting the reference to General Instruction I.B.2 in Instruction 3 to the signature block of Forms S-3 and F-3. Instruction 3 to the signature block of Form S-3 and Form F-3 provides that a registrant may sign the registration statement even if a final credit rating has not been issued so long as the registrant states its reasonable belief that the rating will be issued by the time of sale. See Section II.B. below for a discussion of General Instruction I.B.5.

S-3 or Form F-3 because of their wide market following and who are currently eligible to no longer be eligible. As we noted in the 2011 Proposing Release, we are not aware of anything in the legislative history to indicate that Congress intended to substantially alter the pool of issuers eligible for short-form registration and access to the shelf registration process.[58] Accordingly, we believe that any alternative standard for Form S-3 and Form F-3 eligibility that does not refer to credit ratings should preserve the forms and access to the shelf registration process for issuers who have a wide following in the marketplace.[59] These modifications to the proposals should preserve short-form eligibility for widely followed issuers. In addition to adding a non-convertible securities issued criteria, as proposed, we are also adding other criteria intended to allow widely followed issuers access to Form S-3 and Form F-3 and the shelf registration process.[60] These criteria do not distinguish among issuers by the quality of their credit but instead focus on wide following in the marketplace. Those modifications are discussed in more detail below.

In the 2011 Proposing Release, we solicited comment specifically related to how the proposals would affect operating subsidiaries of utility companies, REITs and insurance company issuers of certain insurance contracts. Among other things, we asked whether we should adopt industry-specific provisions that would enable these companies to continue to file registration statements on Form S-3 and Form F-3. The revisions we have made to the proposals, including the addition of several alternative standards, would allow widely followed issuers to use Form S-3 and Form F-3, and we believe that most of

58 See 2011 Proposing Release, supra, note 15, at note 20.

59 See Securities Offering Reform, Release No. 33-8591 (Aug. 3, 2005) [70 FR 44722], where we said that we believed issuers with a wide following would produce "Exchange Act reports that not only are reliable but also are broadly scrutinized by investors and the markets."

60 We note that none of these criteria are a standard of credit worthiness.

the operating subsidiaries of utility companies, REITs and insurance company issuers of certain insurance contracts that may have been excluded under the proposals will be included under the amendments we are adopting today.[61]

(b) $1 Billion of Non-Convertible Securities (Other than Common Equity) Issued or $750 Million of Non-Convertible Securities (Other than Common Equity) Outstanding

We are adopting the $1 billion of non-convertible securities, other than common equity, issued over three years criterion as proposed because we believe it would be an appropriate indicator of whether an issuer is widely followed. In addition, we are persuaded by commentators' arguments that focusing solely on issuances over the past three years may inappropriately limit use of Form S-3 or Form F-3. We agree that considering outstanding securities issued in primary registered offerings would result in issuers for whom short form registration is appropriate being eligible to use Form S-3 or Form F-3. As a result, we are amending General Instruction I.B.2. of Form S-3 and Form F-3 to provide that, among other things and in addition to the $1 billion of non-convertible securities, other than common equity, issued over three years criterion, an issuer that has at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act outstanding (as measured from a date within 60 days prior to the filing of the registration statement) will be eligible to register on Form S-3 or Form F-3 if the issuer meets the other requirements (such as those in General Instruction I.A.) of the form. For the non-convertible securities (other than common equity) outstanding criteria, we chose a level of $750 million because we believe this threshold will allow currently eligible

61 See Section II.A.4.ii below for a discussion of the impact of the amendments.

issuers to continue to use Form S-3 and Form F-3 while preserving the forms' use for widely followed issuers. As noted above, several commentators supported a lower threshold than $1 billion.[62] While most of those commentators supported a threshold ranging from $250 million to $500 million, we believe setting the threshold to $750 million of non-convertible securities (other than common equity) outstanding will encourage registered offerings and assist in maintaining the availability of Form S-3 and Form F-3 for currently eligible issuers while also preserving Form S-3 and Form F-3 for widely followed issuers. This alternative will allow companies that have irregular issuances of non-convertible securities (other than common equity), but that still have significant amounts of non-convertible securities (other than common equity) issued in primary, registered offerings outstanding, to continue to have access to short-form registration and the shelf offering process. Similarly, by also adopting the $1 billion issued over three years threshold, we believe issuers who may issue a significant amount of non-convertible securities over a three-year period but then retire a portion of those securities based on prevailing market conditions will be able to continue to be eligible to use Form S-3 and Form F-3.

Consistent with the 2011 Proposing Release, the revised thresholds should be calculated consistent with the standards used to determine WKSI status. As a result, in determining compliance with both the $1 billion issued and the $750 million outstanding thresholds:

- issuers can aggregate the amount of non-convertible securities, other than common equity, issued in registered primary offerings that were issued within the

62 See note 38 above. The commentators included law firms and industry groups.

previous three years (measured as of a date within 60 days prior to the filing of the registration statement) or, for the non-convertible securities (other than common equity) outstanding threshold, that are outstanding as of a date within 60 days prior to the filing of the registration statement;

- issuers can include only such non-convertible securities, other than common equity, that were issued in registered primary offerings for cash and not registered exchange offers;[63] and
- parent company issuers only can include in their calculation the principal amount of their full and unconditional guarantees, within the meaning of Rule 3-10 of Regulation S-X,[64] of non-convertible securities, other than common equity, of their majority-owned subsidiaries issued in registered primary offerings for cash over the prior three years or, for the non-convertible securities (other than common equity) outstanding threshold, that are outstanding as of a date within 60 days prior to the filing of the registration statement.

In response to public comment, we have added an instruction to Form S-3 and Form F-3 clarifying how insurance company issuers should calculate the $1 billion issued and $750 million outstanding thresholds. Insurance company issuers, when registering offerings of insurance contracts,[65] will be permitted to include in their calculation the amount of insurance contracts, including variable insurance contracts, issued in offerings

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63 Issuers will not be permitted to include the principal amount of securities that were offered in registered exchange offers by the issuer when determining compliance with the eligibility thresholds. A substantial portion of these offerings involve registered exchange offers of substantially identical securities for securities that were sold in private offerings.

64 17 CFR 210.3-10.

65 For this purpose, an "insurance contract" is a security that is subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia.

registered under the Securities Act over the prior three years, or for the non-convertible securities (other than common equity) outstanding threshold, that are outstanding as of a date within 60 days prior to the filing of the registration statement.[66] We believe that insurance company issuers that have a significant amount of registered contracts issued or outstanding receive sufficient scrutiny by the marketplace that short-form registration is appropriate for insurance contracts of those issuers. We also believe that calculating the eligibility thresholds in this manner will enable insurance company issuers that are currently eligible to use Form S-3 and Form F-3 to register insurance contract offerings, and that are unable to rely on the alternative eligibility criteria, to remain eligible to use those forms.

In calculating the $1 billion or the $750 million amount, as applicable, issuers generally will be permitted to include the principal amount of any debt and the greater of liquidation preference or par value of any non-convertible preferred stock that were issued in primary registered offerings for cash.[67] In calculating the $1 billion amount or the $750 million amount, as applicable, an insurance company, when using Form S-3 or Form F-3 to register insurance contracts, may include the purchase payments or premium payments for insurance contracts issued in offerings registered under the Securities Act over the prior three years, or for the non-convertible securities (other than common

66 One commenter asked that we clarify that an insurance company be permitted to include variable insurance contracts in calculating whether the insurance company meets the eligibility threshold. See letter from Sutherland.

67 In determining the dollar amount of securities that have been registered during the preceding three years, issuers will use the same calculation that they use to determine the dollar amount of securities they are registering for purposes of determining fees under Rule 457 [17 CFR 230.457].

equity) outstanding threshold, the contract value as of the measurement date, of any outstanding insurance contracts issued in offerings registered under the Securities Act.[68]

Several commentators asserted that we should allow issuers to include securities issued in unregistered transactions to be included in the eligibility threshold.[69] In addition, some commentators wanted us to permit the inclusion of registered exchange offers in the calculations,[70] and one commentator believed that U.S. dollar denominated securities issued in Regulation S offerings should be permitted to be included in the calculations.[71] These commentators generally believed that securities issued in these transactions play a role in whether an issuer is widely followed.[72] After considering the comments, we have decided not to allow securities issued in unregistered offerings, registered exchange offerings or Regulation S offerings to be included in the $1 billion or $750 million calculations. We are concerned that including such securities could result in the inclusion of some securities that are not indicative of wide market following, and thus do not benefit from the attendant scrutiny of the issuer's public filings by a broad section of market participants, such as privately negotiated placements to a small number of investors. We are also concerned that delineating when a private offering would, and would not, be included would be unworkable. Further, as noted above, the Commission

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68 For variable insurance contracts, the amount of purchase payments or premium payments used in this calculation may not include amounts initially allocated to investment options that are not registered under the Securities Act, and the contract value may not include amounts allocated as of the measurement date to investment options that are not registered under the Securities Act.

69 See letters from Central Hudson, SIFMA, Davis Polk, Exelon, NAREIT, McGuire Woods, Oglethorpe, PSEG, Debevoise, UnionBanCal and SCSGP.

70 See letters from SIFMA, Exelon, McGuire Woods, Oglethorpe, PSEG, Debevoise and SCSGP.

71 See letter from Davis Polk.

72 See, e.g., letter from SIFMA.

has previously indicated a policy preference for registered offerings.[73] We believe that it would be inconsistent with that preference to allow securities issued in transactions not registered under the Securities Act to be included in the calculation of the $1 billion or $750 million thresholds. In addition, the calculation of the $1 billion and the $750 million standards are substantially similar to the calculation for WKSI status in which unregistered and registered exchange offerings are not permitted to be included.

(c) Subsidiaries of WKSIs

Under the amendments as adopted, issuers that are wholly-owned subsidiaries of WKSIs will be eligible to use Form S-3 or Form F-3 for offerings of non-convertible securities other than common equity. Commentators noted that a wholly-owned subsidiary of a WKSI is likely to be followed by analysts who follow the WKSI as a part of the WKSI's operations, which supports allowing these companies access to Form S-3 and Form F-3. We also believe this will allow many utility company operating subsidiaries and insurance company issuers of certain insurance contracts to continue to be able to use Form S-3 and Form F-3, which would reduce the negative impact the proposals in the 2011 Proposing Release potentially could have had on these issuers' ability to raise capital and to offer securities.

Some commentators urged us to permit less than wholly-owned subsidiaries of WKSIs to have access to Form S-3 and Form F-3 under a new eligibility criteria for subsidiaries of WKSIs.[74] Except with respect to certain REIT structures discussed below, we have limited this eligibility to wholly-owned subsidiaries of WKSIs because we believe that a wholly-owned subsidiary is more likely to be followed by analysts in

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73 See note 56 and related text. See also Securities Offering Reform in note 59 above.

74 See note 36 above and related text.

connection with its WKSI parent. Also, we note that the limitation does not appear to significantly impact the eligibility of WKSI subsidiaries currently eligible to use Form S-3 and Form F-3.

Although the new criteria for subsidiaries of WKSIs will generally be limited to wholly-owned subsidiaries, we are adopting a provision that will allow certain operating partnerships of REITs to continue to use Form S-3 and Form F-3. Given the partnership structure, REITs generally do not wholly own the operating partnerships; however, the REIT controls the operating partnership because it is the general partner. Further, the REIT generally conducts all of its business through the operating partnership and holds its properties in the operating partnership. As a result of this structure, one commentator representing the REIT industry explained that followers of the REIT parent analyze the operations of the operating partnerships in conjunction with following the REIT.[75] We are adopting a provision that will allow a majority-owned operating partnership subsidiary of a REIT to register offerings of non-convertible securities, other than common equity, on Form S-3 or Form F-3 so long as the REIT parent is a WKSI. In the limited context of REITs with operating partnerships, we believe permitting the use of Form S-3 and Form F-3 by majority-owned operating partnerships whose REIT parent is a WKSI is consistent with our goal of seeking to assure that entities using those forms are widely followed.

(d) Grandfathering of Other Currently Eligible Issuers

Finally, commentators expressed wide support for a temporary "grandfather" provision that would allow issuers that are currently eligible to use Form S-3 and Form F-

75 See letter from NAREIT.

3 to continue to use those forms for a period of time even if the issuers would not be eligible under the new rules.[76] As noted above, we are not aware of anything in the legislative history to indicate that Congress intended for Section 939A of the Dodd-Frank Act to substantially alter access to our short forms or the shelf registration process. Although we believe that the revisions to the proposal described above would not result in significant numbers of issuers losing access to those forms, we are nevertheless concerned that there could be some issuers that would no longer be eligible to use Form S-3 or Form F-3. In order to ease transition to the new rules and allow companies affected by the amendments time to adjust, we are adopting a temporary "grandfather" clause that will allow issuers who reasonably believe they would have been eligible to rely on General Instruction I.B.2. of Form S-3 or Form F-3 based on the criteria in existence prior to the new rules and who disclose that belief and the basis for it in the registration statement, to be able to use Form S-3 and Form F-3 if they file a final prospectus for an offering on Form S-3 or Form F-3 within three years from the effective date of the new rules.[77] We are adopting a "reasonable belief" standard because of the way in which some credit ratings work. Because some issuers would likely not obtain a credit rating until a deal is relatively certain (unless the issuer has an issuer rating), those issuers would not have a bright-line way of determining whether they were eligible to use Form S-3 and Form F-3 based on the criteria in effect prior to the new rules. We believe requiring the issuer to disclose its reasonable belief will prompt issuers to consider

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76 See letters from SIFMA, Entergy, Davis Polk, Cleary, AEP, Roundtable, Wisconsin Energy, Oglethorpe, DTE, MGE and Vectren.

77 Under this eligibility standard, issuers will be able to file new Forms S-3 or F-3, but any offerings would need to have a final prospectus filed within three years of the effective date of the new rules.

carefully whether the disclosure is accurate since they will be responsible for the disclosure under the Securities Act. As a result, as long as the issuer has a reasonable belief that it would have been eligible and discloses that belief (and the basis for it) in the registration statement, the issuer will be able use Form S-3 and Form F-3 for a period of three years from the effective date of the new rules. We believe three years will provide issuers with enough time to adjust to the new rules, including modifying how they might choose to offer securities. Factors that indicate a reasonable belief of eligibility would include, but not be limited to:

- An investment grade issuer credit rating;
- A previous investment grade credit rating on a security issued in an offering similar to the type the issuer seeks to register that has not been downgraded or put on a watch-list since its issuance; or
- A previous assignment of a preliminary investment grade rating.

(ii) Impact of Amendments

We noted in the 2011 Proposing Release that we anticipated that under the proposed threshold, which was intended to capture widely followed issuers based on the amount of recently issued non-convertible securities other than common equity, some high yield debt issuers and issuers without credit ratings that are not currently eligible to use Form S-3 would become eligible and some issuers currently eligible to use Form S-3 and Form F-3 would become ineligible. We believe the changes we have made to the proposals, which include also considering the amount of outstanding non-convertible securities other than common equity, will reduce the likelihood of unnecessarily excluding issuers that are currently eligible to use Form S-3 and Form F-3. In the proposing release, based on a review of non-convertible securities, other than common equity, issued in the United States from January 1, 2006 through August 15, 2008, we estimated that approximately 45 issuers who were previously eligible to use Form S-3 (and who had made an offering during the review period) would no longer be able to use Form S-3 for offerings of non-convertible securities other than common equity securities.[78] We further estimated in the 2011 Proposing Release that approximately eight issuers who were previously ineligible to use Form S-3 or Form F-3 would be eligible to use those forms if the proposals were adopted. In connection with the changes to the proposals that we are adopting today, we reviewed the 45 companies we believed would become ineligible to use Form S-3 or Form F-3 under the proposals to determine how many companies would remain eligible to use Form S-3 and Form F-3. Based on our review, we estimate that of the 45 companies we previously estimated would be excluded under the proposal, 39 would remain eligible because they are wholly-owned subsidiaries of WKSIs and two would remain eligible because they have at least $750 million in non-convertible securities (other than common equity) outstanding. Thus, from the sample of 45 companies that would have lost their eligibility based on the standards in the proposing release, four companies would remain ineligible to use Form S-3 or Form F-3 with the changes we are making in this adopting release. Based on the review of offerings described above, we estimate that 16 issuers who have recently used Form S-1 will become newly eligible to use Form S-3 and Form F-3. The number of issuers who may become newly eligible to use Form S-3 or Form F-3 includes insurance company issuers of certain insurance contracts, a number of whom now file on Form S-1

[78] See the 2011 Proposing Release at note 58 and related text.

but that will become eligible to use Form S-3 as a result of the changes made to the eligibility requirements being adopted.[79] As a result, we believe that the amendments will result in a net increase of 12 additional issuers becoming eligible to use Form S-3 and Form F-3.

Some commentators believed that our estimates in the proposing release understated the number of companies that would be affected by the proposals.[80] Another commentator reviewed data from March 2008 to March 2011 in the utility industry and believes that at least 60 utility companies would have been affected.[81] We acknowledged in the 2011 Proposing Release that reviewing offerings during a different time period would give different results. We also acknowledged that our data did not capture issuers who were eligible to use Form S-3 and Form F-3 but did not make offerings during the review period. However, we believe that the changes we are making to the proposals will reduce the impact on certain issuers, particularly utility companies, REITs and insurance company issuers of certain insurance contracts. We believe the provision to allow wholly-owned subsidiaries of WKSIs (or, in the case of REITs, majority owned operating partnerships of WKSIs) to continue to have access to Form S-3 and Form F-3 and the other changes we are making will allow these types of issuers continued access to short form registration and the shelf offering process. Because we do not believe Congress intended to substantially alter the companies eligible to use Form S-3 and Form F-3, we are adopting a standard that we believe balances the goals of preserving Form S-3 and

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79 See note 44 above.

80 See letters from SIFMA, Entergy and EEI.

81 See letter from SIFMA. See also letter from Entergy, who argued that the potential number of utility companies affected may have been understated because utility companies did not make offerings due to market conditions.

Form F-3 eligibility for current users while reserving the forms for issuers that are widely followed in the marketplace.

B. Technical Amendment to General Instruction I.B.5. of Form S-3

General Instruction I.B.5. to Form S-3 provides transaction requirements for offerings of investment grade asset-backed securities. That instruction contains a cross-reference to the definition of "investment grade securities" that currently is found in General Instruction I.B.2. of Form S-3. As one commentator noted, the amendments we are adopting today would remove the definition of investment grade securities from General Instruction I.B.2.[82] In April 2010, we proposed to remove references to credit ratings as a requirement for shelf eligibility for offerings of asset-backed securities.[83] Among other things, the proposal would have required risk retention by the sponsor as a condition to shelf eligibility. Those proposals are still outstanding. As a result, such issuers still look to General Instruction I.B.5. for their offerings. Therefore, we are adopting an amendment to General Instruction I.B.5. of Form S-3 to move the definition of investment grade securities to that instruction until such time as new shelf eligibility requirements for asset-backed issuers are adopted that do not reference credit ratings.

C. Rescission of Form F-9

Form F-9 allows certain Canadian issuers[84] to register investment grade debt or investment grade preferred securities that are offered for cash or in connection with an exchange offer, and which are either non-convertible or not convertible for a period of at

82 See letter from American Securitization Forum dated March 28, 2011 (ASF).

83 See Asset-Backed Securities, Release No. 33-9117 (Apr. 7, 2010) [75 FR 23328]. In 2010, we proposed amendments that would remove General Instruction I.B.5. of Form S-3 and move shelf offerings of asset-backed securities to a new form.

84 Form F-9 is the Multijurisdictional Disclosure System ("MJDS") form used to register investment grade debt or preferred securities under the Securities Act by eligible Canadian issuers.

least one year from the date of issuance.[85] Under the form's requirements, a security is rated "investment grade" if it has been rated investment grade by at least one NRSRO, or at least one Approved Rating Organization, as defined in National Policy Statement No. 45 of the Canadian Securities Administrators ("CSA").[86] This eligibility requirement was adopted as part of a 1993 revision to the MJDS originally adopted by the Commission in 1991 in coordination with the CSA.[87]

Under Form F-9, an eligible issuer has been able to register investment grade securities using audited financial statements prepared pursuant to Canadian generally accepted accounting principles ("Canadian GAAP") without having to include a U.S. GAAP reconciliation. In contrast, a MJDS filer must reconcile its home jurisdiction financial statements to U.S. GAAP when registering securities on a Form F-10.[88] However, the CSA has adopted rules that will require Canadian reporting companies to prepare their financial statements pursuant to International Financial Reporting Standards as issued by the International Accounting Standards Board ("IFRS") beginning in 2011.[89] Foreign private issuers that prepare their financial statements in accordance with IFRS

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85 Securities convertible after a period of at least one year may only be convertible into a security of another class of the issuer.

86 See General Instruction I.A. to Form F-9.

87 See Amendments to the Multijurisdictional Disclosure System for Canadian Issuers, Release No. 33-7025 (Nov. 3, 1993) [58 FR 62028]. See also Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Release No. 33-6902 (June 21, 1991) [56 FR 30036].

88 See Item 2 under Part I of Form F-10 [17 CFR 239.40]. Form F-10 is the general MJDS registration statement that may be used to register securities for a variety of offerings, including primary offerings of equity and debt securities, secondary offerings, and exchange offers pursuant to mergers, statutory amalgamations, and business combinations.

89 See, for example, CSA IFRS-Related Amendments to Securities Rules and Policies (2010), which are available at: http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20101001_52-107_ifrs-amd-3339-supp3.pdf. Canadian reporting companies that are U.S. registrants may elect to prepare their financial statements in accordance with U.S. GAAP. See Part 3.7 of National Instrument 52-107.

are not required to prepare a U.S. GAAP reconciliation.[90] Since a Canadian issuer will not have to perform a U.S. GAAP reconciliation under IFRS, one of the primary differences between Form F-9 and Form F-10 will be eliminated. Once the Canadian IFRS-related amendments become effective,[91] the disclosure requirements for an investment grade securities offering registered on Form F-10 will be the same as the disclosure requirements for one registered on Form F-9.

In the 2011 Proposing Release, we proposed to rescind Form F-9 due to the Canadian regulatory developments described above. One commentator noted that Canadian issuers who have a later fiscal year end will have a later effective date for required IFRS financial statements.[92] If Form F-9 were to be rescinded before an issuer is required to prepare IFRS financial statements, then that issuer would be required to provide a reconciliation to U.S. GAAP in connection with the filing of a registration statement during the interim period before its IFRS financial statements are available. In order to address this concern and ease transition for these issuers, we are adopting a delayed effective date of December 31, 2012 for the rescission of Form F-9.

Commentators also noted that a gap remains between the eligibility requirements for Form F-9 and Form F-10.[93] Currently, issuers using Form F-9 are not required to have a public float while issuers using Form F-10 must either have a $75 million public

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90 See Item 17(c) of Form 20-F.

91 Canadian reporting issuers and registrants with financial years beginning on or after January 1, 2011, will be required to comply with the new IFRS requirements. For companies with a year-end of December 31, 2011, the initial reporting period under IFRS will be the first quarter ending March 31, 2011. See the "Transition to International Financial Reporting Standards" of the Ontario Securities Commission ("OSC"), which is available at: http://www.osc.gov.on.ca/en/ifrs_index.htm?wloc=141RHEN&id=21789EN.

92 See letter from Bank of Nova Scotia dated March 28, 2011 (Scotiabank).

93 See letters from Davies Ward Phillips & Vineberg LLP dated March 28, 2011 (Davies), Osler, Hoskin & Harcourt LLP dated March 28, 2011 (Osler) and Fraser Milner Casgrain LLP dated March 28, 2011 (FMC).

float or be debt issuers with a guarantee from a parent meeting the requirements of Form F-10. As a result, to the extent a Form F-9 issuer does not have the requisite public float and does not have a parent guarantee of its debt, it would not be eligible to use Form F-10.

As we noted in the 2011 Proposing Release, MJDS issuers have infrequently used Form F-9. Of the 40 Form F-9s filed by 22 issuers since January 1, 2007, we believe only one of these issuers would not qualify to file on Form F-10 if Form F-9 is rescinded. Consistent with the temporary "grandfather" provision we are adopting for Form S-3 and Form F-3 filers, in order to address this concern and ease the transition, we are adopting a temporary "grandfather" provision in Form F-10 that would permit any issuer that discloses in the registration statement that it has a reasonable belief that it would have been eligible to file on Form F-9 as of the effective date of the amendments, and discloses the basis for that belief, to file a final prospectus for an offering on Form F-10 for a period of three years from the effective date of the new rules even if it does not satisfy the parent guarantee or public float requirements of Form F-10.[94]

One commentator also noted that removing the reference to Form F-9 from Form 40-F (as was proposed in the 2011 Proposing Release) would result in former F-9 filers who do not have a public float of $75 million or a parent guarantee of their debt losing eligibility to file annual reports on Form 40-F.[95] Issuers who are not eligible to use Form 40-F use Form 20-F, which requires disclosure in accordance with standards set by the Commission rather than standards set by the Canadian securities regulators. In Form 40-

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94 Similar to the grandfather provision we are adopting for Form S-3 and Form F-3 filers, new Form F-10s may be filed, but issuers relying on this instruction will need to file a final prospectus for any such offering within three years of the effective date of the new rules.

95 See letter from Davies.

F, Canadian MJDS filers file with the Commission their home jurisdiction periodic disclosure documents under cover of Form 40-F. In Form 20-F, foreign private issuers are subject to the Commission's special disclosure requirements for foreign private issuers, and have to prepare separate disclosure to comply with those requirements. Similar to the Form F-10 "grandfather" provision above, we believe this change to Form 40-F would result in a very small number of issuers no longer being able to use Form 40-F. In order to address this concern, we are adopting a permanent "grandfather" provision that would allow currently eligible Form 40-F filers to continue to use Form 40-F to satisfy their reporting obligations under Section 13 and Section 15(d) of the Exchange Act as to previously sold securities if they had filed and sold securities under a Form F-9 with the Commission before the effective date of the new rules. We believe a permanent "grandfather" provision is appropriate for these issuers because some issuers may have issued securities many years ago and may still be reporting pursuant to the requirements of Form 40-F, and given the design of the MJDS system, we do not believe it would be appropriate to change the requirements that these issuers relied on when the offering was made.

One commentator was opposed to rescinding Form F-9 because Form F-9 filers who are in the oil and gas industry are not required to provide the disclosure required by Accounting Standards Codification 932 "Extractive Activities – Oil and Gas" (ASC 932) that would be required for Form F-10 filers.[96] A review of issuers that have filed a Form F-9 since January 1, 2007 indicates that this change would affect very few issuers. As the commentator notes, the Commission has indicated that it will continue to monitor the

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96 See letter from Paul, Weiss, Rifkind, Wharton & Garrison LLP dated March 28, 2011 (Paul Weiss).

necessity of providing ASC 932 disclosure as regulatory changes occur.[97] At this time we are not making any changes to the requirement for Form F-10 filers to provide ASC 932 disclosure or otherwise making special accommodations for previous Form F-9 filers. We are also not adopting a grandfather provision for this disclosure requirement because we believe the burden on former F-9 filers will not be significant and will impact a very small number of issuers.

D. Ratings Reliance in Other Forms and Rules

1. Forms S-4 and F-4 and Schedule 14A

Proposals relating to Form S-4, Form F-4 and Schedule 14A were also included in the 2011 Proposing Release. We did not receive significant separate comment on these proposals. Form S-4 and Form F-4 include the Form S-3 and Form F-3 eligibility criteria by allowing registrants that meet the registrant eligibility requirements of Form S-3 or F-3 and that are offering investment grade securities to incorporate by reference certain information.[98] Similarly, Schedule 14A permits a registrant to incorporate by reference if the Form S-3 registrant requirements in General Instruction I.A. are met and action is to be taken as described in Items 11, 12 and 14[99] of Schedule 14A, which concerns non-convertible debt or preferred securities that are "investment grade securities" as defined in General Instruction I.B.2. of Form S-3.[100] In

97 See Release No. 33-8879, Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP (Dec. 21, 2007) [73 FR 986].

98 See General Instruction B.1 of Forms S-4 and Form F-4.

99 Item 11 of Schedule of 14A provides for solicitations related to the authorization or issuance of securities other than an exchange of securities. Item 12 provides for solicitations related to the modification or exchange of securities. Item 14 provides for solicitations related to mergers, consolidations and acquisitions.

100 See Note E of Schedule 14A.

addition, Item 13 of Schedule 14A allows financial information to be incorporated into a proxy statement if the requirements of Form S-3 (as described in Note E to Schedule 14A) are met. Because we are changing the eligibility requirements in Forms S-3 and F-3 to remove references to ratings by an NRSRO, we believe the same standard should apply to the disclosure options in Forms S-4 and F-4 based on Form S-3 or F-3 eligibility. That is, a registrant will be eligible to use incorporation by reference in order to satisfy certain disclosure requirements of Forms S-4 and F-4 to register non-convertible debt or preferred securities on Form S-4 or Form F-4 if:

(i) the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) the issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act;

(iii) the issuer is a wholly-owned subsidiary of a WKSI as defined in Rule 405 under the Securities Act;

(iv) the issuer is a majority-owned operating partnership of a REIT that qualifies as a WKSI; or

(v) the issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to

General Instruction I.B.2 of Form S-3 or Form F-3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments.

Similarly, we are amending Schedule 14A to refer simply to the requirements of General Instruction I.B.2. of Form S-3, rather than to "investment grade securities." As a result, an issuer will be permitted to incorporate by reference into a proxy statement if the issuer satisfied the requirements of General Instruction I.A. of Form S-3, the matter to be acted upon related to non-convertible securities, other than common equity, and was described in Item 11, 12 or 14 of Schedule 14A and the issuer falls into one of the categories listed above (measured as of a date that is within 60 days of the proxy first being sent to security holders).

2. Securities Act Rules 138, 139 and 168

Other Securities Act rules also reference credit ratings. Rules 138, 139, and 168 under the Securities Act provide that certain communications are deemed not to be an offer for sale or offer to sell a security within the meaning of Sections 2(a)(10)[101] and 5(c)[102] of the Securities Act when the communications relate to an offering of non-convertible investment grade securities. Under current rules, these communications include the following:

- under Securities Act Rule 138, a broker's or dealer's publication about securities of a foreign private issuer that meets F-3 eligibility requirements

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101 15 U.S.C. 77b(a)10.

102 15 U.S.C. 77e(c).

(other than the reporting history requirements) and is issuing non-convertible investment grade securities;

- under Securities Act Rule 139, a broker's or dealer's publication or distribution of a research report about an issuer or its securities where the issuer meets Form S-3 or F-3 registrant requirements and is or will be offering investment grade securities pursuant to General Instruction I.B.2. of Form S-3 or F-3, or where the issuer meets Form F-3 eligibility requirements (other than the reporting history requirements) and is issuing non-convertible investment grade securities; and
- under Securities Act Rule 168, the regular release and dissemination by or on behalf of an issuer of communications containing factual business information or forward-looking information where the issuer meets Form F-3 eligibility requirements (other than the reporting history requirements) and is issuing non-convertible investment grade securities.

In the 2011 Proposing Release, we proposed to revise these rules to refer to the new proposed instructions in General Instruction I.B.2 of Form S-3 or Form F-3, as appropriate. We received little comment on these proposals. One commentator did not believe amendments to these rules were required by the Dodd-Frank Act.[103] The commentator was concerned that the amendments would be burdensome on firms that publish research because they would have to determine the issuer's form eligibility each time they wanted to publish research instead of relying on a published credit rating.[104]

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[103] See letter from SIFMA.

[104] Id.

We do not believe that determining an issuer's form eligibility will be unduly burdensome for those seeking to publish research. A review of the issuer's or its parent company's publicly available filings, such as Forms 10-K or prospectuses, should indicate whether the issuer satisfies the eligibility requirements for Form S-3 or Form F-3.[105] We also believe that these revisions are appropriate both because of the Dodd-Frank Act's goal to reduce reliance on credit ratings and to promote regulatory consistency. As a result, we are adopting revisions to Rules 138, 139, and 168 to be consistent with the revisions we are adopting to the eligibility requirements in Forms S-3 and F-3.

3. Rule 134(a)(17)

Securities Act Rule 134(a)(17)[106] permits the disclosure of security ratings issued or expected to be issued by NRSROs in certain communications deemed not to be a prospectus or free writing prospectus. We proposed in the 2011 Proposing Release to remove this rule since we believe providing a safe harbor that explicitly permits the presence of a credit rating assigned by an NRSRO is not consistent with the purposes of Section 939A.

Commentators were opposed to this proposal.[107] Two commentators argued that removing Rule 134(a)(17) is not required by Section 939A of Dodd-Frank.[108] One

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[105] For example, for an issuer that is a subsidiary of a WKSI, the parent's Form 10-K would note its WKSI status. For the amount of non-convertible securities (other than common equity) outstanding or issued, the amounts in financial statements could be compared to prospectuses to determine that the securities were sold in registered offerings.

[106] 17 CFR 230.134(a)(17). These disclosures generally appear in "tombstone" ads or press releases announcing offerings. A communication is eligible for the safe harbor if the information included is limited to such matters as, among others, factual information about the identity and business address of the issuer, title of the security and amount being offered, the price or a bona fide estimate of the price or price range, the names of the underwriters participating in the offering and the name of the exchange where such securities are to be listed and the proposed ticker symbols.

[107] See letters from SIFMA, Davis Polk, Cleary, Roundtable, ASF and Debevoise.

[108] See letters from SIFMA and Davis Polk.

commentator did not believe that allowing the inclusion of credit rating information encourages reliance on ratings but instead merely reflects the fact that ratings are relevant to investors.[109] Another commentator believed we should expand the rule to cover all credit ratings instead of those issued by NRSROs.[110] That commentator believed removing Rule 134(a)(17) would result in less information being available to investors. One commentator believed the amendment is not required by either the letter or spirit of Section 939A and would chill information available to investors.[111]

Notwithstanding the comments we received, we believe it is appropriate to revise Rule 134 in order to remove the safe harbor for disclosure of credit ratings assigned by NRSROs. We believe providing a safe harbor that explicitly permits the presence of a credit rating assigned by an NRSRO is not consistent with the purposes of Section 939A to reduce reliance on credit ratings. We also do not believe this change will have a material impact on the information available to investors because issuers will (as is common now) be able to disclose a credit rating in a free writing prospectus.[112] In addition, as we noted in the 2011 Proposing Release, removing the safe harbor for this

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109 See letter from SIFMA.

110 See letter from Davis Polk. A proposal to expand Rule 134(a)(17) was included in the 2008 proposing Release. We received little comment on the proposal at that time. As we noted in the 2011 Proposing Release, we do not believe it is appropriate to expand the rule to cover all credit ratings issued because we do not believe it would be consistent with the otherwise limited disclosures covered by the Rule 134 safe harbor.

111 See letter from Cleary. See also letters from Roundtable, ASF and Debevoise.

112 One commentator pointed out that not all companies are eligible to use free writing prospectuses. See letter from SIFMA. The examples given by the commentator covered investment companies and business development companies. However, pursuant to Rule 134(g), those companies currently cannot rely on the safe harbor in Rule 134, so the amendment to Rule 134(a)(17) should not affect those companies. In addition, we note that the exclusion from the ability to use free writing prospectuses for "ineligible issuers" does not preclude such issuers (except for blank check companies, penny stock companies and shell companies) from using free writing prospectuses that are "term sheets," which is a common way that issuers disclose the credit rating for a particular offering.

type of information would not necessarily result in a communication that included this information being deemed to be a prospectus or a free writing prospectus. The revision results in there no longer being a safe harbor for a communication that included this information. Instead, the determination as to whether such information constitutes a prospectus would be made in light of all of the circumstances of the communication.

III. Paperwork Reduction Act

A. Background

Certain provisions of the rule amendments contain a "collection of information" within the meaning of the Paperwork Reduction Act of 1995 (PRA).[113] The Commission is submitting these amendments and rules to the Office of Management and Budget (OMB) for review in accordance with the PRA.[114] An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:[115]

"Form S-1" (OMB Control No. 3235-0065) ;

"Form S-3" (OMB Control No. 3235-0073);

"Form F-1" (OMB Control No. 3235-0258);

"Form F-3" (OMB Control No. 3235-0256);

"Form F-9" (OMB Control No. 3235-0377); and

"Form F-10" (OMB Control No. 3235-0380).

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113 44 U.S.C. 3501 et seq.

114 44 U.S.C. 3507(d) and 5 CFR 1320.11.

115 Although we are adopting amendments to Form S-4, Form F-4 and Schedule 14A, we do not anticipate any changes to the reporting burden or cost burdens associated with these forms, or the number of respondents as a result of the proposed amendments.

We adopted all of the existing regulations and forms pursuant to the Securities Act or the Exchange Act. These regulations and forms set forth the disclosure requirements for registration statements and proxy statements that are prepared by issuers to provide investors with information. Our amendments to existing forms and regulations are intended to replace rule and form requirements of the Securities Act and the Exchange Act that rely on security ratings with alternative requirements.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collection of information. There is no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on the EDGAR filing system.

B. Summary of Collection of Information Requirements

The criteria we are adopting for issuers of non-convertible securities, other than common equity, who are otherwise ineligible to use Form S-3 or Form F-3 to conduct primary offerings because they do not meet the aggregate market value requirement is designed to capture those issuers with a wide market following.

Some commentators believed that our estimates in the 2011 Proposing Release understated the number of companies that would no longer be eligible under the proposals.[116] One commentator reviewed data from March 2008 to March 2011 in the utility industry and believed that at least 60 utility companies would no longer have been eligible to use Form S-3 or Form F-3 over that three year period.[117] One commentator believed the potential number of utility companies who would lose eligibility may have

116 See letters from SIFMA, Entergy and EEI.

117 See letter from SIFMA.

been understated because utility companies did not make offerings due to market conditions.[118] Another commentator believed that our PRA figures were "way off" because there are "far more S-1, S-3, F-1 and F-3 filings" than described in the release, although the commentator did not provide any additional data.[119] We believe the changes we have made to the proposals will reduce the number of currently eligible issuers that would no longer be eligible to use Form S-3 and Form F-3, particularly utility companies. Our revised PRA estimates reflect the expected impact.[120]

We expect that under the new criteria, the number of companies in a 12-month period eligible to register on Form S-3 or Form F-3 for primary offerings of non-convertible securities, other than common equity, for cash will increase by approximately four issuers for Form S-3 and one issuer for Form F-3.[121] We expect that the issuers filing on Form S-1 and F-1 will decrease by the same amounts.

In addition, because these amendments relate to eligibility requirements, rather than disclosure requirements, the Commission does not expect that the revisions adopted will impose any new material recordkeeping or information collection requirements. Issuers may be required to ascertain the aggregate principal amount of non-convertible securities, other than common equity, outstanding that were issued in registered primary

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118 See letter from Entergy.

119 See letter from Chang.

120 In addition, our estimates reflect the expected impact after the expiration of the temporary "grandfather" provisions in Form S-3, Form F-3 and Form F-10. Those "grandfather" provisions will expire three years after the effective date of the new rules.

121 In Section II.A.4.ii above, we estimated that approximately four companies who made an offering between January 1, 2006 and August 15, 2008 would no longer be eligible to use Form S-3 and Form F-3. We further estimated that 16 issuers would become newly eligible to use Form S-3 and Form F-3. As a result, we estimate that a net of 12 issuers would have become eligible to use Form S-3 and Form F-3 over that approximately 31-month time period. For purposes of the PRA estimates, we estimate that over a 12-month time period that five issuers would become eligible to use Form S-3 or Form F-3 (approximately one-third of 12). We further estimate that four of those five will become eligible to use Form S-3 and one will become eligible to use Form F-3.

offerings for cash, but the Commission believes that this information should be readily available and easily calculable.

We are also rescinding Form F-9, which is the form used by qualified Canadian issuers to register investment grade securities. Because of recent Canadian regulatory developments, we no longer believe that keeping Form F-9 as a distinct form would serve a useful purpose. In addition, Canadian issuers have infrequently used Form F-9. As a result of the rescission of Form F-9, we believe there would be an additional six filers on Form F-10.[122] We do not believe that the burden of preparing Form F-10 will change because the information required by Form F-10 is substantially the same as that required by Form F-9.

C. Paperwork Reduction Act Burden Estimates

For purposes of the Paperwork Reduction Act, we estimate that there will be no annual incremental increase in the paperwork burden for issuers to comply with our collection of information requirements. We do estimate, however, that the number of respondents on Forms S-3, F-3 and F-10 will increase as a result of the amendments. As a result, the aggregate burden hour and professional cost numbers will increase for those forms due to the additional number of respondents. We also expect that the number of respondents will decrease for Forms S-1 and F-1, which will reduce the aggregate burden hour and professional costs for those forms.[123] These estimates represent the average burden for all companies, both large and small. For each estimate, we calculate that a

[122] Based on a review of Commission filings, since January 1, 2007, only 22 issuers have filed on Form F-9. As a result, we estimate that over a 12-month period, approximately six additional Form F-10s will be filed.

[123] We propose to rescind Form F-9, which will eliminate the PRA burden for that form, but we expect that the number of respondents on Form F-10 will increase as a result.

portion of the burden will be carried by the company internally, and the other portion will be carried by outside professionals retained by the company. The portion of the burden carried by the company internally is reflected in hours, while the portion of the burden carried by outside professionals retained by the company is reflected as a cost. We estimate these costs to be $400 per hour. A summary of the changes is included in the table below.

Table 1: Calculation of Incremental PRA Burden Estimates

	Current Annual Responses (A)	Proposed Annual Responses (B)	Current Burden Hours (C)	Increase/(Decrease) in Burden Hours (D)	Proposed Burden Hours (E) =C+D	Current Professional Costs (F)	Increase/(Decrease) in Professional Costs (G)	Proposed Professional Costs =F+G
Form S-1	768	764	186,687	(972)	185,715	$224,024,000	($1,166,792)	$222,857,208
Form S-3	2,065	2,069	243,927	472	244,399	$292,711,500	$566,996	$293,278,496
Form F-1	42	41	18,975	(452)	18.523	$22,757,400	($541,843)	$22,215,557
Form F-3	106	107	4,426	42	4,468	$5,310,600	$50,100	$5,360,700
Form F-10	75	81	469	36	505	$562,500	$45,000	$607,500
Total				(874)			($1,046,539)	

IV. Cost-Benefit Analysis

A. Amendments

As discussed above, we are adopting rule amendments in light of Section 939A of the Dodd-Frank Act to eliminate references to credit ratings in our rules in order to reduce reliance on credit ratings.[124] Today's amendments seek to replace rule and form requirements of the Securities Act and the Exchange Act that rely on security ratings by NRSROs with alternative requirements that do not rely on ratings.

124 See note 18 above and related text.

The Commission is revising the transaction eligibility requirements of Forms S-3 and F-3 and other rules and forms that refer to these eligibility requirements. Currently, these forms allow issuers who do not meet the forms' other transaction eligibility requirements to register primary offerings of non-convertible securities for cash if such securities are rated investment grade by an NRSRO. The eligibility standard of having an investment grade rating has been used to indicate whether an issuer is widely followed in the marketplace. The revised rules would replace this transaction eligibility requirement with a requirement that, for primary offerings of non-convertible securities, other than common equity, for cash, an issuer is eligible if:

(i) the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) the issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) the issuer is a wholly-owned subsidiary of a WKSI as defined in Rule 405 under the Securities Act; or

(iv) the issuer is a majority-owned operating partnership of a REIT that qualifies as a WKSI; or

(v) the issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S-3 or Form F-3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments.

We are making conforming revisions to Form S-4, Form F-4 and Schedule 14A. We are also revising Rules 138, 139, and 168 under the Securities Act, which address certain communications by analysts and issuers, to be consistent with the revisions to Form S-3 and Form F-3. We are also removing Rule 134(a)(17) so that disclosure of credit ratings information is no longer covered by the safe harbor that deems certain communications not to be a prospectus or a free writing prospectus. Finally, we are rescinding Form F-9.

We are sensitive to the costs and benefits imposed by our rules. The discussion below focuses on the costs and benefits of the amendments we are making to implement the Dodd-Frank Act within our discretion under that Act, rather than the costs and benefits of the Dodd-Frank Act itself. The two types of costs and benefits may not be entirely separable to the extent that our discretion is exercised to realize the benefits intended by the Dodd-Frank Act.

B. Benefits

As we stated in the 2011 Proposing Release, we believe that having issued $1 billion of registered non-convertible securities over the prior three years would generally correspond with a wide following in the marketplace.[125] As described above, the amendments we are adopting today would allow additional issuers to remain eligible to

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[125] See 2011 Proposing Release, supra note 15, at note 52.

use Form S-3 and Form F-3 based on a variety of criteria. The amendments would replace the investment grade criteria for eligibility to register offerings of non-convertible securities on Form S-3 or Form F-3. The criteria we are adopting today reserves the use of Form S-3 and Form F-3 for widely followed issuers while allowing a greater number of issuers to remain eligible to use those forms while also allowing some widely followed issuers to become newly eligible to use the forms.

Issuers will no longer be required to purchase ratings services in order to be eligible for registering a transaction on Form S-3 or Form F-3 and will benefit from not having to incur the associated costs of obtaining a credit rating to the extent that they decide not to obtain a credit rating for other uses. As a result, these rules could lessen the bargaining power rating agencies have with issuers (to the extent such bargaining power was artificially enhanced by the prior requirements of such forms), potentially lowering the cost of obtaining ratings. In addition, the removal of a provision in our forms requiring the use of a credit rating to establish eligibility for a type of registration generally reserved for widely followed issuers obviates a market externality that may have constituted a barrier to entry to potential competitors seeking to develop alternative methods of communicating creditworthiness to investors. Accordingly, removing any perceived imprimatur that may have resulted from the reference to credit ratings in Form S-3 and Form F-3 may increase competition in the financial services sector.

