SECURITIES AND EXCHANGE COMMISSION

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Kathleen L. Casey served as SEC Commissioner
July 17, 2006 until August 5, 2011

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

(21 Documents)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65248 / September 2, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14525

In the Matter of **EXCELLENCY INVESTMENT REALTY TRUST, INC.,** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Excellency Investment Realty Trust, Inc. ("Excellency" 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, Respondent consents to the entry of this Order Instituting Proceedings Pursuant to Section 12(j) of the Securities Exchange Act of 1934, Making Findings, and Revoking Registration of Securities ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

1. Excellency, a Maryland corporation based in Hartford, Connecticut, is engaged in the business of acquiring, developing, and operating rental apartment properties. The common stock of Excellency is registered under Section 12(g) of the Exchange Act. It is currently quoted on OTC Link, operated by OTC Markets Group, Inc.

2. Excellency has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission in that it has not filed an Annual Report on Form 10-K since the fiscal year ending December 31, 2009 or periodic or quarterly reports on Form 10-Q for any fiscal period since the fiscal quarter ending June 30, 2010.

IV.

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

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

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

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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.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 65261 / September 2, 2011

Admin. Proc. File No. 3-4393

In the Matter of MARK S. PARNASS c/o David R. Chase, P.A. 1700 East Las Olas Boulevard, Suite 305 Fort Lauderdale, Florida 33301	ORDER DENYING IN PART PETITION TO VACATE ADMINISTRATIVE BAR ORDER

I.

Mark S. Parnass seeks to vacate a Commission bar order entered in 1975 with his consent (the "1975 Order"). The Division of Enforcement opposes the grant of relief. For the reasons set forth below, we have determined to deny Parnass' petition for complete relief from the 1975 Order; however, we vacate that portion of the 1975 Order prohibiting Parnass from associating with an investment adviser or investment company.

II.

In the 1975 Order, the Commission found that Parnass, who was secretary and a director of Bovers Parnass & Turel, Inc., a former registered broker-dealer, aided and abetted the firm's net capital violations.[1] In that order, the Commission also found that Parnass had been enjoined in a related civil action from violating net capital provisions and that a trustee had been appointed for the firm under the Securities Investor Protection Act of 1970.[2] The Commission barred Parnass from association with any broker, dealer, investment adviser, or investment company, with the right to reapply to become associated with a broker-dealer in a non-supervisory and

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1 *Mark Parnass*, Findings and Order Imposing Remedial Sanctions, Securities Exchange Act Rel. No. 11218 (Jan. 31, 1975), 6 SEC Docket 212.

2 *Id.* at 213; *see Bovers, Parnass & Turel, Inc.*, Exchange Act Rel. No. 10873 (June 25, 1974), 4 SEC Docket 500, 501.

non-proprietary capacity after eighteen months and in a supervisory and proprietary capacity after three and one-half years. Since 1980, Parnass has been permitted to associate as a registered representative in a supervised capacity with a number of broker-dealer firms.

In 1986, the Commission issued an order instituting and settling administrative proceedings, which found that Parnass violated the security registration provisions of the Securities Act of 1933 in connection with market making activity, while he was employed as a registered representative for M.H. Meyerson & Co., a registered broker-dealer.[3] The Commission suspended Parnass for sixty days from association with any broker, dealer, investment adviser, investment company, municipal securities broker, or municipal securities dealer.

In 2001, Parnass sought to associate as a general securities principal with GBI Capital Partners, Inc. NASD denied Parnass' request because, as it stated in its decision, Parnass committed an additional violation of the securities laws in 1986 after being barred by the 1975 Order and because GBI Capital Partners had engaged in "many regulatory violations," which indicated that the firm did not have the "level of regulatory compliance" required of a firm that seeks to employ a statutorily disqualified individual as a principal.[4]

In 2004, Parnass petitioned the Commission to vacate the 1975 Order, arguing that twenty-nine years had passed since the bar was issued, that his net capital violations were not serious and would not likely have warranted a bar in 2004, that he had been continuously employed in the securities industry for twenty-four years, and that the bar order subjected him to unanticipated consequences, namely, the onerous application procedures and annual fees imposed on statutorily disqualified individuals and the members with which they seek to associate. The Commission denied Parnass' 2004 petition, concluding that "there are no

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3 *Mark Parnass*, Order Instituting Proceedings Pursuant to Sections 15(b)(6) and 19(h) of the Securities Exchange Act of 1934 and Findings and Order of the Commission, Exchange Act Rel. No. 23250 (May 19, 1986), 35 SEC Docket 1227. Specifically, Parnass was found to have solicited purchasers for approximately one million shares of restricted stock before the owners of those restricted shares actually sold them; once the shares were sold, Parnass used them to cover his short position in the stock. Parnass, in effect, acted as an underwriter of the shares, precluding him from invoking the "safe harbor" of Securities Act Rule 144, 17 C.F.R. § 230.144, or any other provision, to exempt the transactions from the registration requirements of the Act.

4 In reaching its decision, NASD also considered a Letter of Caution issued to Parnass in 2000. The letter was issued in response to visits that Parnass made to a GBI Capital office before receiving NASD's permission to associate with the firm. Noting that Parnass admitted that he "had exercised bad judgment during this episode," NASD stated in its 2001 decision that it was "troubled" by Parnass' conduct.

compelling circumstances here that would warrant vacating the 1975 bar order."[5] In so finding, the Commission noted, among other things, that the "mere passage of time since the issuance of the bar order . . . does not justify relief" and that Parnass had been suspended in 1986 for violating the Securities Act's registration provisions.[6] The Commission concluded that the public interest would not be served if the safeguards provided by the 1975 Order were removed.

Parnass has again requested that the Commission vacate the 1975 Order, raising many of the same arguments as in his 2004 petition and stressing that thirty-five years have now passed since Parnass was first barred, and that twenty-five years have now passed since Parnass was last sanctioned by the Commission.

III.

We have stated that, in reviewing requests to lift or modify administrative bar orders, we will determine whether, "under all the facts and circumstances presented, it is consistent with the public interest and investor protection to permit the petitioner to function in the industry without the safeguards provided by the bar."[7] However, our long-standing approach to Commission administrative bars has been that they will "remain in place in the usual case and be removed only in compelling circumstances," due in significant part to our interest in preserving the finality of Commission orders.[8] This interest is particularly relevant to those orders entered by consent.

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5 *Mark S. Parnass*, Order Denying Petition to Vacate Administrative Bar Order, Exchange Act Rel. No. 50730 (Nov. 23, 2004), 84 SEC Docket 727, 729.

6 The Commission also noted that, "[i]n 2001, NASD considered this intervening misconduct and his then-current employer's disciplinary history in refusing to allow Parnass to associate in a principal capacity." *Id.*

7 *Ciro Cozzolino*, 57 S.E.C. 175, 181 (2003); *Edward I. Frankel*, 57 S.E.C. 186, 193 (2003); *Stephen S. Wien*, 57 S.E.C. 162, 170 (2003). Among the "facts and circumstances" we have considered in such cases are: the nature of the misconduct at issue in the underlying matter; the time that has passed since issuance of the administrative bar; the compliance record of the petitioner since issuance of the administrative bar; the age and securities industry experience of the petitioner, and the extent to which we have granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; and the position and persuasiveness of the Division of Enforcement's response to the petition for relief. *Jesse M. Townsley, Jr.*, 58 S.E.C. 743, 746 (2005).

8 *Cozzolino*, 57 S.E.C. at 182; *Frankel*, 57 S.E.C. at 194; *Wien*, 57 S.E.C. at 171; *see also ICC v. City of Jersey City*, 322 U.S. 503, 514 (1944) ("If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that

(continued...)

As we have stated, "by settling with the Commission, violators receive significant benefits and the Commission, in turn, advances investors' interests through an order that permits continuing control over respondents."[9] A cautious approach to vacating bar orders therefore protects the integrity of the settlement process and "ensures that the Commission, in furtherance of the public interest and investor protection, retains its continuing control over such barred individuals' activities."[10]

Having considered all the facts and circumstances bearing on Parnass' petition, we have determined to deny his request because he has not demonstrated "compelling circumstances" sufficient to justify vacating the 1975 Order and eliminating all the important protections it affords. Parnass notes that thirty-five years have now passed since the original bar was issued and argues that the net capital violations that gave rise to the 1975 bar were not serious and probably would have resulted in a lesser sanction under current standards. He argues that he has committed only one intervening regulatory violation, which was "technical in nature" and did not involve fraud or scienter; Parnass emphasizes that twenty-five years have passed since he was sanctioned for this last violation without further incident.

We do not consider Parnass' violations to have lessened in degree or gravity simply because time has passed; we have opined frequently on the central importance of net capital requirements to investor protection,[11] and in Parnass' case, the original violation of the net capital rule resulted in the appointment of a trustee to liquidate the firm.[12] Also, we have long regarded violations of the registration provisions to be among the most serious, having noted that Section 5 is the "keystone" of the Securities Act and "serves to protect the public in the offer and

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8 (...continued)
the administrative process could ever be consummated in an order that would not be subject to reopening.").

9 *Cozzolino*, 57 S.E.C. at 182-83 n.20; *Frankel*, 57 S.E.C. at 194-95, n.20; *Wien*, 57 S.E.C. at 171, n.19.

10 *Cozzolino*, 57 S.E.C. at 182; *Frankel*, 57 S.E.C. at 194; *Wien*, 57 S.E.C. at 171.

11 *See, e.g., Joseph Ricupero*, Exchange Act Rel. No. 62891 (Sept. 10, 2010), 99 SEC Docket 32270, 32277-78 & nn.19-21 ("The net capital rule serves as 'the principal regulatory tool by which the Commission and [the self-regulatory organizations] monitor the financial health of brokerage firms and protect customers from the risks involved in leaving their cash and securities with broker-dealers.'" (quoting *CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13815 & n.41)).

12 Parnass notes in passing in his Reply Brief that the liquidation was "a strategic liquidation based upon the broker-dealer having sufficient assets from which to return customer funds." The purport of this comment is unclear.

sale of new securities issues."[13] Moreover, we have repeatedly held that the mere passage of time since the issuance of the bar order – in this case, thirty-five years – does not weigh significantly in favor of relief.[14] That is especially true where, as here, the respondent has not passed that time with an unblemished disciplinary record.[15]

Parnass cites two orders, *Mark E. Ross* and *John W. Bendall, Jr.*,[16] in which the Commission vacated bar orders after noting that twenty-five and twenty-eight years, respectively, had passed. However, the passage of time in those cases was not the sole factor upon which our decisions were based. Significantly, unlike Parnass, respondents Ross and Bendall had not committed any further violations subsequent to those that were the bases of their bar orders, and both respondents were considerably younger when their sanctions were imposed: Ross was 19 and Bendall was 24. Parnass was 32 when his bar order was entered and 43 when he settled his second Commission proceeding.

Parnass' other arguments also fail to provide the "compelling circumstances" necessary to support vacating his bar. Parnass argues, for example, that he is subject to verifiable and unanticipated consequences of the bar because of the burdensome application procedures required to change firms or to modify restrictions on his activities, and because of NASD's $1,500 annual fee on member firms employing statutorily disqualified individuals. This argument is unavailing, as we have previously considered and rejected claims, like the one Parnass makes here, that the re-entry procedure and NASD's fee and audit processes constitute unanticipated harms that would justify setting aside a bar order.[17]

Parnass also argues that he has not been involved with creating, producing, maintaining or retaining the books or records of any of his employers and has no intention of doing so, thereby making it unlikely that he will ever be in a position to engage again in a net capital rule violation such as the one for which he was sanctioned in 1975. However, even if we accept Parnass' representation, the function of a bar order is not limited to merely preventing future identical violations, but is more broadly designed to achieve the goals of deterrence, both specific

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13 *Alvin W. Gebhart, Jr.*, 58 S.E.C. 1133, 1177 & n.108 (2006) (citing *First Heritage Inv. Co.*, 51 S.E.C. 953, 959 (1994)), *affirmed in part, reversed in part, and remanded (all on other grounds)*, 255 Fed. Appx. 254 (9th Cir. 2007) (unpublished), *appeal after remand at, petition denied*, 602 F.3d 1125 (9th Cir. 2010).

14 *See, e.g.*, *Cozzolino*, 57 S.E.C. at 183.

15 *See Frankel*, 57 S.E.C. at 195-96 (denying Frankel's petition to vacate 1972 bar order based, in part, on intervening Florida sanctions against him).

16 *Mark E. Ross*, 54 S.E.C. 784 (2000); *John W. Bendall, Jr.*, 52 S.E.C. 1226 (1997).

17 *See Frankel*, 57 S.E.C. at 196-97; *Cozzolino*, 57 S.E.C. at 184.

and general, to address the risks of allowing a respondent to remain in the industry, to serve as a "legitimate prophylactic remedy consistent with [our] statutory obligations," and, above all, to "protect[] investors and the integrity of the markets."[18]

Parnass suggests in his petition that, in denying his request to vacate the bar against him in its 2004 order, the Commission should not have "attached importance" to the NASD's denial of GBI Capital's application to employ Parnass as a principal in 2001 and to the Letter of Caution NASD issued to Parnass in 2000.[19] As an initial matter, we note that the Commission's 2004 order took note of NASD's Letter of Caution as a factual matter, but based none of its analysis on the letter.[20] Moreover, although we recognize that NASD's denial of GBI Capital's application is not evidence of Parnass' compliance or non-compliance with the securities laws since his bar order was imposed, it does provide some additional support for our conclusion that the bar order should remain in place. In denying GBI Capital's request, NASD made appropriate use of the review process for member firms seeking to employ statutorily disqualified individuals and denied the request based on two sound reasons: (1) Parnass' disciplinary history and (2) GBI Capital's apparent inability, because of its own significant disciplinary history, to provide Parnass with the level of supervision necessary under the circumstances. This relatively recent exercise of control over Parnass' participation in the industry afforded by the bar illustrates its continuing value to the public interest and to the protection of investors.

We find that Parnass has not presented "compelling circumstances" that demonstrate that the public interest and investor protection will be served if Parnass is permitted to function in the securities industry without the safeguards provided by the 1975 Order. We have therefore concluded that it is not appropriate to grant the petition and decline to vacate the bar against Parnass from association with any broker or dealer. We have determined, however, that it is appropriate to modify the bar against Parnass insofar as it prohibits him from associating with an investment adviser or investment company.[21]

Accordingly, IT IS ORDERED that the petition of Mark S. Parnass to vacate the bar order entered against him on January 31, 1975, as it applies to the bar from association with any broker or dealer be, and it hereby is, DENIED; and it is further

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18 *Don Warner Reinhard*, Exchange Act Rel. No. 63720 (Jan. 14, 2011), 100 SEC Docket 36940, 36952 & nn.36-38.

19 *See supra* note 4 and accompanying text.

20 *See Parnass*, 84 SEC Docket at 728-30.

21 *See, e.g., Salim B. Lewis*, 58 S.E.C 491, 506 (2005).

ORDERED that the January 31, 1975 order entered against Mark S. Parnass, to the extent that it bars him from association with any investment adviser or investment company, be, and it hereby is, VACATED.

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. 65265 / September 6, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14530

In the Matter of **RICHARD A. GEIGER,** **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 Richard A. Geiger ("Respondent" or "Geiger").

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. Geiger is a former trader at Sierra Brokerage Services, Inc. ("Sierra"), a broker-dealer registered with the Commission during the relevant time period. During the relevant time period, Geiger was a registered representative associated with Sierra. Geiger, 56 years old, is a resident of Morton, Illinois.

2. On August 26, 2011, a final judgment was entered by consent against Geiger, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and from aiding and abetting violations of Section 15(c)(1) of the Exchange Act, in the civil action entitled Securities and Exchange Commission v. Sierra Brokerage Services, Inc., et al., No. 2:03-CV-326, in the United States District Court for the Southern District of Ohio.

3. The Commission's complaint alleged that Geiger participated with others in a scheme to manipulate the price of BluePoint Linux Software Corporation ("BluePoint") shares. The Commission further alleged that Geiger worked in concert with Sierra and others to create artificial trading activity and to manipulate the share price of BluePoint from $6 to a high price of $21 on the first day that BluePoint shares were traded. The Commission further alleged that Geiger aided and abetted Sierra's price leadership and domination of other market makers by leading the bid and raising the bid throughout the first day of trading even though it had no legitimate reason to do so.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Geiger 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.

Respondent 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
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. 65276 / September 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14535

In the Matter of **Astralis Ltd.,** **Cavit Sciences, Inc.,** **Crystal International Travel Group, Inc., and** **Tasker Products 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 Astralis Ltd., Cavit Sciences, Inc., Crystal International Travel Group, Inc., and Tasker Products Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Astralis Ltd. ("ASTR") [1] (CIK No. 1099066) is a void Delaware corporation located in Fairfield, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ASTR 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 $336,489 for the prior nine months. As of September 2, 2011, the common stock of ASTR 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. Cavit Sciences, Inc. ("CVIT") (CIK No. 1368502) is a dissolved Florida corporation located in Patterson, New Jersey with a class of securities registered with the

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

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Commission pursuant to Exchange Act Section 12(g). CVIT 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 $618,189 for the prior nine months. As of September 2, 2011, the common stock of CVIT 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. Crystal International Travel Group, Inc. ("CINT") (CIK No. 1069322) is a void Delaware corporation located in Morristown, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CINT is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended July 31, 2007. As of September 2, 2011, the common stock of CINT 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. Tasker Products Corp. ("TKER") (CIK No. 1084557) is a void Delaware corporation located in Fairlawn, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TKER 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. On May 28, 2009, TKER was the subject of an involuntary Chapter 7 petition in the U.S. Bankruptcy Court for the Southern District of New York, which was still pending as of September 2, 2011. As of September 2, 2011, the common stock of TKER was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. 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.

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

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 8, 2011

In the Matter of **Dialpoint Communications Corp.,** **Pacel Corp.,** **Quantum Group, Inc. (The), and** **Tradequest International, 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 Dialpoint Communications 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 Pacel Corp. 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 Quantum Group, Inc. (The) because it has not filed any periodic reports since the period ended July 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Tradequest International, Inc. because it has not filed any periodic reports since the period ended September 30, 2007.

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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 September 8, 2011, through 11:59 p.m. EDT on September 21, 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. 65288 / September 8, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14539

In the Matter of **Dialpoint Communications Corp.,** **Pacel Corp.,** **Quantum Group, Inc. (The), and** **Tradequest International, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Dialpoint Communications Corp., Pacel Corp., Quantum Group, Inc. (The), and Tradequest International, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Dialpoint Communications Corp. ("DLPC") [1] (CIK No. 1404403) is a revoked Nevada corporation located in Rock Hill, South Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DLPC 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 $62,690 for the prior nine months. As of September 2, 2011, the common stock of DLPC 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. Pacel Corp. ("PCLO") (CIK No. 1044490) is a revoked Nevada corporation located in Charlotte, North Carolina with a class of securities registered with

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

the Commission pursuant to Exchange Act Section 12(g). PCLO 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 $2,288,304 for the prior nine months. As of September 2, 2011, the common stock of PCLO 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. Quantum Group, Inc. (The) ("QNGP") (CIK No. 1118847) is a Nevada corporation located in Wellington, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). QNGP 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, 2009, which reported a net loss of $11,866,892 for the prior nine months. As of September 2, 2011, the common stock of QNGP 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. Tradequest International, Inc. ("TRDQ") (CIK No. 29322) is a revoked Nevada corporation located in Coral Gables, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TRDQ 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 $1,237,655 for the prior nine months. As of September 2, 2011, the common stock of TRDQ 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

5. 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.

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

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

III.

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

A. Whether the allegations contained in Section II 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

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65294 / September 8, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14540

In the Matter of

JOHN SCOTT CLARK,

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 John Scott Clark ("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. John Scott Clark ("Clark"), age 58, is a Utah resident living in Hyde Park, Utah. Clark is the founder and control person of Impact Cash, LLC and Impact Payment Systems, LLC. Clark has never been registered with the Commission or any other regulatory agency in any capacity. From at least March 2006, Clark was acting as an unregistered broker. Clark sold Impact Cash, LLC and Impact Payment Systems, LLC securities in the form of Joint Operating Agreements.

2. On June 16, 2011, a judgment was entered by consent against Clark, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. John Scott Clark, et al., Civil Action Number 1:11-CV-0046, in the United States District Court for the District of Utah.

3. The Commission's complaint alleged that from March 2006 through September 2010, Clark raised more than $47 million from at least 120 investors for the stated purposes of funding payday loans, purchasing lists of leads for payday loan customers, and paying the operating expenses of Impact Cash, LLC and Impact Payment Systems, LLC. The complaint further alleged that Clark did not deploy all of the investor capital to make payday loans as represented, but instead diverted investor funds to maintain a lavish lifestyle, including buying expensive cars, art and a home theatre system. Clark also misappropriated investor money to fund outside business ventures and used new investor funds to pay purported profits to earlier 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 Clark's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act Respondent Clark 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

SECURITIES AND EXCHANGE COMMISSION

17 CFR Ch. II

[Release Nos. 33-9260, 34-65350, IA-3280, IC-29792, File No. S7-37-11]

Regulatory Flexibility Agenda

AGENCY: Securities and Exchange Commission.

ACTION: Notice of semiannual regulatory agenda.

SUMMARY: The Securities and Exchange Commission approved the publication of an agenda of its rulemaking actions pursuant to the Regulatory Flexibility Act. The agenda, which is not a part of or attached to this document, was submitted by the Commission to the Regulatory Information Service Center for inclusion in the Unified Agenda of Federal Regulatory and Deregulatory Actions, which is scheduled for publication in its entirety on www.reginfo.gov in October 2011. The version of the Unified Agenda to be published in the Federal Register will include only those rules for which the agency has indicated that preparation of an analysis under the Regulatory Flexibility Act is required. Information in the Commission's agenda was accurate on September 16, 2011, the date on which the Commission's staff completed compilation of the data. To the extent possible, rulemaking actions by the Commission after that date will be reflected in the agenda. The Commission invites questions and public comment on the agenda and on the individual agenda entries.

DATES: Comments should be received on or before December 30, 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/other.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-37-11 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 Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-37-11. 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 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: Anne Sullivan, Office of the General Counsel, 202-551-5019.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act ("RFA"), (Pub. L. No. 96-354, 94 Stat. 1164 (September 19, 1980), requires each federal agency in April and October of each year to publish in the Federal Register an agenda identifying rules that the agency expects to consider in the next twelve months that are likely to have a significant economic impact on a substantial number of small entities (5 U.S.C. 602(a)). The RFA specifically provides that publication of the agenda does not preclude an agency from considering or acting on any matter not included in the agenda, and that an agency is not required to consider or act on any matter that is included in the agenda (5 U.S.C. 602(d)). Actions that do not have an estimated date are placed in the long term category; the Commission may nevertheless act on items in that category within the next twelve months. The agenda includes new entries, entries carried over from previous publications, and rulemaking actions that have been completed (or withdrawn) since publication of the last agenda. The Commission invites public comment on the agenda and on the individual agenda entries.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: September 16, 2011

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 9, 2011

In the Matter of **Amerex Group, Inc.,** **AmeriChip International, Inc.,** **Amish Naturals, Inc.,** **Banker's Store Inc. (The),** **Champion Parts, Inc., and** **Gray Peaks, 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 Amerex 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 AmeriChip International, Inc. because it has not filed any periodic reports since the period ended August 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Amish Naturals, Inc. because it has not filed any periodic reports since the period ended December 28, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Banker's Store Inc. (The) because it has not filed any periodic reports since the period ended February 28, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Champion Parts, Inc. because it has not filed any periodic reports since the period ended July 1, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Gray Peaks, Inc. because it has not filed any periodic reports since the period ended September 30, 2007.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed 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 September 9, 2011, through 11:59 p.m. EDT on September 22, 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. 65306 / September 9, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14543

In the Matter of **Amerex Group, Inc.,** **AmeriChip International, Inc.,** **Amish Naturals, Inc.,** **Banker's Store Inc. (The),** **Champion Parts, Inc., and** **Gray Peaks, 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 Amerex Group, Inc., AmeriChip International, Inc., Amish Naturals, Inc., Banker's Store Inc. (The), Champion Parts, Inc., and Gray Peaks, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

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1. Amerex Group, Inc. ("AEXG") [1] (CIK No. 351129) is a suspended Oklahoma corporation located in Tulsa, Oklahoma with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AEXG 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 $1,567,438 for the prior three months. As of April 19, 2011, the common shares of AEXG were

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

quoted on OTC Link, had eight market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. AmeriChip International, Inc. ("ACII") (CIK No. 1132487) is a revoked Nevada corporation located in Clinton Township, Michigan with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ACII is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended August 31, 2008, which reported a net loss of $2,775,832 for the prior nine months. As of September 2, 2011, the common stock of ACII 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. Amish Naturals, Inc. ("AMNT") (CIK No. 1179651) is a revoked Nevada corporation located in Holmesville, Ohio with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AMNT 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 28, 2008, which reported a net loss of $517,600 for the prior three months. As of September 2, 2011, the common stock of AMNT 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. Banker's Store Inc. (The) ("BSTR") (CIK No. 27850) is a New York corporation located in Bowling Green, Kentucky with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BSTR 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 February 28, 2009, which reported a net loss of $596,035 for the prior nine months. As of September 2, 2011, the common stock of BSTR 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. Champion Parts, Inc. ("CREBQ") (CIK No. 19161) is a dissolved Illinois corporation located in Hope, Arkansas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CREBQ 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 1, 2007, which reported a net loss of $852,000 for the prior six months. On October 10, 2007, CREBQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Arkansas, which was converted to a Chapter 7 proceeding on January 25, 2008, and was still pending on September 2, 2011. As of September 2, 2011, the common shares of CREBQ were quoted on OTC Link, had seven market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Gray Peaks, Inc. ("GRPK") (CIK No. 1295702) is a void Delaware corporation located in Schaumburg, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GRPK 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 $1,229,544 for the prior nine months. As of September 2, 2011, the common stock of

GRPK 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 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

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. 65309 / September 9, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-12947

In the Matter of

RITCHIE CAPITAL MANAGEMENT, LLC, RITCHIE MULTI-STRATEGY GLOBAL TRADING LTD., A.R. THANE RITCHIE AND WARREN LOUIS DEMAIO,

Respondents.

ORDER DISCHARGING PLAN ADMINISTRATOR AND TERMINATING FAIR FUND

On February 5, 2008, the Respondents consented to the entry of an Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1934, Section 21C of the Securities Exchange Act of 1934, Sections 203(e) and 203(f) of the Investment Advisers Act of 1940, and Section 9(b) and 9(f) of the Investment Company Act of 1940 ("Order"), which directed, among other things, that the Respondents pay disgorgement, civil penalties, and prejudgment interest in the amount of $40,191,968.82, and establish a Fair Fund to provide for the distribution of funds to investors harmed by the late-trading activity described in the Order. The Order directed the Respondents to "develop a Distribution Plan of the Distribution Fund in consultation with the advisers of the Affected Mutual Funds and subject to approval of the Commission." The Respondents retained Bart M. Schwartz as the Plan Administrator.

On July 30, 2008, the United States Securities and Exchange Commission ("Commission") issued a Notice of Proposed Distribution Plan and Opportunity for Comment (Exchange Act Rel. No. 58260). No comments were received by the Commission in response to the Notice. On December 11, 2008, the Commission issued an Order Approving Distribution Plan, Appointing a Plan Administrator and Waiving Bond (Exchange Act Rel. No. 59085). The Plan provided for distribution to mutual funds whose value was diluted by the late trading activities described in the Order. The dilution amount was calculated by using the "next-day NAV" analysis. The

Respondents, in connection with the staff of the Commission, identified the harmed mutual funds and calculated the distribution amounts to be paid to each.

On November 10, 2009, the Commission entered an order directing the disbursement of the Fair Fund consisting of disgorgement, prejudgment interest, civil penalties, and accrued interest, for a total of $40,554,758.04. By May 20, 2010, all $40,554,758.04 had been distributed to the harmed mutual funds.

The Plan Administrator submitted a Final Accounting pursuant to Rule 1105(f) of the Commission's Rules on Fair Fund and Disgorgement Plans, which was approved by the Commission. Pursuant to the Plan Administrator's Final Accounting, which was approved by the Commission on August 4, 2011, $15,784 in residual funds is to be transmitted to the U.S. Treasury.

Accordingly, it is ORDERED that:

A. the Fair Fund is terminated;

B. the Plan Administrator, Bart M. Schwartz, is discharged; and

C. the $15,784 remaining in the Fair Fund shall be transferred to the U.S. Treasury.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65321 / September 12, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14546

In the Matter of **International Solubles Corp., Internet Capital Ventures & Association, Inc. (n/k/a Atlantis Studios Corporation), Intratel Group, Ltd., iQrom Communications, Inc., Irutil Co. Inc., and ISNI.net, 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 International Solubles Corp., Internet Capital Ventures & Association, Inc. (n/k/a Atlantis Studios Corporation), Intratel Group, Ltd., iQrom Communications, Inc., Irutil Co. Inc., and ISNI.net, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. International Solubles Corp. (CIK No. 1126307) is a dissolved Florida corporation located in Maitland, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). International Solubles is delinquent in its periodic filings with the Commission, having not filed any periodic

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reports since it filed a Form 10-QSB for the period ended June 30, 2002, which reported a net loss of over $51,000 for the prior six months.

2. Internet Capital Ventures & Association, Inc. (n/k/a Atlantis Studios Corporation) (CIK No. 1119688) is a void Delaware corporation located in Deerfield Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Internet Capital is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2001.

3. Intratel Group, Ltd. (CIK No. 931758) is a void Delaware corporation located in Clearwater, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Intratel 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 $855,000 for the prior three months.

4. iQrom Communications, Inc. (CIK No. 1065525) is a permanently revoked Nevada corporation located in Orlando, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). iQrom is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2001, which reported a net loss of over $1.4 million for the prior three months.

5. Irutil Co. Inc. (CIK No. 1114799) is a Bahamas corporation located in Nassau, Bahamas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Irutil is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F registration statement on June 5, 2002, which reported a net loss of over $163,000 for the period ended December 31, 2000.

6. ISNI.net, Inc. (CIK No. 1098846) is a void Delaware corporation located in Punta Gorda, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ISNI.net 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, 2002, which reported a net loss of over $17,000 for the prior nine months.

B. DELINQUENT PERIODIC FILINGS

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

8. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports. Rule 13a-16 requires foreign private issuers to 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.

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

SECURITIES EXCHANGE ACT OF 1934
Release No. 65349 / September 16, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14551

In the Matter of

MATTHEW R. JENNINGS,

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 Matthew R. Jennings ("Respondent" or "Jennings").

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. Jennings was the CEO of Westmoore Management, LLC; CEO of Westmoore Capital Management, Inc.; president of Westmoore Partners, Inc.; the general partner of Westmoore Investment, L.P.; and CEO and director of Westmoore Capital, LLC. From at least April 2002 to January 21, 2009, Jennings was associated with Westmoore Securities, Inc., a broker-dealer registered with the Commission. Jennings, 41 years old, is a resident of Yorba Linda, California.

2. On August 12, 2011, a final judgment was entered by consent against Jennings, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Westmoore Management, LLC, et al., Civil Action Number SACV 10-00849 AG (MLGx), in the United States District Court for the Central District of California.

3. The Commission's complaint alleged that, in connection with the unregistered offer and sale of securities, Jennings, through several entities he controlled, misused investor funds to operate an undisclosed Ponzi-like scheme, making payments to existing investors using funds raised from new 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 Jennings's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Jennings 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.

with the right to apply for reentry after five 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

Elizabeth M. Murphy
Secretary

Commissioner Casey not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65351 / September 19, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14437

In the Matter of **JASON MUTASCIO,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") has instituted public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondent Jason Mutascio ("Mutascio" or "Respondent").

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 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 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. In 2009 Respondent was a registered representative, residing in Aventura, Florida, associated with Brewer Financial Services, LLC, a registered broker-dealer.

2. On March 4, 2010, Respondent pled guilty to one count of wire fraud before the United States District Court for the Southern District of Florida in *U.S. v. Mutascio*, Case No. 10-60025-CR-COHN. On May 13, 2010, a Judgment in the criminal case was entered against Respondent. He was sentenced to a prison term of 15 months followed by three years of supervised release and ordered to make restitution in the amount of $52,500.

3. In his guilty plea, Respondent admitted that in March, 2009, he devised a scheme to defraud one of his clients and to obtain money and property by means of false and fraudulent pretenses, representations, and promises. He also admitted that, as the stock broker for his client, Respondent had access and control over the client's brokerage account at Brewer Financial Services and, without the permission of his client, Respondent caused the wire transfer of funds in the amount of $44,000 from his client's brokerage account at Brewer Financial Services to a bank account owned and controlled by one of his family members and then to a bank account under his control.

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 Mutascio be, and hereby is:

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

B. 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

Chairman Schapiro
Commissioner Casey
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3281 / September 19, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14553

In the Matter of

STANLEY J. KOWALEWSKI,

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 Stanley J. Kowalewski ("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. Kowalewski was the CEO and Chief Investment Officer of SJK Investment Management, LLC. ("SJK"), a Delaware Limited Liability Company and an investment adviser registered with the Commission. From June 2009 through January 2011, Kowalewski exercised complete control over SJK. Kowalewski, 39 years old, is a resident of Greensboro, North Carolina.

2. On June 29, 2011, an Order Permanently Enjoining Defendant Kowalewski and Ordering Other Relief was entered by consent against Kowalewski, 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 of Section 10b-5 thereunder, 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. Stanly J. Kowalewski and SJK Investment Management, LLC., Civil Action Number 1:11-CV-0056-TCB, in the United States District Court for the Northern District of Georgia.

3. The Commission's complaint alleged that beginning in the summer of 2009 and continuing through January 6, 2011, Kowalewski and SJK marketed two "fund of funds" (collectively "the Absolute Return Funds") to various entity investors, consisting largely of pension funds, school endowments, hospitals and non-profit foundations. The Complaint further alleges that in raising investor proceeds for those funds – which ultimately totaled approximately $65 million – Defendants Kowalewski and SJK made numerous representations, including that: (a) "substantially all" of the monies invested in the Absolute Return Funds would be invested in "unaffiliated" underlying hedge funds pursuing complex investment strategies, (b) no single underlying fund would be allocated more than 15% of the Absolute Return Funds' monies, (c) SJK would be responsible for its own overhead and operating expenses, including its rent and personnel's salaries, and (d) as compensation for its services, SJK would receive no more than a 1% annual asset management fee and a 10% of profits incentive fee. The Complaint also alleges that in December 2009, Kowalewski and SJK further formed a new, undisclosed fund wholly controlled by them, the Special Opportunities Fund, caused the Absolute Return Funds to "invest" a total of $16.5 million in this new fund, and proceeded to engage in various, undisclosed self-dealing transactions, including having the Special Opportunities Fund: (a) buy Kowalewski's personal home for $2.8 million, at least $1 million more than its likely value, (b) purchase a vacation home for Kowalewski for $3.9 million, (c) pay approximately $1 million of Kowalewski and SJK's personal and business expenses, and (d) pay SJK and Kowalewski a $4 million "administration" fee. The Complaint further alleges that Kowalewski and SJK sent fraudulent monthly account statements to the investors or their representative showing substantial, positive, but illusory, investment returns generated by the "investments" in the Special Opportunities Fund.

IV.

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

Accordingly, it is hereby ORDERED Pursuant to Section 203(f) of the Advisers Act that Respondent Kowalewski 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

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65359 / September 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14555

In the Matter of SGI International, Shared Imaging Partners, LP, Shiega Resources Corp., Sibun River Group, Inc., Simon Transportation Services, Inc., Sirius Software, Inc., SLM Entertainment, Ltd., and Snake River Properties, 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 SGI International, Shared Imaging Partners, LP, Shiega Resources Corp., Sibun River Group, Inc., Simon Transportation Services, Inc., Sirius Software, Inc., SLM Entertainment, Ltd., and Snake River Properties, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. SGI International (CIK No. 737955) is an expired Utah corporation located in La Jolla, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SGI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001, which reported a net loss of over $5 million for the

prior nine months. On January 7, 2003, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Southern District of California, and the case was terminated on February 18, 2009. As of September 13, 2011, the company's stock (symbol "SGII") was traded on the over-the-counter markets.

2. Shared Imaging Partners, LP (CIK No. 812381) is a cancelled Delaware limited partnership located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Shared Imaging 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, 1993.

3. Shiega Resources Corp. (CIK No. 1053143) 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). Shiega Resources is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F registration statement on January 15, 1998, which reported a net loss of $765,322 (Canadian) for the year ended May 31, 1997.

4. Sibun River Group, Inc. (CIK No. 1084032) is a permanently revoked Nevada corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sibun River is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended January 31, 2001, which reported a net loss of $1,500 for the prior nine months.

5. Simon Transportation Services, Inc. (CIK No. 1000577) is an expired Utah corporation located in West Valley City, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Simon Transportation is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2002, which reported a net loss of over $55 million for the prior three months. On February 25, 2003, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Utah, and the case was pending as of September 13, 2011.

6. Sirius Software, Inc. (CIK No. 1088299) is a permanently revoked Nevada corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sirius is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on April 12, 2000, which reported a net loss of $36,008 from the company's March 26, 1999 inception to December 31, 1999.

7. SLM Entertainment, Ltd. (CIK No. 354630) is a suspended California corporation located in Los Angeles, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SLM 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, 1993.

8. Snake River Properties, Inc. (CIK No. 1119352) is a dissolved Colorado corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Snake River is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001, which reported a net loss of $1,298 for the prior five 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. Rule 13a-16 requires foreign private issuers to 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.

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65363 / September 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14556

In the Matter of Sharon Energy, Ltd., Sheldahl, Inc., and Sonoma International, Inc., Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Sharon Energy, Ltd., Sheldahl, Inc., and Sonoma International, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Sharon Energy, Ltd. (CIK No. 844680) is a British Columbia corporation located in Englewood, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sharon Energy is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 1998, which reported a net loss of $209,993 for the prior three months.

2. Sheldahl, Inc. (CIK No. 89615) is an inactive Minnesota corporation located in Northfield, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sheldahl 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 28, 2002, which reported a net loss of $8,274 for the prior six months. On April 30, 2002, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Minnesota, and the case was terminated on December 19, 2008. As of September 13, 2011, the company's stock (symbol "SHELQ") was traded on the over-the-counter markets.

3. Sonoma International, Inc. (CIK No. 91771) is a Nevada corporation located in Lexington, Kentucky with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sonoma 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.

B. DELINQUENT PERIODIC FILINGS

4. 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.

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

Kevin M. O'Neill

By: Kevin M. O'Neill
Deputy Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3287 / September 23, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14561

In the Matter of JAMES M. PEISTER, 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 James Peister ("Peister" 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. At all relevant times, Peister was the CEO and president of Northstar International Group, Inc. ("Northstar"), an unregistered investment adviser, which was the general partner of a hedge fund, North American Globex Fund L.P. ("Globex Fund"). In that capacity, Peister controlled all of the operations and activities of Northstar and the Globex Fund. He resides in Saint James, New York.

2. On September 15, 2011, a judgment was entered by consent against Peister, permanently enjoining him from future violations of Sections 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. James M. Peister, et al., Civil Action Number 2:11-cv-03386-JFB-AKT, in the United States District Court for the Eastern District of New York.

3. The Commission's complaint alleged that, from 2003 through 2009, Peister and Northstar intentionally overstated the assets of Globex Fund, and in so doing they: (1) provided investors and prospective investors with materially false and misleading sales materials claiming an improbable track record of consistent positive monthly returns; (2) issued materially false and misleading account statements to the Globex Fund investors; and (3) issued materially false and misleading financial statements. Peister and Northstar engaged in this conduct at a time when the Globex Fund's actual assets made it impossible to repay all investors either their principal or their share of the purported gain. Furthermore, in order to perpetuate the fraudulent scheme Peister and Northstar continued to solicit new 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 Peister's Offer.

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

> barred from association with any broker, dealer, investment adviser, 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

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65413 / September 27, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14569

In the Matter of North Shore Capital I, Inc., North Shore Capital II, Inc., Northern Financial Corp. (f/k/a American Gem Corp.), Northland Cable Properties Five Limited Partnership, and Northland Cable Properties Four Limited Partnership, 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 North Shore Capital I, Inc., North Shore Capital II, Inc., Northern Financial Corp. (f/k/a American Gem Corp.), Northland Cable Properties Five Limited Partnership, and Northland Cable Properties Four Limited Partnership.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. North Shore Capital I, Inc. (CIK No. 1102006) is a dissolved Colorado corporation located in Springfield, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). North Shore Capital I is delinquent in its periodic filings with the Commission, having not filed any periodic

reports since it filed a Form 10-QSB for the period ended September 30, 2002, which reported a net loss of $100 for the prior three months.

2. North Shore Capital II, Inc. (CIK No. 1111400) is a delinquent Colorado corporation located in Sheboygan, Wisconsin with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). North Shore Capital II is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 2004, which reported a net loss of over $1,300 for the prior twelve months.

3. Northern Financial Corp. (f/k/a American Gem Corp.) (CIK No. 949055) is an Ontario corporation located in Helena, Montana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Northern Financial is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F registration statement on December 5, 1996, which reported a net loss of over $2.4 million for the six-month period ended September 30, 1996. As of September 23, 2011, the company's stock (symbol "NFCPF") was traded on the over-the-counter markets.

4. Northland Cable Properties Five Limited Partnership (CIK No. 776730) is an inactive Washington limited partnership located in Seattle, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Northland Cable Properties Five is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1998.

5. Northland Cable Properties Four Limited Partnership (CIK No. 760729) is an inactive Washington limited partnership located in Seattle, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Northland Cable Properties Four 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, 1996, which reported a net loss of over $685,000 for the prior twelve months.

B. DELINQUENT PERIODIC FILINGS

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

7. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports. Rule 13a-16

requires foreign private issuers to 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.

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

III.

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

A. Whether the allegations contained in Section II 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

INVESTMENT ADVISERS ACT OF 1940
Release No. 3293 / September 28, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14571

In the Matter of **DARYL DWORKIN,** **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 Daryl Dworkin ("Dworkin" 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. Dworkin, age 42, resides in Syosset, New York. From September 2002 through March 2003 and from April 2004 through April 2008, Dworkin was an analyst at The NIR Group, LLC ("NIR"), an unregistered investment adviser. NIR was briefly registered with the Commission for several months in 2006 but chose to withdraw the firm's registration.

2. On July 7, 2010, Dworkin pled guilty to one count of conspiracy to commit securities fraud in violation of Title 15 United States Code, Section 78; one count of Securities Fraud in violation of Title 17 United States Code, Section 240.10b-5; and one count of conspiracy to Use Interstate Facilities with Intent to Promote Unlawful Activity in violation of Title 18, Section 1952 before the United States District Court for the Eastern District of New York, in United States v. Daryl Dworkin, Crim. Information No. 10-CR-515.

3. The counts of the criminal information to which Dworkin pled guilty alleged, inter alia, that in or about and between 2007 and 2009, Dworkin, together with others, knowingly and willfully made materially false statements to one of NIR's investors and between 2006 and 2008 Dworkin accepted kickbacks from two PIPE deal finders.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Dworkin 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

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65460 / September 30, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-11935

In the Matter of

Smith Barney Fund Management LLC and Citigroup Global Markets Inc.,

Respondents.

ORDER MODIFYING THE DISTRIBUTION PLAN

On January 7, 2010, the Commission published a notice of the Plan of Distribution ("Plan") proposed by the Division of Enforcement in connection with this proceeding (Exchange Act Release No. 61312). On February 25, 2010, the Commission extended the comment period by 30 days (Exchange Act Release No. 61587). The Commission received no comments and on April 15, 2010, the Plan was approved (Exchange Act Release No. 61917). On May 12, 2010, the Commission issued an Order Directing Disbursement of Fair Fund to disburse $110,782,362.95 from the Citigroup Distribution Fund (Exchange Act Release No. 62088.)

The Plan provided for the distribution of disgorgement-related portions of the Fair Fund to funds from the Smith Barney Family of Funds (the "Funds") that engaged a Citigroup affiliate, Citicorp Trust Bank fsb or a predecessor entity (collectively, "CTB"), as their transfer agent and paid transfer agent fees to CTB between October 1, 1999, and November 30, 2004, or to successors to such Funds, in proportion to the total transfer agent fees paid to CTB by each Fund or class of a Fund (subject to certain adjustments). Further, the Respondents were to have advanced estimated distribution amounts to Funds that were liquidated after the initial submission of the Plan but before the distribution. On August 1, 2006, Smith Barney Fund Management LLC ("SBFM") was replaced as investment manager or investment adviser with respect to the Funds for which it served in those capacities by Legg Mason Partners Fund Advisor, LLC ("Legg Mason"), a newly formed entity. SBFM continued to serve as administrator to three Funds until October 19, 2006, whereupon it was replaced by Legg Mason as investment manager of those Funds.

Under the Plan, the Respondents were to be reimbursed the amounts advanced to those liquidated Funds, plus interest. After the Commission issued the Order to Disburse, the staff learned that three liquidated Funds had not been advanced the estimated distribution amounts. Specifically, three subsequently liquidated funds, the Legg Mason Partners Capital Preservation II Fund ("Capital Preservation II"), the Legg Mason Partners Variable Government Portfolio ("Variable Government"), and the Legg Mason Partners Variable Equity Index Portfolio

II Fund ("Capital Preservation II"), the Legg Mason Partners Variable Government Portfolio ("Variable Government"), and the Legg Mason Partners Variable Equity Index Portfolio ("Variable Equity Index"), should have received advance payments as described in paragraph 15 of the Plan, but did not.

As a result, Legg Mason proposes to disburse $600,747.86, which should have been paid to the Capital Preservation II Fund prior to its liquidation, plus interest of $25,809.10 to the former shareholders of the fund to reimburse them for the fund's *pro rata* allocation of the Fair Fund. All expenses associated with this disbursement will be paid by Legg Mason. Because the Fair Fund amounts allocated to Variable Government and Variable Equity would have an immaterial impact to the per share Net Asset Value ("NAV") for those funds, and because of the inefficiencies involved in disbursing such small amounts of money to these shareholders, Legg Mason proposes that the money that should have been advanced to those two funds, plus interest, be returned to the Commission. Pursuant to the Plan, when the final accounting is approved, any remaining residual funds will be transmitted to the U.S. Treasury.

Accordingly, it is ORDERED that the Commission modify the Distribution Plan by directing (i) Legg Mason to Arrange for the disbursement of $626,556.96 from the Fair Fund to former shareholders of the Capital Preservation II Fund; and (ii) the return of the money that would have been used to reimburse Legg Mason had it properly paid the advancements to the Legg Mason Partners Variable Government Portfolio and the Legg Mason Partners Variable Equity Index Portfolio to the Commission for transmittal to the U.S. Treasury upon termination of the Fair Fund.

By the Commission.

Elizabeth M. Murphy
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for **September 2011**, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

Unless otherwise noted, each of the following individual Members of the Commission voted affirmatively upon each action of the Commission shown in the file:

MARY L. SCHAPIRO, CHAIRMAN

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

(49 Documents)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65243 / September 1, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-11317

In the Matter of **Putnam Investment Management, LLC,** **Respondent.**	**ORDER DIRECTING DISBURSEMENT OF FAIR FUND RESIDUAL**

On March 30, 2007, the Commission published a notice of the Plan of Distribution ("Plan") proposed by the Division of Enforcement in connection with this proceeding. See Exchange Act Release No. 55561. The Commission received comments, and, on July 20, 2007, the Plan was approved in modified form. See Exchange Act Release No. 56115.

The Plan provides that a Fair Fund consisting of a total of $153,524,387 in disgorgement and civil penalties, plus additional accumulated interest, will be distributed by the Plan Administrator to injured investors according to the methodology set forth in the Plan. By prior orders, the Commission has directed nine disbursements of the Fair Fund to injured investors totaling $144,280,769.88.[1]

[1] By a Corrected Order Directing Disbursement of Fair Fund dated August 15, 2008, the Commission authorized the first distribution in the amount of $33,778,470.39. See Exchange Act Release No. 58369A. By an Order Directing Disbursement of Fair Fund dated December 2, 2008, the Commission authorized the second distribution in the amount of $46,515,302.38. See Exchange Act Release No. 59041. By an Order Directing Disbursement of Fair Fund dated February 25, 2009, the Commission authorized the third distribution in the amount of $28,128,811.12. See Exchange Act Release No. 59447. By an Order Directing Disbursement of Fair Fund dated May 28, 2009, the Commission authorized the fourth distribution in the amount of $4,245,929.44. See Exchange Act Release No. 59994. By an Order Directing Disbursement of Fair Fund dated July 31, 2009, the Commission authorized the fifth distribution in the amount of $19,354,093.35. See Exchange Act Release No. 60412. By an Order Directing Disbursement of Fair Fund dated December 2, 2009, the Commission authorized the sixth distribution in the amount of $4,356,590.74. See Exchange Act Release No. 61098. By an Order Directing Disbursement of Fair Fund dated February 2, 2010, the Commission authorized the seventh distribution in the amount of $4,214,238.67. See Exchange Act Release No. 61463. By an Order Directing Disbursement of Fair Fund dated November 1, 2010, the Commission authorized the eighth distribution in the amount of $2,641,841.14. See Exchange Act Release No.

The Plan further provides that any monies remaining in the Fair Fund that are not able to be distributed directly to injured investors ("Residual") shall be distributed to the Putnam mutual funds harmed by the market timing activity.

Accordingly, it is ORDERED that the Commission staff shall arrange for the transfer of $10,052,040.97 of the Fair Fund to Northern Trust Company, and, beginning within one business day after such transfer, the Plan Administrator shall distribute such amount, plus the additional $36,059,018.56 of Fair Fund monies being held at Northern Trust Company, to the Putnam mutual funds identified in the payment file that Putnam has submitted to the Commission staff, for a total Residual distribution of $46,111,059.53.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

63221. By an Order Directing Disbursement of Fair Fund dated March 4, 2011, the Commission authorized the ninth distribution in the amount of $1,045,492.65. See Exchange Act Release No. 64034.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 239, 249, 269 and 274

[Release Nos. 33-9256; 34-65244; 39-2478; IC-29780]

Amendments to Include New Applicant Types on Form ID

AGENCY: Securities and Exchange Commission.

ACTION: Final rule amendments.

SUMMARY: The Securities and Exchange Commission ("Commission") is amending Form ID to include additional applicant types in order to facilitate processing of the form. Form ID is the application for access codes to file on the Commission's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. The purpose of introducing these new applicant types is to improve the Commission's internal procedures for processing filings, including by routing Form ID filings to the appropriate internal office or division.

EFFECTIVE DATE: [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Catherine Moore, Senior Special Counsel or Andrew Bernstein, Attorney-Adviser, Office of Clearance and Settlement, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, at (202) 551-5710.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Form ID is filed by registrants, third party filers, or any of their respective agents, to whom the Commission previously has not assigned a Central Index Key ("CIK") code, to request access codes in order to file in electronic format through EDGAR. EDGAR access codes include the CIK code, the CIK Confirmation Code ("CCC"), Password ("PW"), and Password

Modification Authorization Code ("PMAC").[1]

Currently, Form ID does not differentiate applicants by specific type and simply lists as possible applicant types "filer," "filing agent," "training agent," "transfer agent," and "individual." However, the number and type of persons that use EDGAR for submitting filings has increased since Form ID was first adopted by the Commission and may increase further following the adoption of various rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[2] Accordingly, the Commission is amending Form ID to list specific persons as applicant types on the form in order to allow the form to be assigned for processing within the Commission based on the type of applicant.

The new applicant types include persons that currently file on EDGAR but who are not separately listed on Form ID, persons that currently file forms with the Commission in paper but who may be required to file on EDGAR in the future, and persons who will be required to meet certain new filing obligations under the Securities Exchange Act of 1934 ("Exchange Act"), including provisions added by the Dodd-Frank Act. The amendments to Form ID also include corresponding definitions for each new applicant type.[3] New applicants should select only one entity type when completing and submitting Form ID.[4] If an applicant qualifies as more than one of the applicant types listed on the form, it should select the applicant type related to the first

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1 See EDGAR Filing Manual (Volume I) General Information (Section 2.4, Accessing EDGAR).

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

3 The definitions included in Form ID are to facilitate the correct selection of "applicant type" by a particular filer and are not intended to amend or otherwise change any provision of the federal securities laws or the regulations promulgated thereunder.

4 For purposes of Form ID, the term "person" includes either an individual or entity. If the applicant is also an "individual" as defined in the current Form ID, then the applicant must apply as both an "individual" as well as another appropriate applicant type that properly characterizes it.

filing it plans to submit on EDGAR. The access codes the applicant retrieves after Form ID is approved may be used to submit filings on EDGAR for any entity type (other than transfer agent) provided that such filing complies with all other applicable rules and regulations.[5] Persons that have previously filed Form ID applications with the Commission are not required to re-file Form ID as a result of these amendments.

As more fully described below, the following applicant types and applicable definitions are being added to Form ID: Investment Company, Business Development Company or Insurance Company Separate Account, Institutional Investment Manager (Form 13F Filer), Non-Investment Company Applicant under the Investment Company Act of 1940, Large Trader, Clearing Agency, Municipal Advisor, Municipal Securities Dealer, Nationally Recognized Statistical Rating Organization, Security-Based Swap Data Repository, Security-Based Swap Dealer and Major Security-Based Swap Participant, and Security-Based Swap Execution Facility.

<u>Investment Company, Business Development Company or Insurance Company Separate Account, Institutional Investment Manager (Form 13F Filer), and Non-Investment Company Applicant under the Investment Company Act of 1940</u>

Currently, a person that may fall within the applicant type of "Investment Company, Business Development Company or Insurance Company Separate Account," "Institutional Investment Manager (Form 13F Filer)," or "Non-Investment Company Applicant under the Investment Company Act of 1940" may make submissions on EDGAR in electronic format without referencing the appropriate applicant type on Form ID. As such, the Commission is adding these specific applicant types to Form ID in order to facilitate processing of the form as filed by such persons. The applicant type of "Investment Company, Business Development

5 Persons that are transfer agents must apply for a separate set of access codes even if they already submit filings on EDGAR in another capacity. <u>See</u> Securities Exchange Act Release No. 54865 (December 4, 2006), 71 FR 74698 (December 12, 2006) (File No. S7-14-06).

Company or Insurance Company Separate Account" being added to Form ID includes persons that meet the definition of "investment company" in Section 3 of the Investment Company Act of 1940 ("Investment Company Act")[6] or otherwise register an offering of their securities on a registration form adopted by the Commission under the Investment Company Act, including management companies (within the meaning of Sections 4 and 5 of the Investment Company Act), face-amount certificate companies (within the meaning of Section 2(a)(15) of the Investment Company Act), unit investment trusts (within the meaning of Section 4 of the Investment Company Act), business development companies (within the meaning of Section 2(a)(48) of the Investment Company Act), and insurance company separate accounts (including any separate account which would be required to be registered under the Investment Company Act except for the exclusion provided by Section 3(c)(11) of such Act and which files a registration statement on Form N-3 or Form N-4). The applicant type of "Institutional Investment Manager (Form 13F Filer)" includes any person that is required to file a Form 13F under Section 13(f) of the Exchange Act and the rules promulgated thereunder.[7] Finally, a "Non-Investment Company Applicant under the Investment Company Act of 1940" is descriptive of the type of Form ID applicant that is submitting an application seeking an order from the Commission for an exemption from one or more provisions of the Investment Company Act and the rules promulgated thereunder.

Large Trader

The applicant type "Large Trader" is being added to Form ID in order for these new registrants to retrieve EDGAR access codes and subsequently register with the Commission as a large trader in accordance with new Rule 13h-1 under the Exchange Act, which will become

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6 See 15 U.S.C. 80a-3.

7 See 15 U.S.C. 78m(f)(6)(A).

effective as of October 3, 2011.[8] The definition of "Large Trader" that is being added to Form ID cross-references the definition that was adopted by the Commission in Rule 13h-1.

Clearing Agency

Among other things, Title VII of the Dodd-Frank Act added new provisions to the Exchange Act that require clearing agencies that clear security-based swaps to register with the Commission. It also required that the Commission adopt rules with respect to security-based swap clearing agencies.[9] The Commission previously stated that it preliminarily believes that clearing agencies should in the future file compliance reports with the Commission in a tagged data format in accordance with the EDGAR database, which would utilize the existing EDGAR framework to provide electronic filings to the Commission.[10] The definition of "Clearing Agency" being added to Form ID cross-references the definition in Section 3(a)(23) of the Exchange Act.[11]

Municipal Advisor

Section 975 of the Dodd-Frank Act amended Section 15B of the Exchange Act to make it unlawful for "a municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless the municipal advisor is registered."[12] Municipal Advisors register with the Commission on Form

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8 See Securities Exchange Act Release No. 64976 (July 27, 2011), 76 FR 46960 (Aug. 3, 2011) (File No. S7-10-10).