The change in the criteria would allow issuers of high yield securities or issuers of non-convertible securities (other than common equity) without a credit rating that were previously unable to avail themselves of the shelf offering process and forward incorporation by reference, to have faster access to capital markets and incur lower transaction costs.[126] These amendments therefore allow the set of issuers with credit risk profiles that are not "investment grade" but that are otherwise widely followed in the marketplace to have access to short-form registration and the shelf offering process. More broadly, to the extent that the eligibility criteria are a better measure of whether or not an issuer is widely followed than receipt of an investment grade credit rating, then any change to the eligible set of issuers would more closely follow the intent of allowing forward incorporation by reference for appropriate issuers.

We believe the benefits of rescinding Form F-9 would be to reduce redundancy by having multiple forms with the same requirements which would streamline the registration process for Canadian issuers.

We believe the benefits of the revisions to Rules 138, 139 and 168 will be to promote regulatory consistency by continuing to use the Form S-3 and Form F-3 standards to determine whether those rules can be relied on. In addition, we believe that removing Rule 134(a)(17) may have the benefit of reducing reliance on credit ratings because it would lessen the extent to which the Commission's rules provide an imprimatur to credit ratings, particularly those issued by NRSROs.

C. Costs

To the extent that the new eligibility standards result in some issuers who were previously eligible to use Forms S-3 and F-3 to register primary offerings of non-convertible securities other than common equity to be required to register on Form S-1,[127]

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126 As discussed in Section II.A.4.ii above, we estimate that the amendments adopted today would result in 16 issuers who previously filed on Form S-1 or F-1 becoming eligible to file on Form S-3 or Form F-3.

127 As discussed in Section II.A.4.ii above, we estimate that the amendments adopted today would result in four issuers no longer being eligible to use Form S-3 or Form F-3. As a result, these issuers would be required to file on Form S-1 or Form F-1.

this would result in increased costs of preparing and filing registration statements, which may decrease capital raising in registered offerings.[128] This would result in additional time spent in the offering process, and issuers would incur costs associated with preparing and filing post-effective amendments to the registration statement. In addition, the resulting loss of the ability to conduct a delayed offering "off the shelf" pursuant to Rule 415 under the Securities Act would result in costs due to the uncertainty an issuer might face regarding the ability to conduct offerings quickly at advantageous times. The increased costs of preparing and filing registration statements using Form S-1 or Form F-1 and the increased uncertainty regarding the issuer's ability to conduct offerings quickly at advantageous times are likely to increase an issuer's cost of capital. Moreover, this is not a one-time cost but would be incurred for each subsequent issuance.

One commentator believed the costs outweigh the benefits of the proposal.[129] That commentator estimated that a regulated insurance company registering non-variable annuity contracts on Form S-1 could face 250 hours of in-house legal time and 150 hours of business, outside counsel and auditor expenses if Form S-3 and Form F-3 were no longer available to such an issuer. The commentator believed the benefits noted in the proposing release were not significant enough to outweigh the costs and were

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128 The ability to conduct primary offerings on short form registration statements confers significant advantages on eligible companies by reducing the costs and increasing the speed of conducting a registered offering. The time required to prepare and update Form S-3 or F-3 is significantly lower than that required for Forms S-1 and F-1 primarily because registration statements on Forms S-3 and F-3 can be automatically updated. Forms S-3 and F-3 permit registrants to forward incorporate required information by reference to disclosure in their Exchange Act filings. In addition, companies that are eligible to register primary offerings on Form S-3 and Form F-3 generally are able to conduct offerings on a delayed basis "off the shelf" without further staff review and clearance. This enables eligible issuers to take advantage of beneficial market conditions to improve their access to capital and may lower their cost of funds. See Section III, above, for a discussion of the estimates of the paperwork costs of preparing and filing on Form S-1 associated with the amendments that we have prepared for purposes of the PRA.

129 See letter from Roundtable.

inappropriate "as collateral damage from legislation aimed at over-reliance on security ratings."[130] We expect the changes we have made to the proposal would limit the costs of the amendments since fewer companies would lose their ability to file on Form S-3 and Form F-3 as supported by our analysis of the issuers that issued non-convertible securities other than common equity between January 1, 2006 and August 15, 2008. In addition, we believe the "grandfather" provisions will also mitigate costs for any issuer that would become ineligible by giving such issuers time to adjust their capital raising practices.

We believe that the amendments could result in some issuers who are currently required to file on Form S-1 or Form F-1 becoming eligible to use Form S-3 or Form F-3. This could result in a cost to investors as there would be less information present in the prospectuses for these companies than there was previously. As a result, investors would have to seek out the Exchange Act reports (for example, by accessing the SEC website) of these issuers for company information which would no longer appear in the prospectus. However, we believe these costs might not be substantial to the extent that the new eligibility standards appropriately capture issuers with a wide market following for whom forward incorporation by reference is appropriate. Such new Form S-3 and Form F-3 issuers will also become eligible take advantage of the shelf offering process. This could result in additional costs to investors if they have less time to review available information before making an investment decision with respect to a takedown from a shelf registration statement.

130 See letter from Roundtable.

If there are some issuers who become eligible to use Form S-3 or Form F-3 who are not widely followed, then there could be costs to investors if information about the issuer is not available or considered by the marketplace.

The amendments could also result in some issuers that would have been eligible to use Form S-3 or Form F-3 because of their investment grade ratings and those that continue to be eligible under the new widely followed standards to decide not to get their securities rated. This could result in a cost to the investors to the extent that credit ratings were providing additional information to the marketplace.

The amendments to Rules 138, 139 and 168 could result in somewhat higher compliance costs if it requires more effort to determine whether an issuer is eligible to use Form S-3 or Form F-3. An issuer is currently eligible to use Form S-3 or Form F-3 for offerings of non-convertible securities, other than common equity, if the non-convertible securities are investment grade, which is a single, objective, bright-line determination. The amendments adopted today will provide several alternative criteria to determine Form S-3 and Form F-3 eligibility, which may make it more difficult to determine at any given point in time whether an issuer is eligible to make an offering of non-convertible securities, other than common equity, on Form S-3 or Form F-3. As a result, determining whether a research report can be published within the safe harbors of Rule 138, 139, or whether certain business information may be released under Rule 168 may be more costly.

The amendment to remove Rule 134(a)(17) could be a cost to investors if ratings information is less available to them, to the extent such ratings information is useful to investors. In addition, to the extent that issuers decide to continue to include ratings information in communications that previously were made in reliance on the Rule 134 safe harbor, they may incur costs in order to ascertain whether including such information would require compliance with prospectus filing requirements.

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a) of the Exchange Act[131] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act[132] and Section 3(f) of the Exchange Act[133] 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 would promote efficiency, competition, and capital formation.

Overall, we believe the changes will increase the efficiency of the shelf offering process by focusing eligibility on those issuers that are widely followed in the market and removing reliance on obtaining a particular credit rating. Our analysis indicates that the amendments will have two distinct effects. First, some issuers currently eligible to register primary offerings of non-convertible securities, other than common equity, on Forms S-3 and F-3 and to use the shelf offering process will lose their eligibility. Second, some issuers will become newly eligible to use Forms S-3 and F-3 and the shelf offering process. We believe that the rules will likely result in more widely followed

131 15 U.S.C. 78w(a).

132 15 U.S.C. 77b(b).

133 15 U.S.C. 78c(f).

issuers being eligible for short-form registration, which is why the rules may increase efficiency and promote capital formation. Issuers who become eligible to register offerings on Form S-3 and Form F-3 and avail themselves of the shelf offering process may now face relatively lower issuance costs, which would positively affect efficiency and capital formation of those issuers. As noted throughout this release, we anticipate that the number of such issuers would be small. In addition, we believe the "grandfather" provisions we are adopting will mitigate the disruption for issuers who may become ineligible to use Form S-3 or Form F-3 by giving them time to adjust their market practices. Because the number of eligible issuers will be roughly the same as under the previous criteria, we believe there would be a negligible impact on competition.

Although we do not believe the new rules will have a significant impact on the eligibility of issuers to use Form S-3 or Form F-3, by reducing reliance on credit ratings there could be an effect on the amount and cost of issuer information available to the market. Without a requirement for an issuer to receive an investment grade credit rating, issuers may have less of an incentive to have their securities rated. They may continue to have their securities rated for other reasons. However, to the extent issuers overall obtain fewer ratings, investors may have to place greater reliance on other financial information providers in their assessment of investor creditworthiness.

From one perspective, this may provide greater opportunity for other information providers to compete to provide credit evaluation services. . If the resulting competition reduces the cost, and maintains or increases the quality, of information in the marketplace regarding credit-worthiness, then this may result in a lower cost of capital and/or improved capital allocation decisions. However, if rating agencies provide investors with a unique set of information that other information providers cannot easily replicate – for instance, if they have access to issuer private information that is not common knowledge to the market – then investors may lose access to certain, valuable information to the extent that issuers chose not to have their securities rated. This may result in less efficient capital allocation. We do not believe this outcome likely because issuers may still find it beneficial to obtain a credit rating in order to provide that information to potential investors. As a result, we believe that the net effect of this rule will be to increase the level of informational efficiency.

The Commission believes that the rescission of Form F-9 could reduce confusion regarding the appropriate form to use for the registration of securities by Canadian issuers, which could result in increased market efficiency.

VI. Regulatory Flexibility Act Certification

Under Section 605(b) of the Regulatory Flexibility Act,[134] we certified that, when adopted, the proposals would not have a significant economic impact on a substantial number of small entities. We included the certification in Part VIII of the 2011 Proposing Release. We did not receive any comments on the certification.

VII. Statutory Authority and Text of Rule and Form Amendments

We are adopting the amendments contained in this document under the authority set forth in Sections 6, 7, 10, 19(a) of the Securities Act and Sections 14 and 23(a) of the Exchange Act.

List of Subjects

17 CFR Parts 200, 229, 230, 232, 239, 240, and 249.

134 5 U.S.C. 605(b).

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

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

* * * * *

Subpart N -- Commission Information Collection Requirements Under the Paperwork Reduction Act: OMB Control Numbers

1. The authority citation for Part 200, Subpart N, continues to read as follows:

Authority: 44 U.S.C. 3506; 44 U.S.C. 3507.

* * * * *

2. Amend §200.800 by removing from paragraph (b) the entry for "Form F-9".

PART 229 -- STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 -- REGULATION S-K

3. The authority citation for Part 229 continues to read, in part, as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq., and 18 U.S.C. 1350 unless otherwise noted.

* * * * *

4. Amend §229.10 by removing the penultimate sentence from paragraph (c) introductory text, revising the first sentence in paragraph (c)(1)(i) by replacing the word

"NRSRO" with the phrase "nationally recognized statistical rating organization (NRSRO)" and removing the last sentence from paragraph (c)(1)(i).

PART 230 -- GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

5. The general authority citation for Part 230 is revised to read 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, 80a-37, and Pub. L. No. 111-203, §939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

6. Amend §230.134 by revising paragraph (a) introductory text, revising paragraph (a)(6), and removing and reserving paragraph (a)(17). The revisions read as follows:

§ 230.134 Communications not deemed a prospectus.

* * * * *

(a) Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph, provided that, except as to paragraphs (a)(4), (a)(5), and (a)(6) of this section, the prospectus included in the filed registration statement does not have to include a price range otherwise required by rule:

* * * * *

(6) In the case of a fixed income security with a fixed (non-contingent) interest rate provision, the yield or, if the yield is not known, the probable yield range, as

specified by the issuer or the managing underwriter or underwriters and the yield of fixed income securities with comparable maturity and security rating;

* * * * *

(17) [Reserved]

* * * * *

7. Amend §230.138 by revising paragraph (a)(2)(ii)(B)(2) to read as follows:

§ 230.138 Publications or distributions of research reports by brokers or dealers about securities other than those they are distributing.

(a) * * *

(2) * * *

(ii) * * *

(B) * * *

(2) Is issuing non-convertible securities, other than common equity, and the issuer meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in 17 CFR 239.33 of this chapter); and

* * * * *

8. Amend §230.139 by revising paragraphs (a)(1)(i)(A)(1)(ii) and (a)(1)(i)(B)(2)(ii) to read as follows:

§ 230.139 Publications or distributions of research reports by brokers or dealers distributing securities.

(a) * * *

(1) * * *

(i) * * *

(A)(1) * * *

(ii) At the date of reliance on this section, is, or if a registration statement has not been filed, will be, offering non-convertible securities, other than common equity, and meets the requirements for the General Instruction I.B.2. of Form S-3 or Form F-3 (referenced in 17 CFR 239.13 and 17 CFR 239.33 of this chapter); or

* * * * *

(B) * * *

(2) * * *

(ii) Is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in 17 CFR 239.33 of this chapter); and

* * * * *

9. Amend §230.168 by revising paragraph (a)(2)(ii)(B) to read as follows:

§ 230.168 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information and forward-looking information.

* * * * *

(a) * * *

(2) * * *

(ii) * * *

(B) Is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in 17 CFR 239.33 of this chapter); and

* * * * *

10. Amend §230.467 by removing:

a. "F-9," from the heading;

b. "Form F-9 or" and "239.39 or" from the second sentence of paragraph (a); and

c. "Form F-9 or" from the first sentence of paragraph (b).

11. Amend §230.473 by removing "F-9 or" and "239.39 or" from paragraph (d).

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

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

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

13. Amend §232.405 by removing:

a. "both Form F-9 (§239.39 of this chapter) and" from the second sentence of Preliminary Note 1;

b. "either Form F-9 or" from paragraphs (a)(2), (a)(3) and (a)(4); and

c. "both Form F-9 and" and "Form F-9 and" in the second sentence of Note to §232.405, and "both Form F-9 and" in the penultimate sentence of Note to §232.405.

PART 239 --FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

14. The general authority citation for part 239 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, 80a–37, and Pub. L. No. 111-203, §939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

15. Amend §239.13 by adding "to paragraph (b)(1)" to the instruction heading following paragraph (b)(1) and by revising paragraphs (b)(2) and (b)(5) to read as follows:

§ 239.13 Form S-3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

* * * * *

(b) * * *

(2) <u>Primary Offerings of Non-Convertible Securities Other than Common Equity</u>. Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant:

(i) Has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) Has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(iv) Is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(v) Discloses in the registration statement that it has a reasonable belief that it would have been eligible to use this Form S-3 as of [Insert date that is 29 days after publication in the Federal Register] because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on this Form S-3 on or before [Insert date that is 3 years and 30 days after publication in the Federal Register].

Instruction to paragraph (b)(2). For purposes of paragraph (b)(2)(i) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933 (15 U.S.C. 77b(a)(13), when using this Form S-3 to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia ("insurance contracts"), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act of 1933 (15 U.S.C. 77a)), issued in offerings registered under the Securities Act over the prior three years. For purposes of paragraph (b)(ii) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933, when using this Form S-3 to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act of 1933), issued in offerings registered under the Securities Act of 1933.

* * *

(5) The securities are investment grade securities. An asset-backed security is an investment grade security if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in 17 CFR 240.15c3-1(c)(2)(vi)(F)) has rated the security in one of its generic rating categories that signifies investment grade; typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade.

* * * * *

16. Amend Form S-3 (referenced in 17 CFR 239.13) by:

a. Revising General Instruction I.B.2.;

b. Revising General Instruction I.B.5(a)(i).; and

c. Revising Instruction 3 to the signature block to remove the word "Requirements" and add in its place the word "Requirement" and to remove the phrase "B.2. or".

The revision reads as follows:

Note -The text of Form S-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form S-3

* * * * *

B. Transaction Requirements. * * *

2. Primary Offerings of Non-Convertible Securities Other than Common Equity.

Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant (i) has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or (ii) has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or (iii) is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or (iv) is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or (v) discloses in the registration statement that it has a reasonable belief that it would have been eligible to use Form S-3 as of [Insert date that is 29 days after publication in the Federal Register] because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on Form S-3 on or before [Insert date that is 3 years and 30 days after publication in the Federal Register].

Instruction. For purposes of Instruction I.B.2(i) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the

United States or the District of Columbia ("insurance contracts"), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act over the prior three years. For purposes of Instruction I.B.2(ii) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act.

* * *

5. Offerings of Investment Grade Asset-Backed Securities.

(a) * * *

(i) The securities are "investment grade securities." An asset-backed security is an "investment grade security" if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in Rule 15c3-1(c)(2)(vi)(F) under the Exchange Act (§240.15c3-1(c)(2)(vi)(F)) has rated the security in one of its generic rating categories which signifies investment grade; typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade.

* * * * *

17. Amend Form S-4 (referenced in 17 CFR 239.25) by revising General Instruction B.1.a.(ii)(B) to read as follows:

Note – The text of Form S-4 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

B. Information with Respect to the Registrant.

1. * * *

a. * * *

(ii) * * *

(B) Non-convertible debt or preferred securities are to be offered pursuant to this registration statement and the requirements of General Instruction I.B.2. of Form S-3 have been met for the securities to be registered on this registration statement; or

* * * * *

18. Amend §239.33 by revising paragraph (b)(2) to read as follows:

§ 239.33 Form F-3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.

* * * * *

(b) * * *

(2) Primary Offerings of Non-Convertible Securities Other than Common Equity. Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant:

(i) Has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) Has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act of 1933 (15 U.S.C. 77a); or

(iii) Is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(iv) Is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(v) Discloses in the registration statement that it has a reasonable belief that it would have been eligible to use Form F-3 as of [Insert date that is 29 days after publication in the Federal Register] because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on Form F-3 on or before [Insert date that is 3 years and 30 days after publication in the Federal Register].

Instruction to paragraph (b)(2). For purposes of paragraph (b)(2)(i) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933 (15

U.S.C. 77b(a)(13)), when using this Form F-3 to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia ("insurance contracts"), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act of 1933 (15 U.S.C. 77a)), issued in offerings registered under the Securities Act of 1933 over the prior three years. For purposes of paragraph (b)(ii) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933, when using this Form F-3 to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act of 1933), issued in offerings registered under the Securities Act of 1933.

* * * * *

19. Amend Form F-3 (referenced in 17 CFR 239.33) by:

a. Revising General Instruction I.B.2.; and

b. Removing Instruction 3 to the signature block.

The revision reads as follows:

Note – The text of Form F-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM F-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form F-3

* * * * *

B. Transaction Requirements * * *

2. Primary Offerings of Non-Convertible Securities Other than Common Equity.

Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant (i) has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or (ii) has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or (iii) is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or (iv) is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or (v) discloses in the registration statement that it has a reasonable belief that it would have been eligible to use Form F-3 as of [Insert date that is 29 days after publication in the Federal Register] because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on Form F-3 on or before [Insert date that is 3 years and 30 days after publication in the Federal Register].

Instruction. For purposes of Instruction I.B.2(i) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia ("insurance contracts"), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act over the prior three years. For purposes of Instruction I.B.2(ii) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act.

* * * * *

20. Amend Form F-4 (referenced in 17 CFR 239.34) by revising General Instruction B.1(a)(ii)(B).

The revision reads as follows:

Note – The text of Form F-4 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM F-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

B. Information with Respect to the Registrant

1. * * *

a. * * *

(ii) * * *

(B) Non-convertible debt or preferred securities are to be offered pursuant to this registration statement and the requirements of General Instruction I.B.2. of Form F-3 have been met for the securities to be registered on this registration statement; or

* * * * *

21. Amend §239.38 by removing "Form F-9" from paragraph (h)(3).

22. Amend Form F-8 (referenced in 17 CFR 239.38) by removing "Form F-9," from each of paragraph A.(3) of General Instruction III and paragraph B. of General Instruction V.

Note – The text of Form F-8 does not, and this amendment will not, appear in the Code of Federal Regulations.

23. Remove and reserve §239.39 (referencing Form F-9).

24. Amend §239.40 by removing "Form F-9" from paragraph (c)(4).

25. Amend Form F-10 (referenced in 17 CFR 239.40) by:

a. In General Instruction I.C.(3), removing "and" after the semi-colon;

b. In General Instruction I.C.(4), removing "Form F-9," removing the period, and adding in its place "; and"; and

c. Adding paragraph C.(5) of General Instruction I to read as follows:

Note – The text of Form F-10 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM F-10

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

C. Form F-10 is available to any Registrant that:

(1) * * *

(5) if it does not meet the requirements of I.C.(4) or I.H., discloses in Part II of the registration statement that it has a reasonable belief that it would have been eligible to make an offering of investment grade, non-convertible securities on Form F-9 as of December 30, 2012, discloses the basis for such belief, and files a final prospectus for an offering under the registration statement on or prior to December 31, 2015.

* * * * *

26. Amend §239.41 by removing "Form F-9" from paragraph (h)(3).

27. Amend Form F-80 (referenced in 17 CFR 239.41) by removing "Form F-9" in paragraph A.(3) of General Instruction III and paragraph B. of General Instruction V.

Note – The text of Form F-80 does not, and this amendment will not, appear in the Code of Federal Regulations.

28. Amend §239.42 by removing "F-9," from the heading and from each of paragraphs (a) and (e).

29. Amend Form F-X (referenced in 17 CFR 239.42) by removing "F-9," from each of paragraphs (a) and (e) of General Instruction I, and each of paragraphs (a) and (c) of General Instruction II.F.

Note – The text of Form F-X does not, and this amendment will not, appear in the Code of Federal Regulations.

* * * * *

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

30. The general authority citation for part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; 18 U.S.C. 1350, 12 U.S.C. 5221(e)(3), and Pub. L. No. 111-203, §939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

31. Amend § 240.14a-101 by revising Note E(2)(ii) to read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

* * * * *

Notes

* * * * *

E. * * *

(2) * * *

(ii) Action is to be taken as described in Items 11, 12, and 14 of this schedule which concerns non-convertible debt or preferred securities issued by a registrant meeting the requirements of General Instruction I.B.2. of Form S-3 (referenced in 17 CFR 239.13 of this chapter); or

* * * * *

PART 249 -- FORMS, SECURITIES EXCHANGE ACT OF 1934

32. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

33. Amend §249.240f by:

a. Removing "F-9," in paragraph (a); and

b. Removing in paragraph (b)(4) the phrase "; provided, however, no market value threshold need be satisfied in connection with non-convertible securities eligible for registration on Form F-9 (§239.39 of this chapter)".

34. Amend Form 40-F (referenced in 17 CFR 249.240f) by:

a. In General Instruction A.(i), removing "F-9";

b. Removing from paragraph (2)(iv) of General Instruction A. the phrase "; provided, however, that no market value threshold need be satisfied in connection with non-convertible securities eligible for registration on Form F-9" and adding in its place the phrase "or the Registrant filed a Form F-9 with the Commission on or before December 30, 2012"; and

c. Revising paragraph (2) of General Instruction C. to read as follows:

(2) Any financial statements, other than interim financial statements, included in this Form by registrants registering securities pursuant to Section 12 of the Exchange Act

or reporting pursuant to the provisions of Section 13(a) or 15(d) of the Exchange Act must be reconciled to U.S. GAAP as required by Item 17 of Form 20-F under the Exchange Act, unless this Form is filed with respect to a reporting obligation under Section 15(d) that arose solely as a result of a filing made on Form F-7, F-8, F-9 or F-80, in which case no such reconciliation is required.

Note – The text of Form 40-F does not, and this amendment will not, appear in the Code of Federal Regulations.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: July 27, 2011

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 240 and 249

Release No. 34-64976; File No. S7-10-10

RIN 3235-AK55

Large Trader Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting new Rule 13h-1 and Form 13H under Section 13(h) of the Securities Exchange Act of 1934 ("Exchange Act") to assist the Commission in both identifying, and obtaining trading information on, market participants that conduct a substantial amount of trading activity, as measured by volume or market value, in the U.S. securities markets. Rule 13h-1 will require a "large trader," defined as a person whose transactions in NMS securities equal or exceed 2 million shares or $20 million during any calendar day, or 20 million shares or $200 million during any calendar month, to identify itself to the Commission and make certain disclosures to the Commission on Form 13H. Upon receipt of Form 13H, the Commission will assign to each large trader an identification number that will uniquely and uniformly identify the trader, which the large trader must then provide to its registered broker-dealers. Such registered broker-dealers will then be required to maintain records of two additional data elements in connection with transactions effected through accounts of such large traders (the large trader identification number, and the time transactions in the account are executed). In addition, the Commission is requiring that such broker-dealers report large trader transaction information to the Commission upon request through the Electronic Blue Sheets systems currently used by broker-dealers for reporting trade

information. Finally, certain registered broker-dealers subject to the Rule will be required to perform limited monitoring of their customers' accounts for activity that may trigger the large trader identification requirements of Rule 13h-1.

The large trader reporting requirements are designed to provide the Commission with a valuable source of useful data to support its investigative and enforcement activities, as well as facilitate the Commission's ability to assess the impact of large trader activity on the securities markets, to reconstruct trading activity following periods of unusual market volatility, and to analyze significant market events for regulatory purposes.

DATES:	Effective Date:	[Insert date 60 days after publication in the Federal Register]
	Compliance Dates:	[Insert date 120 days after publication in the Federal Register] for the requirement on large traders to identify to the Commission pursuant to Rule 13h-1(b).
		[Insert date 270 days after publication in the Federal Register] for broker-dealers to maintain records, report, and monitor large trader activity pursuant to Rule 13h-1(d), (e), and (f).

FOR FURTHER INFORMATION CONTACT: Richard R. Holley III, Assistant Director, at (202) 551-5614, Christopher W. Chow, Special Counsel, at (202) 551-5622, Gary M. Rubin, Attorney, at (202) 551-5669, or Kathleen Gray, Attorney, at (202) 551-5305, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION

Table of Contents

I. **Introduction**

The Commission's ability to analyze market movements and investigate the causes of market events in an expeditious manner, as well as efficiently conduct investigations of regulated entities and bring and prosecute enforcement matters, is influenced greatly by its ability to promptly and efficiently identify significant market participants across equities and options markets and collect uniform data on their trading activity. Though the large trader rule was proposed before the market events of May 6, 2010, that incident has emphasized the importance of enhancing the Commission's ability to quickly and accurately analyze and investigate major

market events, and has highlighted the need for an efficient and effective mechanism for gathering data on the most active market participants.[1] The large trader reporting requirements that the Commission is now adopting will enhance, in the near term, the Commission's ability to identify, and collect information on the trading activity of, the most significant participants in the U.S. markets.[2]

On April 23, 2010, Proposed Rule 13h-1 was published for public comment in the Federal Register.[3] The Commission received 87 comment letters on the proposal from investment advisers, broker-dealers, institutional and individual investors, industry trade groups, and other market participants.[4] Commenters generally supported the goals of the proposal. As further discussed below, however, some commenters expressed concern about certain aspects of the proposal and recommended that the proposal be amended or clarified in certain respects.

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1 On May 6, 2010, the prices of many U.S.-based equity products experienced an extraordinarily rapid decline and recovery. See Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues at http://www.sec.gov/news/studies/2010/marketevents-report.pdf. See also Preliminary Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues at http://www.sec.gov/sec-cftc-prelimreport.pdf.

2 Longer term, the Commission expects the consolidated audit trail proposal, if adopted, to further enhance access by the Commission and self-regulatory organizations to order and trade data from all market participants. See Securities Exchange Act Release No. 62174 (May 26, 2010), 75 FR 32556 (June 8, 2010) (proposed Consolidated Audit Trail) (File No. S7-11-10) ("CAT Proposal"). As discussed further below, the aspects of the large trader reporting rule that enable the collection of information on the identity of large traders, including a large trader identification number, would not be replicated or superseded by the consolidated audit trail and would remain as a key tool in the Commission's oversight of the markets for the long term.

3 See Securities Exchange Act Release No. 61908 (April 14, 2010), 75 FR 21456 (April 23, 2010) (File No. S7-10-10) ("Proposing Release").

4 Copies of comments received on the proposal are available on the Commission's website at http://www.sec.gov/comments/s7-10-10/s71010.shtml.

Some commenters also expressed concern with the proposed rule in light of the separate proposal to establish a consolidated audit trail.[5]

After careful review and consideration of the comment letters, the Commission is adopting Rule 13h-1 (the "Rule") and Form 13H (the "Form") with certain modifications, discussed below, to address concerns expressed by some commenters.

II. Background

The Commission is in the process of conducting a broad and critical look at U.S. market structure in light of the rapid development in trading technology and strategies. The Commission has proposed several rulemakings, including this rulemaking, to address potential discrete issues in the current market structure.[6] In addition, last year the Commission published a concept release on equity market structure designed to further the Commission's broad review of whether its rules have kept pace with, among other things, changes in trading technology and practices.[7]

The Commission's ongoing review of market structure comes at a time when U.S. securities markets are experiencing a dynamic transformation, reflecting a decades-long evolution from a market structure with primarily manual trading to a market structure with primarily automated trading. Electronic trading allows ever-increasing volumes of securities transactions to take place across an expanding multitude of trading systems that together

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5 See CAT Proposal, supra note 2.

6 See, e.g., Securities Exchange Act Release Nos. 60684 (September 18, 2009), 74 FR 48632 (September 23, 2009) (proposal to eliminate flash order exception from Rule 602 of Regulation NMS) (File No. S7-21-09); 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009) (proposal to regulate non-public trading interest) (File No. S7-27-09); 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (File No. S7-03-10) (adopting Rule 15c3-5 under the Exchange Act addressing risk management controls for brokers or dealers with market access); and CAT Proposal, supra note 2.

7 See Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (File No. S7-02-10).

constitute the U.S. national market system. Competition among markets has facilitated the ability of large institutional and other professional market participants to employ sophisticated trading methods to trade electronically on multiple venues simultaneously in huge volumes with great speed.[8]

Given the dramatic changes to the securities markets, the Commission believes it is appropriate to exercise its authority under Section 13(h) of the Exchange Act[9] to establish large trader reporting requirements. Large trader reporting requirements will provide the Commission with a valuable source of useful data that will greatly enhance the Commission's ability to identify large market participants, and collect and analyze information on their trading activity.

Currently, to support its regulatory and enforcement activities, the Commission collects transaction data from registered broker-dealers through the Electronic Blue Sheets ("EBS") system.[10] The EBS system generally is used to analyze trading in a small sample of securities

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[8] Market analysts have offered a wide range of estimates for the level of activity attributable to one category of large traders -- high frequency traders -- but these estimates typically exceed 50% of total volume. See, e.g., Preliminary Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, May 18, 2010, at Appendix A-11 ("Estimates of HFT volume in the equity markets vary widely, though they often are 50 percent of total volume or higher."). See also, e.g., Scott Patterson and Goeffrey Rogow, What's Behind High-Frequency Trading, Wall Street Journal, August 1, 2009 ("High frequency trading now accounts for more than half of all stock-trading volume in the U.S."); and Rob Iati, The Real Story of Trading Software Espionage, Advanced Trading, July 10, 2009, available at http://advancedtrading.com/algorithms/showArticle.jhtml?articleID=218401501 (high frequency trading accounts for 73% of U.S. equity trading volume). One source estimates that, five years ago, that number was less than 25%. See Rob Curran & Geoffrey Rogow, Rise of the (Market) Machines, Wall Street Journal, June 19, 2009, available at http://blogs.wsj.com/marketbeat/2009/06/19/rise-of-the-market-machines/. The trend is clear that high frequency traders now play an increasingly prominent role in the securities markets.

[9] 15 U.S.C. 78m(h), as adopted by the Market Reform Act of 1990 ("Market Reform Act"), PL 101-432 (HR 3657), October 16, 1990.

[10] See 17 CFR 240.17a-25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers).

over a limited period of time.[11] However, the EBS system lacks two important data elements that limit its usefulness when reconstructing market activity: time of execution for the order and a uniform identifier to identify the participant that effected the trade.[12] In addition, EBS does not require, as is contemplated by the large trader reporting system outlined by Section 13(h)(2) of the Exchange Act,[13] that transaction data be available on a next-day basis, which can delay the Commission's ability to promptly collect and begin to analyze transaction data following a market event. The Commission's adoption today of Rule 13h-1 and Form 13H is designed to address certain of these limitations of EBS.

A. The Market Reform Act

Following declines in the U.S. securities markets in October 1987 and October 1989, Congress recognized that the Commission's ability to analyze the causes of a market crisis was impeded by its lack of authority to gather trading information.[14] To address this concern,

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11 The difficulties in collecting trading data for analysis are reflected in the Commission's preliminary report on the events of May 6, 2010. See Preliminary Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, May 18, 2010, at 1 ("The reconstruction of even a few hours of trading during an extremely active trading day in markets as broad and complex as ours—involving thousands of products, millions of trades and hundreds of millions of data points—is an enormous undertaking. Although trading now occurs in microseconds, the framework and processes for creating, formatting, and collecting data across various types of market participants, products and trading venues is neither standardized nor fully automated. Once collected, this data must be carefully validated and analyzed.")

12 The shortcomings of the EBS system were noted by the Senate Committee on Banking, Housing and Urban Affairs in the Senate Report accompanying the Market Reform Act of 1990. See Senate Report, infra note 14, at 48.

13 See 15 U.S.C. 78m(h)(2) ("...records shall be available for reporting to the Commission... on the morning of the day following the day the transactions were effected....").

14 The legislative history accompanying the Market Reform Act also noted the Commission's limited ability to analyze the causes of the market declines of October 1987 and 1989. See generally Senate Comm. on Banking, Housing, and Urban Affairs, Report to accompany the Market Reform Act of 1990, S. Rep. No. 300, 101st Cong. 2d Sess. (May 22, 1990) (reporting S. 648) ("Senate Report") and House Comm. on Energy and Commerce, Report to accompany the Securities Market Reform Act of 1990, H.R. Rep. No. 524, 101st Cong. 2d Sess. (June 5, 1990) (reporting H.R. 3657) ("House Report").

Congress passed the Market Reform Act, which, among other things, amended Section 13 of the Exchange Act to add new subsection (h), authorizing the Commission to establish a large trader reporting system under such rules and regulations as the Commission may prescribe.[15]

The Market Reform Act authorizes the Commission to require large traders to self-identify to the Commission.[16] In addition, the Market Reform Act authorizes the Commission to collect from registered brokers or dealers information on the trading activity of large traders.[17] In particular, the Commission is authorized to require every registered broker or dealer to make and keep records with respect to securities transactions of large traders that equal or exceed a certain "reporting activity level" and report such transactions upon request of the Commission.[18]

B. Rule 17a-25 and the Enhanced EBS System

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15 See Market Reform Act, supra note 9.

16 Section 13(h) of the Exchange Act defines a "large trader" as "every person who, for his own or an account for which he exercises investment discretion, effects transactions for the purchase or sale of any publicly traded security or securities by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange, directly or indirectly by or through a registered broker or dealer in an aggregate amount equal to or in excess of the identifying activity level." See 15 U.S.C. 78m(h)(8)(A). The term "identifying activity level" is defined in Section 13(h) as "transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule or regulation, specifying the time interval during which such transactions shall be aggregated." See 15 U.S.C. 78m(h)(8)(C). The "identifying activity level" is set forth in paragraph (a)(7) of new Rule 13h-1.

17 See Senate Report, supra note 14, at 4, 44, and 71. In this respect, though self-regulatory organization ("SRO") audit trails provide a time-sequenced report of broker-dealer transactions, those audit trails do not identify the large trader in a uniform manner on an inter-market basis. Accordingly, the Commission is not presently able to utilize existing SRO audit trail data to accomplish the objectives of the Market Reform Act.

18 See 15 U.S.C. 78m(h)(2). Section 13(h) also provides the Commission with authority to determine the manner in which transactions and accounts should be aggregated, including aggregation on the basis of common ownership or control. See 15 U.S.C. 78m(h)(3). The term "reporting activity level" is defined in Section 13(h)(8)(D) of the Exchange Act to mean "transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule, regulation, or order, specifying the time interval during which such transactions shall be aggregated." See 15 U.S.C. 78m(h)(8)(D). The "reporting activity level" is set forth in paragraph (a)(8) of new Rule 13h-1.

In 2001, the Commission adopted Rule 17a-25 to enhance the EBS system and facilitate the Commission's ability to collect electronic transaction data to support its investigative and enforcement activities.[19] Rule 17a-25 enhanced the EBS system in three primary areas. First, it requires broker-dealers to submit to the Commission securities transaction information responsive to a Blue Sheets request in <u>electronic</u> format.[20] Second, the rule modified the EBS

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19 <u>See</u> Securities Exchange Act Release No. 44494 (June 29, 2001), 66 FR 35836 (July 9, 2001) (S7-12-00) (final rulemaking) ("Rule 17a-25 Release"); and 42741 (May 2, 2000), 65 FR 26534 (May 8, 2000) (proposed rulemaking) ("Rule 17a-25 Proposing Release"). In the late 1980s, the Commission and the SROs worked together to develop and implement a system with a uniform electronic format, commonly known as the EBS system, to replace the process by which the Commission would request and collect securities trading records from broker-dealers through mailed questionnaires (known as "blue sheets"). <u>See</u> Rule 17a-25 Proposing Release, 65 FR at 26534-35.

In the 1990s, the Commission twice proposed to use its authority under Section 13(h) of the Exchange Act to establish a large trader reporting system; neither system was adopted. In 1991, the Commission proposed a large trader reporting system that would have required large traders to disclose to the Commission their accounts and affiliations, and would have imposed recordkeeping and reporting requirements on broker-dealers with respect to the activity of their large trader customers. <u>See</u> Securities Exchange Act Release No. 29593 (August 22, 1991), 56 FR 42550 (August 28, 1991) (S7-24-91) ("1991 Proposal"). The 1991 proposal included an "identifying activity level," the triggering level at which large traders would be required to identify themselves to the Commission, of aggregate transactions during any 24-hour period that equals or exceeds either 100,000 shares or fair market value of $4,000,000, or any transactions that constitute program trading. <u>See</u> 1991 Proposal, 56 FR at 42551. Commenters expressed concerns about the initial proposal, including about the definition of large trader, the identifying activity level, the duty to supervise compliance, its costs, as well as various technical aspects of reporting. <u>See</u> Securities Exchange Act Release No. 33608 (February 9, 1994), 59 FR 7917 (February 17, 1994) (S7-24-91) ("1994 Reproposal"). In 1994, the Commission again proposed a large trader reporting system which, among other things, included an increased "identifying activity level" of aggregate transactions in publicly traded securities effected during a calendar day where the account is located that are equal to or greater than the lesser of 200,000 shares and fair market value of $2,000,000 or fair market value of $10,000,000. <u>See</u> 1994 Reproposal.

20 <u>See</u> 17 CFR 240.17a-25. Rule 17a-25 requires submission of the same standard customer and proprietary transaction information that SROs request in connection with their market surveillance and enforcement inquiries. For a proprietary transaction, the broker-dealer must include the following information: (1) clearing house number or alpha symbol used by the broker-dealer submitting the information; (2) clearing house number(s) or alpha symbol(s) of the broker-dealer(s) on the opposite side to the trade; (3) identifying symbol assigned to the security; (4) date transaction was executed; (5) number of shares, or quantity of bonds or options contracts, for each specific transaction; whether each transaction was a purchase, sale, or short sale; and, if an options contract, whether open long or short or close long or short; (6) transaction price; (7) account number; (8) identity of the exchange or market where each transaction was executed; (9) prime broker identifier; (10) average price account identifier; and (11) the identifier assigned to

system to take into account evolving trading strategies used primarily by institutional and professional traders. Specifically, the rule requires broker-dealers to supply three additional data elements (beyond what was required under Exchange Act Rules 17a-3 and 17a-4) – namely, prime brokerage identifiers,[21] average price account identifiers,[22] and depository institution identifiers[23] – to assist the Commission in aggregating securities transactions by entities trading through multiple accounts at more than one broker-dealer.[24] Finally, the rule requires broker-dealers to update their contact person information to provide the Commission with up-to-date information necessary for the Commission to direct EBS requests to the appropriate staff.[25]

C. The Need for Large Trader Reporting

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the account by a depository institution. For customer transactions, the broker-dealer also is required to include the customer's name, customer's tax identification number, customer's address(es), branch office number, registered representative number, whether the order was solicited or unsolicited, and the date the account was opened. If the transaction was effected for a customer of another member, broker, or dealer, the broker-dealer must include information on whether the other party was acting as principal or agent on the transaction.

21 The Commission requires prime brokerage identifiers to avoid double-counting of transactions where EBS submissions reflect the same trade by both the executing broker-dealer and the broker-dealer acting as the prime broker. See Rule 17a-25 Release, supra note 19, 66 FR at 35838.

22 Some broker-dealers use "average price accounts" as a mechanism to buy or sell large amounts of a given security for their customers. Under this arrangement, a broker-dealer's average price account may buy or sell a security in small increments throughout a trading session and then transfer the accumulated long or short position to one or more accounts for an average price or volume-weighted average price after the market close. Similar to prime brokerage identifiers, the Commission requires average price account identifiers to avoid double-counting where the EBS submission reflects the same transaction for both the firm's average price account and the accounts receiving positions from the average price account. See Rule 17a-25 Release, supra note 19, 66 FR at 35838-39.

23 The inclusion of a depository identifier in EBS reports was designed to expedite the Commission's efforts to aggregate trading when conducting complex trading reconstructions. See Rule 17a-25 Release, supra note 19, 66 FR at 35839.

24 See 17 CFR 240.17a-25(b).

25 This provision was designed to address the recurring problem of frequent staff turnover and re-organizations at broker-dealers to ensure the Commission directs EBS requests to the appropriate personnel. See Rule 17a-25 Release, supra note 19, 66 FR at 35839.

While Rule 17a-25 enhanced the Commission's EBS system and improved the Commission's ability to obtain electronic transaction records, it is insufficient to accomplish the objectives of Section 13(h) of the Exchange Act and is inadequate with respect to the Commission's efforts to monitor the impact of large trader activity on the securities markets.[26] The limitations of the current EBS system also inhibit the usefulness of EBS data in the conduct of the Commission's investigative and enforcement activities.

Most importantly, the data gathered by the EBS system does not include information on the time of the trade or the identity of the trader.[27] While the Commission may be able to use price as a proxy for execution time when reconstructing trading history in a particular security when, in limited cases, the trading therein is characterized by a generally unidirectional trend in price, such analysis does not necessarily produce accurate results, is resource intensive, and hinders the Commission's ability to promptly analyze data.[28] Further, information to identify each large trader in a uniform manner across markets is necessary to permit the Commission to fully track and analyze large trader activity, especially with respect to large traders that trade through multiple accounts at multiple broker-dealers or trade using direct market access arrangements.[29]

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26 See 15 U.S.C. 78m(h)(1).

27 As noted above, the Commission has proposed to establish a consolidated audit trail for equities and options that would collect and consolidate detailed information about orders entered and trades executed on any exchange or in the over-the-counter market. See CAT Proposal, supra note 2. The large trader reporting requirements we are adopting today are designed to address the near-term need for access to more information about large traders and their activities.

28 In addition, Rule 17a-25 does not require EBS data to be available for reporting to the Commission on a next-day basis, and therefore the Commission may face delays when obtaining transaction data.

29 The Commission has separately adopted a rule that addresses direct market access to exchanges and alternative trading systems ("ATSs"). See Securities and Exchange Act Release Nos. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (File No. S7-03-10) (final rule) and 61379 (January 26, 2010), 75 FR 4713 (January 29, 2010) (proposed rule).

The Commission believes that the Rule is necessary because, as noted above, large traders appear to be playing an increasingly prominent role in the securities markets. For example, market observers have offered a wide range of estimates for the percent of overall volume attributable to one potential subcategory of large trader – high frequency traders – which is typically estimated at 50% or higher of total volume.[30] The large trader reporting requirements will provide the Commission a mechanism for obtaining the information necessary to reliably identify the most significant of these market participants and promptly and efficiently obtain information on their trading on a market-wide basis.

As the events of May 6, 2010 demonstrated, the reconstruction of trading activity during an extremely active trading day in our high-speed, diverse, and complex markets can involve an enormous undertaking to collect uniform data and analyze thousands of products, millions of trades, and hundreds of millions (and perhaps even billions) of data points.[31] While the large trader reporting requirements will not be a panacea for the challenges facing the Commission in its oversight of the markets, it represents an important enhancement to the Commission's capabilities to uniformly identify large traders and quickly obtain information on their trading activity in a manner that can be implemented expeditiously by leveraging an existing reporting system.

This release first gives a general description of Rule 13h-1 as adopted and then discusses the specific provisions of the Rule and the accompanying Form 13H on which large traders will self-identify to the Commission. It then discusses the recordkeeping, reporting, and monitoring responsibilities applicable to registered broker-dealers under the Rule. The release highlights

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30 See supra note 8 (discussing analyst estimates of high frequency trader activity).

31 See supra note 11 (citing from the Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, May 18, 2010).

various comments received and outlines the modifications made to the Rule and Form 13H from the Proposing Release in light of these comments.

D. Relation to Consolidated Audit Trail Proposal

Separately from this rulemaking, the Commission has also proposed to establish a consolidated audit trail for equities and options that would capture customer and order event information for most orders in NMS securities across all markets, from time of order inception through routing, cancellation, modification, or execution.[32] For the reasons described below, the large trader requirements adopted today, while important, are much more limited in terms of their scope, objectives, and implementation burden than the consolidated audit trail system that is still under consideration by the Commission.

The recordkeeping and reporting provisions of Rule 13h-1 are based substantially on existing Rule 17a-25 and the Commission's current EBS system, and therefore can be implemented more expeditiously and at less cost than the consolidated audit trail proposal. In particular, the large trader reporting requirements would involve an enhancement to the existing EBS system for broker-dealers to add two new data fields (i.e., LTID and execution time of the trade) and require that transaction records be available for reporting on a next-day basis. In addition, the large trader reporting requirements would involve a new web-based form (Form 13H) that large traders would file and update to identify themselves to the Commission. Accordingly, through relatively modest steps, the large trader reporting requirements will address the Commission's near-term need for access to more information about large traders and their trading activities and begin to improve the Commission's ability to analyze such information. In contrast, the consolidated audit trail, if adopted, would require the development

32 See CAT Proposal, supra note 2.

over a longer time frame of significant technology systems to collect and consolidate more extensive information regarding orders, trades, and customers in a uniform manner across all markets and other execution venues.

In addition, key aspects of the large trader reporting requirements adopted today are not addressed by, and would continue to be necessary upon any adoption of, a consolidated audit trail. In particular, Rule 13h-1 requires large traders to self-identify to the Commission by filing Form 13H, obtain a unique LTID, and provide that LTID to their broker-dealers. As noted above, this requirement will assist the Commission in efficiently identifying and obtaining trading and other information on market participants that conduct a substantial amount of trading activity. Further, these requirements are compatible with, rather than duplicative of, the Commission's proposed consolidated audit trail. Indeed, by incorporating the LTID information into the data elements that would be reported through the consolidated audit trail, the large trader requirements adopted today will ultimately enrich the data that would be available for regulatory purposes through the proposed consolidated audit trail system.

The Commission recognizes the concerns of some commenters that unnecessary overlap or duplication between large trader reporting requirements and a consolidated audit trail could result in additional costs and other burdens for market participants.[33] Although for the reasons described above the Commission believes that adoption of the large trader rule is appropriate at this time, it expects to take these concerns into account in considering the scope and requirements of any consolidated audit trail.

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33 See, e.g., Managed Funds Association Letter and Wellington Management Letter.

III. Description of Adopted Rule and Form

The large trader reporting requirements have two primary components: (1) registration of large traders with the Commission; and (2) recordkeeping, reporting, and monitoring duties imposed on registered broker-dealers that service large trader customers. First, large traders must register with the Commission by filing and periodically updating Form 13H on which they will provide contact information and report general information concerning their business, regulatory status, affiliates, governance, and broker-dealers. Upon receipt of an initial Form 13H, the Commission will assign and issue to a large trader a unique LTID. The large trader must disclose its LTID to all of its broker-dealers and must highlight to each such broker-dealer all accounts to which the LTID applies. Second, registered broker-dealers must: (1) maintain specified records of transactions effected by or through accounts of large traders as well as Unidentified Large Traders;[34] (2) electronically report all transactions by such persons to the Commission upon request utilizing the existing EBS infrastructure; and (3) perform a limited monitoring function to promote awareness of and foster compliance with the Rule. The specific requirements applicable to large traders and registered broker-dealers are discussed in detail below.

A. Large Traders

1. Large Trader Status

Rule 13h-1(a)(1) defines a "large trader" as "any person that: (i) directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts and effects transactions for the purchase or sale of any NMS security for or on behalf of such accounts, by or through one or more registered broker-dealers, in an aggregate

[34] See new Rule 13h-1(a)(9) (defining the term "Unidentified Large Trader") and discussion infra at Section III.B.

amount equal to or greater than the identifying activity level; or (ii) voluntarily registers as a large trader by filing electronically with the Commission Form 13H." This definition is substantially the same as the proposed definition of the term but, as discussed below, takes into account comments received on that proposed definition.

a. Who Should Register as a Large Trader?

The definition of large trader is designed to focus on the ultimate parent company of an entity or entities that employ or otherwise control the individuals that exercise investment discretion. Accordingly, the definition of large trader, in conjunction with the provision that allows the parent company to comply with the self-identification requirement on behalf of its subsidiaries,[35] is intended to allow the Commission to gather information about the primary institutions that conduct a large trading business while at the same time mitigating the burden of the Rule by focusing the filing requirement on persons and entities that control large traders.

The Commission received several comments relating to the proposed scope of the term large trader.[36] The various components of the definition of large trader, and the comments received about them, are discussed below. In addition, one commenter questioned whether the Rule would violate the Fourth and Fifth Amendments of the U.S. Constitution.[37] The Commission believes that the Rule does not infringe upon these rights.[38]

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35 The rule, however, also permits compliance by a controlled person. See new Rule 13h-1(b)(3)(ii), which is discussed infra at Section III.A.2.a.i.

36 See, e.g., SIFMA Letter at 7; American Benefits Council Letter at 2-3; and Financial Engines Letter at 2-4.

37 See Harris Letter.

38 The United States Court of Appeals for the District of Columbia Circuit has found that disclosure to the Commission does not constitute a regulatory taking. See Full Value Advisors LLC v. SEC, 633 F.3d 1101, 2011 WL 339210 (D.C. Cir. February 4, 2011). The Commission believes that the same reasoning applies in the case of Rule 13h-1. The Commission also, to the extent permissible under the federal securities laws, holds and treats as confidential certain legally-protected proprietary information that it receives in connection with its regulatory activities.

i. **Persons Who Exercise Investment Discretion**

A large trader is any person that "directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts..."[39] Rule 13h-1(a)(4) provides that the term "investment discretion" has "the same meaning as in Section 3(a)(35) of the Securities Exchange Act of 1934." One commenter objected to this definition, asserting that the definition under the Exchange Act is "fraught with ambiguities" and therefore would be unhelpful in "deciphering investment relationships."[40] The commenter offered no alternative definition, but asked for clarification regarding what is meant by "exercising investment discretion." The definition of "investment discretion" in Section 3(a)(35) of the Exchange Act encompasses a person who is "authorized to determine what securities or other property shall be purchased or sold by or for the account" as well as a person that "makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions...."[41] Rule 13h-1(a)(4) further specifies that a "person's employees who exercise investment discretion within the scope of their employment are deemed to do so on behalf of such person." To the extent that an entity employs a natural person that individually, or collectively with others, meets

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Further, the Commission believes that Rule 13h-1 is an appropriate exercise of its regulatory authority and does not violate the Fourth Amendment.

39 See new Rule 13h-1(a)(1).

40 See SIFMA Letter at 17, n.23.

41 15 U.S.C. 78c(a)(35). See also Rule 13h-1(a)(3) (defining control the term "control" to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of securities, by contract, or otherwise. For purposes of this rule only, any person that directly or indirectly has the right to vote or direct the vote of 25% or more of a class of voting securities of an entity or has the power to sell or direct the sale of 25% or more of a class of voting securities of such entity, or in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity").

the definition of a "large trader," then, for purposes of Rule 13h-1, the entity that controls that person or those persons would be a large trader.

One commenter recommended excluding regulated investment companies and pension fund managers from the definition of large trader.[42] The Commission notes that an investment company is a legal structure for the management of pooled assets by an investment adviser. As such, the investment adviser exercises investment discretion over the assets of the investment company. Accordingly, the Commission believes that the requested exclusion for regulated investment companies is not necessary because an investment adviser to an investment company, like a pension manager to a pension fund, is the entity that exercises investment discretion either solely or in connection with other investment managers. The large trader reporting requirements are designed to collect information about important market participants that exercise investment discretion. Accordingly, the Commission is not adopting the suggested exclusion for pension fund managers because it would undermine the purposes of the large trader reporting requirements. The Commission is adopting the definition of investment discretion substantially as proposed.

ii. Parent Company Level Registration

As noted above, the definition of large trader is designed to focus on the ultimate parent company of an entity or entities that employ or otherwise control the individuals that exercise investment discretion. A number of commenters recommended limiting the application of the Rule to include as large traders only those entities that directly exercise investment discretion.[43]

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42 See SIFMA Letter at 18.

43 See Financial Information Forum Letter at 5; Managed Funds Association Letter at 3; T. Rowe Price Letter at 2; and SIFMA Letter at 9.

These commenters also raised a number of concerns with the proposal's focus on placing the filing requirement at the parent company level.

After considering the comments received, the Commission has determined to adopt the scope of the large trader identification requirement substantially as proposed. While the Rule's broader focus on identification at the parent company level may provide less detailed information on the activity of individual traders within a large trader complex,[44] it nevertheless will facilitate the Commission's ability to collect data on the full extent of trading by persons and entities under common control. The Commission also notes that, in addition to promoting the Commission's regulatory and enforcement responsibilities, the large trader reporting requirements also are intended to facilitate the reconstruction of market events using transaction data. To that end, parent company-level aggregation should enhance the Commission's ability to reconstruct trading by significant market participants by providing the Commission with access to a broad set of useful data.

Some commenters noted that parent companies of financial services organizations often do not take part in the day-to-day activities of their subsidiaries and, as a result, employees of those parent companies are not knowledgeable about the trading activities of their subsidiaries and would not be able, for example, to readily respond to any follow-up questions from the Commission.[45] The Commission notes that, to determine whether a parent company is a large trader, the aggregate trading activity of all entities controlled by the parent company must be collected. Controlled entities need produce only aggregated statistics in summary form, which would be added together at the parent level to determine whether the identifying activity level

44 For purposes of the large trader reporting rule, references to the "large trader complex" is intended to refer to all entities under the control of the large trader parent company.

45 See, e.g., Prudential Letter at 3.

has been met. If it has, then the parent company is a large trader and will be required to provide information about itself and its affiliates, unless all of its affiliates comply on its behalf pursuant to Rule 13h-1(b)(3)(ii). Further, the Commission believes that the additional identifying information requested on Form 13H could most easily be collected by a parent company employee from the entities controlled by the parent company. The Commission expects that communication of the basic information required by the Form, as well as aggregate securities transactions to determine whether the identifying activity threshold has been met, between a parent company and the entities that it controls should not be burdensome and should not require the development of new integrated trading systems. To the extent a parent company is unaware of its subsidiaries' aggregate transaction levels and other basic identifying information, the Commission believes that implementing control systems to capture such information will be consistent with appropriate risk management considerations.

One commenter expressed concern that the filing by a parent company of a Form 13H on behalf of its subsidiaries may give the impression that its firewalls are weak.[46] The Commission does not believe a parent company's duty to determine whether it is a large trader based on aggregated statistics that summarize the trading activity of its subsidiaries should violate or undermine the effectiveness of existing firewalls. The Rule only requires that a parent company aggregate and consider daily and monthly share volume and dollar value of certain transactions in NMS securities effected by the persons it controls. The Rule does not require the disclosure of any particular transaction information (e.g., the identity of or additional information on the securities bought or sold). Rather, persons need only produce a total figure of the relevant transactions for which they exercised investment discretion. The parent company would then

46 See Prudential Letter at 3.

aggregate together those figures when measuring its overall activity against the applicable trading activity threshold.

A. Use of LTID Suffixes

Some commenters questioned the utility of the information that would be collected if large traders were identified at the parent company level, including whether grouping together persons who make trading decisions independently of each other would cloud the Commission's view when investigating for certain trading behavior, such as manipulation.[47] As an alternative, some commenters suggested that the Rule permit, but not compel, identification at the parent company level.[48] Another commenter suggested eliminating the requirement that an LTID be affixed to the trades of affiliates that do not independently qualify as large traders.[49] With respect to the concern about the Commission's ability to identify trading activity within a large trader with more particularity, as discussed further below,[50] Item 4(d) of Form 13H permits a large trader to assign LTID suffixes to sub-identify persons, divisions, groups, and entities under its control. For example, a large trader may choose to assign a suffix to each independent division within the large trader. Use of suffixes to identify various sub-groups within a large trader could facilitate a large trader's ability to accurately and efficiently track with more particularity the trading for which it exercises investment discretion, and as a consequence, could facilitate the ability of a large trader to respond to any Commission request to further identify accounts or disaggregate trading data, as discussed below. To the extent large traders utilize LTID suffixes, the need for the Commission to contact large traders for assistance in further

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47 See, e.g., Prudential Letter at 2 and Investment Adviser Association Letter at 4.

48 See Investment Company Institute Letter at 6 and Prudential Letter at 3.

49 See Investment Adviser Association Letter at 5.

50 See infra Section III.A.3.d.

identifying their accounts should be diminished. Accordingly, the Commission encourages large traders to utilize LTID suffixes.

The Commission notes that, ultimately, the information limitation identified by commenters may be addressed by the Commission's separate rulemaking for a consolidated audit trail which, if adopted as proposed, would require collection of information about the person with investment discretion for each order as well as information to identify the beneficial owner for each order.[51] In the meantime, allowing a parent company to comply on behalf of related entities should provide the Commission with important information at lower cost to the industry, by reducing the complexity and burdens of the large trader reporting requirements – such as those proposed by the Commission during the 1990s – that could have required reporting at multiple levels within a control group. At the same time, this provision addresses the Commission's near-term need for access to more information about large traders and their trading activities, which will enable the Commission to more efficiently analyze market events.

B. Control and Minority-Owned Entities

With respect to which persons under a parent company's control should be considered in determining the parent company's large trader status, Rule 13h-1(a)(3) defines "control" (and the terms "controlling," "controlled by," and "under common control with") as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of securities, by contract, or otherwise. For purposes of this rule only, any person that directly or indirectly has the right to vote or direct the vote of 25% or more of a class of voting securities of an entity or has the power to sell or direct the sale of 25% or more of a class of voting securities of such entity, or in the case of a partnership, has the

[51] See CAT Proposal, supra note 2, 75 FR at 32572.

right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity."

One commenter stated that including minority-owned entities would be problematic because it may be difficult for a large trader to obtain the information from a minority-owned entity that would be necessary for it to complete Form 13H.[52] Furthermore, according to this commenter, the minority-owned entity may resist attaching the large trader's LTID to its trades.[53] Another commenter suggested attributing to a large trader only the activity of majority-owned entities that are actual operating subsidiaries, and not attributing the activity of more remote, partially-owned entities.[54] After considering the comments received, the Commission has decided to adopt as proposed the definition of control solely for purposes of this Rule. In particular, the Commission continues to believe that a minority shareholder holding at least 25% of the ownership interests of an entity would be in a position to exercise the influence necessary to secure that entity's cooperation in facilitating a large trader's compliance with the federal securities laws, especially given that all that this entails for the controlled entity would be providing its registered broker-dealers with the large trader's LTID and the accounts to which it applies. In addition, if the controlled entity refuses to cooperate, the large trader itself may be able to notify the broker-dealer of its LTID. The Commission also continues to believe that the definition of control is appropriate and will allow the Commission to identify, and obtain trading

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52 See Prudential Letter at 3. The Commission notes that proposed Form 13H would have required a large trader to identify its accounts and disclose for each account the LTID of any unaffiliated large trader with whom it shares investment discretion. As discussed below, the Commission has not adopted the provisions in the Form relating to the identification of accounts, and, as a consequence, a large trader would not need to obtain the LTID of any unaffiliated large trader for purposes of completing the Form.

53 See Prudential Letter at 3.

54 See SIFMA Letter at 18.

data from, controlled persons for whom a large trader is in a position to materially influence the investment decisions made by such person.[55]

b. Identifying Activity Level

Rule 13h-1(a)(7) defines the term "identifying activity level" as "aggregate transactions in NMS securities that are equal to or greater than: (1) during a calendar day, either two million shares or shares with a fair market value of $20 million; or (2) during a calendar month, either twenty million shares or shares with a fair market value of $200 million." One commenter expressly supported these threshold levels.[56] Another commenter recommended increasing the daily threshold limit to shares with a fair market value of $100 million during any calendar day.[57] Others advocated increased thresholds, but did not identify a particular level or provide empirical support for their recommendations.[58]

Some commenters thought that the proposed identifying activity level would capture infrequent traders, who they believe should not attract regulatory interest under a large trader reporting rule.[59] The Commission notes that nothing in Section 13(h) of the Exchange Act suggests that the Commission should focus its attention only on those large traders that are frequent traders. The statute permits the Commission to monitor the impact on the securities

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55 The Commission considered other thresholds for control and determined that a 25% threshold would be the appropriate level for purposes of new Rule 13h-1. As discussed in the Proposing Release, the Commission notes that the definition of control is similar to the definition of control contained in Form 1 (Application for Registration or Exemption from Registration as a National Securities Exchange). See Proposing Release, supra note 3, 75 FR at 24161. Cf. Rule 19h-1(f)(2) under the Exchange Act, 17 CFR 240.19h-1(f)(2) (featuring a 10% threshold with respect to the right to vote 10% or more of the voting securities or receive 10% or more of the net profits).

56 See T. Rowe Price Letter at 2.

57 See Financial Engines Letter at 7.

58 See, e.g., Managed Funds Association Letter at 2.

59 See Investment Adviser Association Letter at 10; Howard Hughes Medical Institute Letter at 1; Managed Funds Association Letter at 2; and SIFMA Letter at 8.

markets of securities transactions involving a substantial volume or a large fair market value or exercise value. While frequency of trading is one factor that the Commission considered in defining who is a large trader, it was not the only factor. In explaining why it proposed to exclude certain transactions, the Commission stated that the proposed exclusions were designed to exclude certain small and otherwise infrequent traders from the definition of a large trader, but also stated: "the proposed excepted transactions are not effected with an intent that is commonly associated with an arm's length purchase or sale of securities in the secondary market and therefore do not fall within the types of transactions that are characterized by the exercise of investment discretion."[60] To the extent that a market participant trades only infrequently, but does so in large volume in the course of exercising investment discretion, the Commission seeks to identify that participant as a large trader. Nevertheless, the Commission recognizes the filing burden that could be placed on a trader whose activity only on very rare occasions meets the identifying activity threshold. These persons may be eligible for Inactive Status, a concept which is discussed below.

The Commission continues to believe that the identifying activity level is appropriate because it will identify large traders that engage in a substantial amount of trading activity relative to overall market volume – specifically, approximately 0.01% of the daily volume and market value of trading in NMS securities.[61] Moreover, as discussed below, Inactive Status is available for large traders whose trading activity reaches the identifying activity level infrequently.

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60 See Proposing Release, supra note 3, 75 FR at 21463.

61 See Proposing Release, supra note 3, 75 FR 21463-64. An "NMS security" is "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options." 17 CFR 242.600(b)(46). The term refers generally to exchange-listed securities, including equities and options.

Transactions Counted Towards the Identifying Activity Level. As proposed, Rule 13h-1(a)(6) defined the term "transactions" as "all transactions in NMS securities, including exercises or assignments of option contracts," except for certain specifically enumerated transactions.[62] To more closely align this definition with the aggregation provisions contained in paragraph (c) of the Rule, the Commission is adopting a revised definition that provides that the term "transaction" means "all transactions in NMS securities, excluding exercises or assignments of option contracts," except for certain specifically enumerated transactions.[63] As noted in the Proposing Release, for purposes of the identifying activity level with respect to options, only purchases and sales of the options themselves, and not transactions in the underlying securities pursuant to exercises or assignments of such options, need to be counted. However, for purposes of the identifying activity level, the volume and value of options purchased or sold would be determined

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62 Specifically, under the proposal, the following would not be counted as "transactions" for purposes of the proposed Rule: (i) any journal or bookkeeping entry made to an account in order to record or memorialize the receipt or delivery of funds or securities pursuant to the settlement of a transaction; (ii) any transaction that is part of an offering of securities by or on behalf of an issuer, or by an underwriter on behalf of an issuer, or an agent for an issuer, whether or not such offering is subject to registration under the Securities Act of 1933, provided, however, that this exemption shall not include an offering of securities effected through the facilities of a national securities exchange; (iii) any transaction that constitutes a gift; (iv) any transaction effected by a court appointed executor, administrator, or fiduciary pursuant to the distribution of a decedent's estate; (v) any transaction effected pursuant to a court order or judgment; (vi) any transaction effected pursuant to a rollover of qualified plan or trust assets subject to Section 402(a)(5) of the Internal Revenue Code; or (vii) any transaction between an employer and its employees effected pursuant to the award, allocation, sale, grant, or exercise of a NMS security, option or other right to acquire securities at a pre-established price pursuant to a plan which is primarily for the purpose of an issuer benefit plan or compensatory arrangement.

63 As noted in the Proposing Release, the aggregation provisions in paragraph (c) are designed to require market participants to use a "gross up" approach in calculating their activity levels. Accordingly, offsetting or netting transactions among or within accounts, even for hedged positions, would be added to a participant's activity level in order to show the full extent of a trader's purchase and sale activity. This approach reflects the fact that substantial trading activity has the potential to impact the market regardless of the trader's net position. See Proposing Release, supra note 3, 75 FR at 21464.

by reference to the securities underlying the option.[64] Thus, the Rule is intended to focus on the trading of options and the potential impact of those options positions on the underlying markets. By excluding purchases and sales pursuant to exercises or assignments, the Rule avoids double-counting towards the applicable identification threshold. The revised definition of "transaction" more closely aligns it with the explanation of the aggregation provision applicable to options provided in the Proposing Release. The Commission believes that the definition as adopted is consistent with Section 13(h)(1) of the Exchange Act, and will advance its stated goals, including "monitoring the impact on the securities markets of securities transactions involving a substantial volume or a large fair market value or exercise value...."[65]

In addition, the Commission received comments on the enumerated exclusions from the term "transaction."[66] As indicated in the Proposing Release, the proposed exceptions from the term "transaction" were designed to exclude certain transactions from the identifying activity level calculation because they are not effected with an intent that is commonly associated with the arm's-length trading of securities in the secondary market and therefore do not fall within the types of transactions that are characterized by the exercise of investment discretion.[67] One

64 See id. For example, 50,000 shares of XYZ stock and 500 XYZ call options would count as aggregate transactions of 100,000 shares in XYZ (i.e., 50,000 + 500 x 100 = 100,000). With respect to index options, the market value would be computed by multiplying the number of contracts purchased or sold by the market price of the options and the applicable multiplier. For example, if ABC Index has a multiplier of 100, a person who purchased 200 ABC call options for \$400 would have effected aggregate transaction of \$8 million (i.e., 200 x 400 x 100 = \$8,000,000). Transactions in index options are not required to be "burst" into share equivalents for each of the underlying component equities.

65 See 15 U.S.C. 78m(h)(1).

66 See, e.g., American Benefits Council Letter; Financial Engines Letter; Howard Hughes Medical Institute Letter; and SIFMA Letter.

67 See Proposing Release, supra note 3, 75 FR at 21463 ("The proposed exclusions are designed to exempt certain small and otherwise infrequent traders from the definition of a large trader as well as activity that is not characterized by active investment discretion or is associated with capital raising or employee compensation. Specifically, the Commission preliminarily believes that the proposed excepted transactions are not effected with an intent that is commonly associated with

commenter requested that the Commission allow registered broker-dealers to include the excluded transactions when reporting transaction data to the Commission pursuant to Rule 13h-1(e).[68] The commenter explained that registered broker-dealers' existing infrastructure may not collect sufficient data to allow the broker-dealer to exclude excepted transactions when reporting transaction data to the Commission. In response to this comment, the Commission is adopting a definition of "transaction" in the Rule to reflect its limited application, as discussed in the Proposing Release. Specifically, to underscore that the enumerated transactions are excluded from the definition of transaction only for the purpose of determining who is a large trader, the Commission is adopting the introductory portion of the second sentence of Rule 13h-1(a)(6) to provide that: "The term transaction or transactions means all transactions in NMS securities, including exercises or assignments of option contracts. For the sole purpose of determining whether a person is a large trader, the following transactions are excluded from this definition...." Accordingly, a person need not count trading activity that falls within one of the listed categories of excluded transactions when it determines whether it meets the applicable identifying activity threshold. However, in response to a Commission request for data, a broker-dealer must report all transactions that it effected through the accounts of a large trader without excluding any transactions listed in Rule 13h-1(a)(6).

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an arm's-length purchase or sale of securities in the secondary market and therefore do not fall within the types of transactions that are characterized by the exercise of investment discretion. While a large enough one-time transaction in the proposed categories could have an impact on the market, the Commission would be able to obtain information on that trade through other means, including the EBS system. The Commission preliminarily believes that the benefit to the Commission of identifying such person as a large trader solely through one of the enumerated excepted transactions would not be justified by the costs that would be imposed on the person and their registered broker-dealer that accompany meeting the definition of large trader.")

68 See Financial Information Forum Letter at 3.

In the Proposing Release, the Commission requested comment about whether any of the proposed exclusions from the definition of transaction should be eliminated or whether any other types of transactions should be excluded.[69] While no commenter recommended eliminating any of the excluded transactions, several commenters suggested the Commission consider additional exclusions. For example, some commenters suggested excluding all or some transactions effected on behalf of defined contribution plans.[70] The Commission does not believe that a blanket exclusion for transactions effected on behalf of defined contribution plans is warranted because such trades are effected through the exercise of investment discretion and are within the scope of activity contemplated by the statute. Instead, the Commission believes it is appropriate to provide additional guidance regarding the application of the Rule to transactions effected on behalf of defined contribution plans. As highlighted by commenters, investment discretion may be exercised on behalf of defined contribution plans differently, depending on the particular structure of the plan. For example, in some defined contribution plans, participants select their own investments from among the choices offered by their employer.[71] A trustee then effects the transactions pursuant to the instructions it receives from the plan participants. For purposes of determining who is a large trader, the participants in such plans are the ones who exercise investment discretion over the transactions that are effected on their behalf. In such plans, the Commission does not view the trustee as exercising investment discretion over the transactions

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69 See Proposing Release, supra note 3, 75 FR at 21472.

70 See Financial Engines Letter at 7 and American Benefits Council Letter at 2 (suggesting exempting significant repositioning of portfolio balances by very large defined benefit plans; investment lineup changes by defined contribution retirement plan sponsors; and plan activity in connection with acquisitions and divestitures of businesses which may precipitate a large movement of participants out of a plan).

71 See American Benefits Council Letter at 2.

for purposes of the Rule.[72] Additionally, solely for purposes of determining who is a large trader pursuant to Rule 13h-1, the Commission considers an employer to not exercise investment discretion merely by establishing investment options for its employees. Other types of defined contribution plans may be structured differently.[73]

Another commenter requested clarification that only the trustee of a retirement plan, not the plan sponsor and other parties involved in plan administration, must self-identify as a large trader.[74] As discussed above, the Rule requires the person who exercises investment discretion over a certain level of transactions to identify as the large trader, which may be the trustee but would generally not be the plan sponsor or administrator if neither exercises investment discretion.

One commenter argued for broadly excluding transactions associated with corporate actions, including mergers and acquisitions and other purchases of assets, self-tenders, buybacks (including Rule 10b-18 buybacks), and certain internal corporate actions (such as journals between accounts within the same entity where there is no change in the beneficial owners).[75] The commenter also recommended excluding stock loans, equity repurchases, and in-kind creations of exchange-traded funds ("ETFs"). As discussed below, the Commission agrees that

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72 The Commission expects that few individual defined contribution plan participants will effect aggregate transactions greater than or equal to the identifying activity level, and the Commission therefore expects that generally they will not meet the definition of large trader.

73 The Commission notes that, pursuant to Section 13(h)(6) of the Exchange Act and new Rule 13h-1, the Commission may by order exempt, upon specified terms and conditions or for stated periods, any person or class of persons or any transaction or class of transactions from the provisions of this rule to the extent that such exemption is consistent with the purposes of the Exchange Act. See new Rule 13h-1(g), which is discussed infra at Section III.E.

74 See American Benefits Council Letter at 2-3.

75 See SIFMA Letter at 8.

many, but not all,[76] of the additional categories of transactions identified by the commenter can be excluded for purposes of determining large trader status. Accordingly, the Commission is adopting subparagraph (viii) to Rule 13h-1(a)(6), which excludes the following additional transactions for purposes of calculating the identifying activity level: "any transaction to effect a business combination, including a reclassification, merger, consolidation, or tender offer subject to Section 14(d) of the Securities Exchange Act; an issuer tender offer or other stock buyback by an issuer; or a stock loan or equity repurchase agreement."

Consistent with the views outlined in the Proposing Release, the Commission believes that these additional categories of transactions are effected for materially different reasons than those commonly associated with the arm's-length trading of securities in the secondary market and the associated exercise of investment discretion. For example, transactions to effect a business combination, as well as an issuer tender offer or other stock buyback by an issuer, reflect fundamental corporate decision-making that involves matters much broader than those traditionally associated with trading activity in NMS securities. Such transactions are discrete corporate actions to effect the acquisition of a business or to manage the extent of the distribution of an issuer's securities. Further, stock loan and equity repurchase agreements typically are entered into to facilitate short sale transactions or as part of a larger financing transaction, and not as part of an investment decision traditionally associated with trading activity in NMS securities. Accordingly, the Commission believes it appropriate to not count these transactions for the purpose of determining whether a person meets the identifying activity level contained in the definition of large trader.

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76 For example, the Commission is not making any changes in response to the suggestion of one commenter to essentially exempt all transactions effected on behalf of organizations dedicated to a charitable purpose. See Howard Hughes Medical Institute Letter. See also infra text accompanying note 255 and the subsequent discussion.

For purposes of the identifying activity level for large trader reporting, the Commission believes that it is appropriate to count transactions effected in the secondary market to assemble, or dispose of, securities that are transferred between an "authorized participant" and an ETF. An authorized participant is a trader that, on its own behalf or on behalf of others, presents securities (or other assets) to an ETF in order to create ETF shares or receives securities (or other assets) from an ETF in connection with the redemption of ETF shares. Among other reasons, authorized participants engage in such creations and redemptions to take advantage of arbitrage opportunities resulting from differences in the market prices of the securities held by the ETF and the market prices of the ETF shares. The Commission expects that, if authorized participants are large traders, it will be useful to monitor their secondary market trading and to be able to access records of their trading activity across broker-dealers. However, the Commission does not believe that the actual transfer of the basket of securities between an authorized participant and an ETF should be counted for purposes of large trader reporting. Accordingly, the Commission will count toward the identifying activity level trading activity in the secondary market that relates to the acquisition or disposition of securities in connection with, for example, the creation or redemption of ETF shares, but not the transfer of such securities between an authorized participant and an ETF.[77]

c. **Voluntary Registration**

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[77] Specifically, then, in connection with creation or redemption: (1) purchases of securities by an authorized participant for the purpose of assembling a basket would count toward an authorized participant's identifying activity level; (2) transfers of those securities by an authorized participant to the ETF would not be counted toward the ETF's identifying activity level; (3) acquisitions of securities by an authorized participant from the ETF would not count toward the authorized participant's identifying activity level; and (4) sales of securities by an authorized participant into the secondary market would count toward the authorized participant's identifying activity level. No transactions effected would be counted toward an ETF's identifying activity level because the ETF would not be exercising investment discretion by creating or redeeming ETF shares.

One commenter suggested that the Commission allow a person to register voluntarily as a large trader as that person nears the applicable trading activity threshold in order to reduce its need to actively monitor its trading levels.[78] The Commission agrees with the commenter that the ability to voluntarily register will mitigate the monitoring burden on market participants who expect to effect transactions equal to or greater than the identifying activity level at some point in the future. Accordingly, the Commission is adopting: (1) a definition of large trader that includes those persons who voluntarily register as large traders; and (2) changes to Form 13H to require a large trader to indicate in its initial filing with the Commission whether it has chosen to voluntarily register. Any such person that elects to voluntarily file will be treated as a large trader for purposes of the Rule, and will be subject to all of the obligations of a large trader under the Rule, notwithstanding the fact that the person had not effected the requisite level of transactions at the time it registered as a large trader.

2. Duties of a Large Trader

Pursuant to Rule 13h-1, a large trader must self-identify by filing Form 13H with the Commission. In addition, a large trader must disclose its LTID to the registered broker-dealers effecting transactions on its behalf and identify for them each account to which it applies.

a. File Form 13H with the Commission

Form 13H provides for six types of filings: Initial Filing; Annual Filing; Amended Filing; Inactive Status; Termination Filing; and Reactivated Status. Each type is discussed below. As reflected in the instructions to the Form, large traders must file all Forms 13H through EDGAR,[79] which is being updated to accept these submissions.[80] Accordingly, large

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[78] See Investment Company Institute Letter at 7.

[79] One commenter requested that the Commission not require filing of Forms 13H until it has an electronic filing system in place because, while the rule requires electronic filing, the

traders will need to have or obtain permission to access and file through EDGAR, and can obtain the necessary access codes, if they do not already have them, by filing a Form ID (Uniform Application for Access Codes to File on EDGAR).[81] Among other things, large traders will be given a Central Index Key ("CIK") number that uniquely identifies each filer and allows them to submit filings through EDGAR. While Form 13H filings will be processed through the Commission's EDGAR system, once filed, the Form 13H filings will not be accessible through the Commission's website or otherwise be publicly available.

i. Initial Filings – Who Must File?

Except as provided below, each large trader must file a Form 13H "Initial Filing" to identify itself to the Commission.[82] In complex organizations, more than one related entity can qualify as a large trader. Consider the following example:

- Holding Company owns a 100% ownership interest in Broker-Dealer and Investment Adviser. However, as a practical matter, Holding Company is not engaged in the day-to-day operation of either entity.
- Broker-Dealer owns a 33% ownership interest in Proprietary Trading Firm. None of the firm's other investors own a controlling interest of 25% or more of the firm,

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Commission noted the possibility in the Proposing Release that paper filings might be required for a limited period of time. See T. Rowe Price Letter at 3. See also Proposing Release, supra note 3, 75 FR at 21465, n. 80. The Commission shares the concern expressed by the commenter. Form 13H will be a web-based application and will be submitted through EDGAR, a secure web interface, on the applicable compliance date.

80 See generally 17 CFR 232 (Regulation S-T – General Rules and Regulations for Electronic Filings).

81 An applicant must file Form ID in electronic format via the Commission's EDGAR Filer Management website. See 17 CFR 232 (Regulation S-T) and the EDGAR Filer Manual for instructions on how to file electronically, including how to use the access codes.

82 See new Rule 13h-1(b)(1).

and therefore no LTIDs, other than that of Broker-Dealer, would be attached to the trades of Proprietary Trading Firm.

- Investment Adviser owns a 100% ownership interest in Sub-Adviser #1 and Sub-Adviser #2.
- Sub-Adviser #1, on behalf of its clients, exercises investment discretion over accounts and effects transactions in NMS securities on behalf of those accounts in an aggregate amount greater than the identifying activity level.
- Sub-Adviser #2, on behalf of its clients, exercises investment discretion over accounts and effects transactions in NMS securities on behalf of those accounts in an aggregate amount less than the identifying activity level.
- While engaging in proprietary trading, Broker-Dealer exercises investment discretion over accounts and effects transactions in NMS securities on behalf of those accounts in an aggregate amount greater than the identifying activity level.
- The Proprietary Trading Firm effects transactions in NMS securities in an aggregate amount greater than the identifying activity level.

All of the identified entities, except Sub-Adviser #2, independently qualify as large traders under the Rule. Therefore, as discussed below, unless these entities rely on the provisions of Rule 13h-1(b)(3)(i), each of them must file separate Forms 13H with the Commission.[83]

Rule 13h-1(b)(3)(i) provides that a large trader shall not be required to separately comply with the requirements of paragraph (b) if a person who controls the large trader complies with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) applicable to such large trader with respect to all of its accounts. This provision allows the identification requirement to be

[83] See new Rule 13h-1(b)(1).

pushed up the corporate hierarchy to the parent entity (i.e., Holding Company, in the example above).

Conversely, Rule 13h-1(b)(3)(ii) applies the same principle on a "top down" basis, providing that a large trader shall not be required to comply with the requirements of paragraph (b) if one or more persons controlled by such large trader collectively comply with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) applicable to such large trader with respect to all of its accounts. A controlling person of one or more large traders (such as Holding Company, in the example above) would be required to comply with all of the requirements of paragraph (b) unless the entities that it controls discharge all of the responsibilities of the controlling person under paragraph (b). This provision maintains the focus on the parent company by allowing, for example, a corporate entity to comply on behalf of one or more natural persons who are its controlling owners. In the above example, if Investment Adviser and Broker-Dealer separately register as large traders, Holding Company would not have to separately register as a large trader, assuming that those two entities capture all transactions and accounts controlled by Holding Company.[84] Instead, Investment Adviser and Broker-Dealer would identify (in Item 4(c) of the Form) the other as an affiliate filing separately, and identify Holding Company as their affiliate's parent company on their respective Form 13H filings. In this way, the Commission will be able to tell that the entities are under the common control of Holding Company, and the Commission could assign LTIDs that reference their common parent.

[84] In this case, Investment Adviser would be responsible for providing its LTID to each registered broker-dealer that effects transactions on its behalf, on behalf of Sub-Adviser #1, or on behalf of Sub-Adviser #2. Additionally, Broker-Dealer would be responsible for providing its LTID to each registered broker-dealer that effects transactions on its behalf or on behalf of Proprietary Trading Firm. Further, Investment Adviser would be responsible for identifying each of the accounts to which its LTID applies, which would include the accounts of Sub-Adviser #1, Sub-Adviser #2, and Broker-Dealer would be responsible for identifying each of the accounts to which its LTID applies, which would include the accounts of Proprietary Trading Firm.

When must an Initial Filing be submitted? A large trader must file a Form 13H Initial Filing promptly after effecting aggregate transactions equal to or greater than the identifying activity level.[85] The Commission solicited[86] and received comments about the Initial Filing deadline.[87] Some commenters requested additional guidance on what constitutes "promptly."[88] One commenter recommended that the Commission specify a 10-day filing deadline.[89] In contrast, another commenter suggested that the Commission define promptly as without delay, but in no circumstances later than 30 days after the trader qualifies as a large trader.[90] Another commenter assumed that promptly means within 30 days.[91] The Commission continues to believe that "promptly" is an appropriate standard because it emphasizes the need for filings to be submitted without delay to ensure their timeliness while affording filers a limited degree of flexibility.[92] However, given the requests for additional guidance, the Commission believes that under normal circumstances, it would be appropriate for Initial Filings (and Reactivated Filings, discussed below) to be filed within 10 days after the large trader effects aggregate transactions equal to or greater than the identifying activity level.[93]

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85 See new Rule 13h-1(b)(1).

86 See Proposing Release, supra note 3, 75 FR at 21472.

87 See Investment Adviser Association Letter at 9; SIFMA Letter at 18-19; and Investment Company Institute Letter at 10.

88 See, e.g., Investment Adviser Association Letter at 9 and SIFMA Letter at 18-19.

89 See Investment Adviser Association Letter at 9.

90 See Investment Company Institute Letter at 10.

91 See SIFMA Letter at 18-19.

92 See Securities Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564, 33567 (June 18, 2007) (in declining to define the term "promptly" as used on Section 15E(b)(1) of the Exchange Act, the Commission stated that whether an amendment is furnished promptly will depend on the facts and circumstances such as the amount of information being updated).

93 The Commission notes that the guidance provided here regarding the "promptly" standard for Form 13H filings is based on the scope of the Form, the expected time to complete the Form, and

ii. **Annual Filings**

All large traders must submit an Annual Filing within 45 days after the end of each full calendar year,[94] except that large traders on Inactive Status (discussed below) are not required to file Form 13H while they are on Inactive Status.[95]

iii. **Amended Filings**

If any of the information contained in a Form 13H filing becomes inaccurate for any reason, a large trader must file an Amended Filing no later than the end of the calendar quarter in which the information became stale.[96] While not required by the Rule, a large trader may voluntarily file an amended filing more frequently than quarterly at its discretion. A large trader on "Inactive Status" (described below) is not required to file any Amended Filings while it is on Inactive Status.

iv. **Inactive Status**

Rule 13h-1(b)(3)(iii) permits a large trader who has not effected aggregate transactions at any time during the previous full calendar year in an amount equal to or greater than the identifying activity level to obtain inactive status by filing for "Inactive Status" through a Form 13H submission.[97] Inactive Status would be effective upon such filing.

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the required submission thereof through EDGAR, and accordingly this guidance is applicable only to Form 13H filings.

94 See new Rule 13h-1(b)(1)(ii).

95 See new Rule 13h-1(b)(3)(iii).

96 See new Rule 13h-1(b)(1)(iii). The Commission expects that significantly less information will need to be inputted for an Amended Filing and the large trader may have a considerable amount of lead time before the end of the calendar quarter to submit the Amended Filing.

97 New Rule 13h-1(b)(3)(iii) provides: "A large trader that has not effected aggregate transactions at any time during the previous full calendar year in an amount equal to or greater than the identifying activity level shall become inactive upon filing a Form 13H and thereafter shall not be required to file Form 13H or disclose its large trader status unless and until its transactions again are equal to or greater than the identifying activity level. A large trader that has ceased operations may elect to become inactive by filing an amended Form 13H to indicate its terminated status."

Inactive status is designed to reduce the burden on infrequent traders who may trip the threshold on a particular occasion but do not regularly trade at sufficient levels to support continued status as a large trader. In particular, Inactive Status is designed to minimize the impact of the Rule on natural persons who infrequently effect transactions of a magnitude that otherwise warrant the added regulatory requirements under the Rule. Inactive status relieves the large trader from the requirement to file amended Forms 13H. It also permits the large trader to request that its broker-dealers stop maintaining records of its transactions by LTID.

The Commission requested comment about whether the proposed provision for Inactive Status is appropriate and sufficient and whether it should be modified or eliminated.[98] The Commission did not receive any comments regarding Inactive Status.[99] The Commission is adopting this provision, as proposed.

v. Reactivated Status

A person on Inactive Status who effects aggregate transactions that are equal to or greater than the identifying activity threshold must file a "Reactivated Status" Form 13H promptly after effecting such transactions.[100] Upon filing for Reactivated Status, the person once again would be subject to the filing requirements of Rule 13h-1 and must inform its broker-dealers of its reactivated status.[101] The Commission did not receive any comments regarding Reactivated

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98 See Proposing Release, supra note 3, 75 FR at 21472.

99 One commenter, however, asked about broker-dealers' duties regarding inactive persons. See Financial Information Forum Letter at 5; see also infra text accompanying note 167.

100 See new Rule 13h-1(b)(1)(i). In addition, a person may voluntarily elect to file for Reactivated Status prior to effecting aggregate transactions that are equal to or greater than the identifying activity threshold. As with initial filings, a person may elect to file for Reactivated Status if it did not wish to monitor its trading for purposes of the identifying activity threshold.

101 New Rule 13h-1(b)(2) provides that each large trader shall disclose to the registered broker-dealers effecting transactions on its behalf its large trader identification number and each account to which it applies. Additionally, a large trader on Inactive Status pursuant to paragraph (b)(3) of

Status. The Commission is adopting this provision, as proposed. In particular, the provision for reactivated status is designed to ensure that a large trader on Inactive Status that becomes active above the identifying activity threshold is once again required to file and update Form 13H and inform its broker-dealers of the need to record its trading activity by its LTID.

vi. Termination Filings

Under Rule 13h-1(b)(3)(iii), a person, under certain narrow circumstances, may permanently end its large trader status by submitting a "Termination Filing." This filing is designed to allow a large trader to inform the Commission that it has terminated operations, and therefore there is no chance of it requalifying for large trader status in the future.[102] Termination status is designed to signal to the Commission to not expect future amended or annual Form 13H filings from that large trader, such as when a large trader dissolves, ceases doing business, or, in some cases, is acquired, as described below.

The Commission believes it may be helpful to provide additional examples to illustrate the narrow circumstances under which a large trader may file a "Termination Filing." These examples also should provide guidance to large traders on how to amend their Forms 13H when a large trader is involved in a merger.

- Example 1: A large trader merges into another large trader, resulting in only one entity. The non-surviving large trader would submit a "Termination Filing" that specifies the effective date of the merger. The surviving large trader, in an Amended Filing or its next Annual Filing (depending on the effective date of the merger), would update Item 4 to list the non-surviving company as an affiliate

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new Rule 13h-1 must notify broker-dealers promptly after filing for reactivated status with the Commission.

102 By contrast, as described above, Inactive Status may be only temporary.

that files separately and provide the additional identifying information required in Item 4. Specifically, in the Description of Business and Relationship to the Large Trader fields, the surviving entity would disclose that the non-surviving entity has been acquired and no longer exists as a separate entity. The non-surviving company's market participation identification number ("MPID") and LTID number (including suffix, if any) should also be listed. Capture of this information will allow the Commission to track the control of the non-surviving entity. In this scenario, the surviving large trader would continue using its LTID.

- Example 2: An existing large trader acquires another large trader and the target is maintained as a separate subsidiary. Following the acquisition, the target's trading would need to be tagged with the acquirer's LTID. The acquired subsidiary company may file a Termination Filing so long as all of its trading is tagged with its new parent's LTID.[103] Alternatively, the acquired entity may maintain its original LTID and have its trading tagged with both its original LTID and its new parent's LTID. If a Termination Filing is not made, then both companies would have to amend Items 4 of their Forms 13H to list the other as an affiliate and disclose their affiliate's information, including its MPID and LTID.
- Example 3: A large trader is acquired by a company that was not previously a large trader. The new parent company is now a "large trader" due to acquiring control of a large trader. Accordingly, the acquirer would file an "Initial" Form 13H and obtain a new LTID, which would be used to identify all of its trades and the trades of its affiliates (including its newly acquired large trader subsidiary).

103 If a Termination Filing is elected, the acquirer may wish to use an LTID suffix to separately identify the acquired entity's trading activity.