9 See 15 U.S.C. 78q-1(g), (i), and (j) (as amended by Section 763(b) of the Dodd-Frank Act).

10 See Securities Exchange Act Release No. 64017 (March 3, 2011), 76 FR 14472 (March 16, 2011) (File No. S7-08-11).

11 15 U.S.C. 78c(a)(23).

12 See 15 U.S.C. 78o-4(a)(1)(B) (as amended by Section 975(a)(1)(b) of the Dodd-Frank Act).

MA-T.[13] This current form is temporary, however, with an expiration date of December 31, 2011.[14] On December 20, 2010, the Commission proposed rules relating to a permanent registration regime for municipal advisors.[15] The proposed permanent registration regime would require that an application for the registration of a municipal advisor must be filed electronically with the Commission on proposed new Forms MA or MA-1, as applicable, and the Commission is considering whether such applications should be filed through EDGAR.[16] The definition of "Municipal Advisor" on Form ID cross-references the definition in Section 15B(e)(4) of the Exchange Act.[17]

Municipal Securities Dealer

A "Municipal Securities Dealer" currently registers with the Commission in paper format on Form MSD.[18] The definition of "Municipal Securities Dealer" being added to Form ID cross-references the definition in Section 3(a)(30) of the Exchange Act.[19]

Nationally Recognized Statistical Rating Organization

A Nationally Recognized Statistical Rating Organization ("NRSRO") currently registers with the Commission in paper format on Form NRSRO[20] and files annual reports required under

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13 17 CFR 249.1300T.

14 See Securities Exchange Act Release No. 62824 (September 1, 2010), 75 FR 54465 (September 8, 2010) (File No. S7-19-10).

15 See Securities Exchange Act Release No. 63576 (December 20, 2010), 76 FR 824 (January 6, 2011) (File No. S7-45-10).

16 Id. at 839.

17 See 15 U.S.C. 78o-4(a)(1)(B) (as amended by Section 975(a)(1)(b) of the Dodd-Frank Act).

18 17 CFR 249.1100.

19 15 U.S.C. 78c(a)(30).

20 17 CFR 249b.300.

Rule 17g-3 of the Exchange Act.[21] The Commission has proposed amending these rules to require an NRSRO to use EDGAR in order to submit all future information and reports.[22] The definition of a "Nationally Recognized Statistical Rating Organization" that is being added to Form ID cross-references the definition in Section 3(a)(62) of the Exchange Act.[23]

Security-Based Swap Data Repository

The Dodd-Frank Act provided the Commission with broad authority to adopt rules governing security-based swap data repositories ("SDRs") and to develop additional duties applicable to these SDRs. The Commission proposed Rule 13n-1 under the Exchange Act to establish the procedures by which SDRs could apply to the Commission for registration.[24] This proposed rule provided that an application for the registration of an SDR must be filed electronically on proposed new Form SDR with the Commission. The definition of "Security-Based Swap Data Repository" being added to Form ID cross-references the definition in Section 3(a)(75) of the Exchange Act.[25]

Security-Based Swap Dealer and Major Security-Based Swap Participant

Section 761(a) of the Dodd-Frank Act amended Section 3(a) of the Exchange Act to add definitions for, among others, the terms "security-based swap dealer" and "major security-based swap participant."[26] Section 15F of the Exchange Act, added by section 764(a) of the Dodd-Frank Act, establishes requirements for registration and comprehensive oversight of security-

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21 17 CFR 240.17g-3.

22 See Securities Exchange Act Release No. 64514 (May 18, 2011), 76 FR 33420 (June 8, 2011) (File No. S7-18-11).

23 15 U.S.C. 78c(a)(62).

24 See Securities Exchange Act Release No. 63347 (November 19, 2010), 75 FR 77306 (December 10, 2010) (File No. S7-35-10).

25 See 15 U.S.C.78c(a)(75) (as amended by Section 761 of the Dodd-Frank Act).

26 See Pub. L. 111-203, §761(a).

based swap dealers and major security-based swap participants.[27] The definition of "Major Security-Based Swap Participant" that is being added to Form ID cross-references the definition in Section 3(a)(67)(A) of the Exchange Act.[28] In addition, the definition of "Security-Based Swap Dealer" that is being added to Form ID cross-references the definition in Section 3(a)(71)(A) of the Exchange Act.[29]

Securities-Based Swap Execution Facility

Section 761(a) of the Dodd-Frank Act amended Section 3(a) of the Exchange Act to add definitions for, among others, the term "security-based swap execution facility."[30] In accordance with Section 763 of the Dodd-Frank Act, the Commission proposed Regulation SB SEF under the Exchange Act, which was designed to create a registration framework for security-based swap execution facilities ("SB SEFs").[31] Proposed rule 801(a) in Regulation SB SEF would require the registration application for SB SEFs to be filed electronically in a tagged data format with the Commission on Form SB SEF.[32] The definition of a "Securities-Based Swap Execution Facility" that is being added to Form ID cross-references the definition found in Section 3(a)(77) of the Exchange Act.[33]

The Commission believes that updating Form ID to add the above applicant types and related definitions will facilitate the processing of the form, including by routing Form ID filings to the appropriate internal office or division, and allow filers to promptly retrieve access codes

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[27] 15 U.S.C. 78o-10 (as amended by Section 764(a) of the Dodd-Frank Act).

[28] See 15 U.S.C. 78c(a)(67)(A) (as amended by Section 761 of the Dodd-Frank Act).

[29] See 15 U.S.C. 78c(a)(71)(A) (as amended by Section 761 of the Dodd-Frank Act).

[30] See Pub. L. 111-203, §761(a).

[31] See Securities Exchange Act Release No. 63827 (February 2, 2011), 76 FR 10948 (February 28, 2011) (File No. S7-06-11).

[32] Id.

[33] See 15 U.S.C. 78c(a)(77) (as amended by Section 763 of by the Dodd-Frank Act).

and file in electronic format on EDGAR.

II. PROCEDURAL AND OTHER MATTERS

The Administrative Procedure Act ("APA")[34] generally requires an agency to publish, before adopting a rule, notice of a proposed rulemaking in the Federal Register.[35] This requirement does not apply, however, to, "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[36] Further, the APA also generally requires that an agency publish a rule in the Federal Register 30 days before the rule becomes effective.[37] This requirement, however does not apply where an agency finds good cause.[38]

The Commission is amending Form ID to include new applicant types. These new applicant types are "Investment Company, Business Development Company or Insurance Company Separate Account," "Institutional Investment Manager (13F Filer)," "Non-Investment Company Applicant under the Investment Company Act of 1940," "Large Trader," "Clearing Agency," "Municipal Advisor," "Municipal Securities Dealer," "Nationally Recognized Statistical Rating Organization," "Security-Based Swap Data Repository," "Security-Based Swap Dealer and Major Security-Based Swap Participant," and "Securities-Based Swap Execution Facility." The sole purpose of including these new applicant types is to improve the Commission's internal procedures for processing filings, including routing Form ID filings to the appropriate internal office or division. Accordingly, the Commission finds that because the

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[34] 5 U.S.C. 551 et seq.

[35] See 5 U.S.C. 553(b).

[36] Id.

[37] See 5 U.S.C. 553(d).

[38] Id.

amendments relate solely to rules of agency organization, procedure or practice, publishing the changes for comment is unnecessary.[39]

The APA also generally requires publication of a rule in the Federal Register at least 30 days before its effective date unless the agency finds otherwise for good cause.[40] As noted above, the amendments to Form ID are intended solely to improve the Commission's internal procedures for processing filings. These changes will not impose a new burden on any person to file the form with the Commission as the obligation to submit a Form ID arises from the requirement to make filings with the Commission through EDGAR in accordance with other rules and regulations issued by the Commission. Similarly, the amendments do not impose any burden on persons who have previously submitted a Form ID as these persons will not be required to re-file the Form ID to account for the inclusion of specific applicant types. These changes will allow the Commission to process Form IDs more efficiently and will reduce the likelihood of unnecessary delays in processing. For these reasons, the Commission finds good cause for these procedural amendments to take effect immediately.

III. PAPERWORK REDUCTION ACT

Form ID, as in effect prior to these amendments, contains "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[41] Specifically, there is a current approved collection of information for Form ID entitled "EDGAR

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39 For similar reasons, the amendments do not require analysis under the Regulatory Flexibility Act or analysis of major status under the Small Business Regulatory Enforcement Fairness Act. See 5 U.S.C. 601(2) (for purposes of Regulatory Flexibility analyses, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking) and 5 U.S.C. 804(3)(C) (for purposes of Congressional review of agency rulemaking, the term "rule" does not include any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties).

40 See 5 U.S.C. 553(d)(3).

41 44 U.S.C. et seq.

Form ID" (Office of Management and Budget ("OMB") Control No. 3235-0328). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

We do not believe that the amendments to Form ID necessitate an increase or decrease in the current PRA burden estimates for Form ID. Specifically, respondents to Form ID previously were required to indicate whether they are submitting the form as a "filer," "filing agent," "training agent," "transfer agent," or "individual." The amendments we are adopting today simply add new applicant types to reflect persons that currently file on EDGAR but who are not separately listed on Form ID. These new applicant types include "Investment Company, Business Development Company or Insurance Company Separate Account," "Institutional Investment Manager (Form 13F Filer)," "Non-Investment Company Applicant under the Investment Company Act of 1940," "Large Trader," "Clearing Agency," "Municipal Advisor," "Municipal Securities Dealer," "Nationally Recognized Statistical Rating Organization," "Security-Based Swap Data Repository," "Security-Based Swap Dealer and Major Security-Based Swap Participant," and "Securities-Based Swap Execution Facility." Respondents will continue to be required to select an appropriate applicant type, with the sole difference being that that the list of options will increase.

The amendments to Form ID do not impose a new burden on any person to file the form with the Commission, nor do they impose any burden on persons who have previously submitted a Form ID as these persons will not be required to re-file the Form ID to account for the inclusion of specific applicant types. The sole change being effected by these amendments will be that new registrants will be asked to indicate a specific applicant type when completing the Form ID. To the extent that these new registrants will be required to register with the Commission and make filings on EDGAR in accordance with other Commission rules and regulations, the PRA burdens associated with those obligations will be accounted for in the context of those other rules and regulations.

The total estimated burden of filing a Form ID for a filer not currently subject to a requirement to file on EDGAR is 0.15 hours. For the reasons discussed above, we therefore believe that the overall information collection burden of Form ID would remain the same. As a result, we have not submitted the revisions to the collection of information to the Office of Management and Budget for review under 44 U.S.C. 3507(d) and 5 CFR 1320.11.

IV. ECONOMIC ANALYSIS

A. Consideration of Costs and Benefits

The amendments to Form ID update the form to reflect the increased use of the EDGAR database by various persons and institutions regulated by the Commission. Some of these entities currently file on EDGAR in electronic format and others may be required to file on EDGAR in the future. The amendments will facilitate the Commission's process for reviewing and processing the form and, consequently, the ability of filers to promptly retrieve the access codes needed to file on EDGAR. We do not believe these amendments will impose any significant costs on non-agency parties.

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

Section 23(a)[42] 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

[42] 15 U.S.C. 78w(a).

the purposes of the Exchange Act. Section 3(f) of the Exchange Act[43] and Section 2(c) of the Investment Company Act[44] 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 do not believe that the amendments to Form ID that reflect new entity applicant types will have any impact on competition.

V. STATUTORY AUTHORITY

We are adopting the amendments to Form ID under the authority in Section 19(a)[45] of the Securities Act, Sections 3(b),[46] 13(a),[47] 23(a),[48] and 35A[49] of the Exchange Act, Section 319[50] of the Trust Indenture Act of 1939 and Sections 30[51] and 38[52] of the Investment Company Act of 1940.

List of Subjects

17 CFR Parts 239, 249, 269 and 274

Reporting and recordkeeping requirements, Securities.

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43 15 U.S.C. 78c(f).

44 15 U.S.C. 80a-2(c).

45 15 U.S.C. 77s(a).

46 15 U.S.C. 78c(b).

47 15 U.S.C. 78m(a).

48 15 U.S.C. 78w(a).

49 15 U.S.C. 78ll.

50 15 U.S.C. 77sss.

51 15 U.S.C. 80a-29.

52 15 U.S.C. 80a-37.

TEXT OF FORM AMMENDMENTS

For the reasons set out in the preamble, the Commission amends Title 17, Chapter II, of the Code of Federal Regulations as follows.

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

1. 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, 80a–37, and Pub. L. No. 111-203, §939A, 124 Stat. 1376, (2010) unless otherwise noted.

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PART 249 - FORMS, SECURITIES EXCHANGE ACT OF 1934

2. 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.

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PART 269 – FORMS PRESCRIBED UNDER THE TRUST INDENTURE ACT OF 1939

3. The authority citation for part 269 continues to read as follows:

Authority: 15 U.S.C. 77ddd(c), 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77sss, and 78ll(d), unless otherwise noted.

PART 274 – FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

4. The authority citation for part 274 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

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5. Form ID (referenced in §§239.63, 249.446, 269.7 and 274.402 of this chapter) is revised to read as set forth in the attached Appendix A.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

September 1, 2011

Note: The following Appendix A will not appear in the Code of Federal Regulations.

APPENDIX A

U.S. Securities and Exchange Commission
Washington, DC 20549

OMB APPROVAL	
OMB Number:	3235-0328
Expires:	November 30, 2013
Estimated average burden hours per response:	0.15

FORM ID

UNIFORM APPLICATION FOR ACCESS CODES TO FILE ON EDGAR

PART I—APPLICATION FOR ACCESS CODES TO FILE ON EDGAR

Name of applicant (Applicant's name as specified in its charter, except, if individual, last name, first name, middle name, suffix [e.g., "Jr."]) ______________________________

Mailing Address or Post Office Box No. ______________________________

City ______________ State or Country ______________ Zip______________

Telephone number (include Area and, if Foreign, Country Code) ______________

Applicant is (see definitions in the General Instructions):

☐ Individual (if you check this box, you must also check another box that appropriately describes you)
☐ Clearing Agency
☐ Filer
☐ Filing Agent
☐ Institutional Investment Manager (Form 13F Filer)
☐ Investment Company, Business Development Company or Insurance Company Separate Account
☐ Large Trader
☐ Municipal Advisor
☐ Municipal Securities Dealer
☐ Nationally Recognized Statistical Rating Organization
☐ Non-Investment Company Applicant under the Investment Company Act of 1940
☐ Security-Based Swap Data Repository
☐ Security-Based Swap Dealer and Major Security-Based Swap Participant
☐ Security-Based Swap Execution Facility
☐ Training Agent
☐ Transfer Agent

PART II—FILER INFORMATION (To be completed only by filers that are not individuals)

Filer's Tax or Federal Identification Number (do not enter Social Security Number) ______________

Doing Business As ______________________________

Foreign Name (if Foreign Issuer Filer and applicable) ______________________________

Primary Business Address or Post Office Box No. (if different from mailing address)

____

City ______________ State or Country ______________ Zip______________

State of Incorporation ______________ Fiscal Year End (mm/yy) ______________

SEC 2084 (09-11)

Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a current valid OMB control number.

PART III—CONTACT INFORMATION (To be completed by all applicants)

Person to receive EDGAR Information, Inquiries and Access Codes ______________________

Telephone Number (Include Area and, if Foreign, Country Code) ______________________

Mailing Address or Post Office Box No. (if different from applicant's mailing address)

____

City ______________ State or Country ______________ Zip______________

E-Mail Address ____

PART IV—ACCOUNT INFORMATION (To be completed by filers and filing agents only)

Person to receive SEC Account Information and Billing Invoices ______________________

Telephone Number (Include Area and, if Foreign, Country Code) ______________________

Mailing Address or Post Office Box No. (if different from applicant's mailing address)

____

City ______________ State or Country ______________ Zip ______________

PART V—SIGNATURE (To be completed by all applicants)

Signature ____

Type or Print Name ____

Position or Title ____

Date______________________

Intentional misstatements or omissions of facts constitute federal criminal violations. *See* 18 U.S.C. 1001.

Section 19(a) of the Securities Act of 1933 (15 U.S.C. 77s(a)), sections 13(a) and 23(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) and 78w(a)), section 319 of the Trust Indenture Act of 1939 (15 U.S.C. 77sss), and sections 30 and 38 of the Investment Company Act of 1940 (15 U.S.C. 80a-29 and 80a-37) authorize solicitation of this information. We will use this information to assign system identification to filers, filing agents, and training agents. This will allow the Commission to identify persons sending electronic submissions and grant secure access to the EDGAR system.

FORM ID
GENERAL INSTRUCTIONS

USING AND PREPARING FORM ID

FORM ID must be filed by all applicant types listed on this Form, or their agents, to whom the Commission previously has not assigned a Central Index Key (CIK) code, to request the following access codes to permit filing on EDGAR:

- Central Index Key (CIK)—The CIK uniquely identifies each filer, filing agent, and training agent. We assign the CIK at the time you make an initial application. You may not change this code. The CIK is a public number.
- CIK Confirmation Code (CCC)—You will use the CCC in the header of your filings in conjunction with your CIK to ensure that you authorized the filing.
- Password (PW)—The PW allows you to log onto the EDGAR system, submit filings, and change your CCC.
- Password Modification Authorization Code (PMAC)—The PMAC allows you to change your password.

An applicant must file this Form in electronic format via the Commission's EDGAR Filer Management website. Please see Regulation S-T (17 CFR Part 232) and the EDGAR Filer Manual for instructions on how to file electronically, including how to use the access codes.

The applicant must complete the Form ID electronic filing by also submitting to the Commission a copy of a notarized paper "authenticating" document. The authenticating document must include the information required to be included in the Form ID filing, be manually signed by the applicant over the applicant's typed signature, and confirm the authenticity of the Form ID filing. Applicants may fulfill the authenticating document requirement by making a copy of the applicant's electronic Form ID filing, adding the necessary confirming language, signing it, and having the signature notarized.

If the applicant has prepared the authenticating document before making its electronic Form ID filing, it may submit the document as an uploaded Portable Document Format (PDF) attachment to the electronic filing. An applicant also may submit the authenticating document by faxing it to the Commission at (202) 504-2474 or (703) 914-4240 within two business days before or after its electronic Form ID filing. If submitted by fax after the electronic Form ID filing, the authenticating document must contain the accession number assigned to the electronic Form ID filing. If the fax is not received timely, the Form ID filing and application for access codes will not be processed, and the applicant will receive an e-mail message at the contact e-mail address included in the Form ID filing informing the applicant of the failure to process and providing further guidance. The message will state why the application was not processed.

For assistance with technical questions about electronic filing, call Filer Support at (202) 551-8900. For assistance with questions about the EDGAR rules, Division of Corporation Finance filers may call the Office of Information Technology at (202) 551-3600; and Division of Investment Management filers may call the IM EDGAR Inquiry Line at (202) 551-6989.

You must complete all items in any parts that apply to you. If any item in any part does not apply to you, please leave it blank.

PART I—APPLICANT INFORMATION (To be completed by all applicants)

Provide the applicant's name in English.

Please check one of the boxes to indicate whether you will be sending electronic submissions as a clearing agency, filer, filing agent, institutional investment manager, investment company, large trader, municipal advisor, municipal securities dealer, nationally recognized statistical rating organization, non-investment company applicant under the Investment Company Act of 1940, security-based swap data repository, security-based swap dealer, security-based swap execution facility, training agent, or transfer agent. Mark only one of these boxes per application. If you are an individual, however, also mark the "Individual" box.

For purposes of this Form, the term "person" includes either an individual or entity. In addition, please note that the following definitions are to facilitate the correct selection of "applicant type" and are not intended to amend or otherwise change any provision of the federal securities laws or the regulations promulgated thereunder. Finally, to the extent that a definition cross-references a particular statute, such definition shall also include any rules or regulations promulgated by the Commission further refining the statutory definition.

- "Individual"—A natural person.
- "Clearing Agency"—Any person that is a "clearing agency" as defined in Section 3(a)(23) of the Securities Exchange Act of 1934, as amended. (*See* 15 U.S.C. 78c(a)(23)).
- "Filer"—Any person on whose behalf an electronic filing is made that is not otherwise covered by another Form ID applicant type (other than "Individual", as noted in the Instructions above).
- "Filing Agent"—A financial printer, law firm, or other person, which will be using these access codes to send a filing or portion of a filing on behalf of a filer.
- "Institutional Investment Manager (Form 13F Filer)"—Any person that is required to file a Form 13F under Section 13(f) of the Securities Exchange Act of 1934, as amended. (*See* 15 U.S.C. 78m(f)(6)(A)).
- "Investment Company, Business Development Company or Insurance Company Separate Account"—Any person that meets the definition of "investment company" in Section 3 of the Investment Company Act of 1940, as amended (*See* 15 U.S.C. 80a-3), or otherwise registers an offering of its securities on a registration form adopted by the Commission under such Act, including management companies, face-amount certificate companies, unit investment trusts, business development companies, and insurance company separate accounts (including any separate account which would be required to be registered under the Investment Company Act of 1940 except for the exclusion provided by Section 3(c)(11) of such Act and which files a registration statement on Form N-3 or Form N-4).
- "Large Trader"—Any person that is a "large trader" as defined by Rule 13h-1(a)(1) under the Securities Exchange Act of 1934, as amended (*See* 17 CFR 240.13h-1(a)(1)).
- "Municipal Advisor"—Any person that is a "municipal advisor" as defined in Section 15B(e)(4) of the Securities Exchange Act of 1934, as amended. (*See* 15 U.S.C. 78o-4(e)(4)).
- "Municipal Securities Dealer"—Any person that is a "municipal securities dealer" as defined in Section 3(a)(30) of the Securities Exchange Act of 1934, as amended. (*See* 15 U.S.C. 78c(a)(30)).
- "Nationally Recognized Statistical Rating Organization"—Any person that is a "nationally recognized statistical rating organization" as defined in Section 3(a)(62) of the Securities Exchange Act of 1934, as amended. (*See* 15 U.S.C. 78c(a)(62)).
- "Non-Investment Company Applicant under the Investment Company Act of 1940"—Any person submitting an application for an order seeking an exemption under the Investment Company Act of 1940, as amended.
- "Security-Based Swap Data Repository"—Any person that is a "security-based swap data repository" as defined in Section 3(a)(75) of the Securities Exchange Act of 1934, as amended. (*See* 15 U.S.C. 78c(a)(75)).
- "Security-Based Swap Dealer and Major Security-Based Swap Participant"—Any person that is a "security-based swap dealer" or a "major security-based swap participant" as each term is defined in Sections 3(a)(71) and (67) of the Securities Exchange Act of 1934, as amended. (*See* 15 U.S.C. 78c(a)(71) and (67)).

- "Security-Based Swap Execution Facility"—Any person that is a "security-based swap execution facility" as defined in Section 3(a)(77) of the Securities Exchange Act of 1934, as amended. (*See* 15 U.S.C. 78c(a)(77)).
- "Training Agent"—Any person that will be sending only test filings in conjunction with training other persons.
- "Transfer Agent"—Any person planning to register as a Transfer Agent as defined in Section 3(a)(25) of the Securities Exchange Act of 1934, as amended, on whose behalf an electronic filing is made. (*See* 15 U.S.C. 78c(a)(25)).

PART II—FILER INFORMATION (To be completed only by filers that are not individuals)

The filer's tax or federal identification number is the number issued by the Internal Revenue Service. This section does not apply to individuals. Accordingly, do not enter a Social Security number. If an investment company filer is organized as a series company, the investment company may use the tax or federal identification number of any one of its constituent series. Issuers that have applied for but not yet received their tax or federal identification number and foreign issuers that do not have a tax or federal identification number must include all zeroes. A "foreign issuer" is an entity so defined by Securities Act of 1933 (15 U.S.C. 77a *et seq.*) Rule 405 (17 CFR 230.405) and the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) Rule 3b-4(b) (17 CFR 240.3b-4(b)). Foreign issuers should include their country of organization.

A foreign issuer filer must provide its "doing business as" name in the language of the name under which it does business and must provide its foreign language name, if any, in the space so marked.

If the filer's fiscal year does not end on the same date each year (e.g., falls on the last Saturday in December), the filer must enter the date the current fiscal year will end.

PART III—CONTACT INFORMATION (To be completed by all applicants)

In this section, identify the individual who should receive the access codes and other EDGAR-related information. Please include an e-mail address that will become your default notification address for EDGAR filings; it will be stored in the Company Contact Information on the EDGAR Database. EDGAR will send all subsequent filing notifications automatically to that address. You can have one e-mail address in the EDGAR Company Contact Information. For information on including additional e-mail addresses on a per filing basis, refer to Volume 1, Section 3.2.2 of the EDGAR Filer Manual.

PART IV—ACCOUNT INFORMATION (To be completed by filers and filing agents only)

Identify in this section the individual who should receive account information and/or billing invoices from us. We will use this information to process electronically fee payments and billings. If the address changes, update it via the EDGAR filing website, or your account statements may be returned to us as undeliverable.

PART V—SIGNATURE (To be completed by all applicants)

If the applicant is a corporation, partnership, trust or other entity, state the capacity in which the representative individual, who must be duly authorized, signs the Form on behalf of the applicant.

If the applicant is an individual, the applicant must sign the Form.

If another person signs on behalf of the representative individual or the individual applicant, confirm the authority of the other person to sign in writing in an electronic attachment to the Form. The confirming statement need only indicate that the representative individual or individual applicant authorizes and designates the named person or persons to file the Form on behalf of the applicant and state the duration of the authorization.

Chairman Schapiro not participating
Commissioner Aguilar Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65247 / September 1, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14524

In the Matter of **SEQUENOM, INC.** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Sequenom, Inc. ("Sequenom" or "Respondent").

II.

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

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

These proceedings arise out of Sequenom's disclosure of materially misleading scientific data regarding a prenatal screening test for Down syndrome (the "Down Syndrome Test" or "Test"). Between June 2008 and January 2009, Sequenom made a series of announcements and filings with the Commission regarding the Down Syndrome Test, indicating that the Test was close to 100% accurate and that it would be ready for commercial use by June 2009. The company's stock price rose significantly based on its announcements regarding the Test and statements made by representatives of the company, including Elizabeth A. Dragon ("Dragon"), Sequenom's senior vice president of research and development. Contrary to the company's and Dragon's public statements, the Test was far less accurate than disclosed, making it much less marketable. On April 29, 2009, Sequenom announced that the public could no longer rely on its past announcements regarding the Down Syndrome Test and that the Test would not be launched by June 2009. In response to the April 29 announcement, the company's stock price dropped 76%.

Respondent

1. Sequenom is a Delaware corporation based in San Diego. Sequenom is a diagnostic testing and genetics analysis company whose common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act. Its shares trade on The Nasdaq Global Market.

Other Relevant Entities and Persons

2. Elizabeth A. Dragon, PhD resided in Gilbert, Arizona. Dragon had a doctorate in cell biology/virology, and was Sequenom's senior vice president of research and development between May 2006 and September 2009, when she was terminated. On June 2, 2010, the Commission filed a lawsuit against Dragon charging her with violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Dragon died on February 26, 2011.

Background

3. Dragon, an officer of Sequenom, committed fraud by touting the accuracy of Sequenom's Down Syndrome Test when she knew the Test had significant flaws and did not

[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.

perform well. Specifically, during three public events between June 2008 and January 2009, Dragon presented Test data to analysts and investors and made the following material misrepresentations:

a. She claimed that the Test was close to 100% accurate on a "blinded" basis. In fact, when the scientists working on the Test ran samples on a blinded basis its rate of accuracy was less than 80%. Consequently, Dragon provided the scientists with the known outcomes of samples so that they could manipulate the results in order to achieve a higher rate of accuracy.

b. In June 2008, she claimed that 200 samples had been analyzed using the Test when, in fact, only 51 samples had been tested. This inflated number was carried forward with each of her subsequent presentations.

c. Finally, she claimed that the Test had accurately detected Down syndrome in a blood sample taken during the first trimester of pregnancy. In fact, she knew that the scientists working on the Test repeatedly called this particular sample incorrectly.

4. Sequenom's stock price rose significantly over the course of several months based on the company's positive statements regarding the Test, as well as its announcement that it planned to commercially launch the Test in June 2009. For example, the company's stock was trading at approximately $7.66 prior to Dragon's first presentation of Test data in early June 2008. By the end of June 2008, the stock was trading at $15.96, and peaked at just under $28 in September 2008.

5. In April 2009, Sequenom launched an informal investigation that revealed the fraud. On April 29, 2009, the company announced that the data regarding the Down Syndrome Test had been "mishandled," that the public could no longer rely on the company's prior announcements regarding the Test, and that the Test would not be launched in June 2009. As a result of the announcement, Sequenom's stock price fell 76% from $14.91 to $3.62.

6. Following a more thorough investigation conducted by an independent committee of the Board of Directors, on September 28, 2009, Sequenom announced that Dragon and Sequenom's CEO had been terminated, and that the company's CFO and vice president of marketing had resigned as well.

Sequenom's Material Misstatements and Omissions

7. During each presentation that Dragon made, she used slides that included the relevant data, and the information on the slides was used to draft press releases regarding each of the three sets of Test data.

8. Once Sequenom had issued the press releases associated with Dragon's presentations of new Test data, it also filed the data with the Commission in Forms 8-K.

9. The Test data included in Dragon's presentation from January 2009, was used in the company's Form 10-K for the fiscal year ended December 31, 2008. Dragon reviewed the relevant section of the Form 10-K and did not object to the use of the inaccurate data.

10. The material misrepresentations Sequenom made in its filings are as follows:

a. *June 6, 2008 Form 8-K.* Stated that Sequenom had performed blinded studies on 200 samples, and that the Test was 100% accurate. In fact, the Test had been run in an unblinded manner on only 51 samples, and was less than 100% accurate.

b. *September 25, 2008 Form 8-K.* Stated that Sequenom had performed blinded studies, was 100% accurate, and had correctly called a Down syndrome sample taken in the first trimester of pregnancy. In fact, the scientists performed unblinded studies. On a blinded basis, the accuracy of the Test was less than 80%, and the scientists made an incorrect call on the first trimester Down syndrome sample. Additionally, the company's disclosure regarding the inflated number of samples tested in June 2008, was carried over to all future disclosures regarding the Test data.

c. *January 29, 2009 Form 8-K (as amended on February 6, 2009).* Stated that Sequenom had performed blinded studies, and that the Test had correctly called all but one sample, which was a false positive. In fact, the Test had been run on an unblinded basis. On a blinded basis, the Test results included multiple false positive and false negative results.

d. *March 12, 2009 Form 10-K.* Repeated the misrepresentations from the January 2009 8-K, including the total number of samples tested, the accuracy of the Test, and a statement that the Test had been run on a blinded basis.

Violations

11. As a result of the conduct described above, Sequenom violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities. Specifically, between June 2008 and January 2009, Sequenom, through Dragon, an officer of the company, made several materially misleading statements and omissions to the public through public filings, press releases and oral statements.

12. Also as a result of the conduct described above, Sequenom violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-11 thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission information, documents, and annual reports as the Commission may require, and mandate that

periodic reports contain such further material information as may be necessary to make the required statements not misleading.

13 Sequenom violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-11 thereunder by filing three Form 8-Ks and an annual report on Form 10-K that contained materially false and misleading statements and omissions regarding the Test data.

Sequenom's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Sequenom cease and desist from committing or causing any violations and any future violations of Sections 10(b) and 13(a) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, and 13a-11 thereunder.

B. Respondent acknowledges that the Commission is not imposing a civil penalty based upon its cooperation in a Commission investigation and related enforcement action. 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 a civil money 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
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3270 / September 2, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14526

In the Matter of **ROBERT FEINBLATT,** **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 Feinblatt ("Feinblatt" 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. Feinblatt, age 42, resides in New York, New York. During the relevant period, Feinblatt was a co-founder and principal at Trivium Capital Management, LLC ("Trivium"). Feinblatt has held a Series 7 securities license. 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 ("Trivium Funds").

2. On July 18, 2011, a final judgment was entered by consent against Feinblatt, 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 <u>Securities and Exchange Commission v. Feinblatt, et al.</u>, 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 Feinblatt, 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 Feinblatt's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Feinblatt 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 5 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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65254 / September 2, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3316 / September 2, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14527

In the Matter of **TRAVIS W. VRBAS,** **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 Travis W. Vrbas ("Respondent" or "Vrbas") 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.C. 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:

A. Vrbas served as chief financial officer of Brooke Corporation ("Brooke") from March 10, 2008 until October 30, 2008, and as chief financial officer of Brooke Capital Corp. ("Brooke Capital") from August 15, 2008 until October 30, 2008. Prior to August 15, 2008, Vrbas was the primary accountant in charge of preparing Brooke Capital's financial statements.

B. Brooke was, at all relevant times, a Kansas corporation with its principal place of business in Overland Park, Kansas. Brooke was a provider of banking, insurance, and other financial services. At all relevant times, Brooke's common stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the NASDAQ Global Market. Brooke Capital was, at all relevant times, a Kansas corporation with its principal place of business in Overland Park, Kansas. Brooke Capital operated a franchise network of insurance agents. At all relevant times, Brooke Capital's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act, and traded on the American Stock Exchange.

C. On July 13, 2011, a final judgment was entered against Vrbas, permanently enjoining him from future violations of Sections 17(a)(1) and 17(a)(3) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 13(b)(5) of the Exchange Act, Rules 10b-5, 13a-14, and 13b2-1 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder, in the civil action entitled Securities and Exchange Commission v. Travis W. Vrbas, Case No. 11-CV-2251 WEB/KGG, in the United States District Court for the District of Kansas. Vrbas was also ordered to pay a $130,000 civil money penalty.

D. The Commission's complaint alleged, among other things, that Vrbas was responsible for Brooke filing materially false and misleading financial statements in the company's Form 10-K for the fiscal year ended December 31, 2007, and in the company's Forms 10-Q for the period ended March 31, 2008, the period ended June 30, 2008 and Amended 2008 Form 10-Q for that period, and Form S-3 filed May 28, 2008, and for Brooke Capital filing materially false and misleading financial statements in the company's Form 10-K for the fiscal year ended December 31, 2007, and in the company's Forms 10-Q for the periods ended March 31, 2008 and June 30, 2008. The Complaint alleged that Vrbas knew that Brooke Capital had improperly recognized loan fee revenue on unfunded loans in a departure from generally accepted accounting principles ("GAAP"), which materially misstated the net income of Brooke and Brooke Capital.

E. In addition, the Complaint alleged that Vrbas made certifications of Brooke's Form 10-K for the fiscal year ended December 31, 2007, and in the company's Forms 10-Q for the period ended March 31, 2008, the period ended June 30, 2008 and Amended 2008 Form 10-Q for that period, and Brooke Capital's Form 10-Q for the period ended June 30, 2008, which contained untrue statements of material fact, and omitted material facts necessary to make the statements made therein, in light of the circumstances under which the statements were made, not misleading.

F. In addition, the Complaint alleged that Vrbas reviewed and signed Brooke's Form 10-K for the period ended December 31, 2007, Forms 10-Q for the period ended March 31, 2008, the period ended June 30, 2008 and Amended 2008 Form 10-Q for that period, and Form S-3 filed May 28, 2008, and Brooke Capital's Form 10-Q for the period ended June 30, 2008, which contained material misrepresentations and omitted material facts. Those misrepresentations and omissions included, among other things:

1. the extent to which franchise location numbers and growth included abandoned and failed locations;

2. the nature and extent of Brooke Capital's financial assistance to franchisees, including, the number of franchisees receiving financial assistance, the long-term and recurring nature of such financial assistance to some franchisees, the dependence of some franchisees on such financial assistance to continue operations, and Brooke Capital's payment of principal and interest on some franchisee loans to Aleritas; and

3. the extent to which Brooke and Brooke Capital were profitable, liquid, and able to cash flow.

G. In addition, the Complaint alleged that Vrbas failed to make and keep accurate books and records of Brooke and Brooke Capital with regards to the misstatements of their financial statements.

H. In addition, the Complaint alleged that Vrbas failed to devise and maintain a system of internal accounting controls sufficient to prevent, detect and correct the misstatements of the financial statements of Brooke and Brooke Capital.

IV.

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

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

Vrbas 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 EXCHANGE ACT OF 1934
Release No. 65260 / September 2, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3317 / September 2, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14528

In the Matter of **LELAND G. ORR, 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 Leland G. Orr ("Respondent" or "Orr") 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. 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:

A. Orr served as chief financial officer of Brooke Corporation ("Brooke") from 1995 until March 11, 2008, and as chief executive officer of Brooke from March 11, 2008 until October 17, 2008. Orr served as chief financial officer of Brooke Capital Corp. ("Brooke Capital") from November 15, 2007 until August 15, 2008. Orr is and has been a certified public accountant licensed in the state of Kansas.

B. Brooke was, at all relevant times, a Kansas corporation with its principal place of business in Overland Park, Kansas. Brooke was a provider of banking, insurance, and other financial services. At all relevant times, Brooke's common stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the NASDAQ Global Market. Brooke Capital was, at all relevant times, a Kansas corporation with its principal place of business in Overland Park, Kansas. Brooke Capital operated a franchise network of insurance agents. At all relevant times, Brooke Capital's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act, and traded on the American Stock Exchange.

C. On July 13, 2011, a judgment was entered against Orr, permanently enjoining him from future violations of Sections 17(a)(1) and 17(a)(3) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 13(b)(5) of the Exchange Act, Rules 10b-5, 13a-14, 13b2-1 and 13b2-2 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder, in the civil action entitled Securities and Exchange Commission v. Leland G. Orr, Case Number 11-CV-2251 WEB/KGG, in the United States District Court for the District of Kansas.

D. The Commission's complaint alleged, among other things, that Orr was responsible for Brooke filing materially false and misleading financial statements in the company's Form 10-K for the fiscal year ended December 31, 2007, and in the company's Forms 10-Q for the period ended March 31, 2008, the period ended June 30, 2008 and Amended 2008 Form 10-Q for that period, and Form S-3 filed May 28, 2008, and for Brooke Capital filing materially false and misleading financial statements in the company's Form 10-K for the fiscal year ended December 31, 2007, and in the company's Forms 10-Q for the periods ended March 31, 2008 and June 30, 2008. The Complaint alleged that Orr engaged in a number of improper accounting practices that materially misstated the net income of Brooke and Brooke Capital in a departure from generally accepted accounting principles ("GAAP"), including, among other things, improperly recognizing loan fee revenue on unfunded loans, and failing to adjust and to record adequate reserves for uncollectable franchise accounts receivable which were commonly referred to as statement and non-statement balances.

E. In addition, the Complaint alleged that Orr allowed consolidation of Aleritas Capital Corporation's ("Aleritas") financial statements into Brooke's financial statements, with knowledge that Aleritas improperly reduced second quarter collateral preservation expenses and established a collateral recovery asset during the second quarter of 2008, thereby materially misstating the financial statements contained in Brooke's Form 10-Q for the period ended June 30, 2008 and Amended 2008 Form 10-Q for that period.

F. In addition, the Complaint alleged that Orr made certifications of Brooke's Form 10-K for the fiscal year ended December 31, 2007, and in the company's Forms 10-Q for the period ended March 31, 2008, the period ended June 30, 2008 and Amended 2008 Form 10-Q for the that period, and Brooke Capital's Form 10-K for the period ended December 31, 2007, and Forms 10-Q for the periods ended March 31, 2008 and June 30, 2008, which contained untrue statements of material fact, and omitted material facts necessary to make the statements made therein, in light of the circumstances under which the statements were made, not misleading.

G. In addition, the Complaint alleged that Orr reviewed and signed Brooke's Form 10-K for the period ended December 31, 2007, Forms 10-Q for the period ended March 31, 2008, the period ended June 30, 2008 and Amended 2008 Form 10-Q for that period, and Form S-3 filed May 28, 2008, and Brooke Capital's Form 10-K for the period ended December 31, 2007, and Forms 10-Q for the periods ended March 31, 2008 and June 30, 2008, which contained material misrepresentations and omitted material facts. Those misrepresentations and omissions included, among other things:

1. the extent to which franchise location numbers and growth included abandoned and failed locations;

2. the nature and extent of Brooke Capital's financial assistance to franchisees, including, the number of franchisees receiving financial assistance, the long-term and recurring nature of such financial assistance to some franchisees, the dependence of some franchisees on such financial assistance to continue operations, and Brooke Capital's payment of principal and interest on some franchisee loans to Aleritas; and

3. the extent to which Brooke and Brooke Capital were profitable, liquid, and able to cash flow.

H. In addition, the Complaint alleged that Orr made false or misleading statements and failed to disclose information to the independent auditors and accountants of Brooke and Brooke Capital about certain of the companies' fraudulent accounting practices.

I. In addition, the Complaint alleged that Orr failed to make and keep accurate books and records of Brooke and Brooke Capital with regards to the misstatements of their financial statements.

J. In addition, the Complaint alleged that Orr failed to devise and maintain a system of internal accounting controls sufficient to prevent, detect and correct the misstatements of the financial statements of Brooke and Brooke Capital.

IV.

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

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

Orr 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

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65256; File No. SR-C2-2011-008)

September 2, 2011

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Order Approving Proposed Rule Change to Establish a Pilot Program to List and Trade a p.m.-Settled Cash-Settled S&P 500 Index Option Product

I. Introduction

On February 28, 2011, C2 Options Exchange, Incorporated (the "Exchange" or "C2") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] a proposed rule change to permit the listing and trading of p.m.-settled, cash-settled options on the Standard & Poor's 500 Index ("S&P 500"). The proposed rule change was published for comment in the Federal Register on March 8, 2011.[3] The Commission received seven comment letters on the proposal, some of which urged the Commission to disapprove the proposal.[4] C2 responded to the comment letters in a response letter dated April 20, 2011.[5] To ensure that the Commission had sufficient time to consider and take action on the Exchange's proposal in light of, among other things, the comments received on the proposal, the Commission extended the time period in which to either

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

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 64011 (March 2, 2011), 76 FR 12775 ("Notice").

4 See Letters to Elizabeth M. Murphy, Secretary, Commission, from Randall Mayne, Blue Capital Group, dated March 18, 2011 and April 28, 2011 ("Mayne Letter 1" and "Mayne Letter 2"); Michael J. Simon, Secretary, International Securities Exchange, LLC ("ISE"), dated March 29, 2011 and May 11, 2011 ("ISE Letter 1" and "ISE Letter 2"); Andrew Stevens, Legal Counsel, IMC Financial Markets, dated March 24, 2011 ("IMC Letter"); John Trader, dated April 20, 2011 ("Trader Letter"); and JP, dated April 30, 2011 ("JP Letter").

5 See Letter to Elizabeth M. Murphy, Secretary, Commission, from Joanne Moffic-Silver, Secretary, C2, dated April 20, 2011 ("C2 Response Letter").

approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to June 6, 2011.[6]

In order to solicit additional input from interested parties, including relevant data and analysis, on the issues presented by C2's proposed rule change, on June 3, 2011, the Commission instituted proceedings to determine whether to approve or disapprove C2's proposal.[7] In its order instituting the proceedings, the Commission specifically noted its interest in receiving additional data and analysis relating to the potential effect that proposed p.m.-settled index options could have on the underlying cash equities markets. In response to the proceedings, the Commission received an additional three comment letters on the proposal as well as a rebuttal letter from C2.[8] This order approves the proposed rule change on a 14-month pilot basis.

II. Description of the Proposal

The Exchange's proposal would permit it to list and trade cash-settled S&P 500 index options with third-Friday-of-the-month ("Expiration Friday") expiration dates for which the exercise settlement value will be based on the index value derived from the closing prices of component securities ("p.m.-settled"). The proposed contract (referred to as "SPXPM") would use a \$100 multiplier, and the minimum trading increment would be \$0.05 for options trading below \$3.00 and \$0.10 for all other series. Strike price intervals would be set no less than 5

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6 See Securities Exchange Act Release No. 64266 (April 8, 2011), 76 FR 20757 (April 13, 2011).

7 See Securities Exchange Act Release No. 64599 (June 3, 2011), 76 FR 33798 (June 9, 2011).

8 See Letters to Elizabeth M. Murphy, Secretary, Commission, from Michael J. Simon, Secretary, International Securities Exchange, LLC dated July 11, 2011 ("ISE Letter 3"); William J. Brodsky, Chairman and Chief Executive Officer, C2, dated July 11, 2011 ("CBOE Letter 3"); Thomas Foertsch, President, Exchange Capital Resources, dated July 11, 2011; and William J. Brodsky, Chairman and Chief Executive Officer, C2, dated July 25, 2011.

points apart. Consistent with existing rules for index options, the Exchange would allow up to twelve near-term expiration months, as well as LEAPS. Expiration processing would occur on the Saturday following Expiration Friday. The product would have European-style exercise and would not be subject to position limits, though there would be enhanced reporting requirements.

The Exchange proposes that the SPXPM product be approved on a pilot basis for an initial period of fourteen months. As part of the pilot program, the Exchange committed to submit a pilot program report to the Commission at least two months prior to the expiration date of the program (the "annual report"). The annual report would contain an analysis of volume, open interest, and trading patterns. The analysis would examine trading in the proposed option product as well as trading in the securities that comprise the S&P 500 index. In addition, for series that exceed certain minimum open interest parameters, the annual report would provide analysis of index price volatility and share trading activity. In addition to the annual report, the Exchange committed to provide the Commission with periodic interim reports while the pilot is in effect that would contain some, but not all, of the information contained in the annual report. In its filing, C2 notes that it would provide the annual and interim reports to the Commission on a confidential basis.[9]

III. Comments Received

In response to the initial notice of C2's proposal, the Commission received seven comment letters, some of which expressed concern with the proposal.[10] One commenter specifically urges the Commission to disapprove the proposal.[11] Commenters expressing concern with the proposal raised several issues, including: the potential for adverse effects on

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9 See Notice, supra note 3, at 12777.

10 See Mayne Letter 1, ISE Letter 1, ISE Letter 2, and Trader Letter, supra note 4.

11 See ISE Letter 1 and ISE Letter 2, supra note 4.

the underlying cash markets that could accompany the reintroduction of p.m. settlement; concern with the similarity (but lack of fungibility) between the existing S&P 500 index option traded on the Chicago Board Options Exchange, Incorporated ("CBOE") and the proposed S&P 500 index option that would be traded on C2; the lack of proposed position limits for SPXPM; and issues regarding exclusive product licensing. Three commenters expressed support for the proposal.[12]

In the proceedings to determine whether to approve or disapprove the proposal, the Commission preliminarily summarized the issues raised by the commenters, and also set forth a series of questions and requests for data on the issue of p.m. settlement. In response to the proceedings, the Commission received three letters, including one from C2, one from ISE that expands on the concerns it previously raised and reiterates its recommendation for the Commission to disapprove the proposal, and one from a new commenter that supports the proposal because it will offer investors greater flexibility.[13] The Commission also received an additional letter from C2 responding to the comments of ISE.[14] The comments received are addressed below.

IV. Discussion and Commission Findings

After careful consideration of the proposal and the comments received, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,[15] and, in particular, the requirements of Section 6 of the Act.[16] Specifically, the Commission finds that the proposed rule

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12 See Mayne Letter 2, IMC Letter, and JP Letter, supra note 4.

13 See ECR Letter, supra note 8.

14 See C2 Rebuttal Letter, supra note 8.

15 In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

16 15 U.S.C. 78f.

change is consistent with Section 6(b)(5) of the Act,[17] which requires that an exchange have rules designed to remove impediments to and perfect the mechanism of a free and open market and to protect investors and the public interest.

A. Relationship to the National Market System

One commenter believes that separate a.m. and p.m.-settled S&P 500 index options could potentially bifurcate the market for CBOE's existing a.m.-settled SPX contract.[18] This commenter notes that the SPX, which trades only on CBOE, accounts for 60% of all index options trading, and argues that the sole difference in settlement between SPX on CBOE and the proposed S&P 500 index options on C2 (i.e., a.m. vs. p.m. settlement) is a "sham" that is intended to "keep them non-fungible," which would "make a mockery of Section 11A of the Act."[19] The commenter states that the objectives of Section 11A are reflected in a national market system plan for options that requires exchanges to prevent trading through better priced quotations displayed on other options exchanges, and that making a p.m.-settled S&P 500 index option non-fungible with CBOE's SPX would allow the CBOE group to establish two "monopolies" in S&P 500 options, one floor-based (CBOE) and one electronic (C2) that would avoid the application of the limitation on trade throughs.[20] The commenter also contends the proposal is designed to protect CBOE's floor-based SPX trading without having to accommodate the more narrow quotes that would likely occur on C2 in an electronically-traded p.m.-settled product.[21]

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17 15 U.S.C. 78f(b)(5).

18 See ISE Letter 1, supra note 4, at 4.

19 Id. at 2. See also ISE Letter 2, supra note 4, at 3-4.

20 See ISE Letter 1, supra note 4, at 3.

21 See ISE Letter 1, supra note 4, at 2.

Another commenter asserts that CBOE and C2 should trade a fungible S&P 500 index option in order to address what the commenter describes as "huge customer-unfriendly spreads" in SPX.[22] The commenter argues that if the CBOE believes p.m. settlement is superior to a.m. settlement, then CBOE should file to change SPX to p.m. settlement so that the product traded on C2 would be fungible with that proposed to be traded on CBOE.[23]

In response, C2 argues that the difference between a.m.-settled and p.m.-settled S&P 500 index option would be a material term and that C2's proposed S&P 500 index option could not be fungible with, nor could it be linked with, CBOE's SPX option.[24]

The Commission agrees that the difference between a.m.-settled SPX and the proposed p.m.-settled SPXPM involves a materially different term (i.e., settlement time) that makes C2's proposed SPXPM index option a different security than, and thus not fungible with, CBOE's SPX option.[25] The Commission notes that it has permitted very similar but different products to trade on the same exchange or on different exchanges without those separate products being fungible. For example, the Commission previously approved for CBOE the listing and trading of

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22 See Trader Letter, supra note 4, at 1. See also JP Letter, supra note 4, at 1.

23 See Trader Letter, supra note 4, at 1.

24 See C2 Response Letter, supra note 5, at 3.

25 Consequently, rules applicable to prevent trading through better priced quotations in the same security displayed on other options exchanges would not be applicable for trading between these two products.

Similarly, in response to a comment that investors would be confused by the presence of an a.m.-settled SPX on CBOE and a p.m.-settled S&P 500 index option on C2 (see ISE Letter 1, supra note 4, at 3), the Commission does not believe that SPX on CBOE and a p.m.-settled S&P 500 index option on C2 would cause investor confusion. The two products would trade under different ticker symbols and any potential for investor confusion could be mitigated though investor outreach and education initiatives. Furthermore, as C2 notes in its response letter, CBOE currently lists two options on the S&P 100 (American-style OEX and European-style XEO) and is not aware of any investor confusion among the products. See C2 Response Letter, supra note 5, at 3.

a.m.-settled S&P 500 index options during a time when CBOE also traded p.m.-settled S&P 500 index options, and the two separate products were not fungible.[26]

One commenter also raises concerns about the potential effect on competition of C2 listing and trading an option product that is subject to an exclusive license, citing to concerns they express with respect to the SPX product traded on CBOE.[27]

The Commission recognizes the potential impact on competition resulting from the inability of other options exchanges to list and trade SPXPM. In acting on this proposal, however, the Commission has balanced the potentially negative competitive effects with the countervailing positive competitive effects of C2's proposal. The Commission believes that the availability of SPXPM on the C2 exchange will enhance competition by providing investors with an additional investment vehicle, in a fully-electronic trading environment, through which

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26 See infra note 44 (citing to Securities Exchange Act Release No. 24367). See also Securities Exchange Act Release No. 51619 (Apr. 27, 2005), 70 FR 22947 (May 3, 2005) (order approving ISE's listing and trading of options on various Russell Indexes, including options based upon one-tenth values of the Russell Indexes).

27 See ISE Letter 1, supra note 4, at 6-7 (arguing in part that "CBOE's monopoly in the product imposes significant harm to investors," including the fact that "CBOE charges for trading SPX options that are much greater than the fees for multiply listed options" and "the quotes in SPX options are much wider than they would be if there was competition from other exchanges," as well as that "CBOE is able to use the monopolistic revenue stream from these options to subsidize other products....") and ISE Letter 2, supra note 4, at 3-4 (arguing in part that "[t]he Proposal is harmful to investors because it... perpetuates the unreasonably high monopolistic pricing and artificially wide spreads that result from the lack of competition in this product.").

The issue of state law intellectual property rights of index developers in the use of their indexes to trade derivatives is the subject of litigation between CBOE and ISE (as well as other parties). See Chicago Board Options Exchange, Incorporated et al. v. International Securities Exchange, et al., Case No. 06 CH 24798 (Cir. Ct. of Cook Cty., Ch. Div. July 8, 2010), appeal docketed, No. 1-10-2228 (Ill. App. Ct. August 9, 2010). See also Board of Trade of the City of Chicago v. Dow Jones & Co., Inc., 98 Ill.2d 109 (1983). In issuing this order, the Commission expresses no view with respect to the matters underlying this ongoing litigation, including their validity or the enforceability of the exclusivity agreement.

investors can gain and hedge exposure to the S&P 500 stocks. Further, this product could offer a competitive alternative to other existing investment products that seek to allow investors to gain broad market exposure. Also, we note that it is possible for other exchanges to develop or license the use of a new or different index to compete with the S&P 500 index and seek Commission approval to list and trade options on such index.

Accordingly, with respect to the Commission's consideration of C2's proposed rule change at this time, the Commission finds that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[28]

B. Position Limits

Under C2's proposal, position limits would not apply to SPXPM. One commenter argues that position limits should apply to SPXPM.[29] This commenter notes that, since 2001 when the Commission approved a CBOE rule filing to remove all position limits for SPX options,[30] the Commission has generally expected exchanges to apply a model, such as the Dutt-Harris model, to determine the appropriate position limits for all new index options products.[31] Because C2

28 The Commission may in the future determine it appropriate to consider or address competitive issues related to exclusive licensing of index option products on a more comprehensive level.

29 See ISE Letter 1, supra note 4, at 6.

30 See Securities Exchange Act Release No. 44994 (October 26, 2002), 66 FR 55722 (November 2, 2001). In this filing, the Commission relied in part on CBOE's ability to provide enhanced surveillance and reporting safeguards to detect and deter trading abuses arising from the elimination of position and exercise limits in options on the S&P 500.

31 See ISE Letter 1, supra note 4, at 6. In a 2005 paper from Hans Dutt and Lawrence Harris, titled "Position Limits for Cash-Settled Derivative Contracts" ("Dutt-Harris Paper") the authors developed a model to determine appropriate position limits for cash-settled index derivatives. The authors concluded that the then-prevailing position limits were lower than the model suggested would be appropriate for many derivative contracts. The authors also concluded, however, that position limits are not as important for broad-based index derivative contracts that are cash settled because they are composed of highly liquid and well-followed securities. As such, the authors note that it would require

claims that the product is new and non-fungible, the commenter argues that the Commission should apply the Dutt-Harris model to require C2 to impose position limits on SPXPM.[32]

In its response to comments, C2 notes that the Dutt-Harris Paper acknowledges that S&P 500 options have, and should have, extraordinarily large position limits and Dutt-Harris observes that position limits are most useful when market surveillance is inadequate.[33] C2 argues that position limits suggested by the Dutt-Harris model for an S&P 500 index option would be so large as to be irrelevant and that positions of such magnitude would attract scrutiny from surveillance systems that would, as a consequence, serve as an effective substitute for position limits.[34] Further, in its response letter, C2 summarizes the circumstances and considerations relied upon by the Commission when it approved the elimination of position limits on CBOE's S&P 500 index option, including the enormous capitalization of the index and enhanced reporting and surveillance for the product.[35] Thus, because of the enhanced reporting and

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very high trading volumes to manipulate the underlying securities and, consequently, any attempted manipulation would be more easily detectable and prosecutable.

32 See ISE Letter 1, supra note 4, at 6.

33 See C2 Response Letter, supra note 5, at 5.

34 See id. Generally, position limits are intended to prevent the establishment of options positions that could be used or that might create incentives to manipulate or disrupt the underlying market to benefit the holder of the options. See, e.g., Securities Exchange Act Release Nos. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998) (SR-CBOE-97-11) (approving increases to the position and exercise limits for options on the Standard & Poor's 100 Stock Index ("OEX"), the OEX firm facilitation exemption, and the OEX index hedge exemption); Dutt-Harris Paper, supra note 31 ("Position limits directly limit manipulation by limiting the size of derivative positions that would benefit from manipulative practices.").