The acquired subsidiary company may file a Termination Filing so long as all of its trading is tagged with its new parent's LTID.[104] Alternatively, the acquired entity may maintain its original LTID and have its trading tagged with both its original LTID and its new parent's LTID. If a Termination Filing is not made, then both companies would have to identify the other as an affiliate in Items 4 of their Forms 13H.

The Commission did not receive any comments regarding Termination Filings. The Commission is adopting this provision, as proposed. In particular, the ability to submit Termination Filings will allow the Commission to accurately track only active large traders and will allow large traders that cease operation to formally terminate their filing obligations under Rule 13h-1.

b. Self-Identification to Broker-Dealers

As proposed, Rule 13h-1(b)(2) would have required a large trader to disclose to the registered broker-dealers effecting transactions on its behalf its LTID and each account to which it applies. Second, the provision, as proposed, would have required a large trader to disclose its LTID to all others with whom it collectively exercises investment discretion. The Commission received comments about the latter requirement.[105]

Proposed Schedule 6 to the Form would have required a large trader, in connection with disclosing its brokerage accounts, to also list the LTID(s) of all other large traders that exercise investment discretion over the particular account. To assure that large traders had access to other large traders' LTIDs, the proposed rule would have required large traders to disclose their status

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[104] If a Termination Filing is elected, the acquirer may wish to use an LTID suffix to separately identify the acquired entity's trading activity.

[105] See, e.g., Wellington Management Letter at 5.

to one another. One commenter requested clarification regarding whether a large trader would be obligated to identify unaffiliated large traders only if investment discretion is exercised collectively.[106]

As discussed below, the Commission is not adopting the requirement to disclose brokerage account numbers on Form 13H and instead is requiring a large trader to provide a list of all registered broker-dealers with whom it has an account. Consequently, the requirement to provide the LTID(s) of all other large traders that exercise investment discretion over the particular account now is no longer relevant and is not being adopted. Because the requirement to disclose the information is not being adopted, it would not be necessary for large traders to inform others of their LTIDs, and the Commission is similarly not adopting the proposed requirement for a large trader to disclose its LTID to all others with whom it collectively exercises investment discretion. Accordingly, Rule 13h-1(b)(2), as adopted, requires a large trader to disclose to the registered broker-dealers effecting transactions on its behalf its LTID and each account to which it applies.

Lastly, the requirements that a large trader provide its LTID to all registered broker-dealers who effect transactions on its behalf, and identify each account to which it applies, are ongoing responsibilities that must be discharged promptly. For example, if a subsidiary of a large trader is acquired by another large trader, to the extent that subsidiary effects transactions in NMS securities equal to or greater than the reporting activity level, both large traders must promptly notify their registered broker-dealers of the LTID change.[107]

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106 See Wellington Management Letter at 5-6. Another commenter recommended that the Commission not require investment advisers to identify other advisers of a client account that trade separately and without collaboration in a different custodial account. See Investment Company Institute Letter at 10.

107 This responsibility is in addition to the large traders' duty to amend Form 13H pursuant to Rule 13h-1(b)(1).

3. Overview of Form 13H

Form 13H is designed to collect basic identifying information about large traders that will allow the Commission to understand the character and operations of the large trader. The Commission solicited[108] and received[109] many comments regarding various aspects of proposed Form 13H. The Commission, for example, received comments requesting clarification regarding certain information required by the proposed Form, as well as suggestions designed to reduce and streamline the reporting burden on large traders.[110] One commenter noted that the large trader reporting rule is only one of many proposed new regulations that are being contemplated by Congress and various federal regulators that would affect commercial banks.[111] The Commission is sensitive to the burdens imposed by the large trader rule.[112] As discussed below, the Commission is incorporating some commenters' suggestions in the Form as adopted, and many of the changes from the proposed version of the Form are intended to reduce further the burdens of the Form. The Commission believes that the version of Form 13H it is adopting today will be less burdensome than the proposed version, most notably because, as discussed further below, it replaces the proposed requirement to provide account numbers with a more general requirement to identify broker-dealers at which the large trader or any of its Securities

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108 See Proposing Release, supra note 3, 75 FR at 21472-73.

109 See, e.g., Wellington Management Letter at 3-6; American Bankers Association Letter at 2; David L. Goret Letter at 1-3; Anonymous e-mail dated June 22, 2010; and Prudential Letter at 3-4.

110 See, e.g., SIFMA Letter; Wellington Management Letter; Investment Company Institute Letter; and American Bankers Association Letter.

111 See American Bankers Association Letter at 2.

112 As discussed infra (see Section III.D.2), Section 13(h)(5) of the Exchange Act expressly requires the Commission to take into account, among other things, the costs associated with maintaining information with respect to transactions effected by large traders and reporting such information to the Commission.

Affiliates maintains an account.[113] In addition, the Commission is seeking to design the electronic filing system for Form 13H to minimize the filing burden. For example, a selection of previously filed Form 13H submissions, including the most recently submitted version, will be readily accessible so that large traders can simply edit and resubmit the Form when amendments are required. The Commission believes that filing Form 13H in an electronic format will be less burdensome and more efficient for both large traders and the Commission.

The Commission is adopting the Form with some format-driven modifications from the proposed version to better reflect its format as an electronic, rather than paper, filing. For example, the Commission is not adopting the proposed fields that would have required filers of Annual Filings and Amended Filings to identify the Items and Schedules being updated since the Commission will be able to distinguish this information more readily in an electronic filing environment. In addition, the Commission is not adopting the Schedules to the Form, and the information previously contained in the proposed Schedules has been realigned into the body of the Form. References to paper-based "continuation sheets" are not being adopted. Similarly, the concept of Schedules, while relevant to a paper-based form, is unnecessary in the context of an all-electronic filing.[114] These and other related non-substantive changes from the proposed version of the Form reflect that the Form will be accessed electronically and filed by large traders exclusively online.

Voluntary Registration. For the reasons discussed above,[115] in response to a comment, the Commission is revising Form 13H from the proposed version of the Form to allow a market

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113 As defined in the instructions to Form 13H, "Securities Affiliate" means an affiliate of the large trader that exercises investment discretion over NMS securities.

114 In addition, in response to comments and as discussed in greater detail below, the Commission is revising the scope of the data that would have been collected in the proposed Schedules.

115 <u>See</u> <u>supra</u> at Section III.A.1.c.

participant to register voluntarily as a large trader, even if it has not yet effected transactions equal to or greater than the identifying activity level at the time of filing. Correspondingly, Form 13H requires a large trader to indicate whether its "Initial Filing" is voluntary. A large trader that elects to voluntarily file is required to disclose the date upon which it filed the Form, rather than the date on which its trading activity equaled or exceeded the identifying activity level.

Background Information About the Large Trader and its Authorized Person. Form 13H requires the large trader to provide its mailing address, which may be different than its business address. Additionally, the Form requires that the following information be provided about the Authorized Person (i.e., the natural person authorized to submit the Form 13H on behalf of the large trader): business address, telephone number, facsimile number, and email address. This information was proposed to be required by Schedule 6 of the Form and has been relocated to the introductory section of the Form. Proposed Item 3 of Schedule 4, which would have mandated disclosure of the large trader's principal place of business (if different from the information disclosed on the cover page), has not been adopted. Instead, the requested information has been moved to the beginning of the adopted Form, where both business and mailing addresses are requested. All of this information is necessary for the Commission to identify and contact large traders.

a. Item 1

In Item 1(a) of the Form, the large trader must indicate the types of businesses that it or any of its affiliates engage in:[116] broker or dealer; bank holding company;[117] non-bank holding

[116] Unless otherwise specified, the Form requires information about the large trader that is filing the Form 13H. Typically, the filing large trader would be the large trader's ultimate parent company, which means the person at the highest level of the organizational chart required under Item 4(a) that controls a large trader or multiple large traders.

[117] The use of the term "Holding Company" in the proposal has been clarified in the adopted Form by dividing it into two options "Bank Holding Company" and "Non-Bank Holding Company."

company; government securities broker or dealer; municipal securities broker or dealer; bank; pension trustee; non-pension trustee;[118] investment adviser to one or more registered investment companies; investment adviser to one or more hedge funds or other funds not registered under the Investment Company Act; insurance company; commodity pool operator; or futures commission merchant. A large trader also may check "Other" and disclose other types of financial businesses engaged in by the large trader.

Item 1(b) of the Form requires that the large trader provide the following for itself and each of its Securities Affiliates: a description of the nature of its operations, including a general description of its trading strategies.[119] The instructions provide guidance regarding the level of detail expected.[120]

Collection of this basic descriptive information will allow the Commission to better understand each large trader and will allow the Commission to more carefully tailor requests both to registered broker-dealers for large trader transaction data and, if necessary, to large traders for additional information pursuant to Rule 13h-1(b)(4).

The Commission does not believe that the changes to the Form from the proposed version discussed above are substantive. Instead, the changes are intended to clarify the scope of information elicited by Item 1 and to reflect the fully-electronic nature of the Form.

b. Item 2

118 To clarify that all trustees that are large traders would be required to report, the adopted Form includes categories for "Pension Trustee" as well as "Non-Pension Trustee."

119 Item 5 of proposed Schedule 4 would have required the large trader to describe the nature of the large trader's business. Form 13H as adopted contains this requirement in Item 1.

120 For example, a large trader may describe its operations as including an "investment adviser specializing in fundamental analysis" or it may describe a broker-dealer as a "proprietary trader focusing on statistical arbitrage" or "options market maker."

Item 2 of the Form requires the large trader to indicate whether it or any of its Securities Affiliates files any other forms with the Commission.[121] If so, Item 2 requires identification of each filing entity, the form(s) filed, and the CIK number.

The Commission is narrowing the scope of Item 2 from the proposal to require the large trader to disclose whether it or any of its affiliates that exercise investment discretion over NMS securities (as distinguished from all of its affiliates) file any forms with the Commission. Additionally, rather than disclosing the filers' Central Registration Depository ("CRD") Numbers[122] and SEC File Numbers[123] as proposed, Item 2 as adopted requires only disclosure of their CIK numbers.[124]

One commenter objected to the collection of information under proposed Item 2, pointing out that the Commission already has access to this information.[125] The Commission believes that Item 2 is useful because it centralizes information about a large trader's various SEC filing obligations and will thereby allow the Commission to more promptly access records of those filers using their CIK numbers. Especially given the circumscribed scope of Item 2 as adopted, the Commission believes that this requirement will not be unduly burdensome. Further, each

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121 The title of Item 2 of the adopted Form has been slightly amended; its title is "Securities and Exchange Commission Filings," not "Securities and Exchange Commission Registration." This non-substantive change reflects that registration is not the effect of all forms filed with the Commission.

122 The CRD is a computerized database that contains information about most brokers, their representatives, and the firms for whom they work.

123 As discussed above, an SEC File Number is assigned by EDGAR to registrants and others who file materials with the Commission through EDGAR. See supra discussion at text accompanying notes 79-81.

124 CIK numbers, which are assigned to persons that file material with the Commission, are applicable to a broader universe of entities that may be large traders, as opposed to CRD numbers which are only applicable to broker-dealers.

125 See American Bankers Association Letter at 2.

large trader should have ready access to this information and be able to summarize it with minimal additional burden.

c. Item 3

Item 3 of the Form requires a large trader to disclose whether it or any of its affiliates is registered with the Commodity Futures Trading Commission ("CFTC") or regulated by a foreign regulator. If so, the large trader is required to identify each entity and the CFTC registration number or primary foreign regulator, as applicable.

The Commission received one comment about the aspect of proposed Item 3 of the Form that would have required disclosure about bank regulation.[126] The commenter argued that the required information did not further the underlying purpose of the proposal, and recommended that the Commission, to the extent necessary, obtain this information directly from applicable banking regulators instead of from the large trader.[127] In response to this comment, the Commission has significantly narrowed the scope of this item by not adopting the proposed requirement in Item 3(b) of the proposed Form to disclose information on bank regulators. Instead, as mentioned above, the Commission is adopting the requirement to disclose whether the large trader includes a bank[128] or bank holding company. The Commission believes that collection of this basic information will be sufficient to characterize a large trader's operations,

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126 See id.

127 Item 3(b) of the proposed Form would have required the large trader to disclose: (1) whether it or any of its affiliates is a bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, or foreign bank; if so, the large trader would have been required to identify each such affiliate and its banking regulators.

128 As adopted, the instructions for Form 13H define the term "bank" to mean a national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, or foreign bank.

and should reduce the burdens of the Form while focusing the collection of information on the securities trading operations of each large trader.

Further, as proposed, Item 3(c) would have required the large trader to disclose whether it or any of its affiliates is an insurance company and identify each such regulated entity and its respective insurance regulators. One commenter recommended limiting Item 3(c) to only the large trader and its large trader affiliates, and suggested that the Form require identification only of their primary regulators.[129] Otherwise, the commenter stated, its list of regulators would include a long list of state insurance regulators.[130] In balancing the benefits of collecting such information against the burden on large traders to provide it, the Commission has decided to not adopt the requirements of proposed Item 3(c). The Commission again notes that Item 1 of Form 13H requires that the large trader disclose whether the large trader includes an insurance company. The Commission believes that collection of this basic information will be sufficient to characterize a large trader's operations, and should reduce the burdens of the Form while focusing the collection of information on the large trader's securities trading operations.

In addition, proposed Item 3(d) would have required the large trader to disclose whether it or any of its affiliates is regulated by a foreign regulator and identify each such regulated entity and all of its foreign regulators. One commenter recommended that the information requested in Item 3(d) only be required of the large trader and its large trader affiliates.[131] It further suggested that the Form require identification only of the primary foreign regulators.[132] The commenter stated that its list of regulators would be very long, as some of its foreign affiliates may have 25

129 See Prudential Letter at 4.

130 See id.

131 See id.

132 See id.

foreign regulators.[133] In balancing the benefits of collecting such information against the burden on large traders to provide it, the Commission is not adopting the requirement as proposed. This adopted item, renumbered as Item 3(b), requires identification only of the primary foreign regulator. Further, the Commission is making the requirement applicable only to the large trader and its Securities Affiliates. In addition, two separate questions proposed on CFTC registration have been combined into one question to streamline the presentation of those items. No substantive change has been made to either question. The Commission believes that the requirement as adopted should not be as burdensome and yet should provide the Commission with access to the basic information it needs to understand the identity and regulatory status of a large trader and its affiliates.

d. Item 4

Item 4(b) of the Form requires information on affiliates of the large trader that exercise investment discretion over NMS securities (i.e., Securities Affiliates).[134] Item 5 of the proposed Form would have required a large trader to identify each affiliate that either exercises investment discretion over accounts that hold NMS securities or that beneficially owns NMS securities. In response to comments received, the Commission is not adopting the requirement to disclose affiliates that merely beneficially own NMS securities.[135] Accordingly, large traders will not have to identify or further describe affiliates who merely beneficially own NMS securities. The Commission believes that limiting the scope of required information to focus on affiliates that

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[133] See id.

[134] Information from proposed Item 5 (on affiliates) has been integrated into Item 4 of the adopted Form, which covers the organization of the large trader generally. This change was intended to consolidate under one Item similar information that is requested on the organization of each large trader.

[135] One commenter suggested that the Commission require identification of only those affiliates that trade in NMS securities. See SIFMA Letter at 17.

exercise investment discretion over NMS securities is appropriate and may reduce reporting burdens, while providing the Commission with important information about affiliates that are engaged in trading activities consistent with the primary focus of the Rule.

Given the narrower scope of affiliates about which information is now requested, the Commission is adopting as Item 4(a) a requirement to attach an organizational chart. At a minimum, the organizational chart must depict the large trader, its parent company (if applicable), all of its Securities Affiliates, and all entities identified in Item 3(a).[136] The organizational chart requirement is intended to help the Commission to quickly understand the affiliate structure of the large trader and should be useful, among other things, in assigning LTIDs and understanding any suffixes that are assigned. At the same time, a narrative description of the relationship between affiliates can also be useful where the relationships are difficult to portray in an organizational chart.[137] Accordingly, as part of Item 4(b), the Commission is requiring a narrative description of the relationship between (1) the large trader; and (2) each Securities Affiliate and each entity identified in Item 3(a).

As part of Item 4(b), the Commission is adopting a requirement that the large trader list its Securities Affiliates and all entities identified in Item 3(a). Additionally, the large trader must describe the business and disclose the MPID (if any) for each of those entities. The MPIDs of Securities Affiliates will be useful to the Commission when analyzing trading data on affiliates identified on the Form. The Commission believes that MPIDs will allow the staff to more

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136 As long as its organizational chart lists all required entities, a large trader may submit its standard organizational chart that it keeps in the ordinary course of its business. The organizational chart, as part of the Form 13H submission, would be treated as confidential by the Commission. See infra Section III.A.3.g (discussing confidentiality).

137 As proposed, Item 5 of the Form would have collected information about the relationships of affiliates in a list form.

carefully tailor requests to registered broker-dealers for large trader trade data, and they may reduce the need for the Commission to send disaggregation requests to a large trader.[138]

Item 4(c) of the Form requires the provision of the LTIDs, including LTID suffixes, for all entities within the large trader that file separately (if any). This requirement is very similar to what was proposed under Item 5. Item 4(c) as adopted, however, expressly requires that a large trader include the LTID suffix (if any) of all identified entities.

Item 4(d) of the Form allows a large trader to assign suffixes to its affiliates. In the Proposing Release, the Commission specified that a large trader could elect to append additional characters (a suffix) to sub-identify particular units that directly control an account.[139] Use of a suffix might be useful, for example, to facilitate a large trader's internal recordkeeping and to facilitate responses to Commission disaggregation requests.[140] The instructions to Item 4(d) of the Form provide guidance on the format for suffixes.[141] A list of the entities within the large trader complex that have been assigned suffixes will help the Commission understand the large trader's use of suffixes and may facilitate the ability of a large trader to track and manage its assigned suffixes.

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138 One commenter suggested that assignment of a LTID to track the trades of large traders does not go far enough. See GETCO Letter at 3. The commenter recommended that all market participants be required to have and use a unique MPID when entering orders on market centers, either directly or through sponsored market access arrangements. The Commission believes that such an initiative is beyond the scope of this particular rulemaking, which requires large traders to provide such information to the Commission. If the Commission were to consider extending such a requirement to other market participants, it would be subject to a separate rulemaking providing interested persons an opportunity to comment.

139 See Proposing Release, supra note 3, 75 FR at 21460, n.40.

140 See id. at 75 FR at 21460, n.44.

141 Specifically, suffixes must have three characters, all of which must be numbers. No letters or special characters may be used in a suffix. Further, the same suffix should not be assigned to more than one entity using the same LTID, and large traders should avoid reusing suffixes.

The Commission believes that the information about large trader affiliates required by Item 4 of the Form is necessary to provide the Commission with the background necessary to understand the character and trading activities of a large trader.

e. Item 5

Item 5 of Form 13H requires information about the governance of the large trader.[142] Item 5(a) mandates disclosure of one or more of the following statuses of the large trader: individual;[143] partnership; limited liability partnership; limited partnership; corporation; trustee; or limited liability company. Additionally, the Form permits the large trader to check "Other" and specify a form of organization that is not comparable to any of the enumerated organization types.

Item 5(b) requires the identification of each partner in the large trader partnership and partnership status (i.e., general partner or limited partner).

Item 5(c) requires the identification of each executive officer, director, or trustee of a large trader corporation or trustee. The column title in Item 5(c) reflects the instruction that the large trader identify its Executive Officers.[144]

f. Item 6

Item 6 of Form 13H requires large traders to identify broker-dealers at which the large trader has an account. As proposed, Item 6 would have required large traders to provide

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142 Information from proposed Schedule 4 (on governance) has been integrated into Item 5 (also on governance). Specifically, the Commission is consolidating proposed Schedule 4 of Form 13H into Item 5 and re-titling it "Governance of the Large Trader." This change was intended to consolidate under one Item similar information concerning the governance of each large trader.

143 The proposed categories for individuals ("self employed" and "otherwise employed") have been condensed into a single requirement to identify a large trader as an individual.

144 Although proposed Schedule 4 to Form 13H did not specify that only the identities of executive officers were required, the proposed instructions to the Form indicated that the proposed Form did not seek to collect the identities of all officers of the large trader.

information concerning each broker-dealer account through which it or certain of its affiliates trade. The Commission received several comments concerning Schedule 6 to the proposed Form.[145] As discussed below, some commenters, particularly investment advisers, noted that this requirement would be impractical or at least very burdensome and could require disclosure of potentially hundreds of thousands of account numbers.[146] One commenter explained that many investment advisers do not know the account numbers assigned to them by broker-dealers because that information is not required by the software they use to communicate order allocation and settlement instructions to broker-dealers.[147] Other commenters stated that some investment advisers for defined contribution plans do not have access to account information because the plan record-keepers, not the investment advisers who provide instructions to the record-keepers, establish and maintain the relationships with the broker-dealers.[148] Even for large traders that have ready access to their brokerage account numbers, commenters suggested that the sheer volume of that information, and the frequency with which it might change, would make regular disclosure extremely burdensome.[149] Other commenters stated that account numbers sometimes are embedded with personally identifiable information and objected to the requirement because: (1) the Commission should not require investment advisers to disclose

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145 See, e.g., Anonymous e-mail dated June 22, 2010; Wellington Management Letter at 3-6; and Financial Engines Letter at 4-6.

146 See, e.g., Wellington Management Letter at 3-4.

147 See id.

148 See Financial Engines Letter at 4-5 and Investment Adviser Association Letter at 6. One commenter added that some investment managers do not have account number information because they execute trades with registered broker-dealers with whom they have only an informal relationship and no contract. See Investment Adviser Association Letter at 6.

149 For example, one investment adviser stated that there are over 400,000 separate broker-dealer account numbers associated with its clients. See Wellington Management Letter at 3. It further stated that it currently does not maintain a list of those account numbers. See id.

their clients' identities;[150] and (2) the burdens necessary for the Commission to establish sufficiently robust safeguards to protect the confidentiality of this information would be considerable.[151]

Some commenters suggested alternatives to disclosing account numbers in the proposed Form. One commenter suggested that the Commission instead require large traders to maintain and submit only upon request the required brokerage account information.[152] Two other commenters suggested revising the proposed Form to instead collect the names of broker-dealers through which the large trader executes transactions.[153]

Based on the comments received, the Commission understands that the provision of brokerage account information through Form 13H could burden some large traders in light of current industry practices. While this information could be of value to the Commission, the Commission has determined to not adopt Schedule 6 as proposed. Instead, the adopted Form requires that large traders identify the registered broker-dealers at which the large trader or any of its Securities Affiliates has an account and disclose whether each such broker-dealer provides prime broker, executing broker, and/or clearing broker services. If the Commission needs more specific individual account-level information, it can use the provided list of broker-dealers and the services they provide to make targeted requests to those entities for more detailed

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150 One commenter stated the requirement, which would disclose client information, may: (1) raise numerous privacy issues, particularly with respect to transmission of confidential information from foreign jurisdictions such as members of the European Union and Switzerland and (2) harm relationships between investment managers and their clients. See Investment Adviser Association Letter at 6.

151 See David L. Goret Letter at 3.

152 See American Banking Association Letter at 2.

153 See Wellington Management Letter at 4 and Investment Company Institute Letter at 8-9.

information.[154] In addition, the Commission notes that it may contact the large trader directly pursuant to Rule 13h-1(b)(4) to seek additional information to further identify the large trader and all accounts through which the large trader effects transactions.[155]

One of the commenters who suggested this approach cautioned that any list of broker-dealers provided by large traders should be kept confidential because leakage of such information (and particularly leakage of changes to such a list) could impact the stock price of publicly traded broker-dealers on that list.[156] The confidential treatment of all information collected through Form 13H is discussed below.

g. Confidentiality

A number of commenters underscored the sensitive nature of the information collected on Form 13H and expressed support for the Commission's position that the information would be protected as contemplated by the Market Reform Act.[157] Two commenters expressed concern about the risk of theft and/or inadvertent disclosure of private client names and account numbers.[158] One commenter asked whether the Commission would share information about Unidentified Large Traders with other regulatory agencies for supervisory or enforcement

154 Under Exchange Act Rules 17a-25 and 13h-1, broker-dealers are required to maintain and report the applicable account numbers in which a transaction was effected. Accordingly, the Commission will obtain information on account numbers in connection with a particular request for data.

155 One commenter suggested it was unnecessary to collect brokerage account information because, if necessary, the Commission could request more detailed information from the large trader pursuant to proposed Rule 13h-1(b)(4). See Investment Adviser Association Letter at 7.

156 See Investment Company Institute Letter at 9, n.18.

157 See, e.g., Wellington Management Letter at 6; Financial Engines Letter at 7; Investment Adviser Association Letter at 10; and Investment Company Institute Letter at 2, 4.

158 See Anonymous e-mail dated June 22, 2010 and Managed Funds Association Letter at 3-4.

purposes.[159] Additionally, two commenters suggested that the Commission monitor for misuses of confidential information such as front-running.[160]

The Commission is committed to maintaining the information collected pursuant to Rule 13h-1 in a manner consistent with Section 13(h)(7) of the Exchange Act.[161] The statute specifies that the Commission shall not be compelled to disclose information collected from large traders and registered broker-dealers under a large trader reporting system, subject to limited exceptions. Specifically, the statute provides that:

> Nothing in this subsection shall authorize the Commission to withhold information from Congress, or prevent the Commission from complying with a request for information from any other Federal department or agency requesting information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.[162]

The legislative history of Exchange Act Section 13(h) suggests that Congress: (1) understood that confidential information that could reveal proprietary trading strategies to competitors would be collected and correspondingly restricted public access to this information; and (2) crafted the exceptions to (a) ensure that it could obtain information from the Commission; (b) allow the Commission to grant access to federal departments and other federal agencies acting within the

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159 See SIFMA Letter at 19.

160 See T. Rowe Price Letter at 2 and Investment Adviser Association Letter at 10.

161 See 15 U.S.C. 78m(h)(7).

162 15 U.S.C. 78m(h)(7).

scope of their jurisdictions; and (c) allow the Commission to comply with an order of a court of the United States in certain actions.[163]

While the Commission must share the information it collects on large traders as outlined above, the Commission is committed to protecting the confidentiality of that information to the fullest extent permitted by applicable law. By assuring large traders of the confidentiality of information they provide to the Commission, the Commission is addressing commenters' concerns.

B. Broker-Dealers: Recordkeeping, Reporting, and Monitoring

As proposed, Rule 13h-1 would impose recordkeeping and reporting responsibilities on the following: registered broker-dealers that are large traders; registered broker-dealers that, together with a large trader or Unidentified Large Trader, exercise investment discretion over an account; and registered broker-dealers that carry accounts for large traders or Unidentified Large Traders or, with respect to accounts carried by a non-broker-dealer, broker-dealers that execute transactions for large traders or Unidentified Large Traders. In addition, the proposed rule would require certain registered broker-dealers to implement procedures to encourage and foster compliance with the self-identification requirements of the proposed rule. As discussed in greater detail below, after considering the comments received on the Rule's application to registered broker-dealers, the Commission is adopting these provisions of the Rule substantially as proposed, but with some modifications to reflect certain comments and to clarify the requirements applicable to registered broker-dealers.

1. Recordkeeping Requirements

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163 See Senate Report, supra note 14, at 41.

The Commission received few comments concerning the proposed recordkeeping requirements,[164] and is adopting Rule 13h-1(d) substantially as proposed with one modification.[165] As proposed, every registered broker-dealer would have been required to maintain records of information for, among others, "(i) an account such broker-dealer carries for a large trader or an Unidentified Large Trader, (ii) an account over which such broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader, or (iii) if the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion." The Commission is not adopting the requirement to maintain records for accounts over which such broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader.

As described above, in connection with the requirement for large traders to disclose on Form 13H a list of broker-dealers at which a large trader or any Securities Affiliate has an account rather than a list of account numbers at such broker-dealers as proposed, the Commission is not adopting the proposed requirement that large traders disclose their LTIDs to other large traders.[166] Thererfore, large traders will not be required to communicate their LTIDs to other traders, and, consequently, there is no mechanism in the Rule for a large trader to be informed of the status of another trader with whom it jointly exercises investment discretion.

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164 See SIFMA Letter at 10, 14 and Financial Information Forum Letter at 5.

165 While paragraph (d)(2) of the Rule sets forth the information that is to be maintained for each transaction, subparagraph (xiii) requires that the broker-dealer record the LTIDs "associated with the account, unless the account is for an Unidentified Large Trader." This provision effectively requires that a broker-dealer tag an LTID to an account rather than to each transaction. In addition, for an Unidentified Large Trader, the Commission expects broker-dealers to assign their own unique identifier to the applicable account(s).

166 See discussion supra at Section III.A.2.b. The proposed requirement that large traders disclose their LTIDs to other large traders was intended to facilitate the ability of a large trader to complete Form 13H, including the provisions that required it to identify its account numbers and the LTID of any trader with whom it shared investment discretion over the account.

Similarly, the Commission believes it is appropriate to narrow the scope of the recordkeeping duty concerning accounts over which a broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader. Accordingly, under the Rule as adopted, registered broker-dealers must maintain records for all transactions effected directly or indirectly by or through (i) an account such broker-dealer carries for a large trader or an Unidentified Large Trader or (ii) if the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion. As a practical matter, however, the Commission will continue to have access to records of any account over which a broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader by virtue of the fact that such an account is an account of a large trader subject to the recordkeeping requirements.

In addition, the Commission is adopting as proposed the requirement that, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting transactions directly or indirectly for such large trader or Unidentified Large Trader maintain records of all of the required information.

One commenter asked whether registered broker-dealers would be required to maintain records of transactions by inactive large traders.[167] In the Proposing Release, the Commission stated that an inactive large trader could inform its broker-dealers of its Inactive Status and request that they discontinue tagging its transactions with its LTID.[168] The Rule does not require

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167 See Financial Information Forum Letter at 5.

168 See Proposing Release, supra note 3, at 21464. As discussed above, Inactive Status relieves a former large trader from having to file and amend Form 13H with the Commission. The Rule, however, does not specifically require a registered broker-dealer to discontinue tagging the trader's transactions with its LTID. As discussed below, Form 13H and the information contained therein, is confidential. Accordingly, the Commission would not reveal a large trader's status to a broker-dealer that sought to confirm a reported Inactive Status.

a broker-dealer to maintain records of transactions by an inactive large trader after receiving notice from the large trader that the trader had filed for inactive status with the Commission on Form 13H.

One commenter asked the Commission to clarify Rule 13h-1(d)(5),[169] which requires that the "records and information required to be made and kept pursuant to the provisions of this rule shall be available on the morning after the day the transactions were effected (including Saturdays and holidays)."[170] Specifically, the commenter asked whether, by requiring that records be available on Saturdays and holidays, the Commission expects that broker-dealers might be required to submit transaction data on Saturdays and holidays. The Commission notes that the Rule contemplates that broker-dealers might be called upon by the Commission to report data to the Commission on a Saturday or holiday, consistent with the legislative history that accompanies Section 13(h).[171] Depending on the urgency of the situation, the Commission may need prompt access to large trader data and the Rule contemplates that possibility.[172] The provisions applicable to the reporting of data to the Commission are discussed below.

2. Reporting Requirements

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169 See Financial Information Forum Letter at 3.

170 See id.

171 See Senate Report, supra note 14, at 40. See also Section 13(h) of the Exchange Act, 15 U.S.C. 78m(h)(2), providing that "[r]ecords shall be reported to the Commission… immediately upon request by the Commission…."

172 The Commission notes that while new Rule 13h-1(d)(5) governs the availability of data, new Rule 13h-1(e) governs the reporting of transaction data by broker-dealers to the Commission. Specifically, that provision requires registered broker-dealers to submit transaction data "no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested." Accordingly, while information must be available on the morning after the transaction was effected, the reporting deadline is based upon the day of the Commission's request.

As proposed, Rule 13h-1(e) would require every registered broker-dealer who is itself a large trader, exercises investment discretion over an account together with a large trader or an Unidentified Large Trader, or carries an account for a large trader or an Unidentified Large Trader to report to the Commission upon request records they keep pursuant to Rule 13h-1(d)(1). In addition, as proposed, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting such transactions directly or indirectly for a large trader would be required to report such records.

As described above, the Commission is not adopting the proposed requirement on large traders to disclose their LTIDs to other large traders.[173] The Commission believes it is appropriate to similarly narrow the scope of the reporting duty to not extend the reporting requirement to broker-dealers that exercise investment discretion over an account together with a large trader or an Unidentified Large Trader.

Accordingly, as adopted, upon the request of the Commission, every registered broker-dealer who is itself a large trader or carries an account for a large trader or an Unidentified Large Trader shall electronically report to the Commission all information required under paragraphs (d)(2) and (d)(3) for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and Unidentified Large Traders, equal to or greater than the reporting activity level. Additionally, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting such transactions directly or indirectly for a large trader shall electronically report such information.

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173 See discussion supra at Section III.A.2.b.

Broker-dealers will be required to report a particular day's trading activity if it equals or exceeds the "reporting activity level" of 100 shares.[174] Transaction reports must be submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.[175]

The Commission solicited[176] and received comments regarding the reporting duty of registered broker-dealers.[177] One commenter, in observing that the proposed rule would require registered broker-dealers to submit transaction data to the Commission before the close of business on the day specified in the request for such transaction information, asked for clarification about whether the day could be the same day the request is made.[178] The same commenter suggested that the Commission should allow registered broker-dealers a full business day, based on the time of the request, to respond to data requests.[179] Other commenters suggested longer periods. One suggested two days,[180] and one suggested affording registered

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174 New Rule 13h-1(a)(8) defines the reporting activity level as: "(i) each transaction in NMS securities, effected in a single account during a calendar day, that is equal to or greater than 100 shares; (ii) any other transaction in NMS securities, effected in a single account during a calendar day, that a registered broker-dealer may deem appropriate; or (iii) such other amount that may be established by order of the Commission from time to time." The Commission solicited comment about a number of aspects of the proposed reporting activity level, see Proposing Release, supra note 3, 75 FR at 21473, but received no comments regarding the proposed threshold.

175 Cf. Exchange Act Section 13(h)(2), 15 U.S.C. 78m(h)(2), which requires that "[s]uch records shall be available for reporting to the Commission, or any self-regulatory organization that the Commission shall designate to receive such reports, on the morning of the day following the day the transactions were effected, and shall be reported to the Commission or a self-regulatory organization designated by the Commission immediately upon request by the Commission or such a self-regulatory organization."

176 See Proposing Release, supra note 3, 75 FR at 21473.

177 See, e.g., Financial Information Forum Letter at 4 and SIFMA Letter at 13-17.

178 See Financial Information Forum Letter at 2.

179 See id.

180 See Prudential Letter at 5.

broker-dealers 10 business days to respond, which could be shortened over time to three business days.[181] The latter commenter opposed the proposed deadline, stating that broker-dealers' existing infrastructure cannot respond to data requests for large trader transactions within one business day. As noted in the Proposing Release, the Commission expects that certain system enhancements will be required to prepare broker-dealers' existing EBS infrastructure for compliance with Rule 13h-1, including the provisions regarding the availability of data.[182] While the Commission does not anticipate that, under normal circumstances, it would request delivery of large trader transaction data on the same day the request is made, the Commission believes it is important that it have the flexibility to do so if required by the urgency of the situation.[183]

In response to the requests of commenters to provide additional guidance on the expected timeframe within which broker-dealers would need to submit transaction data to the Commission, the Commission is adopting a modified version of Rule 13h-1(e) to provide that reports of transactions must be "submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested."

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181 See SIFMA Letter at 15.

182 See Proposing Release, supra note 3, 75 FR at 21471.

183 The Commission notes that the Rule requires that trade data be available for reporting to the Commission on the morning after the day the transactions were effected (which could include Saturdays and holidays). As specified in new Rule 13h-1(e), in response to a Commission request for transaction data, the information must be reported to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.

The Commission understands from one commenter that EBS data processes are normally done during overnight batch runs.[184] In light of these considerations, the Commission believes it would be appropriate for broker-dealers to utilize any overnight process they may have currently in production, and the Rule as adopted provides that the Commission will normally request reports to be submitted in manner that allows time for such overnight processing.

However, under unusual circumstances, the Commission may request more immediate responses that may require some broker-dealers to perform a manual process in order to provide reports to the Commission sooner than could be accommodated by an overnight batch process. For example, on the morning following a market event such as May 6, 2010, the Commission could request data about the prior day to be submitted the same day as the request is made. The Commission recognizes that under these circumstances, depending on the nature of broker-dealer's systems, the report data may be preliminary and require updating by the opening of business of the day following the request. One commenter inquired whether registered broker-dealers would be required to submit transaction data directly to the Commission instead of through the normal channel for EBS submissions.[185] As adopted, Rule 13h-1(e) requires that reports be submitted "electronically, in machine-readable form and in accordance with a format specified by the Commission that is based on the existing EBS system format." Like Exchange Act Rule 17a-25, this provision does not require (or prohibit) preparation or transmission of reports by any intermediary. However, as stated in the Proposing Release, in order to mitigate costs on registered broker-dealers, the Commission intends to utilize the existing infrastructure of the EBS system for the large trader reporting rule.

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184 See Financial Information Forum Letter at 3.

185 See id.

Another commenter asked whether the Commission intended to request transaction data according to LTID.[186] The Commission expects that it would, on occasion, request EBS data according to LTID. A narrowly-focused request for transaction records of a particular large trader would help the Commission obtain in the most efficient manner possible targeted and limited data and should reduce the burden on broker-dealers by allowing them to provide smaller files in response to an EBS request for records of specific large traders.

One commenter recommended using the OATS system maintained by the Financial Industry Regulatory Authority ("FINRA") instead of the EBS system for the large trader reporting rule. The commenter pointed out that, unlike the EBS system, OATS processes are tied to front office order and execution systems and thus could more readily incorporate the proposed new field of execution time.[187] Further, the commenter noted that OATS should be able to provide next day reporting.[188] The Commission, however, believes that the large trader reporting requirements can be most efficiently implemented and operated through relatively modest enhancements to the existing EBS system. Use of OATS, which is maintained by FINRA, would involve expanding OATS to additional categories of securities (e.g., options) and making additional enhancements to accommodate the records that would need to be kept pursuant to the Rule. For these reasons, the Commission does not believe basing the large trader reporting rule on OATS is appropriate at this time.

3. Monitoring Requirements

Overview of Proposed Rule. Under proposed Rule 13h-1(d) and (e), certain registered broker-dealers would be subject to recordkeeping and reporting responsibilities for their

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186 See id. at 2.

187 See SIFMA Letter at 15.

188 See id.

customers that meet the criteria for Unidentified Large Traders. Proposed Rule 13h-1(a)(9) defined "Unidentified Large Trader" as "each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this rule that a registered broker-dealer knows or has reason to know is a large trader." The proposed Rule provided that a registered broker-dealer "has reason to know whether a person is a large trader based on the transactions in NMS securities effected by or through such broker-dealer."

In assessing whether a broker-dealer "has reason to know" whether one of its customers may be a large trader, the proposed rule effectively would have required the broker-dealer to take into account trading activity in its own customer accounts.

Proposed Rule 13h-1(f) also contained a safe harbor that was designed to reduce the broker-dealer's burdens in connection with monitoring its customers' trading for purposes of identifying possible large traders.[189] The safe harbor in proposed Rule 13h-1(f) required reasonably designed systems to detect and identify persons that may be large traders – based upon transactions effected through an account or group of accounts or other information readily available to the broker-dealer. Further, the proposed safe harbor required reasonably designed systems to inform such persons of their potential obligations under Rule 13h-1.

The proposed monitoring requirements were intended to promote awareness of and foster compliance with Rule 13h-1 by customers who might not be aware of their large trader reporting responsibilities. As noted in the Proposing Release, the proposed rule placed "the principal burden of compliance with the identification requirements on large traders themselves"[190] while the broker-dealer monitoring requirements were intended to be "limited" and "a necessary

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189 See Proposing Release, supra note 3, 75 FR at 21470.

190 Id.

backstop to encourage compliance and fulfill the objectives of Section 13(h) of the Exchange Act."[191]

Comments Received. In the Proposing Release, the Commission requested comments on the proposed monitoring requirements and the related safe harbor.[192] The Commission received several comments that addressed the proposed duty to monitor customers for purposes of Rule 13h-1.[193] One commenter asserted that the Commission lacks the statutory authority to impose a monitoring requirement on registered broker-dealers in connection with the large trader reporting rule.[194] A few commenters asked for clarification of the monitoring requirements and offered alternatives.[195] Of those commenters that addressed the issue, most were critical of the proposed monitoring requirements.[196] One commenter characterized the role of broker-dealers under the proposed rule as "gatekeepers," and asserted that "the proposed rule would impose on broker-dealers much of the operational monitoring regarding registration of large traders."[197] Two commenters asked whether the Rule would require broker-dealers to stop doing business with Unidentified Large Traders.[198] One of those commenters asserted that it should not because that would have the unintended consequence of driving customers to broker-dealers who may be less

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191 Id.

192 See id. at 21472-73.

193 See, e.g., Financial Information Forum Letter at 4-5; GETCO Letter at 3; and SIFMA Letter at 9-13.

194 See SIFMA Letter at 11.

195 See, e.g., Financial Information Forum Letter; SIFMA Letter; and GETCO Letter.

196 One commenter described the proposed safe harbor as "anything but safe" and, as discussed above, asserted that the proposal exceeds the Commission's statutory authority because, among other reasons, the safe harbor provided that a registered broker-dealer would have reason to know that a customer is an Unidentified Large Trader based on other readily available information, as well as transactions effected through the broker-dealer. See SIFMA Letter at 11.

197 Id. at 9.

198 See id. at 11 and Financial Information Forum Letter at 5.

diligent in monitoring for large traders.[199] These two commenters also requested guidance about whether the monitoring provisions required any specific policies and procedures.[200] Another commenter asked whether a broker-dealer has a duty to proactively determine whether a customer is an Unidentified Large Trader based on the broker-dealer's knowledge that its customer maintains accounts at other broker-dealers.[201]

Summary of Monitoring Requirements in Final Rule. The Commission addresses these comments below, but for purposes of clarity we also will briefly summarize the monitoring requirements in the final Rule. As adopted, the Rule requires that a registered broker-dealer treat as an Unidentified Large Trader (for purposes of the recordkeeping and reporting provisions in paragraphs (d) and (e) of the Rule) any person that the broker-dealer "knows or has reason to know" is a large trader where such person has not complied with the identification requirement applicable to large traders (i.e., identified itself as a large trader to the broker-dealer and disclosed the accounts to which its LTID applies). As noted in Rule 13h-1(a)(9), in considering whether the broker-dealer has "reason to know" that a person is a large trader, however, the broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer (i.e., it need not seek out information on transactions effected by that person through another broker-dealer). Moreover, a broker-dealer may determine that it has no "reason to know" that a person is a large trader through two methods. First, the broker-dealer may simply conclude, based on its knowledge of the nature of its customers and their trading activity with the broker-dealer, that it has no reason to expect that any of these customers' transactions

199 See SIFMA Letter at 11.

200 See id. at 10 and Financial Information Forum Letter at 5.

201 See SIFMA Letter at 10.

approach the identifying activity level.[202] Second, the broker-dealer may rely on the safe harbor provision in paragraph (f) of the Rule. Under the safe harbor, a registered broker-dealer would be deemed not to know or have reason to know that a person is a large trader if it does not have actual knowledge that a person is a large trader and it establishes policies and procedures reasonably designed to identify customers whose transactions at the broker-dealer equal or exceed the identifying activity level and, if so, to treat such persons as Unidentified Large Traders and notify them of their potential reporting obligations under this Rule. Under either approach, a broker-dealer's obligation with respect to an Unidentified Large Trader is limited to compliance with the requirements of paragraphs (d) and (e) of the Rule, and the broker-dealer would not be required to cease trading or take other action with respect to that Unidentified Large Trader.[203] The Commission notes that, pursuant to the reporting requirements of the Rule, it may periodically request reports from broker-dealers regarding all customers they may be treating as Unidentified Large Traders.

Response to Comments and Discussion of the Final Rule. The Commission carefully considered the comments on the proposed rule, and therefore is providing responses and additional clarifications below regarding the monitoring requirements required under this Rule. In response to the comment asserting that the Commission lacks authority to impose monitoring requirements, we note that the explicit authority under Section 13(h) of the Exchange Act to

202 For example, the broker-dealer may know, or learn from its customer, that the transactions over the identifying activity level were effected in connection with a tender offer, which are excluded under the Rule for purposes of determining whether a person is a Large Trader. Alternatively, the broker-dealer may know, or learn from its customer, that the account in question is an omnibus account and that the individual subaccounts do not exceed the identifying activity level.

203 The Commission reiterates that the monitoring requirements are intended to be a "limited" duty that serves as "a necessary backstop to encourage compliance and fulfill the objectives of Section 13(h) of the Exchange Act." Proposing Release, supra note 3, 75 FR at 21470. The Commission believes that requiring limited monitoring by broker-dealers will help assure that the objectives of the Rule are met and is consistent with the statutory intent of Section 13(h) of the Exchange Act.

adopt this Rule is supplemented by Section 23(a) of the Exchange Act, which allows the Commission to "make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which they are responsible or for the execution of the functions vested in them by this title...."[204] Further, Section 13(h)(2) of the Exchange Act specifically authorizes the Commission to require registered broker-dealers to report transactions that "equal or exceed the reporting activity level effected directly or indirectly by or through [them]...for any person that such broker or dealer has reason to know is a large trader on the basis of transactions in securities effected by or through such broker or dealer" (emphasis added).[205] That section, then, contemplates that registered broker-dealers would take into account their own customers' trading (which they have reason to know). The Commission believes, therefore, that it is reasonable to require broker-dealers to take into account a customer's trading activity through the broker-dealer's accounts to implement Section 13(h).

The Commission is, however, making several modifications to the proposed rule in response to commenters' requests for additional clarification. First, in response to questions regarding the scope of the information that a broker-dealer must consider in determining whether a person may be a large trader, the Commission is adopting a definition of Unidentified Large Trader to clarify what was intended in the proposed Rule – that a broker-dealer does not have "reason to know" that a person is a large trader other than by reference to transactions in accounts of the broker-dealer. In particular, proposed paragraph (a)(9) of the Rule would have defined an Unidentified Large Trader as a "person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this rule that a registered broker-dealer knows or has reason to know is a large trader." It further provided that "[a] registered broker-dealer has

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204 15 U.S.C. 78w(a).

205 15 U.S.C. 78m(h)(2).

reason to know whether a person is a large trader based on the transactions in NMS securities effected by or through such broker-dealer." To clarify the Commission's intent for determining whether a registered broker-dealer has reason to know, the Commission is adopting a revised second sentence of paragraph (a)(9) of the Rule to provide: "For purposes of determining under this rule whether a registered broker-dealer has reason to know that a person is a large trader, a registered broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer." In other words, when considering whether a customer's trading activity has exceeded the "identifying activity level," the broker-dealer need only consider the customer's activity effected through an account or a group of accounts at that broker-dealer. If that activity rose to the "identifying activity level", the broker-dealer would be required to treat the customer as an Unidentified Large Trader. Beyond considering the transactions effected through an account or a group of accounts at the broker-dealer, however, the broker-dealer is not required to proactively make further inquiries for the purpose of determining its customer's status (e.g., by seeking to determine the customer's trading activity at other broker-dealers). However, if a registered broker-dealer nevertheless has actual knowledge that a person is a large trader and the person has not provided the broker-dealer with a LTID, then the broker-dealer must treat the person as an Unidentified Large Trader under the recordkeeping and reporting requirements of the Rule.

Further, in response to questions regarding the scope of a broker-dealer's obligations with respect to an Unidentified Large Trader, the Commission notes that the Rule does not require a broker-dealer to stop doing business with Unidentified Large Traders. Rather, paragraph (d)(3) of the Rule requires broker-dealers to maintain information on Unidentified Large Traders, and paragraph (e) requires broker-dealers to report that information to the Commission on request.[206] Moreover, the Rule does not require a broker-dealer to proactively or affirmatively determine who is in fact a large trader. A potential large trader is required to assess for itself whether it meets the identifying activity threshold and thus qualifies as a large trader. The Commission notes that in some cases only the potential large trader would know whether it in fact is a large trader because certain types of transactions are excluded from the identifying activity level calculation. For example, a broker-dealer may have a customer that effected $22,000,000 worth of transactions through that broker-dealer in a given day, in excess of the identifying activity threshold. If that customer did not previously identify itself as a large trader to the broker-dealer by providing an LTID and identifying the accounts to which it applies, then the broker-dealer would treat the customer as an Unidentified Large Trader. However, the customer may not, in fact, be required to register as a large trader because the customer may not have exercised investment discretion over those transactions.

The Commission also is making several modifications to paragraph (f) from the proposal to clarify the requirements of the safe harbor provision contained in that paragraph. As noted above, this safe harbor would provide a broker-dealer with assurance as to whether it has "reason to know" that a person is a large trader, and therefore whether the broker-dealer must treat such person as an Unidentified Large Trader. As a practical matter, the Commission expects that broker-dealers with customers whose trading activities could exceed the identifying activity level will likely elect to avail themselves of the safe harbor. To qualify under the safe harbor, the broker-dealer must (i) implement policies and procedures reasonably designed to identify customers whose trading activity exceeds the identifying activity level, (ii) treat such customers

206 The Rule does not address any other obligation or potential liability of the broker-dealer under any other provisions of the federal securities laws.

as Unidentified Large Traders for purposes of the Rule, and (iii) notify such customers of their potential obligation to comply with the rule as a large trader.

Certain technical changes to paragraph (f) have been made to clarify these requirements. For example, paragraphs (f)(1) and (2) now make clear that if a customer's trading activity exceeds the identifying activity level, and the customer has not self-identified as a large trader, the broker-dealer must treat that customer as an Unidentified Large Trader for purposes of the Rule. In addition, paragraph (f)(1) has been revised to clarify that – consistent with the definition of Unidentified Large Trader – the broker-dealer's policies and procedures for measuring a customer's trading activity need only consider transactions effected in accounts carried by the broker-dealer or through which the broker-dealer executes transactions.[207]

ATSs. One commenter,[208] a broker-dealer that operates an ATS, argued that an ATS should not have a duty to monitor its subscribers' compliance with the large trader identification requirements. The commenter argued that, just as an exchange would not have an obligation to monitor its broker-dealer members' compliance with proposed Rule 13h-l, a broker-dealer that operates an ATS should not be required to monitor whether its subscribers are complying with the requirements of the rule. The Commission notes that the monitoring requirements are only applicable to registered broker-dealers that are large traders, carry accounts for large traders or Unidentified Large Traders, or effect transactions on behalf of large trader customers whose

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207 In addition, as proposed, paragraph (f) applied to broker-dealers that are large traders, exercise investment discretion over an account together with a large trader or Unidentified Large Trader, carry an account for a large trader or Unidentified Large Trader, or effect transactions directly or indirectly for a large trader where a non-broker-dealer carries the account. Because the Commission is not adopting the proposed requirement to disclose account numbers or the corresponding requirements on large traders to disclose their LTIDs to other large traders, the Commission believes it is appropriate to streamline the introduction to paragraph (f) to refer to broker-dealers generally, and to modify sub-paragraph (1) to refer to transactions effected through an account or a group of accounts carried by such broker-dealer or through which such broker-dealer executes transactions, as applicable.

208 See GETCO Letter at 3.

accounts are carried by non-broker-dealers. If an ATS is not operating in those capacities, then it is not subject to the monitoring requirements.

C. Foreign Entities

In the Proposing Release, the Commission requested comment about whether the proposed treatment of foreign entities is appropriate and the extent to which foreign statutes might complicate compliance with the proposed rule by foreign large traders.[209] In addition, the Commission solicited comment concerning whether the proposed rule would have any unintended negative consequences for the U.S. markets.[210] The Commission received a number of comments, both general and specific, on these topics.[211] One commenter expressed concern with the broad definition of "large trader" applying to non-U.S. entities, and suggested that the Commission modify the proposed rule to impose recordkeeping and reporting requirements solely on registered broker-dealers.[212] The Commission believes that limiting the definition of "large trader" in the suggested manner would be inconsistent with the legislative intent behind Section 13(h), as evidenced by the plain language of the statute.[213] The statute contemplates that the Commission would be able to identify all persons who are large traders, not just large traders who are U.S. entities. Accordingly, the Rule requires a foreign entity that is a large trader to

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209 See Proposing Release, supra note 3, 75 FR at 21473.

210 See id. at 21482.

211 See, e.g., European Banking Federation and Swiss Bankers Association Letter at 2-5 and SIFMA Letter at 12-13.

212 See European Banking Federation and Swiss Bankers Association Letter at 3.

213 Section 13(h)(1) in pertinent part provides that each large trader shall: (A) provide such information to the Commission as the Commission may by rule or regulation prescribe as necessary or appropriate, identifying such large trader and all accounts in or through which such large trader effects such transactions; and (B) identify, in accordance with such rules or regulations as the Commission may prescribe as necessary or appropriate, to any registered broker or dealer by or through whom such large trader directly or indirectly effects securities transactions, such large trader and all accounts directly or indirectly maintained with such broker or dealer by such large trader in or through which such transactions are effected.

comply with the identification requirements of paragraph (b) of the Rule. With respect to the recordkeeping and reporting requirements, however, the Commission notes that paragraphs (d) and (e) of the Rule, concerning recordkeeping and reporting, respectively, explicitly apply only to U.S.-registered broker-dealers.

One commenter suggested that it would be impractical for a registered broker-dealer to collect identifying information required by proposed Rule 13h-1(d)(3) when such collections may be prohibited under foreign laws.[214] The commenter further suggested that, because registered broker-dealers may not be able to comply with this provision, they "may effectively be forced to cease providing services to non-U.S. intermediaries acting on behalf of unidentified non-U.S. Traders…."[215] Another commenter suggested that it would be impractical for a registered broker-dealer to monitor for foreign Unidentified Large Traders who trade through intermediaries.[216] The commenter asked for clarification in this context regarding a registered broker-dealer's duty to inform its customers about the self-identification requirements of the Rule.[217] Specifically, the commenter asked whether it would be sufficient for the broker-dealer to notify the foreign intermediary of its customer's possible obligation to comply with the self-identification requirements of the Rule. As discussed further below, when a U.S. registered broker-dealer deals directly with a foreign entity that is an intermediary, it would treat that foreign intermediary like any other customer: it must collect the information specified by Rule 13h-1(d)(2) about the foreign intermediary's transactions if it is a large trader and, if it is an

214 See European Banking Federation and Swiss Bankers Association Letter at 3.

215 See id.

216 See SIFMA Letter at 12.

217 See id.

Unidentified Large Trader,[218] the broker-dealer must also collect the information specified by Rule 13h-1(d)(3).[219] The Rule does not require a registered broker-dealer to collect the identifying information about the foreign intermediary's customers.[220]

As discussed above, Rule 13h-1(f) provides that a registered broker-dealer shall be deemed not to know or have reason to know that a person is a large trader if it establishes policies and procedures reasonably designed to assure compliance with the identification requirements of the Rule and does not have actual knowledge to the contrary. Those policies and procedures would need to be reasonably designed to identify potential large traders based upon transactions effected through an account or a group of accounts considering account name, tax identification number, or other identifying information available on the books and records of the broker-dealer. The Rule does not require broker-dealers to definitively determine who is, in fact, a large trader.

Further, in the case of foreign intermediaries, the Commission recognizes that the U.S. registered broker-dealer may only know as its customer the foreign intermediary, not the persons trading through the account of the foreign intermediary. In such case, the registered broker-

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218 See discussion supra at Section III.B.3 (concerning monitoring for Unidentified Large Traders).

219 Rule 13h-1(d)(3) requires a broker-dealer to maintain the following additional information for an Unidentified Large Trader: name, address, date the account was opened, and tax identification number(s). If an Unidentified Large Trader is a non-U.S. entity and does not have a U.S.-issued tax identification number, then the broker-dealer would only need to maintain the entity's name, address, and date the account was opened.

220 The legislative history indicates Congress's expectation that the Commission, in implementing a large trader reporting system, "would not impose requirements on broker-dealers to report beneficial ownership information that is not recorded in the normal course of business." Senate Report, supra note 14, at 42. The Committee specifically noted that many broker-dealers did not maintain beneficial ownership records of transactions of foreign persons that are carried out through banks, particularly foreign banks, which serve as the record holder of such securities. See id. The Committee expected that such beneficial owners would not be assigned LTIDs. See id. As discussed above, for all persons (both foreign and domestic), large trader status is triggered by the exercise of investment discretion, not mere beneficial ownership of NMS securities.

dealer's policies and procedures would apply to its contact with the foreign intermediary. If the intermediary effects transactions through the U.S. broker-dealer that exceed the identifying activity level, then the safe harbor contemplates, as discussed above, that the broker-dealer inform the intermediary that the intermediary may be a large trader under Rule 13h-1. The foreign intermediary, then, bears the principal burden of compliance in determining whether it is a large trader.

With respect to the requirement on large traders to file Form 13H with the Commission, the Commission is aware that the laws of certain foreign jurisdictions may hinder a foreign large trader's ability to disclose certain personal identifying information. In the event, which the Commission believes to be unlikely, that the laws of a large trader's foreign jurisdiction preclude or prohibit the large trader from waiving such restrictions or otherwise voluntarily filing Form 13H with the Commission, then such foreign large traders or representatives of foreign large traders may request an exemption from the Commission pursuant to Section 36 of the Exchange Act[221] and paragraph (g) of the Rule.[222]

Commenters also discussed the practical difficulties associated with requiring large traders (such as investment advisers) to disclose account numbers. A few commenters stated that the proposal was unclear as to whether it would have required collection of brokerage account information or the account numbers assigned by investment advisers that sometimes contain client-identifying information.[223] The Commission has addressed this concern by not adopting

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221 15 U.S.C. 78mm.

222 A registered broker-dealer, however, would remain subject to the recordkeeping, reporting, and monitoring provisions of the Rule with respect to any Unidentified Large Traders independent of whether any such entity had received an exemption from the requirements to file Form 13H with the Commission.

223 See European Banking Federation and Swiss Bankers Association Letter at 3; T. Rowe Price Letter at 2; and Financial Engines Letter at 4.

the proposed requirement to report brokerage account numbers, as discussed above.[224] Instead, the Commission is requiring that a large trader provide information about the registered broker-dealers through which Securities Affiliates have an account. One commenter asserted that many foreign large traders do not have a direct relationship with any registered broker-dealer because they utilize intermediaries.[225] The commenter stated that the large trader's ability to provide information about the "ultimate broker may be incomplete at best and may result in inadvertently misleading the Commission."[226] The Commission does not believe that it is unduly burdensome to expect a large trader to be able to identify the foreign intermediary with which it maintains accounts. The Commission expects all large traders, regardless of their place of domicile, to identify each broker-dealer at which it or any Securities Affiliate has an account and disclose the type(s) of services provided.

D. Three Specific Factors Considered by the Commission Pursuant to Section 13(h) of the Exchange Act

When engaging in rulemaking pursuant to its authority under Section 13(h), the Commission is required to take into account the following factors: (A) existing reporting systems; (B) the costs associated with maintaining information with respect to transactions effected by large traders and reporting such information to the Commission or self-regulatory organizations; and (C) the relationship between the United States and international securities markets.[227] These considerations have informed this final rule, as discussed below.

1. Existing Reporting Systems

224 See supra at Section III.A.3.f.

225 See European Banking Federation and Swiss Bankers Association Letter at 2.

226 See id. at 4 (discussing the challenges associated with foreign large traders providing account information).

227 See Section 13(h)(5) of the Exchange Act, 15 U.S.C. 78m(h)(5).

Currently, the Commission collects transaction data from registered broker-dealers through the EBS system.[228] At present, neither the EBS system nor any other source of data available to the Commission allows it to definitively identify traders that conduct a substantial amount of trading activity or assess the impact of their activities on the securities markets.

Rule 13h-1 is focused on collecting information about large traders through modifications to existing EBS systems. Specifically, the Rule will provide the Commission with background information about all large traders through Form 13H submissions,[229] and will allow the Commission to obtain information on their transactions through the requirement on registered broker-dealers to track large trader trades according to the trader's LTID. Moreover, by requiring registered broker-dealers to collect and report (upon request) the execution time of all large trader transactions, the Commission is significantly enhancing its ability to investigate trading. Accordingly, the Commission believes that this new rule, which will be implemented through modifications to existing EBS systems, is narrowly tailored to address specific regulatory interests by requiring the disclosure of information that is not otherwise collected.[230]

2. Costs Associated With Maintaining and Reporting Large Trader Transaction Data

As discussed in detail below,[231] the Commission considered the costs associated with maintaining and reporting the large trader transaction data required under the Rule by registered broker-dealers. In particular, as discussed below, the Commission has designed the proposed

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228 See 17 CFR 240.17a-25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers). See also Rule 17a-25 Release, supra note 19.

229 See supra Section II.B.

230 The Commission notes that Form 13H requires a large trader to identify other forms it and its Securities Affiliates file with the Commission. As discussed above, this disclosure is designed to facilitate and expedite investigations connected to large traders.

231 See infra Section V.B.2.

rule to minimize the burdens of the large trader reporting requirements on both large traders and registered broker-dealers.

3. Relationship Between U.S. and International Securities Markets

In adopting Rule 13h-1 and Form 13H, the Commission is mindful of the danger of disadvantaging U.S. securities markets vis-à-vis foreign securities markets. In the Proposing Release, the Commission expressed concern that excluding foreign large traders from the proposed rule's requirements could create a competitive disparity between domestic markets and persons and foreign markets and persons.[232] Commenters raised issues about the application of the Rule to foreign entities, which are addressed above.[233]

The Commission solicited comment specifically about: whether the proposed rule might incentivize trading through certain market centers; whether large traders would effect their trades through entities other than registered broker-dealers (e.g., foreign brokers); whether large traders might trade increasingly in foreign jurisdictions to evade the proposed reporting requirements; whether the proposed treatment of foreign entities is appropriate; the extent to which foreign statutes complicate foreign large traders' ability to comply with the proposed rule; and whether the proposal would have any unintended negative consequences for the U.S. markets.[234] The Commission received few comments that specifically addressed these topics.

One commenter warned that, to the extent that registered broker-dealers incur higher costs as a result of the complying with the Rule, the Rule may result in some brokerage business being driven offshore to foreign brokers who will not bear the same compliance burden.[235] As

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232 See Proposing Release, supra note 3, 75 FR at 21471.

233 See supra Section III.C.

234 See Proposing Release, supra note 3, 75 FR at 21473, 21482.

235 See Prudential Letter at 2, n.4.

discussed above, the Commission clarified the extent and nature of the monitoring responsibilities applicable to registered broker-dealers and does not believe that the limited, high-level monitoring requirements would impose a cost so high as to drive business offshore. Further, as discussed in the Proposing Release and further below, the Commission believes that the Rule has been narrowly tailored to produce a core set of information necessary for the Commission to effectuate its authority under Section 13(h) of the Exchange Act in a manner that only results in minimal increased costs and burdens.

Another commenter suggested that the Rule may shift business away from trading in NMS securities and to other financial products that are not subject to the large trader reporting requirements but that allow market participants to undertake economically equivalent positions.[236] Specifically, the commenter asserted that market participants may gain the equivalent exposure through European Depositary Receipts, Global Depositary Receipts, European exchange-traded funds, futures, and swaps and that, if the Rule is adopted, it may cost less to use these alternatives than to invest directly in NMS securities.[237] The commenter provided no data to support its position and did not take into account the liquidity profiles or transaction cost differences among those alternatives. The Rule is designed to be minimally burdensome both to large traders and the registered broker-dealers who must record and report trading information. The Commission also notes that the costs associated with some of the alternatives identified by the commenter may soon change. For example, Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act[238] directs the Commission and the CFTC to regulate over-the-counter derivatives. Thus, these investments will be subject to

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[236] See European Banking Federation and Swiss Bankers Association Letter at 4-5.

[237] See id.

[238] Pub. L. No. 111-203 (July 21, 2010).

regulation and oversight that have not applied in the past. In addition, the CFTC has a large trader reporting regime that currently applies to traders and transactions that are subject to the CFTC's regulatory authority. The Senate Report that accompanied the Market Reform Act observed that the U.S. futures markets, where reporting of large futures positions is required, have not been competitively disadvantaged by the CFTC's large trader reporting system, and that participants in those U.S. markets have generally not left for foreign markets.[239] On balance, as discussed further below, the Commission believes that the costs associated with Rule 13h-1 will not negatively impact the attractiveness of U.S. securities markets, capital formation in the U.S.,[240] or the competitive position of U.S. market participants.

E. Implementation and Compliance Dates, Exemptive Authority

The Commission proposed that the broker-dealer recordkeeping requirements contained in Rule 13h-1(d) and the reporting requirements contained in Rule 13h-1(e) would become effective six months after adoption of a final rule.[241] In the Proposing Release, the Commission solicited comment regarding the proposed implementation period.[242] The few commenters who specifically responded to this inquiry expected that it would take longer than six months to implement the necessary system changes.[243] One commenter suggested that 18 months would be a more appropriate implementation period to accommodate the system changes and testing required to implement the proposed T+1 reporting requirement.[244]

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239 See Senate Report, supra note 14, at 42.

240 The Senate Committee on Banking, Housing and Urban Affairs expected the Commission, in adopting any direct reporting rules, to consider carefully the total impact of such rules on capital formation in the U.S. See id.

241 See Proposing Release, supra note 3, 75 FR at 21471.

242 See id. at 21473.

243 See Financial Information Forum Letter at 7 and SIFMA Letter at 6.

244 See SIFMA Letter at 19.

After considering the comments, the Commission continues to believe that, because the Rule utilizes the existing EBS system infrastructure, broker-dealers should be able to enhance their existing recordkeeping and reporting systems to meet the requirements of the proposed large trader rule within a relatively short time period. Nevertheless, to accommodate commenters' requests for more time to test and implement their systems, the Commission is adopting an implementation date for the requirements applicable to registered broker-dealers three months later than proposed. The Commission believes that this additional time should allow registered broker-dealers to plan, design, implement, and test the small number of enhancements to their existing transaction reporting systems required by the Rule. Accordingly, the deadline for implementing the recordkeeping and reporting requirements applicable to registered broker-dealers is seven months after the Effective Date of the Rule.[245]

The Commission also proposed that the self-identification requirements for large traders under Rule 13h-1(b) would become effective three months after adoption of a final rule.[246] In the Proposing Release, the Commission requested comments about whether that implementation period was sufficient.[247] A number of commenters suggested lengthening the three-month implementation period, recommending either 12 months[248] or 18 months.[249] Two commenters[250]

245 The Effective Date of the Rule, as noted above, is 60 days after publication in the Federal Register.

246 See Proposing Release, supra note 3, 75 FR at 21471.

247 See id. at 21473.

248 See Prudential Letter at 5; Investment Adviser Association Letter at 9; and Investment Company Institute Letter at 12.

249 See SIFMA Letter at 19.

250 See T. Rowe Price Letter at 3 and Investment Adviser Association Letter at 9-10.

suggested that the self-identification requirements should be delayed until the Commission is prepared to receive electronic Forms 13H.[251]

As discussed above, the Commission has streamlined the Form 13H from the proposed version to minimize the reporting burdens. For example, the Commission did not adopt the most detailed question in the proposed Form that would have required large traders to identify all of the brokerage account numbers through which they trade. With these changes from the proposal, the Commission believes that the three-month time frame provides large traders adequate time to gather together the information required by the Form. Further, the Commission expects that its electronic filing system will be operational and capable of receiving fully-electronic Form 13H filings by the proposed compliance date. Nevertheless, to accommodate commenters' requests for more time, the Commission is adopting a longer compliance date for large traders. Accordingly, the self-identification requirement for large traders will commence two months after the Effective Date of the Rule.[252]

Section 13(h)(6) of the Exchange Act[253] authorizes the Commission "by rule, regulation, or order, consistent with the purposes of this title, [to] exempt any person or class of persons or any transaction or class of transactions, either conditionally or upon specified terms and conditions or for stated periods, from the operation of [Section 13(h)], and the rules and regulations thereunder." Rule 13h-1(g) implements this authority, providing that: "[u]pon written application or upon its own motion, the Commission may by order exempt, upon

251 In the Proposing Release, the Commission mentioned the possibility that large traders might be required to file Forms 13H in paper form in the event that the agency's electronic filing system is not operational as of the implementation deadline. See Proposing Release, supra note 3, 75 FR at 21465.

252 The Effective Date of the Rule, as noted above, is 60 days after publication in the Federal Register.

253 15 U.S.C. 78m(h)(6).

specified terms and conditions or for stated periods, any person or class of persons or any transaction or class of transactions from the provisions of this rule to the extent that such exemption is consistent with the purposes of the Securities Exchange Act."

The Commission requested comment about whether certain categories of persons (such as floor brokers, specialists, and market makers) should be exempted from the proposed rule.[254] One commenter suggested exempting persons whose trading activities are an ancillary activity in support of a core charitable purpose.[255] The commenter asserted that such non-profit entities generally are infrequent traders, and that the Rule is designed to capture the activities of frequent traders.[256]

As discussed above, frequency of trading alone does not affect whether a person is a large trader.[257] Non-profit organizations may engage in arm's-length purchases and sales of NMS securities in the secondary market, and their transactions may involve the exercise of investment discretion. Therefore, at this time, the Commission does not believe that a blanket exemption for such entities is appropriate.

The Commission notes, as discussed above, that any entity that merely beneficially owns NMS securities would not qualify as a large trader; only an entity that exercises investment discretion, directly or indirectly, on behalf of itself or others (e.g., a registered investment adviser or a pension fund manager), and effects transactions equal to or greater than the identifying activity level, can qualify as a large trader.

IV. Paperwork Reduction Act

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254 See Proposing Release, supra note 3, 75 FR at 21473.

255 See Howard Hughes Medical Institute Letter at 2.

256 See id. at 1.

257 See supra text following note 60.

The Rule contains "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[258] In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission submitted the provisions to the Office of Management and Budget ("OMB") for review. The title for the proposed collection of information requirement, including proposed Rule 13h-1 and proposed Form 13H, is "Information Required Regarding Large Traders Pursuant to Section 13(h) of the Securities Exchange Act of 1934 and Rules Thereunder." An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

In the Proposing Release, the Commission solicited comment on the collection of information requirements. The Commission noted that the estimates of the effect that the Rule would have on the collection of information were based on the Commission's experience with similar reporting requirements. As discussed above, the Commission received 87 comment letters on the proposed rulemaking. Various commenters addressed the collection of information aspects of the proposal.[259]

A. Summary of Collection of Information

Under Rule 13h-1, a "large trader" is any person that directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts and effects transactions for the purchase or sale of any NMS security for or on behalf of such accounts, with or through one or more registered broker-dealers, in an aggregate amount equal to or greater than the identifying activity level.

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258 44 U.S.C. 3501 et seq.

259 See, e.g., Managed Funds Association Letter, Prudential Letter, Investment Adviser Association Letter, Wellington Management Letter, Investment Company Institute Letter.

All large traders will be required to identify themselves to the Commission by filing Form 13H and will be required to update their Form 13H from time to time.[260] Upon receiving an initial Form 13H, the Commission will assign to the large trader a unique LTID. Each large trader will be required to disclose to registered broker-dealers effecting transactions on its behalf its LTID and each account to which it applies.[261] In addition, upon request by the Commission, a large trader will be required promptly to provide additional information to the Commission that will allow the Commission to further identify the large trader and all accounts through which the large trader effects transactions.[262]

As discussed above, in response to comments, the Commission has adopted Form 13H without the proposed requirement that large traders report their broker-dealer account numbers on Form 13H. Instead, large traders will be required to report a list of broker-dealers with whom they have an account. As a consequence, as discussed above, large traders will not have to report on Form 13H the LTID of any unaffiliated large trader with whom they share investment discretion, as that proposed requirement was connected to the identification of accounts.

Rule 13h-1 also imposes recordkeeping, reporting, and monitoring requirements on registered broker-dealers. Paragraph (d)(1) of the Rule requires every registered broker-dealer to maintain records of all information required under paragraphs (d)(2) and (d)(3) for all transactions effected directly or indirectly by or through (i) an account such broker-dealer carries for a large trader or an Unidentified Large Trader or (ii) if the broker-dealer is a large trader, any

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260 See new Rule 13h-1(b).

261 See new Rule 13h-1(b)(2).

262 See new Rule 13h-1(b)(4).

proprietary or other account over which such broker-dealer exercises investment discretion.[263] Additionally, where a non-broker-dealer (such as a bank) carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting transactions directly or indirectly for such person must maintain records of all of the information required under paragraphs (d)(2) and (d)(3) for those transactions. The term "Unidentified Large Trader" is defined to mean each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of the Rule that a registered broker-dealer knows or has reason to know is a large trader. For purposes of determining under the Rule whether a registered broker-dealer has reason to know that a person is a large trader, a registered broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer.[264] Further, a registered broker-dealer will be deemed not to know or have reason to know that a person is a large trader if it establishes policies and procedures reasonably designed to assure compliance with the identification requirements and does not have actual knowledge that a person is a large trader.[265] In response to comments, the Commission clarified that a broker-dealer need only look to aggregate transactions it effected for its customer in assessing whether a person may be an Unidentified Large Trader. The Commission also clarified that even if a person's transactions at a broker-dealer meet the applicable identifying activity threshold, the customer might or might

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263 A broker-dealer that exercises discretion over an account with someone else would know that that person is an Unidentified Large Trader based on the transactions effected through that jointly managed account.

264 See new Rule 13h-1(a)(9) (defining "Unidentified Large Trader").

265 See new Rule 13h-1(f) (the monitoring safe harbor). The policies and procedures contemplated by the safe harbor contemplate systems that are reasonably designed to detect and identify a large trader based upon transactions effected through an account or groups of accounts considering the identity of the trader by using information readily available to the broker-dealer, such as name or tax identification number.

not be a large trader under Rule 13h-1, and the person itself is responsible for determining whether it is a large trader.[266]

Complementing the recordkeeping requirements on broker-dealers, Rule 13h-1(e) requires registered broker-dealers that are required to keep records pursuant to paragraph (d)(1) to report that information to the Commission upon request.[267] Specifically, upon the request of the Commission, a registered broker-dealer must report electronically, in machine-readable form and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and other persons for whom records must be maintained, equal to or greater than the reporting activity level.[268]

Broker-dealers will need to report a particular day's trading activity only if it equals or exceeds the "reporting activity level." While a registered broker-dealer is required to report data for a given day only if it is equal to or greater than the reporting activity level, the Rule specifically allows a broker-dealer to voluntarily report a day's trading activity that falls short of the applicable threshold. Registered broker-dealers may wish to take this approach if they prefer to avoid implementing systems to filter the transaction activity and would rather utilize a "data dump" approach to reporting large trader transaction information to the Commission. Further, as

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266 For example, the customer might have effected transactions that, for purposes of determining whether a person is a large trader, are excluded from consideration under new Rule 13h-1(a)(6), in which case the customer would not qualify as a "large trader" based solely on those transactions.

267 See new Rule 13h-1(e).

268 In addition to reporting transaction data on large traders, the Rule requires broker-dealers to report transaction data for Unidentified Large Traders, along with additional information to help the Commission identify the Unidentified Large Trader. Specifically, paragraph (e) of the Rule requires broker-dealers to maintain and report for Unidentified Large Traders such person's name, address, date the account was opened, and tax identification number(s). See also new Rule 13h-1(d)(3).

discussed above, the Commission clarified in response to comments that while a person need not count trading activity that falls within one of the listed categories of excluded transactions when it determines whether it meets the applicable identifying activity threshold, a broker-dealer must report all transactions that it effected through the accounts of a large trader without reference to or exclusion of any transactions listed in Rule 13h-1(a)(6).

In recognition of the value of utilizing existing reporting systems,[269] the Rule requires broker-dealers to transmit the transaction records to the Commission utilizing the infrastructure of the existing EBS system. With respect to timing, Section 13(h)(2) of the Exchange Act provides that records of a large trader's transactions must be made available on the morning after the day the transactions were effected.[270] Rule 13h-1 incorporates this requirement in paragraph (d)(5). Therefore, transaction reports, including data on transactions up to and including the day immediately preceding the request, will need to be submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested. Paragraph (d)(4) of the Rule requires that such records be kept for a period of three years, the first two in an accessible place, in accordance with Rule 17a-4 under the Exchange Act.[271]

B. Use of Information

The Commission will use the information collected pursuant to Rule 13h-1 to identify significant market participants and collect data on their trading activity. The large trader

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269 As noted above, in connection with exercising rulemaking authority under Exchange Act Section 13(h), the Commission must consider existing reporting systems. See supra Section III.D.1.

270 See 15 U.S.C. 78m(h)(2). See also discussion supra at Section III.B.2 (concerning reporting requirements).

271 17 CFR 240.17a-4.

reporting requirements will provide the Commission with access to a new data source that will contribute to its ability to conduct investigations and enforcement matters, as well as analyze market activity, and should enhance its ability to assess the impact of large traders on the securities markets. It also will facilitate the Commission's trading reconstruction efforts, as transaction data that will be reported to the Commission pursuant to Rule 13h-1 will include the time of execution of the order as well as the identity of the large trader that effected the trade.

Registered broker-dealers will use the information they collect pursuant to Rule 13h-1, including LTID numbers, to comply with the requirement of the Rule to report to the Commission upon request all transactions they effect for large traders. In addition, registered broker-dealers that take advantage of the monitoring safe harbor will use the information they collect pursuant to Rule 13h-1 in connection with their policies and procedures under the Rule to monitor for Unidentified Large Traders and inform them of their potential obligations under Rule 13h-1. Registered broker-dealers also will be required to disclose the additional information they collect on Unidentified Large Traders pursuant to Rule 13h-1(d)(3) to the Commission upon request.

C. Respondents

In the Proposing Release, the Commission estimated that the "collection of information" associated with the Rule would apply to approximately 400 large traders and 300 registered broker-dealers. In the Proposing Release, the Commission solicited comment on the estimated number of respondents. Several commenters believed that the Commission's estimated number of respondents appeared to be too low, though few provided data or analysis to support their conclusions.[272] For the reasons discussed below, the Commission continues to believe that the Rule will affect approximately 400 large traders and 300 registered broker-dealers.

1. Number of Large Traders

The estimated number of large traders was based on Commission experience in reviewing EBS data and overseeing market participants. Notably, the estimate reflects Rule 13h-1(b)(3) filing requirement provisions, which focus, in more complex organizations, on the parent company of the entities that employ or otherwise control the individuals that exercise investment discretion. One commenter believed that the estimate of 400 large traders was underestimated and that the proposed thresholds may capture more than 400 large traders, including especially infrequent large traders, based on the proposed identifying activity level.[273] In particular, the commenter argued that the rule should not impose a self-identification requirement on traders that only infrequently trade in substantial volume.[274] The Commission agrees with this view, which reflects some of the considerations that informed the Commission's proposed provision for inactive status, which it is adopting. As discussed above, inactive status is designed to reduce the burden on infrequent traders who may trip the large trader threshold on a particular occasion but who do not regularly trade at sufficient levels to otherwise warrant the regulatory requirements under the Rule. Inactive status relieves the large trader from the requirement to file amended Forms 13H. However, as discussed above, even where a market participant trades in an amount that reaches the identifying activity threshold only infrequently – which at those times nonetheless would represent a substantial amount of trading activity relative to overall market

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272 See, e.g., Investment Adviser Association Letter at 10; Managed Funds Association Letter at 2; SIFMA Letter at 7; and Financial Information Forum Letter at 5-6.

273 See Managed Funds Association Letter at 2.

274 See id.

volume - the Commission seeks to identify that participant as a large trader at those times so as to be able to obtain information about the participant. In light of the proposed provision for inactive status, which the Commission is adopting as proposed, the Commission's original estimate of 400 large traders accounted for traders that only infrequently trade in excess of the proposed identifying activity threshold, which the Commission also is adopting as proposed.

The Commission continues to believe that the estimate of 400 large traders is appropriate for other reasons. The estimate reflects the Rule's focus on identification and registration of large traders at the parent company level. As noted in the Proposing Release, the purpose of this focus is to narrow the number of persons that will need to self-identify and register on Form 13H as "large traders," thereby allowing the Commission to identify the primary institutions that conduct a large trading business. One commenter believed that the number was underestimated and that 400 option traders alone would qualify as large traders.[275] However, this concern does not reflect the fact that the Rule contemplates registration as a large trader at the parent company level. Most, if not all, large trader control groups, as a natural consequence of their substantial trading and hedging activities, would involve persons that are active across a broad array of financial products trading in multiple venues, including cash equities and derivatives. The Commission's estimate, which was based on its experience with EBS data, takes into account this fact. Accordingly, the estimate does not separately count the number of subsidiary traders that conduct an options business (or any other securities business) as separate from the number of large trader complexes since the estimated number of large traders considers that large traders will identify at the parent company level, which is generally less burdensome than registering at the subsidiary level, as discussed above.

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275 See SIFMA Letter at 7.

In addition, as discussed above, in response to comments the Rule as adopted allows a large trader to voluntarily register with the Commission, even before it meets the applicable trading activity threshold, in order to eliminate its need to actively monitor its trading levels.[276] The Commission is not adjusting its estimate of the number of large traders to account for such voluntary registrations because it expects that only persons whose trading activity would eventually equal or exceed the identifying activity level will take advantage of this new provision. In other words, the Commission expects that the only persons who would take advantage of the voluntary registration provision are persons that wish to avoid the burdens of monitoring their trading activity where such trading generally meets or exceeds the identifying activity threshold – that is, who in fact will be large traders. Accordingly, the Commission's original estimate of 400 large traders already includes persons who might consider voluntary registration because such persons were effectively deemed to be large traders for purposes of that estimate.

2. Number of Broker-Dealers Affected

In the Proposing Release, the Commission estimated that 300 registered broker-dealers would be subject to the recordkeeping, reporting, and monitoring requirements of the rule. This estimate was based on broker-dealer responses to FOCUS report filings with the Commission made in 2009. This estimate reflected the number of broker-dealer carrying firms that the Commission believes would carry accounts for large traders or that would effect transactions directly or indirectly for a large trader or an Unidentified Large Trader where a non-broker-dealer carries the account.

276 See supra text accompanying note 115 (for a discussion of voluntary filing).

One commenter thought that the Commission's broker-dealer estimate of 300 broker-dealers was underestimated and believed that the number of broker-dealers affected by the monitoring requirements might be closer to 1,500.[277] This commenter, whose analysis was based on the monitoring safe harbor provisions of the proposed rule, expressed concern with the reference to "other readily available information" contained in the proposed safe harbor. The commenter explained that "other readily available information might only be available at the introducing broker-dealer, and therefore clearing firms might reasonably require the broker-dealers that introduce customer accounts to them to implement their own policies and procedures…."[278] Thus, the commenter's assertion was based on a belief that, though the Rule itself would not specifically require it, carrying broker-dealers might, in turn, require their introducing broker correspondents to establish policies and procedures to collect information on Unidentified Large Traders required by the Rule to assist the clearing firms in complying with the requirements of the Rule that are applicable to them.[279] The commenter's estimate of 1,500 entities was based on the fact that approximately 1,657 FINRA members have been assigned MPIDs as of June 2010.[280]

The Commission is mindful of this commenter's concern and has clarified in the adopted monitoring safe harbor provision of Rule 13h-1(f) the more limited scope intended of "other identifying information" that a broker-dealer would need to consider. Specifically, as adopted, the safe harbor policies and procedures would need to be reasonably designed to identify Unidentified Large Traders based only on accounts at the broker-dealer. In assessing which

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277 See Financial Information Forum Letter at 6. The commenter focused its comment on the proposed monitoring requirement.

278 See id.

279 See id.

280 See id.

accounts to consider, the Rule, as adopted, clarifies that the broker-dealer's policies and procedures should consider account name, tax identification number, or other identifying information "available on the books and records of such broker-dealer." The broker-dealer's safe harbor policies and procedures would not need to take into account identifying information on the books and records of another broker-dealer. The Commission believes it has addressed the commenter's concerns by clarifying in the adopted Rule that the approximately 300 brokers affected by this Rule would not be required to consider information that would otherwise have required, as estimated by the commenter, as many as 1,500 broker-dealers that introduce customer accounts to implement their own policies and procedures.

In addition, the Commission believes that large traders, whose aggregate NMS securities transactions equal or exceed the identifying activity level, require sophisticated trade-processing capacities. Accordingly, it is unlikely that 1,500 broker-dealers that have been assigned an MPID either carry accounts for or will effect a transaction on behalf of a large trader because not all such entities will have, or will be in the business of, effecting trades for large traders. For example, one commenter, a large investment management firm and likely large trader, reported that it currently has "approximately 250 broker-dealers on our approved list for executing equity transactions."[281] This number is lower than the Commission's estimate of 300 affected broker-dealers.

Further, as discussed above, in considering whether a broker-dealer has "reason to know" that a person is a large trader, the broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer.[282] Moreover, a broker-dealer may determine that it has no "reason to know" that a person is a large trader through two methods.

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[281] See Wellington Management Letter at 3.

[282] Section III.B.3 (discussing the monitoring requirements).

First, the broker-dealer may rely on the safe harbor of Rule 13h-1(f). Alternatively, however, a broker-dealer may simply conclude, based on its knowledge of the nature of its customers and their trading activity with the broker-dealer, that it has no reason to expect that any of these customers' transactions approach the identifying activity level. Accordingly, an introducing broker-dealer whose customers do not effect transactions in NMS securities by or through it at levels close to the identifying activity level could simply draw such conclusion and would not need to implement any new policies and procedures.

Therefore, for the reasons described above, all 1,500 entities are not expected to be impacted by the monitoring provisions of Rule 13h-1(f) and the Commission continues to believe that its initial estimate of 300 affected broker-dealers is appropriate consistent with the additional guidance provided in Rule 13h-1(f), as adopted.[283] As discussed above, the Commission's estimate of 300 broker-dealers was based on broker-dealer responses to FOCUS report filings with the Commission, and reflected the number of broker-dealers that the Commission believes would be reasonably likely to carry accounts for large traders or that would be reasonably likely to effect transactions directly or indirectly for a large trader where a non-broker-dealer carries the account.

Further, as discussed above, the Commission received a comment letter from a broker-dealer that operates an ATS inquiring whether the requirement to monitor for Unidentified Large Traders would extend to other registered broker-dealers, including a broker-dealer that operates an ATS.[284] The monitoring requirements are applicable to registered broker-dealers that are

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283 To the extent that a broker-dealer that is subject to the monitoring requirements requires, by contract or otherwise, an entity that is not otherwise subject to the Rule's monitoring requirements to nevertheless perform a monitoring function, the Commission's estimate does not account for that situation.

284 See GETCO Letter at 3.

large traders, carry accounts for large traders or Unidentified Large Traders, or effect transactions on behalf of large trader customers whose accounts are carried by non-broker-dealers. If an ATS is not operating in those capacities, then it is not subject to the monitoring requirements. The Commission does not expect ATSs to act in these capacities, and so the Commission is not amending its estimate of the number of affected registered broker-dealers to include ATSs.

D. Total Initial and Annual Burdens

1. Burden on Large Traders

a. Duties of Large Traders

Rule 13h-1 will present new burdens to persons that meet the definition of large trader. In particular, persons, including those that might not presently be registered with the Commission in some capacity, that meet the definition of "large trader" will become subject to a new reporting duty, as the Rule will require each large trader to identify itself to the Commission by filing a Form 13H and submitting annual updates, as well as updates on as frequently as a quarterly basis when necessary to correct information previously disclosed that has become inaccurate. Additionally, each large trader will be required to identify itself to each registered broker-dealer through which it effects transactions. As discussed above, however, the Commission did not adopt the proposed requirement that large traders disclose their LTIDs to others with whom they collectively exercise investment discretion.[285]

Paragraph (b)(1) of the Rule requires large traders to file Form 13H with the Commission promptly after first effecting transactions that reach the identifying activity level.[286] Thereafter, large traders are required to file an amended Form 13H promptly following the end of a calendar

[285] See supra text following note 106 (for a discussion of the change).

[286] See new Rule 13h-1(b)(1)(i).

quarter in the event that any of the information contained therein becomes inaccurate for any reason (e.g., change of contact information, type of organization, trading strategy, regulatory status, list of broker-dealers at which the large trader has an account, or description of affiliates).[287] Regardless of whether any amended Forms 13H are filed, large traders also are required to file Form 13H annually, within 45 days after the calendar year-end, in order to ensure the accuracy of all of the information reported to the Commission.[288] Additionally, Rule 13h-1(b)(4) provides that the Commission may require large traders to provide, upon request, additional information to identify the large trader and all accounts through which the large trader effects transactions. Such requests for additional information may include, for example, a disaggregation request to assist the Commission in identifying accounts through which a large trader effects specific transactions.

b. **Initial and Annual Burdens**

In the Proposing Release, the Commission estimated that it would take a large trader approximately 20 hours to calculate whether its trading activity qualifies it as a large trader, complete the initial Form 13H with all required information, obtain a LTID from the Commission, and inform its registered broker-dealers and other entities of its LTID and the accounts to which it applies. The Commission based this estimate on its understanding that large traders currently maintain systems that capture their trading activity and that these existing systems would be sufficient without further modification to enable a large trader to determine whether it effects transactions for the purchase or sale of any NMS security for or on behalf of accounts over which it exercises investment discretion in an aggregate amount equal to or greater

287 See new Rule 13h-1(b)(1)(iii).

288 See new Rule 13h-1(b)(1)(ii).

than the identifying activity level. Accordingly, the Commission estimated that the one-time burden for large traders would be approximately 8,000 burden hours.[289]

The Commission also estimated that the ongoing annualized burden for complying with proposed Rule 13h-1 would be approximately 6,800 burden hours for all large trader respondents.[290] This figure was based on the estimated number of hours it would take to file any amendments as well as the required annual update to Form 13H. The Commission estimated that the average large trader would be required to file one annual update and three amended updates annually.[291]

Several commenters believed that the Commission underestimated the burden hour estimates for large traders.[292] Some commenters suggested that large trader organizations may need to develop integrated systems in order to accomplish parent company-level reporting, and

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289 The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including those required by Rule 13f-1: (Compliance Manager at 3 hours) + (Compliance Attorney at 7 hours) + (Compliance Clerk at 10 hours) x (400 potential respondents) = 8,000 burden hours. Rule 13f-1, like new Rule 13h-1, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information.

290 The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f-1 and Rule 17a-25: (Compliance Manager at 2 hours) + (Compliance Attorney at 5 hours) + (Compliance Clerk at 10 hours) x (400 potential respondents) = 6,800 burden hours. Rule 13f-1, like new Rule 13h-1, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information. As discussed above, Rule 17a-25 requires broker-dealers to disclose information that is very similar in scope and character to the information required under new Rule 13h-1. The Commission believed that determining whether a firm reaches the identifying activity level was a compliance function and that no software reprogramming would be required.