35 See C2 Response Letter, supra note 5, at 5-6. C2 represents in its response letter that it would monitor trading in p.m.-settled S&P 500 index options in the same manner as CBOE does for other broad-based index options with no position limits. See id. at 6.

surveillance for this product, described below, C2 argues that the absence of position limits on its proposed S&P 500 index option would not be inconsistent with Dutt-Harris.[36]

The Exchange represents, however, that it will implement enhanced reporting requirements pursuant to its Rule 4.13 (Reports Related to Position Limits) and Interpretation and Policy .03 to its Rule 24.4 (Position Limits for Broad-Based Index Options), which sets forth the reporting requirements for certain broad-based indexes that do not have position limits.[37]

In 2001, when the Commission permanently approved a CBOE rule (which had been in place for a two-year pilot period) to eliminate position limits on SPX (as well as options on the Dow Jones Industrial Average and the S&P 100 index),[38] the Commission stated that because the S&P 500 index is a broad-based index with a considerable capitalization, manipulation of the 500 component stocks underlying the index would require extraordinarily large positions that would be readily detectable by enhanced surveillance procedures. In its approval order, the Commission relied in part on CBOE's enhanced surveillance and reporting procedures that are intended to allow CBOE to detect and deter trading abuses in the absence of position limits. In particular, CBOE requires its members to submit a report to CBOE when the member builds a position of 100,000+ contracts. Among other things, the report includes a description of the option position, whether the position is hedged (and, if so, a description of the hedge), and whether collateral was used (and, if so, a description of the collateral). This enhanced surveillance and reporting arrangement allows CBOE to continually monitor, assess, and respond to any concerns at an early stage. To complement its enhanced surveillance and reporting

36 See id.

37 See Notice, supra note 3, at note 4 and accompanying text.

38 See Securities Exchange Act Release No. 44994 (October 26, 2001), 66 FR 55722 (November 2, 2001) (SR-CBOE-2001-22).

requirements, CBOE has the ability to intervene to impose additional margin or assess capital charges when warranted. Thus, together with the "enormous capitalization"[39] of the S&P 500 index and the deep and liquid markets for the S&P 500 stocks, the Commission found that CBOE's enhanced surveillance procedures "reduce[] concerns regarding market manipulation or disruption in the underlying market."[40]

C2 has represented in this filing that its enhanced surveillance requirements and procedures for SPXPM would be identical to the surveillance and reporting requirements and procedures used by CBOE with respect to SPX. Accordingly, the Commission believes that position limits would not be necessary for SPXPM options as long as C2 has in place and enforces effective enhanced surveillance and reporting requirements. These enhanced procedures will allow the Exchange to see, with considerable advance notice, the accumulation of large positions, which it can then monitor more closely as necessary and take additional action if appropriate.[41]

C. Reintroduction of P.M. Settlement

When cash-settled[42] index options were first introduced in the 1980s, they generally

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39 Id. at 55723.

40 Id.

41 In addition, the Commission notes that C2 would have access to information through its membership in the Intermarket Surveillance Group with respect to the trading of the securities underlying the S&P 500 index, as well as tools such as large options positions reports to assist its surveillance of SPXPM options.

In approving the proposed rule change, the Commission also has relied upon the Exchange's representation that it has the necessary systems capacity to support new options series that will result from this proposal. See Notice, supra note 3, at 12777.

42 The seller of a "cash settled" index option pays out the cash value of the applicable index on expiration or exercise. A "physically settled" option, like equity and ETF options, involves the transfer of the underlying asset rather than cash. See Characteristics and Risks of Standardized Options, available at: http://www.theocc.com/components/docs/riskstoc.pdf, for a discussion of settlement.

utilized closing-price settlement procedures (i.e., p.m. settlement).[43] The Commission became concerned about the impact of p.m. settlement on cash-settled index options on the markets for the underlying stocks at the close on expiration Fridays.[44] These concerns were heightened during the quarterly expirations of the third Friday of March, June, September and December when options, index futures, and options on index futures all expire simultaneously. P.m.-

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43 The exercise settlement value for a p.m.-settled index option is generally determined by reference to the reported level of the index as derived from the closing prices of the component securities (generally based on the closing prices as reported by the primary exchange on which the stock is listed) on the last business day before expiration (e.g., the Friday before Saturday expiration). See Characteristics and Risks of Standardized Options, available at: http://www.theocc.com/components/docs/riskstoc.pdf, for a discussion of settlement value.

44 See, e.g., Securities Exchange Act Release Nos. 45956 (May 17, 2002), 67 FR 36740 (May 24, 2002) (adopting release concerning cash settlement and regulatory halt requirements for security futures products) ("Regulators and self-regulators were concerned that the liquidity constraints faced by the securities markets to accommodate expiration-related buy or sell programs at the market close on expiration Fridays could exacerbate ongoing market swings during an expiration and could provide opportunities for entities to anticipate these pressures and enter orders as part of manipulative or abusive trading practices designed to artificially drive up or down share prices."); 24367 (April 17, 1987), 52 FR 13890 (April 27, 1987) (SR-CBOE-87-11) (order approving a proposal for S&P 500 index options with an exercise settlement value based on an index value derived from opening, rather than closing, prices); and 32868 (September 10, 1993), 58 FR 48687 (September 10, 1993) (notice of filing and order granting accelerated approval of proposed rule change by the New York Stock Exchange, Inc. ("NYSE") relating to changes in auxiliary closing procedures for expiration days) (stating, "[a]s long as some index derivative products continue to expire based on closing stock prices on expiration Fridays, the Commission agrees with the NYSE that such procedures are necessary to provide a mechanism to handle the potential large imbalances that can be engendered by firms unwinding index derivative related positions"). The cash settlement provisions of stock index futures and options contracts facilitated the growth of sizeable index arbitrage activities by firms and professional traders and made it relatively easy for arbitrageurs to buy or sell the underlying stocks at or near the market close on expiration Fridays (i.e., the third Friday of the expiration month) in order to ''unwind'' arbitrage-related positions. These types of unwinding programs at the close on expiration Fridays often severely strained the liquidity of the securities markets as the markets, and in particular the specialists on the NYSE, faced pressure to attract contra-side interest in the limited time that was permitted to establish closing prices. See Securities Exchange Act Release No. 44743 (August 24, 2001), 66 FR 45904 (August 30, 2001) (File No. S7–15–01) (proposing release concerning cash settlement and regulatory halt requirements for security futures products).

settlement was believed to have contributed to above-average volume and added market volatility on those days, which sometimes led to sharp price movements during the last hour of trading.[45] As a consequence, the close of trading on the quarterly expiration Friday became known as the "triple witching hour." Besides contributing to investor anxiety, heightened volatility during the expiration periods created the opportunity for manipulation and other abusive trading practices in anticipation of the liquidity constraints.[46]

In light of the concerns with p.m. settlement and to help ameliorate the price effects associated with expirations of p.m.-settled, cash-settled index products, in 1987, the Commodity Futures Trading Commission ("CFTC") approved a rule change by the Chicago Mercantile Exchange to provide for a.m. settlement for index futures, including futures on the S&P 500 index.[47] The Commission subsequently approved a rule change by CBOE to list and trade a.m.-

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45 See, e.g., Securities Exchange Act Release Nos. 24276 (March 27, 1987); 52 FR 10836 (April 3, 1987) (notice of filing and order granting accelerated approval to a proposed rule change by the NYSE relating to opening price settlement of expiring NYSE Composite and Beta Index options); 37894 (October 30, 1996), 61 FR 56987 (November 5, 1996) (notice of filing and order granting accelerated approval of proposed rule change by the NYSE permanently approving the expiration day auxiliary closing procedures pilot program); and 45956 (May 17, 2002), 67 FR 36740 (May 24, 2002) (adopting release concerning cash settlement and regulatory halt requirements for security futures products) (reaffirming the Commission's view of the advantages of a.m. settlement). See also Hans Stoll and Robert Whaley, Expiration Day Effects of Index Options & Futures (March 15, 1986) (noting that share volume on the NYSE was much higher in the last hour of a quarterly expiration Friday when both options and futures expire than on non-expiration Fridays).

46 See, e.g., Securities Exchange Act Release No. 45956 (May 17, 2002), 67 FR 36740 (May 24, 2002) (adopting release concerning cash settlement and regulatory halt requirements for security futures products) (explaining that entities could take advantage of illiquidity resulting from the unwinding of arbitrage-related positions on expiration Fridays to manipulate share prices).

47 See Proposed Amendments Relating to the Standard and Poor's 500, the Standard and Poor's 100 and the Standard Poor's OTC Stock Price Index Futures Contract, 51 FR 47053 (December 30, 1986) (notice of proposed rule change from the Chicago Mercantile Exchange). See also Securities Exchange Act Release No. 24367 (April 17, 1987), 52 FR 13890 (April 27, 1987) (SR-CBOE-87-11) (noting that the Chicago

settled S&P 500 index options.[48] In 1992, the Commission approved CBOE's proposal to transition all of its European-style cash-settled options on the S&P 500 index to a.m.

Mercantile Exchange moved the S&P 500 futures contract's settlement value to opening prices on the delivery date).

The exercise settlement value for an a.m.-settled index option is determined by reference to the reported level of the index as derived from the opening prices of the component securities on the business day before expiration.

48 See Securities Exchange Act Release No. 24367 (April 17, 1987), 52 FR 13890 (April 27, 1987) (SR-CBOE-87-11) (order approving a proposal for S&P 500 index options with an exercise settlement value based on an index value derived from opening, rather than closing, prices). At the time it approved CBOE's introduction of a.m. settlement for cash-settled index options, the Commission identified two benefits to a.m. settlement for cash-settled index options. See Securities Exchange Act Release No. 30944 (July 21, 1992), 57 FR 33376 (July 28, 1992) (SR-CBOE-92-09). First, it provides additional time to test price discovery, as market participants have the remainder of the regular trading day to adjust to opening session price movements and determine whether those movements reflect changes in fundamental values or short-term supply and demand conditions. Second, it provides more opportunity to trade out of positions acquired during the opening auction. In this respect, attracting contra-side interest to a single-priced auction to offset an order imbalance (such as those attributable to index arbitrage) may more readily be achieved in an opening auction on Friday morning than a closing auction on Friday afternoon because the morning session allows market participants that have provided that liquidity to have the remainder of the regular trading day to liquidate their positions. In contrast, positions acquired in a Friday afternoon closing auction generally cannot be liquidated as readily and efficiently until the following Monday. Holding positions overnight, or over a weekend, may entail greater risk than holding intraday positions. To accept such risk (real or perceived), market participants generally will require a greater premium, which may translate into greater price concessions, and thus lead to greater volatility in the closing auction. In other words, a consequence of p.m. settlement may be enhanced volatility at the close. See, e.g., Securities Exchange Act Release No. 44743 (August 24, 2001), 66 FR 45904 at 45908 (August 30, 2001) ("Steep discounts (premiums) were necessary in part because traders who bought (sold) stocks to offset unwinding programs had to maintain their newly acquired long (short) positions over the weekend – during which time they were subject to considerable market risk.").

settlement.[49] Thereafter, the Commission approved proposals by the options markets to transfer most of their cash-settled index products to a.m. settlement.[50]

The Commission and the CFTC noted the benefits of a.m. settlement in a 2001 joint release concerning securities futures, where they observed that "the widespread adoption of opening-price settlement procedures in index futures and options has served to mitigate the liquidity strains that had previously been experienced in the securities markets on expirations."[51]

Since 1992, the Commission has approved proposals that provide for cash-settled index options with p.m. settlement on a limited basis for options products that generally are characterized by lower relative volume and that generally do not involve settlement on the third Friday of a month.[52] At the time of each approval, the Commission stated that limited approvals

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49 See Securities Exchange Act Release No. 30944 (July 21, 1992), 57 FR 33376 (July 28, 1992) (SR-CBOE-92-09) (order approving CBOE's proposal relating to position limits for SPX index options based on the opening price of component securities).

50 CBOE's index options on the S&P 100 (OEX), however, kept their p.m. settlement. See Securities Exchange Act Release No. 30944 (July 21, 1992), 57 FR 33376 (July 28, 1992) (SR-CBOE-92-09). No futures or options on futures trade on the S&P 100 index. Other types of options utilize p.m. settlement, including physically-settled single-stock options and options on ETFs.

51 See Securities Exchange Act Release No. 44743 (August 24, 2001), 66 FR 45904 at 45908 (August 30, 2001) (proposing release for a joint rule between the Commission and the CFTC generally stipulating, among other provisions, that the final settlement price for each cash-settled security futures product fairly reflect the opening price of the underlying security or securities). See also Securities Exchange Act Release No. 45956 (May 17, 2002), 67 FR 36740 at 36741-42 (May 24, 2002) (adopting release concerning cash settlement and regulatory halt requirements for security futures products in which the Commission reaffirmed the advantages of a.m. settlement) ("[O]pening price settlement procedures offered several features that enabled the securities markets to better handle expiration-related unwinding programs.").

52 In particular, in 1993, the Commission approved CBOE's proposal to list and trade p.m.-settled, cash-settled options on certain broad-based indexes expiring on the first business day of the month following the end of each calendar quarter ("Quarterly Index Expirations"). See Securities Exchange Act Release No. 31800 (February 1, 1993), 58 FR 7274 (February 5, 1993) (SR-CBOE-92-13). In 2006, the Commission approved, on a pilot basis, CBOE's listing of p.m.-settled index options expiring on the last business

on a pilot basis would allow the exchange and the Commission to monitor the potential for adverse market effects and modify or terminate the pilots, if necessary. Notably, with the exception of FLEX Index options, these recently-approved p.m.-settled contracts do not involve expiration on the third Friday of the month. These new contracts, including FLEX, have also been characterized by limited volume, and would not be expected to have a pronounced effect on volatility in the underlying securities at the close as a result.

In response to C2's proposal, two commenters raise concerns over the reintroduction of p.m. settlement on a potentially popular index derivative and the possible impact that doing so could have on the underlying cash equities markets.[53] One commenter urges the Commission to consider why markets went to a.m. settlement in the early 1990s and opines that hindsight supports the conclusion that a.m. settlement has been good for the markets.[54] While

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day of a calendar quarter ("Quarterly Options Series"). See Securities Exchange Act Release No. 54123 (July 11, 2006), 71 FR 40558 (July 17, 2006) (SR-CBOE-2006-65). In January 2010, the Commission approved CBOE's listing of p.m.-settled FLEX options on a pilot basis.[52] See Securities Exchange Act Release No. 61439 (January 28, 2010), 75 FR 5831 (February 4, 2010) (SR-CBOE-2009-087) (order approving rule change to establish a pilot program to modify FLEX option exercise settlement values and minimum value sizes). FLEX options provide investors with the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices. Prior to 2010, only a.m. settlement based on opening prices of the underlying components of an index could be used to settle a FLEX index option if it expired on, or within two business days of, a third-Friday-of-the-month expiration ("Blackout Period"). Last year, the Commission approved a pilot program to permit FLEX index options with p.m. settlement that expire within the Blackout Period. See Securities Exchange Act Release No. 61439 (January 28, 2010), 75 FR 5831 (February 4, 2010) (SR-CBOE-2009-087). In September 2010, the Commission approved CBOE's listing of p.m.-settled End of Week expirations (expiring on each Friday, other than the third Friday) and End of Month expirations (expiring on the last trading day of the month) for options on broad-based indexes, also on a pilot basis. See Securities Exchange Act Release No. 62911 (September 14, 2010), 75 FR 57539 (September 21, 2010) (SR-CBOE-2009-075).

53 See ISE Letter 1, supra note 4, at 4-5; ISE Letter 2, supra note 4, at 2-3; and Mayne Letter 1, supra note 4, at 1-2.

54 See Mayne Letter 1, supra note 4, at 1 (noting that concerns with p.m. settlement "led to the advent of the far more innocuous, and perhaps more fair 'AM-Print' method of

acknowledging that the answer is not clear, the commenter asks the Commission to consider whether it is now safe to return to the dominance of p.m.-settled index options and futures.[55] However, this commenter submitted a subsequent letter in which he agreed with the Exchange that "conditions today are vastly different" from those that drove the transition to a.m. settlement.[56] The commenter concludes that C2's proposal should be approved on a pilot basis, which would allow the Commission to collect data to closely analyze the impact of the proposal.[57]

A different commenter describes the history behind the transition to a.m. settlement and criticizes C2 for trivializing that history.[58] This commenter argues that a mainstream return to the "discredited" p.m. settlement would "risk undermining the operation of fair and orderly financial markets."[59] The commenter notes that experience with the "flash crash" of May 6, 2010 demonstrates that the current market structure struggles to find price equilibriums, and that dispersed trading is a "mirage" as participants often flock to the same liquidity centers in time of stress.[60] In its July comment letter, the commenter took a slightly different approach by arguing that fragmentation is the biggest change to the markets since 1987 when markets moved to a.m. settlement.[61] The commenter notes that even with almost all volume concentrated on one

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determining the final value for expiring index options. To judge by the abatement of the negative press, hindsight would seem to support that the AM-Print made for a more level playing field.")

55 See id. at 2

56 See Mayne Letter 2, supra note 4, at 1.

57 See id.

58 See ISE Letter 1, supra note 4, at 4.

59 Id.

60 See id.

61 See ISE Letter 3, supra note 8, at 2.

exchange back in the 1980s, the markets could not address closing liquidity and volatility concerns and prevent market disruptions on "triple witch" settlement dates.[62] The commenter believes that fragmentation makes it almost impossible for any single market to concentrate liquidity at the close to produce an effective clearing price at times of market volatility.[63] In addition, the commenter argues that exchange-specific closing procedures are only applicable to trading on one exchange, which represents a small fraction of the overall market today, and therefore will have little ability to dampen market volatility.[64] The commenter believes that C2's proposal would exacerbate liquidity strains by reintroducing an extraordinary market event – the triple witching hour – and argues that allowing S&P 500 index options to be based on closing settlement prices, even on a pilot basis, would re-introduce the potential for extreme market volatility at expiration.[65]

In addition, the commenter states that Commission approval of C2's proposal would lead to the reintroduction of multiple p.m.-settled derivatives and argues that while the SPXPM pilot would be troubling, having multiple pilots operating simultaneously would undermine the industry-wide move to a.m. settlement.[66] The Commission generally considers relevant information available to it at the time it reviews each filing in evaluating whether the filing is consistent with the Act.[67]

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62 See id.

63 See id.

64 See id.

65 See ISE Letter 1, supra note 4, at 5. This commenter also notes that recently-imposed circuit breakers in the cash equities markets do not apply in the final 25 minutes of trading. See id.

66 See ISE Letter 3, supra note 8, at 3.

67 See 15 U.S.C. 78s(b) (concerning Commission consideration of proposed rule changes submitted by self-regulatory organizations).

Taking the opposite view, two commenters urge the Commission to approve the proposal on a pilot basis.[68] One commenter asserts its belief that C2's proposal will not cause greater volatility in the underlying securities of the S&P 500 index.[69] This commenter opines that whether an options contract is p.m.-settled as opposed to a.m.-settled is not a contributing factor to volatility, and the commenter notes that there is more liquidity in the securities underlying the S&P 500 index at the close compared to the opening.[70] The commenter states that exchanges are well equipped to handle end-of-day volume and that existing p.m.-settled products do not contribute to increased volatility.[71] The other commenter states that the reintroduction of p.m. settlement is long overdue and would attract liquidity from dark pools, crossing mechanisms, and the over-the-counter markets.[72]

In its initial response to comments, C2 argues that the concerns from 18 years ago that led to the transition to a.m. settlement for index derivatives have been largely mitigated.[73] C2 argues that expiration pressure in the underlying cash markets at the close has been greatly reduced with the advent of multiple primary listing and unlisted trading privilege markets, and that trading is now widely dispersed among many market centers.[74] C2 further argues that opening procedures in the 1990s were deemed acceptable to mitigate one-sided order flow driven by index option expiration and that today's more sophisticated automated closing procedures

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68 See IMC Letter, supra note 4, at 1-2 and JP Letter, supra note 4.

69 See IMC Letter, supra note 4, at 1.

70 See id.

71 See id. at 2.

72 See JP Letter, supra note 4.

73 See C2 Response Letter, supra note 5, at 4.

74 See id.

should afford a similar, if not greater, level of comfort.[75] Specifically, C2 notes that many markets, notably The NASDAQ Stock Market LLC ("Nasdaq") and the NYSE, now utilize automated closing cross procedures and have closing order types that facilitate orderly closings, and that these closing procedures are well-equipped to mitigate imbalance pressure at the close.[76] In addition, C2 believes that after-hours trading now provides market participants with an alternative to help offset market-on-close imbalances.[77]

C2 also notes that for roughly five years (1987-1992) CBOE listed both a.m. and p.m.-settled SPX and did not observe any related market disruptions during that period in connection with the dual a.m./p.m. settlement.[78] Finally, C2 believes that p.m.-settled options predominate in the over-the-counter ("OTC") market, and C2 is not aware of any adverse effects in the underlying cash markets attributable to the considerable volume of OTC trading.[79] C2 asserts that given the changes since the 1980s, concerns with p.m. settlement are "misplaced" and have been "negated" now that closing procedures on the cash equities markets have become more automated with real-time data feeds that are distributed to a wider array of market participants.[80]

The Commission agrees with C2 that the closing cross mechanisms on the primary listing stock markets have matured considerably since the late 1980s. Closing procedures used by the primary equity markets now offer a more transparent and automated process for attracting

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75 See C2 Response Letter, supra note 5, at 4.

76 See id.

77 See id. at 2.

78 See Notice, supra note 3, at 12776.

79 See id.

80 See C2 Response Letter, supra note 5, at 2 and 4. In its comment letter, ISE notes that C2's claim that electronic trading can smooth out the price-setting process is "disingenuous" as recent history suggests that the opposite may be true in some cases (such as the market events of May 6, 2010). See ISE Letter 1, supra note 4, at 5.

contra-side interest and determining closing prices in a manner that is comparable to the process used to determine opening prices.[81] The Commission recognizes, however, that the ability of such procedures to counter-balance any potential negative effects that could stem from p.m. settlement is dependent on their ability to attract liquidity in a fragmented market to the primary listing exchanges during a very concentrated window of time at the close of trading on expiration Fridays. Consequently, the potential effect that p.m.-settlement of cash-settled index options could have on the underlying cash equities markets at expiration remains unclear and the

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[81] Nasdaq (see Nasdaq Rule 4754), NYSE (see NYSE Rule 123C), and NYSE Amex LLC ("NYSE Amex") (see NYSE Amex Rule 123C) all have automated closing cross procedures for their equities markets, which are designed to attract liquidity, to determine a price for a security that minimizes any imbalance, and to match orders at the 4:00 p.m. close. Participants of these exchanges generally receive frequently-disseminated market data reports reflecting any imbalance, which is intended to attract offsetting interest to minimize or eliminate an imbalance heading into the close. NYSE Arca, Inc. has closing procedures (NYSE Arca Rule 7.35), but it only conducts a closing cross for securities in which it is the primary listing market as well as for all exchange-listed derivatives.

Additionally, to minimize the potential for price swings at the close, Nasdaq provides that the closing price must be within an acceptable range of 10% of the midpoint of the NBBO, while the NYSE permits the Designated Market Maker in a stock to request that the exchange extend its trading day to not longer than 4:30 p.m. to allow for the solicitation and entry of orders that are specifically solicited to offset an imbalance existing as of 4:00 p.m. To further minimize selling pressure at the NYSE, market-on-close and limit-on-close orders may be entered after 3:45 p.m. only if they offset an imbalance. The NYSE also provides for closing-only orders that only execute if they offset an imbalance. The Commission views these closing cross procedures as a significant change in how orders are handled at the close of trading that could potentially help reduce volatility at the close caused by p.m. settlement.

C2 also notes that SPXPM expiration dates would be predetermined and known in advance and, as a consequence, this awareness could facilitate the generation of contra-side trading interest. See C2 Response Letter, supra note 5, at 3. The potential for reoccurring heightened volatility during these expiration periods may, however, increase the opportunity for manipulation and other abusive trading practices in anticipation of the liquidity constraints. To the extent such volatility was possible, active surveillance and robust enforcement activity by C2 and other self-regulatory organizations around expiration dates would help to address the potential for abusive trading.

Commission remains concerned about the possible effect on volatility at the close of a return to p.m. settlement for cash-settled index options.[82]

C2 cites to the Commission's recent approval of a series of proposals that authorized the expansion of a limited subset of options products to p.m. settlement along with data collected in connection with those products as revealing no evidence that p.m. settlement is likely to have a disruptive effect on volatility at the close.[83] We do not believe that such an inference necessarily can be drawn. These prior approvals involved sub-categories of options that are generally characterized by relatively low volume and thus would not be expected to have a pronounced effect on volatility in the underlying securities at the close on expiration.[84] Further, many of these products are not authorized for listing with expiration on the third Friday of a month when other cash-settled index derivatives expire. For example, C2 mentions CBOE's experience with End-of-Week p.m.-settled options (which it notes is the most heavily traded of CBOE's new special-dated expiration products), and concludes that they fail to show any evidence of disruptive volatility on the settlement days for these contracts.[85] Despite the fact that End-of-Week p.m.-settled options constitute over 7% of CBOE's S&P 500 index option volume, their

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82 The Commission's concern with the potential effect that p.m.-settlement of cash-settled index options could have on the underlying cash equities markets at expiration takes into consideration, as C2 notes, that the use of closing prices by retail and institutions investors is widespread. See C2 Letter 3, supra note 8, at 6. For example, mutual funds use closing prices to calculate their net asset values. Therefore, any event or product that potentially introduces additional volatility into the process of determining closing prices has the potential to harm investors and the public interest.

83 See C2 Letter 3, supra note 8, at 4-5.

84 We note that historical experience with respect to more heavily traded index options and index futures indicates that p.m. settlement carries additional risks for enhanced volatility on settlement days. See, e.g., Hans Stoll and Robert Whaley, Expiration Day Effects of Index Options & Futures (March 15, 1986) (concluding that price effects "are observable on quarterly futures expirations…[and] [t]he volatility of prices is significantly higher on such expiration days, and the stock market indices tend to fall on such expiration days.").

85 See id. at 5.

volume does not compare to that of CBOE's SPX product, which accounts for 60% of all index options trading. For this reason, it is difficult to draw any conclusions about the potential impact of p.m.-settled S&P 500 index options on the market for the underlying component stocks based on the existing p.m.-settled cash-settled options. Further, past experience suggests that the potential impact would be more significant if both index options and index futures (and options on index futures) were offered with p.m. settlement.

While the enhanced closing processes on the primary listing markets may serve to mitigate some of the risk that imbalances on the underlying cash markets prior to the close could lead to excess volatility, the extent of that mitigation is unclear. A pilot program would provide an opportunity to observe and analyze the actual effects on the underlying cash markets of SPXPM. Further, to the extent that trading interest is redirected to the primary markets during times of stress, as one commenter noted, it could be conducive to addressing an imbalance to concentrate liquidity on the primary markets during the close. In particular, those markets conduct automated closing cross procedures, described above,[86] that are designed to more efficiently disseminate information broadly and attract and offset imbalances. We note, however, that despite C2's emphasis on the higher volumes in today's markets compared with the 1980s and the dispersion of trading to more venues,[87] volume statistics are not necessarily indicative or predictive of the level of available liquidity.[88]

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86 See supra note 81.

87 See id.

88 See, e.g., 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, available at http://www.sec.gov/news/studies/2010/marketevents-report.pdf, at page 6 ("As the events of May 6 demonstrate, especially in times of significant volatility, high trading volume is not necessarily a reliable indicator of market liquidity.").

Finally, C2 estimates that 95% of OTC options based on the S&P 500 index are p.m.-settled,[89] and states that SPXPM will attract some of that trading interest. C2 notes that doing so would be consistent with the objectives of the Dodd–Frank Wall Street Reform and Consumer Protection Act and could help mitigate counterparty risks faced by OTC market participants.[90] The Commission agrees that the proposal could benefit investors to the extent it attracts trading in p.m.-settled S&P 500 index options from the opaque OTC market to the more transparent exchange-listed markets.

Further, C2's proposal will offer investors another investment option through which they could obtain and hedge exposure to the S&P 500 stocks. In addition, C2's proposal will provide investors with the ability to trade an option on the S&P 500 index in an all-electronic market, which may better meet the needs of investors who may prefer to trade electronically.[91] Accordingly, C2's proposal will provide investors with added flexibility through an additional product that may be better tailored to meet their particular investment, hedging, and trading needs.

To assist the Commission in assessing any potential impact of a p.m.-settled S&P 500 index option on the options markets as well as the underlying cash equities markets, as discussed above,[92] C2 has proposed to submit data to the Commission on a confidential basis in connection with the pilot. The Commission believes that C2's proposed fourteen-month pilot, together with the data and analysis that C2 will provide to the Commission, will allow C2 and the Commission

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89 See C2 Letter 3, supra note 8, at 13.

90 See id.

91 See, e.g., Exchange Capital Resources Letter, supra note 8, at 3 (stating in part that "…the addition of the SPXPM product will offer the investor greater flexibility and opportunity to participate in S&P 500 option product line.")

92 See Section II (Description of the Proposal).

to monitor for and assess the potential for adverse market effects. Specifically, the data and analysis will assist the Commission in evaluating the effect of allowing p.m. settlement for S&P 500 index options on the underlying component stocks.

In light of the fact that approval of C2's proposal would be a change from a.m. settlement for cash-settled index options, the Commission instituted proceedings to determine whether to approve or disapprove the proposal. In particular, through specific requests for comment and data, the Commission solicited input from market participants on the potential impact on the markets, particularly the underlying cash equities markets.

As discussed above, the Commission remains concerned about the potential impact on the market at expiration for the underlying component stocks for a p.m.-settled, cash-settled index option such as SPXPM. The potential impact today remains unclear, given the significant changes in the closing procedures of the primary markets over the past two decades. The Commission is mindful of the historical experience with the impact of p.m. settlement of cash-settled index derivatives on the underlying cash markets, discussed at length above, but recognizes, however, that these risks may be mitigated today by the enhanced closing procedures that are now in use at the primary equity markets.

Finally, approval of C2's proposal on a pilot basis will enable the Commission to collect current data to assess and monitor for any potential for impact on markets, including the underlying cash equities markets. In particular, the data collected from C2's pilot program will help inform the Commission's consideration of whether the SPXPM pilot should be modified, discontinued, extended, or permanently approved. It also could benefit investors and the public interest to the extent it attracts trading in p.m.-settled S&P 500 index options from the opaque

OTC market to the more transparent exchange-listed markets, where trading in the product will be subject to exchange trading rules and exchange surveillance.

Thus, based on the discussion above, the Commission finds that C2's current proposal is consistent with the Act, including Section 6(b)(5) thereof in that it is designed to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest. In light of the enhanced closing procedures and the potential benefits to investors discussed above, the Commission finds that it is appropriate and consistent with the Act to approve C2's proposal on a pilot basis. The collection of data during the pilot and C2's active monitoring of any effects of SPXPM on the markets will help the Commission assess the impact of p.m. settlement in today's market.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[93] that the proposed rule change (SR-C2-2011-008) be, and hereby is, approved on a 14-month pilot basis only.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

[93] 15 U.S.C. 78s(b)(2).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3272 / September 6, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14529

In the Matter of **GREGORY P. LOLES,** **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 Gregory P. Loles ("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 finding 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. At all relevant times, Loles was the owner and operator of Apeiron Capital Management, Inc. ("Apeiron"), an unregistered investment adviser in Westport, Connecticut. Loles, 52 years old, is a resident of Easton, Connecticut.

2. On July 26, 2011, Loles pleaded guilty to one count of mail fraud in violation of Title 18 of the United States Code, Section 1341, one count of wire fraud in violation of Title 18 of the United States Code, Section 1343, one count of securities fraud in violation of Title 15 of the United States Code, Sections 77q(a) and 77x, and one count of money laundering in violation of Title 18 of the United States Code, Section 1956 before the United States District Court for the District of Connecticut, in United States v. Gregory P. Loles Crim. Action No. 3:10CR247 (MRK).

3. The four counts of the indictment to which Loles pleaded guilty alleged, inter alia, that Loles defrauded investors and obtained money by means of materially false and misleading statements while operating Apeiron as an unregistered investment adviser, that he caused investors to wire transfer funds to Apeiron's account for investment purposes, which he then diverted for his own personal use and benefit, and that he used the United States mails and private commercial interstate carriers to deliver checks to investors as purported interest from investments in order to perpetuate his fraud.

IV.

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

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

> barred from association with any investment adviser, broker, dealer, 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

SECURITIES AND EXCHANGE COMMISSION

17 CFR Chapter II

[Release Nos. 33-9257; 34-65262; 39-2479; IA-3271; IC-29781; File No. S7-36-11]

RETROSPECTIVE REVIEW OF EXISTING REGULATIONS

AGENCY: Securities and Exchange Commission

ACTION: Request for information.

SUMMARY: On July 11, 2011, the President issued Executive Order 13579, "Regulation and Independent Regulatory Agencies," which, among other things, states that independent regulatory agencies, no less than executive agencies, should promote the goal, set forth in Executive Order 13563 of January 18, 2011, of a regulatory system that protects "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." In furtherance of its ongoing efforts to update regulations to reflect market developments and changes in the regulatory landscape, and in light of Executive Order 13579, the Securities and Exchange Commission ("Commission") invites interested members of the public to submit comments to assist the Commission in considering the development of a plan for the retrospective review of its regulations.

DATES: Comments must be submitted on or by: October 6, 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/other.shtml); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-36-11 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 Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-36-11. 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 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: Robert G. Bagnall, Attorney-Fellow, Office of the General Counsel, 202-551-7939.

SUPPLEMENTARY INFORMATION:

Background - Current Commission Processes for Retrospective Analysis of Existing Regulations

Because today's financial markets are dynamic and fast-moving, the regulations affecting those markets and participants in these markets must be reviewed over time and revised as necessary so that the regulations continue to fulfill the Commission's mission. The Commission has long had in place formal and informal processes for the review of existing rules to assess the rules' continued utility and effectiveness in light of continuing evolution of the securities markets and changes in the securities laws and regulatory priorities. Key examples of the ongoing processes of the Commission and staff for review of existing rules include the following:

- The Commission and staff review existing regulations retrospectively as part of studies of broad substantive program areas. For example, in March 2011, the Commission initiated a broad review of offering and reporting requirements affecting issuers. The Commission posted a regulatory review webpage seeking suggestions from the public on "modifying, streamlining, expanding, or repealing existing rules to better promote economic growth, innovation, competitiveness and job creation" consistent with our mandates to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.[1]

- Consistent with section 610(a) of the Regulatory Flexibility Act, the Commission annually reviews each of its rules that has become final within the past ten years. In connection with that review, the Commission publishes a list of the rules scheduled to be

[1] *See* http://www.sec.gov/spotlight/regulatoryreviewcomments.shtml.

reviewed by the Commission staff during the next twelve months.[2] The Commission's stated policy is to review all such final rules to assess their continued utility with a view to identifying those rules in need of modification or even rescission.[3]

- The Commission and staff frequently receive and consider suggestions to review existing rules through various types of communications, ranging from formal petitions for rulemaking to informal correspondence from investors, investor and industry groups, Congress, fellow regulators, the bar and the public.

- The Commission and staff frequently discuss the need to revisit existing rules through formal and informal public engagement, including advisory committees, roundtables, town hall meetings, speeches, conferences and other meetings.

- The Commission staff may identify existing regulations that may merit review through its compliance inspection and examination functions, enforcement investigations, and the receipt of requests for exemptive relief or Commission or staff guidance.

- A significant portion of the Commission's rulemaking activity already involves the consideration of changes to existing rules. Commission staff, in preparing rulemaking proposals, routinely consider related existing rules and assess whether to recommend changes to, or the elimination of, those existing rules.

Executive Order 13579

On July 11, 2011, the President signed Executive Order 13579, "Regulation and Independent Regulatory Agencies." The Executive Order states that independent regulatory agencies, to facilitate the periodic review of existing significant regulations, "should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. The review of existing rules "should also consider

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[2] *See, e.g.*, Regulatory Flexibility Agenda, Securities Act Release No. 9194 (March 3, 2011), 76 FR 40208 (July 7, 2011).

[3] When the Commission implemented the Regulatory Flexibility Act in 1980, it stated that it "intend[ed] to conduct a broader review [than that required by that Act], with a view to identifying those rules in need of modification or even rescission." Securities Act Release No. 6302 (Mar. 20, 1981), 46 FR 19251 (Mar. 30, 1981).

strengthening, complementing, or modernizing rules where necessary or appropriate – including, if relevant, undertaking new rulemaking."[4]

Executive Order 13579 also states that, within 120 days, each independent agency "should develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Request for Comments

In furtherance of its ongoing efforts to update regulations to reflect market developments and changes in the regulatory landscape, and in light of Executive Order 13579, the Commission invites public comments on the development of a plan for retrospective review of existing significant regulations. The Commission welcomes general comments on what the scope and elements of such a plan should be. In addition, the Commission encourages commenters to respond to the questions below:

1. What factors should the Commission consider in selecting and prioritizing rules for review?
2. How often should the Commission review existing rules?
3. Should different rules be reviewed at different intervals? If so, which categories of rules should be reviewed more or less frequently, and on what basis?
4. To what extent does relevant data exist that the Commission should consider in selecting and prioritizing rules for review and in reviewing rules, and how should the Commission assess such data in these processes? To what extent should these processes include reviewing financial economic literature or conducting empirical studies? How can our review processes obtain and consider data and analyses that address the benefits of our rules in preventing fraud or other harms to our financial markets and in otherwise protecting investors?
5. What can the Commission do to modify, streamline, or expand its regulatory review processes?
6. How should the Commission improve public outreach and increase public participation in the rulemaking process?
7. Is there any other information that the Commission should consider in developing and implementing a preliminary plan for retrospective review of regulations?

[4] Memorandum for the Heads of Independent Regulatory Agencies, M-11-28, "Executive Order 13579, "Regulation and Independent Regulatory Agencies" (July 22, 2011), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf

Please note that the Commission is not soliciting comment in this notice on specific existing Commission rules to be considered for review. Any comments regarding a currently pending Commission rule proposal, including proposed amendments to existing rules, should be directed to the comment file for the relevant rule proposal.[5]

We anticipate that any processes set forth in a Commission plan will reflect constraints imposed by limits on resources and competing priorities.[6] Accordingly, the Commission encourages commenters to consider what additional steps, if any, beyond the Commission's current review processes could be implemented effectively and efficiently in light of the Commission's overall resource constraints and responsibilities.

The Commission is issuing this request for information solely for information and program-planning purposes. The Commission will consider the comments submitted and may use them as appropriate in the preparation of a retrospective review plan but does not anticipate responding to each comment submitted. While responses to this request do not bind the Commission to any further actions, all submissions will be made publicly available on [*sec.gov or regulations.gov*].

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: September 6, 2011

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[5] *See* http://www.sec.gov/rules/submitcomments.htm.

[6] Executive Order 13579 states that an agency's plan should reflect "its resources and regulatory priorities and processes."

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65271 / September 6, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3318 / September 6, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14532

In the Matter of **RAN H. FURMAN, CPA** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3) OF THE COMMISSION'S RULES OF PRACTICE**

I.

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

II.

The Commission finds that:

A. RESPONDENT

1. Furman, age 42, resides in San Diego, California. From September 2003 through January 2005, Furman was the Chief Financial Officer ("CFO") of Island Pacific, Inc. ("Island Pacific"), whose common stock was registered with the Commission pursuant to Section

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

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

12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and traded on the American Stock Exchange until it was delisted on October 25, 2005, as a result of the company's failure to file periodic reports. As Island Pacific's CFO, Furman oversaw Island Pacific's financial operations, participated in the preparation of Island Pacific's financial statements, and certified the accuracy of Island Pacific's quarterly and annual reports, which were filed with the Commission. Furman was licensed as a certified public accountant ("CPA") in 1991 by the State of Washington and was employed as an auditor by a public accounting firm for two years. Both prior to and subsequent to his employment with Island Pacific, Furman was the CFO of other public companies. Presently, he performs consulting work through his own company, Black Rock Management, providing interim finance and CFO-type services to smaller companies, including a public company where he previously was the CFO.

B. CIVIL INJUNCTION

1. On July 8, 2011, the United States District Court for the Southern District of California entered a final judgment against Furman, permanently enjoining him from future violations, direct or indirect, of Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13a-14, 13b2-1, and 13b2-2 thereunder, and from aiding and abetting violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder, in the civil action entitled Securities and Exchange Commission v. Retail Pro, Inc. (fka Island Pacific, Inc.), et al., Civil Action Number 08 CV 1620 WQH (RBB). The final judgment also prohibits Furman for a period of seven years from serving as an officer or director of a public company and orders him to pay a third-tier civil penalty of $75,000.

2. On November 18, 2009, the Court entered an Order granting partial summary judgment in the Commission's favor, holding that Furman had violated Section 13(b)(5) of the Exchange Act and Rules 13b2-1 and 13b2-2 thereunder. On February 25, 2011, following trial, a jury returned a verdict in the Commission's favor on its remaining claims for relief, finding that Furman had violated Section 10(b) of the Exchange Act and Rules 10b-5 and 13a-14 thereunder, and had aided and abetted one or more violations by Island Pacific of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder. Subsequently, on June 23, 2011, the Court entered Orders in support of the above final judgment and making findings of fact and conclusions of law concerning the relief sought by the Commission and then awarded by the Court. The Court found that the evidence presented at trial and on summary judgment demonstrated that "Furman played an essential and knowing role in the securities law violations at issue." The Court found, among other things, that:

- Furman knowingly participated in and facilitated the alteration of a license agreement, which permitted Island Pacific to improperly record revenue of $3.9 million in its fiscal second quarter 2004, and then directed Island Pacific to record a second transaction in its fiscal third quarter 2004 that offset the $3.9 million receivable issued in the prior quarter, based on a sublicense agreement Furman knew was not finalized, and that Furman further knew it was improper to record under both Generally Accepted Accounting Principles ("GAAP") and Island Pacific's own revenue recognition policy;

- Furman drafted or was responsible for the means by which Island Pacific's fiscal 2004 second and third quarter and annual financial information was disseminated to the investing public and knew that this information materially misrepresented Island Pacific's financial results and also contained material omissions;
- Furman knowingly and willingly participated in the termination of a whistleblower employee and subsequent efforts to conceal the whistleblower's concerns and allegations of potential fraud from the company's auditors;
- Furman knowingly withheld and concealed other material information from the auditors, including the various versions of the license and sublicense agreements and documents showing that neither transaction was finalized by the end of the quarter in which the transaction was reported;
- Furman signed management representation letters knowing they contained false and/or misleading statements, including that he had no knowledge of any allegations of fraud or suspected fraud affecting the company received in communications from employees or former employees, even though he had received an email from the whistleblower explaining in detail why "certain transactions...appear to be structured in a manner that is intended to inflate revenues for the purpose of boosting the share price," and had responded by firing the whistleblower the next day -- just a few days before signing one management representation letter;
- Furman knowingly circumvented the company's system of accounting controls by signing false management representation letters;
- At each step in the process, Furman had the opportunity to refuse to continue to participate in the infractions and/or concealment of the infractions; and
- The nature of Furman's work as a consultant performing "officer-like" activities presents an ongoing opportunity for him to violate the securities laws.

III.

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

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

IT IS FURTHER ORDERED that Furman may within thirty days after service of this Order file a petition with the Commission to lift the temporary suspension. If the Commission within thirty days after service of the Order receives no petition, the suspension shall become permanent pursuant to Rule 102(e)(3)(ii).

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

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

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. 65270 / September 6, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14531

In the Matter of RICK LAWTON, 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 Rick Lawton ("Lawton" 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. Between 2003 and 2006, Lawton was Secretary and In-house Counsel of Earthly Mineral Solutions, Inc. ("EMS"). In connection with the events set forth below, Lawton acted as an unregistered broker or dealer. Lawton, age 64, resides in Reno, Nevada.

2. On March 16, 2011, a judgment was entered by consent against Lawton, permanently enjoining him from future violations of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, 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. Earthly Mineral Solutions, Inc., et al., Civil Action Number 2:07-CV-01057-JCM-(LRL), in the United States District Court for the District of Nevada.

3. The Commission's complaint alleged that Lawton participated with others in a scheme to defraud investors through the sale of interests in mining claims in the desert near Las Vegas, Nevada. Specifically, Lawton offered investors a guaranteed annual return of 7% to 9% on their investment and told investors that the returns on their investments would be paid out of the revenue generated from the sale of fertilizer produced from the mining claims. In reality, EMS never operated a fertilizer business, but rather paid new investors with prior investors' funds.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Lawton 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

Chairman Schapiro not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 65267 / September 6, 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 DENYING MOTION FOR RECONSIDERATION

I.

On July 11, 2011, we issued an opinion (the "Opinion") sustaining the findings of violations and sanctions imposed by the Financial Industry Regulatory Association ("FINRA") on Applicants Dale Edward Kleinser and FCS Securities ("FCS"), of which Kleinser is the sole proprietor.[1] We found that Applicants failed to file audited financial 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] and failed to show that an exemption permitted them to file

[1] *FCS Sec.*, Securities Exchange Act Rel. No. 64825 (July 11, 2011), __ SEC Docket __.

[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.
(continued...)

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unaudited annual reports for those years. We sustained FINRA's $5,000 fine, imposed on Applicants jointly and severally, and FINRA's four-month suspension of FCS from membership, which will convert to an expulsion from membership if FCS does not file audited annual reports for 2006 and 2007 before the suspension ends. On August 4, 2011, after receiving an extension of time in which to file, Applicants filed a Motion for Reconsideration of the Opinion (the "Motion").[3]

We consider the Motion under Rule 470 of the Commission's Rules of Practice.[4] The "exceptional remedy" of a motion for reconsideration is designed to correct manifest errors of law or fact, or to permit the presentation of newly discovered evidence.[5] Applicants may not use motions for reconsideration to reiterate arguments previously made or to cite authority previously available,[6] nor may they advance arguments that they could have made previously but chose not to make.[7] Absent extraordinary circumstances, a motion for reconsideration is not an appropriate

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[2] (...continued)
See, e.g., Paul Joseph Benz, 58 S.E.C. 34, 41 (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) ("[W]e 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 . . . .'").

[3] In their Motion, Applicants request "more time to respond to the DECISION." We have already determined that an extension until August 4 was appropriate, and Applicants have filed their Motion. Our Rules of Practice do not provide for successive motions for reconsideration. We therefore deny this request for additional time.

[4] 17 C.F.R. § 201.470. The Comment to Rule 470 states that "[a] motion for reconsideration is intended to be an exceptional remedy." Exchange Act Rel. No. 35833 (Jan. 9, 1995), 59 SEC Docket 1546, 1588.

[5] *E.g., Manuel P. Asensio*, Exchange Act Rel. No. 62645 (Aug. 4, 2010), 99 SEC Docket 30990, 30991 (denying reconsideration); *John Gardner Black*, Investment Advisers Act Rel. No. 3040 (June 18, 2010), 98 SEC Docket 29486, 29488 (same); *Perpetual Sec., Inc.*, Exchange Act Rel. No. 56962 (Dec. 13, 2007), 92 SEC Docket 472, 473 (same).

[6] *E.g., Asensio*, 99 SEC Docket at 30991; *Black*, 98 SEC Docket at 29488; *Perpetual*, 92 SEC Docket at 473.

[7] *See KPMG Peat Marwick LLP*, 55 S.E.C. 1, 3 n.7 (2001) (denying reconsideration; noting that "settled principles of federal court practice establish that a party may not seek rehearing of an appellate decision in order to advance an argument that it could have made previously but elected" not to (citing cases) and holding that a party is foreclosed from

(continued...)

vehicle for the submission of new evidence,[8] and we will not accept such additional evidence unless "'the movant could not have known about or adduced [the evidence] before entry of the order subject to the motion for reconsideration.'"[9] Applicants' Motion does not meet this rigorous standard.

In general, Applicants' Motion reiterates arguments already made and specifically considered by us, including the assertions that (1) certain purported transactions we found to lack economic substance instead reflect genuine sales and purchases, (2) Applicants should have been allowed to adduce certain evidence after the hearing because they had no reason to introduce the evidence at an earlier stage of the proceeding, and (3) FINRA is impeding Applicants' efforts to show that they are entitled to file unaudited annual reports. We will not readdress those matters here.

The only new point in Applicants' Motion that requires a brief response is the argument that documents establishing the validity of certain business relationships relevant to the issue whether the purported transactions at issue had any economic substance "were in SEC files years before the exemption was even needed, or found, consider[ed], or employed." Thus, Applicants argue, "FINRA and SEC, have proof of everything [Applicants] have said, from the beginning." Applicants attached to their Motion a letter from Kleinser to the NASD dated September 11, 1997 and a letter to Kleinser from an examiner in our Office of Small Business Policy dated May 4, 1994 (together, the "Attachments") that, they contend, support this argument.

Applicants have not shown that they could not have known about or adduced the Attachments (or other documents that allegedly were in the Commission's files "years before the exemption was . . . employed") before we issued the Opinion. We therefore will not accept them as newly discovered evidence.[10] Moreover, Applicants' argument that FINRA or the Commission

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7 (...continued)
resurrecting, as part of a motion for reconsideration, an argument made and lost below and abandoned on review).

8 *John Montelbano*, 56 S.E.C. 372, 378 (2003) (denying reconsideration).

9 *Perpetual*, 92 SEC Docket at 473 n.4 (quoting *Feeley & Wilcox Asset Mgmt. Corp.*, 56 S.E.C. 1264, 1269 n.18 (2003) (denying reconsideration)).

10 Even if we were to consider the Attachments, they do not establish that the purported transactions at issue had economic substance. The statement in the 1997 letter that "FCS Ventures, Inc. has exclusive control over shareholder assets as well as the assets of FCS Ventures" does not establish, as Applicants argued, that Ventures shareholders held separate transferable interests in notes for which FCS Ventures was identified as the promissory note (continued...)

had documents on file that would support their position could have been made earlier and therefore is not properly raised in a motion for reconsideration.[11]

Therefore, IT IS ORDERED that Applicants' August 4, 2011 Motion for Reconsideration be, and it hereby is, denied.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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10 (...continued)
holder, and in any event, our finding that the purported transactions lacked economic substance was based on many aspects of the purported transactions, not just that one. The 1994 letter shows that a staff examiner found FCS Ventures's Form D filing deficient, a matter with no recognizable relevance to the filing of unaudited annual reports at issue in this proceeding.

11 *Perpetual Sec., Inc.*, 92 SEC Docket at 475 (citing *Feeley & Wilcox*, 56 S.E.C. at 1269 n.18). If this argument were properly before us, we would reject it. Applicants could not have satisfied their burden of proof that they were entitled to rely on the exemption by such sweeping references to unspecified documents allegedly on file with the Commission or FINRA.

Applicants include in their Motion a request for access to a "case file" pertaining to certain requests for no-action relief, contending that the file "is far more than [the] No-Action Letters" discussed in the Opinion. We have already considered – and, in the Opinion, we rejected – Applicants' reliance on the No-Action Letters. There is no reason to think that any documents contained in such a case file would be relevant to this proceeding, and in any event, the time for introducing new evidence in this proceeding is long past. We therefore deny Applicants' request for access to the file.

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65273 / September 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14533

In the Matter of BSK & Tech, 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 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 BSK & Tech, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. BSK & Tech, Inc. (CIK No. 1446606) is a revoked Nevada corporation located in Seoul, South Korea with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BSK & Tech 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 January 23, 2009, which reported a net loss of over $231,000 for the twelve month period ended December 31, 2007. As of August 26, 2011, the company's stock (symbol "BSKT") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports, and failed to heed delinquency letters sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations or, through its failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

4. As a result of the foregoing, Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 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 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 Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice [17 C.F.R. § 201.220(b)].

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

This Order shall be served forthwith upon Respondent personally or by certified, registered, or Express Mail, or by other means permitted by the Commission 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 not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65274 / September 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14534

In the Matter of **American Capital Partners Limited, Inc., American Educators Financial Corp. (n/k/a Asia Ventures Corp.), Austral Pacific Energy Ltd., Bidville, Inc. (n/k/a PrimEdge, Inc.), Bio-Warm Corp. (n/k/a PHI Gold Corp.), Black Rock Golf Corp. (a/k/a Aurus Corp.), Broadband Wireless International Corp., and Buffalo Gold Ltd.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents American Capital Partners Limited, Inc., American Educators Financial Corp. (n/k/a Asia Ventures Corp.), Austral Pacific Energy Ltd., Bidville, Inc. (n/k/a PrimEdge, Inc.), Bio-Warm Corp. (n/k/a PHI Gold Corp.), Black Rock Golf Corp. (a/k/a Aurus Corp.), Broadband Wireless International Corp., and Buffalo Gold Ltd.

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II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. American Capital Partners Limited, Inc. (CIK No. 1114098) is a Nevada corporation located in West Palm Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). American Product is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of over $4,000 for the prior three months. As of August 29, 2011, the company's stock (symbol "APRJ") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. American Educators Financial Corp. (n/k/a Asia Ventures Corp.) (CIK No. 320349) is a void Delaware corporation located in Troy, Alabama with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). American Educators 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, 1993, which reported a net loss of over $2.1 million for the prior nine months. On March 31, 1994, American Educators Financial filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Middle District of Alabama, and the case was terminated on October 12, 1994. On December 22, 1989, a permanent injunction was entered against American Educators Financial, enjoining the company from violations of the Exchange Act, including Section 13(a). As of August 29, 2011, the company's stock (symbol "AVEN") was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Austral Pacific Energy Ltd. (CIK No. 1041829) is a British Columbia corporation located in Wellington, New Zealand with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Austral Pacific Energy is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2007, which reported a net loss of over $19 million for the prior twelve months. As of August 29, 2011, the company's stock (symbol "AUSPF") was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Bidville, Inc. (n/k/a PrimEdge, Inc.) (CIK No. 1081275) is a revoked Nevada corporation located in Boca Raton, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Bidville is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of over $2 million for the prior nine months. As of August 29, 2011, the company's stock (symbol "PEDI") 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. Bio-Warm Corp. (n/k/a PHI Gold Corp.) (CIK No. 1121459) is a defaulted Nevada corporation located in Huntington Beach, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Bio-Warm 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 May 31, 2005, which reported a net loss of over $238,000 for the prior three months. As of August 29, 2011, the company's stock (symbol "PHIG") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception or Exchange Act Rule 15c2-11(f)(3).

6. Black Rock Golf Corp. (a/k/a Aurus Corp.) (CIK No. 1012627) is a forfeited Delaware corporation located in Englewood, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Black Rock Golf is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 1998, which reported a net loss of over $713,000 for the prior three months. On July 17, 1998, Black Rock Golf filed a voluntary Chapter 7 petition in the U.S. Bankruptcy Court for the Division of Colorado, and the case was terminated on May 31, 2000. Aurus Corp. claims it is a successor to Black Rock Golf, and as of August 29, its stock (symbol "AURC") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). Based upon Delaware state corporate records, it appears that Black Rock Golf's corporate identity was highjacked by Aurus Corp., which is not a legitimate corporate successor. Aurus Corp. has not separately registered its securities under Exchange Act Section 12(g). A simultaneous trading suspension against Aurus with the 12(j) proceeding against Black Rock Golf is appropriate because Aurus purports to be the successor to delinquent issuer Black Rock Golf.

7. Broadband Wireless International Corp. (CIK No. 12388) 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). Broadband Wireless International 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 March 31, 2006, which reported a net loss of over $224,000 for the prior twelve months. On December 28, 2001, Broadband Wireless International filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Oklahoma, and the case was terminated on May 4, 2004. As of August 29, 2011, the company's stock (symbol "BBAN") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. Buffalo Gold Ltd. (CIK No. 1090053) is an Alberta corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Buffalo Gold 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, 2007, which reported a net loss of over $14.8 million (Canadian) for the prior twelve months. As of August 29, 2011, the company's stock (symbol "BYBUF") 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

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

10. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports. Rule 13a-16 requires foreign private issuers 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.

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

III.

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

A. Whether the allegations contained in Section II 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

INVESTMENT ADVISERS ACT OF 1940
Release No. 3273 / September 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14536

In the Matter of **MONTFORD AND COMPANY, INC. d/b/a MONTFORD ASSOCIATES,** **and** **ERNEST V. MONTFORD, SR.,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f), AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Montford and Company, Inc. d/b/a Montford Associates ("Montford Associates") and Sections 203(f) and 203(k) of the Advisers Act against Ernest V. Montford, Sr. ("Montford," together with Montford Associates, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. <u>RESPONDENTS</u>

1. *Montford Associates* is a registered investment adviser chartered in Georgia with a principal place of business in Atlanta, Georgia.