291 This estimate was based on the varied characteristics of large traders and the nature and scope of the items that would be disclosed on proposed Form 13H that would require updating and considered that large traders would file one required annual update and three quarterly updates when information contained in the Form 13H became inaccurate.

292 See, e.g., Prudential Letter; Investment Adviser Association Letter; and Investment Company Institute Letter.

correspondingly asserted that the estimate should account for this.[293] As described below, however, a parent company need only add together the aggregate gross trading activity of its subsidiaries when it calculates whether it has reached the identifying activity level and need not integrate trading or other systems. In addition, importantly, with respect to the information that must be assembled and reported on the Form that would require the development of an integrated system, as discussed directly below, the Commission has not adopted what commenters identified as the single most burdensome item – the reporting of brokerage account numbers. Instead, the Form, as adopted, requires large traders to disclose only basic identifying information, such as a list of affiliates and a list of broker-dealers at which it has accounts, and would not require the development of integrated systems to track brokerage account numbers across subsidiaries.

Several commenters indicated that the proposed requirement to report account numbers and names could be unduly burdensome.[294] These commenters, notably the investment advisers, expressed concern over potential burden on large traders associated with reporting brokerage account numbers. One commenter noted that it has more than 400,000 separate broker-dealer account numbers associated with its clients that reside on the systems of the broker-dealers with whom it transacts.[295] This commenter stated that it does not track or maintain a list of these

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293 See Prudential Letter at 5; Investment Adviser Association Letter at 7-8; and Investment Company Institute Letter at 4-5, 9.

294 See, e.g., Wellington Management Letter and American Bankers Association Letter.

295 See Wellington Management Letter at 3. See also American Bankers Association Letter at 2 (stating that it believes reporting account numbers and names is unduly burdensome because it may require the reporting of potentially thousands of brokerage accounts).

internal broker-dealer account numbers and does not utilize these account numbers when communicating with broker-dealers about trades.[296]

Another commenter suggested that account information may not be on the premises of the large trader and that, even if it were, this data would not be in automated form that is amenable to reporting on Form 13H.[297] One commenter explained that many investment advisers do not know the account numbers assigned to them by their broker-dealers because that information is not required by the software they use to communicate order allocation and settlement instructions to broker-dealers.[298] Another commenter stated that many investment advisers have a large number of discretionary advisory clients and effect transactions on behalf of such clients through a substantial number of different broker-dealers, through multiple prime brokers, and, in the case of multi-managed accounts, in concert with other advisers.[299] This commenter stated that the proposal assumes that for each advisory client, the investment adviser can easily identify brokerage accounts by name and number.[300] This commenter stated that in practice, however, each transaction can be executed on behalf of many clients and that with respect to each such transaction, although a particular broker-dealer may have assigned an

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296 See Wellington Management Letter at 3. See also Financial Engines Letter at 4-5 (stating that although investment advisers may execute trades with broker-dealers indirectly, the adviser does not technically maintain brokerage accounts with those broker-dealers and is therefore not privy to information about brokerage accounts).

297 See Investment Company Institute Letter at 11.

298 See Wellington Management Letter at 3-4. As an alternative to reporting the account number, the commenter suggested that an investment adviser report the codes utilized by its software solution to communicate with its broker-dealers.

299 See Investment Company Institute Letter at 7-8.

300 See id.

account number for its own internal recordkeeping purposes, the adviser does not have this information.[301]

Based on these comments, the Commission agrees that its proposal underestimated the burden hour estimates for large traders to report account numbers on Form 13H. In particular, the Commission based its initial burden estimate for reporting account numbers on its understanding that large traders have systems in place to readily track and manage their brokerage account numbers. According to certain commenters, particularly investment advisers, this may not be the case for some large traders, as some advisers rely on software to intermediate the process of communicating with their broker.[302] For these entities, the information may not be in a form that is amenable to reporting on the Form without the use of third-party software.[303]

As discussed above, the Commission is addressing these comments by not adopting the proposed requirement to report account numbers.[304] Instead, the Commission is requiring the large trader to disclose: (1) the names of broker-dealers with whom it has an account and (2) the types of brokerage services provided by those brokers. One commenter noted that many traders already maintain a list of approved broker-dealers in a readily accessible format, as they maintain approved broker-dealer lists in the ordinary course of business and have processes for adding and deleting broker-dealers as well as reviewing trades with a broker-dealer not on the approved list.[305] Requiring the reporting on the Form of a list of broker-dealers used, rather than all accounts held by each broker-dealer, will bring the compliance burden for many large traders that are investment advisers in line with the Commission's original estimate of burdens on large

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301 See id.

302 See id. at 8.

303 See, e.g., Investment Company Institute Letter and Wellington Management Letter.

304 See supra Section III.A.3.f (discussing account numbers).

305 See Investment Company Institute Letter at 9.

traders generally. Consequently, the estimated burdens on large traders under the Form are now in line with the requirements of the adopted Rule and Form.

With respect to the Commission's assumption that large traders will be able to utilize existing systems when considering their trading levels, one commenter stated that, in cases where a large trader is a parent company, the parent may not itself be carrying on any trading activity and, thus, will neither have the detailed knowledge about its subsidiaries' trading activities or the systems to capture the information required on Form 13H.[306] Another commenter stated that the burden of potentially needing to develop new systems would be increased for firms with complicated corporate structures.[307] This commenter noted that "[m]any corporate groups maintain operational independence from their subsidiaries and that each affiliate may employ its own individual system, which may not communicate with other affiliates."[308] This commenter asserted that, as a result, the process for gathering information would have to be done on a manual basis until a system could be developed and that gathering information across multiple affiliates (both U.S. and non-U.S. entities) manually will place a tremendous burden on investment managers.[309] In addition, this commenter noted that compliance with the Rule would be more difficult for investment advisers in that they are required to maintain information barriers between different affiliates in their organizations.[310]

As discussed above, with respect to determining whether the identifying activity level is met, the Commission notes that parent companies need only collect and aggregate the total trading activity of those entities they control when determining whether they meet the applicable

306 See Prudential Letter at 5.

307 See Investment Adviser Association Letter at 2, 7-8.

308 See id. at 8.

309 See id.

310 See id.

identifying activity level. To accomplish this, only summary statistics need to be produced to the parent company, which would be added together at the parent company level to determine whether the parent company complex meets the applicable identifying activity level threshold. In other words, each subsidiary will use existing systems to calculate its trading, and then will provide that information directly to the parent company. The trading systems themselves need not be integrated to accomplish this task. This limited activity should not undermine existing firewalls, because information would not be shared among entities under common control but would only be shared with the parent company. In addition, general information such as "Subsidiary XYZ executed $10,000,000 worth of transactions on Monday representing 750,000 shares" that is communicated directly from the subsidiary to the parent company would be highly unlikely to undermine firewalls. Further, the calculation of trading volume only needs to be done until the entity meets the applicable identification activity level. Once the entity meets this level, it becomes a large trader and no longer needs to calculate its trading in this manner. To the extent a parent company complex wishes to avoid this process altogether, it may elect to register voluntarily as a large trader.

A few commenters believed that the proposed requirement to list affiliates that beneficially own, as well as exercise investment discretion over, NMS securities would be overly burdensome.[311] One commenter recommended that the requirement should apply to a smaller set of affiliates, namely only those affiliates that actually conduct trading in NMS securities.[312] Another commenter stated that large traders should only be obligated to identify other

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311 See SIFMA Letter at 17; Wellington Management Letter at 5; Financial Information Forum Letter at 4; and Prudential Letter at 4.

312 See SIFMA Letter at 17.

unaffiliated large traders if investment discretion is exercised collectively.[313] Two commenters asked the Commission to not require large traders to list bank and insurance regulators.[314] One commenter stated that listing all applicable regulators is likely to lead to the creation of an extensive list in the case of a diversified financial services company.[315] This commenter stated that it would be required to list approximately fifty insurance regulators for one subsidiary and more than 25 foreign regulators for its non-U.S. affiliates.[316] Another commenter stated that bank regulator information is unnecessary to meet the Rule's underlying purpose and that the Commission could seek this information from the federal banking regulators.[317] As discussed above, in adopting the Rule, the Commission limited the scope of affiliates about which it will collect information pursuant to Form 13H.[318] Specifically, the Commission did not adopt the requirement to disclose affiliates that merely beneficially own NMS securities and it did not adopt proposed Items 3(b) and (c) of the Form, which would have required the large trader to disclose whether it or any of its affiliates is a bank or an insurance company and identify each such entity and its respective regulators. The Commission anticipates that focusing the Rule's scope in this regard will reduce burdens on large traders to be in line with the Commission's original understanding, while enabling the Commission to focus on gathering the most relevant and useful information about large traders.

The Commission does not expect that the revisions to the Form, including eliminating the requirement to disclose certain affiliates and applicable bank and insurance regulators, discussed

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313 See Wellington Management Letter at 5-6.

314 See Prudential Letter at 4 and American Bankers Association Letter at 2.

315 See Prudential Letter at 4.

316 See id.

317 See American Bankers Association Letter at 2.

318 See supra Section III.A.3.d (discussing Item 4 of the Form).

above, will materially affect the Commission's initial burden estimates. In particular, a full analysis of which affiliates need to be reported and disclosed would still need to be conducted, even though the scope of information that needs to be disclosed on Form 13H has been reduced from the proposal. The disclosure on the Form of bank and insurance regulators as proposed would have represented only a minimal additional burden, and such information would likely have been static and infrequently changed. Similarly, the Commission's decision to not adopt the requirement to disclose affiliates that merely beneficially own NMS securities likewise should not materially affect the estimated reporting burden because the Form, as adopted, now includes additional items such as the requirement to provide an organizational chart and to identify any affiliates that file separately and any affiliates that have been assigned an LTID suffix. The Commission carefully considered the changes to the Form in light of the comments received on the Form and the initial cost estimates, and believes that the removal of certain required information balances the addition of new required information of a similar scope so as to not affect the overall reporting burdens.

2. **Burden on Registered Broker-Dealers**

a. **Recordkeeping**

As part of the Commission's existing EBS system, pursuant to Rule 17a-25 under the Exchange Act, the Commission currently requires registered broker-dealers to keep records of most of the information for their customers that will be captured by Rule 13h-1.[319] The

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[319] See 17 CFR 240.17a-25. Pursuant to Rule 17a-25, broker-dealers are required to maintain the following information that will be captured by new Rule 13h-1: date on which the transaction was executed; account number; identifying symbol assigned to the security; transaction price; the number of shares or option contracts traded and whether such transaction was a purchase, sale, or short sale, and if an option transaction, whether such was a call or put option, an opening purchase or sale, a closing purchase or sale, or an exercise or assignment; the clearing house number of such broker or dealer and the clearing house numbers of the brokers or dealers on the opposite side of the transaction; a designation of whether the transaction was effected or caused

additional items of information that the Rule will capture are: (1) LTID(s) and (2) transaction execution time. Some registered broker-dealers will need to re-program their systems to capture execution time to the extent their systems do not already capture that information in a manner that is reportable pursuant to an EBS request for data. The Commission believes that the burdens of the Rule on registered broker-dealers will likely vary due to differences in their recordkeeping systems.

In the Proposing Release, the Commission estimated that all registered broker-dealers that either are large traders or have a customer base that includes large traders and Unidentified Large Traders would be required to make modifications to their existing systems to capture the additional data elements that were not currently captured by systems that comply with Rule 17a-25, including, for example, LTID numbers. The Commission estimated that the one-time, initial burden for registered broker-dealers for system development, including re-programming and testing of the systems to comply with the proposed rule, would be approximately 133,500 burden hours.[320] This figure was based on the estimated number of hours for initial internal

to be effected for the account of a customer of such broker or dealer, or was a proprietary transaction effected or caused to be effected for the account of such broker or dealer; market center where the transaction was executed; prime broker identifier; average price account identifier; and the identifier assigned to the account by a depository institution. For customer transactions, the broker-dealer is required to also include the customer's name, customer's address, the customer's tax identification number, and other related account information.

320 The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f-1 and Rule 17a-25: (Computer Ops Dept. Mgr. at 30 hours) + (Sr. Database Administrator at 25 hours) + (Sr. Programmer at 150 hours) + (Programmer Analyst at 100 hours) + (Compliance Manager at 20 hours) + (Compliance Attorney at 10 hours) + (Compliance Clerk at 20 hours) + (Sr. Systems Analyst at 50 hours) + (Director of Compliance at 5 hours) + (Sr. Computer Operator at 35 hours) x (300 potential respondents) = 133,500 burden hours. As noted above, the Commission acknowledged that, in some instances, multiple LTIDs may be disclosed to a registered broker-dealer for a single account. Therefore, the hourly burden estimate factored in the cost that registered broker-dealers would need to develop systems capable of tracking multiple LTIDs. Rule 13f-1, like the Rule, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information. As discussed supra, Rule 17a-25

development and implementation, including software development, taking into account the fact that new data elements were required to be captured and would need to be available for reporting to the Commission as of the morning following the day on which the transactions were effected. The Commission noted that because broker-dealers already capture, pursuant to Rule 17a-25, most of the data that proposed Rule 13h-1 would capture, it did not expect broker-dealers to incur any hardware costs as existing hardware should be able to accommodate the additional two fields of information that would need to be captured.

In the Proposing Release, the Commission stated that the ongoing annualized expense for the recordkeeping requirement for registered broker-dealers would not result in a separate burden for purposes of the PRA, as registered broker-dealers already were required to provide to the Commission almost all of the proposed information for all of their customers pursuant to Rule 17a-25 under the Exchange Act. Moreover, the Commission stated that once a registered broker-dealer's system was updated to capture the additional two fields of information required by Rule 13h-1, the Commission did not believe that the additional fields would result in any ongoing annualized expense beyond what broker-dealers currently incur to maintain the existing EBS data that is required to be kept pursuant to Rule 17a-25.

In response to the Commission's recordkeeping burden estimates, one commenter believed that the Commission significantly underestimated the time and resources for broker-dealers to comply with the Rule.[321] In particular, the commenter stated that the build-out costs to update the EBS system to accommodate the two new items (LTID and execution time) would

requires broker-dealers to disclose information that is very similar in scope and character to the information required under the Rule.

321 See SIFMA Letter at 14.

exceed the Commission's estimate of 133,500 burden hours.[322] Though the commenter did not provide a methodology for its estimate or provide a specific estimate of burden hours, it noted the following: "Assuming that just the generation process alone would require three months of effort for each firm with an electronic blue sheets reporting responsibility and that conforming related systems would require additional time, and then multiplied across the approximately 300 broker-dealers that the SEC estimates would be subject to the proposed rule, the total build-out for the industry would require 75 years of effort on a cumulative basis."[323] The commenter noted that one potential major cost of implementing the recordkeeping requirement is that some broker-dealers do not have access to execution times in a manner that is readily reportable under the EBS infrastructure.[324] These broker-dealers, the commenter stated, would need to devote considerable resources to updating EBS to gather, process, and transmit such information.[325] The Commenter recommended using the OATS system maintained by FINRA instead of the EBS system for the large trader reporting rule and argued that using the OATS infrastructure would not be as "onerous" as modifying the existing EBS system.[326] However, the same commenter mentioned one firm it talked to that estimated that it would cost less and take 50% less time to build out the EBS system compared to expanding OATS.[327] The Commission believes the

322 See id.

323 See id. at 5.

324 See id. at 13.

325 See id.

326 See id. at 5.

327 See id. at 6. The commenter states that one firm has estimated it would costs $4 to $5 million and take 18 to 24 months to expand OATS, whereas it would cost an estimated $3 to $4 million and take 12 to 18 months to build out the EBS system as proposed. The commenter did not provide any basis for these estimates nor what assumptions this firm made with regards to collection, reporting, and monitoring requirements, or other any other aspects of the Rule. The Commission's response to this comment in light of its estimate of the costs applicable to broker-dealers under the recordkeeping requirements of the Rule is discussed below in detail.

firm cited by the commenter supports the Commission's position that an expansion of the EBS system is a more cost effective option to leverage an existing reporting system for purposes of the large trader rule.

A separate commenter that represents a group that focuses on technological aspects of securities regulation expressed concern with the proposed monitoring requirements but did not address the costs associated with modifications to the EBS system. Rather, the commenter believed that broker-dealers could reasonably modify their systems to capture execution time within the proposed six-month implementation period.[328] However, this same commenter noted that EBS requests using LTID as a query mechanism would take longer to implement than the proposed six month compliance date.[329] As discussed above, the Commission expects that it would, on occasion, request EBS data according to LTID.[330] In addition, the Commission notes that it is adopting a longer compliance date than it proposed - seven months after the Effective Date of the Rule. Because the Rule will be effective 60 days after publication in the Federal Register, this effectively results in a compliance date nine months after publication in the Federal Register.

The Commission understands that many broker-dealers will face different challenges in capturing and reporting execution time information, depending on the sophistication of and resources they have previously devoted to their recordkeeping systems. The Commission's estimate, however, is an average calculation that accommodates a broad spectrum of broker-dealer EBS systems, including the possibility that some firms might face larger burdens than the average since different firms would be affected to different degrees. Not all broker-dealers will

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See supra Section V.B.2.a (costs applicable to broker-dealers under the recordkeeping requirements of the Rule).

328 See Financial Information Forum Letter at 7.

329 See id.

330 See supra Section III.B.2 (discussing reporting requirements).

face complexities involved with modifying non-integrated legacy systems to capture execution time, and some broker-dealers will not need to devote as many resources to those efforts as will others. The Commission's estimate is based on an aggregated figure that recognizes that different broker-dealers will need to invest different levels of resources based on the needs of their particular technology. Accordingly, the Commission believes that its initial 133,500 hour burden/year estimate for the one-time burden on registered broker-dealers to modify their existing EBS systems is reasonable and appropriate.[331] This figure assumes that, on average, each broker-dealer would have to devote 445 burden hours in order to develop, program, and test the enhancements to their existing systems to capture and report the additional fields of information (LTIDs and execution time).[332]

b. Reporting

In addition to requiring registered broker-dealers to maintain records of account transactions, the Rule also requires registered broker-dealers to report transaction data to the Commission upon request. In the Proposing Release, the Commission stated that this collection of information would not involve any substantive or material change in the burden that already exists as part of registered broker-dealers providing transaction information to the Commission in the normal course of business under the existing EBS system.[333] However, the Commission

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331 The Commission notes that its estimate is in line with the burden estimates from Rule 17a-25. See Rule 17a-25 Release, supra note 19, 66 FR at 35840-41.

332 The Commission derived the total estimated burdens from the following estimates, which are based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f-1 and Rule 17a-25: (Computer Ops Dept. Mgr. at 30 hours) + (Sr. Database Administrator at 25 hours) + (Sr. Programmer at 150 hours) + (Programmer Analyst at 100 hours) + (Compliance Manager at 20 hours) + (Compliance Attorney at 10 hours) + (Compliance Clerk at 20 hours) + (Sr. Systems Analyst at 50 hours) + (Director of Compliance at 5 hours) + (Sr. Computer Operator at 35 hours) x (300 potential respondents) = 133,500 burden hours.

333 See 17 CFR 240.17a-25.

noted that the information would need to be available for reporting to the Commission on a next-day basis, versus the 10 business day period that typically is associated with an EBS request for data.[334] Nevertheless, the Commission believes that once the electronic recordkeeping system is in place to capture the information, and the system is designed and built to furnish the information within the time period specified in the Rule, the collection of information would result in minimal additional burden.

Although it is difficult to predict with certainty the Commission's future needs to obtain large trader data, the Commission estimated in the Proposing Release that, taking into account the Commission's likely need for data to be used for market reconstruction purposes and investigative matters, it would send 100 requests for large trader data per year to each affected registered broker-dealer.[335] The Commission estimated that it will take a registered broker-dealer 2 hours to comply with each request, considering that a broker-dealer would need to run the database query of its records, download the data file, and transmit it to the Commission.[336] The Commission received no comments on its reporting burden estimate and continues to

334 See Rule 17a-25 Release, supra note 19.

335 Compared to the EBS system, where the Commission sent 5,168 electronic blue sheets requests between January 2007 and June 2009, the Commission expects to send fewer requests for large trader data, in particular because the Commission expects that a request for large trader data will be broader and encompass a larger universe of securities and a longer time period than would be the case for the typically more targeted EBS requests it currently sends.

336 The Commission notes that the adopting release for Rule 17a-25 estimated that electronic response firms spend approximately 8 minutes and manual response firms spend 1.5 hours responding to an average blue sheet request. See Rule 17a-25 Release, supra note 19, at 35841. The Commission's 2-hour estimate for new Rule 13h-1 is intended to account for the collection and reporting of additional information on Unidentified Large Traders. This estimate also accommodates broker-dealers that might want to perform quality checks over the information before it is reported to the Commission.

believe that its initial estimate was reasonable. Accordingly, the Commission estimates the ongoing annual aggregate hour burden for broker-dealers to be 60,000 burden hours.[337]

c. **Monitoring**

In the Proposing Release, the Commission estimated that the one-time, initial burden for registered broker-dealers to comply with the monitoring requirements would be approximately 21,000 burden hours to establish a compliance system to detect and identify Unidentified Large Traders.[338] This figure was based on the estimated number of hours to establish policies and procedures reasonably designed to assure compliance with the identification requirements of the Rule. The Commission estimated that the ongoing annualized burden to broker-dealers for the monitoring requirements of the Rule, including the requirement on broker-dealers to inform Unidentified Large Traders of their potential obligations under Rule 13h-1, would be approximately 4,500 burden hours.[339]

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337 100 x 300 x 2 = 60,000 burden hours. The Commission derived the total estimated burdens based on the Commission's experience with, and burden estimates for, other existing reporting systems, including Rule 17a-25. The Commission estimated that each broker-dealer who electronically responds to a request for data in connection with Rule 17a-25 and the EBS system spends 8 minutes per request. See Rule 17a-25 Release, supra note 19, 66 FR at 35841. Unlike EBS, under new Rule 13h-1, a broker-dealer will also be required to report data on Unidentified Large Traders. The Commission therefore believes that the time to comply with a request for data under the Rule could take longer than would a similar request for data under the EBS system, as a broker-dealer likely would take additional time to review and report information on any Unidentified Large Traders, including the additional fields of information specified in paragraph (d)(3) of the Rule, that they would be required to report to the Commission under the Rule.

338 The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f-1: (Sr. Programmer at 10 hours) + (Compliance Manager at 10 hours) + (Compliance Attorney at 10 hours) + (Compliance Clerk at 20 hours) + (Sr. Systems Analyst at 10 hours) + (Director of Compliance at 2 hours) + (Sr. Computer Operator at 8 hours) x (300 potential respondents) = 21,000 burden hours. Rule 13f-1, like new Rule 13h-1, requires monitoring of a certain trading threshold.

339 The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f-1 and Rule 17a-25: (Compliance Attorney at 15 hours) x (300 potential respondents) = 4,500 burden hours. Rule 13f-1, like new Rule 13h-1, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information.

As discussed above, one commenter believed that the Commission's estimate of 300 broker-dealers was underestimated and believed that the number of broker-dealers affected by the monitoring requirements might be closer to 1,500 because of steps the commenter believed clearing brokers would likely impose on others in order for them to comply with the monitoring safe harbor provision of Rule 13h-1(f), as proposed.[340] This commenter based its estimate on a belief that, though the Rule itself would not specifically require it, carrying broker-dealers might, in turn, require their introducing broker correspondents to establish policies and procedures to collect "other reasonably available information" on Unidentified Large Traders required by the proposed safe harbor to assist the clearing firms in complying with the requirements of the Rule that are applicable to them.[341] The commenter based its estimate on the fact that approximately 1,657 FINRA members have been assigned MPIDs as of June 2010. As such, this commenter believes that the Commission's ongoing burden estimate of 4,500 burden hours/year[342] (equivalent to $1,215,000/year[343]) should instead be something between 111,000 burden hours/year and 3,000,000 burden hours/year[344] (equivalent to $30,000,000-$750,000,000/year).[345] The commenter noted that its estimate included a full-time compliance professional.[346]

As discussed above, the safe harbor provision of Rule 13h-1(f), as adopted, makes clear the intended scope of "other identifying information" that a broker-dealer would need to

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340 See Financial Information Forum Letter at 6.

341 See id.

342 Compliance Attorney at 15 hours x 300 potential respondents = 4,500 burden hours

343 Compliance Attorney at 15 hours x $270 per hour x 300 potential respondents = $1,215,000

344 Compliance Attorney at 370 hours x 300 potential respondents = 111,000 burden hours; Compliance Attorney at 2,000 hours x 1,500 potential respondents = 3,000,000 burden hours.

345 See Financial Information Forum Letter at 7.

346 See id.

consider, which is narrower in scope than what the commenter assumed. As adopted, the safe harbor policies and procedures would need to be reasonably designed to identify Unidentified Large Traders based on accounts at the broker-dealer. In assessing which accounts to consider, the Rule, as adopted, clarifies that the broker-dealer's policies and procedures should consider account name, tax identification number, or other identifying information "available on the books and records of such broker-dealer." The policies and procedures would not need to consider information on the books and records of another broker-dealer. Accordingly, the Rule has been clarified to exclude a possible expansive interpretation of "other readily available information" that formed the basis for the commenter's concern.

Further, the Commission believes that large traders, whose aggregate NMS securities transactions by definition equal or exceed the identifying activity level, require sophisticated trade-processing capacities on the part of broker-dealers that service them. Consequently, the Commission believes it is unlikely that nearly all broker-dealers that have been assigned an MPID either carry accounts for or will effect a transaction on behalf of a large trader. Therefore, it does not expect all such entities to be impacted by the monitoring provisions of Rule 13h-1(f).[347] By providing additional guidance in the Rule, as adopted, the Commission believes it has clarified the intended monitoring responsibilities of broker-dealers and has shown that the burden estimates for these more limited requirements are in line with the Commission's original estimates.

d. **Total Burden**

[347] To the extent that a broker-dealer that is subject to the monitoring requirements requires, by contract or otherwise, an entity that is not otherwise subject to the Rule's monitoring requirements to nevertheless perform a monitoring function, the Commission's estimate does not account for that situation.

Under the Rule, the total burden on these respondents will be 214,500 hours for the first year[348] and 64,500 hours for each subsequent year.[349]

E. Collection of Information is Mandatory

All collections of information pursuant to Rule 13h-1 will be mandatory.

F. Confidentiality

Section 13(h)(7) of the Exchange Act provides that Section 13(h) "shall be considered a statute described in subsection (b)(3)(B) of [5 U.S.C. 552]", which is part of the Freedom of Information Act ("FOIA").[350] As such, "the Commission shall not be compelled to disclose any information required to be kept or reported under [Section 13(h)]."[351] Accordingly, the information that a large trader will be required to disclose on Form 13H or provide in response to a Commission request will be exempt from disclosure under FOIA. In addition, any transaction information that a registered broker-dealer reports to the Commission under the Rule also will be exempt from disclosure under FOIA. The circumstances under which the Commission will provide information collected pursuant to Rule 13h-1 and Form 13H are discussed above.[352]

G. Record Retention Period

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348 This figure was derived from the estimated one-time burdens from the recordkeeping requirement (133,500 burden hours) + the reporting requirement (60,000 burden hours) + the monitoring requirement (21,000 burden hours) = 214,500 total burden hours.

349 This figure was derived from the estimated ongoing burdens from the reporting requirement (60,000 burden hours) + the monitoring requirement (4,500 burden hours) = 64,500 total burden hours.

350 5 U.S.C. 552(b)(3)(B) is now 5 U.S.C. 552(b)(3)(A)(ii).

351 See Section 13(h)(7) of the Exchange Act, 15 U.S.C. 78m(h)(7).

352 See supra Section III.A.3.g.

Registered broker-dealers will be required to retain records and information under Rule 13h-1 for a period of three years, the first two in an accessible place, in accordance with Rule 17a-4 under the Exchange Act.[353]

V. Consideration of Costs and Benefits

The Commission is sensitive to the costs and benefits that result from its rules. In the Proposing Release, the Commission identified certain costs and benefits of the Rule as proposed and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. The Commission received several comments relating to the cost-benefit analysis, which are discussed below. For the reasons discussed below, the Commission continues to believe that its estimates of the benefits and costs of Rule 13h-1, as set forth in the Proposing Release, are appropriate.

A. Benefits

U.S. securities markets have experienced a dynamic transformation in recent years. In large part, the changes reflect the culmination of a decades-long trend from a market structure with primarily manual trading to a market structure with primarily automated trading. Rapid technological advances have produced fundamental changes in the structure of the securities markets, the types of market participants, the trading strategies employed, and the array of products traded. The markets also have become even more competitive, with exchanges and other trading centers offering innovative order types, data products and other services, and aggressively competing for order flow by reducing transaction fees and increasing rebates. These changes have facilitated the ability of large institutional and other professional market participants to employ sophisticated trading methods to trade electronically in huge volumes with

353 17 CFR 240.17a-4.

great speed. In addition, large traders have become increasingly prominent at a time when the markets are experiencing an increase in overall volume.[354]

Currently, to support its regulatory, investigative, and enforcement activities, the Commission collects transaction data through the EBS system.[355] The Commission uses the EBS system to obtain securities transaction information for two primary purposes: (1) to assist in the investigation of possible federal securities law violations, primarily involving insider trading or market manipulation; and (2) to conduct market reconstructions.

The EBS system has performed effectively as an enforcement tool for analyzing trading in a small sample of securities over a limited period of time. However, because the EBS system is designed for use in narrowly-focused enforcement investigations that generally involve trading in particular securities, it has proven to be insufficient for large-scale market reconstructions and analyses involving numerous stocks during peak trading volume periods. Importantly, EBS does not address the Commission's need to identify market participants in a uniform manner that would allow the Commission to readily aggregate their trading activity across broker-dealers, nor does it include time of execution information necessary to properly sequence and reconstruct trading activity.

Following declines in the U.S. securities markets in October 1987 and October 1989, Congress noted that the Commission's ability to analyze the causes of a market crisis was impeded by its lack of authority to gather trading information.[356] To address this concern, Congress passed the Market Reform Act, which, among other things, amended Section 13 of the

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354 See supra note 8 (discussing analyst estimates of high frequency trader activity).

355 See 17 CFR 240.17a-25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers).

356 The legislative history accompanying the Market Reform Act also noted the Commission's limited ability to analyze the causes of the market declines of October 1987 and 1989. See generally Senate Report, supra note 14 and House Report, supra note 14.

Exchange Act to add new subsection (h), authorizing the Commission to establish a large trader reporting system under such rules and regulations as the Commission may prescribe.[357]

The large trader reporting authority in Section 13(h) of the Exchange Act was intended to facilitate the Commission's ability to monitor the impact on the securities markets of securities transactions involving a substantial volume or large fair market value, as well as to assist the Commission's enforcement of the federal securities laws.[358] In particular, the Market Reform Act provided the Commission with the authority to collect broad-based information on large traders, including their trading activity, reconstructed in time sequence, in order to provide empirical data necessary for the Commission to perform investigations and conduct analysis of data.[359]

The large trader reporting system envisioned by the Market Reform Act authorizes the Commission to require large traders[360] to self-identify to the Commission and provide information to the Commission that identifies the trader.[361] The Market Reform Act also authorized the Commission to require large traders to identify their status as large traders to any registered broker-dealer through whom they directly or indirectly effect securities transactions.[362]

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357 PL 101-432 (HR 3657), October 16, 1990.

358 See 15 U.S.C. 78m(h)(1). See also Senate Report, supra note 14, at 42.

359 See Senate Report, supra note 14 at 4, 44, and 71. In this respect, though SRO audit trails provide a time-sequenced report of broker-dealer transactions, those audit trails generally do not identify the broker-dealer's customers. Accordingly, the Commission is not presently able to utilize existing SRO audit trail data to accomplish the objectives of the Market Reform Act.

360 Section 13(h) of the Exchange Act defines a "large trader" as "every person who, for his own or an account for which he exercises investment discretion, effects transactions for the purchase or sale of any publicly traded security or securities by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange, directly or indirectly by or through a registered broker or dealer in an aggregate amount equal to or in excess of the identifying activity level." See 15 U.S.C. 78m(h)(8)(A).

361 See 15 U.S.C. 78m(h)(1)(A).

362 See 15 U.S.C. 78m(h)(1)(B).

In addition to facilitating the ability of the Commission to identify large traders, the Market Reform Act also authorizes the Commission to collect information on the trading activity of large traders from broker-dealers. In particular, the Commission is authorized to require every registered broker-dealer to make and keep records with respect to securities transactions of large traders that equal or exceed a certain "reporting activity level" and report such transactions upon request of the Commission.[363]

To implement its authority under Section 13(h) of the Exchange Act, the Commission is adopting new Rule 13h-1 and Form 13H to establish large trader reporting requirements. The Rule is intended to assist the Commission in identifying traders that conduct a substantial volume or large fair market value of trading activity in the U.S. securities markets and obtain certain baseline information on their trading activity. Specifically, a "large trader" is defined as a person who effects transactions in NMS securities of at least, during any calendar day, two million shares or shares with a fair market value of $20 million or, during any calendar month, either 20 million shares or shares with a fair market value of $200 million.[364] The large trader reporting rule is designed to facilitate the Commission's ability to assess the impact on the securities markets of large trader activity and allow it to conduct trading reconstructions following periods of unusual market volatility and analyze significant market events for regulatory purposes.

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363 See 15 U.S.C. 78m(h)(2). Section 13(h) also provides the Commission with authority to determine the manner in which transactions and accounts should be aggregated, including aggregation on the basis of common ownership or control. See 15 U.S.C. 78m(h)(3). The term "reporting activity level" is defined in Section 13(h)(8)(D) of the Exchange Act to mean "transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule, regulation, or order, specifying the time interval during which such transactions shall be aggregated." See 15 U.S.C. 78m(h)(8)(D).

364 This test is defined in the Rule as the "identifying activity level." See new Rule 13h-1(a)(7). Section 13(h)(8)(c) of the Exchange Act, 15 U.S.C. 78m(h)(8)(c), authorizes the Commission to determine, by rule or regulation, the applicable identifying activity level.

The identification, recordkeeping, and reporting requirements will provide the Commission with a mechanism to identify large traders, as well as their affiliates, the broker-dealers they use, and their transactions. Specifically, Rule 13h-1 will require large traders to identify themselves to the Commission and make certain disclosures to the Commission on Form 13H. Upon receipt of Form 13H, the Commission will issue a unique identification number to the large trader, which the large trader will then provide to its registered broker-dealers. Registered broker-dealers will be required to maintain transaction records for each large trader customer and will be required to report that information to the Commission upon request. In addition, certain registered broker-dealers will need to adopt procedures to monitor their customers' activity for volume that triggers the identification requirements of the Rule.

In light of recent turbulent markets and the increasing sophistication and trading capacity of large traders, the Commission believes it needs to implement a large trader reporting rule to further enhance its ability to collect and analyze trading information, especially with respect to the most active market participants. In particular, the Commission believes it needs to implement a large trader reporting rule to reliably and efficiently identify large traders and promptly obtain information on their trading on a market-wide basis.

The Commission believes that the large trader reporting rule is necessary because, as noted above, large traders appear to be playing an increasingly prominent role in the securities markets.[365] Market observers have offered a wide range of estimates for the percent of overall volume attributable to one potential subcategory of large trader – high frequency traders – which is typically estimated at 50% of total volume or higher.[366] The large trader reporting rule is

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365 See 15 U.S.C. 78m(h)(1) and (h)(2) (reflecting the purpose of Section 13(h) of the Exchange Act to allow the Commission to monitor the impact of large traders).

366 See supra note 8 (discussing analyst estimates of high frequency trader activity).

intended to provide a basic set of tools for the Commission to monitor more readily and efficiently the impact on the securities markets of large traders.

Among other things, the Commission believes that the large trader reporting rule will enhance its ability to: (1) reliably identify large traders and their affiliates, (2) obtain more promptly trading data on the activity of large traders, including execution time, and (3) aggregate and analyze trading data among affiliated large traders. In addition to those benefits that the Commission believes will result from the large trader reporting rule, the Commission also expects that investors should likewise benefit as a consequence of the Commission's enhanced access to information to identify large traders and obtain prompt data on their activity that the Commission would be able to employ in carrying out its regulatory mission.

The Commission sought comment on the benefits associated with the proposed Rule. Many of the 87 comment letters, including those from retail investors, expressed support for the Rule's stated intent to obtain certain baseline trading information about traders that conduct a substantial volume or large fair market value of trading activity in the U.S. securities markets.[367]

One commenter, a large pension fund, stated that it believes that its beneficiaries will benefit from a greater understanding of today's hyper-electronic trading, which encompasses speed and volumes that were previously unknown to most participants.[368] Another commenter, a large mutual fund adviser, stated that the large trader reporting requirements are a pragmatic approach to obtain relevant data on trading activity in the U.S. securities markets and that recent volatility in the marketplace, as exemplified by the unprecedented events of May 6, 2010, has

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367 See, e.g. GETCO Letter; CalSTRS Letter; David L. Goret Letter; Prudential Letter; Investment Adviser Association Letter; American Benefits Council Letter; Howard Hughes Medical Institute Letter; T. Rowe Price Letter; Financial Engines Letter; Investment Company Institute Letter; Wellington Management Letter; SIFMA Letter; and Foothill Securities Letter.

368 See CalSTRS Letter at 1. The commenter noted that it would be "pleased to be subject to the rule." Id.

emphasized the need to provide improved regulatory access to trade data in order to detect manipulative trading activities and to analyze significant market events that negatively impact investor trust in the stock market.[369] In addition, a large broker-dealer commented that the EBS system is insufficient in today's trading environment for large scale investigations and market reconstructions across numerous securities during peak trading volume periods and agreed that regulators need additional levels of transparency into the trading practices of all firms with significant activity.[370]

B. Costs

1. Large Traders

In the Proposing Release, the Commission identified the primary costs to large traders from the proposal as the requirement to self-identify to the Commission, including using existing systems to detect when they meet the identifying activity level, filing Form 13H when large trader status is achieved, and informing its broker-dealers of its LTID and all accounts to which it applies. The Commission is adopting the identification requirements substantially as proposed. However, the Commission has not adopted Form 13H as proposed. Specifically, the Commission did not adopt the proposed requirement that large traders report brokerage account numbers. Instead, the Rule as adopted requires that large traders report a list of broker-dealers with whom they have an account. As a consequence, large traders will not have to report on Form 13H the LTID of any other large traders with whom they collectively exercise investment discretion, and so will not have to disclose their LTID to other traders or collect from other large traders the LTID of such traders.

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369 See T. Rowe Price Letter at 1.

370 See GETCO Letter at 2.

The Rule will require large traders to file Form 13H with the Commission promptly after first effecting transactions that reach the identifying activity level.[371] Further, when determining who should register with the Commission as a "large trader" by filing Form 13H, the Rule is intended to focus, in more complex organizations, on the parent company of the entities that exercise investment discretion. The purpose of this focus is to narrow the number of persons that will self-identify as "large traders" and file Form 13H, while allowing the Commission to identify the primary institutions that conduct a large trading business. Focusing the identification requirements in this manner is intended to enable the Commission to easily identify and readily contact the principal groups that control large traders, while minimizing the costs associated with filing and self-identification that will be imposed on large traders. Large traders will, however, be able to assign and attach a suffix to the LTID that is assigned to them by the Commission.

To limit the impact of the Rule on entities whose trading is not characterized by the exercise of investment discretion that the Commission intends to capture under the definition of "large trader," the Rule provides several exceptions from the definition of "transaction" that are considered when determining large trader status. These exceptions are intended to balance the Commission's desire to capture significant trading activity with the cost imposed on market participants to register and report as large traders. These exceptions include any transaction that constitutes a gift, any transaction effected by a court-appointed executor, administrator, or fiduciary pursuant to the distribution of a decedent's estate, any transaction effected pursuant to a court order or judgment, and any transaction effected pursuant to a rollover of qualified plan or trust assets subject to Section 402(c)(1) of the Internal Revenue Code.[372] As discussed above, in response to comments, the Commission is adopting as exceptions, in addition to those proposed,

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371 See new Rule 13h-1(b)(1)(i).

372 See new Rule 13h-1(a)(6).

several types of transactions that focus on corporate actions that are not characteristic of an arm's-length purchase or sale of securities in the secondary market that would normally be characteristic of a "trader" in securities, such as business combinations, issuer tender offers, and buybacks, as well as stock loans and equity repurchases. The Commission believes that these additional categories of transactions are effected for materially different reasons than those commonly associated with the arm's-length trading of securities in the secondary market and the associated exercise of investment discretion. For example, transactions involving business combinations, as well as issuer stock buybacks and issuer tender offers, reflect fundamental corporate decision-making. They are not effected with an intent or expectation to profit from the trade itself, but are transactions conducted by or with issuers of securities in furtherance of corporate objectives involving publicly-traded securities. Further, stock loan and equity repos typically are entered into as part of a larger financing transaction or for purposes of generating corporate income and, as such, are effected with general corporate intent rather than for purposes of buying or selling positions in securities. Accordingly, the Commission believes it appropriate to not count these transactions for the purpose of determining whether a person meets the identifying activity threshold contained in the definition of large trader. The Commission believes that adding these additional exclusions will further reduce the potential cost of the Rule on affected entities, as well as registered broker-dealers, while at the same time allowing the Commission to focus the Rule on those entities and activities that the Commission seeks to identify under the Rule.

In addition, the Rule provides for an Inactive Status to further reduce the potential costs of the Rule for infrequent traders who may trip the threshold on a particular occasion but do not otherwise trade at sufficient levels to merit continued status as a large trader or that warrant imposing the regulatory burdens of the Rule. In particular, large traders that have not effected aggregate transactions at any time during the previous full calendar year that are equal to or greater than the identifying activity level will be eligible for Inactive Status upon checking a box on the cover page of their next annual Form 13H filing.[373] Specifically, Inactive Status will relieve a person from the requirement to file amended Forms 13H.

Form 13H also allows a large trader to report the termination of its operations (i.e., Inactive Status where the entity, because it has discontinued operations, has no potential to requalify for large trader status in the future). This designation is intended to allow large traders to inform the Commission of their status and to signal to the Commission not to expect future Form 13H filings from the large trader. For example, termination status will be relevant in the case of a merger or acquisition where the large trader does not survive the corporate transaction. In addition, with respect to registered broker-dealers, the Termination Filing is intended to reduce the potential costs to registered broker-dealers who will no longer have to track the entity's LTID.

In the Proposing Release, the Commission noted that from time to time, information provided by large traders through their Forms 13H may become inaccurate. Rather than requiring prompt updates whenever this occurs, the Rule instead will require "Amended Filings" on a quarterly basis (and only when the prior submission becomes inaccurate). Specifically, large traders will be required to amend their latest Form 13H by submitting an "Amended Filing" promptly following the end of a calendar quarter in the event that any of the information contained in a Form 13H filing becomes inaccurate for any reason (e.g., change of name or

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373 See new Rule 13h-1(b)(3)(iii).

address, type of organization, regulatory status, broker-dealers used, or affiliates).[374] Regardless of whether any quarterly amended Form 13Hs are filed, large traders are required to file Form 13H annually (an "Annual Filing"), within 45 days after the calendar year-end, in order to ensure the accuracy of all of the information reported to the Commission.[375] The quarterly filing requirement for amendments is designed to mitigate the filing burden on large traders, as large traders will not be required to file a large number of amendments on a more prompt basis every time something in their latest Form 13H needs to be corrected or updated. A large trader could elect to file more promptly or frequently at its discretion, but would not be required to do so.

In the Proposing Release, the Commission estimated that the aggregate costs for the estimated 400 respondents that would register on Form 13H and obtain from the Commission an LTID and inform its broker-dealers of its LTID and the accounts to which it applies would be \$1,317,600.[376] The Commission stated its belief that potential large trader respondents would not need to modify their existing systems to comply with proposed Rule 13h-1. Rather, the Commission believed that large traders already maintain systems that are capable of computing their level of trading, and the Commission expected that firms would be able to use their existing systems to assess whether they have reached the identifying activity level. Further, as discussed above, the Rule as adopted allows a large trader to voluntarily register with the Commission,

374 See new Rule 13h-1(b)(1)(iii).

375 See new Rule 13h-1(b)(1)(ii).

376 The Commission derived the total estimated cost from the following estimates, which were based on the Commission's experience with, and cost estimates for, other existing reporting systems including Rule 13f-1: ((Compliance Manager (3 hours) at \$258 per hour) + (Compliance Attorney (7 hours) at \$270 per hour) + (Compliance Clerk (10 hours) at \$63 per hour)) x (400 potential respondents) = \$1,317,600. Rule 13f-1, like new Rule 13h-1, requires the filing of a form (Form 13F) upon exceeding a certain trading threshold. Hourly figures were from SIFMA's Management & Professional Earnings in the Securities Industry 2008 and SIFMA's Office Salaries in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 or 2.93, as appropriate, to account for bonuses, firm size, employee benefits, and overhead.

even before it meets the applicable trading activity threshold, in order to eliminate the need for a person to actively monitor its trading levels for purposes of Rule 13h-1. To the extent a large trader does not want to track its trading levels for the identifying activity level thresholds, it can avail itself of the option to voluntarily register and forego the burden of such tracking. Any person that elects to voluntarily file would be treated as a large trader for purposes of the Rule, and would be subject to all of the obligations of a large trader under the Rule, notwithstanding the fact that the person had not effected the requisite level of transactions at the time it registered as a large trader.