2. *Montford,* age 64, resides in Atlanta, Georgia. During the relevant time period, Montford was President, Chief Executive Officer, Chief Compliance Officer, and 100% owner of Montford Associates.

B. OTHER RELEVANT ENTITIES

3. *SJK Investment Management, LLC* ("SJK") is a registered investment adviser, chartered in North Carolina with a principal place of business in Greensboro, North Carolina.

4. *Stanley J. Kowalewski* ("Kowalewski"), age 38, resides in Summerfield, North Carolina. During the relevant time period, Kowalewski was Chief Executive Officer, Chief Investment Officer, and 100% owner of SJK. On January 6, 2011, the Commission filed an emergency civil injunctive action charging Kowalewski and SJK with securities fraud, and obtained a temporary restraining order and asset freeze.

C. ALLEGATIONS

Respondents' Claims of Independence

5. During the relevant period, Respondents provided fee-based investment advisory services to institutional investors. These services included, among others, recommending investment managers to clients, monitoring manager performance, and reporting quarterly to clients on manager performance. In connection with providing their services, Respondents claimed to provide "independent" investment advice.

6. Montford Associates' Forms ADV – filed with the Commission in 2009 and 2010, and signed by Montford – included representations regarding Respondents' independence. Item 8.B.3 of Part I of the Forms ADV filed on May 8, 2009 and March 26, 2010 disclosed that Respondents did not have any sales interests in the securities they recommended. Item 13 of Part II, as filed on March 4, 2009 and March 29, 2010, stated that Respondents received no economic benefit from a non-client in connection with giving advice to clients. Schedule F of those same filings represented that Respondents would "disclose to clients … all matters that reasonably could be expected to impair [the firm's] ability to make unbiased and objective recommendations." Also in Schedule F, the Forms ADV specifically disclosed that Respondents did "not accept **any** fees from investment managers or mutual funds." (Emphasis supplied.) During the relevant period, Respondents made this disclosure directly to clients.

7. Montford Associates' promotional materials represented that the firm was "a source of independent investment advice for institutional investors." Montford Associates' website contained articles touting the benefits of an "independent" investment adviser. In one, Montford Associates states "[t]he best investment advisors are *independent* – without affiliations to … money managers." In another, Montford states clients "need a strategy they can trust, because investments … should be based on merit, not … undisclosed compensation." Finally, Montford Associates' letterhead claimed that the firm is an "Independent Investment Management Consultant."

Respondents Received Fees for Promoting SJK Without Disclosing Those Fees to Clients

8. In 2010, Montford Associates received two payments totaling $210,000 from Kowalewski and SJK. These payments represented approximately 25 percent of Montford Associates' total revenue in 2010. The chronology of payments and related services is set forth below.

9. As of June 2009, eleven Montford Associates clients were invested with Kowalewski, who at that time was associated with a registered investment adviser based in the Washington, D.C. area (the "DC Adviser"). In July 2009, Kowalewski left the DC Adviser and created SJK.

10. Beginning in approximately May or June 2009, Montford met with clients to recommend that they stay with Kowalewski and transfer their funds from the DC Adviser to SJK. Through his initial meetings with clients, Montford became aware that his clients were concerned that Kowalewski was leaving the DC Adviser to start his own company.

11. In August 2009, Montford told Kowalewski that Montford Associates would need to get paid for his work, which included recommending SJK and assisting in the transfer of client funds from the DC Adviser. In response, Kowalewski agreed to pay Montford Associates. At some later point before November 2009, Kowalewski informed Montford that two payments would be made: one of $130,000 near the end of 2009, and one after SJK had finished its first year of business (in late 2010). Montford understood that the first payment would be made after Montford Associates' clients invested with SJK.

12. Before and continuing after the payment plan was established, Montford recommended to clients that they invest with Kowalewski. Montford recommended that each of Montford Associates' eleven clients invested with Kowalewski at the DC Adviser transfer their investments to the SJK-managed funds or accounts.

13. Client funds were initially transferred from the DC Adviser to SJK between August and October 2009. After Montford Associates' clients had transferred to SJK, on November 30, 2009, Montford Associates invoiced SJK for $130,000. The invoice stated: "Marketing and Syndication Fee for the SJK Investment Management LLC Launch." SJK paid Montford Associates the entire amount by wire transfer on January 4, 2010.

14. After Montford Associates received this initial payment, Montford recommended that clients invest additional funds with SJK. Specifically, in March, June, July, and October 2010, respectively, certain Montford Associates clients made additional investments in SJK-advised funds based on Montford's recommendation. Additionally, in September 2010, Montford dissuaded one client from withdrawing its investment from SJK. Montford apprised Kowalewski of his efforts, forwarding him related correspondence.

15. Montford and Kowalewski agreed on an additional $80,000 as the second payment for Montford Associates' services. On November 1, 2010, Montford invoiced SJK $80,000 for "Marketing and Syndication Fee for the SJK Investment LLC Launch." SJK wired the funds to Montford Associates on that same day.

16. In total, Respondents' clients invested over $80 million with SJK. Respondents' clients' assets represented approximately 90 percent of SJK's total assets under management.

17. Respondents' services to SJK and Kowalewski, and the related $210,000 in fees, was material information to Respondents' clients, but at no time before January 2011, when the Commission filed an emergency action against Kowalewski and SJK, did Respondents disclose the services and fees to their clients.[1] Respondents also failed to update Item 8.B.3 of Part I of the Form ADV filed on May 8, 2009 and Item 13 and Schedule F of Part II filed on March 4, 2009, when those disclosures became materially inaccurate. Furthermore, Item 8.B.3 of Part I of Montford Associates' Form ADV filed on March 26, 2010 and Item 13 and Schedule F of Part II filed on March 29, 2019, were materially false when filed.

D. VIOLATIONS

18. As a result of the conduct described above, Respondents willfully violated Sections 206(1) and 206(2) of the Advisers Act by employing devices, schemes or artifices to defraud clients or engaging in transactions, practices or courses of business that defrauded clients or prospective clients.

19. As a result of the conduct described above, Respondents willfully violated Section 207 of the Advisers Act by making untrue statements of a material fact in registration applications or reports Respondents filed with the Commission and willfully omitting to state in such applications or reports material facts which were required to be stated therein.

20. As a result of the conduct described above, Respondent Montford Associates willfully violated, and Respondent Ernest Montford willfully aided and abetted and caused Montford Associates' violations of, Section 204 of the Advisers Act and Rule 204-1(a)(2) thereunder by failing to update registration applications or reports Respondents filed with the Commission when the information contained therein became materially inaccurate.

III.

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

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

[1] On January 6, 2011, the Commission filed an emergency civil injunctive action charging Kowalewski and SJK with securities fraud, and obtained a temporary restraining order and asset freeze. On February 2, 2011, the Commission obtained an order appointing a receiver over the assets of SJK and Kowalewski. As alleged in the Commission's complaint, Kowalewski misappropriated the money invested with SJK. Specifically, the Commission's complaint alleges that Kowalewski caused investors to pay SJK improper fees, which Kowalewski, in part, used to pay his personal expenses and SJK's operating expenses. On June 29, 2011, Kowalewski was permanently enjoined from violating the federal securities laws.

B. What, if any, remedial action is appropriate in the public interest against Respondent Montford Associates pursuant to Section 203(e) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

C. What, if any, remedial action is appropriate in the public interest against Respondent Ernest Montford pursuant to Section 203(f) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

D. Whether, pursuant to Section 203(k) of the Advisers Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 206(1), 206(2), 207, and 204 of the Advisers Act and Rule 204-1(a)(2) thereunder and whether Respondents should be ordered to pay disgorgement and civil penalties pursuant to Section 203 of the Advisers Act.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 7, 2011

In the Matter of **American Capital Partners Limited, Inc.,** **American Educators Financial Corp. (n/k/a Asia Ventures Corp.),** **Austral Pacific Energy Ltd.,** **Bidville, Inc. (n/k/a PrimEdge, Inc.),** **Bio-Warm Corp. (n/k/a PHI Gold Corp.),** **Black Rock Golf Corp. (a/k/a Aurus Corp.),** **Broadband Wireless International Corp.,** **BSK & Tech, Inc., and** **Buffalo Gold 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 American Capital Partners Limited, Inc. because it has not filed any periodic reports since the period ended September 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of American Educators Financial Corp. (n/k/a Asia Ventures Corp.) because it has not filed any periodic reports since the period ended September 30, 1993.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Austral Pacific Energy Ltd. because it has not filed any periodic reports since the period ended December 31, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Bidville, Inc. (n/k/a PrimEdge, Inc.) because it has not filed any periodic reports since the period ended September 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Bio-Warm Corp. (n/k/a PHI Gold Corp.) because it has not filed any periodic reports since the period ended May 31, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Black Rock Gold Corp. (a/k/a Aurus Corp.) because it has not filed any periodic reports since the period ended March 31, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Broadband Wireless International Corp. 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 BSK & Tech, Inc. because it has not filed any periodic reports since it filed a registration statement on January 23, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Buffalo Gold Ltd. because it has not filed any periodic reports since the period ended December 31, 2007.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed 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 September 7, 2011, through 11:59 p.m. EDT on September 20, 2011.

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 EXCHANGE ACT OF 1934
Release No. 65301 / September 8, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-13828

In the Matter of Comverse Technology, Inc., Respondent.	ORDER ON THE BASIS OF COMVERSE TECHNOLOGY, INC.'S OFFER OF SETTLEMENT, IMPLEMENTING SETTLEMENT

I.

The Securities and Exchange Commission ("Commission") issued an Order Instituting Administrative Proceedings and Notice of Hearing Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Comverse Technology, Inc. ("Comverse" or "Respondent") on March 23, 2010.

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of this proceeding and any other proceeding brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the entry of this Order, the following findings, conditions for company filings and consequent remedies set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

1. Comverse (CIK No. 0000803014) is a New York corporation based in New York, New York. Its common stock is registered with the Commission pursuant to Exchange Act Section 12(g) and is quoted on the Pink Sheets under the symbol CMVT.PK.

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

2. Comverse is required to file reports pursuant to Exchange Act Section 13(a) and the rules and regulations thereunder, including Exchange Act Rules 13a-1 and 13a-13.

3. Prior to the institution of this proceeding, Comverse consented to the entry of final judgment against it in the action encaptioned SEC v. Comverse Technology, Inc., Civil Action No. 09-2588-DBH (E.D.N.Y.), pursuant to which Comverse was:

a. ordered to "become current in its periodic reporting requirements pursuant to [Exchange Act] Section 13(a) and Rules 12b-20, 13a-1, and 13a-13 thereunder, by the earlier of February 8, 2010 or the date on which [Comverse] files a restatement" and

b. permanently enjoined from, among other things, violating directly or indirectly Exchange Act Section 13(a) and the rules and regulations thereunder, "by failing to file, or by filing or causing to be filed, with the Commission" any report required by Exchange Act Section 13(a) and the rules and regulations.

The United States District Court for the Eastern District of New York entered the final judgment against Comverse on June 25, 2009 ("Injunction Order").

4. When this proceeding was instituted on March 23, 2010, Comverse was in violation of the Injunction Order and Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission, in that it had not filed an annual report on Form 10-K since April 20, 2005 or quarterly reports on Form 10-Q since December 12, 2005. At the time, it was delinquent in filing the following four annual reports on Form 10-K and twelve quarterly reports on Form 10-Q:

a. an annual report on Form 10-K for the fiscal year ended January 31, 2006 ("Fiscal Year 2005"), which was due May 2, 2006;

b. a quarterly report on Form 10-Q for the quarter ended April 30, 2006 ("First Quarter 2006"), which was due June 14, 2006;

c. a quarterly report on Form 10-Q for the quarter ended July 31, 2006 ("Second Quarter 2006"), which was due September 16, 2006;

d. a quarterly report on Form 10-Q for the quarter ended October 31, 2006 ("Third Quarter 2006"), which was due December 16, 2006;

e. an annual report on Form 10-K for the fiscal year ended January 31, 2007 ("Fiscal Year 2006"), which was due April 17, 2007;

f. a quarterly report on Form 10-Q for the quarter ended April 30, 2007 ("First Quarter 2007"), which was due June 16, 2007;

g. a quarterly report on Form 10-Q for the quarter ended July 31, 2007 ("Second Quarter 2007"), which was due September 15, 2007;

h. a quarterly report on Form 10-Q for the quarter ended October 31, 2007 ("Third Quarter 2007"), which was due December 15, 2007;

i. an annual report on Form 10-K for the fiscal year ended January 31, 2008 ("Fiscal Year 2007"), which was due April 15, 2008;

j. a quarterly report on Form 10-Q for the quarter ended April 30, 2008 ("First Quarter 2008"), which was due June 14, 2008;

k. a quarterly report on Form 10-Q for the quarter ended July 31, 2008 ("Second Quarter 2008"), which was due September 14, 2008;

l. a quarterly report on Form 10-Q for the quarter ended October 31, 2008 ("Third Quarter 2008"), which was due December 15, 2008;

m. an annual report on Form 10-K for the fiscal year ended January 31, 2009 ("Fiscal Year 2008"), which was due April 16, 2009;

n. a quarterly report on Form 10-Q for the quarter ended April 30, 2009 ("First Quarter 2009"), which was due June 14, 2009;

o. a quarterly report on Form 10-Q for the quarter ended July 31, 2009 ("Second Quarter 2009"), which was due September 14, 2009; and

p. a quarterly report on Form 10-Q for the quarter ended October 31, 2009 ("Third Quarter 2009"), which was due December 15, 2009.

5. After this proceeding was commenced, Comverse remained in violation of the Injunction Order and continued to be non-compliant with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission, in that it did not timely file the following two annual reports on Form 10-K and four quarterly reports on Form 10-Q:

a. an annual report on Form 10-K for the fiscal year ended January 31, 2010 ("Fiscal Year 2009"), which was due April 16, 2010;

b. a quarterly report on Form 10-Q for the quarter ended April 30, 2010 ("First Quarter 2010"), which was due June 14, 2010;

c. a quarterly report on Form 10-Q for the quarter ended July 31, 2010 ("Second Quarter 2010"), which was due September 14, 2010;

d. a quarterly report on Form 10-Q for the quarter ended October 31, 2010 ("Third Quarter 2010"), which was due December 15, 2010;

e. an annual report on Form 10-K for the fiscal year ended January 31, 2011 ("Fiscal Year 2010"), which was due April 16, 2011; and

f. a quarterly report on Form 10-Q for the quarter ended April 30, 2011 ("First Quarter 2011"), which was due June 14, 2011.

6. On October 4, 2010, Comverse filed with the Commission an annual report on Form 10-K which contained audited annual consolidated financial statements for Fiscal Years 2005 to 2008; unaudited condensed selected financial information for each of the four fiscal quarters in Fiscal Years 2007 and 2008; and unaudited restated selected financial information for the fiscal year ended January 31, 2005, with restatement adjustments for prior years going back to fiscal year ended December 31, 1991.

7. On January 25, 2011, Comverse filed with the Commission its Fiscal Year 2009 Form 10-K. This filing was late.

8. On May 31, 2011, Comverse filed with the Commission its Fiscal Year 2010 Form 10-K. This filing was late.

9. On June 22, 2011, Comverse filed with the Commission its First Quarter 2011 Form 10-Q. This filing was late.

10. Comverse continues to be in violation of Injunction Order today.

IV.

On July 26, 2011, Comverse submitted an Offer of Settlement in which it agreed to the following:

A. Comverse shall file with the Commission, in accordance with the technical and substantive requirements for EDGAR documents, and in accordance with the requirements of Exchange Act Section 13(a) and the rules and regulations thereunder:

i. Quarterly reports on Form 10-Q for the quarters ended April 30, 2010, July 31, 2010, and October 31, 2010, by no later than 5:30 p.m. EDT on September 9, 2011; and

ii. A quarterly report on Form 10-Q for the quarter ending July 31, 2011, on time, meaning by no later than 5:30 p.m. EDT on September 9, 2011, or within the extended period of five calendar days permitted by Exchange Act Rule 12b-25, if Comverse files a Form 12b-25.[2]

B. If Comverse makes all of the filings by the deadlines set forth in Paragraph IV.A., and the Division of Enforcement ("Division") has not informed Comverse of any deficiencies pursuant to Paragraph IV.D., the Division will notify the Office of the Secretary of the Commission of that fact, and the Secretary will thereupon

[2] For the Form 10-Q for the quarter ending July 31, 2011, Comverse may rely on Rule 405(a)(2)(ii) of Regulation S-T when submitting the Interactive Data File that is required to comply with Paragraphs (d)(1) through (d)(4) and (e)(1) and (e)(2) of Rule 405 of Regulation S-T.

enter, without further notice, an order of the Commission in the form attached hereto as Exhibit A, terminating this proceeding without the requested remedy of revocation or suspension of registration.

C. If Comverse fails to make any of the filings by the deadlines set forth in Paragraph IV.A., the Division will notify the Office of the Secretary of the Commission of that fact, and the Secretary will thereupon enter, without further notice, an order of the Commission pursuant to Exchange Act Section 12(j), in the form attached hereto as Exhibit B, that finds Comverse to have failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder, and revokes the registration of each class of Comverse's securities registered with the Commission pursuant to Exchange Act Section 12.

D. If, by the deadlines set forth in Paragraph IV.A., Comverse makes each of the required filings but any filing is in a form that the Division, in consultation with the Division of Corporation Finance and any other appropriate Commission staff, but in the Division's sole discretion, determines is not in accordance with the technical and substantive requirements for EDGAR documents, or not in accordance with the requirements of Exchange Act Section 13(a) or the rules and regulations thereunder:

i. The Division will inform Comverse of the nature of the deficiency/ies in any such filing within five business days from the date of the filing;

ii. Comverse will have until the later of (i) the fifth business day after the date of such notice, or (ii) the deadline by which such filing is due as set forth in Paragraph IV.A., to remedy the identified deficiency/ies and to resubmit such filing in accordance with the technical and substantive requirements for EDGAR documents, and in accordance with the requirements of Exchange Act Section 13(a) and the rules and regulations thereunder;

iii. If, after Comverse resubmits such filing pursuant to Paragraph IV.D.ii., the Division, in consultation with the Division of Corporation Finance and any other appropriate Commission staff, but in the Division's sole discretion, determines that any such filing continues to be not in accordance with the technical and substantive requirements for EDGAR documents, or not in accordance with the requirements of Exchange Act Section 13(a) or the rules and regulations thereunder, as previously noticed, the Division will notify the Secretary's Office of that fact and the Secretary will thereupon enter, without further notice, an order of the Commission pursuant to Exchange Act Section 12(j), in the form attached hereto as Exhibit B.

iv. If, after Comverse resubmits such filing pursuant to Paragraph IV.D.ii., and Comverse remedies the identified deficiency/ies, the Division will notify the Office of the Secretary of the Commission of that fact, and the

Secretary will thereupon enter, without further notice, an order of the Commission in the form attached hereto as Exhibit A.

V.

On the basis of the foregoing, IT IS ORDERED THAT:

Comverse's Offer of Settlement is accepted and a subsequent order resolving the proceeding will be issued in accordance with the terms of the Offer of Settlement described above.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

EXHIBIT A

UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

ADMINISTRATIVE PROCEEDING
File No. 3-13828

In the Matter of **Comverse Technology, Inc.,** **Respondent.**	**ORDER TERMINATING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

It is hereby ORDERED that this administrative proceeding is terminated and that final judgment shall enter without the imposition of a remedy pursuant to Section 12(j) of the Securities Exchange Act of 1934.

By the Commission.

Elizabeth M. Murphy
Secretary

EXHIBIT B

UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

ADMINISTRATIVE PROCEEDING
File No. 3-13828

In the Matter of **Comverse Technology, Inc.,** **Respondent.**	**ORDER MAKING FINDINGS AND REVOKING REGISTRATION OF SECURITIES PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors to institute this Order Making Findings and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") pursuant to the Offer or Settlement submitted by Comverse Technology, Inc. ("Comverse" or "Respondent"), which was accepted by the Commission in an Order on the Basis of Comverse Technology, Inc.'s Offer of Settlement filed on [MONTH, DAY], 2011 (the "[MONTH, YEAR] Order").

II.

Solely for the purpose of this proceeding and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the entry of this Order, as set forth below.

III.

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

1. Comverse (CIK No. 0000803014) is a New York corporation based in New York, New York. Its common stock is registered with the Commission pursuant to Exchange Act Section 12(g) and is quoted on the Pink Sheets under the symbol CMVT.PK.

2. Comverse is required to file reports pursuant to Exchange Act Section 13(a) and the rules and regulations thereunder, including Exchange Act Rules 13a-1 and 13a-13.

3. Prior to the institution of this proceeding, Comverse consented to the entry of final judgment against it in the action encaptioned SEC v. Comverse Technology, Inc., Civil Action No. 09-2588-DBH (E.D.N.Y.), pursuant to which Comverse was:

a. ordered to "become current in its periodic reporting requirements pursuant to [Exchange Act] Section 13(a) and Rules 12b-20, 13a-1, and 13a-13 thereunder, by the earlier of February 8, 2010 or the date on which [Comverse] files a restatement" and

b. permanently enjoined from, among other things, violating directly or indirectly Exchange Act Section 13(a) and the rules and regulations thereunder, "by failing to file, or by filing or causing to be filed, with the Commission" any report required by Exchange Section 13(a) and the rules and regulations.

The United States District Court for the Eastern District of New York entered the final judgment against Comverse on June 25, 2009 ("Injunction Order").

4. When this proceeding was instituted on March 23, 2010, Comverse was in violation of the Injunction Order and Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission, in that it had not filed an annual report on Form 10-K since April 20, 2005 or quarterly reports on Form 10-Q since December 12, 2005. At the time, it was delinquent in filing the following four annual reports on Form 10-K and twelve quarterly reports on Forms 10-Q:

a. an annual report on Form 10-K for the fiscal year ended January 31, 2006 ("Fiscal Year 2005"), which was due May 2, 2006;

b. a quarterly report on Form 10-Q for the quarter ended April 30, 2006 ("First Quarter 2006"), which was due June 14, 2006;

c. a quarterly report on Form 10-Q for the quarter ended July 31, 2006 ("Second Quarter 2006"), which was due September 16, 2006;

d. a quarterly report on Form 10-Q for the quarter ended October 31, 2006 ("Third Quarter 2006"), which was due December 16, 2006;

e. an annual report on Form 10-K for the fiscal year ended January 31, 2007 ("Fiscal Year 2006"), which was due April 17, 2007;

f. a quarterly report on Form 10-Q for the quarter ended April 30, 2007 ("First Quarter 2007"), which was due June 16, 2007;

g. a quarterly report on Form 10-Q for the quarter ended July 31, 2007 ("Second Quarter 2007"), which was due September 15, 2007;

h. a quarterly report on Form 10-Q for the quarter ended October 31, 2007 ("Third Quarter 2007"), which was due December 15, 2007;

i. an annual report on Form 10-K for the fiscal year ended January 31, 2008 ("Fiscal Year 2007"), which was due April 15, 2008;

j. a quarterly report on Form 10-Q for the quarter ended April 30, 2008 ("First Quarter 2008"), which was due June 14, 2008;

k. a quarterly report on Form 10-Q for the quarter ended July 31, 2008 ("Second Quarter 2008"), which was due September 14, 2008;

l. a quarterly report on Form 10-Q for the quarter ended October 31, 2008 ("Third Quarter 2008"), which was due December 15, 2008;

m. an annual report on Form 10-K for the fiscal year ended January 31, 2009 ("Fiscal Year 2008"), which was due April 16, 2009;

n. a quarterly report on Form 10-Q for the quarter ended April 30, 2009 ("First Quarter 2009"), which was due June 14, 2009;

o. a quarterly report on Form 10-Q for the quarter ended July 31, 2009 ("Second Quarter 2009"), which was due September 14, 2009; and

p. a quarterly report on Form 10-Q for the quarter ended October 31, 2009 ("Third Quarter 2009"), which was due December 15, 2009.

5. While this proceeding was pending, Comverse remained in violation of the Injunction Order and Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission, in that it had not timely filed the following two annual reports on Form 10-K and four quarterly reports on Form 10-Q:

a. an annual report on Form 10-K for the fiscal year ended January 31, 2010 ("Fiscal Year 2009"), which was due April 16, 2010;

b. a quarterly report on Form 10-Q for the quarter ended April 30, 2010 ("First Quarter 2010"), which was due June 14, 2010;

c. a quarterly report on Form 10-Q for the quarter ended July 31, 2010 ("Second Quarter 2010"), which was due September 14, 2010;

d. a quarterly report on Form 10-Q for the quarter ended October 31, 2010 ("Third Quarter 2010"), which was due December 15, 2010;

e. an annual report on Form 10-K for the fiscal year ended January 31, 2011 ("Fiscal Year 2010"), which was due April 16, 2011; and

f. a quarterly report on Form 10-Q for the quarter ended April 30, 2011 ("First Quarter 2011"), which was due June 14, 2011.

6. On October 4, 2010, Comverse filed with the Commission an annual report on Form 10-K which contained audited annual consolidated financial statements for Fiscal Years 2005 to 2008; unaudited condensed selected financial information for each of the four fiscal quarters in Fiscal Years 2007 and 2008; and unaudited restated selected financial information for the fiscal year ended January 31, 2005, with restatement adjustments for prior years going back to fiscal year ended December 31, 1991.

7. On January 25, 2011, Comverse filed with the Commission its Fiscal Year 2009 Form 10-K. This filing was late.

8. On May 31, 2011, Comverse filed with the Commission its Fiscal Year 2010 Form 10-K. This filing was late.

9. On June 22, 2011, Comverse filed with the Commission its First Quarter 2011 Form 10-Q. This filing was late.

10. [INSERT PARAGRAPH(S) REGARDING NON-DEFICIENT FILINGS MADE BY THE DEADLINE SET FORTH IN THE OFFER OF SETTLEMENT.]

11. Comverse remains in violation of the Injunction Order and continues not to be compliant with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder, while its common stock is registered with the Commission, in that:

a. Comverse failed to file [FORM(S) DESCRIPTION] by its/their required due date of [DATE] as described in Section IV.A. of the [MONTH, YEAR] Order; and/or

b. The Division of Enforcement has determined that Comverse's [FORM(S) DESCRIPTION] were not [made in accordance with the technical and substantive requirements for EDGAR documents, and/or in accordance with the requirements of Section 13(a) of the Exchange Act and the rules and regulations thereunder] as described in Section IV.D. of the [MONTH, YEAR] Order.]

IV.

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

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

purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

In view of the foregoing, the Commission finds that it is necessary and appropriate for the protection of investors to revoke the registration of each class of Respondent's securities registered pursuant to Exchange Act Section 12(j).

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

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3274 / September 8, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14541

In the Matter of **Roy E. Scarboro,** **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 Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Roy E. Scarboro ("Scarboro" 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. Scarboro was the founder, owner, and president of Capital Asset Management Group, LLC ("Capital Asset Management"), an unregistered investment adviser that served as the general partner of Capital Asset Management Fund, L.P. ("CAMF"), an affiliated unregistered investment fund. Scarboro provided investors in CAMF with a private placement memorandum, which stated that, on behalf of the fund, Capital Asset Management could engage in

any "investment activities" that it "consider[ed] appropriate." Through Capital Asset Management, Scarboro made all investment decisions for CAMF. In terms of compensation, the private placement memorandum specified that, as the general partner in CAMF, Capital Asset Management would receive an annual fee of one percent of assets under management, as well as 35 percent of the fund's net profits.

2. On December 3, 2010, Scarboro entered a guilty plea to: one count of making false statements to the Federal Bureau of Investigation in violation of 18 U.S.C. Section 1001; one count of securities fraud in violation of Sections 10(b) and 32 of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and 18 U.S.C. Section 2; and one count of money laundering in violation of 18 U.S.C. Sections 1956(a)(1)(A)(i) and 2 in U.S. District Court for the Western District of North Carolina, in United States v. Roy E. Scarboro, Information No. 3:10-cr-00254-RJC (December 3, 2010).

3. The counts of the criminal information to which Scarboro pleaded guilty alleged, among other things, that beginning in July 2009 Scarboro induced six investors to invest over $650,000 with CAMF. Through December 2009, CAMF suffered dramatic investment losses, and Scarboro misappropriated at least $50,000 of investor funds for his personal use. In order to conceal CAMF's losses and his misappropriation of investor funds, Scarboro provided investors with monthly account statements showing fictitious investment 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 Scarboro's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Investment Advisers Act that Respondent Scarboro 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

Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3275 / September 8, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14542

In the Matter of

ANTHONY SCOLARO,

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 Anthony Scolaro ("Scolaro" 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 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. Scolaro, age 50, was a portfolio manager at Diamondback Capital Management, LLC ("Diamondback"), a registered Connecticut-based hedge fund investment adviser, until he left the firm in November 2009. Scolaro is a resident of Darien, Connecticut. Scolaro graduated from the University of Vermont in 1982 with a B.A. degree in economics and political science. He held Series 7, 63 and 65 securities licenses.

2. On September 1, 2011, a final judgment was entered by consent against Scolaro, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Anthony Scolaro, et al., Civil Action Number 11-CV-6112, in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged, inter alia, that, while working as a portfolio manager at Diamondback in 2007, Scolaro was tipped material, nonpublic information concerning the acquisition of Axcan Pharma Inc. ("Axcan"), which had been misappropriated in violation of a duty. The complaint further alleged that Scolaro traded in the securities of Axcan based on that material, nonpublic information and that he knew, or should have known, that the information was obtained in breach of a fiduciary or other duty of trust and confidence owed to the source of the information.

4. On November 19, 2010, Scolaro pled guilty to one count of securities fraud and one count of conspiracy to commit securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. § 371 before the United States District Court for the Southern District of New York in United States v. Anthony Scolaro, 11-CR-429.

5. The counts of the criminal information to which Scolaro pled guilty alleged, inter alia, that Scolaro, 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 he 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 Scolaro's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Scolaro 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

INVESTMENT ADVISERS ACT OF 1940
Release No. 3276 / September 9, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14399

In the Matter of **GREGORY A. SEIB,** **Respondent.**	**ORDER MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940**

I.

On May 20, 2011, the Securities and Exchange Commission ("Commission") instituted proceedings pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Gregory A. Seib ("Seib" or "Respondent").

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, and findings contained in Section III. 2. below, which are admitted, Respondent consents to the entry of this Order Making Findings And Imposing Remedial Sanctions Pursuant To Section 203(f) Of The Investment Advisers Act of 1940, as set forth below.

III.

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

1. Seib, age 40, resides in Atlanta, Georgia. From 1998 until at least September 2007, Seib was a managing director of a hedge fund adviser that was not registered with the Commission.

2. On May 2, 2011, a final judgment was entered by consent against Seib, 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 Securities and Exchange Commission v. Gregory A. Seib, Civil Action Number 1:11-CV-0626, in the United States District Court for the Northern District of Georgia.

3. The Commission's complaint alleged that between April 27, 2007 and July 13, 2007, Seib purchased call options and shares of stock in NASDAQ-listed Cambridge Display Technology, Inc. ("Cambridge") for his personal account after misappropriating confidential information about a pending merger of the company from his employer, who served as an outside director of Cambridge. The complaint also alleged that the merger was publicly announced on July 31, 2007. The complaint further alleges that as a result of Seib's purchases of Cambridge stock, he generated profits of $71,654.14.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Seib 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 five 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

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. PA-47 ; File No. S7-19-11]

Privacy Act of 1974: Implementation and Amendment of Exemptions

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") is adopting a rule to amend its Privacy Act regulations to exempt portions of three new systems of records and to make technical amendments to its current inventory of exempted systems of records. Specifically, application of the exemptions to the three new systems of records is necessary to protect information compiled for law enforcement purposes.

DATES: Effective Date: [insert date 30 days after publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Cristal Perpignan, Acting Chief Privacy Officer, Office of Information Technology, 202-551-7716.

SUPPLEMENTARY INFORMATION:

Background: On May 24, 2011, SEC published notice of three new Privacy Act systems of records entitled Tips, Complaints, and Referrals (TCR) Records (SEC-63)", "SEC Security in the Workplace Incident Records (SEC-64)", and "Investor Response Information System (IRIS) (SEC-65)"; and to revise two existing systems of records at Release No. PA-46, (May 18, 2011), 76 FR 30213 (May 24, 2011). In conjunction with publication of the systems of records notice, the SEC published, with invitation to comment, a proposed rule to exempt the new systems of records from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of the Privacy Act and 17 CFR 200.303, 200.304, and 200.306; and to make technical amendments to its current inventory of exempted systems of records at Release No. PA-45 (May 18, 2011), 76 FR 30048 (May 24, 2011). The TCR Records (SEC-63) system of records contains records related to tips, complaints, referrals of misconduct, or related information about actual or potential violations of the federal securities laws; investor harm; conduct of public companies; securities professionals; regulated entities; and associated persons. This system of records may include investigatory materials that were compiled in connection with the Commission's enforcement responsibilities under the federal securities laws. Such material may consist of unsolicited and often unverified statements concerning individuals, information received from confidential sources, as well as reports from the Commission's investigators and other law enforcement personnel. The disclosure of the existence of investigatory materials could seriously undermine effective enforcement of the federal securities laws by prematurely alerting individuals to the fact that they are under investigation, by giving them access to the evidentiary bases for a Commission enforcement action or seriously hampering the Commission's case in court or before an administrative law judge.

The SEC Security in the Workplace Incident Records (SEC-64) system of records contains records related to reports involving incidents of assault, harassment, intimidation, bullying, weapons possession, or threats at the SEC. This system of records may include investigatory materials that were compiled in connection with inquiries or investigation of potential or actual incidents of violence by and against individuals at an SEC facility. The disclosure of information as it relates to investigatory materials or the identity of sources of information may seriously undermine the safety and security of employees in the workplace. Access to such information could allow the subject of an investigation or inquiry of an actual or potential criminal or civil violation to interfere with and impede the investigation, tamper with witnesses or evidence, and to avoid detection or apprehension.

The IRIS (SEC-65) system of records contains records related to complaints/inquiries/requests from members of the public and others. This system of records may include investigatory materials that were compiled in connection with the Commission's enforcement responsibilities under the federal securities laws. Such material may consist of unsolicited and often unverified statements concerning individuals, information received from confidential sources, as well as reports from the Commission's investigators and other law enforcement personnel. The disclosure of the existence of investigatory materials could seriously undermine effective enforcement of the federal securities laws by prematurely alerting individuals to the fact that they are under investigation, by giving them access to the evidentiary bases for a commission enforcement action or seriously hampering the Commission's case in court or before an administrative law judge.

The Commission is exempting SEC-63, SEC-64 and SEC-65 from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) and 17 CFR 200.303, 200.304, and 200.306, insofar as they contain investigatory materials compiled for law enforcement purposes; and amending its existing inventory of exemptions by modifying the name of SEC 38 from "Office of Personnel Code of Conduct and Employee Performance Files" to "Disciplinary and Adverse Actions, Employee Conduct, and Labor Relations Files" and by deleting reference to "Personnel Security Files", which was published for deletion at Release No. PA-29 (July 28, 2000), 65 FR 49037(August10, 2000).

Public Comments: The Commission received only one comment on the proposal, but it did not address the specific exemptions; instead, the commenter stated generally that he thought privacy should be preserved and not taken away. We continue to believe the exemptions are consistent with the Privacy Act because the exemptions protect information relating to enforcement investigations from disclosure.

Paperwork Reduction Act

This rule does not contain a "collection of information" requirement within the meaning of the Paperwork Reduction Act of 1995, so the Paperwork Reduction Act is not applicable.

Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. The Privacy Act of 1974 directs each agency that proposes to establish or make a significant change in a system of records to publish in the Federal Register a notice of the existence and character of the system. Government agencies may exempt certain records from certain provisions of the Privacy Act, but to claim an exemption the agency must issue a rule justifying the exemption.

The new systems of records may include investigatory materials compiled in connection with the Commission's enforcement of the federal securities laws, in connection with potential or actual incidents of workplace violence, or in connections with complaints, inquiries or requests from the public. The Commission and investors will benefit from the amendments, because in their absence the potential access to or disclosure of the investigatory materials in these systems of records could seriously undermine the effective enforcement of the Federal securities laws, and could jeopardize the safety and security of Commission employees in the workplace.

We recognize that the proposed amendments may impose costs on individuals who may wish to obtain access to records that contain investigatory materials in these systems of records. We have no way of estimating the potential number of individuals who might in the future desire such access. Nevertheless, the benefits of exempting those records from public access are compelling, and they clearly justify the costs of the exemption. In addition, Congress was aware of such potential costs when they promulgated the specific exemption in 5 U.S.C. 552a(k)(2). The Commission discussed these costs and benefits in the proposing release and received no comments on them.

Regulatory Flexibility Act Certification

Pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, SEC certified that these regulations would not significantly affect a substantial number of small entities. The rule imposes no duties or obligations on small entities. Further, in accordance with the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, SEC has determined that this rule would not impose new recordkeeping, application, reporting, or other types of information collection requirements. The Commission provided this certification in the proposing release and received no comments.

List of Subjects in 17 CFR Part 200

Administrative practice and procedure; Privacy.

Text of Amendments

For the reasons set out in the preamble, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows:

PART 200- ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart H—Regulations Pertaining to the Privacy of Individuals and Systems of Records Maintained by the Commission

The authority citation for Part 200 is revised by adding authority for § 200.312 in numerical order to read as follows:

Authority: 15 U.S.C. 77o, 77s, 77sss, 78d, 78d-1, 78d-2, 78w, 78ll(d), 78mm, 80a-37, 80b-11, and 7202, unless otherwise noted.

* * * * *

Section 312 is also issued under 5 U.S.C. 552a(k).

* * * * *

2. Remove the authority citation at the end of §200.312.

3. Amend §200.312 by:

a. removing "and" at the end of paragraph (a)(5);

b. adding paragraphs (a)(7), (a)(8) and (a)(9); and

c. revising paragraph (b).

The additions and revision read as follows.

§ 200.312 Specific exemptions.

* * * * *

(a) * * *

(7) Tips, Complaints, and Referrals (TCR) Records;

(8) SEC Security in the Workplace Incident Records; and

(9) Investor Response Information System (IRIS).

(b) Pursuant to 5 U.S.C. 552a(k)(5), the system of records containing the Commission's Disciplinary and Adverse Actions, Employee Conduct, and Labor Relations Files shall be exempt from sections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of the Privacy Act, 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (e)(4)(I), and (f), and 17 CFR 200.303, 200.304, and 200.306 insofar as they contain investigatory material compiled to determine an individual's suitability, eligibility, and qualifications for Federal civilian employment or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: September 12, 2011

SECURITIES AND EXCHANGE COMMISSION

Release Nos. 33-9258; 34-65322; File No. 265-27

SUBJECT: Advisory Committee on Small and Emerging Companies.

AGENCY: Securities and Exchange Commission.

ACTION: Notice of Federal Advisory Committee Establishment.

SUMMARY: The Securities and Exchange Commission intends to establish the Securities and Exchange Commission Advisory Committee on Small and Emerging Companies.

ADDRESSES: Written comments may be submitted by the following methods:

Electronic Comments

- Use the Commission's Internet submission form (http://www.sec.gov/rules/other.shtml); or
- Send an e-mail message to rule-comments@sec.gov, including File No. 265-27 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. 265-27. 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 also will be 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; we do not edit personal identifying information from your submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Johanna V. Losert, Special Counsel, or Gerald J. Laporte, Office Chief, Office of Small Business Policy, Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549-3628, (202) 551-3460.

SUPPLEMENTARY INFORMATION: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. – App., the Commission is publishing this notice that the Chairman of the Commission, with the concurrence of the other Commissioners, intends to establish the Securities and Exchange Commission Advisory Committee on Small and Emerging Companies (the "Committee"). The Committee's objective is to provide the Commission with advice on its rules, regulations, and policies, with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately-held small businesses ("emerging companies") and publicly traded companies with less than $250 million in public market capitalization ("smaller public companies") through securities offerings, including private and limited offerings and initial and other public offerings;

(2) trading in the securities of emerging companies and smaller public companies; and

(3) public reporting and corporate governance requirements of emerging companies and smaller public companies.

Up to 20 voting members will be appointed to the Committee who can effectively represent those directly affected by, interested in, and/or qualified to provide advice to the Commission on its rules, regulations, and policies as set forth above. The Committee's membership will be balanced fairly in terms of points of view represented and functions to be performed. Non-voting observers for the committee from the North American Securities Administrators Association and the Small Business Administration may also be named.

The Committee may be established 15 days after publication of this notice in the *Federal Register* by filing a charter for the Committee with the Committee on Banking, Housing, and Urban Affairs of the United States Senate and the Committee on Financial Services of the United States House of Representatives. A copy of the charter as so filed also will be filed with the Chairman of the Commission, furnished to the Library of Congress, and posted on the Commission's website at www.sec.gov. An undated copy of the charter is now available at www.faca.gov.

The Committee will operate for two years from the date it is established or such earlier date as determined by the Commission unless, before the expiration of that time period, its charter is re-established or renewed in accordance with the Federal Advisory Committee Act.

The Committee will meet at such intervals as are necessary to carry out its functions. The charter contemplates that the full Committee will meet three times annually. Meetings of subgroups or subcommittees of the full Committee may occur more frequently.

The charter will provide that the duties of the Committee are to be solely advisory. The Commission alone will make any determinations of action to be taken and policy to be expressed with respect to matters within the Commission's authority as to which the Committee provides advice or makes recommendations. The Chairman of the Commission affirms that the establishment of the Committee is necessary and in the public interest.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: September 12, 2011

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65320 / September 12, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14545

In the Matter of Interactive Therapeutics, Inc., Interchem (N.A.) Industries, Inc., International Cavitation Technologies, Inc., International Fibercom, Inc., International Gaming Management, Inc., International Meta Systems, Inc., Internet Communications Corp., InvestAmerica, Inc., IQUniverse, Inc., and IRG Technologies, 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 Therapeutics, Inc., Interchem (N.A.) Industries, Inc., International Cavitation Technologies, Inc., International Fibercom, Inc., International Gaming Management, Inc., International Meta Systems, Inc., Internet Communications Corp., InvestAmerica, Inc., IQUniverse, Inc., and IRG Technologies, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

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1. Interactive Therapeutics, Inc. (CIK No. 1111818) is a dissolved Colorado corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Interactive Therapeutics 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 March 31, 2008, which reported a net loss of over $35,000 for the prior twelve months.

2. Interchem (N.A.) Industries, Inc. (CIK No. 863444) is a British Columbia corporation located in Overland Park, Kansas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Interchem 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, 1993, which reported a net loss of $899,000 for the prior twelve months. On October 19, 1995, the British Columbia Securities Commission issued a cease trade order against Interchem for its delinquent filings.

3. International Cavitation Technologies, Inc. (CIK No. 313109) is a delinquent Colorado corporation located in Bixby, Oklahoma with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). International Cavitation Technologies 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 May 31, 2001, which reported a net loss of over $451,000 for the prior twelve months. On July 9, 2003, International Cavitation Technologies filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Texas, and the case was terminated on August 17, 2004.

4. International Fibercom, Inc. (CIK No. 924632) is a dissolved Arizona corporation located in Phoenix, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). International Fibercom is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2001, which reported a net loss of over $143 million for the prior nine months. On February 13, 2002, International Fibercom 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 still pending as of March 21, 2011.

5. International Gaming Management, Inc. (CIK No. 803168) is a void Delaware corporation located in Minneapolis, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). International Gaming Management is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended May 31, 1994, which reported a net loss of over $14.5 million for the prior nine months.

6. International Meta Systems, Inc. (CIK No. 820475) is a forfeited Delaware corporation located in Austin, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). International Meta Systems is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 1997, which

reported a net loss of over $7.1 million for the prior nine months. On March 2, 1998, International Meta Systems filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Texas, which was converted to Chapter 7, and the case was terminated on March 15, 2002.

7. Internet Communications Corp. (CIK No. 841693) is a dissolved Colorado corporation located in Greenwood Village, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Internet Communications is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2000, which reported a net loss of over $2.8 million for the prior nine months.

8. InvestAmerica, Inc. (CIK No. 1053253) is a revoked Nevada corporation located in Park City, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). InvestAmerica is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended September 30, 2001, which reported a net loss of over $33.1 million for the prior twelve months.

9. IQUniverse, Inc. (CIK No. 716399) is an inactive Minnesota corporation located in Minneapolis, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IQUniverse is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2002, which reported a net loss of over $1.6 million for the prior nine months.

10. IRG Technologies, Inc. (CIK No. 899283) is a permanently revoked Nevada corporation located in Carrollton, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IRG 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, which reported a net loss of over $7.3 million for the prior six months. On August 2, 1995, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Texas, which was converted to Chapter 7, and the case was terminated on May 5, 2008.

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 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.

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
Secretary

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

SECURITIES AND EXCHANGE COMMISSION
Release No. 34-65339

September 14, 2011

Order Granting Temporary Exemption of Kroll Bond Rating Agency, Inc. from the Conflict of Interest Prohibition in Rule 17g-5(c)(1) of the Securities Exchange Act of 1934

I. Introduction

Rule 17g-5(c)(1) of the Securities Exchange Act of 1934 ("Exchange Act") prohibits a nationally recognized statistical rating organization ("NRSRO") from issuing or maintaining a credit rating solicited by a person that, in the most recently ended fiscal year, provided the NRSRO with net revenue equaling or exceeding 10% of the total net revenue of the NRSRO for the fiscal year. In adopting this rule, the Commission stated that such a person would be in a position to exercise substantial influence on the NRSRO, which in turn would make it difficult for the NRSRO to remain impartial.[1]

II. Application and Exemption Request of Kroll Bond Rating Agency, Inc.

Kroll Bond Rating Agency, Inc. ("Kroll"), f/k/a LACE Financial Corp. ("LACE"), is a credit rating agency registered with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act. Kroll traditionally has operated mainly under the "subscriber-paid" business model, in which the NRSRO derives its revenue from restricting access to its ratings to paid subscribers. Kroll has informed the Commission that it intends to expand its existing NRSRO business by establishing a new "issuer-paid" rating service under which it will issue ratings paid for by the issuer, underwriter, or sponsor of the security being rated. In connection with this planned expansion, Kroll has requested a temporary and limited exemption from Rule 17g-5(c)(1) on the grounds that the restrictions imposed by Rule 17g-5(c)(1) would

1 Release No. 34-55857 (June 5, 2007), 72 FR 33564, 33598 (June 18, 2007).

pose a substantial constraint on the firm's ability to compete effectively with large rating agencies offering comparable ratings services. Specifically, Kroll argues that given that the fees typically associated with issuer-paid engagements tend to be relatively high when compared to the fees associated with its existing subscriber-based business, it is possible that in the early stages of its expansion the fees associated with a single issuer-paid engagement could exceed ten percent of its total net revenue for the fiscal year. Accordingly, Kroll has requested that the Commission grant it an exemption from Rule 17g-5(c)(1) for any revenues derived from non-subscription based business during the remainder of calendar years 2011 and 2012, which are also the end of Kroll's 2011 and 2012 fiscal years, respectively.

III. Discussion

The Commission, when adopting Rule 17g-5(c)(1), noted that it intended to monitor how the prohibition operates in practice, particularly with respect to asset-backed securities, and whether exemptions may be appropriate.[2] The Commission has previously granted two temporary exemptions from Rule 17g-5(c)(1), including one on February 11, 2008 to LACE, as Kroll was formerly known, in connection with its initial registration as an NRSRO ("LACE Exemptive Order").[3] The Commission noted several factors in granting that exemption, including the fact that the revenue in question was earned prior to the adoption of the rule, the likelihood of smaller firms such as LACE being more likely to be affected by the rule, LACE's expectation that the percentage of total revenue provided by the relevant client would decrease, and the increased competition in the asset-backed securities class that could result from LACE's registration. In granting the LACE Exemptive Order, the Commission also noted that an exemption would further the primary purpose of the Credit Rating Agency Reform Act of 2006

2 Release No. 34-55857 (June 5, 2007), 72 FR 33564, 33598 (June 18, 2007).
3 Release No. 34-57301 (February 11, 2008), 73 FR 8720 (February 14, 2008).

("Rating Agency Act") as set forth in the Report of the Senate Committee on Banking, Housing, and Urban Affairs accompanying the Rating Agency Act: to "improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry".[4] On June 23, 2008, the Commission, citing the same factors set forth in the LACE Exemptive Order, issued a similar order granting Realpoint LLC a temporary exemption from the requirements of Rule 17g-5(c)(1) in connection with Realpoint LLC's registration as an NRSRO.[5]

On September 2, 2010, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings ("LACE/Putnam Order") against LACE and Barron Putnam, LACE's founder as well as its majority owner during the relevant time period. The LACE/Putnam Order found, among other things, that the firm made misrepresentations in its application to become registered as an NRSRO and its accompanying request for an exemption from Rule 17g-5(c)(1). Specifically, the Commission found that the firm materially misstated the amount of revenue it received from its largest customer during 2007.[6] On November 9, 2010, the Commission issued an Order Making Findings and Imposing A Cease-and-Desist Order (the "Mouzon Order") against LACE's former president, Damyon Mouzon. The Mouzon Order found, among other things, that as LACE's president, Mouzon was responsible for ensuring the accuracy of the information provided to the Commission in connection with the firm's NRSRO application and its request for an exemption, and that he knew or should have

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

5 Release No. 34-58001 (June 23, 2008), 73 FR 36362 (June 26, 2008).

6 In the Matter of LACE Financial Corp. and Barron Putnam, Respondents: Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15E(d) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Orders, Release No. 62834 (September 2, 2010).

known that the financial information that LACE provided to the Commission in connection with its NRSRO application and its request for an exemption from Rule 17g-5(c)(1) was inaccurate.[7] LACE, Putnam and Mouzon each consented to the entry of those orders on a neither admit nor deny basis.

In the request that is subject to this Order, Kroll acknowledged the recent orders against LACE and its former owner and president and stated that it has taken significant steps to enhance the compliance and other functions associated with the traditional subscriber-based business, including replacing senior management, retaining new compliance and financial personnel, and adding new independent directors comprising a majority of the board. Kroll has informed Commission staff that LACE's former ownership and management personnel no longer have any ownership or other relationship, financial or otherwise, with Kroll. Kroll has further informed Commission staff that LACE ceased performing any work or analysis in connection with the issuer-paid ratings that were the subject of the LACE Exemptive Order in December 2008.

The Commission believes that a temporary, limited and conditional exemption allowing Kroll to enter the market for rating structured finance products is consistent with the Commission's goal of improving ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry. In order to maintain this exemption, Kroll will be required to publicly disclose in Exhibit 6 to Form NRSRO, as applicable, that the firm received more than 10% of its net revenue in fiscal years 2011 and 2012 from a client or clients that paid it to rate asset-backed securities. This disclosure is designed to alert users of credit ratings to the existence of this specific conflict and

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7 In the Matter of Damyon Mouzon, Respondent: Order Making Findings and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934, Release No. 63280 (November 9, 2010).

is consistent with exemptive relief the Commission has previously granted to LACE and Realpoint LLC. Furthermore, in addition to Kroll's existing obligations as an NRSRO to maintain policies, procedures, and internal controls, by the terms of this order, Kroll will also be required to maintain policies, procedures, and internal controls specifically designed to address the conflict created by exceeding the 10% threshold. Finally, the Commission notes that Kroll is subject to the September 2, 2010 Order Instituting Administrative and Cease-and-Desist Proceedings against LACE Financial Corp.

Section 15E(p) of the Exchange Act, as added by Section 932(a)(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, requires Commission staff to conduct an examination of each NRSRO at least annually. As part of this annual examination regimen for NRSROs, Commission staff will closely review Kroll's activities with respect to managing this conflict and meeting the conditions set forth below and will consider whether to recommend that the Commission take additional action, including administrative or other action.

The Commission therefore finds that a temporary, limited and conditional exemption allowing Kroll to enter the market for rating structured finance products is consistent with the Commission's goal, as established by the Rating Agency Act, of improving ratings quality by fostering accountability, transparency, and competition in the credit rating industry, subject to Kroll's making public disclosure of the conflict created by exceeding the 10% threshold and maintaining policies, procedures and internal controls to address that conflict, is necessary and appropriate in the public interest and is consistent with the protection of investors.

IV. Conclusion

Accordingly, pursuant to Section 36 of the Exchange Act,

IT IS HEREBY ORDERED that Kroll Bond Rating Agency, Inc., formerly known as LACE Financial Corp., is exempt from the conflict of interest prohibition in Exchange Act Rule 17g-5(c)(1) until January 1, 2013, with respect to any revenue derived from issuer-paid ratings, provided that: (1) Kroll Bond Rating Agency, Inc. publicly discloses in Exhibit 6 to Form NRSRO, as applicable, that the firm received more than 10% of its total net revenue in fiscal year 2011 or 2012 from a client or clients; and (2) in addition to fulfilling its existing obligations as an NRSRO to maintain policies, procedures, and internal controls, Kroll Bond Rating Agency, Inc. also maintains policies, procedures, and internal controls specifically designed to address the conflict created by exceeding the 10% threshold.

Elizabeth M. Murphy

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65340 / September 14, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3320 / September 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14549

In the Matter of **Wayne A. Pratt, 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 Wayne A. Pratt ("Pratt" or "Respondent") 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, Paragraph 3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Pratt, age 50, was the Chief Financial Officer of Syntax-Brillian Corp. ("Syntax") from at least November 2005 through September 2007. Pratt oversaw all the accounting and financial reporting functions at Syntax. He is a Certified Public Accountant licensed in the State of Arizona.

2. Syntax was a Delaware corporation headquartered in Tempe, Arizona. Syntax developed and marketed, among other things, high-definition LCD televisions primarily in the United States and purportedly also in China. Syntax was formed through a reverse merger between Syntax Groups Corporation, a private corporation based in City of Industry, California, and Brillian Corporation, a U.S. public company based in Tempe, Arizona. At all relevant times, Syntax's common stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"). On July 8, 2008, Syntax filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Prior to its suspension on July 22, 2008, Syntax's common stock was listed for trading on the Nasdaq under the stock symbol "BRLC." Syntax's fiscal year ended on June 30.

3. On September 1, 2011, a final judgment was entered against Pratt, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 13(b)(5) of the Exchange Act and Exchange Act Rules 10b-5, 13a-14, 13b2-1, and 13b2-2, and aiding and abetting violations of Sections 10(b), 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Exchange Act Rules 10b-5, 12b-20, 13a-1, 13a-11, and 13a-13, in a civil action entitled *Securities and Exchange Commission v. James Li (A/K/A Ching Hua Li), Thomas Chow (A/K/A Man Kit Chow), Roger Kao (A/K/A Chao Chun Kao), Christopher Liu (A/K/A Chi Lei Liu), and Wayne A. Pratt*, Civil Action No. CV11-1712-PHX-SRB, in the United States District Court for the District of Arizona. Pratt was ordered to pay $88,000 in disgorgement of his executive bonus compensation received while participating in the fraud, $17,000 in prejudgment interest, and a $90,000 civil money penalty.

4. The Commission's complaint alleged that an egregious financial fraud was perpetrated by senior management and members of the Board of Directors of Syntax. The Complaint alleged that Pratt ignored red flags of improper revenue recognition and participated in preparing backdated documentation that was provided to Syntax's auditors to support fictitious fiscal 2006 year-end sales. In its Complaint, the Commission alleged that Pratt also ignored indications of impaired assets, agency sales, and potential collectability issues. According to the Commission's Complaint, Pratt also signed Commission filings for each reporting period between June 30, 2006, and June 30, 2007, and Sarbanes-Oxley Act of 2002 ("SOX") certifications that contained material misstatements. The Commission further alleged that Pratt signed management representation letters for Syntax's auditors that contained materially false and misleading statements. In its Complaint, the Commission alleged that, by his misconduct, Pratt violated and/or aided and abetted violations of the antifraud, reporting, recordkeeping, internal controls, and SOX certification provisions of the federal securities laws.

IV.

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

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

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

B. After 5 years from the date of this order, Pratt 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

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 65345 / September 16, 2011

Admin. Proc. File No. 3-14442

In the Matter of the Application of NORMAN CHEN For Review of Disciplinary Action Taken by FINRA	ORDER GRANTING MOTION TO DISMISS APPLICATION FOR REVIEW

I.

On June 27, 2011, Norman Chen ("Chen"), a former associated person of FINRA member firm Chase Investment Services Corp. ("Chase"), filed an application for review of disciplinary action taken by the Financial Industry Regulatory Authority, Inc. ("FINRA"), barring him from associating in any capacity with a FINRA member. On July 13, 2011, FINRA filed a motion to dismiss Chen's application for review based on his "fail[ure] to follow FINRA procedures" to contest the imposed sanction and, thus, "exhaust his administrative remedies." Chen has not submitted an opposition to FINRA's motion to dismiss.

For the reasons set forth below, we have determined to grant FINRA's motion to dismiss Chen's application for review.

II.

On September 13, 2010, Chase filed a Form U5 Uniform Termination Notice for Securities Registration ("Form U5"), disclosing it had terminated Chen's employment on August 11, 2010. As Chase explained in the Form U5, it "discharged" Chen after determining by internal review that he had "opened a credit card for an employee who was not eligible for the specific card" and "falsified a bank client[']s [identification] in order to open a bank account."

FINRA subsequently began an investigation into whether Chen had violated the securities laws or FINRA rules. On September 17, 2010, FINRA sent Chen a letter (the "First Letter"), pursuant to FINRA Rule 8210,[1] requesting information regarding the alleged wrongdoing that led to his dismissal from Chase, including a signed statement from Chen addressing the allegations. The First Letter asked for Chen's response by October 1, 2010. FINRA sent the First Letter, as well as all subsequent letters, to Chen's "last known residential address" as reflected in the Central Registration Depository (the "CRD").[2] Chen did not respond to the First Letter.

On January 14, 2011, FINRA sent Chen a second letter (the "Second Letter"), pursuant to FINRA Rule 8210, requesting the same information that it had requested in the First Letter. The Second Letter, which FINRA sent by certified and first-class mailing to Chen's CRD address, asked for Chen's response by January 28, 2011. A return receipt, signed by "Norman Chen," showed that the Second Letter was delivered on January 22, 2011. Chen, again, did not respond.

On February 23, 2011, FINRA sent Chen a third letter (the "Third Letter"), notifying him that, pursuant to FINRA Rule 9552(a),[3] he would be suspended on March 21, 2011, if he failed to take "corrective action" by providing FINRA with the information requested in its previous two letters. The Third Letter informed Chen of his right to request a hearing in this matter before March 21, 2011, pursuant to FINRA Rule 9552(e), and that "[a] timely request for hearing would stay the effective date of any suspension." An express mail receipt showed delivery of the Third Letter on February 24, 2011.

On March 21, 2011, FINRA sent Chen a fourth letter (the "Fourth Letter"), notifying him that he was suspended, effective that date. The Fourth Letter informed Chen that he would be automatically barred from associating with a FINRA member in any capacity on May 26, 2011, pursuant to FINRA Rule 9552(h), if he did not provide the requested information and request termination of his suspension by May 23, 2011. An express mail receipt showed delivery of the Fourth Letter on March 22, 2011.

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1 FINRA Rule 8210 requires individuals associated with a FINRA member firm to provide information upon request with respect to any matter involved in an investigation.

2 FINRA Rule 8210(d) (stating notice "shall be deemed received" by mailing to the person's "last known residential address . . . in [CRD]"); *see also* NASD Notice to Members 97-31 (reminding registered persons to keep a current mailing address with NASD "[f]or at least two years *after* an individual has been terminated by the filing of . . . [a] Form U5" (emphasis in original)).

3 FINRA Rule 9552(a) permits FINRA to suspend the association of an individual with a FINRA member firm upon twenty-one days' notice if such individual does not provide FINRA with information requested pursuant to FINRA's rules.

The record includes an undated letter from Chen, requesting a hearing in the matter. Although FINRA's letter on February 23, 2011, had clearly directed that any such request should be sent to FINRA's Office of Hearing Officers, with an address provided, Chen's letter was written to John Rahmer, FINRA's investigator who sent the First and Second Letters. Chen's letter was marked with a "received" stamp, dated March 24, 2011, but it is unclear which FINRA office stamped it. In addition to his request for hearing, Chen's letter stated that he "felt that [he] was fired from Chase unjustly" and that he "was hurried and harassed into answering" questions from Chase personnel.

On March 28, 2011, FINRA's Office of Hearing Officers denied Chen's request for a hearing because it was untimely. The Office of Hearing Officers further informed Chen of his right, pursuant to FINRA Rule 9552(f), to "file a written request for termination of [his] suspension on the ground of full compliance" with FINRA's information requests. An express mail receipt showed delivery of the Office of Hearing Officers' letter on March 29, 2011.

In a letter dated May 22, 2011, a day before the deadline, Chen requested that FINRA "lift [his] suspension . . . under Procedural Rule 9552(f)." In the three-paragraph letter, Chen apologized for his "immature behavior . . . [which] delayed this process and jeopardized [his] chances of reinstating [his] Licences." Chen "promise[d] to be in full compliance[,] . . . punctual with all matters moving forward." Chen's letter, however, did not include the information requested by FINRA in its previous letters, including his response to allegations in the Form U5 of wrongdoing.

On May 26, 2011, FINRA barred Chen, pursuant to Rule 9552(h), from associating in any capacity with a FINRA member firm based on his failure to comply with its information requests.[4] On June 1, 2011, FINRA denied Chen's May 22 request to lift his then-suspension. In the letter, FINRA recounted the multiple letters it had sent Chen since September 2010 and stated that Chen had yet to "provide FINRA with the information requested in the staff's letters," as required by Rule 9552(f) to terminate a suspension. Chen filed a timely application for review.

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4 The record is unclear whether FINRA was in receipt of Chen's May 22 letter when it barred him on May 26, as the order did not address Chen's request to lift the suspension.

III.

We have consistently held that "we will not consider an application for review if the applicant failed to exhaust FINRA's procedures for contesting the sanction at issue."[5] As we have stressed, "'[i]t is clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review.'"[6]

FINRA's actions, here, were in accordance with its rules and the purposes of the Exchange Act. FINRA Rule 9552 sets forth the procedures for suspending and ultimately barring individuals who fail to supply requested information or take corrective action. Rule 9552 "promote[s] a reasonable, fair and efficient disciplinary process," which is consistent with the Exchange Act's purpose, among others, of "prevent[ing] fraudulent and manipulative acts and practices," through appropriate disciplinary action.[7] We have stated that "[t]he failure to respond to [FINRA] information requests frustrates [FINRA]'s ability to detect misconduct, and such inability in turn threatens investors and markets."[8] In accordance with its rules, FINRA notified Chen in several letters to him that he would be suspended and automatically barred if he failed to either respond to FINRA's inquiry into allegations of wrongdoing or timely request a hearing to contest his impending sanction. Chen failed to respond to FINRA's inquiry or timely request a hearing. As a result, Chen's bar was imposed automatically pursuant to FINRA rules.

In his application for review, Chen does not dispute the specific grounds on which FINRA based its action – *i.e.*, that he failed to respond to FINRA's information requests or timely request a hearing to contest his impending sanction – exist in fact. His only response to FINRA was contained in his untimely request for a hearing, explaining – without addressing the

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5 *Gregory S. Profeta*, Securities Exchange Act Rel. No. 62055 (May 6, 2010), 98 SEC Docket 28074, 2876; *see also Jeffrey A. King*, 58 S.E.C. 839, 843 (2005); *Lee Gura*, 57 S.E.C. 972, 976 (2004); *Gary A. Fox*, 55 S.E.C. 1147, 1149-50 (2002).

6 *Id.* (quoting *Royal Sec. Corp.*, 36 S.E.C. 275, 277 (1955)); *see also Swirsky v. NASD*, 124 F.3d 59, 62 (1st Cir. 1997) ("agree[ing] with other circuits that have considered the question" and concluding that the doctrine of exhaustion of administrative remedies applies to NASD disciplinary actions (collecting cases)).

7 *Order Approving Rule Change*, Exchange Act Rel. No. 61242 (Dec. 28, 2009) (shortening the time period before a suspension automatically becomes a bar from six to three months); *see also Order Approving Proposed Rule*, Exchange Act Rel. No. 43102 (Aug. 1, 2000), 72 SEC Docket 2976, 2981 (stating in adopting predecessor to Rule 9552 that it provides "appropriate discipline of members who fail to provide [FINRA] with certain information").

8 *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5127 (citation omitted), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

substance of the Form U5's allegations – that he felt "hurried and harassed into answering" Chase's questions. When FINRA instructed him of his right to request termination of his then-suspension "on the grounds of full compliance" with FINRA's information request, Chen's response was again insufficient, consisting of an apology and a promise of full compliance, but failing to address the allegations of his wrongdoing disclosed in the Form U5.

In his application for review, Chen claims that he "sent numerous letters to FINRA abiding by the rules as much as I could for hearings and the appeal process," a claim not supported by the record. He further "promise[s] to work diligently and timely in trying to comply [with] all regulations set forth by both the SEC and FINRA." To date, however, Chen has not responded to FINRA's motion to dismiss.

Chen has not asserted, nor does the record show, any justification for his failure to comply with FINRA's information requests or follow FINRA's procedures to contest the action. Rather, the record shows a pattern of unresponsiveness and delay in Chen's interactions with FINRA throughout the proceedings below. Chen failed to respond to FINRA's September 2010 and January 2011 information requests. His request for a hearing was untimely. Even his letter on May 22, 2011, while promising his "full compliance" with all matters, again failed to respond to FINRA's original requests for information – which by then had been outstanding for over nine months. Under the circumstances, we view Chen's conduct "amounted to a complete failure to respond and [FINRA] acted consistently with the purposes of the Exchange Act in imposing the bar" against him.[9]

Accordingly, it is ORDERED that FINRA's motion to dismiss the application for review filed by Norman Chen be, and it hereby is, GRANTED.[10]

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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[9] *Elliot M. Hershberg*, 58 S.E.C. 1184, 1191-92 (2006) (finding applicant's conduct "amounted to a complete failure to respond," despite a "belated offer to testify" "fourteen months after [FINRA's] initial request"), *aff'd*, 210 F. App'x 125 (2d Cir. 2006) (unpublished).

[10] We have considered all of the parties' contentions. We have rejected or sustained them to the extent they are inconsistent or in accord with the views expressed herein.

Chairman Schapiro, Commissioner Walter not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES AND EXCHANGE ACT OF 1934
Rel. No. 65347 / September 16, 2011

Admin. Proc. File No. 3-14054

In the Matter of the Application of

DENNIS S. KAMINSKI
c/o Peter J. Anderson, Esq.
Sutherland, Asbill & Brennan LLP
999 Peachtree Street, NE
Atlanta, Georgia 30309-3996

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDINGS

Failure to Supervise

Former principal of member firm of registered securities association failed to establish and maintain a supervisory system reasonably designed to achieve compliance with applicable securities laws, regulations, and association rules. *Held*, association's findings of violation and sanction imposed are *sustained*.

APPEARANCES:

Peter J. Anderson and *Cheryl L. Haas-Goldstein*, of Sutherland Asbill & Brennan LLP, for Dennis S. Kaminski.

Marc Menchel, *Alan Lawhead*, *James Wrona*, and *Vickie R. Olafson*, for NASD.

Appeal filed: September 16, 2010
Last brief received: December 21, 2010

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I.

Dennis S. Kaminski, formerly a general securities principal and senior executive officer of Mutual Service Corporation ("MSC"), an NASD member firm, seeks review of NASD disciplinary action.[1] NASD found that Kaminski violated NASD Conduct Rules 3010 and 2110[2] by failing to supervise MSC's review of the firm's variable annuity trading. For those violations, NASD suspended Kaminski for eighteen months in all capacities, fined him $50,000, and required that he requalify before acting in any capacity requiring qualification.[3] We base our findings on an independent review of the record.

II.

A. Kaminski's Experience and Responsibilities at MSC

Kaminski has worked in the securities industry since 1975. He began working for MSC in March 1986. Kaminski's responsibilities at MSC changed over the years, but he supervised the firm's compliance department throughout his tenure. In 2004, when the alleged misconduct occurred, Kaminski served as an executive vice president of the firm and its chief administrative officer. He was also a member of MSC's management committee. Kaminski was responsible for the firm's day-to-day operations and oversaw its compliance, operations, and legal departments. Kaminski supervised the head of the firm's compliance department, vice president Michael Poston, who consistently sought Kaminski's approval on all significant actions. Kaminski also supervised the head of the firm's operations department, senior vice president Susan Coates. In October 2004, Poston left the firm, and Kaminski assumed the position of acting chief compliance officer. In November 2008, Kaminski left MSC and began working for Summit Brokerage Services where, as of the time of his appeal, he was registered, among other capacities, as a general securities principal.

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1 On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was instituted before that date, we continue to use the designation NASD.

2 NASD Rule 3010(a) requires a member firm to "establish and maintain a system to supervise the activities" of its registered representatives, registered principals, and other associated persons that is "reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules." Rule 2110 requires that members "observe high standards of commercial honor and just and equitable principles of trade."

3 NASD also assessed joint and several hearing costs of $19,857 against Kaminski and the two other parties in the disciplinary proceeding.

B. Settlement of Prior NASD Disciplinary Proceeding

In December 2001, MSC executed a Letter of Acceptance Waiver and Consent ("AWC") to settle an NASD disciplinary proceeding involving alleged deficiencies in MSC's supervisory procedures with respect to the firm's variable annuity transactions. The AWC stated that NASD had charged MSC with violating NASD rules, including Rules 3010 and 2110, by failing to (1) establish, maintain, and enforce adequate written supervisory procedures with respect to the firm's variable annuity transactions; (2) establish and maintain a system to supervise registered representatives' exchanges of variable products; (3) evidence principals' suitability reviews of variable annuity transactions; and (4) obtain customer information necessary for determining the suitability of variable products transactions. MSC consented to a censure and a $35,000 fine, undertook to improve its written supervisory procedures, and agreed to provide NASD with evidence that it had implemented revised supervisory procedures. Kaminski participated in the settlement on behalf of MSC.

As part of its commitments under the AWC, MSC submitted a Corrective Action Statement to NASD that documented the firm's actions to improve its supervisory procedures. Among the corrective actions implemented by MSC was the creation of a separate unit within the compliance department, the Trade Review Team ("TRT"). MSC represented that the TRT would implement a more extensive and detailed review of variable annuity transactions and "1035 exchanges."[4] The firm's written supervisory procedures required members of the TRT to have Series 24 supervisory licenses.[5] Gari C. Sanfilippo, a registered general securities principal, was a compliance supervisor in the TRT.

MSC also created the New Variable Business Pending Approval Report (the "Red Flag Blotter") to capture daily variable products transactions and "1035 exchanges" that triggered certain warning signals or red flags.[6] The TRT reviewed the details of each transaction that

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[4] A "1035 exchange" is a tax-exempt exchange of one annuity contract for another, pursuant to 26 U.S.C. § 1035.

[5] A Series 24 supervisory license authorizes a general securities principal to "supervise all areas of the member's investment banking and securities business, such as underwriting, trading and market making, advertising, or overall compliance with financial responsibilities." *Qualifications FAQ - Examinations*, FINRA-Compliance-Registration, available at http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/RegisteredReps/Qualifications/p011087 (last visited on August 15, 2011).

[6] The Red Flag Blotter was designed to capture variable annuity transactions that triggered the following warning signals: missing age or financial information; customer over age seventy; transaction amount in excess of fifteen percent of customer's net worth; customer's annual income less than $25,000; transaction amount greater than or equal to twenty-five percent

(continued...)

appeared on the Red Flag Blotter, assessed suitability, approved or rejected each transaction (generally within a three-day window) and forwarded the Red Flag Blotter to the operations department for final firm approval.

Kevin L. Cohen, a junior compliance examiner, was responsible for reviewing the Red Flag Blotter. Cohen reported to Poston, who, in turn, reported to Kaminski. Cohen testified that, on an average day, the Red Flag Blotter detailed information on approximately thirty to forty-five transactions and that it generally took the TRT at least three hours each day to review these transactions. Following its review of each transaction, the TRT would indicate whether it approved or denied the transaction, along with its reasons for the decision. Cohen explained that the TRT was "the primary unit responsible for overseeing and making sure that [MSC's] representatives were recommending transactions that were suitable to [the firm's] customers."

After the TRT completed its review, MSC's operations department conducted a second review. Denise Roth, a first vice president of MSC's operations department, performed the second review and provided final approval of the transactions. Roth reported to Coates, who, like Poston, reported to Kaminski.

Numerous witnesses testified to the importance of the Red Flag Blotter review. Kaminski testified that the Red Flag Blotter was important "because it deals with the review of a business line that . . . has a lot of volume" and it allowed the firm "to determine if there was any suitability issues" with MSC's variable annuity sales.[7] Poston stated that the Red Flag Blotter was "very important," "critical," and "the most important report we had" because it allowed MSC to keep current on problem transactions for a product that Poston described as "a risk area." Poston further noted that the Red Flag Blotter gave the compliance department "the ability to pick up questionable 1035 exchanges, which were of particular interest" to MSC, and "it allowed [the compliance department] to further investigate the matter and/or take appropriate action, if necessary . . . on a real time basis." Coates explained that it was important that the Red Flag Blotter be reviewed in a timely manner to ensure that MSC's transaction complied with applicable Commission and NASD rules. The Red Flag Blotter also enabled MSC to reverse unsuitable variable annuity transactions without cost within the "free look" period provided by most issuers.

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[6] (...continued)
of customer's annual income; transaction amount greater than $150,000; IRA within a qualified account; holding period of less than five years; surrender charges greater than $1,000; and inappropriate sub-account allocations.

[7] Coates estimated that in 2004 variable annuity transactions comprised thirty percent of MSC's total business. During 2004, MSC processed variable annuity transactions worth more than $900 million, of which twenty-eight percent were "1035 Exchanges."

C. MSC's Compliance Department

In 2004, MSC's compliance department was responsible for performing numerous daily functions. Among other duties, the compliance department was responsible for training and support, reviewing sales material, inspecting approximately 350 branch offices, handling issues for approximately 350 investment advisors, and investigating customer complaints. The compliance department also was responsible for conducting surveillance through the TRT. The TRT daily reviewed approximately twenty exception reports and blotters and reviewed approximately ten more reports on a weekly or monthly basis. During this period, MSC acquired several smaller independent firms throughout the country, significantly increasing the firm's size and adding to the demands of MSC's compliance department.

At the same time, MSC became the subject of numerous regulatory sweeps and investigations that placed significant demands on the compliance department. For example, NASD required MSC to notify mutual fund customers who purchased MSC's Class A mutual fund shares that they may be eligible for breakpoint discounts (the "Breakpoint Project"). The Breakpoint Project required MSC to send approximately 85,000 claim forms to customers who had purchased Class A shares, track the letters, and review and respond to customer claims.

During 2004, MSC's compliance department became significantly understaffed. By January 2004, the compliance department's normal staff of approximately seventeen was down to approximately twelve, and more left as the year continued. By the end of the year, the compliance department had six examiners, three of whom were "brand new," no administrative assistant or first vice president, and no permanent chief compliance officer. Poston also testified that MSC paid compliance personnel salaries that were not competitive, making it difficult for MSC to replace staff who left.

Poston sent Kaminski numerous memoranda and emails dated between January 2004 and October 2004, advising Kaminski of the compliance department's urgent need for additional staff, inability to hire qualified staff at the salaries offered, increasing staff departures, and difficulty in meeting the department's responsibilities and increased workload. For example, at Kaminski's direction in late 2003, Poston prepared and sent Kaminski a memorandum, dated January 8, 2004, outlining the compliance department's staffing problems and requirements in detail. In this memorandum, Poston requested that an "additional position be allocated to the TRT function since it's [sic] role, and importance has been expanding." Kaminski did not reply to Poston's memorandum.

Poston wrote Kaminski another memorandum, dated March 31, 2004, stating that "current compliance staffing is below standards we have established in the past and that immediate action should be taken to increase our compliance resources." Poston also wrote that there was a "serious experience gap," with only Poston having extensive compliance experience, and reminded Kaminski that Poston was still "awaiting authorization" to hire additional personnel for the TRT. Poston concluded his memorandum by stating that "some of these compliance resource shortfalls . . . could be viewed as serious." In an April 2004 email, Poston again informed Kaminski that the firm was having difficulty hiring additional staff for the compliance department because the salaries it was offering were too low.[8] Poston testified that he told an April 2004 meeting of senior management, which included Kaminski, that the compliance department was "really in a state of crisis in that [it] had significant burdens with the breakpoint analysis going on" and was "falling behind on [its] surveillance reports," its "regularly scheduled branch office inspections," and "a host of other related types of activities." Poston testified that he was unable to schedule further meetings with Kaminski or other MSC management to address the staffing problems facing the compliance department.

Kaminski also received other warnings about the TRT's staffing problems. In an email dated March 4, 2004, which Coates forwarded to Kaminski and Poston, Roth wrote that the "[variable annuity] exception transactions are at least two weeks behind . . . . [and that] [i]t appears that the TRT is understaffed." Kaminski did not respond to Coates' email. Coates also forwarded to Kaminski an April 28, 2004 email from Roth in which Roth noted that Sanfilippo had advised him that the TRT needed assistance in keeping up with the Red Flag Blotters.

In late March 2004, Kaminski approved the hiring of temporary staff in the compliance department to assist with the increasing workload. However, Poston reported to Kaminski that the temporary staff was not sufficiently knowledgeable to be of assistance. Kaminski suggested that Poston obtain other temporary staff, but directed Poston to offer any new staff a lower salary.

Kaminski also testified during an on-the-record interview ("OTR") in March 2005 that he had numerous problems with Poston's leadership of the compliance department and the TRT.[9] Kaminski stated that he became increasingly concerned about Poston's management abilities. According to Kaminski, Poston's performance was unsatisfactory with respect to "accountability," "delegated" authority, and "follow-up." Kaminski also noted that Poston's attendance at work was "erratic" and that Poff, MSC's president, and other senior officers were

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[8] In the email, Poston told Kaminski that eight job applicants refused to even meet with the firm when told the salary range. Kaminski responded by asking Poston to mention the problem casually to John Poff, President and Chief Operating Officer of MSC. Kaminski testified that he also brought the matter up with Poff.

[9] In this investigative testimony, Kaminski maintained that he did not discover that the Red Flag Blotters were not being reviewed until informed of this by Sanfilippo in July 2004. In December 2005, Kaminski's counsel wrote to the NASD examiners that, upon further reflection, Kaminski wished to amend his investigative testimony to acknowledge that Poston had advised him in early March 2004 and then again in late May 2004 that the compliance department was having difficulty performing its review functions on a timely basis. Counsel's letter added, however, that Poston had assured Kaminski that the problems with the Red Flag Blotter reviews had been "fixed."

unhappy with Poston's technical, leadership, and analytical skills. Kaminski stated that he had informed Poston that Poston needed to improve his handling of his "duties and responsibilities."

Poff corroborated that Kaminski had been dissatisfied with Poston's job performance. During an OTR in September 2006, Poff testified that, in 2003 and 2004, Kaminski became increasingly concerned and dissatisfied with Poston's job performance. Poff mentioned, for instance, that Kaminski told him that he had once found Poston asleep at his desk. Poff also stated that Kaminski had told him that Poston had missed several deadlines and had been unresponsive to MSC branch office employees who had requested assistance from the compliance department.

D. Backlog of Red Flag Blotter Reviews

Because of its increased duties and reduced staffing, the compliance department fell behind in its daily review of the Red Flag Blotter. Cohen testified that, by February 2004, he had fallen two or more weeks behind in his daily review of the Red Flag Blotter. Poston testified that the Breakpoint Project had a "profound" effect on the compliance department's resources and that the compliance department was "having trouble keeping up with a lot of the TRT blotters beginning in 200[4] around the February/March time frame." Poston stated that the TRT was able to do periodic reviews of the Red Flag Blotter through mid-March, but wasn't able to "keep[] to our normal discipline of trying to get it done on a daily basis."

As the volume of Breakpoint Project customer claims increased, the compliance department fell further behind in its review of its surveillance reports, including the Red Flag Blotter. On or about March 15, 2004, after a meeting between Kaminski and Poston, MSC ceased the daily review of the Red Flag Blotter. From March 15 through May 31, 2004, the TRT conducted no reviews of the Red Flag Blotter.[10]

In May 2004, Kaminski and Poston determined that Cohen should resume his daily review of the Red Flag Blotter on June 1. When Cohen resumed his daily review, the TRT had a backlog of approximately 597 variable annuity transactions that had not been reviewed. Poston directed Cohen to ignore the backlog and review the Red Flag Blotter going forward from June 1.

In August 2004, Kaminski transferred three people from other MSC departments to the compliance department to assist the TRT in reducing its backlog of surveillance reports, including the Red Flag Blotter. Kaminski temporarily assigned Graham Taylor, a marketing services representative who specialized in retirement plans, to the TRT to assist in the review of the Red Flag Blotter backlog. While knowledgeable about variable annuities, Taylor had no compliance experience and did not have a Series 24 license. Kaminski did not recall that the firm's procedures required that a registered principal with a Series 24 license conduct the Red

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[10] The TRT ceased reviewing the Red Flag Blotter during this period, but MSC continued to compile the data and to produce the Red Flag Blotter.

Flag Blotter review or that Taylor was not a Series 24 principal. Kaminski advised Taylor that Kaminski would be his direct supervisor, but that Taylor would take his day-to-day instructions from Sanfilippo and Cohen. Thereafter, Kaminski was largely unaware of Taylor's day-to-day activities.

Sanfilippo and Cohen assigned Taylor to review the 597 variable annuity transactions on the backlogged Red Flag Blotters, and Cohen trained Taylor on how to conduct this review.[11] All of the witnesses agreed that, after Cohen trained Taylor, he worked largely unsupervised. During his review of the backlogged Red Flag Blotters, Taylor began backdating documents to create the impression that his reviews had occurred closer to the transaction dates.[12]

E. NASD Examinations and Investigations

On May 18, 2004, several senior MSC officers, including Kaminski, Poston, Poff, and MSC's Chairman and CEO John Dixon, met with NASD staff in Atlanta to discuss, among other matters, MSC's supervisory practices for its variable annuity business, which was an ongoing concern of NASD (the "May 2004 Meeting"). Kaminski sent an email to Poston before the meeting instructing him not to provide any incriminating information to NASD staff. During the meeting, the MSC officers showed NASD staff copies of the firm's Red Flag Blotter. However, neither Kaminski nor the other MSC officers told NASD staff that the firm was not currently reviewing the Red Flag Blotter.[13] Kaminski also incorrectly advised NASD staff that the firm had implemented a monthly surveillance report for the firm's "1035 exchanges" when, in fact, it did not begin this report until the fall of 2004. Poston sent Kaminski an email the next day stating that the meeting had gone better than expected and commented that "[i]n some ways, it's too easy answering their [NASD's] concerns." Poston further wrote that "[w]e were able to dodge yet again" and "[m]aybe we're getting too good at this game."

In the fall of 2004, NASD began an investigation into whether MSC's variable annuity "1035 exchanges" for 2003 and 2004 had been suitable for the firm's customers.[14] The

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11 Cohen did not review most of Taylor's work. Cohen instead spot-checked a sample of about five to ten of the backlogged transactions per week. Sanfilippo did not review any of Taylor's work.

12 Roth similarly backdated her approval dates on backlogged Red Flag Blotters to correspond to the dates Taylor inputted.

13 Kaminski also failed to inform NASD of the Red Flag Blotter suspension in a July 14, 2004 letter he sent to the NASD in response to allegations of the firm's continuing NASD rule violations.

14 This was separate from the earlier NASD examination that led to the meeting (continued...)

investigation began because of the firm's high level of variable annuity exchanges. In January 2005, as part of that investigation, Kaminski provided testimony in an OTR (the "January 2005 OTR"), but did not inform NASD examiners of the suspension and backlog in reviewing the Red Flag Blotter.

F. NASD Disciplinary Proceeding

In July 2007, the NASD Department of Enforcement ("Enforcement") charged Kaminski with one count of "fail[ing] to carry out [his] supervisory responsibilities" and "fail[ing] to reasonably supervise the firm's review of its variable annuity transactions" in violation of NASD Rules 3010(a) and 2110.[15] An evidentiary hearing was held at which Kaminski was represented by counsel, gave testimony, and submitted exhibits into evidence. At the hearing, Kaminski did not dispute that he was aware of staffing problems in the compliance department in early 2004. However, there was conflicting testimony as to Kaminski's responsiveness to these problems and to his knowledge of their impact on the TRT's timely review of the Red Flag Blotter.

Poston testified that he and Kaminski generally held weekly meetings to discuss the workings of the department, but that during the period at issue, they met more frequently and discussed the Red Flag Blotter backlog and the compliance department's staffing problems in great detail. He told Kaminski that it was necessary to "get[] more experienced people" in order to timely review the Red Flag Blotter and other surveillance reports. Poston testified further that Kaminski failed to provide additional staff and resources. Coates testified that she too had numerous conversations with Kaminski in which she expressed her concern that the TRT was understaffed.

Kaminski testified that, contrary to Poston's and Coates's assertions, he responded in a "positive" and "timely manner" to requests for additional staff and resources. Kaminski further testified that, while he "seldom push[ed] for adding staff," he felt that the demands of the Breakpoint Project justified new hiring and authorized Poston to hire temporary staff. Kaminski could not recall discussing the TRT's problems in timely reviewing the Red Flag Blotter with Poston or Coates or receiving Roth's emails about those problems.

There was also conflicting testimony about whether Kaminski ordered or participated in the decision to suspend the review of the Red Flag Blotter. According to Poston, Kaminski decided to suspend the review so that the Breakpoint Project could proceed and told Poston of this decision during a meeting in Kaminski's office on or about March 15, 2004, after which Poston ordered Cohen to suspend his review of the Red Flag Blotter. Poston's administrative

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14 (...continued)
between NASD examiners and senior MSC personnel on May 18, 2004.

15 Enforcement also brought charges against Coates, Poston, Roth, Sanfilippo, Cohen and Taylor.

assistant, Julie Hamilton, testified that Poston and Kaminski held a closed door meeting just before Poston announced the suspension of the Red Flag Blotter review. Hamilton testified further that Poston did not possess the authority to make such a decision unilaterally. Poston also testified that, following Kaminski's decision to suspend the review, Poston regularly updated Kaminski about the status of the backlog and the compliance department's continued problems.

Kaminski, by comparison, testified that he became aware in April or May 2004 that there was a backlog of blotters unreviewed by the TRT, but that it was not until July that he learned that the Red Flag Blotter review had been suspended. Kaminski denied that Poston had told him in March or April 2004 that it would be necessary to temporarily suspend the Red Flag Blotter review. Kaminski also denied ordering the suspension.

On December 16, 2008, the Hearing Panel found that Kaminski had violated NASD Rules 3010(a) and 2110 by failing to reasonably supervise MSC's review of its variable annuity transactions between approximately March 15, 2004 and May 31, 2004. The Panel determined that Kaminski should be suspended in all principal capacities for six months and fined $50,000. The Hearing Panel found Kaminski's testimony that he was unaware of the Red Flag Blotter suspension until July 2004 not to be credible when viewed against Poston's consistent testimony that Kaminski ordered the suspension. The Hearing Panel also found that, during Postons's tenure at MSC, he consistently sought approval from Kaminski on all significant actions. The Hearing Panel determined that Kaminski knew by March 2004 that the compliance department was "in crisis" and that he ordered the compliance department to suspend its review of the Red Flag Blotter so that it could focus on completing the Breakpoint Project.

Pursuant to NASD Rule 9312,[16] the Review Subcommittee of the NASD National Adjudicatory Council ("NAC") elected to review the Hearing Panel's sanction determination with respect to Kaminski. The NAC concluded that Kaminski's misconduct was egregious. It held that Kaminski was involved in MSC's settlement of the 2001 NASD disciplinary action concerning the firm's failure to properly supervise its variable annuity trading, and that he knew that MSC had instituted the procedures for reviewing the Red Flag Blotter, in part, as a response to that disciplinary action. The NAC found that, despite this knowledge, Kaminski failed to reasonably supervise MSC's review of its variable annuity transactions. The NAC affirmed the $50,000 fine imposed on Kaminski, but increased the six-month principal suspension to an eighteen-month suspension in all capacities and required that Kaminski requalify before acting in any capacity requiring qualification.

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16 NASD Rule 9312 permits members of the NAC or the Review Subcommittee to call for the review by the NAC of a Hearing Panel decision.

III.

Section 19(e) of the Securities Exchange Act of 1934 provides that, in reviewing a disciplinary proceeding by a self-regulatory organization ("SRO"), we shall determine whether the associated person engaged in the conduct found by the SRO, whether the conduct violated the SRO rules at issue, and whether those rules were applied in a manner consistent with the purposes of the Exchange Act.[17] In conducting our review, we apply a preponderance of the evidence standard to determine whether the record supports NASD's findings that Kaminski's conduct violated NASD's Rules.

NASD Rule 3010(a) requires that a member "establish and maintain" a supervisory system "that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with [NASD Rules]." In addition to an adequate supervisory system, "[t]he duty of supervision includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation."[18] "Once indications of irregularity arise, supervisors must respond appropriately."[19] "In large organizations it is especially imperative that those in authority exercise particular vigilance when indications of irregularity reach their attention."[20] "The standard of 'reasonable' supervision is determined based on the particular circumstances of each case."[21]

Kaminski was an executive vice president who oversaw MSC's operations and compliance departments, the two departments that provided all of MSC's variable annuity transaction oversight. Kaminski had participated in the settlement negotiations with NASD in 2001 that resulted in the creation of the Red Flag Blotter, and he admitted below that it was an important compliance tool.

We agree with NASD that Kaminski "ignored staffing shortages, failed diligently to inform senior management of compliance needs, placed individuals from other departments in compliance positions for which they were not qualified, failed effectively to communicate to senior management the need to restrict business expansion to that which could be supervised adequately, and failed to limit the firm's activities when resources were not made available."

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17 15 U.S.C. § 78s(e).

18 *Michael T. Studer*, 57 S.E.C. 1011, 1023-24 (2004); *see also John B. Busacca, III*, Exchange Act Rel. No. 63312 (Nov. 12, 2010), 99 SEC Docket 34481, 34498 n.48.

19 *La Jolla Capital Corp.*, 54 S.E.C. 275, 285 (1999).

20 *Wedbush Sec., Inc.*, 48 S.E.C. 963, 967 (1988).

21 *John A. Chepak*, 54 S.E.C. 502, 513 n.27 (2000) (citing *Christopher J. Benz*, 52 S.E.C. 1280, 1284 (1997), *appeal denied*, 168 F.3d 478 (3d Cir. 1988) (Table)).

Kaminski received numerous red flags from Poston, Coates, and other members of his staff that MSC's compliance department was having difficulty meeting its responsibilities in the face of increased regulatory requirements and the rapid expansion of its business, but he failed to act decisively to address them. Kaminski knew about the compliance department's staffing problems as early as 2003 when he directed Poston to prepare a written report to address these problems. In response to this directive, Poston sent Kaminski detailed memoranda outlining the department's staffing problems and seeking additional experienced staff and resources. Coates and Poston met with Kaminski weekly to discuss compliance, operations, and regulatory concerns, including inadequate staffing. Poston "constantly" provided updates to Kaminski on the department's status, and Coates spoke to Kaminski several times about inadequate staffing and other problems with the compliance department.

Kaminski responded with actions that failed to address the urgency of the department's staffing needs. He suggested that Poston write up another summary of the department's problems that Kaminski would present to the executive committee. Although Kaminski approved the hiring of temporary staff in the compliance department to assist with the increasing workload, when Poston reported to Kaminski that the temporary staff was not sufficiently knowledgeable, Kaminski suggested that Poston try to obtain other temporary staff, but directed that Poston offer them lower pay.

Kaminski also had serious doubts about Poston's ability to perform the duties delegated to him. Kaminski testified that he was alarmed with Poston's performance during 2003 and 2004. Poff testified that Kaminski once found Poston asleep at his desk. Poff further testified that he and Kaminski discussed several deadlines Poston had missed and the fact that Poston had been unresponsive to associated persons who sought compliance assistance. Despite these doubts, Kaminski failed to follow up and ensure that Poston was properly exercising his delegated supervisory duties. Rather, he left Poston to his own devices, providing only minimal assistance and guidance despite Poston warning him repeatedly of the mounting problems in the compliance department. Thus, when Kaminski became aware in March 2004 that the TRT had fallen behind in its review of the Red Flag Blotters, he had already received ample red flags that the compliance department was in crisis because of regulatory and business pressure.

However, rather than take the steps necessary to address these problems, Kaminski ordered the TRT to suspend its review of the Red Flag Blotter on or about March 15, 2004. As noted, MSC created the Red Flag Blotter as a result of settlement negotiations with NASD, in which Kaminski had participated, to remedy deficiencies in MSC's supervision of variable annuity transactions. He and others testified below about the importance of the Red Flag Blotter as a critical compliance tool. It allowed MSC to monitor the suitability of its variable annuity sales, a product that comprised a significant portion of MSC business and was viewed as a "risk area." The Red Flag Blotter identified questionable 1035 exchanges, permitted the compliance department to investigate and/or take action on a real time basis, and generally permitted MSC timely to reverse unsuitable variable annuity transactions without cost to customers. By ordering the TRT to suspend its review of the Red Flag Blotter instead of devoting attention and resources to the compliance department, Kaminski demonstrated a significant failure of supervision.

Kaminski claims that he did not order the TRT to suspend its review of the Red Flag Blotter in March 2004, and that he did not learn of the suspension until July 2004. However, Poston testified that he spoke with Kaminski about the advisability of suspending the Red Flag Blotter review and that Kaminski directed him to suspend the review so that the Breakpoint Project could proceed. Poston also testified that, following Kaminski's decision to suspend the review, Poston regularly updated Kaminski about the status of the backlog and the compliance department's continued problems. The NASD Hearing Panel found Kaminski's testimony "not credible" that he was unaware of the suspension until well after it had occurred, finding instead that Kaminski had given the order to suspend the review so that the compliance department could focus on completing the Breakpoint Project. We give considerable weight and deference to the credibility findings of an initial fact-finder because such findings are based on hearing the witnesses' testimony and observing their demeanor.[22]

Evidence in the record corroborates the Hearing Panel's credibility determination. Hamilton, Poston's administrative assistant, testified that Kaminski met with Poston just before Poston announced the suspension decision. She testified further that Poston did not have the authority to make a unilateral decision to halt the TRT's review of the Red Flag Blotter. Kaminski testified that Poston had never before made a decision as significant as halting a trading surveillance program without consulting Kaminski first. Based upon our review of the record, we see no reason to reject the Hearing Panel's credibility determinations.

Kaminski contends that when he was finally apprised of the critical nature of the problem, he "immediately took action . . . to clean up this mess" and "supported [Poston]'s request for additional resources . . . and the hiring of temporary employees." Kaminski along with Poston determined that Cohen should resume the Red Flag Blotter review, but Cohen was directed to ignore the backlog and only review the blotter going forward. Later Kaminski assigned Taylor to review the 597 variable annuity transactions on the Red Flag Blotter backlog, but Taylor was not a principal, did not have a Series 24 license, was not an expert in variable annuities, and had never worked in compliance. Kaminski testified that he was unaware that the firm's procedures required that the TRT personnel be registered principals with Series 24 licenses or that Taylor was not a Series 24 principal. Taylor did not understand that he was conducting any type of suitability review, and he testified that he did not believe he was qualified to conduct such a review. There was no dispute among the witnesses that Taylor was essentially unsupervised in his new position. During his review of the backlogged Red Flag Blotters, Taylor began backdating documents to create the impression that his reviews occurred closer to the transaction dates. Although Taylor reported to Kaminski, Kaminski testified that he "really did not know exactly what Mr. Taylor was doing." Kaminski failed to detect Taylor's backdating.

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22 *Joseph J. Vastano, Jr.*, 57 S.E.C. 803, 811 (2004); *Anthony H. Barkate*, 57 S.E.C. 488, 499 (2004).

Accordingly, we find that Kaminski failed to reasonably supervise MSC's review of its variable annuity transactions in violation of NASD Rules 3010 and 2110.

IV.

Pursuant to Exchange Act Section 19(e)(2), we sustain NASD sanctions unless we find, giving due regard to the public interest and the protection of investors, that the sanctions are excessive, oppressive, or impose an unnecessary or inappropriate burden on competition.[23] NASD's Sanction Guidelines for failing to supervise provide for a monetary penalty of between $5,000 and $50,000 and a suspension in all supervisory capacities for up to thirty days.[24] In egregious cases, the Guidelines suggest "suspending the responsible individual in any or all capacities for up to two years or barring the responsible individual."[25] NASD found that Kaminski's conduct was egregious, and that a suspension of eighteen months in all capacities, along with a requirement that Kaminski requalify before acting in any capacity requiring qualification, and a fine of $50,000, was warranted.

Proper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and NASD rules.[26] It is also a critical component to ensuring investor protection.[27] The Sanction Guidelines applicable to a failure to supervise violation advise adjudicators to consider the "[n]ature, extent, size and character of the underlying misconduct."[28] Kaminski's failure to adequately supervise the compliance department led to the suspension of the TRT's review of the Red Flag Blotter for more than two months and to 597 variable annuity transactions that had triggered one or more red flags not being timely reviewed. The Red Flag Blotter was one of MSC's most important trade surveillance tools and essential to ensuring that the firm complied with its suitability obligations under the federal securities laws and NASD's

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23 15 U.S.C. § 78s(e)(2). Kaminski does not claim, nor does the record show, that NASD's action imposed an unnecessary or inappropriate burden on competition.

24 We are "not bound by the Guidelines, [but] use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2)." *CMG Inst'l Trading, Inc.*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13814 n.38.

25 *NASD Sanction Guidelines* at 108 (2007).

26 *See Rita H. Malm*, 52 S.E.C. 64, 68 (1994) (holding that the responsibility for "[a]ssuring proper supervision is a necessary component of broker-dealer operations").

27 *See Robert E. Strong*, Exchange Act Rel. No. 57426 (Mar. 4, 2008), 92 SEC Docket 2875, 2894 (noting that NASD's supervisory rules "serve important policy objectives related to investor protection").

28 *NASD Sanction Guidelines* at 108.

rules. MSC created it as part of a settlement with NASD to address MSC's previous failure to supervise its variable annuity sales. After Kaminski became aware that the TRT had fallen behind in its review, he did not take steps to remedy this failure in the firm's procedures but instead ordered the TRT to suspend its review. Given MSC's disciplinary history, Kaminski's participation in the 2001 settlement with NASD that created the Red Flag Blotter, and the importance of the Red Flag Blotter in protecting MSC's customers, we find that Kaminski's supervisory failure was egregious.

The Sanction Guidelines also call for consideration of "[w]hether respondent ignored 'red flag' warnings that should have resulted in additional supervisory scrutiny."[29] As discussed above, Kaminski ignored or gave half-hearted responses to warnings from Poston and Coates about the compliance department's increasing staffing and resources deficiencies that should have resulted in additional supervisory scrutiny. He also failed to heed his own doubts and other red flags about Poston's abilities as a supervisor. We agree with NASD that, given these numerous red flags, Kaminski's failure to supervise was reckless.

The Sanction Guidelines further direct adjudicators to consider whether the respondent attempted to conceal information from NASD or provided inaccurate or misleading testimony or documentary information to NASD.[30] At the May 2004 Meeting, Kaminski failed to disclose that MSC had suspended the Red Flag Blotter review, despite the fact that the meeting was held for the express purpose of discussing, among other matters, MSC's supervisory practices for its variable annuity business. Before the meeting, Kaminski directed Poston to ensure that he did not provide any incriminating information to NASD staff. During the meeting, Kaminski misrepresented to NASD staff that MSC had implemented a "1035 exchange" surveillance report when, in fact, this did not occur until the fall of that year. In his January 2005 OTR, Kaminski again failed to advise NASD staff of the suspension of the Red Flag Blotter review.

Kaminski argues that he was denied a fair hearing because NASD considered his efforts to conceal his misconduct to be an aggravating factor without giving him sufficient notice or an opportunity to defend against the claim. NASD, however, did not find that Kaminski violated NASD rules by misleading staff. It instead considered his misleading conduct in its sanction determination as allowed by the Guidelines. As we have stated before, an adjudicator may consider matters that fall outside the underlying rule violation when determining whether the sanction serves a remedial purpose that will deter future misconduct and improve overall standards in the securities industry.[31]

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29 *Id.*

30 *Id.* at 7 (Principal Consideration 12).

31 *See, e.g., J. Stephen Stout*, 54 S.E.C. 888, 915 n.64 (2000) (considering subsequent arbitration scheme when determining sanction in a suitability case); *Joseph J.*
(continued...)

Moreover, Kaminski had notice of and an opportunity to respond to NASD's claim that he failed to disclose problems with MSC's review of its variable annuity products. For example, Kaminski testified about the May 2004 Meeting and cross examined other witnesses who testified about the meeting, including Poston and an NASD examiner. He also had the opportunity to explain his OTR testimony, which was admitted into evidence at the hearing.[32]

Kaminiski asserts that NASD did not specifically ask about the Red Flag Blotter review at the May 2004 Meeting or in the January 2005 OTR. Kaminski maintains that he would have introduced evidence regarding the parameters of NASD's inquiries and elaborated on his responses. However, the May 2004 Meeting and January 2005 OTR did not take place in a vacuum, but rather in the context of NASD examinations and investigations of a firm that had demonstrated serious failures with respect to its supervision of variable annuity transactions. The Red Flag Blotter review, which MSC implemented as part of a settlement with NASD to remedy these deficiencies, had been suspended for more than two-months. Kaminski does not dispute that he failed to inform NASD of this fact at either the May 2004 Meeting or the January 2005 OTR. Under these circumstances, we agree with NASD that Kaminski's failure to inform NASD of the halt in the review of the Red Flag Blotters was an aggravating factor.

Kaminski maintains that the sanctions imposed on him are "disproportionally severe," noting that NASD has "previously imposed lower fines and far shorter suspensions for more serious misconduct." Kaminski also points out that the NAC reduced the bar that the Hearing Panel imposed on Cohen and Sanfilippo to an eighteen-month suspension in all capacities and a requirement that they requalify before acting in any capacity requiring qualification (the same suspension that NASD imposed on Kaminski) - despite the fact that they had been found responsible for falsifying books and records and misrepresenting compliance efforts. However, the NAC reduced the sanctions because it found, contrary to the Hearing Panel's findings, that although Cohen and Sanfilippo were registered principals, they were "fairly low in the compliance department chain of command" and were "not part of the firm's management structure," nor did they contribute to "establishing the gamesmanship culture at MSC." In any event, we consistently have held that the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by

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31 (...continued)
Barbato, 53 S.E.C. 1259, 1282 (1999) (considering respondent's conduct in contacting witnesses in its sanction analysis of a fraud charge).

32 Kaminski argues that FINRA did not include the January 2005 OTR transcript among its proposed exhibits. However, his co-respondent, Sanfilippo, included the transcript among the proposed exhibits that he offered before the hearing, and the Hearing Officer admitted the transcript into the record during the hearing.

comparison with action taken in other cases.[33] Accordingly, we reject Kaminski's contention that the sanctions are disproportionately severe.

Kaminski further asserts that the sanction is "punitive" because suspending him in all capacities is not sufficiently tailored to his alleged misconduct, which involved only supervisory violations. Kaminski contends the appropriate sanction in these circumstances is a supervisory suspension. We disagree. Kaminski's disregard of his supervisory responsibilities led to a breakdown in the firm's compliance system and to what NASD accurately described as a "lax regulatory culture." Given Kaminski's lack of understanding of his obligations as a securities professional and his continued employment in the securities industry, a suspension of eighteen months in all capacities will have the remedial effect of protecting the investing public from harm by impressing upon Kaminski and others the importance of complying with the federal securities laws and NASD rules.[34]

Kaminski points to several facts that he argues are mitigating and to which he asserts NASD gave insufficient consideration. Kaminski maintains that his "distinguished history" and "unblemished record in the industry" over his thirty-year career should be seen as a mitigating counterpoint to this singular "blemish" on his career. We have repeatedly stated that a "lack of disciplinary history is not a mitigating factor for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional."[35] Kaminski's argues that his "unilateral" and "swift" actions upon discovering the

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33 *See, e.g., John M.E. Saad*, Exchange Act Rel. No. 62178 (May 26, 2010), 98 SEC Docket 28591, 28600, appeal filed, No. 10-1195 (D.C. Cir. July 23, 2010); *Scott Epstein*, Exchange Act Rel. No. 59329 (Jan. 30, 2009), 95 SEC Docket 13833, 13865 n.75, appeal filed, No. 09-1550 (3rd Cir. Feb. 24, 2009); *John R. D'Alessio*, 56 S.E.C. 396, 427 (2003); *Robert A. Amato*, 51 S.E.C. 316, 321 n.25 (1993); *see also Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 187 (1973) (holding that "[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases"); *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (holding that, because the "Commission is not obligated to make its sanctions uniform," court would not compare sanction imposed in case to those imposed in previous cases).

34 We find no merit in Kaminski's claim that the NAC erred in imposing sanctions that exceeded those sought by NASD Enforcement. We have repeatedly held that the NAC reviews the Hearing Panel's decision *de novo* and has broad discretion to modify the Hearing Panel's decisions and sanctions. *See, e.g., Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), 97 SEC Docket 22027, 22035 n.17 (citing *Phillippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800), *aff'd*, 2011 WL 1086638 (2d Cir. 2011); FINRA Rules 9348 & 9349.

35 *Epstein*, 95 SEC Docket at 13865 (quoting *Keyes*, 89 SEC Docket at 801 n.20);
(continued...)

suspension of the Red Flag Blotter review are mitigating. However, as discussed above, Kaminski repeatedly failed to address the growing problems with the Red Flag Blotter review and the compliance department.

We find no merit to Kaminski's claim that the NASD's failure to find that his supervisory failures caused customer harm was not a mitigating factor.[36] As several witnesses testified, the TRT's review of the Red Flag Blotter was a critical tool for monitoring the firm's sales of variable annuity products. Kaminski's supervisory failure resulted in the TRT not reviewing 597 variable annuity transactions in the Red Flag Blotter in a timely manner. As NASD found, the result of Kaminski's failure to supervise could have been devastating to the firm or its customers.

Accordingly, we find that a suspension of eighteen months in all capacities, along with a requirement that Kaminski requalify before acting in any capacity requiring qualification, and a fine of $50,000 achieves the goals of being remedial and deterring future violations, without being excessive or oppressive.

An appropriate order will issue.[37]

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

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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[35] (...continued)
see also Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006) (holding that lack of disciplinary history not a mitigating factor); *Robert J. Prager*, 58 S.E.C. 634, 666–67 (2005) (finding no mitigation in respondent's "otherwise 'pristine' disciplinary record"); *Ernest A. Cipriani*, 51 S.E.C. 1004, 1007 & n.15 (1995) (rejecting respondent's "otherwise spotless" disciplinary record as a mitigating factor for purposes of sanctions).

[36] *See PAZ Sec. Inc.*, Exchange Act Rel. No. 57656 (April 11, 2008), 93 SEC Docket 5122, 5129 n.18 (holding that applicants' failures to comply with NASD rule "are not mitigated because those failures did not, in themselves, produce a monetary benefit to Applicants or result in injury to the investing public"), petition denied, 566 F.3d 1172 (D.C. Cir. 2009); *Coastline Fin., Inc.*, 54 S.E.C. 388, 396 (1999) (rejecting absence of customer harm as a mitigating factor for sanctions).

[37] We have considered all of the arguments advanced by the parties. We have rejected or sustained those arguments 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. 65347 / September 16, 2011

Admin. Proc. File No. 3-14054

In the Matter of the Application of

DENNIS S. KAMINSKI
c/o Peter J. Anderson, Esq.
Sutherland, Asbill & Brennan LLP
999 Peachtree Street, NE
Atlanta, Georgia 30309-3996

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NASD

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

ORDERED that the disciplinary action taken, and costs imposed, by NASD against Dennis S. Kaminski be, and they hereby are, sustained.

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. 65348 / September 16, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-13828

In the Matter of **Comverse Technology, Inc.,** **Respondent.**	**ORDER TERMINATING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

It is hereby ORDERED that this administrative proceeding is terminated and that final judgment shall enter without the imposition of a remedy pursuant to Section 12(j) of the Securities Exchange Act of 1934.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3279 / September 16, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14552

In the Matter of **VINAYAK S. GOWRISH,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Gowrish, 33 years old, is a resident of San Mateo, California. During the relevant period, Gowrish was an associate at TPG Capital, L.P. ("TPG"), which at the time was an unregistered investment adviser.

B. ENTRY OF THE INJUNCTION

2. On July 15, 2011, a final judgment was entered against Respondent, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in the civil action entitled Securities and Exchange Commission v. Vinayak S. Gowrish, Civil Action Number 09-05883(SI), in the United States District Court for the Northern District of California.

3. The Commission's complaint alleged that, from at least December 2006 through May 2007, Gowrish, in breach of a duty owed to his employer, misappropriated material nonpublic information from his employer in connection with TPG's negotiations to acquire Sabre Holdings Corp. ("Sabre"), TXU Corp. ("TXU"), and Alliance Data Systems Corp. ("ADS"). The complaint further alleged that Gowrish tipped the confidential acquisition information to his long-time friend, Adnan Zaman. Zaman, in turn, tipped the information to their two friends, Pascal S. Vaghar and Sameer N. Khoury. On the basis of the information provided by Gowrish through Zaman, Vaghar and Khoury then traded Sabre, TXU, and ADS securities, realizing approximately $375,000 in illicit profits. The Commission's complaint alleged that, in exchange for the confidential information, Vaghar provided cash kickbacks to both Gowrish and Zaman. On February 3, 2011, a federal jury found that Gowrish violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

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; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 34-65355; File No. S7-38-11]

RIN - [3235-AL04]

Prohibition against Conflicts of Interest in Certain Securitizations

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing for comment a new rule under the Securities Act of 1933 ("Securities Act") to implement the prohibition under Section 621 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") on material conflicts of interest in connection with certain securitizations. Proposed Rule 127B under the Securities Act would prohibit certain persons who create and distribute an asset-backed security, including a synthetic asset-backed security, from engaging in transactions, within one year after the date of the first closing of the sale of the asset-backed security, that would involve or result in a material conflict of interest with respect to any investor in the asset-backed security. The proposed rule also would provide exceptions from this prohibition for certain risk-mitigating hedging activities, liquidity commitments, and bona fide market-making.

DATES: Comments should be received on or before December 19, 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 S7-38-11 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 Street, NE, Washington, DC 20549.

All submissions should refer to File Number S7-38-11. 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 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 Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Elizabeth Sandoe, Senior Special Counsel, David Bloom, Branch Chief, Anthony Kelly, Special Counsel, Barry O'Connell, Attorney Advisor, Office of Trading Practices and Processing and Jack I. Habert, Attorney Fellow, Division of Trading and Markets, at (202) 551-5720, and David Beaning, Special Counsel and Katherine Hsu, Chief, Office of Structured Finance, Division of Corporation Finance, at (202) 551-3850, at the Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is requesting public comment on proposed Rule 127B under the Securities Act.

I. Introduction

Section 621 of the Dodd-Frank Act adds new Section 27B to the Securities Act.[1] This new Section of the Securities Act prohibits an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity (collectively "securitization participants"), of an asset-backed security ("ABS"), including a synthetic ABS, from engaging in a transaction that would involve or result in certain material conflicts of interest.[2] The prohibition under Securities Act Section 27B applies to both registered and unregistered offerings of ABS.[3] This prohibition applies during the period ending on the date that is one year after the date of the first closing of the sale of the ABS. Section 27B provides exceptions from the prohibition described above for certain risk-mitigating hedging activities, liquidity commitments and bona fide market-making.[4]

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 621, 124 Stat. 1376, 1632 (2010).

[2] Section 27B(a) of the Securities Act states that an "underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an asset-backed security (as such term is defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), which for the purposes of this section shall include a synthetic asset-backed security), shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity." 15 U.S.C. 77z-2a(a).

[3] See infra Section IIIA(ii).

[4] Section 27B(c) of the Securities Act excepts the following activity from the prohibition under Section 27B(a) of the Securities Act: "(1) risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with positions or holdings arising out of such underwriting, placement, initial purchase, or sponsorship; or (2) purchases or sales of asset-backed securities made pursuant to and consistent with- (A) commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, to provide liquidity for the asset-backed security, or (B) bona fide market-making in the asset-backed security."

15 U.S.C. 77z-2a(c).

Section 27B of the Securities Act further requires the Commission to issue rules for the purpose of implementing the new Section's prohibition.[5] To meet this statutory requirement, we are proposing new Rule 127B under the Securities Act to make it unlawful for a securitization participant to engage in any transaction that would involve or result in any material conflict of interest between the securitization participant and any investor in an ABS that the securitization participant created or sold at any time for a period ending on the date that is one year after the date of the first closing of the sale of the ABS.[6] Consistent with Securities Act Section 27B(c), the proposed rule excepts from the prohibition certain risk-mitigating hedging activities, liquidity commitments, and bona fide market-making. We discuss proposed Rule 127B in more detail below and offer a number of examples of how the proposed rule would apply to particular fact patterns. We also seek commenter input regarding whether information barriers or disclosure would be relevant and appropriate in managing and mitigating conflicts of interest or permitting certain transactions that might otherwise be prohibited by the proposed rule.