In addition, the Commission estimated in the Proposing Release that the aggregate cost to file amendments as well as an annual updated Form 13H would be $998,400.[377] The Commission did not expect these costs per large trader of self-identification and reporting to the Commission to have any significant effect on how large traders conduct business because such costs would be marginal when compared to level of activity at which a large trader would be trading, and should not change how such traders conduct business, create a barrier to entry, or otherwise alter the competitive landscape among large traders. Further, the Commission is designing an electronic filing system for Form 13H that is intended to minimize the costs associated with filing Form 13H, for example, by allowing filers to access and amend their most recently filed Form 13H when filing an amended or annual update.

377 The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 6a-2: ((Compliance Manager (2 hours) at $258 per hour) + (Compliance Attorney (5 hours) at $270 per hour) + (Compliance Clerk (10 hours) at $63 per hour)) x (400 potential respondents) = $998,400. Rule 6a-2, like new Rule 13h-1, requires: (1) Form amendments when there are any material changes to the information provided in the previous submission; and (2) submission of periodic updates of certain information provided in the initial Form 1, whether or not such information has changed.

As noted in the PRA section above, several commenters believed that the Commission underestimated the costs of the proposed rule on large traders.[378] These commenters principally noted that the proposal's requirements to gather and report information related to account numbers and names, affiliates, and bank and insurance regulators would be burdensome.[379] Commenters noted that the Commission assumed that this information was readily available for all large traders.[380]

As discussed above, the Commission, in adopting the Rule, modified Form 13H from the proposed version to reduce the potential costs associated with filing Form 13H for affected entities. Most significantly, the Commission did not adopt the proposed requirement that large traders report their broker-dealer account numbers on Form 13H. Instead, large traders will be required to report a list of broker-dealers with whom they or their Securities Affiliates have an account. In light of these modifications from the proposal, the Commission continues to believe that its estimate of initial and ongoing costs is appropriate. The initial cost estimate was based on the understanding that large traders know and can readily identify their brokerage account numbers. As noted by commenters, particularly investment advisers, this may not be the case for all large traders, at least not in a form that would be conducive to reporting on Form 13H. One commenter recommended an alternative approach to requiring large traders to disclose a list of the broker-dealers that the large trader is authorized to use.[381] This commenter noted that many investment advisers maintain an approved list of broker-dealers and have processes for adding and deleting broker-dealers as well as reviewing trades with a broker-dealer not on the approved

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378 See, e.g., Prudential Letter; Investment Adviser Association Letter; and Investment Company Institute Letter.

379 See, e.g., American Bankers Association Letter.

380 See, e.g., Investment Company Institute Letter.

381 See Wellington Management Letter at 4 and Investment Company Institute Letter at 8-9.

list.[382] The Commission has considered this alternative, and believes it is appropriate to focus the reporting burden on a list of broker-dealers at which the large trader maintains an account, rather than a list of accounts held at those broker-dealers. The Commission believes, based on the comments it received from investment advisers on this topic, that this new requirement will reduce the potential costs for certain large traders, particularly investment advisers.

The adopted Rule also limits the scope of information that must be reported on bank and insurance regulators and focuses the identification requirement on affiliates that trade, rather than merely beneficially own, NMS securities. However, the Commission does not anticipate that these changes from the proposal will materially affect the Commission's initial cost estimates. In particular, the prominence and scope of those items on the Form, relative to the other disclosure requirements, were minor and the fact that they were not adopted should not materially affect the cost estimates. Further, the Form, as adopted, now includes additional items such as the requirement to provide an organizational chart and to identify any affiliates that file separately and any affiliates that have been assigned an LTID suffix. The Commission carefully considered the changes to the Form in light of the comments received on the Form and the initial cost estimates, and believes that the removal of certain required information balances the addition of new requirement information of a similar scope so as to not affect the overall reporting burdens. Accordingly, the balanced modifications to the Rule and additional guidance on the intended scope of the Rule result in changes that are in line with the Commission's original estimates.

2. Registered Broker-Dealers

[382] See Investment Company Institute Letter at 9.

The Commission anticipated that the three primary costs to registered broker-dealers from the proposal were: (1) recordkeeping requirements; (2) reporting requirements; and (3) monitoring requirements.

a. Recordkeeping

The Rule will require registered broker-dealers to keep records of transactions for large traders and Unidentified Large Traders.[383] The Rule also will require brokers and dealers to furnish transaction records of large traders and Unidentified Large Traders to the Commission upon request. While most of the data required to be kept pursuant to Rule 13h-1 is already required under Rule 17a-25 and reported via the EBS system, the large trader reporting rule will contain two additional fields of information, notably the LTID number(s) and execution time of the transaction. The Rule will require records to be kept for a period of three years, the first two in an accessible place, in accordance with Rule 17a-4(b) under the Exchange Act.[384]

In the Proposing Release, the Commission estimated that the one-time, initial costs for each registered broker-dealer for development of enhancements to its EBS infrastructure, including re-programming and testing of the systems, would be approximately \$106,060.[385] The Commission also believed that there would be minimal additional costs associated with the operation and maintenance of the large trader reporting rule because it would utilize the existing

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383 See new Rule 13h-1(a)(9) (defining "Unidentified Large Trader").

384 17 CFR 240.17a-4.

385 The Commission derived the total estimated one-time cost from the following: (Computer Ops Dept. Mgr. (30 hours) at \$335 per hour) + (Sr. Database Administrator (25 hours) at \$281 per hour) + (Sr. Programmer (150 hours) at \$292 per hour) + (Programmer Analyst (100 hours) at \$193 per hour) + (Compliance Manager (20 hours) at \$258 per hour) + (Compliance Attorney (10 hours) at \$270 per hour) + (Compliance Clerk (20 hours) at \$63 per hour) + (Sr. Systems Analyst (50 hours) at \$244 per hour) + (Director of Compliance (5 hours) at \$388 per hour) + (Sr. Computer Operator (35 hours) at \$75 per hour) = \$106,060. As noted above, the Commission acknowledged that, in some instances, multiple LTIDs may be disclosed to a registered broker-dealer for a single account. Therefore, the cost estimate factored in the cost that registered broker-dealers would need to develop systems capable of tracking multiple LTIDs.

EBS system. Accordingly, the Commission estimated the total start-up, operating, and maintenance cost burden for registered broker-dealers to be $31,818,000.[386] As previously noted, this figure was based on the estimated number of hours for development and implementation of enhancements to the firm's EBS systems, including software development, taking into account the fact that two new data elements were required to be captured and that data would be required to be available for reporting to the Commission on the morning following the day on which the transactions were effected. Because broker-dealers already capture most of the data required to be captured under Rule 13h-1 pursuant to Rule 17a-25, the Commission did not expect broker-dealers to have to incur any additional hardware costs.

In response to the Commission's recordkeeping burden estimates, as previously discussed in the PRA section above, one commenter stated that one of its member firms estimated it would cost $3,000,000-$4,000,000 to build out its EBS system in a manner required by the proposed rule, though the commenter did not provide any basis for the estimate or assumptions that were made with regards to the collection, reporting, and monitoring requirements of the Rule.[387] This figure, which is an estimate of one effected entity that represents a single data point, is significantly higher than the Commission's estimate of $106,060 for the initial one-time costs of implementing the system changes required by the Rule as adopted. The commenter noted that one potential major cost of implementing the recordkeeping requirement is that some broker-dealers do not have access to execution times in a manner that is readily reportable under the

386 300 affected broker-dealers x $106,060 = $31,818,000.

387 See SIFMA Letter at 6.

EBS infrastructure.[388] These broker-dealers, the commenter stated, would need to devote considerable resources to updating EBS to gather, process, and transmit such information.[389]

The Commission notes that commenters did not express particular concern with the proposed requirement to record and report LTIDs, but rather focused on the transmission of execution time from the execution-facing systems to the clearing-facing systems which traditionally are utilized in the EBS process. The Commission understands that broker-dealers will face different challenges in capturing and reporting execution time information, depending on the sophistication of and resources they have previously devoted to their recordkeeping systems. Relevant factors might include, for example, the size of the entity, the nature, flexibility, and extent of their existing systems, and the business and other regulatory drivers for their technological strategies. As such, the Commission's estimate involves an average calculation that accommodates a broad spectrum of broker-dealer EBS systems and considers that different firms would be affected to different degrees, including the possibility that some firms might spend more than the average. However, not all broker-dealers will face complexities involved with modifying non-integrated legacy systems to capture execution time, and some broker-dealers will not need to devote as many resources to those efforts as will others. For example, one commenter that represents a group that focuses on technological aspects of securities regulation expressed concern with the proposed monitoring requirements but did not address the costs associated with modifications to the EBS system. Rather, the commenter believed that broker-dealers could reasonably modify their systems to capture execution time within the proposed six-month implementation period.[390] The Commission's estimate is based on an aggregated figure

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388 See id. at 13.

389 See id.

390 See Financial Information Forum Letter at 7.

that recognizes that different broker-dealers will need to invest different levels of resources based on the needs of their particular technology.

b. Reporting

The Rule will require registered broker-dealers to report transactions that equal or exceed the reporting activity level effected by or through such broker-dealer for both identified and Unidentified Large Traders. More specifically, upon the request of the Commission, registered broker-dealers will be required to report electronically, in machine-readable form and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) of the Rule for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and other persons for whom records must be maintained, which equal or exceed the reporting activity level. These broker-dealers will need to report a particular day's trading activity only if it equals or exceeds the "reporting activity level" but will be permitted to report all data without regard to that threshold.

In the Proposing Release, the Commission estimated that the costs of the proposed reporting requirements would be $16,200,000.[391] The Commission's estimate took into account the design and intent of the proposed rule to utilize the recordkeeping and reporting infrastructure of the existing EBS system. The Commission received no comments on its reporting cost estimate and continues to believe that its initial estimate is appropriate.

c. Monitoring

[391] The Commission derived the total estimated ongoing cost from the following: (Compliance Attorney (2 hours) at $270 per hour) x (100 requests per year) x (300 potential respondents) = $16,200,000.

As proposed, paragraph (f) of Rule 13h-1 would establish a "safe harbor" for the duty to monitor for Unidentified Large Traders.[392] Specifically, for purposes of determining under the Rule whether a registered broker-dealer has reason to know that a person is a large trader, a registered broker-dealer generally need take into account only transactions in NMS securities effected by or through such broker-dealer.[393] A registered broker-dealer would be deemed not to know or to have reason to know that a person is a large trader if: (1) it does not have actual knowledge that a person is a large trader;[394] and (2) it established and maintained policies and procedures reasonably designed to assure compliance with the identification requirements. Proposed paragraphs (f)(1) and (2) of the rule provided the specific elements that will be required for the safe harbor, including policies and procedures reasonably designed to inform persons of their obligations to file Form 13H and disclose their large trader status.

As discussed above, a few commenters asked for clarification of the monitoring requirements and offered alternatives.[395] Of those commenters that addressed the issue, most were critical of the proposed monitoring requirements.[396] The Commission believes the concerns expressed by commenters are a result of confusion as to the nature of the contemplated monitoring requirements. As noted in the Proposing Release, the Rule places "the principal

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[392] See new Rule 13h-1(a)(9) (defining an Unidentified Large Trader as "each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this rule that a registered broker-dealer knows or has reason to know is a large trader.")

[393] See new Rule 13h-1(a)(9).

[394] As discussed above, if a registered broker-dealer has actual knowledge that a person is a large trader, then the broker-dealer would treat such person as an Unidentified Large Trader under the Rule.

[395] See, e.g., Financial Information Forum Letter; SIFMA Letter; and GETCO Letter.

[396] One commenter described the proposed safe harbor as "anything but safe" and, as discussed above, asserted that the proposal exceeds the Commission's statutory authority because, among other reasons, the safe harbor provided that a registered broker-dealer would have reason to know that a customer is an Unidentified Large Trader based on other readily available information, as well as transactions effected through the broker-dealer. See SIFMA Letter at 11.

burden of compliance with the identification requirements on large traders themselves."[397] Further, the Commission characterized broker-dealers' monitoring requirements as "limited" and "a necessary backstop to encourage compliance and fulfill the objectives of Section 13(h) of the Exchange Act."[398] The safe harbor in Rule 13h-1(f) references reasonably designed systems to detect and identify persons that may be large traders – based upon transactions effected through an account or group of accounts or other information readily available to the broker-dealer. Further, the safe harbor references reasonably designed systems to inform such persons of their potential obligations under Rule 13h-1. The broker-dealer monitoring requirements are intended to promote awareness of and foster compliance with Rule 13h-1.

The Commission notes that a large trader is required to assess for itself whether it meets the identifying activity threshold and thus qualifies as a large trader. To this extent, the Commission notes that there are certain exclusions, for example from the types of transactions that are counted towards the identifying activity threshold, that may have excused a customer from having to register as a large trader even though its aggregate transactions exceed the applicable identifying activity threshold. Unless a broker-dealer has actual knowledge to the contrary that a customer is a large trader (e.g., the customer voluntarily informs the broker-dealer that it is a large trader under Rule 13h-1), the monitoring requirements contemplate an inquiry by the broker-dealer into whether a customer meets the identifying activity threshold based upon transactions effected through an account or a group of accounts at that broker-dealer.

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397 Proposing Release, supra note 3, 75 FR at 21470.

398 Id.

In the Proposing Release, the Commission estimated the initial, one-time cost to establish policies and procedures pursuant to the proposed safe harbor provision would be $3,982,800.[399] The Commission estimated that the ongoing cost would be $1,215,000.[400] The Commission believed that the proposed safe harbor would reduce the costs associated with the monitoring requirements of the proposed rule on registered broker-dealers. Among other things, it would limit the broker-dealer's obligations to only those Unidentified Large Traders that should be readily identifiable and apparent to the broker-dealer and would require the broker-dealer to inform such persons of their obligations to file proposed Form 13H and disclose their large trader status to the Commission.

As noted above in the PRA section, one commenter stated that the Commission's broker-dealer estimate of 300 broker-dealers was underestimated. This commenter believed that the number of broker-dealers affected by the monitoring requirements might be closer to 1,500 to the extent that carrying broker-dealers require their introducing broker correspondents to establish policies and procedures under the safe harbor to collect the information on Unidentified Large Traders required by the Rule to help the clearing firm comply with the requirements of the Rule that are applicable to them.[401] The commenter based its estimate on the fact that approximately 1,657 FINRA members have been assigned MPIDs as of June 2010.[402] As such, this commenter

399 The Commission derived the total estimated one-time cost from the following: ((Sr. Programmer (10 hours) at $292 per hour) + (Compliance Manager (10 hours) at $258 per hour) + (Compliance Attorney (10 hours) at $270 per hour) + (Compliance Clerk (20 hours) at $63 per hour) + (Sr. Systems Analyst (10 hours) at $244 per hour) + (Director of Compliance (2 hours) at $388 per hour) + (Sr. Computer Operator (8 hours) at $75 per hour)) x (300 potential respondents) = $3,982,800.

400 The Commission derived the total estimated ongoing cost from the following: (Compliance Attorney at (15 hours) x $270 per hour) x (300 potential respondents) = $1,215,000.

401 See Financial Information Forum Letter at 6.

402 See id.

argued that the Commission's ongoing burden estimate of 4,500 burden hours/year[403] (equivalent to $1,215,000/year[404]) should really be 111,000 burden hours/year–3,000,000 burden hours/year[405] (equivalent to about $30,000,000-$750,000,000/year).

As discussed above, the commenter based its analysis on the safe harbor provisions of the proposed rule and was concerned with the reference to "other readily available information" contained in the proposed safe harbor. The commenter's estimate was based on a belief that, though the Rule itself would not specifically require it, carrying broker-dealers might, in turn, require their introducing broker correspondents to establish policies and procedures to collect information on Unidentified Large Traders required by the Rule to assist the clearing firms in complying with the requirements of the Rule that are applicable to them.[406] As adopted, however, the safe harbor provision of the Rule makes clear the intended scope of "other identifying information" that a broker-dealer would need to consider, which is narrower than what the commenter assumed. As adopted, the safe harbor policies and procedures would need to be reasonably designed to identify Unidentified Large Traders based on accounts at the broker-dealer. In assessing which accounts to consider, the Rule, as adopted, clarifies that the broker-dealer's policies and procedures should consider account name, tax identification number, or other identifying information "available on the books and records of such broker-dealer." As discussed above, the safe harbor policies and procedures would not need to take into account information on the books and records of another broker-dealer. Accordingly, the scope of the

403 Compliance Attorney at 15 hours x 300 potential respondents = 4,500 burden hours.

404 Compliance Attorney at 15 hours at $270 per hour x 300 potential respondents = $1,215,000.

405 Compliance Attorney at 370 hours x 300 potential respondents = 111,000 burden hours; Compliance Attorney at 2,000 hours x 1,500 potential respondents = 3,000,000 burden hours.

406 See Financial Information Forum Letter at 6.

provision cited by the commenter is not as extensive as the commenter thought might be intended, and the revised Rule text has now clarified the intended scope.

Further, also as described with respect to the PRA, the Commission believes that large traders, whose aggregate NMS securities transactions equal or exceed the identifying activity level, require sophisticated trade-processing capacities.[407] The Commission believes it is unlikely that all broker-dealers that have been assigned an MPID would likely either carry accounts for or effect transactions on behalf of a large trader. Accordingly, all such entities are not expected to be impacted by the monitoring provisions of Rule 13h-1(f), and the Commission continues to believe that its initial estimate of 300 affected broker-dealers is appropriate.[408]

VI. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.[409] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[410] Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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407 See supra text accompanying note 281 (noting one commenter, a large investment management firm and likely large trader, that reported that it currently has approximately 250 broker-dealers on its approved list for executing equity transactions).

408 To the extent that a broker-dealer that is subject to the monitoring requirements requires, by contract or otherwise, an entity that is not otherwise subject to the Rule's monitoring requirements to nevertheless perform a monitoring function, the Commission's estimate does not account for that situation.

409 15 U.S.C. 78c(f).

410 15 U.S.C. 78w(a)(2).

The Commission is adopting Rule 13h-1 pursuant to its authority under Sections 13(h) and 23(a) of the Exchange Act. Section 13(h)(2) requires the Commission, when engaging in rulemaking pursuant to that authority that would require every registered broker-dealer to make and keep for prescribed periods such records as the Commission by rule or regulation prescribes, to consider whether such rule is "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]."[411]

In the Proposing Release, the Commission requested comment on whether proposed Rule 13h-1 would place a burden on competition, as well as the effect of the proposal on efficiency, competition, and capital formation. While the Commission did receive comment letters that discussed the overall number of respondents that would be affected by the proposed rule,[412] as well as the Commission's cost and burden estimates,[413] the Commission only received one comment that specifically addressed whether Rule 13h-1 would burden competition or impact efficiency, competition, and capital formation.[414] The comment is addressed as part of the discussion below.

A. Competition

In the Proposing Release, the Commission considered the impact of proposed new Rule 13h-1 on the securities markets and market participants. Information provided by market participants and broker-dealers in their registrations and filings with us informs our views on the

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411 The Commission is adopting new Rule 13h-1(b) relating to identification requirements for large traders pursuant to Section 13(h)(1) of the Exchange Act, which does not require the Commission to consider the factors identified in Section 3(f), 15 U.S.C. 78c(f). Analysis of the effects, including the considerations under Section 23(a), of new Rule 13h-1(b) is discussed above in Sections IV and V.

412 See supra Section IV.C.

413 See supra Sections IV.D and V.B.

414 See European Banking Federation and Swiss Bankers Association Letter.

structure of the markets in which they participate. We begin our consideration of potential competitive impacts with observations of the current structure of these markets.

The securities trading industry is a competitive one with reasonably low barriers to entry. The intensity of competition across trading platforms in this industry has increased in the past decade as a result of a number of factors, including market reforms and technological advances. This increase in competition has resulted in decreases in market concentration, more competition among trading centers, a proliferation of trading platforms competing for order flow, and decreases in trading fees.

The reasonably low barriers to entry for trading centers are evidenced, in part, by the fact that new entities, primarily ATSs, continue to enter the market.[415] For example, there are approximately 40 registered ATSs that trade NMS securities. In addition, the Commission within the past few years has approved applications by two entities – BATS Exchange, Inc. and NASDAQ Stock Market LLC – to become registered as national securities exchanges for trading equities, and approved proposed rule changes by two existing exchanges – International Securities Exchange, LLC ("ISE") and Chicago Board Options Exchange, Incorporated – to add equity trading facilities to their existing options business.[416] Moreover, on March 12, 2010, Direct Edge received approval from the Commission for its trading platforms to operate as facilities of two newly created national securities exchanges.[417] We believe that competition

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415 See Securities Exchange Act Release No. 60997 (Nov. 13, 2009), 74 FR 61208, 61234 (Nov. 23, 2009) (discussing the reasonably low barriers to entry for ATSs and that these reasonably low barriers to entry have generally helped to promote competition and efficiency).

416 The ISE discontinued its equities platform in 2010. See Press Release, Direct Edge, available at http://www.directedge.com/DE_ISE_Partner.aspx.

417 See Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010).

among trading centers has been facilitated by Rule 611 of Regulation NMS,[418] which encourages quote-based competition between trading centers; Rule 605 of Regulation NMS,[419] which empowers investors and broker-dealers to compare execution quality statistics across trading centers; and Rule 606 of Regulation NMS,[420] which enables customers to monitor their broker-dealers' order routing practices.

Broker-dealers are required to register with the Commission and at least one SRO. The broker-dealer industry, including market makers, is a competitive industry with most trading activity concentrated among several larger participants and thousands of smaller participants competing for niche or regional segments of the market. There are approximately 5,035 registered broker-dealers, of which approximately 862 are small broker-dealers.[421]

Larger broker-dealers often enjoy economies of scale over smaller broker-dealers and compete with each other to service the smaller broker-dealers, who are both their competitors and their customers.

As discussed above, the Commission acknowledges that the Rule will entail costs. In particular, requiring registered broker-dealers to establish recordkeeping systems to capture the required information, in particular the new fields that are not currently captured under the existing EBS system, will require one-time initial expenses, as discussed above. In addition, registered broker-dealers will need to implement policies and procedures to monitor their customers' trading in order to determine whether customers' trades would trigger the threshold

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418 17 CFR 242.611.

419 17 CFR 242.605.

420 17 CFR 242.606.

421 These numbers are based on a review of 2009 FOCUS Report filings reflecting registered broker-dealers, and discussions with SRO staff. These numbers do not include broker-dealers that are delinquent on FOCUS Report filings.

for large trader status. The Commission does not believe that these expenses would adversely affect competition.

In our judgment, the costs of complying with Rule 13h-1 would not be so large as to significantly raise barriers to entry, or otherwise alter the competitive landscape of the industries involved because the incremental costs of Rule 13h-1 that would be incurred by broker-dealers would be marginal relative to the costs of complying with the existing EBS system.[422] In industries characterized by reasonably low barriers to entry and competition, the viability of some of the less successful competitors may be sensitive to regulatory costs. Nonetheless, we believe that the broker-dealer industry would remain competitive, despite the costs associated with implementing new Rule 13h-1, even if those costs influence the entry or exit decisions of individual broker-dealer firms at the margin.

The Commission does not expect that the costs associated with new Rule 13h-1, which are marginal relative to the costs of complying with the existing EBS system, would be a determining factor in a broker-dealer's entry or exit decision or decision to accept large trader customers because the volume of trading associated with large traders and resultant revenue that could be gained by servicing a large trader would justify the costs associated with the Rule.

Further, the Commission would not be compelled to disclose publicly any information required to be kept or reported under Section 13(h) of the Exchange Act, including information kept or reported pursuant to Rule 13h-1.[423] Information and trading data that the Commission would obtain pursuant to the Rule would not be shared with others and would not be available to other large traders or broker-dealers. Accordingly, because the large trader transaction data will

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422 See supra Sections IV (Paperwork Reduction Act) and V (Consideration of Costs and Benefits) for a detailed description of the expected costs.

423 See supra Section III.A.3.g.

be reported only to the Commission, and not made publicly available for use by a large trader's customers or competitors, the Commission expects the Rule to have little to no impact on competition.

The approach of new Rule 13h-1 will advance the purposes of the Exchange Act in a number of significant ways. The Commission believes that the large trader reporting rule will enhance its ability to identify large traders and collect trading data on their activity at a time when, for example, many such traders employ rapid algorithmic systems that quote and trade in huge volumes. The large trader reporting rule will provide a useful source of data to facilitate the ability of the Commission to monitor and analyze more readily and efficiently the impact of large traders, including high-frequency traders, on the securities markets. Although, as noted above, several commenters stated that the Commission underestimated the costs of the proposed rule,[424] the Commission has made several modifications to the Rule to reduce reporting burdens. The Commission believes that establishing the large trader reporting rule would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In particular, the Commission believes that the Rule will implement the Commission's authority under Section 13(h) of the Exchange Act at a crucial time when large traders play an increasingly prominent role in the securities markets.

While one commenter raised the possibility that a U.S. large trader reporting rule may incentivize non-U.S. traders to shift their trading in NMS securities to transactions that provide an economically equivalent long position but would not impose any reporting requirement,[425] the Commission believes that the Rule, as adopted, has minimized this possibility. In particular, this release addresses the concerns raised by the commenter by clarifying the obligations on U.S.

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[424] See supra Section V.B.

[425] See European Banking Federation and Swiss Bankers Association Letter at 4.

broker-dealers to collect information on customers in light of applicable foreign laws. In summary, a registered broker-dealer must collect the information specified by Rule 13h-1(d)(2) about the foreign intermediary's transactions if it is a large trader or an Unidentified Large Trader.[426] The broker-dealer also must collect the information specified by Rule 13h-1(d)(3) relating to Unidentified Large Traders. The Rule does not require a registered broker-dealer to collect the identifying information about the foreign intermediary's client(s).[427] Further, the Commission clarified that the Rule does not require broker-dealers to definitively determine who is, in fact, a large trader.

Finally, the Commission believes that, because the reporting requirements applied to all large traders (both U.S. and foreign) will be minimal, they will not negatively impact the competitiveness of U.S. markets.

B. Capital Formation

New Rule 13h-1 is intended to facilitate the Commission's ability to monitor the impact on the securities markets of securities transactions involving a substantial volume of shares, a large fair market value or a large exercise value, as well as to assist the Commission's enforcement of the federal securities laws. The Rule focuses on the core of the large trader reporting requirements – the entities that control persons that exercise investment discretion and are responsible for trading large amounts of securities. As these entities can represent significant

426 See discussion supra at Section III.B.3 (explaining when a registered broker-dealer must treat its customer as an Unidentified Large Trader).

427 The legislative history indicates that the Commission stated that it "would not impose requirements on broker-dealers to report beneficial ownership information that is not recorded in the normal course of business." Senate Report, supra note 14, at 42. The Committee specifically noted that many broker-dealers currently maintain no beneficial ownership records of transactions of foreign persons that are carried out through banks, particularly foreign banks, which serve as the record holder of such securities. See id. The Committee expected that such beneficial owners would not be assigned LTIDs. See id. As discussed above, for all persons (both foreign and domestic), large trader status is triggered by the exercise of investment discretion, not mere beneficial ownership of NMS securities.

sources of liquidity and overall trading volume, their trading may have a direct impact on the cost of capital of securities issuers. As such, the Commission's ability to promptly obtain information from registered broker-dealers on large trader activity should better enable the Commission to understand the impact of large traders on the securities markets. As the Commission improves its understanding, it should be better positioned to administer and enforce the federal securities laws, thereby promoting the integrity and efficiency of the markets, as well as, ultimately, investor trust and capital formation. For example, the information collected from Rule 13h-1(d) would allow for a more timely reconstruction of trading activity during a market crisis and thus could better position the Commission to craft any regulatory responses.

However, one commenter expressed concern that a potential consequence of a large trader reporting rule might be to deprive U.S. markets of capital that will instead flow to alternative market centers that provide an economically equivalent long position but would not impose any reporting requirement to the extent that foreign traders seek to avoid trading in reportable NMS securities.[428] The consequence could be to deprive U.S. markets of capital, and to possibly create pricing disparities between economically equivalent non-reportable transactions and their analog reportable transactions.[429]

The commenter based its concerns on certain aspects of the Proposed Rule that it believed would impact non-U.S. traders. One concern was that potential non-U.S. traders would have little or no experience in dealing with Commission regulation and may not even realize they are subject to identifying and reporting requirements.[430] Another concern involved how a broker-dealer would be expected to collect information from non-U.S. intermediaries and the

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428 See European Banking Federation and Swiss Bankers Association Letter at 4-5.

429 See id.

430 See id. at 2.

impact of privacy laws on the ability to collect information and for large traders to reports such information.[431] A third concern involved the practicality of the proposed requirement for large traders to list account numbers on Form 13H.[432]

The Commission is mindful of these comments and believes that the modifications and clarifications in the adopted Rule and discussed in detail above should mitigate these concerns. For example, as adopted, the Rule does not require account numbers to be included on Form 13H, alleviating the commenters' concern about the practicality of non-U.S. traders providing this information. Also as discussed above, the scope of the monitoring requirements has been clarified in the adopted Rule such that the obligations of broker-dealers to collect information from non-U.S. parties is limited to only the non-U.S. entity with whom they transact. Furthermore, in the event, which the Commission believes to be unlikely, that the laws of a large trader's foreign jurisdiction preclude or prohibit the large trader from waiving such restrictions or otherwise voluntarily filing Form 13H with the Commission, then such foreign large traders or representatives of foreign large traders may request an exemption from the Commission pursuant to Section 36 of the Exchange Act[433] and paragraph (g) of the Rule.

Given these mitigating factors, the Commission does not believe that any remaining costs to a non-U.S. trader that trades in an amount sufficient to require identification with the Commission via Form 13H outweigh the considerable benefits of directly accessing U.S. markets for the trading of NMS securities. Moreover, armed with more current and accurate trading information on large traders, the Commission would be able to identify regulatory and potential enforcement issues more quickly. Thus, Rule 13h-1 could help maintain investor trust in the

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431 See id. at 3.

432 See id. at 3-4.

433 15 U.S.C. 78mm.

markets, and in turn could add depth and liquidity to the markets and promote capital formation. Further, the Commission believes that the requirements imposed on all large traders, whether U.S. or foreign, are necessary and appropriate, not unduly burdensome, and would be imposed uniformly on all affected entities (whether U.S. or non-U.S.).

C. Efficiency

New Rule 13h-1 is designed to achieve the appropriate balance between the Commission's goals of monitoring the impact on the securities markets of securities transactions by large traders and assisting the Commission's enforcement of the federal securities laws, on the one hand, and the effort to minimize the burdens and costs associated with implementing a large trader reporting rule.

The Commission believes that the disclosure by registered broker-dealers to regulators that would be achieved by the large trader reporting rule would promote efficiency by enabling the Commission to go beyond the EBS system, which permits investigations of small samples of securities over a limited period of time, and to instead assist with large-scale investigations and market reconstructions involving numerous stocks during peak trading volume periods. The Rule also would enable the Commission to receive from registered broker-dealers contemporaneous information on large traders' trading activity much more promptly than is currently the case with the EBS system. With a system designed specifically to help the Commission reconstruct and analyze time-sequenced trading data, the Commission could more quickly investigate the nature and causes of unusual market movements and initiate investigations and regulatory actions where warranted.

The Commission acknowledges that the trading activity of certain large traders also promotes market liquidity in secondary securities markets. The Commission also acknowledges that participation in primary market offerings may be affected by changes in expectations about secondary market liquidity and price efficiency. As discussed above, however, the Commission believes that Rule 13h-1 will enhance the Commission's efforts to monitor the markets, in furtherance of promoting efficiency and capital formation and thereby bolstering investor trust.

VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")[434] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)[435] of the Administrative Procedure Act,[436] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small entities."[437] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment, which if adopted, would not "have a significant economic impact on a substantial number of small entities."[438]

Paragraph (a) of Rule 0-10 provides that for purposes of the Regulatory Flexibility Act, a small entity when used with reference to a "person'" other than an investment company means a

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434 5 U.S.C. 601 et seq.

435 5 U.S.C. 603(a).

436 5 U.S.C. 551 et seq.

437 Although Section 601(b) of the RFA defines the term "small entity," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term small entity for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in Rule 0-10, 17 CFR 240.0-10. See Securities Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS-305).

438 See 5 U.S.C. 605(b).

person that, on the last day of its most recent fiscal year, had total assets of $5 million or less.[439] In reference to a broker-dealer, small entity means total capital of less than $500,000 and not affiliated with any person that is not a small business or small organization. Pursuant to Section 605(b), the Commission believes that Rule 13h-1 and Form 13H will not have a significant economic impact on a substantial number of small entities.

In the Proposing Release, the Commission requested comment on whether proposed Rule 13h-1 and Form 13H would have a significant economic impact on a substantial number of small entities. While the Commission did receive comment letters that discussed the overall number of respondents that would be affected by the proposed new rule,[440] the Commission did not receive any comments that specifically addressed whether Rule 13h-1 and Form 13H would have a significant economic impact on small entities.

Rule 13h-1 and Form 13H will require self-identification by large traders, which is a term that, as discussed below, would implicate persons and entities with the resources and capital necessary to transact securities in substantial volumes relative to overall market volume in NMS securities.[441] Specifically, the Rule defines "large trader" as a person that effects transactions in an "identifying activity level" of: (1) 2 million shares, or shares with a fair market value of $20 million, effected during a calendar day; or (2) 20 million shares, or shares with a fair market value of $200 million, effected during a calendar month.

The Commission anticipates that the types of entities that would identify as large traders would include, for example, broker-dealers, financial holding companies, investment advisers,

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439 17 CFR 240.0-10(a). Investment companies are small entities when the investment company, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less at the end of its most recent fiscal year. 17 CFR 270.0-10(a).

440 See supra Section IV.C.

441 See supra text accompanying note 61.

and firms that trade for their own account. The Commission does not believe that any small entities would be engaged in the business of trading, over the course of the applicable measuring period, in a volume that approaches the threshold levels. Because the Rule focuses on parent companies and is designed to identify the largest market participants by volume or fair market value of trading, the Commission believes that a large trader that trades in such substantial volumes would necessarily have considerable assets (beyond the level of a small entity) to be able to conduct such trading.

In addition, Rule 13h-1 will apply to registered broker-dealers that serve large trader customers. The Commission believes that, given the considerable volume in which a large trader as defined in the Rule would effect transactions, particularly in the case of high-frequency traders, registered broker-dealers servicing large trader customers or broker-dealers that are large traders themselves likely would be larger entities, with total capital greater than $500,000, and have systems and capacities capable of handling the trading associated with such accounts. Further, because the trading capacities of large traders will typically necessitate the services of sophisticated broker-dealers likely to be well capitalized entities or affiliated with well capitalized entities, the Commission does not believe that any broker-dealer that maintains large trader customers would be "not affiliated with any person that is not a small business or small organization" under Rule 0-10.

For the foregoing reasons, the Commission hereby certifies that, pursuant to 5 U.S.C. 605(b), Rule 13h-1 will not have a significant economic impact on a substantial number of small entities.

VIII. Statutory Authority

Pursuant to the Exchange Act and particularly, Sections 13(h) and 23(a) thereof, 15 U.S.C. 78m(h) and 78w(a), the Commission adopts new Rule 13h-1 under the Exchange Act that will implement a large trader reporting rule to provide the Commission with a mechanism to identify large traders, and the affiliates, accounts, and transactions of large traders.

IX. Text of the Amendments

List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements; Securities.

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

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

1. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4 and 80b-11, and 7201 et seq.; 18 U.S.C. 1350, 12 U.S.C. 5221(e)(3); and 7 U.S.C. 2(c)(2)(E), unless otherwise noted.

* * * * *

2. Add § 240.13h-1 to read as follows:

§ 240.13h-l Large trader reporting.

(a) Definitions. For purposes of this section:

(1) The term large trader means any person that:

(i) Directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts and effects transactions for the purchase or sale of any NMS security for or on behalf of such accounts, by or through one or more registered broker-dealers, in an aggregate amount equal to or greater than the identifying activity level; or

(ii) Voluntarily registers as a large trader by filing electronically with the Commission Form 13H (§ 249.327 of this chapter).

(2) The term person has the same meaning as in Section 13(h)(8)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(h)(8)(E)).

(3) The term control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of securities, by contract, or otherwise. For purposes of this section only, any person that directly or indirectly has the right to vote or direct the vote of 25% or more of a class of voting securities of an entity or has the power to sell or direct the sale of 25% or more of a class of voting securities of such entity, or in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity.

(4) The term investment discretion has the same meaning as in Section 3(a)(35) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(3)(a)(35)). A person's employees who exercise investment discretion within the scope of their employment are deemed to do so on behalf of such person.

(5) The term NMS security has the meaning provided for in Section 242.600(b)(46) of this chapter.

(6) The term transaction or transactions means all transactions in NMS securities, excluding the purchase or sale of such securities pursuant to exercises or assignments of option contracts. For the sole purpose of determining whether a person is a large trader, the following transactions are excluded from this definition:

(i) Any journal or bookkeeping entry made to an account in order to record or memorialize the receipt or delivery of funds or securities pursuant to the settlement of a transaction;

(ii) Any transaction that is part of an offering of securities by or on behalf of an issuer, or by an underwriter on behalf of an issuer, or an agent for an issuer, whether or not such offering is subject to registration under the Securities Act of 1933 (15 U.S.C. 77a), provided, however, that this exemption shall not include an offering of securities effected through the facilities of a national securities exchange;

(iii) Any transaction that constitutes a gift;

(iv) Any transaction effected by a court appointed executor, administrator, or fiduciary pursuant to the distribution of a decedent's estate;

(v) Any transaction effected pursuant to a court order or judgment;

(vi) Any transaction effected pursuant to a rollover of qualified plan or trust assets subject to Section 402(a)(5) of the Internal Revenue Code (26 U.S.C. 1 et seq.);

(vii) Any transaction between an employer and its employees effected pursuant to the award, allocation, sale, grant, or exercise of a NMS security, option or other right to acquire securities at a pre-established price pursuant to a plan which is primarily for the purpose of an issuer benefit plan or compensatory arrangement; or

(viii) Any transaction to effect a business combination, including a reclassification, merger, consolidation, or tender offer subject to Section 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(d)); an issuer tender offer or other stock buyback by an issuer; or a stock loan or equity repurchase agreement.

(7) The term identifying activity level means: aggregate transactions in NMS securities that are equal to or greater than:

(i) During a calendar day, either two million shares or shares with a fair market value of $20 million; or

(ii) During a calendar month, either twenty million shares or shares with a fair market value of $200 million.

(8) The term reporting activity level means:

(i) Each transaction in NMS securities, effected in a single account during a calendar day, that is equal to or greater than 100 shares;

(ii) Any transaction in NMS securities for fewer than 100 shares, effected in a single account during a calendar day, that a registered broker-dealer may deem appropriate; or

(iii) Such other amount that may be established by order of the Commission from time to time.

(9) The term Unidentified Large Trader means each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this section that a registered broker-dealer knows or has reason to know is a large trader. For purposes of determining under this section whether a registered broker-dealer has reason to know that a person is large trader, a registered broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer.

(b) Identification requirements for large traders.

(1) Form 13H. Except as provided in paragraph (b)(3) of this section, each large trader shall file electronically Form 13H (17 CFR 249.327) with the Commission, in accordance with the instructions contained therein:

(i) Promptly after first effecting aggregate transactions, or after effecting aggregate transactions subsequent to becoming inactive pursuant to paragraph (b)(3) of this section, equal to or greater than the identifying activity level;

(ii) Within 45 days after the end of each full calendar year; and

(iii) Promptly following the end of a calendar quarter in the event that any of the information contained in a Form 13H filing becomes inaccurate for any reason.

(2) Disclosure of large trader status. Each large trader shall disclose to the registered broker-dealers effecting transactions on its behalf its large trader identification number and each account to which it applies. A large trader on Inactive Status pursuant to paragraph (b)(3) of this section must notify broker-dealers promptly after filing for reactivated status with the Commission.

(3) Filing requirement.

(i) Compliance by controlling person. A large trader shall not be required to separately comply with the requirements of this paragraph (b) if a person who controls the large trader complies with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) of this section applicable to such large trader with respect to all of its accounts.

(ii) Compliance by controlled person. A large trader shall not be required to separately comply with the requirements of this paragraph (b) if one or more persons controlled by such large trader collectively comply with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) of this section applicable to such large trader with respect to all of its accounts.

(iii) Inactive status. A large trader that has not effected aggregate transactions at any time during the previous full calendar year in an amount equal to or greater than the identifying activity level shall become inactive upon filing a Form 13H (17 CFR 249.327) and thereafter shall not be required to file Form 13H or disclose its large trader status unless and until its transactions again are equal to or greater than the identifying activity level. A large trader that has ceased operations may elect to become inactive by filing an amended Form 13H to indicate its terminated status.

(4) Other information. Upon request, a large trader must promptly provide additional descriptive or clarifying information that would allow the Commission to further identify the large trader and all accounts through which the large trader effects transactions.

(c) Aggregation.

(1) Transactions. For the purpose of determining whether a person is a large trader, the following shall apply:

(i) The volume or fair market value of transactions in equity securities and the volume or fair market value of the equity securities underlying transactions in options on equity securities, purchased and sold, shall be aggregated;

(ii) The fair market value of transactions in options on a group or index of equity securities (or based on the value thereof), purchased and sold, shall be aggregated; and

(iii) Under no circumstances shall a person subtract, offset, or net purchase and sale transactions, in equity securities or option contracts, and among or within accounts, when aggregating the volume or fair market value of transactions for purposes of this section.

(2) Accounts. Under no circumstances shall a person disaggregate accounts to avoid the identification requirements of this section.

(d) Recordkeeping requirements for broker and dealers.

(1) Generally. Every registered broker-dealer shall maintain records of all information required under paragraphs (d)(2) and (d)(3) of this section for all transactions effected directly or indirectly by or through:

(i) An account such broker-dealer carries for a large trader or an Unidentified Large Trader, or

(ii) If the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion.

(iii) Additionally, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting transactions directly or indirectly for such large trader or Unidentified Large Trader shall maintain records of all of the information required under paragraphs (d)(2) and (d)(3) of this section for those transactions.

(2) Information. The information required to be maintained for all transactions shall include:

(i) The clearing house number or alpha symbol of the broker or dealer submitting the information and the clearing house numbers or alpha symbols of the entities on the opposite side of the transaction;

(ii) Identifying symbol assigned to the security;

(iii) Date transaction was executed;

(iv) The number of shares or option contracts traded in each specific transaction; whether each transaction was a purchase, sale, or short sale; and, if an option contract, whether the transaction was a call or put option, an opening purchase or sale, a closing purchase or sale, or an exercise or assignment;

(v) Transaction price;

(vi) Account number;

(vii) Identity of the exchange or other market center where the transaction was executed.

(viii) A designation of whether the transaction was effected or caused to be effected for the account of a customer of such registered broker-dealer, or was a proprietary transaction effected or caused to be effected for the account of such broker-dealer;

(ix) If part or all of an account's transactions at the registered broker-dealer have been transferred or otherwise forwarded to one or more accounts at another registered broker-dealer, an identifier for this type of transaction; and if part or all of an account's transactions at the reporting broker-dealer have been transferred or otherwise received from one or more other registered broker-dealers, an identifier for this type of transaction;

(x) If part or all of an account's transactions at the reporting broker-dealer have been transferred or otherwise received from another account at the reporting broker-dealer, an identifier for this type of transaction; and if part or all of an account's transactions at the reporting broker-dealer have been transferred or otherwise forwarded to one or more other accounts at the reporting broker-dealer, an identifier for this type of transaction;

(xi) If a transaction was processed by a depository institution, the identifier assigned to the account by the depository institution;

(xii) The time that the transaction was executed; and

(xiii) The large trader identification number(s) associated with the account, unless the account is for an Unidentified Large Trader.

(3) Information relating to Unidentified Large Traders. With respect to transactions effected directly or indirectly by or through the account of an Unidentified Large Trader, the information required to be maintained for all transactions also shall include such Unidentified Large Trader's name, address, date the account was opened, and tax identification number(s).

(4) Retention. The records and information required to be made and kept pursuant to the provisions of this section shall be kept for such periods of time as provided in § 240.17a-4(b).

(5) Availability of information. The records and information required to be made and kept pursuant to the provisions of this rule shall be available on the morning after the day the transactions were effected (including Saturdays and holidays).

(e) Reporting requirements for brokers and dealers. Upon the request of the Commission, every registered broker-dealer who is itself a large trader or carries an account for a large trader or an Unidentified Large Trader shall electronically report to the Commission, using the infrastructure supporting § 240.17a-25, in machine-readable form and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) of this section for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and Unidentified Large Traders, equal to or greater than the reporting activity level. Additionally, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting such transactions directly or indirectly for a large trader shall electronically report using the infrastructure supporting § 240.17a-25, in machine-readable form and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) of this section for such transactions equal to or greater than the reporting activity level. Such reports shall be submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.

(f) Monitoring safe harbor. For the purposes of this rule, a registered broker-dealer shall be deemed not to know or have reason to know that a person is a large trader if it does not have actual knowledge that a person is a large trader and it establishes policies and procedures reasonably designed to:

(1) Identify persons who have not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this section but whose transactions effected through an account or a group of accounts carried by such broker-dealer or through which such broker-dealer executes transactions, as applicable (and considering account name, tax identification number, or other identifying information available on the books and records of such broker-dealer) equal or exceed the identifying activity level;

(2) Treat any persons identified in paragraph (f)(1) of this section as an Unidentified Large Trader for purposes of this section; and

(3) Inform any person identified in paragraph (f)(1) of this section of its potential obligations under this section.