In crafting our proposed rule, we have primarily incorporated the text of Section 27B of the Securities Act. This release also sets forth below certain proposed clarifying interpretations of that text and a number of questions for public comment, all of which take into account

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[5] Section 27B(b) of the Securities Act. 15 U.S.C. 77z-2a(b).

[6] We note that Section 27B(a) is not effective until the adoption of final rules issued by the Commission. Section 621(b) of the Dodd-Frank Act states that "Section 27B of the Securities Act of 1933 . . . shall take effect on the effective date of final rules issued by the Commission under section (b) of such section 27B . . .." The proposed interpretations and related examples discussed in this proposing release therefore will have no force or effect except to the extent they are incorporated into any final Commission release adopting rules under Section 27B.

comments we have received to date regarding the implementation of Section 621 of the Dodd-Frank Act.[7]

II. Background

A. Securitization

Securitization is a mechanism for pooling certain financial assets that have payment streams and credit exposures associated with them and effectively converting the pool into a new financial instrument – an ABS – that is "backed" by the pool of assets and offered and sold to investors. More specifically, a financial institution or other entity, commonly known as a sponsor, first originates or acquires a pool of financial assets, such as mortgage loans, credit card receivables, auto loans or student loans. The sponsor then sells the financial assets, directly or through an affiliate, to a special purpose entity ("SPE"). The SPE issues the securities supported or "backed" by the financial assets. These securities are sold to investors in either a public offering subject to an effective registration statement filed with the Commission or an offering exempt from registration. As described by the Commission:

> Securitization generally is a financing technique in which financial assets, in many cases illiquid, are pooled and converted into instruments that are offered and sold in the capital markets as securities. This financing technique makes it easier for lenders to exchange payment streams coming from the loans [or other pooled assets] for cash so that they can make additional loans or credit available to a wide range of borrowers and companies seeking financing. Some of the types of assets that are financed today through securitization include residential and commercial mortgages, agricultural equipment leases, automobile loans and leases, student loans and credit card receivables.[8]

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[7] As of August 24, 2011, the Commission had received eight comment letters addressing new Section 27B of the Securities Act. All the comment letters regarding new Section 27B of the Securities Act are available on the Commission's website at http://www.sec.gov/comments/df-title-vi/conflicts-of-interest/conflicts-of-interest.shtml.

[8] Asset-Backed Securities, Release No. 33-9117 (Apr. 7, 2010), 75 FR 23328, 23329 (May 3, 2010) ("Release 33-9117").

As a result of the securitization, the credit and other risks associated with the pooled assets is transferred away from the sponsor's balance sheet to investors in the ABS.[9]

ABS investors are generally interested in the experience of the collateral manager and the "quality of the underlying assets, the standards for their servicing, the timing and receipt of cash flows from those assets and the structure for distribution of those cash flows."[10] With respect to the structure for cash flow distributions, some ABS transactions are structured to provide cash flow distribution through "pass-through certificates representing a pro rata share of the cash flows from the underlying asset pool".[11] Other ABS transactions offer a range of risk exposures and yields to investors. This is accomplished through the SPE issuing different classes of securities, commonly referred to as tranches.[12] Transaction agreements typically specify the structure of an ABS transaction and detail how cash flows generated by the asset pool will be divided among tranches. This division of cash flows is often referred to as the "flow of funds" or "waterfall."[13]

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[9] One type of ABS is a collateralized debt obligation ("CDO"). In a CDO structure, a sponsor may sell to an SPE an asset pool that holds fixed income products, such as loans, mortgage-backed securities or corporate bonds. The SPE then issues debt securities collateralized or "backed" by this asset pool.

[10] Asset-Backed Securities, Release No. 33-8518 (Dec. 22, 2004), 70 FR 1506, 1511 (Jan. 7, 2005) ("Release 33-8518").

[11] Id.

[12] Id. ("ABS transactions often involve multiple classes of securities, or tranches, with complex formulas for the calculation and distribution of the cash flows. In addition to creating internal credit enhancement or support for more senior classes, these structures allow the cash flows from the asset pool to be packaged into securities designed to provide returns with specific risk and timing characteristics.").

[13] Id. ("The flow of funds specifies the allocation and order of cash flows, including interest, principal and other payments on the various classes of securities, as well as any fees and expenses, such as servicing fees, trustee fees or amounts to maintain credit enhancement or other support.").

The securitization process developed in the 1970s and subsequently has experienced significant growth and evolved dramatically.[14] With this evolution, the investor base has broadened and the ABS themselves have become more complex. There are, for example, now synthetic ABS in which investors in securities issued by SPEs acquire credit exposure to a portfolio of fixed income assets without the SPE owning these assets. Rather, the investors gain this exposure because the SPE has entered into derivatives transactions, such as credit default swaps ("CDS") that reference particular assets.[15] The counterparty to the CDS may be the sponsor who originated or selected the underlying portfolio. The SPE, as seller of protection under the CDS, is in effect long the credit exposure on those assets as if it had purchased them.

For example, a bank that maintains fixed income assets on its balance sheet may protect itself against default of those assets by purchasing a CDS from the SPE that references the same or similar types of assets. In other cases, a person may desire to purchase CDS protection even though such person does not own the reference assets underlying the CDS sold by the SPE. In both of the above cases, the SPE, as seller of the CDS protection, takes on the risk of default on the reference assets underlying the CDS (and the consequent obligation to make a payment to the CDS counterparty as a result of such default) in exchange for ongoing payments from the purchaser of the CDS protection. In addition, in both scenarios any payments the SPE is required to make under the CDS will be funded from amounts received by the SPE from the investors in the ABS issued by the SPE. Thus, the proceeds of the SPE's issuance of securities

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[14] See, e.g., SYLVAIN RAYNES & ANN RUTLEDGE, THE ANALYSIS OF STRUCTURED SECURITIES: PRECISE RISK MEASUREMENT AND CAPITAL ALLOCATION 3 (2003); see also Release No. 33-9117, 75 FR at 23330, ("[a]t the end of 2007, there were . . . nearly $2.5 trillion of asset-backed securities outstanding"). Securities Industry and Financial Markets Association, Global CDO Issuance – Quarterly Data from 2000 to Q1 2011 (updated 4/1/11), available at http://www.sifma.org/research/statistics.aspx (reporting a doubling in the volume of synthetic CDO issuances between 2005 and 2007). In recent years, the market for securitization has declined. See, e.g., David Adler, A Flat Dow for 10 Years? Why it Could Happen, BARRONS (Dec. 28, 2009).

[15] The protection sold by the SPE under a CDS may reference a portfolio of assets, a single asset, or an index.

typically are not used to purchase loans, receivables or other investment assets, but instead are typically used to purchase highly creditworthy collateral[16] to support (i) the SPE's contingent obligation to pay the purchaser of the CDS in the event of one or more defaults with respect to the reference assets underlying the CDS (the synthetic reference pool of assets), and (ii) to the extent not used for payments to the CDS purchaser, the SPE's obligations to investors in the SPE's issued securities.[17] The SPE makes payments to investors based on cash flows and proceeds from the CDS and the collateral pool.

Therefore, in both the non-synthetic ABS and the synthetic ABS, the SPE and the investors in the SPE have an ongoing long exposure to each instrument in a reference pool of assets – i.e., assets held directly by the SPE, in the case of a non-synthetic transaction, or assets referenced in a CDS under which the SPE has sold protection to a counterparty, in the case of a synthetic transaction. The transactions differ, however, in that the synthetic transaction inherently involves a party – the counterparty to the CDS – that has purchased CDS protection on the same reference pool of assets and thus has an ongoing short exposure to those assets. This purchaser of CDS protection may be a securitization participant (such as the bank sponsoring the synthetic ABS). In these cases – and considering the CDS in isolation – the securitization participant would be taking an investment position that is directionally opposite to that taken by the investors in the synthetic ABS, as is generally the case in any transaction

[16] The term "collateral," when used in connection with a synthetic ABS, has a different meaning than the term "collateral" in a non-synthetic ABS. In a non-synthetic ABS the collateral is the pool of underlying assets (e.g., a pool of student loans). In a synthetic ABS, the collateral is often U.S. Treasury securities or other securities used as credit support for the SPE's potential payment obligations under a CDS that references an underlying asset pool.

[17] The assets or types of assets on which the SPE will sell protection would typically be disclosed to investors upfront and they would invest in the SPE's securities based on the anticipated risk of default on those assets and income received by the SPE from selling protection via CDS that reference those assets. The SPE would in effect have a synthetic reference pool of assets created by the SPE's long exposure to the assets underlying the CDS that it sold.

through which a buyer is able to acquire and a seller is able to dispose of a particular financial exposure in pursuit of their respective investment objectives. If the referenced assets default, the securitization participant receives a payment from the SPE pursuant to the CDS and the investors in the SPE ultimately suffer a loss on their investment.[18] If the referenced assets do not default, the investors would have benefited from payments from the CDS counterparty while the SPE would not have any payment obligations to the CDS counterparty.

Request for Comments Regarding the Description of the Securitization Process

1. Are there any other key features of the securitization process that need to be highlighted in considering the scope of Securities Act Section 27B? If so, which features, and why?
2. We seek commenter input regarding the reasons why market participants enter into synthetic ABS transactions instead of non-synthetic ABS transactions. What relative economic or other benefits do synthetic ABS transactions offer to investors and securitization participants? Under what circumstances are such transactions more or less beneficial for each type of market participant? What economic, market or other considerations affect the determination by investors and securitization participants to enter into such transactions?
3. We ask that commenters estimate the volume of synthetic ABS transactions on an annual basis in terms of size and dollar value over the last ten years and to supplement those estimates with data where possible. We would also appreciate comparative estimates of synthetic and non-synthetic ABS transaction volume during this same period.

[18] As further discussed below, the securitization participant's short exposure may itself be hedged – by entering into an offsetting CDS transaction, or otherwise – such that in terms of its overall risk profile the securitization participant does not retain exposures directionally opposite to those taken by investors in the synthetic ABS.

4. We ask that commenters describe the impact on the market, and in particular on investors, if securitization participants refrained from structuring and selling any particular types of synthetic ABS. Please include a discussion of all advantages and disadvantages as well as any effects on investor protection, liquidity, capital formation, the maintenance of fair, orderly and efficient markets and the availability of credit to borrowers.
5. Do synthetic ABS transactions involving other synthetic ABS, CDOs of CDOs or other transactions involving multiple layers of ABS exposures raise additional or heightened conflict of interest concerns? If so, why and how should these factors be reflected in our proposed rule?
6. What are the key features of the securitization process that bear on the existence or significance of conflicts of interest between participants in that process and investors in the ABS? How has the securitization process changed in recent years, and how have those changes exacerbated or mitigated any potential conflicts of interest? Are the potential conflicts of interest in this process different in kind, degree or with respect to transparency than the conflicts that may arise in connection with creating and offering other credit products, such as corporate debt?
7. Are certain types of ABS more susceptible to conflicts of interest? Are certain parties in the securitization process more likely to have a conflict of interest with investors than others? Are there transactions inherent in the structure of a synthetic ABS that raise special or heightened conflict of interest concerns relative to other ABS transactions or otherwise?

8. Are the conflicts of interest that may arise during the securitization process different in kind or degree than those that may arise after the securitization process? How should the Commission interpret issues related to pre- and post-offering conflicts of interest for purposes of Securities Act Section 27B?

9. We request commenters' views concerning conflicts that may arise from the multi-tranche structure, including where securitization participants retain part or all of a particular tranche.[19]

B. Initial Comments Received Regarding the Implementation of Section 27B

Shortly after the passage of the Dodd-Frank Act, the Commission provided the public with the opportunity to express views on the various Dodd-Frank Act provisions that the Commission is required to implement, including Section 27B of the Securities Act, as added by Section 621 of the Dodd-Frank Act.[20] As noted above, we received eight initial comment letters regarding our implementation of Section 27B. One letter was written by the sponsors of Section 621 of the Dodd-Frank Act, who urged the Commission and other federal financial regulators, among other things, to "fully and faithfully" implement the Dodd-Frank Act, including Section 27B of the Securities Act.[21] This letter noted that a central purpose of Securities Act Section

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[19] We note that other provisions of the Dodd-Frank Act seek to align the interests of ABS investors with securitizers. See, e.g., Section 941 of the Dodd-Frank Act. The proposed rule is not intended to prohibit risk retention as required by Section 941. See Credit Risk Retention, Release No. 34-64148 (March 30, 2011), 76 FR 24090 (April 29, 2011) (Commission proposing rules jointly with the Office of the Comptroller of the Currency, Treasury, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency and the Department of Housing and Urban Development to implement the credit risk retention requirements of section 15G of the Securities Exchange Act of 1934 (15. U.S.C. § 78o-11), as added by Section 941 of the Dodd-Frank Act) ("Release 34-64148").

[20] Public Comments on SEC Regulatory Initiatives under the Dodd-Frank Act, available at http://sec.gov/spotlight/regreformcomments.shtml.

[21] Letter from Senators Jeffrey Merkley and Carl Levin to Commission Chairman Mary Schapiro, et al. (Aug. 3, 2010) ("Merkley-Levin Letter") at p. 1, available at http://www.sec.gov/comments/df-title-vi/conflicts-of-interest/conflictsofinterest-2.pdf.

27B is to prohibit "firms from packaging and selling asset-backed securities to their clients and then engaging in transactions that create conflicts of interest between them and their clients."[22] Further, it noted that a Permanent Subcommittee on Investigations hearing that addressed issues related to The Goldman Sachs Group, Inc. "highlighted a blatant example of this practice: the firm assembled asset-backed securities, sold those securities to clients, bet against them, and then profited from the failures."[23] These commenters included in their letter excerpts from the Congressional Record providing further background as to the purpose of Section 621, including the following statement: "[t]he intent of section 621 is to prohibit underwriters, sponsors and others who assemble asset-backed securities, from packaging and selling those securities and profiting from the securities' failures."[24]

Other commenters were industry associations and representatives of market participants who expressed their views on the implementation of Section 27B both in general and in the context of specific situations, and who highlighted their concerns about an overly broad application of Securities Act Section 27B. For example, one comment letter supported the prohibition on material conflicts of interest but also urged that certain activities should not be prohibited regardless of whether they result in potential or actual conflicts of interest.[25] Two other commenters cautioned against a broad interpretation of the term "material conflicts of

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[22] Id. at p. 5.

[23] Id.

[24] Id. (citing 156 Cong. Rec. S5899 (daily ed. July 15, 2010) (statement of Sen. Carl Levin)).

[25] Letter from the Securities Industry and Financial Markets Association (Dec. 10, 2010) ("SIFMA Letter") at pp. 4 and 12 (SIFMA "generally support[s] the prohibition of material conflicts of interest" but "enumerates certain natural and expected conflicts which may arise in ABS transactions but do not constitute the type of 'material conflicts' intended to be regulated by Section 621").

interest" for purposes of Section 27B of the Securities Act.[26] These commenters noted, for example, that the relationship between securitization participants, on the one hand, and investors, on the other hand, can in certain respects be viewed as fundamentally conflicted in the simple sense that a buyer and seller of assets always have opposing interests, as to price, asset quality and other terms and conditions.[27] These commenters asserted that Section 27B was not intended to eliminate this type of conflict.

Commenters suggested different tests for assessing whether a transaction involves or results in a material conflict of interest prohibited by Section 27B. One commenter suggested that a transaction or activity should not be prohibited under Section 27B if "(i) such transaction or activity represents an overall alignment of risk to the ABS or underlying assets similar to that borne by investors of the ABS, (ii) such transaction or activity is unrelated to the [securitization participant's] role in the specific ABS, (iii) disclosure of the transaction or activity of the [securitization participant] adequately mitigates the risk posed by the potential or actual conflict with respect to any investors in the ABS or (iv) another regulatory regime applies with respect to the potential or actual conflict of interest."[28]

Another commenter asserted the proposal should prohibit: "(a) ABS transactions in which the adverse performance of the pool assets would directly benefit an identified party or sponsor (or any affiliate of any such entity) of the applicable ABS transaction; (b) ABS

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[26] Letters from the American Securitization Forum (Oct. 21, 2010) ("ASF Letter") at p. 3 and the Committee on Federal Regulation of Securities and the Committee on Securitization and Structured Finance of the Section of Business Law of the American Bar Association (Oct. 29, 2010) ("ABA Letter") at p. 2.

[27] ABA Letter at p. 3 ("The relationship between an ABS sponsor and ABS investors is inherently conflicted, in that the ABS sponsor is seeking funding and the ABS investors are providing that funding on negotiated terms. Pool selection may also involve conflicts . . . We believe that conflicts of this type, relating to the terms and nature of the security, exist in any ABS transaction and cannot be eliminated.").

[28] SIFMA Letter at p. 3.

transactions in which a loss of principal, monetary default or early amortization event on the ABS would directly benefit an identified party or sponsor (or any affiliate); and (c) ABS transactions in which an insolvency event related to the issuing entity of the ABS would directly benefit an identified party or sponsor (or any affiliate)."[29] This commenter believed that most ordinary course business transactions concerning securitization participants do not have these characteristics and should be permitted.[30]

A third commenter suggested that the proposal should "prohibit transactions that create a material incentive to intentionally design asset-backed securities to fail or default."[31] The commenter further proposed that a material conflict of interest would exist if "(i) a [securitization participant] participates in the issuance of an asset-backed security that is created primarily to enable such [securitization participant] to profit from a related or subsequent transaction as a direct consequence of the adverse credit performance of such asset-backed security and (ii) within one year following the issuance of such asset-backed security, the [securitization participant] enters into such related or subsequent transaction."[32]

Commenters provided examples of a number of conflicts of interest that they view as inherent in, and indeed essential to, the securitization process and that in their opinion should not be prohibited by Section 27B.[33] In fact, one commenter listed more than twenty categories of

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[29] ABA Letter at p. 3.

[30] Id.

[31] ASF Letter at p. 4.

[32] ASF Letter at p. 5.

[33] See, e.g., ABA Letter at p. 2 ("We believe rules implementing this provision should give appropriate weight to Congressional intent while permitting a broad range of common activities that are essential to the functioning of the securitization market."); see also SIFMA Letter at pp. 2 and 5 ("The goal of the letter is to provide the Commission with some representative examples of potential conflicts of interest that may arise as part of an ABS transaction but that should not be expressly prohibited under Section 621"; "conflicts of interest are inherent in securitization . . . These conflicts should be disclosed to investors and other transaction parties to the extent they are material, but

potential conflicts of interest that, in its view, are inherent in the ordinary course of securitization but should not be prohibited by Section 27B: (1) the basic risk transfer that occurs in structuring a securitization; (2) the tranching of debt; (3) holding differing classes of securities in an asset-backed transaction; (4) risk retention; (5) retaining the right to receive excess spread or cash flows; (6) failure to provide funding under a liquidity facility; (7) failure to provide a credit enhancement; (8) control rights (e.g., "the contractual right to remove the servicer, appoint a special servicer, exercise a clean-up call or instruct a trustee or servicer to take certain actions with respect to the collateral underlying the ABS or against an issuer or other transaction party" and "voting rights as a security holder or in another capacity in a transaction"); (9) hedging activities unrelated to a securitization; (10) providing financing (e.g., a warehouse line or financing investors to purchase an ABS); (11) servicer conduct (e.g., servicer interactions with obligors including loan modifications and adjustments to loan terms); (12) collateral manager conduct (e.g., the collateral manager acquiring assets for itself or others but not making the assets available to the asset-backed issuer, engaging "in 'agency cross' transactions in which the collateral manager or an affiliate thereof acts as a broker for compensation for both the issuer and the other party to the transaction" and "'client cross' transactions in which the collateral manager or an affiliate thereof causes a transaction between a securitization issuer and another client of the collateral manager without the collateral manager or its affiliates receiving compensation"); (13) conduct in connection with a trustee (e.g., a sponsor "may want to acquire a trustee or the trust business from the trustee"); (14) transactions in swaps and caps; (15) transactions in CDS and other derivatives; (16) receipt of payments for performing a role in a securitization prior to payments made to investors; (17) paying an entity for a rating or to provide

should otherwise be permitted . . . conflicts created in the normal course of a securitization are sufficiently known by, or disclosed to, investors and do not fall under the intended scope of Section 621.").

due diligence; (18) market research; (19) entering into a merger, acquisition, or restructuring that could be adverse to the securitization activities; (20) a bank affiliate of an underwriter making a loan to the sponsor; (21) an underwriter acting as underwriter or placement agent in connection with securities issued by a competitor of a sponsor; and (22) an underwriter hedging market-making activity.[34] Other commenters echoed the view that there are many activities that involve or result in potential conflicts of interest in connection with a securitization that should not be prohibited by Section 27B.[35]

Three other commenters offered their views on topics including the elimination of conflicts of interest, costs associated with regulation, and disclosure requirements.[36] A sponsor of tax lien-backed securities suggested that "municipally-sponsored [sic] tax lien securitization

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[34] SIFMA Letter at p. 5 through 11.

[35] See, e.g., ABA Letter at pp. 2-4. The ABA Letter sets forth a more limited list of activities that occur in the ordinary course of a securitization, some of which overlap with the SIFMA Letter, that mainly occur either as part of structuring the ABS or in connection with a securitization, and which the ABA believes should not be prohibited by the proposed rule. With respect to conduct that is related to structuring the ABS, the ABA identifies: (1) a securitization participant seeking funding that is provided by the investor in the securitization; (2) pool selection; (3) risk retention; and (4) subordinated tranches. The ABA Letter also highlights the following conduct customarily effected in connection with securitization: (1) "dealing with delinquent assets (e.g., whether and to what extent to modify an obligation or to foreclose on underlying collateral)"; (2) originating or acquiring second lien loans on mortgaged properties; (3) providing a warehouse loan or other loan to be repaid from the proceeds of ABS issuance; (4) loans to servicers or credit enhancers; (5) loans to an investor secured by ABS (e.g., an investor margin account or repo facility); (6) "sales by an identified party of ABS which it originally placed or sales of other debt or equity securities of an ABS issuer or of debt of an entity included in a CDO or CLO;" and (7) the exercise of remedies upon a loan default.

Similarly, the ASF Letter identifies activities that are routinely undertaken in connection with securitization, which in its view should not be prohibited by the proposed rule, including (1) "short-term funding facilities such as 'warehouse' lines, variable funding notes and asset-backed commercial paper, whereby the underwriter or its affiliate provides financing to the sponsor to fund asset originations or purchases," (2) the pursuit of customary servicing activities such as loan modifications, short sales and short refinances; (3) tranche structure; (4) risk retention; and (5) providing best execution in interest rate and currency swaps to obtain interest rates or currencies that differ from the underlying assets. ASF Letter at p. 3.

[36] See Letters from Robin McLeish (July 28, 2010) ("People should not be allowed [to engage in] any conflict of interest."), Timothy Hogan (Sept. 15, 2010) ("Underwriters . . . should disclose whether they are advocating for the Issuer or the Investor or both . . . This requirement should apply regardless of whether the securities are registered or exempt from registration."), and Robert O.L. Lynn (Oct. 6, 2010) ("Redistributing compliance risk toward the individual-employee level could yield cost-efficient enforcement by increasing the downside risk to anyone attempting to disguise conflicts of interest – without requiring additional taxpayer resources.").

programs should be exempt from the rules promulgated pursuant to Section 621 of the [Dodd-Frank] Act."[37]

III. Discussion of Proposed Rule

Pursuant to Section 27B(b) of the Securities Act, the Commission proposes Rule 127B under the Securities Act to address material conflicts of interest that arise in connection with a securitization. As the securitization process has grown more complex, securitization participants may in some circumstances engage in a range of different activities and transactions that give rise to potential conflicts of interest, and the existence and potential effects of conflicts of interest in that process have received increased attention.[38]

The proposed rule is designed to implement Section 27B of the Securities Act. As noted above, the text of proposed Rule 127B is based substantially on the text of Section 27B. As described below, the Commission is proposing for comment guidance to market participants as to the nature and scope of conduct that would be prohibited under the proposed rule. The Commission has received a number of initial comments regarding the breadth of any proposed definition of material conflict of interest, and we have sought to strike an appropriate balance

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[37] See Letter from Mark Page, Director of Management and Budget, The City of New York (Nov. 12, 2010) at p. 5 ("City of New York Letter").

[38] See, e.g., STAFF OF S. COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, SUB. COMM. ON INVESTIGATIONS, 112TH CONG., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE (Comm. Print 2011), available at http://hsgac.senate.gov/public/_files/Financial_Crisis/FinancialCrisisReport.pdf (hereinafter "Senate Subcommittee Report: Anatomy of a Financial Collapse"). See also, STAFF OF S. COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, SUB. COMM. ON INVESTIGATIONS, 111TH CONG., WALL STREET AND THE FINANCIAL CRISIS: THE ROLE OF INVESTMENT BANKS (Comm. Print 2010) (Exhibit 1a), available at http://hsgac.senate.gov/public/_files/Financial_Crisis/042710Exhibits.pdf (hereinafter "Senate Subcommittee Report: The Role of Investment Banks"); The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, available at http://c0182732.cdn1.cloudfiles.rackspacecloud.com/fcic_final_report_full.pdf (hereinafter, "The Financial Crisis Inquiry Report"); Consent and Final Judgment as to the Defendant J.P. Morgan Securities LLC in SEC v. J.P. Morgan Securities LLC (f/k/a/J.P. Morgan Securities Inc.), 11 CV 4206 (S.D.N.Y 2011); Litigation Release No. 22008 (June 21, 2011); and Consent and Final Judgment as to Defendant Goldman, Sachs & Co. in SEC v. Goldman, Sachs & Co. and Fabrice Tourre, 10 CV 3229 (S.D.N.Y. 2010); Litigation Release No. 21592 (July 15, 2010), 2010 WL 2799362 (July 15, 2010).

between prohibiting the specific type of conduct at which Section 27B is aimed without restricting other securitization activities.[39] We preliminarily believe that the proposed rule strikes that balance, but we seek comment on all aspects of proposed Rule 127B and of our proposed interpretations of its scope and requirements. It is important to note that although the proposed rule would prohibit certain transactions that would involve or result in certain material conflicts of interest, it would in no way limit or restrict the applicability of the general antifraud provisions of the federal securities laws to conduct arising before or after the proposed rule becomes effective. Thus, all conduct in connection with a securitization, whether or not effected in compliance with Section 27B and proposed Rule 127B, would remain subject to these and other relevant provisions of the securities laws.

The discussion of the proposed rule set forth below is divided into three parts. First, we describe certain conditions that, under Section 27B, must be present for the proposed rule to apply. In particular, we discuss the persons, products, timeframes and conflicts that potentially fall within the scope of the proposed rule, and we propose a standard for determining whether a "material conflict of interest" exists for purposes of the proposed rule. Second, we discuss three categories of activities - risk-mitigating hedging activities, liquidity commitments, and bona fide market-making - that are excepted from the scope of the proposed rule, as provided in Section 27B. Third, we provide examples of selected securitization transactions and describe how our proposed test for determining whether or not a transaction involves or results in a "material conflict of interest" prohibited by proposed Rule 127B would apply to such examples. Though in a number of examples particular reference is made to synthetic ABS for the purpose of

[39] See Section IIID of the Release.

furthering the discussion or providing clarification, we are seeking to apply the same general principles and guidance to both synthetic ABS and non-synthetic ABS.

We note that in analyzing whether a particular activity is prohibited by the proposed rule, market participants would be permitted to consider each of the conditions and exceptions discussed below independently. Thus, they could conclude that the activity is not prohibited by the proposed rule if: (1) the activity is outside the scope of the proposed rule (because, for example, it does not involve a covered person or product, or does not entail a material conflict of interest), or (2) the activity falls within a permitted exception to the rule. We seek comment on all aspects of proposed Rule 127B and of our proposed interpretations of its scope and requirements.

A. Conditions Required for Application of the Proposed Rule

There are five key conditions, each of which is discussed below, that define the circumstances in which the proposed rule might prohibit material conflicts of interest in the securitization process. In particular, in order for the proposed rule to apply, the relevant transaction must involve (1) covered persons, (2) covered products, (3) a covered timeframe, (4) covered conflicts and (5) a "material conflict of interest". Each of these conditions must be present in order for the prohibition under the proposed rule to apply.

i. Covered Persons

The proposed rule would apply to an underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of such entity, of an ABS. These persons are specified in Section 27B(a) of the Securities Act and typically have substantial roles in the assembly, packaging and sale of ABS. They structure the product and control the securitization process, and thus they may have the opportunity to engage in activities that the proposed rule and Section 27B of the Securities Act are intended to prevent.

The term "underwriter" is defined in Section 2(a)(11) of the Securities Act. The Securities Act, however, does not define for purposes of Section 27B of the Securities Act the terms "placement agent," "initial purchaser," "sponsor," "affiliate" or "subsidiary." We do not propose to define these terms for purposes of the proposed rule at this time. Although the term "sponsor" is defined in connection with Regulation AB's disclosure regime and the second prong of the definition of the term "securitizer" in Section 15G of the Securities Exchange Act of 1934 ("Exchange Act") is substantially identical to the Regulation AB definition of sponsor, the Regulation AB definition might not identify all persons involved in the structure and sale of, for example, a synthetic ABS transaction, who may have the opportunity to engage in activities that the proposed rule is intended to prevent.[40] We note that synthetic ABS are not included within the scope of Regulation AB.[41] Neither the Commission nor our staff has interpreted the Regulation AB definition in the context of synthetic ABS transactions. We preliminarily believe that the Regulation AB definition of sponsor might be under-inclusive or confusing in the context of the proposed rule. Furthermore, we preliminarily believe that a collateral manager should be subject to the proposed rule, based on such entity's role in structuring the transaction and selecting assets.

We preliminarily believe that terms such as placement agent and initial purchaser are sufficiently well understood in the context of the market for ABS, given that securitization

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[40] The Regulation AB definition of sponsor is found at 17 CFR 229.1101(l); see also Release No. 34-64148.

[41] Synthetic ABS do not fit within the more narrow definition of ABS included in Regulation AB because payments on synthetic ABS are based primarily on the performance of reference assets and not the performance of a discrete pool of financial assets that by their terms covert into cash and are transferred to a separate entity. See generally Release 33-8518.

developed in the 1970s and market participants frequently identify the various participants in the securitization process using these terms (for example, by specifying the placement agent, initial purchaser, and sponsor in offering documents).[42] We also recognize that many of these terms, however, are defined or used in other provisions of the federal securities laws and rules adopted thereunder.[43] While certain specific definitions used in other areas of the federal securities laws and rules may be workable in this context, others may be over- or under-inclusive. For example, we seek commenter input concerning whether the term "sponsor" in this context should include the collateral manager or others who for a fee, or some other benefit, play a substantial role in the creation of an ABS, or managing or servicing the assets underlying an ABS. Although as noted above we do not preliminarily believe definitions are warranted in the proposed rule text, we seek commenters' views on this issue.

<u>Request for Comments regarding Covered Persons</u>

10. Should we provide definitions for the terms "placement agent," "initial purchaser," "sponsor," "affiliate" or "subsidiary"? One commenter suggested that we adopt definitions for the terms "initial purchaser" and "sponsor" but not for other covered persons.[44] Should we adopt this commenter's approach? We seek comment concerning whether certain terms should or should not be

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[42] ABA Letter at page 6 ("Section 27B also uses the term 'sponsor', which is not currently defined in the Securities Act of 1933. However, the term sponsor has been defined in Regulation AB, and the definition there is virtually identical to clause (B) of the definition of "securitizer" that is added to the Securities Exchange Act of 1934 by virtue of Section 941 of the Dodd-Frank Act. We recommend that the Commission utilize the definition of 'sponsor' in Regulation AB for purposes of Section 27B"). While the ABA Letter suggested using the Regulation AB definition of the term sponsor, others did not make such a suggestion.

[43] <u>See</u>, <u>e.g.</u>, <u>infra</u> notes 44 through 51.

[44] <u>See</u> ABA Letter at p. 6 (suggesting "the Commission clarify that the term 'initial purchaser' as used in Section 27B refers to a broker-dealer functioning in a role equivalent to that of an underwriter or placement agent in a Rule 144A transaction" and "that the Commission utilize the definition of 'sponsor' in Regulation AB for purposes of Section 27B.").

defined, and the rationale supporting such distinctions. Specifically, we seek comment as to whether definitions of these terms in other provisions of the federal securities laws and rules would be necessary and workable in this area, whether existing definitions should be tailored specifically for this rule proposal, or whether new definitions would be necessary to achieve the purpose of the proposal.

11. Should the term "sponsor" have the same meaning as defined in Regulation AB?[45] Please explain why or why not. Would such definition be workable or would it be over- or under-inclusive in this context?

12. For purposes of proposed Rule 127B, should the term "sponsor" be defined to specifically include a collateral manager or any other person (e.g., servicers, custodians, etc.) who, for a fee or some other benefit, has a substantial role in the creation of the ABS? We seek commenter input regarding whether such definition would be appropriate or over- or under-inclusive. If you believe such a definition would be over- or under-inclusive, please provide examples of how such definition would be over- or under-inclusive. Would clarification or more specificity be needed if we were to use such a definition of "sponsor"? If so, please explain what would be needed and why. Alternatively, should the term "sponsor" be defined to specifically include a collateral manager or any other person (e.g., servicer, custodian, etc.) who, for a fee or some other benefit, participates in the creation of the ABS? We seek commenter input regarding

[45] 17 CFR 229.1101(*l*) ("Sponsor means 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.").

whether or not this alternative definition would be more appropriate. If commenters believe that definitions of a particular covered person are necessary but that existing definitions from other areas of the federal securities laws and rules or other sources are not workable in this context, please suggest an alternative definition(s). Commenters should explain why their suggested definition(s) better identifies persons intended to be covered by Section 27B.

13. Should proposed Rule 127B provide that an "affiliate" of, or a person "affiliated" with, a specified person is 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? Such terms are defined similarly in Section 16 of the Securities Act, Rule 405 under the Securities Act, and Rule 12b-2 under the Exchange Act.[46] Would such a definition be workable or would it be over or under-inclusive in this context? Please discuss whether or not a servicer would typically be an affiliate of an underwriter, placement agent, initial purchaser or sponsor, under such a definition.

14. Should the definition of the term "subsidiary" be the same as the definition of subsidiary found in Exchange Act Rule 12b-2?[47] Please explain why or why not. Would such definition be workable or would it be over or under-inclusive in this context?

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[46] See 15 U.S.C. 77p(f)(1); 17 CFR 230.405; and 17 CFR 240.12b-2, respectively.

[47] See 17 CFR 240.12b-2 ("A 'subsidiary' of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries.").

15. Should the term "underwriter" in the context of Securities Act Section 27B have the same meaning as the definition in Section 2(a)(11) of the Securities Act?[48] We note that Section 2 of the Securities Act states that terms used in the Securities Act have the meanings assigned to them in that section "unless the context provides otherwise." Is the context in Section 27B of the Securities Act, and proposed Rule 127B thereunder, such that the term "underwriter" should not have the meaning in Section 2(a)(11)? Would that definition be workable or over- or under-inclusive, in this context? Should we define the term "underwriter" instead to have the same meaning as the definition in Rule 100 of Regulation M under the Exchange Act?[49] Please explain why or why not. Would such definition be workable or over- or under-inclusive in this context?

16. Should definitions for each type of covered person be the same as or consistent with Regulation AB? Should "underwriter," "placement agent," "initial purchaser" and "sponsor" have the same meaning as either defined by Regulation AB or, if undefined, as understood in Regulation AB (e.g., underwriter or initial purchaser)? Would these terms need to be defined differently than defined or understood, if undefined, in Regulation AB in order to fulfill the intent of Section 27B of the Securities Act, particularly in connection with synthetic ABS? Please explain. Alternatively, please explain why consistent treatment would be appropriate.

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[48] 15 U.S.C. 77b(a)(11).

[49] 17 CFR 242.100 ("Underwriter means a person who has agreed with an issuer or selling security holder: (1) to purchase securities for distribution; or (2) to distribute securities for or on behalf of such issuer or selling security holder; or (3) to manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder.").

17. For purposes of Rule 127B, should we define "initial purchaser" to mean a broker-dealer functioning in a role equivalent to that of an underwriter or placement agent who purchases the ABS pursuant to an agreement that contemplates the resale of those securities to other purchasers in transactions that are not required to be registered under the Securities Act in reliance upon Rule 144A[50] or that are otherwise not required to be registered because they do not involve any public offering?[51] Would this language adequately describe the types of unregistered transactions in which an initial purchaser might participate (i.e., Rule 144A transactions and private resales made in reliance on the so-called Section "4(1-1/2)" exemption)? Should the definition of "initial purchaser" incorporate different or other concepts? Are there persons that should be subject to this provision in addition to broker-dealers that act as initial purchasers?

ii. Covered Products

Proposed Rule 127B(a), like Section 27B under the Securities Act, applies with respect to any "asset-backed security (as such term is defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), which for purposes of this rule shall include a synthetic asset-backed security)". Section 941(a) of the Dodd-Frank Act added Section 3(a)(77) to the Exchange Act to provide that the term "asset-backed security":

> (A) means a fixed income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a security

[50] 17 CFR 230.144A.

[51] See ABA Letter at p. 6 (suggesting that the Commission "clarify that the term 'initial purchaser' as used in Section 27B refers to a broker-dealer functioning in a role equivalent to that of an underwriter or placement agent in a Rule 144A transaction.").

or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flows from the asset, including –

(i) a collater alized mortgage obligation;
(ii) a collateralized debt obligation;
(iii) a collateralized bond obligation;
(iv)a collateralized debt obligation of asset-backed securities;
(v) a collateralized debt obligation of collateralized debt obligations; and
(vi)a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and

(B) does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.[52]

The proposed rule, like Securities Act Section 27B, incorporates this definition and specifically includes synthetic ABS in describing the scope of the prohibition on certain material conflicts of interests.

We are not proposing to define the term "synthetic asset-backed security" for purposes of proposed Rule 127B, because we understand that this term is commonly used and understood by market participants.[53] However, we seek comment on whether this understanding is correct and whether we should provide a definition of this term to facilitate implementation of the proposed rule.

We also note that the definition of an ABS in Section 3(a)(77) of the Exchange Act (an "Exchange Act-ABS") is much broader than the definition of an ABS in Securities Act Regulation AB. The definition of an Exchange Act-ABS includes securities that are typically

[52] Pub. L. 111-203, §941, 124 Stat. 1376, 1890-91.

[53] We note that the definition of ABS in Securities Act Regulation AB does not include a synthetic ABS. See Release 33-8518, 70 FR at 1514 and Item 1101(c) of Regulation AB (17 CFR 229.1101(c)). However, the prohibition in Section 27B of the Securities Act applies both to an ABS as defined in Section 3 of the Exchange Act, and to a synthetic ABS. Synthetic securitizations "create exposure to an asset that is not transferred to or otherwise part of the asset pool. These synthetic transactions are generally effectuated through the use of derivatives such as a credit default swap or total return swap. The assets that are to constitute the actual 'pool' under which the return on the ABS is primarily based are only referenced through the credit derivative." Release 33-8518, 70 FR at 1514.

sold in transactions that are exempt from registration under the Securities Act, such as CDOs, and that are not necessarily backed by a discrete pool of assets.

Neither Section 27B nor proposed Rule 127B distinguishes between ABS that are sold in an offering registered with the Commission or in an offering that is exempt from registration. Accordingly, our proposal would apply to ABS in both such circumstances. We recognize that Section 27B, and our proposed rule, refer to an underwriter, a term that, in the Securities Act, is typically, but not exclusively, used in the context of registered offerings. Section 27B, however, also applies to placement agents and initial purchasers, which are parties that perform functions similar to an underwriter in unregistered offerings. Moreover, as noted above, the definition of Exchange Act-ABS includes ABS typically offered and sold in unregistered transactions.

Request for Comments Regarding Covered Products

18. Should we define or interpret the term "synthetic asset-backed securities" and if so, how? Please explain why or why not. Please provide a suggested definition and the rationale for why the suggested definition is appropriate. Should any such definition or interpretation be limited to ABS for which the credit exposure for the asset pool from which payments are derived consists substantially of swaps, security-based swaps or other derivatives (and the collateral held by the SPE)?

19. Should any such definition or interpretation of "synthetic ABS" include any combination of securities that produces an economic result equivalent to an ABS, whether or not collateralized or having features meeting the specific requirements of the definition of ABS? If we were to define the term, should we define "synthetic ABS" as securitizations designed to create exposure to an

asset that is not transferred to or otherwise part of the asset pool, including transactions effectuated through the use of derivatives such as a CDS or total return swap, and for which the assets that are to constitute the actual "pool" under which the return on the ABS is primarily based are for the most part referenced through the derivative?[54]

20. Please discuss any similarities or differences between security-based swap agreements in general and security-based swap agreements used in synthetic ABS that are relevant for purposes of proposed Rule 127B. Please discuss whether or not such similarities or differences should be addressed in a definition or interpretation of the term "synthetic ABS" for purposes of proposed Rule 127B, and why.

21. We seek comment on the application of proposed Rule 127B to municipal securities that are "asset-backed securities" within the meaning of Section 3(a)(77) of the Exchange Act as amended by the Dodd-Frank Act.[55] Please explain whether you believe there are any differences between the application of this provision to municipal securities that are ABS and its application to other types of ABS. Should there be an exemption under Securities Act Section 28 from proposed Rule 127B for decisions made in the exercise of the governmental function of a state or local government acting as a securitization participant? Please explain why or why not. Would other exceptions

[54] See Section IIIA(2)(a) of Release 33-8518, 70 FR at 1513-1515.

[55] The definition of an ABS within the meaning of Section 3(a)(77) of the Exchange Act as amended by the Dodd-Frank Act includes securities that are typically sold in transactions that are exempt from registration under the Securities Act.

applicable to state and local government issuers or sponsors of ABS be appropriate? Please explain why or why not. If you believe exceptions should be included, please describe what such exceptions should be and why they would be appropriate. We seek specific comment about whether some or all varieties of municipally-sponsored tax lien securities should be exempt from the proposed rule and if so, why such an exemption would be appropriate for such tax-lien securities.[56] For example, we ask commenters to provide their reasoning as to whether or not the proposed rule should apply to a municipal tax lien securitization in which the tax liens arose by operation of law and were sold by a municipality through a tax lien securitization program in which all liens were securitized and the municipality had no role in the lien selection process.[57]

iii. Covered Timeframe

Proposed Rule 127B uses the Securities Act Section 27B language "at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security." It is during this time period, which extends for one year following the first closing of the sale of the security to the public, that no securitization participant could engage in a transaction giving rise to prohibited conduct. Accordingly, if a transaction occurs in the period prior to one year after the date of the first closing of the sale of the ABS, it is covered by the proposed rule.

[56] See City of New York Letter at p. 5 ("Many actions that the City of New York takes in the exercise of its governmental powers pursuant to other statutes or regulations or to serve the public's interest and protect the health and safety of its residents could potentially be viewed as being in conflict with the interest of investors in the tax lien-backed securities. For example, the City could take an action that would adversely impact the value of one of the properties securing a tax lien or the value of other properties in that area, which could adversely impact the value of that property.").

[57] See id.

Securities Act Section 27B specifies the end of the covered timeframe - one year following the first closing of the sale of the security to the public. Section 27B, however, does not specify the commencement point for the covered timeframe and we are not proposing to do so at this time. As a result, the proposed rule would cover transactions effected prior to "the date of the first closing of the sale of the asset-backed security." We preliminarily believe that this result may be appropriate because prior to the first closing securitization participants involved in structuring and marketing an ABS may engage in transactions involving or resulting in material conflicts of interest that in form or effect are, for purposes of the proposed rule, difficult to distinguish from similar transactions occurring after the first closing. Thus, using the sale date as a starting point for the covered timeframe might be under-inclusive. We request comment, however, on whether and how our proposed approach might be over-inclusive, as well as whether alternative approaches to defining the covered timeframe (such as treating the date of first sale as the beginning of the covered timeframe) might be appropriate.

Request for Comments Regarding Covered Timeframe

22. Is there a point in time prior to "one year after the date of the first closing of the sale of the asset-backed security" at which the prohibition in Section 27B was not intended to apply? Please explain why or why not.
23. Should the proposed rule specify the commencement point for the covered timeframe? Please provide an explanation. In particular, please discuss whether or not the commencement point for the covered timeframe should be "the date of the first closing of the sale of the asset-backed security." Please include a discussion of whether or not such commencement point for the covered timeframe would be appropriate, or whether it would be over- or under-

inclusive. In addition, please discuss whether such approach would have any advantages or disadvantages.

24. Should the commencement point for the covered timeframe be tied to the point at which a person becomes a securitization participant? How would such a point in time be defined? Should the commencement point vary depending on which securitization participant role a person performs? Please provide an explanation.

25. Should the commencement point for the covered timeframe be tied to some other reference point prior to the first closing of the sale of the ABS to the public? Please provide an explanation.

iv. Covered Conflicts of Interest

The Commission also proposes to delineate the scope of "conflicts of interest" that would potentially be covered by the proposed rule.[58] Specifically, there would not be a covered conflict of interest involved if the conflict in question: (1) arose exclusively between securitization participants or exclusively between investors; (2) did not arise as a result of or in connection with the related ABS transaction; or (3) did not arise as a result of or in connection with "engag[ing] in any transaction" (as more fully described below).

First, consistent with Securities Act Section 27B, we propose that the scope of the conflicts of interest covered by proposed Rule 127B(a) would be limited to material conflicts of interest between an entity that is a securitization participant with respect to an ABS and an investor in such ABS, whether or not such investor purchased the ABS from the securitization

[58] The proposed interpretations are not intended for broad application concerning the use of the term "material conflicts of interest" and would not apply in other areas of the federal securities laws and rules or SRO rules or in connection with other provisions of the Dodd-Frank Act.

participant. This proposed interpretation is not intended to narrow or broaden the scope of the statutory language. Under this interpretation, however, if conflicts of interest were to arise solely among securitization participants, acting in their capacity as such in connection with the securitization process, they would not be subject to the proposed rule, given the focus of Section 27B on protecting investors (e.g., conflicts of interests between a sponsor and a collateral manager of an ABS are not the focus of the proposal).[59]

Second, conflicts of interest arising solely among investors in the ABS offering (where investors could include securitization participants, provided these conflicts arise only from their interests as an investor) would also not be covered by the proposed rule.[60] Thus, for example, the proposed rule is not intended to prohibit the multi-tranche structures commonly used in ABS offerings, even though those structures may involve conflicts between the interests of various classes of investors in the offering by virtue of the different risks and rewards associated with such tranches.

Third, we propose that the prohibition under Rule 127B(a) would only apply to those conflicts of interest between a securitization participant and an investor that arise as a result of or in connection with the related ABS transaction. Our proposed rule, therefore, would not address other conflicts of interest that happen to arise between these same parties but that are unrelated to their status as a securitization participant and investor, respectively.[61]

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[59] See Merkley-Levin Letter, at attachment (Cong. Rec. S5899 (daily ed. July 15, 2010) (statement of Sen. Carl Levin)) ("[Securitization participants], like the mechanic servicing a car, would know if the vehicle has been designed to fail. And so they must be prevented from securing handsome rewards for designing and selling malfunctioning vehicles that undermine the asset-backed securities markets. It is for that reason that we prohibit those entities from engaging in transactions that would involve or result in material *conflicts of interest with the purchasers of their products*.") (emphasis added).

[60] See supra note 19.

[61] For example, the underwriter of an ABS may also be the underwriter in an unrelated common stock offering. One investor may purchase securities in both the ABS offering and the common stock offering. If the underwriter

Fourth, we propose that in order for the proposed rule to apply, the conflict of interest must arise as a result of or in connection with "engag[ing] in any transaction." For example, engaging in any transaction would include, but not be limited to, effecting a short sale of, or purchasing CDS protection on, securities offered in the ABS transaction or its underlying assets. "Engag[ing] in any transaction" would also include the securitization participant selecting assets, directly or indirectly, for the underlying asset pool and selling those assets to the SPE.[62]

We recognize that not every activity undertaken by a securitization participant would be "engag[ing] in any transaction" for purposes of Securities Act Section 27B or the proposed rule. For example, the issuance of investment research by a securitization participant would not be "engag[ing] in any transaction" for purposes of the proposed rule. We request comment on whether there are other types of activities in which securitization participants may engage that should be specifically excluded from the scope of the phrase "engag[ing] in any transaction."

Request for Comment Regarding Covered Conflicts of Interest

26. Would the application of the proposed interpretation to conflicts of interest between securitization participants and investors in ABS be appropriate or could

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engaged in transactions that undermined the market value of the common stock offering, that activity (while potentially addressed by other provisions of the federal securities laws and rules thereunder, depending on the facts and circumstances) would not fall within the scope of Proposed Rule 127B even though one of the investors in the common stock offering is also an investor in the ABS offering.

See ABA Letter at p. 5 ("The rules should clarify that the prohibition on material conflicts of interest does not extend to transactions unrelated to the relevant ABS transaction. The language of Section 27B referring to a 'material conflict of interest with respect to any investor in a transaction arising out of such activity', creates some ambiguity as to whether the phrase 'arising out of such activity' is intended to identify the investor, or the context in which the potential conflict may arise. Underwriters, placement agents, initial purchasers and sponsors, or their affiliates, may have a variety of relationships with investors who purchase ABS from or through them. We believe that the better reading of Section 27B is that the conflict of interest shall not arise in the context of the transaction with respect to which the investor acquired the ABS. This construction would help to assure the integrity of ABS offerings, while not imposing unreasonable restrictions on the overall relationships between the identified parties and sponsors, on the one hand, and ABS investors, on the other.").

[62] Merely "engaging in any transaction" does not in and of itself trigger the prohibitions of the proposed rule. For example, the sale of underlying assets to the SPE must also involve or result in a material conflict of interest with ABS investors and all other conditions required for application of the proposed rule must be met.

it be viewed as broadening or narrowing the scope of paragraph (a) of the proposed rule in a way that could prevent it from achieving its intended purpose? Please explain. Please describe any alternative interpretation that would better align the scope of the proposed rule with the conflicts that Section 27B is designed to address.

27. We seek commenter input regarding conflicts of interest that might arise between securitization participants, whether or not such conflicts impact ABS investors, and to what extent, if any, such conflicts are addressed under Securities Act Section 27B.

28. Should the phrase "engaging in any transaction" for these purposes be interpreted more broadly or narrowly? Please provide specific suggestions.

29. Are the examples noted above of activity that constitutes "engaging in any transaction" over-inclusive, under-inclusive or appropriate in the context of the proposed rule? Are there examples of "engaging in any transaction" in addition to effecting a short sale of securities offered in the ABS transaction or its underlying assets, or buying CDS protection on the relevant ABS or its underlying assets, that should be considered in this context? Please explain. Should the phrase "engaging in any transaction" include the asset-backed offering itself?

30. Is the example noted above of an activity that does not constitute "engaging in any transaction" (the issuance of investment research) appropriate in assessing conflicts of interest? Are there other activities that should not be "engaging in any transaction" for these purposes? If so, which activities, and why?

31. Please identify situations, if any, in which a securitization participant has engaged in a transaction that conflicts with the interests of ABS investors as well as engaged in a transaction that is aligned with the interests of ABS investors. Please discuss whether and how you believe such situations should be addressed under the proposed rule.

v. Conflicts of Interest that are Material

Perhaps the most challenging issue in implementing Section 27B is to identify those conflicts of interest involving securitization participants and investors that are "material" and intended to be prohibited under Section 27B and our proposed rule. If a conflict of interest is not a "material conflict of interest", then it would not be covered by Section 27B and our proposed rule.

The proposed rule does not define the term "material conflict of interest." We preliminarily believe that any attempt to precisely define this term in the text of the proposed rule might be both over- and under-inclusive in terms of identifying those types of material conflicts of interest arising as a result of or in connection with a securitization transaction that Section 27B was intended to prohibit, especially given the complex and evolving nature of the securitization markets, the range of participants involved, and the various activities performed by those participants. Accordingly, we propose to clarify the scope of conflicts of interest that are material and intended to be prohibited under Section 27B and our proposed rule through interpretive guidance rather than through a detailed definition in the proposed rule.[63]

In considering how best to interpret the phrase "material conflict of interest" for these purposes, we note that on the one hand, in order to give full effect to Section 27B, this phrase

[63] See supra note 6.

should be interpreted sufficiently broadly so as to capture the full range of transactions by securitization participants that involve or result in a material conflict of interest between securitization participants and investors. If the phrase is construed too narrowly, the proposed rule could potentially permit certain securitization participants to take undue advantage of their role in the securitization process, in which case the proposed rule might fail to enhance the integrity of securitization practices as fully as intended.

On the other hand, however, a number of commenters have argued that multiple conflicts of interest often arise between securitization participants and investors as an inherent part of the securitization process. Thus, they have cautioned, an overly broad interpretation may curtail the willingness of securitization participants to engage in securitization transactions, which ultimately could limit, increase the costs of, or effectively prohibit transactions that might benefit investors, efficiently redistribute risk, and support important segments of the economy.[64]

We are not aware of any basis in the legislative history of Section 621 to conclude that this provision was expected to alter or curtail the legitimate functioning of the securitization markets, as opposed to targeting and eliminating specific types of improper conduct. Moreover, as a preliminary matter, we believe that certain conflicts of interest are inherent in the securitization process, and accordingly that Section 27B and our proposed rule should be construed in a manner that does not unnecessarily prohibit or restrict the structuring and offering of an ABS.

[64] See, e.g., SIFMA Letter at p. 3 ("If not focused on the transactions referenced by Senators Merkley and Levin, rules promulgated under Section 621 could restrict many standard industry practices which are vital to the functioning of the ABS markets and beneficial to investors."). See also ASF Letter at p.3-4 ("Similarly, a broad interpretation of 'material conflicts of interest' could prohibit servicers . . . who are affiliated with the sponsor of a transaction from pursuing customary servicing activities . . . This restriction would effectively prohibit sponsors and their affiliates from servicing the loans that they originate, requiring costly servicing transfers that will decrease efficiency and potentially lead to confusion for consumers and disruptions in the servicing of assets.").

We have considered the various tests suggested by commenters for identifying material conflicts of interest for purposes of Section 27B and our proposed rule. While mindful of these suggestions and of the analysis accompanying them, the Commission preliminarily believes that the appropriate balance would best be struck through an interpretation that, for purposes of the proposed rule, engaging in any transaction[65] would "involve or result in [a] material conflict of interest" between a securitization participant and investors in the relevant ABS if:

1] Either:

A] a securitization participant would benefit directly or indirectly from the actual, anticipated or potential (1) adverse performance of the asset pool supporting or referenced by the relevant ABS, (2) loss of principal, monetary default or early amortization event on the ABS, or (3) decline in the market value of the relevant ABS (where these are discussed below, any such transaction will be referred to as a "short transaction"); or

B] a securitization participant, who directly or indirectly controls the structure of the relevant ABS or the selection of assets underlying the ABS, would benefit directly or indirectly from fees or other forms of remuneration, or the promise of future business, fees, or other forms of remuneration, as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS in a way that facilitates or creates an opportunity for that third party to benefit from a short transaction as described above; and

[65] See supra Section IIIA(iv). Such a transaction would include effecting a short sale of securities offered in the ABS transaction or its underlying assets, or buying CDS protection on the relevant ABS or its underlying assets.

2] there is a "substantial likelihood" that a "reasonable" investor would consider the conflict important to his or her investment decision (including a decision to retain the security or not).[66]

We preliminarily believe that this formulation of a conflict of interest that is material would directly address those types of activities that Section 27B was intended to prohibit – e.g., situations in which a securitization participant engages in a transaction through which it benefits when the related ABS fails or performs adversely or has the potential to fail or perform adversely and there is a substantial likelihood that a reasonable investor would consider the fact of such benefit important to his or her investment decision.[67]

a. Item 1(A) of "Material Conflict of Interest" Test

Engaging in a transaction would "involve or result in [a] material conflict of interest" if as a result of such transaction the securitization participant would benefit from the actual, anticipated or potential poor performance of the ABS or the underlying assets. It would not be necessary for a securitization participant to *intentionally* design an ABS to fail or default in order

[66] See Basic v. Levinson, 485 U.S. 224, 231-32 (1988) (citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

[67] See 156 Cong. Rec. S5899 (daily ed. July 15, 2010) (statement of Sen. Levin) ("The intent of Section 621 is to prohibit underwriters, sponsors, and others who assemble asset-backed securities, from packaging and selling those securities and profiting from the securities' failures.").

Our proposed approach for identifying when a person engages in transactions that involve or result in material conflicts of interest is, in part, similar to the ABA's suggested focus for the proposed rule. See ABA Letter at p. 2 ("we believe the focus of the rulemaking should be on the following types of conflicts: (a) ABS transactions in which the adverse performance of the pool assets would directly benefit an identified party or sponsor (or any affiliate of any such entity) of the applicable ABS transaction; (b) ABS transactions in which a loss of principal, monetary default or early amortization event on the ABS would directly benefit an identified party or sponsor (or any affiliate); and (c) ABS transactions in which an insolvency event related to the issuing entity of the ABS would directly benefit an identified party or sponsor (or any affiliate)."). In addition, the ABA suggested that the "rules should clarify that the prohibition on material conflicts of interest does not extend to transactions unrelated to the relevant ABS transaction." Id. at p. 5.

to trigger the rule's prohibition.[68] We preliminarily interpret the intent of Section 27B more broadly – to prohibit securitization participants from benefiting from the failure of financial instruments that they help structure, offer and sell to investors. Thus, under the proposed rule a securitization participant would be prohibited from profiting from the decline of an ABS it helped to create (assuming that the conflict would be important to a reasonable investor), even if that securitization participant did not intentionally cause, or increase the likelihood of, such decline. For example, a securitization participant that engaged in a short sale of the relevant ABS four months following the first closing of sale of the ABS would meet item 1(A) of the material conflict of interest test. The securitization participant would be able to benefit from a decline in the market value of the ABS through the short sale even if the securitization participant did not design the ABS to fail. The analysis does not turn on whether the securitization participant intentionally designed the ABS to fail, but rather whether the securitization participant would benefit, through the actual, anticipated or potential decline in the market value of the ABS, in this case in the form of gains from the short sale.

We highlight the reference in our proposed test to the requirement that a securitization participant would benefit directly or indirectly from the actual, anticipated or potential decline in the value of the ABS (or underlying assets). If a securitization participant effected a short transaction in the ABS, it would not be necessary for the market value of the ABS to actually decline in order for a "material conflict of interest" to arise. It would be sufficient that the

[68] See SIFMA Letter at p. 1 ("reforms may be necessary to ensure that securitization transaction parties are not creating and selling asset-backed securities ('ABS') that are intentionally designed to fail or default and profiting from the failure or default of such ABS."). See also, ASF Letter at p. 5 (a material conflict exists if the ABS "is created primarily to enable such [securitization participant] to profit from a related or subsequent transaction as a direct consequence of the adverse credit performance of such asset-backed security.").

securitization participant engaged in a transaction under which it would benefit if the market value of the ABS were to decline.[69]

We recognize that – like other prophylactic conflict of interest rules – the proposed rule and interpretation might limit certain investment activities that might otherwise be made for bona fide purposes. For example, it is possible for a securitization participant and investors in an ABS who have complete access to information regarding the underlying assets simply to have different views regarding the future prospects for those assets, based on their independent analysis of market and commercial trends or other factors. For example, an investor may believe that the assets will perform well, but the securitization participant may believe that the assets will perform poorly. In this case, restricting or prohibiting the securitization transaction would limit the ability of both the investor and the securitization participant to transact freely based on their respective views of the underlying assets (even though they might make the same investment choice if they were not involved in the securitization). We therefore acknowledge the concern that this proposal might have unintended effects, such as potentially limiting investment opportunities for investors if a securitization participant refrains from structuring and selling ABS in reaction to this proposal. We seek commenter input below concerning the extent to which such unintended effects might occur, and any potential impacts, including any impact on investors, investor protection, liquidity, capital formation, the maintenance of fair, orderly and efficient markets and the availability of credit to borrowers (through assets underlying an ABS).

On the other hand, in the context of a securitization transaction, the securitization participant is generally seeking to sell to investors a particular investment view regarding the

[69] We also understand that a securitization participant may engage in a short transaction, for example, in the context of market-making or in the context of hedging assets being pooled to create an ABS. If such activities qualify for the proposed exceptions in the rule discussed below – i.e., the exceptions for bona fide market-making and risk-mitigating hedging – they would be permitted.

underlying assets, in the form of the ABS. In this sense, the proposed rule and interpretation would help prohibit the securitization participant from structuring and offering the ABS to investors on the premise that it will be a good investment when the securitization participant has either structured the transaction in a manner that is designed to fail or takes other actions (i.e., entering into a short transaction) through which it will profit from such failure. Moreover, the proposed prohibition would be all the more important given that as a practical matter investors in the ABS may not have as much information regarding the underlying assets as the securitization participant, and may be drawing inferences regarding the quality of the assets based on the involvement and marketing efforts of the securitization participant in the transaction as well as any other information provided by the securitization participant. We seek commenter input regarding potential benefits, including benefits for investors, investor protection, liquidity, capital formation and the maintenance of fair, orderly and efficient markets that might ensue as a result of the proposed interpretation and how these potential benefits may impact any unintended consequences referenced above.

Nothing in the proposed interpretation would prevent a securitization participant from taking positions in which its economic interests would be aligned with the investors in the ABS it has created and sold – such as by purchasing the ABS.[70] While the proposed interpretation would cover benefiting from the adverse performance of the asset pool supporting the ABS, we note that the proposed interpretation would not prevent a securitization participant's transactions in the securities of a lender whose mortgage pools are included or referenced in an ABS because the proposal is focused solely on the ABS and its underlying portfolio.

[70] See SIFMA Letter at p. 3 (a transaction or activity should not be prohibited under Securities Act Section 27B if "such transaction or activity represents an overall alignment of risk to the ABS or underlying assets similar to that borne by investors of the ABS").

b. Item 1(B) of "Material Conflict of Interest" Test

If a securitization participant would not benefit in the manner set forth in item 1(A) of the material conflict of interest test, one must determine whether the securitization participant would benefit in the manner set forth under item 1(B) of that test. A benefit under either item 1(A) or 1(B) would satisfy item 1 of the test.

Engaging in a transaction would involve or result in a material conflict of interest arising as a result of or in connection with a transaction if a securitization participant who directly or indirectly controls the structure of the relevant ABS or the selection of assets underlying the ABS would benefit directly or indirectly – from fees or other forms of remuneration, or the promise of future business, fees, or other forms of remuneration – as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS in a way that facilitates or creates an opportunity for that third party to benefit from a short transaction as described above.[71]

In certain circumstances, a third party might directly or indirectly select assets underlying an ABS or structure the ABS transaction through its relationship with a securitization participant. In these situations, it is possible that the third party, rather than the securitization participant, might enter into a short transaction of a type that would be prohibited for the securitization participant itself under our proposed rule and interpretation. For example, the third party might select assets for the securitization transaction that it anticipates will perform poorly, and then enter into a short transaction on the ABS in order to benefit from the anticipated decline in the market value of the ABS or its underlying assets.

[71] For purposes of item 1(B), we interpret the statutory reference to a securitization participant "engaging in a transaction" to include circumstances where the securitization participant, although not itself a party to a transaction as contemplated by item 1(A), would benefit directly or indirectly as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS in a way that facilitates or creates an opportunity for that third party to benefit from a short transaction.

The securitization participant would not necessarily be a party to the short transaction, and therefore might not directly profit from that short transaction due to any future adverse performance of the ABS or its underlying assets. However, the securitization participant may be incentivized to leverage the role it plays in selecting assets underlying the ABS to seek other benefits. For example, the securitization participant might benefit (e.g., through compensation, the promise of future business, or other forms of remuneration from either the third party or the ABS) by allowing a third party to select the assets in the manner described, and in so doing would effectively benefit by having permitted the third party to potentially profit from a related short transaction. This would result in a material conflict of interest between the securitization participant and investors in the ABS of the type that Section 27B is intended to prohibit. Item 1(B) would apply because the securitization participant would benefit directly or indirectly from fees or other forms of remuneration, or the promise of future business, fees or other forms of remuneration. As a result of item 1(B), a securitization participant could not create an opportunity for a third party to engage in any transaction that the securitization participant itself would not be permitted to engage in under item 1(A) of the proposed interpretation.[72]

Given that Section 27B and our proposed rule apply to securitization participants, the burden of compliance with these requirements would fall on the securitization participant that directly or indirectly controls the structure of the relevant ABS or the selection of assets underlying the ABS and who then permits or facilitates the involvement of a third party in those aspects of the transaction. We recognize that in certain instances there might be practical challenges for securitization participants seeking to determine whether they are subject to this

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[72] We note for clarity that in order for a transaction to be a material conflict of interest under item 1(B), the third party would actually need to effect a short transaction. Thus, with respect to both items 1(A) and 1(B), the material conflict of interest test contemplates the existence of a short transaction by the securitization participant or the third party, as applicable.

restriction, or whether the involvement of third parties in a securitization transaction complied with the proposed rule. For example, in certain cases there might be practical difficulties for a securitization participant in determining whether a third party that was involved in selecting the underlying assets or the structuring of the ABS might also engage in prohibited short transactions. While securitization participants could use different tools to manage these practical difficulties, we preliminarily believe that when reasonable to do so, securitization participants could rely on appropriate contractual covenants or representations, either between themselves or with the relevant third parties, to determine compliance with our proposed rule. For example, if a third party were involved in selecting the underlying assets or structuring the ABS, where reasonable to do so a securitization participant could rely on contractual assurances (from the third party or from another securitization participant who had obtained such assurances from the third party) that the third party would not engage in any short transactions that would be prohibited if engaged in by a securitization participant in the relevant offering.

Of course, it would not be necessary for a securitization participant to obtain such contractual assurances -- for example, in circumstances where it did not have any reasonable basis to believe that a third party would engage in a short transaction in a way that would violate our proposed rule.

c. Item 2 of "Material Conflict of Interest" Test

Item 2 of the proposed interpretation, which requires "a substantial likelihood that a reasonable investor would consider the conflict important to his or her investment decision," is intended to require that the potential implications of the relevant conflict be sufficiently important as to warrant the prohibition imposed under the proposed rule. We preliminarily do not believe it would be appropriate to interpret the proposed rule so broadly as to prohibit all transactions that give rise to any conflict of interest, even if the potential benefits of such transactions for the securitization participant were so minimal as to be unimportant to a reasonable investor.

We note that in considering whether there is a substantial likelihood that a reasonable investor would consider the conflict important to his or her investment decision, it is not possible to designate in advance certain facts or occurrences as determinative in every instance.[73] Rather the proposed interpretation would require an assessment of the inferences that a reasonable investor would draw from a given set of facts and circumstances.[74] It would be appropriate, however, to consider both the probability that the securitization participant would receive a benefit and the magnitude of the benefit.[75] Thus, for example, it is possible that a securitization participant might stand to benefit substantially from a decline in the value of the ABS, but the probability of its receiving such benefit under the circumstances might be so small that a reasonable investor would not consider the conflict important to his or her investment decision.

Although the proposed interpretation uses a materiality formulation that is also used under the federal securities laws for determining whether disclosure is necessary – i.e., whether there is a substantial likelihood that a reasonable investor would consider the issue important to his or her investment decision – the use of this phrase in this context is not intended to suggest that a transaction otherwise prohibited under the proposed rule would be permitted if there were adequate disclosure by the securitization participant. We note in this regard that there may be

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[73] Basic v. Levinson, 485 U.S. at 236 ("Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.").

[74] Id. (citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976)).

[75] Id. at 238 (citing SEC v. Texas Gulf Sulphur, Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc), cert. denied, sub nom Coates v. SEC, 394 U.S. 976 (1969)).

practical challenges in relying on disclosure as a means to address all transactions involving a material conflict of interest – including in particular certain transactions arising after the offering documents have been disseminated but before the one-year timeframe covered by the proposed rule has elapsed.[76] Nevertheless, we request comment as to whether and to what extent adequate disclosure of a material conflict of interest should affect the treatment under the proposed rule of an otherwise prohibited transaction.

Request for Comments Regarding Material Conflicts of Interest

32. We seek comment regarding any potential consequences of not defining the term "material conflict of interest" in the proposed rule text and instead proposing an interpretation in the context of the proposed rule. Please discuss whether or not there may be an unintended chilling effect on securitization transactions resulting from potential uncertainty associated with not defining material conflict of interest. If you believe the Commission should define "material conflict of interest," please provide a suggested definition and the rationale as to why such definition identifies the conflicts that the proposed rule is intended to address.[77] Is it likely or unlikely that such a definition would be able to anticipate all future material conflicts of interest? Would such a definition lead to unintended consequences, such as excluding from the proposed prohibition certain activities undertaken by securitization participants

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[76] See infra Question 98.

[77] See, e.g., ASF Letter at p. 5 (suggesting that a material conflict of interest "shall exist, if other than for hedging purposes or as permitted by Section 27B(c) of the Securities Act of 1933, (i) a [securitization participant] participates in the issuance of an asset-backed security that is created primarily to enable such [securitization participant] to profit from a related or subsequent transaction as a direct consequence of the adverse credit performance of such asset-backed security and (ii) within one year following the issuance of such asset-backed security, the [securitization participant] enters into such related or subsequent transaction.").

that involve material conflicts of interest? Or would such a definition be over-inclusive and encompass activities undertaken by securitization participants that do not involve material conflicts of interest?

33. Is the distinction suggested by commenters between conflicts that are inherent in the securitization process and those that are not a meaningful one?[78] Is this proposed distinction useful for purposes of defining the scope of Securities Act Section 27B? Are there other ways to distinguish between different conflicts of interest that the Commission should take into account in considering the scope of Section 27B? Would a reasonable investor understand the difference between conflicts of interest that are inherent in the offering process and those that are not?[79] Would the reasonable expectations of an investor in an ABS offering be a useful test for determining which conflicts of interest are material?

34. Is the proposed interpretation regarding what constitutes a material conflict of interest appropriate? Should the interpretation be broader or narrower? Please suggest alternative interpretations for what would constitute material conflicts of interest for purposes of the proposed rule and explain why such interpretations would better identify transactions that involve or result in material conflicts of interest. In addition to the magnitude of a benefit and the probability that it will occur, are there additional (or alternative) factors that should be considered in assessing whether there is a substantial likelihood that a

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[78] See supra Section IIB.

[79] Id.

reasonable investor would consider the conflict important to his or her decision to invest?

35. Should the proposed interpretation extend to indirect or unforeseeable benefits to a securitization participant? Please explain why or why not. How would a securitization participant determine that there was no such indirect or unforeseeable benefit?

36. Are there circumstances in which facilitating a third party to benefit from the adverse performance of the ABS or underlying assets would not be a material conflict of interest? Please explain.

37. We seek commenter input regarding the potential use of contractual provisions and covenants by securitization participants to manage their compliance with the proposed rule, as well as a discussion of how a securitization participant would determine that no contractual assurance was necessary.

38. As an alternative, would it be appropriate to prohibit a securitization participant from allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS (absent contractual provisions) if the involvement of the third party in the ABS transaction or the actions of the third party unrelated to the ABS transaction constituted a material conflict of interest with the investors in the ABS transaction (regardless of whether or not the securitization participant benefitted)?

39. Some commenters asserted that the prohibited conduct should be limited to creating and selling an ABS that is "intentionally designed to fail or default"[80]

[80] See SIFMA Letter at p. 2.

or creating and selling an "intentionally flawed" ABS so that a securitization participant can profit from a related or subsequent transaction.[81] As one commenter suggested, should the test focus on whether "(i) such transaction or activity represents an overall alignment of the risk to the ABS or underlying assets similar to that borne by investors of the ABS, (ii) such transaction or activity is unrelated to the [securitization participant's] role in the specific ABS, (iii) disclosure of the transaction or activity of the [securitization participant] adequately mitigates the risk posed by the potential or actual conflict with respect to any investors in the ABS or (iv) another regulatory regime applies with respect to the potential or actual conflict of interest"?[82] Is such a formulation for the proposed rule appropriate? Please explain. Would such a test be over-inclusive and encompass activities that do not involve or result in material conflicts of interest? Would such a test be under-inclusive and fail to cover activities that are intended to be prohibited by Section 27B and the proposed rule? What other approaches would provide a substantially similar or higher level of investor protection as the proposed rule?

40. Are there transactions inherent in the securitization process that would be material conflicts of interest under the proposed interpretation that were not intended to be prohibited by Section 27B? Or, are there transactions inherent in

[81] See ASF Letter at p. 5 ("the definition of 'material conflicts of interest' should prohibit those types of transactions identified by Senators Merkley and Levin that create conflicts of interest by creating intentionally flawed asset-backed securities." Specifically, the commenter suggested that a material conflict of interest exists "if, other than for hedging purposes or as permitted by Section 27B(c) of the Securities Act of 1933, (i) a [securitization participant] participates in the issuance of an asset-backed security that is created primarily to enable such [securitization participant] to profit from a related or subsequent transaction as a direct consequence of the adverse credit performance of such asset-backed security and (ii) within one year following the issuance of such asset-backed security, the [securitization participant] enters into such related or subsequent transaction.").

[82] SIFMA Letter at p. 3.

the securitization process that would not fall within the proposed interpretation and the proposed rule that should be prohibited under Section 27B and application of the proposed rule? Please identify and provide an explanation of these activities as well as an explanation of why they should or should not be prohibited under Section 27B and the proposed rule. We ask that commenters address each of the activities set forth in initial comment letters as described in Section II.B as well as activities not addressed by initial comment letters.

41. Are modifications to the proposed rule or interpretation, consistent with the statute, necessary or advisable to mitigate any such unintended consequences?

42. Is the phrase "fees or other forms of remuneration, or the promise of future business, fees or other forms of remuneration" too narrow or too broad, or is it appropriate? Are there benefits to the securitization participant that would not be captured by this phrase? Should the proposal specifically address the anticipation or expectation of or attempts to induce such benefits? Please explain why or why not.

43. We ask commenters to discuss whether or not the proposal would prohibit any person "engag[ing] in any transaction" that commenters believe should be permitted under Section 27B of the Securities Act? If such activity were prohibited, please discuss any potential impact, including any impact on investors, investor protection, liquidity, capital formation and the maintenance of fair, orderly and efficient markets.

44. We seek commenter input regarding whether the phrase used in item 1(B) "directly or indirectly controls the structure of the relevant ABS or the selection

of assets underlying the ABS" is appropriate, under- or over-inclusive. Please provide examples of persons who would not be identified by this phrase that you believe should be subject to the proposed rule. Please provide examples of persons that would be identified using this phrase that you believe should not be subject to the proposed rule. Would the phrase "exercises control over the structure of the relevant ABS or the selection of assets underlying the ABS" be more appropriate? Please explain why or why not. Would the phrase "has substantial control over the relevant ABS or the selection of assets underlying the ABS" be more appropriate? Please explain why or why not. Would the phrase "influences the structure of the relevant ABS or the selection of assets underlying the ABS" be more appropriate? Please explain why or why not. We seek commenter suggestions on alternative language and an explanation of why it would be more appropriate in this context. Please include in your responses a discussion of whether any alternative option would be over- or under-inclusive and provide examples of persons who would not be identified by the alternatives that you believe should be subject to the proposed rule as well as examples of persons who would be identified by alternatives but that you believe should not be subject to the proposed rule.

45. Is the proposed application of the prohibition under Section 27B to securitization participants if third parties, directly or indirectly, structure the relevant ABS or select assets underlying the ABS appropriate? Should the restrictions be placed on a broader category of activities or a more delineated one? Should we define the phrase "directly or indirectly, to structure the

relevant ABS or select assets underlying the ABS" used in item 1(B)? If yes, please provide a suggested definition and the rationale as to why such definition would be appropriate.

46. We seek commenter input regarding whether the phrase used in item 1(B) "as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS" is appropriate, over- or under-inclusive. Please provide examples of persons who would not be identified by this phrase that you believe should be. Please provide examples of persons that would be identified using this phrase that you believe should not be. Would the phrase "as a result of allowing a third party, directly or indirectly, to influence the structure of the relevant ABS or the selection of assets underlying the ABS" be more appropriate? Please explain. Would the phrase "as a result of allowing a third party, directly or indirectly, to substantially influence the structure of the relevant ABS or the selection of assets underlying the ABS" be more appropriate? Please explain. We seek commenter suggestions on alternative language and an explanation of why it would be more appropriate in this context.

B. <u>Statutory Exceptions</u>

Consistent with Securities Act Section 27B, proposed Rule 127B(b) would provide exceptions to the prohibition in proposed Rule 127B(a) for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making. We have modeled the proposed exceptions on the text of Section 27B of the Securities Act.

i. Risk-mitigating hedging activities

Pursuant to the proposed rule, the following would not be prohibited by paragraph (a) of the proposed rule:

> Risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with such positions or holdings.

The proposed exception for risk-mitigating hedging activities uses the language set forth in Section 27B(c)(1).[83] The goal of this proposed exception is to allow certain hedging activities that are designed to reduce or mitigate risk for the underwriter, placement agent, initial purchaser, or sponsor, where risk mitigation refers to the practice of limiting the consequences of a risk, without necessarily reducing the probability of the risk occurring. For example, firms engage in risk-mitigating hedging as they pool assets to create ABS. The assets are assembled over time and firms hedge the specific risk of a price decline of the assets being assembled for the pool while the pool is formed. This type of activity would fall within the proposed exception.

Although the exception in Section 27B(c)(1) by its terms does not address affiliates and subsidiaries, the Commission preliminarily believes that, since affiliates and subsidiaries of securitization participants are included in the list of persons who are prohibited from engaging in the type of activity specified in Section 27B they too should have the benefit of the proposed exception for risk-mitigating hedging activities. Therefore, the Commission would interpret the exception as applying to affiliates and subsidiaries of securitization participants.

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[83] We did not incorporate the second use of the phrase "arising out of such underwriting, placement, initial purchase or sponsorship" to streamline the proposed rule text, and intend no substantive change from Section 27B(c)(1).

The proposed exception is not intended to permit speculative trading masked as risk-mitigating hedging activities.[84] Generally, risk-mitigating hedging is effected to reduce risk from an existing position or a position about to be taken.[85] The risk-mitigating hedging activities would be required to occur in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an ABS.[86] In addition, the activities would be required to be designed to reduce the specific risk to the underwriter, placement agent, initial purchaser, or sponsor associated with positions or holdings as mandated by Section 27B. Risk-mitigating hedging may include a series of hedging transactions, based on the price movements of the underlying assets, in order to remain delta-neutral.[87] Risk-mitigating hedging does not include trading to establish new positions designed to earn a profit.[88] That activity might be an indicator of speculation.[89]

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[84] Similar concepts are used in proposed Exchange Act Rule 3a67-4 which defines the term "hedging or mitigating commercial risk." For example, Rule 3a67-4(b)(1) provides that "[s]uch position is: (i) [n]ot held for a purpose that is in the nature of speculation, investing or trading" Release No. 34-63452 (Dec. 7, 2010), 75 FR 80174, 80215 (Dec. 21, 2010).

[85] See infra Section IIIE (discussing the potential interplay with the Volcker Rule). Similar concepts are used in connection with risk-mitigating hedging with respect to the Section 619 of the Dodd-Frank Act, commonly referred to as the Volcker Rule. "Risk-mitigating hedging is defined by two essential characteristics; (i) the hedge is tied to a specific risk exposure, and (ii) there is a documented correlation between the hedging instrument and the exposure it is meant to hedge with a reasonable level of hedge effectiveness at the time the hedge is put in place." FINANCIAL STABILITY OVERSIGHT COUNCIL, STUDY & RECOMMENDATIONS ON PROHIBITIONS ON PROPRIETARY TRADING & CERTAIN RELATIONSHIPS WITH HEDGE FUNDS & PRIVATE EQUITY FUNDS (Jan. 2011)("FSOC Study"), at p. 30, available at http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf.

[86] Risk-mitigating hedging would also be permitted in connection with market-making to the extent it relates to positions taken in connection with the permitted activity.

[87] See, e.g., FSOC Study at p. 30 ("hedging activity should adjust over time").

[88] See, e.g., id. at p. 20 (hedging "presents a potential avenue to evade the proprietary trading prohibition if hedges do not correlate with owned assets or if a banking entity seeks an *independent return through the application of the hedge*") (emphasis added).

[89] See, e.g., William L. Silber, On the Nature of Trading: Do Speculators Leave Footprints?, 29 Journal of Portfolio Management 4, 64 (Summer 2003) ("Silber") (describing speculation as trading in anticipation of future prices and taking on the risk of unanticipated equilibrium price movements in order to earn profits). In addition, we note that

Material changes in risk should generate a corresponding change in risk-mitigating hedging.[90] Moreover, a risk-mitigating hedge generally should unwind as exposure is reduced. Over-hedged exposure may be indicative of a proprietary position rather than a risk-mitigating hedge. Intermittent activity (hedging only when one chooses to act) or activity that is inconsistent with a hedging policy is also indicative of proprietary trading. Typically, the hedge should not be significantly greater than actual exposure to the underlying assets. The hedge (e.g., the notional amount under the hedge) should be correlated so that losses (gains) on the position being hedged are offset by gains (losses) on the hedge without appreciable differences. The Commission preliminarily believes that activity would not qualify as a risk-mitigating hedge for purposes of the proposed rule if the predicted performance of the hedge throughout the length of time that the hedge and the related position were held, resulted in a situation in which incrementally poor performance of an ABS or its underlying assets would result in a securitization participant earning appreciably more profits on the hedge than the losses incurred from their ABS exposure.

We seek comment on the application of the proposed exception to "mitigating" the consequences of a risk as intended by Congress.

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these statements are only intended to describe trading that may not qualify for the proposed exception. These statements are not intended to opine on the permissibility of speculative trading in other contexts.

[90] Risk-mitigating hedging indicia are considered in connection with the Volcker Rule. "Hedging activity should be designed to reduce the key risk factors in the banking entities' existing exposure, and should offset gains or losses that would arise from those exposures. Hedging activity should adjust over time based on changes in a banking entity's underlying exposures. Hedging activity should adjust over time if market conditions alter the effectiveness of the hedge even if the underlying positions remain unchanged. Material changes in risk should generate a corresponding change in hedging activity and should be consistent with the desk's hedging policy." FSOC Study, at p. 30.

Request for Comments regarding Risk-mitigating Hedging Activities

47. It has been argued that firms must hedge actual risks created by actual positions that left them with actual exposures.[91] Please discuss how such exposures arise and how they might be defined. Section 27B uses only the terms "positions or holdings." Please discuss application of Section 27B and the proposed rule to exposures. Is there any difference between "positions or holdings" and "actual risks created by actual positions" and "actual exposures"? If yes, please discuss the application of the proposed rule in light of such difference.

48. Please discuss whether clarifying interpretations concerning the terms "mitigate" and "exposures" would be consistent with prohibiting material conflicts of interest. Please discuss whether such interpretations would narrow or broaden the exception in a manner that is inconsistent with the purpose of Section 27B. Please discuss whether additional interpretations would be needed.

49. We seek comment regarding whether or not there are concerns about the level of transparency for risk-mitigating hedging activities and whether there are ways to assure the transparency of risk-mitigating hedging, such as through the use of standardized instruments.

50. Please describe whether, and if so, how firms engaging in securitization transactions currently distinguish risk-mitigating hedging from other activity.

51. We seek comment concerning the type of activity that would fall within the proposed exception under the proposed rule. Please discuss how firms currently

[91] See, e.g., Jeff Merkley, U.S. Senator and Carl Levin, U.S. Senator, Making the Dodd-Frank Act Restrictions On Proprietary Trading & Conflicts of Interest Work, available at http://www.rooseveltinstitute.org/%5Bmenu-trail-parents-raw%5D/making-dodd-frank-act-restrictions-proprietary-trading-and-conflicts-intere#.

identify risks associated with securitization transactions. Please discuss how firms currently hedge such risks (e.g., currency hedges, interest rate hedges, index hedges, credit derivatives). What policies or procedures are used to control, monitor, or manage those hedges? Should it be a condition to relying on the exception that the hedge was consistent with written, reasonably designed policies and procedures regarding risk-mitigating hedging activities? What types of instruments are used to hedge specific risks? When would securitization participants typically engage in risk-mitigating hedging activities pursuant to the proposed exception? Are these activities continuous? Is there a time when risk-mitigating hedging activities in connection with an underwriting, placement, initial purchase or sponsorship would typically cease? Please discuss whether and why a firm may either fully hedge a risk or partially hedge a risk in connection with activities designed to reduce specific risks arising out of an underwriting, placement, initial purchase or sponsorship. Does risk-mitigating hedging differ among the various securitization participants? If yes, please explain.

52. We seek comment regarding how the proposed exception might affect principal trading (other than market-making) as well as examples of principal trading that you believe could or could not qualify for the exception. Please explain why.

53. We seek commenter input regarding any principal trading that would be prohibited by the proposed rule and that would not qualify for the proposed risk-mitigating hedging activities exception or the proposed bona fide market-

making exception discussed below. Please discuss any positive and negative consequences of any such prohibition of principal trading.

54. Please discuss hedging that occurs during the "warehouse period" as assets are accumulated and held prior to securitization. Please comment upon the types of risk that are hedged during the warehouse period (e.g., credit risk, basis risk, default risk, etc.) as well as the types of instruments used to hedge (e.g., index products, derivatives, etc.) and who undertakes the hedging. Please discuss whether and how the securitization participant conducting the hedging distinguishes such hedging from other trading. Please comment upon whether and how such hedging is separated from other trading (e.g., different accounts, separate profit and loss treatment, etc.). Please discuss how such hedging should be treated under the proposed new rule. Commenters should explain their recommendations.
55. We seek comment concerning the type of activities that should or should not qualify for the proposed exception.
56. We seek comment concerning indicators of speculative or other trading masked as risk-mitigating hedging activity.
57. We seek comment as to whether modifications should be made to the proposed risk-mitigating hedging exception in order to reduce any inappropriate adverse impact on investors.
58. We seek comment as to whether modifications should be made to the proposed risk-mitigating hedging exception in order to clarify its scope for those who may seek to avail themselves of the exception.

59. Should the term "risk-mitigating hedging activities" be defined? If yes, please explain and provide a suggested definition. If no, please explain.

60. We seek comment concerning which department(s) of a securitization participant (e.g., an underwriter) typically effect risk-mitigating hedging.

61. Should the exception be conditioned on the maintenance by the securitization participant of books and records that would demonstrate that the activity in question fell within the exception? If so, what types of records should the securitization participant be required to maintain?

62. Should disclosure be a pre-requisite for relying on the exception? Please explain.

ii. Liquidity Commitments

Pursuant to the proposal, the following shall not be prohibited by paragraph (a) of the proposed new rule:

> Purchases or sales of asset-backed securities made pursuant to and consistent with commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of such entity, to provide liquidity for the asset-backed security.

The exception would permit securitization participants (including affiliates and subsidiaries of an underwriter, placement agent, initial purchaser, or sponsor of an ABS) to provide liquidity pursuant to a commitment. While the statutory language specifically refers to "purchases or sales of asset-backed securities," generally, we understand that commitments to provide liquidity may be viewed by some market participants as encompassing a variety of activities. For example, we understand that a liquidity commitment may be viewed as a way to promote full and timely interest payments to ABS investors. In addition, we understand that a securitization participant may provide financing to accommodate for differences in the maturity dates between asset-backed commercial paper and the underlying assets. For example, a sponsor of asset-backed commercial paper may provide a liquidity facility if a tranche of $3 million of the asset-backed commercial paper matures on the 30th day of the month, yet only $2 million of the underlying receivables match that maturity. If there is an inability to repay the $1 million shortfall by issuing new commercial paper, the sponsor may provide a loan secured by the receivables to provide for the $1 million shortfall. By way of another example, a liquidity commitment could be an agreement by a securitization participant, such as an underwriter, to purchase an ABS from its customer in a repo transaction consistent with applicable limitations on such transactions.[92] While we understand that these are some of the ways that liquidity commitments are often understood by market participants, we ask commenters to identify other examples of liquidity commitments and to discuss the application of the exception to such activities as consistent with Securities Act Section 27B.

Request for Comments regarding Liquidity Commitments

63. Are modifications to the proposed Rule 127B(b)(2) exception necessary or are there interpretations that the Commission should provide in order for the exception to work as intended? If yes, please explain why.
64. Are there transactions that involve material conflicts of interest related to a liquidity commitment that should qualify for this exception? Please explain why or why not.
65. Should the proposed exception be interpreted to cover only purchases and sales of the ABS? Please explain why such interpretation would or would not be consistent with the statute.

[92] See, e.g., 15 U.S.C. 78k(d).

66. Is liquidity provided through means other than purchases and sales of the ABS? If yes, please describe all additional means of providing liquidity.

67. Should the proposed exception cover engaging in any transactions involved in warehousing the underlying assets? If yes, please explain, including why this would be consistent with the intent of the exception.

68. We seek comment concerning the current scope of liquidity commitments by each type of securitization participant. How do such entities currently supply liquidity? When does this activity commence and terminate?

69. Please discuss the impact of the proposed exception on liquidity, especially for less liquid securities held by investors.

70. How do firms currently distinguish commitments to provide liquidity from bona fide market-making? Please include a discussion of the use of inventory of the ABS and the underlying securities and the method for setting prices.

71. Please discuss how the various securitization participants provide liquidity commitments. For example, please identify specific ways that a sponsor provides liquidity versus an underwriter.

72. Should the exception be conditioned on the maintenance, by some or all of the securitization participants, of the books and records that would demonstrate that the activity in question fell within the exception? If so, what types of records should the securitization participant be required to maintain?

73. Should disclosure be a pre-requisite for relying on the exception? Please explain.

iii. Bona Fide Market-making Exception

The following activities would not be prohibited by paragraph (a) of proposed Rule 127B under the Securities Act:

> Purchases or sales of asset-backed securities made pursuant to and consistent with bona fide market-making in the asset-backed security.

The exception would permit purchases or sales of ABS to be made pursuant to and consistent with bona fide market-making in the ABS. The exception would be available to all securitization participants (including affiliates and subsidiaries of an underwriter, placement agent, initial purchaser, or sponsor of an ABS) that qualify for it if they engaged in bona fide market-making. We understand that the ABS market is typically an over-the-counter market, and ABS are not broadly distributed. We also understand that a few institutions may hold large positions in an ABS.

In determining if activities qualify as bona fide market-making for purposes of proposed Rule 127B, we preliminarily believe that the following principles are characteristics of bona fide market-making in ABS:

- It includes purchasing and selling the ABS from or to investors in the secondary market.
- It includes holding oneself out as willing and available to provide liquidity on both sides of the market (i.e., regardless of the direction of the transaction).
- It is driven by customer trading, customer liquidity needs, customer investment needs, or risk management by customers or market-makers.
- It generally is initiated by a counterparty and if a customer initiated a customized transaction, it may include hedging if there is no matching offset.

- It does not include activity that is related to speculative selling strategies or investment purposes of a dealer, or that is disproportionate to the usual market-making patterns or practices of the dealer with respect to that ABS.
- Absent a change in a pattern of customer driven transactions, it typically does not result in a number of open positions that far exceed the open positions in the historical normal course of business.
- It generally does not include actively accumulating a long or short position other than to facilitate customer trading interest.
- It generally does not include accumulating positions that remain open and exposed to gains or losses for a period of time instead of being closed out promptly.[93] In contrast, an aged open position taken to facilitate customer trading interest would be hedged rather than exposed to gains and losses for a period of time.[94]

In addition, we note that the fact that trading is carried out in a market-making account or on a market-making desk would not be determinative of whether such trading is bona fide market-making in ABS. The account type or desk would not govern the analysis, since

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[93] Silber, supra note 90 (distinguishing market makers from other traders, such as speculators, using the following market-maker characteristics among others: (i) customer-based traders who buy and sell assets to accommodate customer purchase and sale orders, (ii) earn money on the bid/ask spread without speculating on future prices, (iii) tend to close out positions quickly and thus have small losses on positions, (iv) reduce exposure to equilibrium price movements by minimizing the length of time they hold assets, and (v) avoid holding open positions).

[94] Similarly, indicia to be considered in connection with permitted market-making in less liquid markets under the Volcker Rule includes "[p]urchasing or selling the financial instrument from or to investors in the secondary market; [h]olding oneself out as willing and available to provide liquidity on both sides of the market (i.e., regardless of the direction of the transaction); [t]ransaction volumes and risk proportionate to historical customer liquidity and investment needs; and [g]enerally does not include accumulating positions that remain open and exposed to gains or losses for a period of time instead of being promptly closed out or hedged out to the extent possible. For example, an aged open position taken to facilitate customer trading interest would be hedged rather than exposed to gains and losses for a period of time." See, FSOC Study, p. 29. See infra Section IIIE (discussing the potential interplay with the Volcker Rule).

otherwise a market-making account or desk might be used in an attempt to disguise proprietary trading as bona fide market-making.

We seek comment as to whether the above principles accurately identify the characteristics of bona fide market-making in ABS or whether different or additional characteristics might better identify this activity. We seek comment regarding how utilizing the principles listed above in determining whether activity was bona fide market-making in ABS would affect principal trading and the provision of liquidity by market intermediaries. Please provide examples of principal trading that would qualify for the exception as well as principal trading that would not qualify for the exception.

We note that the applicability of this proposed guidance concerning bona fide market-making is specific to bona fide market-making in ABS and may or may not be applicable in other areas of the federal securities laws and rules, in self-regulatory organization ("SRO") rules or in connection with other provisions of the Dodd-Frank Act.[95]

Depending on the facts and circumstances, bona fide market-making that does not meet each of these principles may still be bona fide market-making for purposes of the proposed exception. However, meeting just one factor might or might not be sufficient to qualify for the exception depending on the facts and circumstances.

We preliminarily believe that these principles would be appropriate as they are aimed at customer trading, customer liquidity needs, customer investment interest, or risk management by customers or market-makers. We also preliminarily believe that these principles would be necessary in order to distinguish bona fide market-making with respect to ABS that qualifies for

[95] Previously, we provided guidance that indicia of "bona-fide market making" for equity securities includes maintaining continuous two-sided quotes, among other things. See Release 34-58775 (Oct. 14, 2008), 73 FR 61690, 61698 (Oct. 17, 2008). However, different factors may apply to ABS, given the differences between the markets in equities and ABS.

the exception from other trading. We recognize, however, that there could be additional principles that would better identify bona fide market-making that is consistent with the intent of the exception. We seek commenters' views on any such principles.

Request for Comments regarding Bona Fide Market-making

74. We seek comment concerning the proposed indicators of bona fide market-making and any additional indicators of bona fide market-making with respect to ABS. We also seek comment concerning additional indicators of speculative or other trading masked as bona fide market-making.
75. Please provide specific, current examples of bona fide market-making in connection with ABS and explain how such activity evidences the proposed characteristics of bona fide market-making. Please discuss activity that does not evidence the proposed characteristics of bona fide market-making but that should qualify for the exception and why.
76. Please discuss whether there are features of ABS market-making that differ from market-making in other types of securities. Please describe the time period for which a market-making position in ABS is generally held and any circumstances which would cause such a position to be held longer.
77. Do firms use derivatives in connection with bona fide market- making with respect to ABS? If yes, how?
78. Please describe whether firms currently identify bona fide market-making in ABS. If so, how?
79. Should we adopt a definition of the term "bona fide market-making" for purposes of proposed Rule 127B? If yes, please provide a suggested definition.

80. Should the exception be conditioned on the maintenance, by some or all of the securitization participants, of books and records that would demonstrate that the activity in question fell within the exception? If so, what types of records should the securitization participant be required to maintain?

81. Should disclosure be a pre-requisite for relying on the exception? Please explain.

Request for Additional Comments concerning the Exceptions

82. Please discuss any activities that you believe would meet the proposed exceptions for risk-mitigating hedging, liquidity commitments and bona fide market-making but that could be viewed as a material conflict of interest. Should the Commission expressly state its view about why such activities would or would not be consistent with the exceptions? Please explain why such activity should or should not be interpreted as consistent with Securities Act Section 27B.

83. Please discuss the ways in which securitization participants might demonstrate compliance with the proposed exceptions for risk-mitigating hedging, liquidity commitments and bona fide market-making.

C. Application of Material Conflict of Interest Test

We set forth below examples of transactions that involve or that do not involve, as the case may be, potential conflicts of interest and describe how our proposed test for identifying material conflicts of interest for purposes of Section 27B and our proposed rule would apply to such transactions. We note that these examples are merely illustrative, and even minor differences in the facts and circumstances could change the analysis of these transactions. We further note that the examples below are intended only to illustrate the application of the proposed rule, and are not intended to address the application of other laws, rules or regulations to the relevant transactions. The conduct depicted in the examples might or might not violate provisions of the securities laws or rules that are not discussed here.

In the following examples, we focus primarily on items 1(A) and (B) of the interpretation as to whether a transaction involves or results in a material conflict of interest: first, whether under the transaction the securitization participant "would benefit directly or indirectly from the actual, anticipated or potential (1) adverse performance of the asset pool supporting the relevant ABS, (2) loss of principal, monetary default or early amortization event on the ABS, or (3) decline in the market value of the relevant ABS"; or second, whether under the transaction the securitization participant "would benefit directly or indirectly from fees or other forms of remuneration, or the promise of future business, fees, or other forms of remuneration, as a result of allowing a third party, directly or indirectly, to structure the relevant ABS or select assets underlying the ABS in a way that facilitates or creates an opportunity for that third party to benefit from a short transaction." We assume for purposes of discussion that, unless otherwise specified, the materiality requirement for our proposed interpretation is satisfied – i.e., there is a substantial likelihood that a reasonable investor would consider the conflict important to his or her investment decision. In addition, unless otherwise indicated in these examples, we assume that the exceptions under the proposed rule (e.g., bona fide market-making or risk-mitigation hedging activities) would not be available.

Example 1 – Securitization Participant Effecting a Short Transaction in an ABS, or any of the Assets Underlying an ABS

In Example 1, an ABS underwriter purchases CDS protection on the securities offered in the relevant ABS three months after the date of the first closing of the sale of the ABS. For these purposes, assume that the ABS meets the definition of an asset-backed security in Section 3(a)(77) of the Exchange Act and the underwriter's purchase of CDS protection was made solely for its own proprietary investment purposes and does not qualify for any exception in the proposed rule.[96]

The underwriter is a covered person as one of the enumerated securitization participants in the proposed rule. The ABS is a covered product because it meets the Section 3 definition of ABS in the Exchange Act. The purchase of CDS protection is a transaction for purposes of the proposal which occurred prior to one year after the date of the first closing of the sale of the ABS. Therefore, the transaction occurred within the covered timeframe.

In this example, the purchase of the CDS protection by the securitization participant is a short transaction within the covered timeframe that is prohibited by the proposed rule.[97] This short transaction would involve a material conflict of interest between the securitization participant and the ABS investors because the securitization participant would profit from the adverse performance of the ABS.[98]

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[96] For example, the underwriter had no client that requested the long CDS exposure such that the purchased CDS protection could qualify for the bona fide market-making exception.

[97] Nothing in the proposed rule would prohibit the securitization participant from purchasing the ABS or selling protection on the ABS or the assets underlying the ABS.

[98] However, if the short transaction was executed in the context of market-making by the securitization participant (e.g., the securitization participant purchases CDS protection from one customer to offset its sale of CDS protection to another customer), the exception under Rule 127B(b) would permit such market-making.

Example 2 – Securitization Participant Hedges Retained Investment in an ABS

In Example 2, an ABS underwriter purchases ABS that it distributed and contemporaneously purchases CDS protection on the ABS. For these purposes, assume that the ABS meets the definition of asset-backed security in Section 3(a)(77) of the Exchange Act, and the underwriter uses the CDS to hedge its ABS position on a delta neutral basis, such that the potential gains on the hedged positions are not appreciably larger than the potential losses on that portion of the ABS investment that is being hedged at any point in the future.

The underwriter is a covered person as one of the enumerated securitization participants in the proposed rule. The ABS is a covered product because it meets the Section 3 definition of ABS in the Exchange Act. The purchase of CDS protection is a transaction, which for purposes of the proposal occurred within the covered timeframe – i.e., prior to one year after the date of the first closing of the sale of the ABS.

In this case, the proposed risk-mitigating hedging activities exception could apply, because the securitization participant is hedging a position arising out of the underwriting, placement, initial purchase or sponsorship of an ABS. However, if, the CDS transaction is structured such that under some circumstances, now or in the future, the recovery on the CDS might be appreciably greater than the exposure on the ABS, the risk-mitigating hedging exception would not apply, because the securitization participant would profit from the adverse performance of the ABS through a short transaction (the CDS). In this case, the securitization participant would not be managing risk, but instead would have a risk-taking position directionally opposed to the ABS (in the amount of the CDS exposure that exceeds what is necessary for a delta neutral hedge).[99]

[99] Labels such as "hedging" would not permit what would otherwise be prohibited conduct under the proposed rule. If a securitization participant engaged in a transaction within one year after the date of the first closing of the sale of

Example 3 – Synthetic ABS Transaction

Example 3 involves several variations on the role of a securitization participant, in this case a sponsor, in a synthetic ABS transaction. In each case, the securitization participant is a party to the CDS contract with the SPE, and thus the securitization participant is short the credit exposure of the reference portfolio underlying the ABS transaction.

In these scenarios, the sponsor is a covered person because it is one of the enumerated securitization participants in the proposed rule, and the ABS is a covered product because the proposal covers synthetic ABS. For purposes of the proposal, the purchase of CDS protection is a short transaction, which occurred prior to one year after the date of the first closing of the sale of the ABS. Therefore, the transaction occurred within the covered timeframe.

In Example 3A, the securitization participant does not have any exposure to the ABS or underlying assets other than its short position through the CDS transaction. In this instance, entering into the CDS with the issuer of the ABS would, by itself, generally involve or result in a material conflict of interest between the securitization participant and the ABS investors that would be prohibited by the proposed rule.

In Example 3B, the securitization participant's short exposure under the CDS with the issuer offsets the securitization participant's existing long exposure to the same assets underlying the ABS. For instance, the securitization participant might be seeking to reduce its long investment exposure to the relevant assets because it has come to believe that the assets will perform poorly. If the firm accomplishes this result by transferring the risk of its long positions to ABS investors through a synthetic ABS – while marketing the ABS securities to investors as a good investment opportunity – it could be viewed as benefiting from a decline in the ABS at the

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the ABS that involved or resulted in a material conflict of interest with respect to investors in the ABS, that would be prohibited by proposed Rule 127B(a), even if it were referred to by the securitization participant as "hedging."

expense of the ABS investors, who now have the exposure to the underlying assets.[100] Although the securitization participant's existing long exposure to those assets and its short exposure under the CDS transaction may offset each other, in this scenario the CDS transaction is providing a hedge for an existing long investment position, rather than a hedge for assets associated with underwriting activities, and thus the risk-mitigating hedging exception would not be available.[101]

We preliminarily believe that in Example 3B and under our proposed interpretation the securitization participant would be prohibited from entering into the CDS transaction with the ABS issuer for the same reason as in Example 3A – the securitization participant would benefit through the CDS transaction from a potential decline in the ABS, and no exception to the prohibition is available – but we request comment on whether this result is appropriate in all circumstances.

In Example 3C, the securitization participant has accumulated a long cash or derivatives position in the underlying assets solely in anticipation of creating and selling a synthetic ABS – and not with a view to taking an investment position in those underlying assets. The securitization participant might choose to use the synthetic securitization structure rather than a traditional cash securitization when that is a more efficient mechanism for providing particular customers with exposure to the underlying assets. In this case the securitization participant therefore enters into a CDS with the SPE as part of a synthetic ABS transaction to offset the

[100] See 156 Cong. Rec. S2599 (daily ed. July 15, 2010) (statement by Sen. Levin) ("But a firm that underwrites an asset-backed security would run afoul of the provision if it also takes the short position in a synthetic asset-backed security that references the same assets it created.").

[101] We note that that risk-mitigating hedging exception in proposed Rule 127B(b)(1) is available only for hedging in connection with positions or holdings *arising out of* underwriting, placement, initial purchase or sponsorship of an ABS. In this scenario, the securitization participant's position in the underlying assets was acquired as an investment, and not for purposes of the initial offering transaction, and therefore the exception would not apply.

exposure to the underlying reference portfolio that it in turn acquired for purposes of effecting the ABS transaction.

We preliminarily believe that in Example 3C the short CDS transaction by the securitization participant would fall within the exception for risk-mitigating hedging activities – provided that there was no significant net basis risk, and that potential gains (or losses) by the securitization participant from the CDS protection it purchased from the issuer would be directly offset by losses (or gains) from the long position accumulated to offset that exposure. We seek comment on whether this interpretation would be appropriate. In addition, we seek comment on whether as a practical matter it will be possible to distinguish circumstances in which the securitization participant's long position in the underlying assets was originally acquired for investment purposes (i.e., Example 3B), from circumstances in which the securitization participant's long position was acquired for purposes of creating the ABS (i.e., Example 3C).

In Example 3D, the securitization participant that has entered into the short CDS transaction with the SPE contemporaneously enters into one or more offsetting CDS transactions with other market participants that did not play a role in selecting the reference assets of the ABS, and did not have any influence on any aspect of the ABS transaction. Provided that the securitization participant did not itself select assets that were biased to facilitate the ability of these market participants to profit from short transactions, and that the offsetting CDS transactions had no significant net basis risk (i.e., potential gains (or losses) by the securitization participant from the CDS protection that it purchased from the issuer would be directly offset by losses (or gains) from the CDS transactions with third parties), we preliminarily believe that under the risk-mitigating hedging exception the securitization participant would be permitted to enter into this combination of the CDS transaction with the issuer of the ABS securities and the offsetting transactions with third parties.[102] The CDS transaction with the SPE is itself a position or holding arising out of the ABS transaction, and the securitization participant would not profit from excess exposure directionally opposed to the ABS because of the offset.[103] In this sense, Example 3D is comparable to Example 3C. However, if in Example 3D the securitization participant's CDS with the issuer is entered into to offset pre-existing CDS exposures to third parties that were entered into for purposes unrelated to the ABS transaction, the scenario would be comparable to Example 3B and the risk-mitigating hedging exception would not apply. As above, we seek comment on whether as a practical matter it will be possible to distinguish circumstances in which the securitization participant's short transaction with the ABS issuer is entered into to hedge an existing position (and is thus prohibited) or to facilitate the ABS transaction (and thus permitted).

Example 4 – Facilitation of Third Party Activities

Example 4 involves variations on situations in which a securitization participant, in this case a placement agent, benefits by allowing an unaffiliated[104] third party to select the composition of the assets that underlie an ABS as defined in Section 3 of the Exchange Act. In each case, the third party purchases CDS protection on the relevant ABS prior to one year before the date of the first closing of the sale of the ABS.[105]

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[102] See 156 Cong. Rec. S2599 (daily ed. July 15, 2010) (statement of Sen. Levin) ("Nor does it restrict a firm from creating a synthetic asset-backed security, which inherently contains both long and short positions with respect to securities it previously created, so long as the firm does not take the short position.").

[103] Furthermore, since in this example there is no third party that has influenced the asset selection or structure of the ABS, it is unlikely that the ABS would have been structured in anticipation of underperformance of the ABS or its reference portfolio.

[104] "Unaffiliated" is used to describe the third party because Section 27B of the Securities Act applies to (and proposed Rule 127B would apply to) affiliates of a securitization participant.

[105] Note that in order to fall within item 1(B), a third party must both (i) directly or indirectly structure the relevant ABS or select assets underlying the ABS, and (ii) enter into a short transaction. Thus, if in a synthetic ABS transaction a third party purchases CDS protection on the relevant ABS from the SPE, but does not structure the

In each of the examples below, assume that the placement agent is a covered person as one of the enumerated securitization participants in the proposed rule, and that, the ABS is a covered product because it meets the Section 3 definition of ABS in the Exchange Act.

In Example 4A, the securitization participant, for a fee, facilitates the third party's entering into a short transaction, the purchase of CDS protection on the ABS, with a party who is not a securitization participant. Under item 1(B) of the interpretation of material conflicts of interest, and as previously described in Section III A(v)(b), by allowing the third party to select assets underlying the ABS, and then facilitating the third party taking a short position on the ABS or its underlying assets, the securitization participant has engaged in a transaction that involves or results in a material conflict of interest between the securitization participant and the ABS investors, and such activity would be prohibited under the proposed rule. The securitization participant creates the opportunity for the third party to select riskier assets for the underlying asset pool so that the anticipated poor performance of these assets would increase the likelihood of a profitable short transaction. In return for creating this opportunity for the third party, the securitization participant receives compensation for facilitating the third party's short transaction.

In Example 4B, the third party again enters into the CDS transaction but now with a party who is not a securitization participant, so that in this case the securitization participant does not facilitate that CDS transaction or receive a fee for doing so. As in Example 4A, in Example 4B, the securitization participant creates the opportunity for the third party to profit from its short transaction by permitting it to select risky assets for the underlying asset pool. We preliminarily believe that the securitization participant's activities in Example 4B would be prohibited under

relevant ABS or select assets underlying the ABS, the third party's activities would not fall within the scope of item 1(B).

our proposed test. Although the securitization participant would not receive direct compensation for facilitating the short transaction we believe it would be appropriate to impute a benefit to the securitization participant for creating the opportunity for the third party to profit from its short transaction. For example, the securitization participant may receive compensation from its role in connection with the ABS or compensation from future business that the third party promises to direct to the securitization participant. We request comment on whether it is appropriate to treat the securitization participant in Examples 4A and 4B in the same manner, or whether the lack of direct compensation to the securitization participant in Example 4B would justify a different result.

In Example 4C, the third party who has selected assets in the ABS also purchases one or more of the securities offered in the ABS transaction. In this case, the third party's purchase of CDS protection on the relevant ABS offsets its exposure to the ABS. In general, we preliminarily believe that activities in which investors who purchase one or more securities offered in an ABS transaction decide at that time or later to reduce or hedge their exposure to these investments through subsequent short transactions, such as purchasing CDS protection, would qualify for the risk-mitigating hedging exception, and that these activities do not involve or result in the types of material conflicts of interest proposed Rule 127B is intended to address. In Example 4C, the third party is in the same position as a securitization participant who has selected the assets underlying the ABS, purchases the ABS, and then seeks to hedge that ABS by buying CDS protection (e.g., the securitization participant in Example 2). By allowing the third party to select assets and then hedge a position in ABS purchased in the offering, the securitization participant would not be permitting the third party to do anything that the securitization participant itself could not do under the proposed rule.

In Example 4D, the same third party purchasing one or more securities issued by the ABS also buys CDS protection on those same securities or other securities in the offering (or their underlying assets), but in this case does so in a manner such that the third party will profit more from the short position than it will lose on the long securities position. For example, the third party may have purchased the equity tranche in order to influence the selection of riskier assets and implement an arbitrage strategy in which it would gain more on a CDS transaction on the issuer's securities than it would lose on the equity tranche.[106] This activity would no longer qualify for the risk-mitigating hedging exception. As per item 1(B) of the test, by allowing a third party to select assets underlying an ABS in a way that facilitates that third party's ability to profit from a short position on the ABS or its underlying assets, the securitization participant has engaged in a transaction that involves or results in a material conflict of interest between itself and investors in the ABS.

Request for Comments Regarding the Examples

We request comment on whether these examples demonstrate engaging in transactions that involve or result in material conflicts of interest of a type that proposed Rule 127B should prohibit. We also request that commenters provide descriptions of any other examples of material conflicts of interest that the proposed rule should prohibit, and address whether our proposed materiality test appropriately captures such conflicts of interest.

84. Please identify activity that would constitute selecting assets underlying the asset pool or structuring the ABS transaction as discussed in the examples above. Should such activity include establishing criteria for asset selection, selecting names from a list of potential reference assets provided by a

[106] See e.g., Senate Subcommittee Report: Anatomy of a Financial Collapse, supra n. 38, at 372 (describing a hedge fund's investment strategy as "purchas[ing] the riskiest portion of a CDO – the equity – and, at the same time, to purchase short positions on other tranches of the same CDO").

securitization participant or other activities? Should the number or percentage of assets selected as collateral be a factor in determining whether or not a person played a role in selecting assets? Should there be some level of activity that should not be considered selecting the assets or structuring the ABS? Please explain why or why not.

85. In connection with Example 3D above, please describe any circumstances in which a securitization participant may not be able to offset its CDS exposure, or can only partially offset its CDS exposure by entering into one or more offsetting transactions with other market participants. We seek commenter input regarding any specific consequences of prohibiting the activity described in Example 3D if the securitization participant cannot fully offset its CDS exposure.

86. We seek commenter input regarding the rationale applied in each of the scenarios in Example 4.

87. Are there additional factors that would better identify material conflicts of interest, especially in the context of evaluating the examples above? Please explain. For example, should we consider any factors not discussed in Example 4B when the unaffiliated third party may purchase CDS protection from another entity? How should such factors be considered in determining whether a transaction involves or results in a material conflict of interest?