(g) Exemptions. Upon written application or upon its own motion, the Commission may by order exempt, upon specified terms and conditions or for stated periods, any person or class of persons or any transaction or class of transactions from the provisions of this section to the extent that such exemption is consistent with the purposes of the Securities Exchange Act of 1934 (15 U.S.C. 78a).

PART 249 -- FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

4. Add § 249.327 to read as follows:

§ 249.327 Form 13H, Information required on large traders pursuant to Section 13(h) of the Securities Exchange Act of 1934 and rules thereunder.

This form shall be used by persons that are large traders required to furnish identifying information to the Commission pursuant to Section 13(h)(1) of the Securities Exchange Act of 1934 [15 U.S.C. § 78m(h)(1)] and § 240.13h-1(b) of this chapter.

Note: The text of Form 13H does not, and this amendment will not, appear in the Code of Federal Regulations.

- OMB Number: 3235-0862
- Estimated average burden hours per response: 18

United States Securities and Exchange Commission

FORM 13H
Large Trader Registration
Information Required of Large Traders Pursuant To Section 13(h) of the Securities Exchange Act of 1934 and Rules Thereunder

[ ] INITIAL FILING: Date identifying transactions first effected (mm/dd/yyyy)________________

Voluntary filing? [ ] no [ ] yes Date of voluntary filing ______________

[ ] ANNUAL FILING:
Calendar year ending ________

[ ] AMENDED FILING

[ ] INACTIVE STATUS: Date commencing Inactive Status (mm/dd/yyyy)________________

[ ] TERMINATION FILING: Effective date (mm/dd/yyyy)________________

EACTIVATED STATUS: Date identifying transactions first effected, post-Inactive Status (mm/dd/yyyy)________________

____

Name of Large Trader Filing This Form

____

LTID

____

Taxpayer Identification Number

____

Business Address of the Large Trader (Street, City, State, Zip, Country)

____

Mailing Address of the Large Trader (Street, City, State, Zip, Country)

Telephone No. (___) ___ - ____ Facsimile No. (___) ___ - ____ Email ________________

Form and the schedules thereto must be submitted by a natural person who is authorized to make this submission on behalf of the large trader.

____
Name of Authorized Person (First, Middle Initial, Last)

____
Title of Authorized Person

____
Relationship to Large Trader

____
Business Address of Authorized Person (Street, City, State, Zip, Country)

Authorized Person's Telephone No. (__) ___ - ____ Facsimile No. (__) ___ - ____

Authorized Person's Email ______________________________

ATTENTION

Intentional misstatements or omissions of facts constitute Federal Criminal Violations. See 18 U.S.C. 1001 and 15 U.S.C. 78ff(a). Intentional misstatements or omissions of facts may result in civil fines and other sanctions pursuant [illegible]e Securities Exchange Act of 1934.

The authorized person signing this form represents that all information contained in the form, schedules, and continuation sheets is true, correct, and complete. It is understood that all information whether contained in the form, schedules, or continuation sheets, is considered an integral part of this form and that any amendment represents that all unamended information remains true, correct, and complete.

____
Signature of Person Authorized to Submit this Form

FORM 13H
INFORMATION REQUIRED OF ALL LARGE TRADERS

ITEM 1. BUSINESSES OF THE LARGE TRADER (check as many as applicable)

(a) Businesses engaged in by the large trader and any of the large trader's affiliates (check as many as applicable)

[ ] Broker or Dealer
[ ] Government Securities Broker or Dealer
[ ] Municipal Securities Broker or Dealer
[ ] Investment Adviser
  [ ] to Registered Investment Companies
  [ ] to Hedge Funds or other Funds not registered under the Investment Company Act
[ ] Futures Commission Merchant
[ ] Commodity Pool Operator
[ ] Bank Holding Company
[ ] Non-Bank Holding Company
[ ] Bank
[ ] Pension Trustee
[ ] Non-Pension Trustee
[ ] Insurance Company

[ ] Other (specify) ______________________

(b) Describe the nature of the business of the large trader including a description for each Securities Affiliate:

____
____
____
____

ITEM 2. SECURITIES AND EXCHANGE COMMISSION FILINGS

Does the large trader or any of its Securities Affiliates file any other forms with the Commission?

[ ] Yes [ ] No

If yes, specify the entity and the forms filed:

Entity	Form(s) Filed	CIK Number
______________	________	________
______________	________	________
______________	________	________
______________	________	________

ITEM 3. CFTC REGISTRATION AND FOREIGN REGULATORS

Is the large trader or any of its affiliates registered with the Commodity Futures Trading Commission in any capacity, including as a "registered trader" pursuant to sections 4i and 9 of the Commodity Exchange Act?

[ ] Yes [ ] No

If yes, identify each entity and specify the registration number:

Entity	Registration Number

(b) Is the large trader or any of its Securities Affiliates regulated by a foreign regulator?

[ ] Yes [ ] No

If yes, identify each entity and its primary foreign regulator(s):

Entity	Primary Foreign Regulator

ITEM 4. ORGANIZATION INFORMATION

(a) Attach an Organizational Chart that identifies the large trader, its parent company (if applicable), all Securities Affiliates, and all entities identified in Item 3(a).

(b) Provide the following information on all Securities Affiliates and all entities identified in Item 3(a):

Entity	MPID(s)	Description of Business	Relationship to the Large Trader

any affiliates file separately, identify each entity:

Entity	LTID	Suffix (if any)
____________________	____________	____________
____________________	____________	____________
____________________	____________	____________

(d) If any affiliates have been assigned an LTID suffix, identify such entities and their corresponding suffixes:

Entity	Suffix
____________________	____________
____________________	____________
____________________	____________

ITEM 5. GOVERNANCE OF THE LARGE TRADER

(a) STATUS OF THE LARGE TRADER (check as many as apply)

[ ] Individual

[ ] Trustee

[ ] Limited Liability Company

[ ] Partnership

[ ] Limited Partnership

[ ] Corporation

[ ] Other (specify)____________________

(b) Complete the following for each general partner, and in the case of limited partnerships, each limited partner that is the owner of more than a 10 percent financial interest in the accounts of the large trader:

Name	Status (check one for each)	
____________________	[ ] General Partner	[ ] Limited Partner
____________________	[ ] General Partner	[ ] Limited Partner
____________________	[ ] General Partner	[ ] Limited Partner
____________________	[ ] General Partner	[ ] Limited Partner
____________________	[ ] General Partner	[ ] Limited Partner
____________________	[ ] General Partner	[ ] Limited Partner
____________________	[ ] General Partner	[ ] Limited Partner

(c) Complete the following for each executive officer, director, or trustee of a large trader corporation or trustee:

Name	Status (check one for each)		
________________	[ ] Executive Officer	[ ] Director	[ ] Trustee
________________	[ ] Executive Officer	[ ] Director	[ ] Trustee
________________	[ ] Executive Officer	[ ] Director	[ ] Trustee
________________	[ ] Executive Officer	[ ] Director	[ ] Trustee
________________	[ ] Executive Officer	[ ] Director	[ ] Trustee
________________	[ ] Executive Officer	[ ] Director	[ ] Trustee
________________	[ ] Executive Officer	[ ] Director	[ ] Trustee

(d) Jurisdiction in which the large trader entity is incorporated or organized:

____

(state and country)

ITEM 6. LIST OF BROKER-DEALERS AT WHICH THE LARGE TRADER OR ITS SECURITIES AFFILIATES HAS AN ACCOUNT

Identify each broker-dealer at which the large trader or any of its Securities Affiliates has an account and the types of services provided.

Name of Broker-Dealer			
________________	[ ] Prime Broker	[ ] Executing Broker	[ ] Clearing Broker
________________	[ ] Prime Broker	[ ] Executing Broker	[ ] Clearing Broker
________________	[ ] Prime Broker	[ ] Executing Broker	[ ] Clearing Broker
________________	[ ] Prime Broker	[ ] Executing Broker	[ ] Clearing Broker
________________	[ ] Prime Broker	[ ] Executing Broker	[ ] Clearing Broker
________________	[ ] Prime Broker	[ ] Executing Broker	[ ] Clearing Broker
________________	[ ] Prime Broker	[ ] Executing Broker	[ ] Clearing Broker
________________	[ ] Prime Broker	[ ] Executing Broker	[ ] Clearing Broker
________________	[ ] Prime Broker	[ ] Executing Broker	[ ] Clearing Broker
________________	[ ] Prime Broker	[ ] Executing Broker	[ ] Clearing Broker

INSTRUCTIONS FOR FORM 13H

Submission of the Form. All submissions on Form 13H must be filed electronically through the Commission's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. For more information on filing through EDGAR, including instructions on how to obtain access to and file electronically through EDGAR, see the EDGAR Filer Manual (available on the Commission's website at: http://www.sec.gov/info/edgar.shtml).

Definitions. The term "Securities Affiliate" means an affiliate of the large trader that exercises investment discretion over NMS securities.

The term "affiliate" means any person that directly or indirectly controls, is under common control with, or is controlled by the large trader.

The term "bank" means a national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, or foreign bank.

The term "executive officer" means "policy-making officer" and otherwise is interpreted in accordance with Rule 16a-1(f) under the Exchange Act.

Type of Filing. Indicate the type of Form 13H filing by checking the appropriate box at the top of the cover page to Form 13H. All filings must include a valid digital signature.

If the filing is an "Initial Filing," indicate whether it is a voluntary filing. Voluntary filings are submitted regardless of whether the aggregate number of transactions effected reached the identifying activity level. For voluntary filings, the large trader must input the date on which it submits its voluntary filing. For non-voluntary filings, the large trader must input the first date on which the aggregate number of transactions effected reached the identifying activity level. A non-voluntary "Initial Filing" must be submitted promptly after first effecting an aggregate number of transactions equal to or greater than the identifying activity level.

If the filing is an "Annual Filing," input the applicable calendar year.

An "Amended Filing" must be filed promptly following the end of the calendar quarter in which any of the information contained in a Form 13H filing becomes inaccurate for any reason. A large trader must file an "Amended Filing" when, for example, it changes its name, business address, organization type (e.g., the large trader partnership reincorporates as a limited liability company), or regulatory status (e.g., a hedge fund registers under the Investment Company Act), or when its organizational chart changes in a manner relevant under Item 4(a) (e.g., it adds or removes a Securities Affiliate).

If the filing is for "Inactive Status," input the date that the large trader qualified for Inactive Status. A large trader that has not effected aggregate transactions at any time during the previous full calendar year in an aggregate amount equal to or greater than the identifying activity level may file for Inactive Status. A large trader shall become inactive, and exempt from the filing and self-identification requirements upon filing for Inactive Status until the identifying activity level is reached again.

If the filing is for "Reactivated Status," indicate the date that the aggregate number of transactions again reached or exceeded the identifying activity level. A filing for "Reactivated Status" must be submitted promptly after effecting an aggregate number of transactions -- subsequent to filing for "Inactive Status" -- equal to or greater than the identifying activity level. In addition, a person may voluntarily elect to file for Reactivated Status prior to effecting aggregate transactions that are equal to or greater than the identifying activity threshold. For such voluntarily filings for "Reactivated Status," the date of the voluntarily filing should be entered rather than the date that the aggregate number of transactions again reached or exceeded the identifying activity level.

If the filing is a "Termination Filing," indicate the date on which the large trader ceased operation. For example, when one large trader merges into another large trader, resulting in only one surviving entity, the non-surviving large trader should specify the effective date of the merger in its Termination Filing.

The Form also requires that a large trader input its Taxpayer Identification Number. The Form further requires a large trader to input its business and mailing addresses. If those addresses are the same, for the mailing address field, the large trader may either input its address again or input "same."

The Form must be filed by a natural person who is authorized to submit it on behalf of the large trader. The Commission may require the large trader to provide descriptive or clarifying information about the information disclosed in the Form 13H, and will contact the Authorized Person to provide such information.

To amend the name, phone number, and email address of the large trader, the large trader must modify its EDGAR profile. Thereafter, changes will automatically be reflected in the Form 13H.

Item 1. Businesses of the Large Trader. Item 1 of the Form requires the large trader to specify, from among the enumerated choices, the types of business engaged in by the large trader, by checking as many as are applicable. Select "Other" to indicate a financial entity not included in any of the enumerated categories and enter a short description for each such entity. In addition, select "Other" if the large trader is an individual and input his or her occupation.

A large trader also is required, for itself and each of its Securities Affiliates, to describe the nature of its operations, including a general description of its trading strategies. As an example, the following would be an appropriate description: "Registered market-maker on [SRO], authorized participant for a number of ETFs based on foreign indices, and proprietary trading focusing on statistical arbitrage."

Item 2. Securities and Exchange Commission Filings. The large trader must indicate whether it or any of its Securities Affiliates files forms with the Commission. If it checks "Yes," the large trader must input the names of the filing entities and, for each of them, input the form(s) they file and the applicable CIK number.

Item 3. CFTC Registration and Foreign Regulators.

Item 3(a) requires the large trader to indicate whether it or any of its affiliates is registered with the Commodity Futures Trading Commission in any capacity, including as a "registered trader" pursuant to Sections 4i and 9 of the Commodity Exchange Act. If it checks "Yes," the large trader must input the name of each such entity and the registration number for each such entity.

Item 3(b) requires the large trader to indicate whether it or any of its Securities Affiliates is regulated by a foreign regulator. Unlike Item 3(a), Item 3(b) applies only to the large trader and its Securities Affiliates. If it checks "Yes," the large trader must input the name of each such regulated entity and its primary foreign regulator.

Item 4. Organization Information.

To comply with Item 4(a), the large trader must attach an organizational chart that depicts the organization of the large trader. At a minimum, the chart must include the large trader, its parent company (if applicable), all Securities Affiliates, and all entities identified in Item 3(a) of the Form (if any) (collectively, "Item 4 Affiliates").

Item 4(b) requires that a large trader provide information about the Item 4 Affiliates. Specifically, the large trader must input the names of Item 4 Affiliates and, for each one of them, also input the following information: MPID(s); a brief description of its business, and its relationship to the large trader.

Item 4(c) requires that a large trader identify all affiliates that file a separate Form 13H. Those affiliates will have a different LTID.

Item 4(d) permits a large trader to assign LTID suffixes to one or more of its Securities Affiliates. A suffix should have no more than three characters, all of which must be numbers; no letters or special characters may be used. The same suffix may not be assigned to more than one affiliate using the same LTID.

Item 5. Governance of the Large Trader.

Item 5 captures basic information about the large trader organization. All terms have the meanings generally ascribed to them in the United States. If a foreign organization type has no comparable corporate form, check "Other" and input the organization type. A large trader who is a natural person must check "Individual."

Item 6. List of Broker-Dealers at Which the Large Trader or Its Securities Affiliates Has an Account.

Item 6 requires that a large trader identify each broker-dealer at which the large trader and any Securities Affiliate has an account. Additionally, for each such broker-dealer, the large trader must indicate the type(s) of services provided. The large trader must check as many of the following that apply: Prime Broker; Executing Broker; Clearing Broker.

Paperwork Reduction Act Disclosures. This collection of information has been reviewed by OMB in accordance with the clearance requirements of 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Responses to this collection are mandatory, pursuant to Section 13(h) of the Exchange Act and Rule 13h-1 thereunder. The Commission will treat as confidential the information collected pursuant to this Form in a manner consistent with Section 13(h)(7) of the Exchange Act, which sets forth a few limited exceptions.

The Commission will use the information collected pursuant to this Form 13H to identify significant market participants, i.e., large traders. Form 13H will allow the Commission to collect background information about large traders, which will contribute to the agency's ability to conduct investigations and enforcement matters. The Commission estimates that the average burden to respond to the Form 13H will be 18 hours. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: July 27, 2011

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64978 / July 27, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3307 / July 27, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14490

In the Matter of **DIAGEO plc,** **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 AND A CIVIL PENALTY**

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 Diageo plc ("Diageo" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over the Respondent and the subject matter of these proceedings, which are admitted, the 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 and a Civil Penalty ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

This matter concerns multiple violations of the Foreign Corrupt Practices Act ("FCPA") by Respondent Diageo, one of the world's largest producers of premium alcoholic beverages. Over more than six years, Diageo, through its subsidiaries, paid over $2.7 million to various government officials in India, Thailand, and South Korea in separate efforts to obtain lucrative sales and tax benefits.

In India, from 2003 through mid-2009 Diageo made over $1.7 million in illicit payments to hundreds of Indian government officials responsible for purchasing or authorizing the sale of its beverages. Increased sales from these payments yielded more than $11 million in ill-gotten gains. In Thailand, from 2004 through mid-2008, Diageo paid approximately $12,000 per month – totaling nearly $600,000 – to retain the consulting services of a Thai government and political party official. This official lobbied extensively on Diageo's behalf in connection with multi-million dollar pending tax and customs disputes, contributing to Diageo's receipt of certain favorable dispositions by the Thai government. With respect to South Korea, in 2004, Diageo paid 100 million won (KRW) (over $86,000) to a customs official as a reward for his role in the government's decision to grant Diageo significant tax rebates. Diageo also paid over $100,000 in travel and entertainment expenses for South Korean customs and other government officials involved in these tax negotiations. Separately, Diageo made hundreds of gift payments totaling over $230,000 to South Korean military officials in order to obtain and retain liquor business.

Diageo and its subsidiaries failed to account accurately for these illicit payments in their books and records. Exercising lax oversight, Diageo also failed to devise and maintain internal accounting controls sufficient to detect and prevent the payments.

Respondent

Diageo, headquartered in London, United Kingdom, is a leading producer and/or distributor of premium branded spirits, beer, and wine, including Johnnie Walker, Smirnoff, J&B, Baileys, Captain Morgan, Tanqueray, and Guinness. Through its various direct and indirect subsidiaries, Diageo maintains operations in more than 180 countries. Diageo's American Depository Shares are registered with the Commission pursuant to Section 12(b) of the Exchange Act and trade on the New York Stock Exchange under the symbol DEO. As a foreign private issuer, Diageo files annual reports with the Commission on Form 20-F.

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

Other Relevant Entities

Diageo India Pvt. Ltd. ("DI") is a wholly-owned indirect subsidiary of Diageo, and is based in Mumbai, India. Throughout the relevant period, Diageo incorporated DI's financial results into the consolidated financial statements that it filed with the Commission.

Diageo Moet Hennessy Thailand ("DT") is a joint venture of Diageo, and is based in Bangkok, Thailand. Throughout the relevant period, Diageo had an indirect majority economic interest in, and operational control of, DT and incorporated DT's financial results into the consolidated financial statements that it filed with the Commission.

Diageo Korea Co. Ltd. ("DK") is a wholly-owned indirect subsidiary of Diageo, and is based in Seoul, South Korea. Throughout the relevant period, Diageo incorporated DK's financial results into the consolidated financial statements that it filed with the Commission.

Facts

A. Background

Diageo's history of rapid multinational expansion through mergers and acquisitions contributed to defects in its FCPA compliance programs. Diageo was formed in 1997 from the merger of Guinness plc and Grand Metropolitan plc. As a result of that merger, Diageo acquired its Indian subsidiary, DI, and an indirect majority economic interest in, and operational control of, its Thai joint venture, DT. Diageo acquired its South Korean subsidiary, DK, in 2001 as part of a larger acquisition of the spirits and wine business of The Seagram Company Ltd. At the time of these acquisitions, Diageo recognized that its new subsidiaries had weak compliance policies, procedures, and controls. Nevertheless, Diageo failed to make sufficient improvements to these programs until mid-2008 in response to the discovery of the illicit payments described below.

B. India

For many years, Diageo, through DI, engaged in a pervasive practice of making illicit direct and indirect payments to government officials throughout India to obtain and retain liquor sales. As a result, Diageo was unjustly enriched by $11,306,081 from increased sales.

Payments to Employees of Government Liquor Stores

From at least 2003 through June 2009, DI paid an estimated $792,310 in improper cash payments through its third-party distributors to 900 or more employees of government liquor stores in and around New Delhi. DI also paid an estimated $186,299 (representing 23% of the payments) in "cash service fees" to the distributors as compensation for advancing the funds. DI made the payments to increase government sales orders of its products, and to secure favorable product placement and promotion within the stores.

Although the improper payments continued for at least six years, it was not until July 2009 that DI instructed its distributors to discontinue them.

DI failed properly to account for either its reimbursement of the illicit payments or the associated "cash service fees." DI's distributors sought recompense by either submitting debit notes or requesting increases in their per-case commissions. Each of the debit notes falsified or obscured the nature of the payments by purporting to be for "market scheme settlement," "deposit[s] with Delhi Excise," "incentives," "special incentives," or "promotions." By recording its reimbursement of the debit notes as "promotion" or "special incentive" expenses in innocuously labeled accounts – "Promotions-Outlet," "Promotions," "Secondary," or "Trade Incentives" – DI concealed the underlying payments' purpose and recipients. Nor did DI's practice of recording the increased per-case commissions under the generic rubric of "commissions" in any way indicate that they constituted reimbursement for cash payments to government employees.

Payments to Employees of India's Canteen Stores Department

During the same six-year period (2003 – 2009), Diageo, through DI, also reimbursed an estimated $530,955, and made plans to reimburse an additional $79,364, in improper cash payments made by third-party sales promoters to government employees of the Indian military's Canteen Stores Department ("CSD"). The payments, made with DI's knowledge and authorization, were designed to: (i) foster the promotion of Diageo products in the CSD's canteen stores (analogous to the U.S. military's post exchanges); (ii) obtain initial listings and annual label registrations for Diageo brands, price revision approvals, and favorable factory inspection reports; (iii) secure the release of seized shipments of Diageo products; and (iv) promote good will through the distribution of Diwali and New Year's holiday gifts to CSD employees.

DI's accounting for its reimbursement of payments to CSD employees bore the same defects as that for the government liquor stores. From June 2003 through June 2007, DI's sales promoters submitted debit notes mischaracterizing the payments as "business promotion expenses," "miscellaneous expenses," "expenses incurred on your behalf," "factory expenses," "travelling expenses," or "telephone expenses." DI recorded its reimbursements as "scheme" or "special scheme" payments. After June 2007, DI reimbursed the payments through increased per-case commissions which it recorded as "DIF – selling commission." The nondescript terms used by DI on its books and records concealed the fact that DI was reimbursing its promoters for wrongful cash payments to CSD employees.

Payments to Label Registration and Excise Officials

Diageo failed to ensure that DI properly accounted for a number of additional, improper payments to government officials who controlled administrative functions vital to DI's business. From at least 2003 through 2008, Diageo, through DI, reimbursed an estimated $98,310 in cash payments made by its third-party promoters and distributors to government officials in the North Region of India and in the State of Assam for the purpose of securing label registrations for Diageo products.[2] The distributors submitted debit notes to DI that described the payments as "special rebates" or as "an incentive for reaching sales targets." DI recorded the reimbursements as "special rebates" or "trade incentives," thereby masking the fact that they represented recompense for illicit payments to government employees.

In addition, from at least 2003 through June 2009, Diageo, through DI, paid an estimated $78,622 in extra commissions to its distributors in the North Region to reimburse them for payments made to Excise officials to secure import permits and other administrative approvals. DI again hid the fact that it was reimbursing the distributors for improper payments to government employees by recording them on its books of account as "DIF – selling commission."

C. Thailand

From April 2004 through July 2008, Diageo, through DT, retained the services of a Thai government and foreign political party official (the "Thai Official") to lobby other Thai officials to adopt Diageo's position in several multi-million dollar tax and customs disputes. For this retainer DT paid approximately $12,000 per month for 49 months, for a total of $599,322. DT compensated the Thai Official through 49 direct payments to a political consulting firm (the "Consulting Firm") for which the Thai Official acted as a principal. Most, if not all, of the $599,322 paid to the Consulting Firm was for the Thai Official's services and accrued to his benefit.

The Thai Official served as a Thai government and/or political party official throughout the relevant period (April 2004 – July 2008) in which he received compensation from DT. At various times the Thai Official served as Deputy Secretary to the Prime Minister, Advisor to the Deputy Prime Minister, and Advisor to the Ministry of Agriculture and Cooperatives. The Thai Official also served on a committee of the ruling Thai Rak Thai political party, and as a member and/or advisor to several state-owned or state-controlled industrial and utility boards. DT's senior management knew that the Thai Official was a government officer during its engagement of the Consulting Firm. The Thai Official was the brother of one of DT's senior officers at that time. Several members of Diageo's global and regional management attended meetings with the Thai Official and senior members of the Thai government.

The Thai Official provided extensive lobbying services on behalf of Diageo and DT in connection with several important tax and customs disputes that were pending between Diageo and the Thai government. For example, with respect to excise taxes,[3] the Thai Official coordinated and attended numerous meetings between senior Thai government

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2 The North Region of India includes the following thirteen states: Bihar, Chandigarh, Chattisgarh, Delhi, Haryana, Punjab, Himachal Pradesh, Jammu, Jharkhand, Madhya Pradesh, Rajasthan, Uttar Pradesh, and Uttaranchal.

3 An excise tax refers to a tax on a good produced for sale, or sold, within a country.

officials and senior Diageo and DT management, including two meetings in April and May 2005 with Thailand's then Prime Minister. In May 2005, shortly following the meetings arranged by the Thai Official, the Prime Minister made a radio address publicly endorsing Diageo's position in favor of a "specific" approach (based on quantity) rather than an "ad valorem" approach (based on price) to calculating excise taxes.

On Diageo's behalf, the Thai Official also met repeatedly with senior commerce, finance, and customs authorities in charge of the transfer pricing and import tax disputes,[4] as well as with members of the Thai parliament. The Thai Official's services contributed to Diageo's successful resolution of several components of these disputes. For example, during 2004 and 2005 Diageo and DT were actively engaged in a dispute with the Thai government over the appropriate transfer pricing formula applied to One Liter bottles of Johnnie Walker Red Label and Black Label Scotch whiskey. Based in part on the Thai Official's lobbying efforts, the Thai government accepted important aspects of DT's transfer pricing method and released over $7 million in bank guarantees that DT had been required to post while the tax dispute was pending.

DT improperly accounted for the monthly retainer that it paid to the Thai Official through his Consulting Firm. The bulk of the payments assumed the form of monthly disbursements of $11,989 to the Consulting Firm for advisory fees and out-of-pocket expenditures. Approximately $15,169 of the payments was for reimbursement of entertainment expenses, including those incurred on behalf of government officials. DT recorded the payments under one of the following generically-labeled accounts: (i) "Outside Services"; (ii) Corporate Social Responsibility"; (iii) Corporate Communications"; (iv) "EA [External Affairs] Project"; or (v) "Stakeholder Engagement." Typically, DT charged payments to the Consulting Firm against the same account for a period of time, and then switched to another account without any discernible rationale for the change in accounting treatment. DT's books and records did not reflect the fact that DT was paying a Thai government and political party official to lobby in connection with multimillion dollar tax and customs disputes.

D. South Korea

Reward Payment to a Korean Customs Official

As in Thailand, Diageo had significant tax and customs issues in South Korea. In April 2003, DK, under Diageo's direction, requested from South Korea a more advantageous formula for calculating the transfer pricing, for tax purposes, of Windsor Scotch whiskey that DK was importing into South Korea. As part of those negotiations, DK also sought tens of millions of dollars in tax rebates based on a claim that DK had overpaid under the then existing transfer pricing formula. In April 2004, following a year of intense negotiations and

4 Transfer pricing refers to the cost that individual entities within multinational firms charge for the goods and services that they supply to one another.

lobbying by DK, the South Korean government granted DK a rebate of approximately $50 million.[5]

In July 2004, three months after DK received the tax rebates, a DK manager (the "Manager") paid an apparent reward of 100 million KRW ($86,339) to a Korean Customs Service official (the "Customs Official") who had played a key role in the transfer pricing negotiations. With the approval of DK's then chief financial officer, the Manager generated 60 million KRW ($51,802) of the payment by means of a surreptitious cash kickback scheme. The Manager solicited an inflated invoice from DK's third-party customs brokerage firm (the "Customs Broker"), which had provided DK with consulting services during the transfer pricing negotiations. As orchestrated, DK paid an inflated invoice amount to the Customs Broker, which then gave 60 million KRW ($51,802) in cash back to the Manager. The Manager funded the remaining 40 million KRW ($34,537) of the total reward amount from personal sources. The Manager then provided the Customs Official with 100 million KRW ($86,339) in the form of ten bank checks of approximately 10 million KRW ($8,634) each.

Diageo, through DK, improperly and falsely accounted for the cash reward payment to the Customs Official. DK booked the invoice from the Customs Broker which it had used to fund 60% of the payment to a general ledger account for professional services and consulting fees. DK also described the expense as relating to the Customs Broker's work on the transfer pricing negotiations. DK's books and records, however, do not reveal that DK solicited the invoice to generate a cash payment to the Customs Official, or that the Customs Broker had failed to render the full services reflected on the invoice. Nor do DK's books and records show that the Manager had personally funded the remainder of the cash reward.

<u>Payments for Travel and Entertainment for Korean Customs Service Officials</u>

During the course of the transfer pricing negotiations in 2003 and 2004, DK also paid $109,253 in travel and entertainment costs for Korean customs and other government officials. Some of these expenses were unapproved and constituted improper inducements of the South Korean officials. For example, in December 2003, the Customs Official and several official colleagues traveled to Scotland with DK employees. The purported reason for the trip was to inspect Diageo's Windsor Scotch production facilities as part of the transfer pricing negotiations. During the course of this apparently legitimate trip, DK's chief financial officer and the Manager took the South Korean officials on a purely recreational side-trip to Prague and Budapest.

DK failed properly to account for the $109,253 in travel and entertainment related expenses. The company booked 46 of the related accounting entries to a general ledger account entitled "Entertainment – Customer," thereby hiding the fact that it was furnishing the travel and entertainment to government officials. DK intended the false accounting treatment to prevent the South Korean authorities, including the Korean National Tax

[5] The South Korean government is currently in the process of reevaluating the appropriate transfer price for Diageo's Windsor Scotch whiskey.

Service, from detecting the officials' acceptance of the travel and entertainment. DK failed to record an additional seven expenses related to entertainment connected to the transfer pricing project. Diageo also failed to implement a system of internal accounting controls that reasonably could have prevented DK's concealment of these expenditures.

Gift Payments to Military Officials

From at least 2002 through at least 2006, Diageo, through DK, routinely made hundreds of small payments to South Korean military officers for the purpose of obtaining or maintaining business and securing a competitive business advantage. The payments assumed two forms: (i) holiday and vacation gifts known as "rice cake" payments; and (ii) business development gifts, called "Mokjuksaupbi" payments.

Rice cake payments were customary and traditional presents that Diageo, through DK, provided to scores of military officers – many of whom were responsible for procuring liquor – several times each year during holidays and vacations. From 2002 through 2006, DK made approximately 400 rice cake payments, totaling at least $64,184, in the form of cash or gift certificates ranging in value between $100 and $300 per recipient. In October 2004, a senior officer within Diageo's global compliance department explicitly approved the practice of making rice cake payments after a DK employee explained that the company would face a competitive disadvantage if it refrained.

Over the same four-year period, Diageo, through DK, also spent approximately $165,287 on hundreds of non-traditional, non-seasonal gifts and entertainment for the military. Of these so-called "Mokjuksaupbi" payments (a term that was broadly intended by DK to refer to "payments for relationships with customers"), approximately $106,051 were for the purpose of influencing specific purchasing decisions. For example, in 2003, DK personnel requested approval of approximately $2,600 to entertain army personnel "for their cooperation" in connection with the re-selection of Windsor Scotch.

Diageo failed to ensure that DK properly accounted for the rice cake and Mokjuksaupbi payments. During 2002 and 2003, DK used fake vendor invoices to generate cash for the rice cake payments and, in 2002, failed to record any of the rice cake payments on its general ledger. DK incorrectly recorded subsequent rice cake payments, and all of the Mokjuksaupbi payments, under general ledger accounts for expenses such as sales, promotion, or customer entertainment. Diageo thereby concealed the fact that it was providing gifts to military personnel from South Korean government auditors.

FCPA Violations

Section 13(b)(2)(A) of the Exchange Act requires public companies to make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the issuer's assets.

Diageo's books and records did not accurately reflect illicit payments that it made, through its subsidiaries, to Indian, Thai, and South Korean government and military officials.

Instead, Diageo, through DI, DT, and DK, disguised the improper payments as legitimate vendor expenses or recorded them under misleading rubrics such as "factory expenses," "telephone expenses," "shareholder stake," and "sales support." In several instances, the illicit payments were not recorded at all. As a result, Diageo violated Section 13(b)(2)(A) of the Exchange Act.

Section 13(b)(2)(B) of the Exchange Act requires companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions: (i) are executed in accordance with management's general or specific authorization; and (ii) are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets.

As evidenced by the extent and duration of the wrongful payments and their improper recordation, Diageo failed to devise and maintain sufficient internal accounting controls. Accordingly, Diageo violated Section 13(b)(2)(B) of the Exchange Act.

Diageo's Cooperation and Remedial Efforts

In determining to accept the Offer, the Commission considered the cooperation afforded the Commission staff and certain remedial measures undertaken by Diageo, including employee termination and significant enhancements to its compliance program.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Diageo cease and desist from committing or causing any violations and any future violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act;

B. Respondent shall, within 30 days of the entry of this Order, pay disgorgement of $11,306,081 and prejudgment interest of $2,067,739 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Diageo plc as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Scott F. Weisman, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

C. Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $3,000,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Diageo plc as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Scott F. Weisman, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

D. Respondent acknowledges that the Commission is not imposing a civil penalty in excess of $3,000,000 based upon its cooperation in a Commission investigation. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission or in a related proceeding, the Division may, at its sole discretion and without prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay an additional civil penalty. Respondent may not, by way of defense to any resulting administrative proceeding: (1) contest the findings in the Order; or (2) 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 64980 / July 28, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14293

In the Matter of

DANIEL G. DANKER,

Respondent.

ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

On March 11, 2011, the Securities and Exchange Commission ("Commission") deemed it appropriate and in the public interest to institute public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Daniel G. Danker ("Respondent").

II.

In response to the institution of these administrative 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 him and the subject matter of these proceedings, and the findings contained in Section III.E. below, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Exchange Act ("Order").

III.

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

A. From at least 1997 until March 2000, Respondent, age 63 and a resident of Topeka, Kansas, was the vice-president, registered principal and office manager of now-defunct Heartland Financial Services, Inc. ("Heartland"), an unregistered entity that held itself out as a broker-dealer, insurance and estate-planning firm. Respondent participated in the investment decisions for Heartland, including making recommendations to investors on their stock purchases through Heartland. Respondent was also a registered representative of Jonathan Roberts Financial Group, Inc., a broker-dealer which was then registered with the Commission, until he voluntarily terminated his registration on or about March 27, 2000.

B. On August 10, 2000, the Commission filed a Complaint in the United States District Court for the Southern District of Indiana ("Court"), captioned *Securities and Exchange Commission v. Payne, et al.*, Case No. 1:00-cv-01265, naming Respondent, among others, as a defendant.

C. The Complaint alleged that Respondent, in connection with the sale of securities, misused and misappropriated investor funds, commingled investors' funds in a common bank account and caused investors to be sent false trade confirmations and monthly statements purporting to verify the nature and amount of their investments. The Complaint alleged that Respondent violated Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933 ("Securities Act"); Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder; and aided and abetted Heartland's and JMS' violations of Sections 15(a)(1) and 15(c)(1) of the Exchange Act, and Rule 15c1-2 promulgated thereunder.

D. On December 23, 2010, the Court entered summary judgment as to liability against Respondent. In its ruling, the Court found in favor of the Commission as to the Commission's claims that Respondent violated the anti-fraud and registration provisions of the federal securities laws set forth above. The Court held that Respondent was precluded from contesting liability for violations of Section 17(a) of the Securities Act and Sections 10(b), 15(a)(1) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder, based on his prior conviction for the same conduct. The Court also found that the evidence was undisputed that Respondent violated Section 5 of the Securities Act.

E. On February 18, 2011, the District Court entered an order permanently enjoining Respondent from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act, as well as Sections 10(b), 15(a)(1) and 15(c)(1) of the Exchange Act, and Rules 10b-5 and 15c1-2 promulgated thereunder.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

Elizabeth M. Murphy
Secretary

Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3253 / July 28, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14491

In the Matter of

BENCHMARK ASSET MANAGERS LLC

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(e) 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(e) of the Investment Advisers Act of 1940 ("Advisers Act") against Benchmark Asset Managers LLC ("Benchmark" 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, 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(e) 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. Benchmark Asset Managers, LLC ("Benchmark") is a Pennsylvania limited liability company with its principal place of business in Philadelphia, Pennsylvania. Benchmark is an investment adviser registered with the Commission and is primarily owned by Harvest Managers LLC ("Harvest") and Otto Sam Folin ("Folin"). Folin is the managing director, Chief Compliance Officer and 33% shareholder of Benchmark and is the president, chief executive officer and a majority owner of Harvest. From 2002 through March 2011, Benchmark and Folin provided investment advice to clients for compensation. In addition, Benchmark and Folin have raised money from investors and advisory clients by offering and selling a variety of securities. From 2004 through March 2011, Benchmark and Folin also managed and advised a group of hedge funds known as the Safe Haven Investment Portfolios LLC ("Safe Haven Portfolios"). Almost all of the investors in the Safe Haven Portfolios were also advisory clients of Benchmark.

2. On July 21, 2011, a final judgment was entered by consent against Benchmark, permanently enjoining it from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 in the civil action entitled Securities and Exchange Commission v. Otto Sam Folin, et al., Civil Action Number 11-cv-04447, in the United States District Court for the Eastern District of Pennsylvania. Benchmark was also ordered to pay disgorgement, jointly and severally with Folin and Harvest, in the amount of $8,706,620, plus prejudgment interest thereon in the amount of $1,454,177, and a civil penalty of $725,000.

3. The Commission's complaint alleged, among other things, that Folin, Benchmark and Harvest made material misrepresentations and omissions in connection with the offer, purchase and sale of various securities in Benchmark and Harvest to advisory clients, noteholders and the Safe Haven Portfolios. Specifically, the Complaint alleged that Benchmark and Folin made misrepresentations and omissions regarding Safe Haven Portfolios' loans to Harvest and Benchmark and certain development costs the Safe Haven Portfolios paid to Harvest and Benchmark. The Complaint further alleged Benchmark and Folin improperly valued the Safe Haven Portfolios loans to Harvest and Benchmark at cost, rather than at fair value, as required by relevant offering documents. As a result, the Complaint alleged, Benchmark and Folin provided investors with misleading account statements that reflected the loans at inflated values. The Complaint also alleged that Folin and Benchmark did not disclose Benchmark's precarious financial condition.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(e) of the Advisers Act that the investment adviser registration of Respondent Benchmark 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. 64993 / July 29, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14294

In the Matter of KENNETH R. PAYNE, Respondent.	ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS

I.

On March 11, 2011, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Kenneth R. Payne ("Payne" or "Respondent").

II.

In response to the institution of these administrative 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 him and the subject matter of these proceedings, and the findings contained in Section III.D. below, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions ("Order").

III.

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

A. From 1991 until August 2000, Payne was the president and owner of now-defunct Heartland Financial Services, Inc. ("Heartland"), an unregistered entity that held itself out as a broker-dealer and insurance and estate-planning firm. Payne participated in the investment decisions for Heartland, including making recommendations to investors on their stock purchases through Heartland. Payne was also a registered representative of Jonathan Roberts Financial Group, Inc., a broker-dealer which was then registered with the Commission.

B. On August 10, 2000, the Commission filed a Complaint in the United States District Court for the Southern District of Indiana ("Court"), captioned *Securities and Exchange Commission v. Payne, et al.*, Case No. 1:00-cv-01265, naming Payne, among others, as a defendant.

C. The Complaint alleged that Payne, in connection with the sale of securities, misused and misappropriated investor funds, commingled investors' funds in a common bank account and caused investors to be sent false trade confirmations and monthly statements purporting to verify the nature and amount of their investments. The Complaint alleged that Payne violated Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933 ("Securities Act"); Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder; and aided and abetted Heartland's and JMS' violations of Sections 15(a)(1) and 15(c)(1) of the Exchange Act, and Rule 15c1-2 promulgated thereunder.

D. On December 23, 2010, the Court entered summary judgment as to liability against Payne. On February 18, 2011, the District Court entered an order permanently enjoining Payne from future violations of Sections 5(a), 5(c), 17(a) of the Securities Act, as well as Sections 10(b), 15(a)(1) and 15(c)(1) of the Exchange Act, and Rules 10b-5 and 15c1-2 promulgated thereunder.

E. In the December 23, 2010 ruling, in which the Court found in favor of the Commission as to the Commission's claims that Payne violated the anti-fraud and registration provisions of the federal securities laws, the Court noted Payne was precluded from contesting his liability for violations of Section 17(a) of the Securities Act and Sections 10(b), 15(a)(1) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder, based on his prior conviction for the same conduct. The Court also found that the evidence was undisputed that Payne violated Section 5 of the Securities Act.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3255 / July 29, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14493

In the Matter of **KENNETH W. BURNT,** **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 Kenneth W. Burnt ("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 Paragraph 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.

III.

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

1. Burnt, age 69, is a resident of Buford, Georgia. From at least September 2009 through December 2010, Burnt was associated with unregistered investment advisers Perimeter Wealth Financial Services, Inc. ("Perimeter Wealth") and KSB Financial, Inc. ("KSB"). Burnt is the CEO and CFO of Perimeter Wealth and the CFO of KSB. Burnt has been the sole advisory employee of both Perimeter Wealth and KSB.

2. On July 19, 2011, an Order Granting Permanent Injunctions and Ordering Other Ancillary Relief was entered by consent against Burnt, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), 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. Kenneth W. Burnt, et al., Civil Action Number 1:10-CV-04121-AT, in the United States District Court for the Northern District of Georgia.

3. The Commission's complaint in the above-referenced civil action alleged that from at least September 2009 through December 2010, Burnt, through Perimeter Wealth and KSB, raised approximately $4.5 million from more than 20 investors through the unregistered offering of securities in interests in a covered-call equities trading program. Investors who participated in the covered-call equities trading program entered into written agreements with Perimeter Wealth and KSB, executed by Burnt. Pursuant to these written agreements, Burnt, through Perimeter Wealth and KSB, represented that 100% of an investor's funds would be placed into a securities account "to be used to purchase high quality undervalued and income equities" that would "generate revenues from the trading of covered-calls." Burnt, through Perimeter Wealth and KSB, guaranteed individual investors specified returns that varied between 8% and 12% per year regardless of actual trading performance and further guaranteed all investors against any loss to their investment principal. Burnt, through Perimeter Wealth and KSB, was to be compensated pursuant to these written agreements with investors based upon investment performance in an amount equal to the investor returns generated above the minimum guaranteed annual returns. Burnt, through Perimeter Wealth and KSB, further represented within the written agreements that "the client is paid first." Despite the representations within the written agreements, Burnt withdrew investor funds for personal use prior to their earning the minimum guaranteed returns.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Burnt be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization.

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

Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3254 / July 29, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14492

In the Matter of OTTO SAM FOLIN, 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 Otto Sam Folin ("Folin" 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. Folin, age 62, is a resident of Philadelphia, Pennsylvania. Folin is the managing director, Chief Compliance Officer and 33% shareholder of Benchmark Asset Managers LLC ("Benchmark"), a registered investment adviser. Folin is the president, chief executive officer and majority owner of Harvest Managers LLC ("Harvest"), the parent company of Benchmark. From 2002 through March 2011, Benchmark and Folin provided investment advice to clients for compensation. In addition, Benchmark and Folin have raised money from investors and advisory clients by offering and selling a variety of securities. From 2004 through March 2011, Benchmark and Folin also managed and advised a group of hedge funds, known as the Safe Haven Investment Portfolios LLC ("Safe Haven Portfolios"). Almost all of the investors in the Safe Haven Portfolios were also advisory clients of Benchmark.

2. On July 21, 2011, a final judgment was entered by consent against Folin permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, 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. Otto Sam Folin, et al., Civil Action Number 11-cv-4447, in the United States District Court for the Eastern District of Pennsylvania. Folin was also ordered to pay disgorgement, jointly and severally with Benchmark and Harvest, in the amount of $8,706,620, plus prejudgment interest thereon in the amount of $1,454,177, and a civil penalty of $150,000.

3. The Commission's complaint alleged, among other things, that Folin, Benchmark and Harvest made material misrepresentations and omissions in connection with the offer, purchase and sale of various securities in Benchmark and Harvest to advisory clients, noteholders and the Safe Haven Portfolios. Specifically, the Complaint alleges that Benchmark and Folin made misrepresentations and omissions regarding Safe Haven Portfolios' loans to Harvest and Benchmark and certain development costs the Safe Haven Portfolios paid to Harvest and Benchmark. The Complaint further alleges Benchmark and Folin improperly valued the Safe Haven Portfolios loans to Harvest and Benchmark at cost, rather than at fair value, as required by relevant offering documents. As a result, the Complaint alleges, Benchmark and Folin provided investors with misleading account statements that reflected the loans at inflated values. The Complaint also alleged that Folin and Benchmark did not disclose Benchmark's precarious financial condition.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Folin be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, transfer agent, municipal advisor, or nationally recognized statistical ratings organization.

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