88. Are there examples not listed above that occur frequently for which further guidance is needed? Please describe.

89. In Examples 1, 2, 3A, 3B, 4A, 4B, 4D, we illustrate activities that would be prohibited under the proposed interpretation discussed in the release. For each of these examples, we seek commenter input regarding how frequently the transactions described in the examples occur in connection with ABS and synthetic ABS as well as the potential positive and negative consequences of prohibiting such transactions. Please also include a discussion regarding any potential impacts, including any positive or negative impact, on investors, investor protection, liquidity, capital formation and the maintenance of fair, orderly and efficient markets if securitization participants refrained from creating and selling certain ABS and synthetic ABS to avoid the activities described in the examples above as a result of the proposed rule.
90. Example 3B describes a securitization participant transferring the risk of its long positions to ABS investors through a synthetic ABS. We seek commenter input regarding how frequently or infrequently this occurs and the consequences that might result from transferring such risk to ABS investors through a synthetic ABS. We also seek commenter input regarding the reasons why a securitization participant might or might not prefer to transfer such risk using a synthetic ABS instead of a non-synthetic ABS.

D. Application of the Proposed Rule to Other Activities

Initial commenters identified many activities that they believed could be implicated by Section 27B and the proposed rule. These activities include: (1) activities that are routinely part of the securitization process that may be effected in connection with structuring an ABS; and (2) activities undertaken by securitization participants that are unrelated to the securitization.[107]

We believe that activities associated with the typical structuring of a non-synthetic ABS would not be prohibited by the proposed rule. For example, the basic transfer of risk in a non-synthetic ABS in which a securitization participant who is long the underlying assets sells them to an SPE is typical of most ABS structures and would not constitute a prohibited transaction, because after such sale the securitization participant would not benefit from the subsequent decline in the value of the ABS or the underlying assets. Additionally, the proposed rule would not prohibit the multi-tranche structure commonly used in securitization transactions. While investors in different tranches may have interests that conflict with each other, such conflicts would fall outside the scope of the proposed rule, which is focused on conflicts of interest between securitization participants and ABS investors. In addition, mere ownership by a securitization participant of the ABS would not constitute a material conflict of interest under the proposed rule, because such ownership by itself would not cause the securitization participant to benefit from the adverse performance of the asset-pool or the ABS; instead, the securitization participant would benefit from the positive performance of these assets.[108]

Commenters stressed the importance of the "material" aspect of the phrase "material conflict of interest" in Section 27B and suggested that activities inherent in the securitization process evidence "expected conflicts . . . but do not constitute the type of 'material conflicts' intended to be regulated by Section 621."[109] We preliminarily believe that many activities that

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[107] See supra Section IIB.

[108] For this reason, we believe the proposed rule would not prohibit risk retention as required by Dodd-Frank Act Section 941. See supra note 19.

[109] SIFMA Letter at p. 4.

these commenters identified as being inherent to the securitization process would not be prohibited by the proposed rule because they would not fall within its scope or would fall within one of the exceptions to the prohibition.[110] Thus, we preliminarily agree that most activities undertaken in connection with the securitization process would not be prohibited by the proposed rule, including but not limited to: providing financing to a securitization participant, deciding not to provide financing, conducting servicing activities, conducting collateral management activities, conducting underwriting activities, employing a rating agency, receiving payments for performing a role in the securitization, receiving payments for performing a role in the securitization ahead of investors, exercising remedies in the event of a loan default, exercising the contractual right to remove a servicer or appoint a special servicer, providing credit enhancement through a letter of credit, and structuring the right to receive excess spreads or equity cashflows.

Commenters also suggested that certain transactions in swaps, caps, CDS and derivatives should fall outside the proposed rule's prohibition. We invite commenters to analyze any such transactions with our proposed framework. In addition, commenters highlighted activities that are unrelated to a particular securitization (such as underwriting another ABS transaction for another issuer) and suggested that they should not be prohibited. We generally agree that many such activities would not be prohibited by the proposed rule, including underwriting an ABS for a different issuer. These activities generally could be undertaken absent additional facts indicating otherwise, such as facts indicating a securitization participant engaged in a proprietary trade that would profit from a directionally opposite view of the ABS.

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[110] See, e.g., SIFMA Letter.

Other activities unrelated to the securitization, such as market research, could be undertaken by a securitization participant. As mentioned earlier, the issuance of research would not be engaging in a transaction for purposes of the proposed rule and as such would not be prohibited.

We ask that commenters analyze these and other activities, using the proposed framework set forth above, including the use of the derivatives and the activities of servicers and collateral managers.

E. Relationship to Volcker Rule

Section 619 of the Dodd-Frank Act,[111] commonly referred to as "the Volcker Rule," amends the Bank Holding Company Act to add new Section 13, Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds. The Volcker Rule includes (1) general prohibitions and restrictions on certain financial entities – including certain broker-dealers – engaging in proprietary trading or sponsoring or investing in a hedge fund or private equity fund, (2) certain exceptions to these prohibitions and restrictions (referred to as "permitted activities"), and (3) limitations on permitted activities.

Like Section 621, the Volcker Rule is concerned with conflicts of interest. For example, the Volcker Rule is concerned with conflicts of interest that stem from proprietary trading at banking and non-bank financial firms. In addition, the Volcker Rule, like Section 621, includes the concepts of certain permitted activities concerning market-making related activities and risk-mitigating hedging activities.[112] Given the similarities between these two sections of the Dodd-Frank Act, the Commission may consider whether aspects of the rules adopted to implement

[111] Dodd-Frank Act, Pub. L. 111-203, § 619, 124 Stat. 1376, 1620 (2010).

[112] See Sections 619(d)(1)(B) and (C) of the Dodd-Frank Act, Pub. L. No. 111-203, § 619(d)(1)(B) and (C), 124 Stat. 1376, 1624 (2010).

Section 619 should be applied to this proposed rule in the future.[113] Our preliminary belief is that the exceptions for risk-mitigating hedging activities and bona fide market-making activities for purposes of proposed Rule 127B should be viewed no less narrowly than the comparable exceptions for such activities under the Volcker Rule.

Request for Comments Regarding Relationship to Volcker Rule

94. Please discuss any potential interplay of the "Volcker Rule" of Section 619 of the Dodd-Frank Act with Section 27B and proposed Rule 127B. In particular, we seek commenter input regarding whether or not the treatment of risk-mitigating hedging activities and bona fide market-making exceptions in Proposed Rule 127B(1) and (3) should be consistent with Section 13(d)(1)(B) and (C) of the Bank Holding Company Act concerning permitted market-making related activities and risk-mitigating hedging activities or whether there are reasons that necessitate different treatment. Please explain.
95. We ask that commenters describe any potential consequences if risk-mitigating hedging and market-making were treated differently under Proposed Rule 127B and the Volcker Rule.
96. We seek commenter input regarding any costs that may be incurred by securitizations participants, ABS investors and others if the exceptions in Proposed Rule 127B(b)(1) and (3) are interpreted differently than Sections 13(d)(1)(B) and (C) of the Bank Holding Company Act.

[113] The Commission must adopt rules not later than nine months after completion of the Financial Stability Oversight Council's study on the Volcker provisions. The study, see supra note 85, was issued on January 18, 2011.

IV. Information Barriers, Disclosure, and Exemptions

Information barriers and disclosure are often used as tools to manage conflicts of interest in other areas of the federal securities laws. While Securities Act Section 27B does not explicitly provide for specific exceptions concerning information barriers or disclosure, we believe it would be useful to explore whether these tools might permit the proposed rule to better achieve its policy objectives without unnecessarily restricting beneficial market activities.

A. Information Barriers

Commenters suggested the Commission consider potential burdens triggered by Securities Act Section 27B on securitization participant's affiliates and the use of existing mechanisms to manage conflicts of interests, including in particular information barriers.[114] Commenters stated that securitization participants may have a large number of affiliates that engage in ordinary course activity that is both "walled-off" from other areas of the securitization participant and effected for purposes unrelated to any particular ABS transaction. Commenters asked that the Commission be mindful of potential "unintended effects on everyday operations" of securitization participant affiliates.[115]

Information barriers, in the form of written, reasonably designed policies and procedures, have been recognized in other areas of the federal securities laws and rules as a means to address or mitigate potential conflicts of interest or other inappropriate activities. For

[114] See discussion infra at note 126. See, e.g., SIFMA Letter at p. 7 ("Financial institutions engage in hedging activities in many contexts and at many levels throughout an organization comprised of many business units, offices, trading desks and funds, each of which may be engaged in separate transactions that, in some cases, are walled off from other parts of the financial institution and may otherwise be transacted for purposes other than betting against the specific ABS that is sponsored or underwritten by that financial institution or its affiliate. Curtailing such hedging activities – which are unrelated to the actual ABS sponsored or underwritten by financial institutions and their affiliates and are entered into as part of their risk management practices and not as a bet against that ABS – would have adverse and unintended effects on everyday operations and risk management practices of financial institutions and their affiliates.").

[115] SIFMA Letter at p. 8.

example, Section 15(g) of the Exchange Act recognizes that information barriers may be used to effectively manage the potential misuse of material, non-public information.[116] Exchange Act Rule 14e-5 prohibits certain purchases of securities outside of tender offers,[117] but contains an exception for purchases or arrangements to purchase by an affiliate of a dealer-manager.[118] The exception requires, among other things, that the dealer-manager maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate.[119] It also requires that the dealer-manager be a registered broker-dealer and that the affiliate have no officers (or persons performing similar functions) or employees (other than clerical, ministerial or support personnel) in common with the dealer-manager that direct, effect, or recommend securities transactions.[120] Likewise, Regulation M, the set of anti-manipulation rules concerning securities offerings, contains an exception for certain persons based on information barriers.[121] Affiliated purchasers are excepted if, among other things, the affiliate maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of Regulation M.[122] In order for an affiliate to avail itself of the exception it must also obtain an annual, independent

[116] Formerly Section 15(f) of the Exchange Act but redesignated by the Dodd-Frank Act. 15 U.S.C. 78o(g).

[117] 17 CFR 240.14e-5.

[118] 17 CFR 240.14e-5(b)(8).

[119] 17 CFR 240.14e-5(b)(8)(i).

[120] 17 CFR 240.14e-5(b)(8)(ii and iii).

[121] 17 CFR 242.100-105.

[122] 17 CFR 242.100(b).

assessment of the operation of such policies and procedures.[123] Like Rule 14e-5, it contains a restriction on common officers and employees.[124]

The concept of independent units (including affiliated entities) within multi-service firms has been recognized in discrete areas of the securities laws for those multi-service firms with units that function separately and independently.[125] We preliminarily believe it may be appropriate to consider the issue of independent units within a multi-service firm in the context of the proposed rule. Certain firms involved in securitization may undertake a wide range of activities in connection with multiple and different business lines, underwriting and trading ABS among them. We seek comment below concerning the extent of the restrictions that the proposed rule would place on firm-wide activities. We seek commenter input regarding whether firm-wide restrictions would be necessary to achieve the objectives of the statute or whether firm-wide restrictions would be unwarranted if transactions were independent of the creation and distribution of an ABS.

Request for Comments Regarding Information Barriers

91. We seek comment concerning the operation of information barriers and whether or not the use of information barriers to address conflicts of interest in connection with securitization transactions might be consistent with Securities Act Section 27B. In particular, the Commission seeks comment concerning

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[123] Id.

[124] Id.

[125] See e.g., 17 CFR 200(f) (allowing multi-service broker-dealers to aggregate positions within defined trading units if a registered broker-dealer meets the following requirements "(1) The broker or dealer has a written plan of organization that identifies each aggregation unit, specifies its trading objective(s), and supports its independent identity; (2) Each aggregation unit within the firm determines, at the time of each sale, its net position for every security that its trades; (3) All traders in an aggregation unit pursue only the particular trading objective(s) or strategy(s) of that aggregation unit and do not coordinate that strategy with any other aggregation unit; and (4) Individual traders are assigned to only one aggregation unit an any time.").

whether this would be appropriate for certain affiliates and subsidiaries of securitization participants that may operate separately and independently.[126]

92. Should we consider the imposition of information barriers or other means of managing potential conflicts of interest? If so, what specific means should be considered (e.g., physical separation?) How effective are any such alternative methods as currently used? Can such methods be circumvented? If so, in what ways? We seek commenter input regarding any limitations related to the use of information barriers in the context of managing potential material conflicts of interest under Section 27B?

93. We seek comment concerning whether ordinary business functions of affiliates and subsidiaries of underwriters, placement agents, initial purchasers, and sponsors are sufficiently separated from the process of creating and marketing ABS so as not to create material conflicts of interest that the proposed rule is designed to address. For example, consider application of the proposed rule to an affiliate of a securitization participant that manages a fund and such fund purchases a CDS referencing securities issued in the ABS transaction. Should this type of activity be permitted, and if so, under what conditions? Discuss whether this scenario might form the basis of a clarifying interpretation or an

[126] See ABA Letter at p. 5 ("Section 27B applies to all affiliates of underwriters and placement agents, which could include banks, broker-dealers, asset managers and ERISA fiduciaries. Banks and their affiliates are already subject to statutory and regulatory provisions designed to prevent conflicts of interest and prevent the use of material nonpublic information, and these provisions may require the establishment of information walls between affiliated entities or between different departments of a bank. Additionally, entities which are fiduciaries are obligated to act for the benefit of their beneficiaries and must be permitted to sell securities and enforce loans based on the best interests of beneficiaries. Underwriters and placement agents subject to Section 27B may have a large number of affiliates, which may result in significant administrative difficulties in applying the rule to all related entities. We ask the Commission to be mindful, when preparing its rules, of these existing obligations of transaction parties and their affiliates and of the compliance burdens which may result.").

exemptive rule. Please include in the discussion your views about possible forms of, and utility of, disclosure regarding the fund's CDS purchase. Please provide an explanation concerning any current separation between the securitization participant and/or its affiliates and subsidiaries, and whether the separation is mandated by existing rules and regulation. Please describe in detail how such separation is implemented, maintained and enforced by a firm. Please discuss whether information barriers, with respect to affiliates or subsidiaries, could result in a conflict of interest not being material, and/or whether, where consistent with Commission authority, the use of information barriers should be conditioned on certain requirements (e.g., restrictions on common officers and employees, annual assessments of policies and procedures, being regulated by the Commission, entities providing certification to the Commission or other persons that activities have not involved or resulted in material conflicts of interest). We seek comment concerning whether such separation can meaningfully protect against material conflicts of interest in this context.

94. If consistent with Securities Act Section 27B, should one unit of a firm be able to effect (or be restricted from effecting) a transaction that involves a directionally opposed view of the ABS or its reference portfolio if that unit is separated by information barriers from another unit in the same firm that created and distributed the ABS? Is there any reason why information barriers would not be effective in this context? We seek comment on circumstances in which departments within one firm may be sufficiently separated so as not to create a

material conflict of interest that the proposed rule is designed to address. Please identify all such departments and the activities in which they may engage that could result in the application of the prohibition in proposed Rule 127B, but may not raise the concerns designed to be addressed by Securities Act Section 27B. Discuss whether this scenario might form the basis of a clarifying interpretation or an exemptive rule. Please include in the discussion your views about possible forms of, and utility of, disclosure. Please provide an explanation of the separation between departments and whether it is mandated by existing rules and regulations. Please describe how such separation is implemented, maintained and enforced by the firm. We seek comment concerning whether such separation can meaningfully protect against material conflicts of interest in this context.

95. If a separate, independent unit concept were to be applied in connection with the proposed rule, what conditions would be appropriate to maintain the integrity of the independence between the separate units within a multiservice firm to permit transactions in one unit that are truly independent from the creation and distribution of an ABS in another unit (e.g., (1) a written plan of organization to identify each unit, support its objective, and support its independent identity; (2) individual employees assigned to only one unit at any time; (3) compliance and internal audit routines; (4) written records; (5) separate management structure, location, business purpose and profit and loss treatment; and (6) other conditions).

B. Disclosure

While Securities Act Section 27B does not contain a disclosure provision, commenters discussed the extent to which disclosure might mitigate potential conflicts of interest in this context.[127] Commenters stated that while there can be many potential conflicts of interest that arise in connection with securitization, most are not the type of material conflict of interest intended to be prohibited by Securities Act Section 27B.[128] Commenters stated that many conflicts of interest that arise in the normal course of a securitization are often contemplated by investors and indeed may be disclosed to investors.[129]

We seek comment concerning the role of disclosure in the context of Securities Act Section 27B and the proposed rule. Securitization participants typically provide various

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[127] See, e.g., Merkley-Levin Letter ("Further, the utility of disclosures must be carefully examined and not be seen as a cure for the conflicts. We provided the Securities and Exchange Commission with sufficient authority to define the contours of the rule in such a way as to remove conflicts of interest from these transactions, while also protecting the healthy functioning of our capital markets."); see infra note 129.

[128] See, e.g., ABA Letter at p. 4 ("In view of the many potential conflicts of interest that may arise between participants and investors in ABS . . . and in view of the legislative history and the statutory use of the term 'material conflict of interest,' we believe the rules issued by the Commission should focus on prohibiting the type of blatant conflict of interest described in the legislative history, while permitting other types of conflicts to exist subject to appropriate disclosure requirements . . . Potential conflicts of the type described above that either exist, or are contemplated, at the time of an ABS transaction are customarily disclosed in offering materials. Although the legislative history is clear that disclosure is not necessarily a cure for a conflict of interest arising out of profiting from a 'designed to fail' transaction, we believe adequate disclosure should suffice to address these ordinary course conflicts."); see also SIFMA Letter at p. 5 ("In contrast to the material conflicts of interest created in the 'designed to fail' transactions cited by Senators Merkley and Levin, many other potential conflicts of interest are inherent in securitizations. These conflicts should be disclosed to investors and other transaction parties to the extent they are material, but should otherwise be permitted to fall outside the scope of Section 621. While Senators Merkley and Levin assert that disclosure alone may not eliminate the problematic nature of certain conflicts, SIFMA believes that conflicts created in the normal course of a securitization are sufficiently known by, or disclosed to, investors and do not fall under the intended scope of Section 621."); ASF Letter at note 11 ("We note that Senator Levin believes that disclosure alone may not cure material conflicts of interest in all cases, such as in situations where 'disclosures cannot be made to the appropriate party or because the disclosure is not sufficiently meaningful.' We further note that Senator Levin does not believe that disclosing that the underwriter of an ABS 'has or might in the future bet against the security' will cure the conflict of interest arising if the underwriter takes a short position in a synthetic transaction that references the ABS. However, in situations that are clearly not instances of an asset-backed security being designed to fail, ASF believes that effective disclosure would remedy perceived conflicts.").

[129] See, e.g., SIFMA Letter at p. 5 ("SIFMA believes that conflicts created in the normal course of a securitization are sufficiently known by, or disclosed to, investors and do not fall under the intended scope of Section 621.").

disclosures to investors in ABS, which generally should include appropriate disclosure as to conflicts of interest between investors and the securitization participant that would be material to investors.[130] While we have not identified all circumstances in which a transaction potentially could be characterized as involving or resulting in material conflicts of interest within the meaning of the proposed rule and Securities Act Section 27B, we seek comment on whether certain types of conflicts relating to an investor could be managed through disclosure. We seek comment about the value of disclosure as a means to manage conflicts of interest, while keeping in mind the limits of disclosure.[131] Various provisions of the federal securities rules and laws address actual and potential conflicts of interest in a variety of ways, including through the use of disclosure. We ask that commenters consider the use of the disclosure in the federal securities laws and rules or other areas, such as SRO rules, and reference those laws or rules and their experiences with those laws or rules in their responses to the questions below where applicable.

As discussed in further detail below, Section 28 of the Securities Act provides the Commission with authority to adopt conditional or unconditional exemptive rules or regulations "to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."[132] We solicit comment as to whether, in some circumstances, material conflicts of interest that would be prohibited under Section 27B and the proposed rule could be addressed sufficiently through a conditional exemption. Specifically, provided the Commission were able to make the findings required by Securities Act Section 28, the Commission could require disclosure, as a condition to an exemption, to allow securitization

[130] We are not addressing the quality or adequacy of typical disclosures in ABS offerings, but are simply noting that such disclosure typically does occur in connection with such offerings.

[131] 156 Cong. Rec. S5899 (daily ed. July 15, 2010) (statement of Sen. Levin). In addition, we note that disclosure that is made subsequent to an ABS transaction would not be appropriate in managing conflicts of interests because an investor would have already made an investment decision regarding whether or not to purchase the ABS.

[132] 15 U.S.C. 77z-3. See infra note 135.

participants to engage in what otherwise would be prohibited behavior under Section 27B and the proposed rule.

Request for Comments regarding Disclosure

96. We seek commenter input regarding whether or not disclosure would be useful in this context and why. We seek commenter input regarding whether or not disclosure would adequately improve the alignment of the interests of securitization participants and investors and whether utilizing disclosure in this manner would adequately protect the public interest and the interests of investors. Please provide specific examples (e.g., disclosure that a particular entity, whether or not a securitization participant, directly or indirectly selected the pool of assets or disclosure of other types of information). If you believe that specific disclosure would be appropriate, please explain under what circumstances and what level of detail should be required.

97. Are there conflicts of interest associated with specific types of transactions or activities that should be or could be managed through disclosure?[133] How would such an approach be incorporated in the context of the proposed rule? Should the use of disclosure in lieu of a complete prohibition apply to specific conflicts and not others? Which? What level of detail should any such

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[133] See, e.g., SIFMA Letter at p. 4 through 11 (suggesting (i) "To the extent the risk transfer dynamic between ABS sponsors and asset originators and investors constitutes a conflict of interest, this potential conflict is best addressed through disclosure," (ii) "Potential conflicts arising in connection with these types of liquidity facilities should be disclosed to investors and otherwise permitted," (iii) "Disclosure of the existence of control rights and transaction parties entitled to exercise such rights should be sufficient to inform investors of the possibility of such conflicts," (iv) "Potential conflicts of interest arising in a transaction with an affiliated servicer should be disclosed to investors and otherwise permitted under the scope of Section 621," (v) "Potential conflicts arising in a transaction with an affiliated trustee (to the extent permitted by existing law) should be disclosed to investors and otherwise permitted under the scope of Section 621," and (vi) "Each securitization waterfall should clearly set forth the priority of payments for investors, including which payments are made prior to payments to investors, which disclosure should be adequate to permit the continuance of these arrangements.").

disclosures include? Should any such disclosures include details about specific transactions or activities that the securitization participant plans to engage in, or has engaged in, relating to the ABS? Is a substantial level of detail effective or useful?

98. Are there circumstances in which any such disclosure might be impracticable or ineffective? For example, if a securitization participant desired to effect a transaction several months after the closing, how might it be feasible for the securitization participant to send disclosures at that time? Would the securitization participant be able to identify all ABS investors to whom disclosures should be, or would be required to be, sent? Would disclosure of transactions that occurred long after the closing be useful, effective or appropriate?

99. Should the use of disclosures in lieu of a complete prohibition be limited to offerings involving certain types of ABS investors? If yes, please specify which ABS investors and why. Why might disclosure be adequate for some ABS investors but not others? What characteristics should a securitization participant use in determining whether an ABS investor needs particular disclosure? Are there some types of ABS investors for which disclosure should never be sufficient in this context? Should disclosures include risk disclosure statements for certain types of ABS investors? If so, which ones? If not, why not?

100. If disclosure were used in the context of proposed Rule 127B, in what format or structure should such disclosure be made? What information should be disclosed? Are there existing documents that could be used to make

disclosures to ABS investors? Please specify which documents and explain why they would be appropriate. Conversely, please identify existing documents that would not be appropriate sources for disclosure. Please explain why.

101. We seek commenter input regarding the manner in which disclosure could be made so that it is timely, effective, and provides a meaningful opportunity for ABS investors to evaluate the conflict of interest. Please provide examples of disclosure that would be timely, effective, and provide a meaningful opportunity for ABS investors to evaluate a conflict of interest. Please provide examples of disclosures that would not be timely, effective, or provide a meaningful opportunity for ABS investors to mitigate the conflict of interest.

102. In order for disclosure to be timely, is there a specific time period prior to an ABS transaction in which disclosure should be made? Please explain. Alternatively, should disclosure be made within a reasonable time prior to an ABS transaction in order to permit an ABS investor an opportunity to evaluate the conflict of interest? Conversely, please discuss when disclosure might be made so far in advance of an ABS transaction that it would not be useful.

103. In order for disclosure to be effective, please discuss the level of detail that would permit a reasonable ABS investor to understand the conflict of interest. Please provide examples of disclosure that would be effective as well as examples of generic disclosures that would not be useful to ABS investors.

104. We seek commenter input regarding what explicit disclosures might be appropriate so that an ABS investor could meaningfully understand a conflict of interest. We seek commenter input regarding whether specific or enhanced

disclosures should be made in connection with more complex ABS. Please identify the type of ABS and discuss the additional disclosures.

105. If disclosure were used in the context of proposed Rule 127B, should some or all of the securitization participants be required to make and maintain records to document disclosure, or to document that disclosure was made, to qualified customers? If so, what types of records should the securitization participant be required to make and maintain? We ask that commenters include in their response a description of the manner in which they would demonstrate compliance that disclosure was made to ABS investors.

106. Are there additional steps that securitization participants that seek to manage conflicts of interest through the use of disclosure should be required to take with regard to disclosure, such as notifying a regulator (e.g., a designated examining authority or other relevant regulatory agency) of any failures to disclose, or ABS investor complaints?

107. Are there specific types of transactions or activities that should or could be managed through consent? Should the use of consent only apply to specific conflicts and not others? Which? Are there circumstances in which obtaining consent might be impracticable or ineffective? Should consent be limited to certain types of customers? Would consent prior to the first sale in the offering (or a reasonable time prior to first sale) provide adequate investor protection? Should consents, if permitted, require customers to acknowledge receipt, or acknowledge understanding of the matters to which they are consenting? Should a securitization participant be required to obtain new consents for each

new transaction, or should securitization participants be permitted to rely on consents indicating that the securitization participant may also enter into transactions in the future that may result from potential conflicts of interest? Would consents indicating potential future transactions be useful or effective?

108. Please discuss the benefits and costs if a disclosure-based exemption were or were not adopted. In addition, please discuss any positive or negative impact on investors of providing or not providing a disclosure-based exemption. For example, would a disclosure-based exemption avoid potential prohibitions or restrictions (or potential chilling effects) on transactions that might otherwise arise under the proposed rule and that might have the unintended consequence of limiting investment opportunities that – if all the risks were fully disclosed – investors would want to have? Would a disclosure-based exemption adversely impact investor protection? If so, how? Similarly, would a disclosure-based exemption alleviate or exacerbate any unintended consequences of the proposed rule related to investors, investor protection, liquidity, capital formation, the maintenance of fair, orderly and efficient markets, and the availability of credit to borrowers (through the assets underlying an ABS)?

C. Exemptive Authority

While Section 27B of the Securities Act prohibits securitization participants from engaging in transactions that involve or result in material conflicts of interest, Section 28 of the Securities Act provides the Commission with authority to adopt conditional or unconditional exemptive rules or regulations.[134] We seek comment on whether and to what extent we should

[134] Section 28 of the Securities Act provides that "the Commission, by rule or regulation, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or

consider exemptive rules or regulations for certain transactions or activities otherwise covered by Section 27B, including conditional exemptions based on information barriers or disclosure.

109. We ask for comment about any benefits or disadvantages of using the general exemptive authority in Section 28 of the Securities Act to address circumstances where commenters believe the application of the prohibition under Section 27B would not be consistent with prohibiting material conflicts of interest. Are there any special considerations relating to offshore sales of ABS that we should take into account in the proposed rule?

110. Are there other considerations related to cross-border sales of ABS that should be contemplated in connection with the proposed rule (e.g., securitizations by offshore affiliates of U.S. entities, offshore securitizations sold to U.S. investors both in and outside of the U.S.)? Please provide comments.

111. Please discuss the ways in which the proposal, if adopted, would affect the ABS market, ABS investors, underwriters, placement agents, initial purchasers, or sponsors and the affiliates or subsidiaries of such entities.

V. General Request for Comment

The Commission seeks comment generally on all aspects of proposed Rule 127B, including on our approach to the proposed rule and implementation of Securities Act Section 27B as enacted by Section 621 of the Dodd-Frank Act. Are there other approaches that we should consider? We seek commenter input regarding whether and how the proposal might positively or negatively impact investor protection, the maintenance of fair, orderly, and efficient

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transactions, from any provision or provisions of this title or of any rule or regulation issued under this title, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors." 15 U.S.C. 77z-3.

markets (including, e.g., investment opportunities or liquidity), and capital formation. Commenters are requested to provide empirical data or economic studies to support their views and arguments related to the proposed rule. In addition to the questions above, commenters are welcome to offer their views on any other matter raised by the proposed rule. We note that comments are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and if accompanied by alternative suggestions to our proposal where appropriate.

VI. Paperwork Reduction Act

Certain provisions of the proposed rule would impose new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[135] The Commission is submitting the proposed collections of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has not yet assigned a control number to the proposed collections of information.

A. Summary of Collections of Information

Proposed Rule 127B might cause securitization participants to rely on appropriate contractual covenants or representations – either between other securitization participants or with relevant third parties – to determine compliance with the rule. For example, if a third party was directly or indirectly involved in structuring the ABS or selecting assets underlying the ABS, a securitization participant might rely on contractual assurances (from the third party or from another securitization participant who had obtained such assurances from the third party) that the

[135] 44 U.S.C. 3501 et seq.

third party would not engage in certain short transactions. We expect that, to facilitate compliance with the proposed rule, securitization participants might enter into new contractual covenants.

B. Proposed Uses of Information

Although proposed Rule 127B does not require that a securitization participant enter into contractual covenants when it allows a third party, directly or indirectly, to structure the ABS or select assets underlying the ABS, the burden of compliance would fall on the securitization participant. Accordingly, entering into such contractual covenants might assist securitization participants in managing compliance with the proposed rule. To the extent that a securitization participant were a regulated entity, we anticipate that this collection of information would be used by the Commission staff in its examination and oversight program. Further, to the extent that a securitization participant were a member of an SRO, we anticipate that this collection of information would be used by the SRO staff in its examination and oversight program.

C. Respondents

According to issuance data from Asset-Backed Alert, supplemented with data from Securities Data Corporation ("SDC"), from 2005 through 2010, there were approximately 751 registered asset-backed transactions yearly. Therefore, the Commission preliminarily estimates that there are approximately 751 securitization participant respondents that might enter into contractual covenants concerning the involvement of a third party in the transaction.[136]

The Commission seeks comment as to the accuracy of the above estimates and all other estimates in this section. The Commission also seeks data regarding the yearly estimated number of unregistered asset-backed transactions.

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[136] We note that the actual number of respondents could be less than 751 as some respondents may be involved in more than one asset-backed transaction.

D. Total Annual Reporting and Recordkeeping Burdens

Proposed Rule 127B might cause securitization participants to rely on appropriate contractual covenants or representations to determine compliance with the rule. While the Commission does not have details concerning the nature of the contractual relationships that exist among and between securitization participants and third parties involved in an asset-backed transaction, we expect that these parties typically enter into contractual relationships to protect their interests. For example, we believe that securitization participants likely enter into confidentiality agreements with other parties concerning the structuring of the transaction. We also understand that most asset-backed transactions are conducted as private placements and that in connection with each of these private placements there is a purchase and sale agreement for the equity piece of the transaction. To the extent that third parties and other securitization participants are parties to these confidentiality agreements and purchase and sale agreements, we believe the proposed rule would impose minimal additional burdens on the securitization participants as it would require only an additional covenant to existing contracts.

Because the Commission expects that most securitization participants already enter into some form of a contractual relationship with other securitization participants and third parties involved in the transaction, from discussions with industry experts we estimate that, on average, it would take approximately 2 to 10 internal and 2 to 10 external hours to draft and negotiate a contractual covenant assuring compliance with proposed Rule 127B into an existing contract. For PRA purposes, we conservatively use the upper end of this range and estimate 10 internal hours from a compliance attorney, and also 10 external hours for outside legal services that would cost $4,000 per contract.[137] Further, we preliminarily estimate that only about half of all securitization participants already have some type of existing contractual arrangements. Accordingly, we estimate that the total annual burden of those securitization participants who already have contractual arrangements would be approximately 3,760 internal burden hours (10 hours x 376 contracts) and approximately $1.5 million ($4,000 per contract x 376 contracts) in external costs.

To the extent there are not existing contracts in place between the securitization participants and third parties, we believe the proposed rule would impose more significant burdens and estimate that it would take approximately 20 internal hours and 20 external hours at a cost of $8,000 (using the estimated $400 per hour cost for outside legal services noted above) per contract to draft and negotiate the contractual covenant. In this instance, we estimate that the total annual burden would be approximately 7,500 internal burden hours (20 hours x 375 contracts) and approximately $3.0 million ($8,000 per contract x 375 contracts) in external costs.

In summary, we estimate that the collection of information would require an annual burden of 11,260 internal hours and $4.5 million in external costs.[138]

E. Collection of Information is Mandatory

The collection of information is not mandatory, however, we recognize that securitization participants may be likely to engage in the collection of information to manage their compliance with the proposed rule.

[137] This is based on an estimated $400 per hour cost for outside legal services. This is the same estimate used by the Commission for these services in the proposed consolidated audit trail rule: Exchange Act Release No. 62174 (May 26, 2010); 75 FR 32556 (June 8, 2010).

[138] These costs are all monetized in the cost-benefit analysis section of this release. The estimated dollar costs for the internal hours are $3.6 million ($320 per hour x 11,260 hours), where the $320 per hour figure for a compliance attorney is from SIFMA's *Management and Professional Earnings in the Securities Industry 2010*, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The total annual monetized PRA cost for the cost-benefit analysis is therefore $8.1 million ($3.6 million in monetized internal costs + $4.5 million in external costs).

F. Confidentiality

The collection of information is not required to be filed with the Commission or otherwise made publicly available. However, as discussed above, if a securitization participant were a regulated entity, we anticipate that this collection of information would be used by the Commission staff in its examination and oversight program. Further, as discussed above, if a securitization participant were an SRO member, we anticipate that this collection of information would be used by the SRO staff in its examination and oversight program.

G. Request for Comment

We invite comment on these estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- evaluate whether the proposed collection of information is necessary for the performance of our functions, including whether the information will have practical utility;
- evaluate the accuracy of our estimates of the burdens of the proposed collections of information;
- determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and
- evaluate 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.

Persons wishing to submit comments on the collection of information requirements of the proposed rules should direct them to (1) 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 (2) Elizabeth M. Murphy, Secretary, Securities and

Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-XX-XX. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File No. S7-XX-XX, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE, Washington, DC 20549-0213. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, so 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. Introduction

We are proposing Securities Act Rule 127B to implement the requirements of new Section 27B of the Securities Act,[139] as mandated under the Dodd-Frank Act. The proposed rule would prohibit securitization participants from engaging in transactions that would involve or result in a material conflict of interest with respect to an investor in such ABS. The proposed rule includes exceptions, as established by Congress, from this prohibition for certain risk-mitigating hedging activities, bona fide market-making, and liquidity commitments.

We are sensitive to the benefits and costs of our rules. Some of those costs and benefits stem from statutory mandates, while others are affected by the discretion we exercise in implementing those mandates. We have endeavored to focus our economic analysis of the proposed rule on the policy choices under the Commission's discretion, recognizing that it may often be difficult to separate the discretionary aspects of the rule from those elements required by statute. We request comment on all aspects of the costs and benefits of the proposal, particularly

[139] 15 U.S.C. 77z-2a.

any effect our proposed rules may have on efficiency, competition, and capital formation. We particularly appreciate comments that distinguish between costs and benefits that are attributed to the statute itself and costs and benefits that are a result of policy choices made by the Commission in implementing the statutory requirements.

B. Benefits

Consistent with the statute, the proposed rule is intended to benefit investors by better aligning incentives of securitization participants with those of investors in the ABS. For example, the proposed rule would apply to an underwriter or sponsor effecting a short transaction in an ABS within the prohibited time period. Although the possibility of short selling the securities during any period of time may create conflicting incentives for securitization participants, the proposed rule is intended to prevent such conflicting incentives during the prohibited time period as required under the statute.

We believe that our decision not to define "material conflict of interest" in the proposed rule would provide the benefit of better investor protection. An inadvertently narrow definition of that term could have the unintended consequence of excluding from the proposed prohibition certain activities undertaken by securitization participants that involve material conflicts of interest. Furthermore, by not limiting the definition to a specific list of material conflicts of interest, the proposed rule may help prevent behavior involving material conflicts of interest that have not come to the attention of investors or the Commission, or that may develop in the future. The broad investor protection provided by the proposed rule could alleviate investor concerns that the securities they purchase might be tainted by conflicts of interest. This would reduce adverse selection costs in the ABS market and encourage investment in ABS to the extent that investors consider material conflicts of interest important in their investment decisions.

As discussed above, one way in which securitization participants might manage their compliance with the proposed rule given the practical difficulties for a securitization participant in determining third-party involvement in the securitization, is through contractual assurances.[140] Similarly, if a securitization participant were a regulated entity, such assurance would be useful information for Commission staff (and, in appropriate circumstances, SRO staff) in its compliance and oversight program. We believe that the use of such assurances would help to prevent transactions that result in a misalignment of interests between securitization participants and ABS investors. Similar or different benefits may or may not ensue if different tools were used to manage compliance. We seek comment regarding the benefits to investors, securitization participants, and the marketplace stemming from the Commission's proposed rule.

C. Costs

We recognize that the proposed rule could impact the scope of some current activities undertaken by underwriters, sponsors, and other securitization participants, such as curtailment or cessation of otherwise common activities which, in turn, could lead to potential costs for such participants and the broader securitization market. As will be described below, material conflicts of interest might only arise between an investor and a particular securitization participant, which might lead the investor to seek a relationship with another securitization participant. However, as illustrated in some of the examples in Section IIIC above, other material conflicts of interest arise as a result of the nature or structure of the transaction as a whole (without regard to the identity of the securitization participants involved), such that these types of transactions might be effectively prohibited. In such cases, there might be costs to the marketplace as a whole as investors and securitization participants seek alternative and potentially less efficient transaction structures to effect a similar investment strategy in a way that would not result in a material

[140] See supra Section IIIA(v)(b).

conflict of interest, or if investors and securitization participants were unable to effect their investment strategies at all. For example, a type of synthetic collateralized debt obligations (CDOs) – balance sheet CDOs - would generally be prohibited under the proposed rule (see Example 3B). Though securitization participants might be able to effect similar types of transactions in the form of non-synthetic ABS (which generally would not be prohibited by the above interpretation of material conflict of interest), there may be reasons why a synthetic form of a balance sheet CDO is a more efficient form of the transaction from the standpoint of the issuer or investors. In addition, this aspect of the proposed rule would limit the hedging options available to a lender who originated assets without the intent to securitize them.[141] Such a lender would be able to sell or securitize assets on its balance sheet, but not synthetically, even if doing so is economically optimal. Thus, a prohibition on structuring balance sheet CDOs might have a negative effect on efficiency and capital formation.

We recognize that by not defining the phrase "material conflict of interest" for purposes of this particular proposal, the proposed rule could create some regulatory uncertainty, which could lead to costs in the asset-backed securitization process. Securitization participants could avoid undertaking certain activities out of concern that the proposed rule would apply to such activities, despite the securitization participant's view that such activities did not create or result in a material conflict of interest. In particular, larger entities with multiple business lines could potentially have, as a dynamic of their structure and relationships with customers (and others), conflicts that – without sufficiently specific guidance – would be perceived as material and unavoidable. Thus, we acknowledge that many of the potential conflicts and costs discussed could disproportionately impact larger, multi-faceted, and diversified firms that offer a variety of

[141] See supra note 100.

services. Below, we identify a number of these potential costs and seek comment on whether there are ways to mitigate them..

Generally, we recognize that securitization participants would incur costs in updating or creating new procedures to monitor for potential material conflicts of interest that would be prohibited under the proposed rule. The magnitude of these potential costs could be more pronounced because we have not proposed definitions of terms, including a definition as to what is material or a conflict of interest. The proposed rule may result in creating an environment in which even the potential for relationships or transaction structures that would result in a material conflict of interest would be reduced. For example, there often may be several independent, unaffiliated parties under the definition of a securitization participant (e.g., underwriters and placement agents) for a given asset-backed securitization. If each such participant in an asset-backed securitization were effectively conflicted out of the process, the asset-backed securitization market could in some situations cease to function efficiently. We recognize that such a restriction on potential participants to an asset-backed securitization could have costs, as well as potential unintended consequences on the ability of market participants to structure asset-backed products. We seek comment as to how the proposed rule might be applied or modified to address such situations.

Because we are not proposing to define the term "material conflict of interest", the effect could amplify the potential costs from the statutory prohibition on a securitization participant's existing and/or potential future client relations. For example, if an existing or potential client approached a firm to request that it undertake a certain conflicted transaction, the firm might determine not to do so because of the concern that the transaction could be viewed as a material conflict of interest between the securitization participant and investors in the ABS if one of the exceptions to the proposed rule were not available. Under these circumstances, the client might need to approach another financial firm to conduct the desired transaction. In some cases, the financial firm might not be able to determine with a sufficient level of certainty that a conflict of interest did not exist. As described above, in certain circumstances, where the transaction structure itself (without regard to the identity of the parties) involved a conflict of interest, the investor might have to forego the ABS investment entirely and thus might be unable to participate in a particular investment opportunity that it desires. A broad interpretation by market participants of the term "material conflict of interest" in the rule could therefore cause the securitization participant to lose profits or fees that would have resulted from the client's business with respect to the conflicting transaction and, potentially, future profits and fees if the client determines to take some of its future business to other firms, or might cause investors to lose investment opportunities they might otherwise have. We recognize that firms expend considerable time and resources to cultivate relationships with their clients and, thus, if the proposed rule were to diminish (beyond the statutory mandate in Securities Act Section 27B) existing relationships or impede the formulation of new relationships, the impacts of the proposed rule could be significant to firms and the broader marketplace.

In addition, clients also could bear undesirable costs by losing the ability to utilize firms with particular expertise or specialization in certain areas due to real or perceived material conflicts of interest. Clients might also incur costs in searching for a different firm to consummate a transaction, where they have a preexisting relationship that they too have invested resources into developing. In addition, to retain their ability to utilize specific firms for non-ABS related transactions, some potential clients might choose to forego the ABS investment. We recognize that if the proposed rule were to cause an investor to forego an ABS investment entirely, there could be costs incurred by the investor in terms of seeking out alternative investments as well as the loss of return from the ABS investment. We seek commenter input regarding other costs that might be incurred by investors from foregoing an ABS transaction entirely.

All securitization participants are subject to the proposed rule's prohibition on material conflicts of interest. Thus, although the inability to conduct a transaction that would result in a material conflict of interest between the securitization participant and investors in the ABS might have a negative impact on certain client relations and could require the client to go elsewhere to conduct the requested transaction, presumably all securitization participants and their clients would potentially encounter similar issues. As a result, while a securitization participant could lose the business of one client due to the proposed rule, in some cases it also could gain the business of another securitization participant's client, where that securitization participant could not conduct the transaction due to a material conflict of interest. Collectively, based upon the analysis above related to firm-client relationships, we acknowledge that the potential loss of customers could be more costly to firms than the potential gain of other clients.[142] In turn, clients could incur costs in having to seek out new firms rather than utilizing firms with which they have preexisting, preferred business relationships. In sum, we recognize that both firms and clients could bear costs that may, in turn, impact the broader market, and we seek comment regarding these costs of the Commission's proposed rule.

Further, we recognize that there could be some instances in which the inability of a securitization participant to conduct a transaction that would result in a material conflict of

[142] See, e.g., Myron B. Slovin, Marie E. Sushka & John A. Polonchek, The Value of Bank Durability: Borrowers as Bank Stakeholders, 48 J. FIN. 247 (1993); Mitchell A. Petersen & Raghuram G. Rajan, The Benefits of Firm-Creditor Relationships: Evidence from Small Business Data, 49 J. FIN. 3 (1994); Sreedhar Bharath, Sandeep Dahiya, Anthony Saunders & Anand Srinivasan, So What Do I Get? The Bank's View of Lending Relationships, 85 J. FIN. ECON. 368 (2007).

interest could adversely affect the price of the ABS. Consistent with Section 27B, the proposed rule provides exceptions for risk-mitigating hedging activity, liquidity commitments, and bona fide market-making. A proposed transaction that results in a prohibited material conflict of interest, however, might not fit into one of these exceptions and, thus, would be subject to the general prohibition in the proposed rule. Although the transaction, if executed, could ultimately have a positive impact on the ABS, it would not be permitted to be undertaken under the proposed rule. This could impose costs both on the securitization participant and on investors in the ABS resulting from a decline (or foregone increase) in the value of the ABS. We seek comment on these pricing-related costs of the proposed rule.

The proposed rule could impose certain costs upon departments within a firm not directly involved with the securitization process by impacting their ability to conduct transactions that could result in a material conflict of interest with investors in an ABS for which the firm is a securitization participant. The scope of the proposed rule could require monitoring for potential material conflicts of interest within all or many departments of the firm. If any department's proposed transaction were determined to raise a potential material conflict of interest, that department could have to abandon the proposed transaction or wait until the proposed rule's prohibition period ended. We seek comment concerning any costs that could be incurred with respect to the various activities among different departments within one firm. We also seek comment concerning whether the operation of information barriers within firms might suggest the need for the Commission to provide interpretations to the proposed rule to exclude activity that should not be captured.

As required by Securities Act Section 27B, the scope of securitization participants in the proposed rule includes affiliates and subsidiaries of underwriters, placement agents, initial purchasers, and sponsors. In some instances, the activities of an affiliate or subsidiary may not be known to the underwriter, placement agent, initial purchaser, or sponsor, and could, inadvertently, involve or result in a material conflict of interest with the investors in the ABS. Monitoring the activities of the affiliate or subsidiary for conflicts could be difficult, especially when there are existing information barriers between the entities, and could impose costs. For this reason, we seek comment concerning any costs that could be incurred by affiliates and subsidiaries.[143]

We recognize the statutory prohibition and thus the proposed rule may have significant costs with respect to how firms and clients establish, maintain, and benefit from relationships. For instance, because larger financial entities tend to form in an effort to achieve synergies and economies of scope in combining and offering multiple services, restrictions on such activities could lead to changes to their business activities that could reduce firm earnings. In part because of the breadth of the statutory provision and, thus, the proposed rule, these potential changes could have some disruptive effect on the firms, their clients, and the broader marketplace, reducing current efficiencies that may exist. Restricting the ability of securitization participants to maintain relationships that service multiple objectives could ultimately impact negatively both financial firms and their clients' ability to conduct economically efficient activities. In addition, firms with particular specialization in given areas that were precluded from providing such expertise due to perceived material conflicts could disadvantage clients.

While not required by the proposed rule, we recognize that one way that securitization participants might seek to facilitate their compliance with the proposed rule is through

[143] See supra Section IV (noting the recognition of information barriers in Section 15(g) of the Exchange Act, Exchange Act Rule 14e-5, and Regulation M under the Exchange Act).

contractual assurances.[144] The costs associated with such assurances could be minimal if contracts are currently utilized and could be easily modified to reflect the assurances (e.g., standardized industry agreements, purchase and sale agreements, and confidentiality agreements). However, in circumstances where there are no agreements in place, there could be more significant costs for parties to negotiate a new agreement in its entirety. Other costs may or may not ensue if a tool other than a contractual assurance were used to manage compliance with the proposed rule. We seek commenter input regarding whether and how behaviors could change as a result of the use of contractual assurances that might increase or decrease costs.

We also note that there are potential costs associated with a clarification we propose to one of the exceptions under the proposed rule.[145] The proposed rule provides exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making, which are consistent with Securities Act Section 27B. We seek comment on the scope of the risk-mitigating hedging exception in the proposed rule in a manner that we believe is consistent with the intent of the legislation, but which could help securitization participants and other industry participants better understand whether an activity qualifies under the exception. In the proposed rule, we seek comment on the application of the proposed exception for risk-mitigating hedging activity to "mitigating" the consequences of a risk. We believe that risk mitigation would permit a securitization participant to limit the consequences of a risk, which could facilitate investor protection. We also seek comment on how "exposures" arise and whether the risk-mitigating hedging exception should apply to exposures as well as positions and holdings. Although we believe that such clarification would allow firms to better reduce and mitigate specific risks that arise out of underwriting, placement, initial purchase, or sponsorship of an ABS, we recognize

[145] See supra Section IIIB(i).

that securitization participants would bear an additional cost in dedicating resources to determine whether their activities fall within this exception as interpreted beyond any cost they already would bear due to the existence of the statutory exception. Similar to the costs that could be incurred for compliance with the proposed rule, securitization participants could also face costs in their assessment of whether their activities qualify for the risk-mitigating hedging exception. We seek comment with respect to all aspects of the proposed risk-mitigating hedging exception.

D. Related Considerations

The coverage of Securities Act Section 27B and, thus the proposed rule which tracks the statute, could negatively impact economic efficiency both from the point of view of the securitizations participants, and sometimes also from the point of view of investors who seek to invest in the pools that back the ABS if certain ABS transactions did not get consummated because of the scope of the proposed rule.

The scope of activities under the proposed rule that could constitute potential conflicts of interest could potentially impact competition among asset-backed securitization market participants. For instance, larger entities with multiple business lines could have, as a result of their structure, unavoidable material conflicts of interest. An investor that utilizes such entities for multiple services could have to switch to competitors, or depending on the structure of ABS, forego the ABS transaction. Under these circumstances, the investor could incur additional search costs and find its business processes less efficient due to the loss of relationships.[146] The securitization participant could also potentially lose any profits or fees that would have resulted from the investor's business with respect to the conflicting transaction and, potentially, future profits and fees if the investor takes future business to another firm. In addition, investors and

[146] See, e.g., Myron B. Slovin, Marie E. Sushka & John A. Polonchek, The Value of Bank Durability: Borrowers as Bank Stakeholders, 48 J. Fin. 247 (1993).

financial firms could both lose the financial benefits gained from established, cultivated relationships with securitization participants. This could be potentially costly to both investors that have established relationships with firms and, ultimately, to investors in the broader marketplace as a contraction in the securitization process could ensue. As firm-investor relationships are costly to develop, but valuable to maintain, firms and such investors might find application of the proposed rule to be disruptive in some circumstances and, thus, the broader marketplace could experience some inefficiency, as well as unintended impacts on capital formation.

In addition, given that the ABS offering process can involve multiple lead underwriters and an underwriting syndicate with several members, the proposed rule could have a multiplicative effect by conflicting out several unaffiliated financial institutions. If an attempt to limit this multiplicative effect through reducing the number of parties involved in a securitization negatively affects the manner in which ABS are structured and underwritten, this might have a negative impact on the efficiency of the securitization process. As previously noted, the scope of the statutory prohibition could amplify the inability of departments within a securitization participant to conduct business as they have in the past, which could increase financial costs, as well as heighten market inefficiency. These inefficiencies could ultimately negatively impact investors in ABS, as well as the consumers whose loans back the ABS.

Request for Comments regarding the Economic Analysis

We seek comments and empirical data on all aspects of this Benefit-Cost Analysis, including identification and quantification of any additional benefits and costs. Specifically, we ask the following:

112. Are there any additional benefits that may arise from the proposed rule? Or, are there benefits described above that would not be likely to result from the proposed rule? If so, please explain these benefits or lack of benefits in detail.

113. Are there any additional costs that may arise from the proposed rule? Or, are there costs described above that would not be likely to result from the proposed rule? If so, please explain these costs or lack of costs in detail.

114. Do the types, or extent, of any benefits or costs from the proposed rule differ between certain securitization participants? For example, do potential benefits or costs differ in their application to underwriters as opposed to placement agents? Please explain.

115. Do the types, or extent, of any benefits or costs from the proposed rule differ between certain kinds of asset-backed securitizations? For example, do any benefits or costs differ between ABS and synthetic ABS? If so, how do the benefits or costs differ?

116. Can you quantify costs that might arise in relation to monitoring for transactions that would result in a material conflict of interest between a securitization participant and investors in the ABS? Do securitization participants have existing procedures that might help mitigate potential costs?

117. With respect to potential costs related to the proposed rule prohibiting transactions by affiliates, subsidiaries, or another department within the firm that would result in a material conflict of interest with investors in the ABS, is it possible to quantify the cost of not being permitted to undertake such transactions?

118. Should the Commission consider interpretations that would be consistent with the goals of Section 27B and the proposed rule, but that would further reduce costs? If so, what areas of interpretation should the Commission explore?

119. What costs would be incurred by securitization participants, investors and others if certain synthetic ABS (e.g., balance sheet CDOs) could no longer be created? We ask commenters to describe any resulting impacts on the ABS market and lending institutions if this were to occur, and provide supporting data if available.

120. We solicit comment on the impact of the proposed rule on efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views if possible.

IX. Small Business Regulatory Enforcement Fairness Act

Under the Small Business Regulatory Enforcement Fairness Act of 1996,[147] 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 rule would be a "major" rule for purposes of the Small Business Regulatory Enforcement Fairness Act. In addition, we solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;

[147] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

- Any potential increase in costs or prices for consumer or individual industries; and
- Any potential effect on competition, investment, or innovation.

X. Regulatory Flexibility Act Certification

Pursuant to 5 U.S.C. 605(b), the Commission hereby certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed rule prohibits transactions by underwriters, placement agents, initial purchasers, or sponsors of an ABS, or any affiliate or subsidiary of such entities, that would involve or result in a material conflict of interest with investors in the ABS. Based on our current available data, we do not believe that a substantial number of underwriters of ABS would meet the definition of a small broker-dealer for purposes of the Regulatory Flexibility Act.[148] In addition, we are aware of only one sponsor that would meet the definition of a small entity for purposes of the Regulatory Flexibility Act.[149] Thus, the Commission does not believe the proposed rule, if adopted, would have a significant economic impact on a substantial number of small entities.

XI. Statutory Authority and Text of Proposed Rule

The Commission is proposing new rule 127B (17 CFR 230.127B) pursuant to authority set forth in Sections 10, 17(a), 19(a), 27B, and 28 of the Securities Act.

List of Subjects

17 CFR Part 230

Advertising, Brokers, Reporting and recordkeeping requirements, Securities.

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148 This is based on the ABS Database, which captures information on all asset-backed and mortgage-backed securitization issues sold worldwide. The database is compiled by the editors of Asset-Backed Alert. A detailed description of the database is provided at http://www.abalert.com/about_abs.php.

149 This is based on data from the ABS Database.

Text of the Proposed Rule

For the reasons set out above, Title 17, chapter II of the Code of Federal Regulations is proposed to be amended 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, 781, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, 80a-37, and Pub. L. 111-203, §939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

2. Add § 230.127B to read as follows:

§230.127B Conflicts of interest relating to certain securitizations.

(a) *Unlawful activity.* An underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an asset-backed security (as such term is defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), which for the purposes of this rule shall include a synthetic asset-backed security), shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity.

(b) Excepted activity. The following activities shall not be prohibited by paragraph (a) of this section:

(1) *Risk-mitigating hedging activities.* Risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with such positions or holdings; or

(2) *Liquidity commitment.* Purchases or sales of asset-backed securities made pursuant to and consistent with commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of such entity, to provide liquidity for the asset-backed security; or

(3) *Bona fide market-making.* Purchases or sales of asset-backed securities made pursuant to and consistent with bona fide market-making in the asset-backed security.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: September 19, 2011

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65356 / September 20, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3282 / September 20, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29795 / September 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14329

In the Matter of **DELTA GLOBAL ADVISORS, INC. AND CHARLES P. HANLON,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 15(b) 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 AS TO CHARLES P. HANLON**

I.

On April 7, 2011, the Securities and Exchange Commission ("Commission") instituted proceedings pursuant to Section 15(b) 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 Charles P. Hanlon ("Hanlon" or "Respondent").

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 15(b) 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 as to Charles P. Hanlon ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

SUMMARY

1. This proceeding involved numerous materially misleading statements and omissions by Delta Global Advisors, Inc. ("Delta"), an investment adviser registered with the Commission, and Hanlon, Delta's principal and control person. During the relevant period, Delta misrepresented to existing and prospective investors its eligibility for Commission registration, including that it served as an investment adviser to a registered investment company and managed as much as $1.5 billion. In fact, Delta did not advise any such client and had at times no more than $9 million under management. These misrepresentations vastly exaggerated the significance and status of the firm. Moreover, Delta failed to disclose its poor financial condition, a default judgment entered against it in a breach of fiduciary duty lawsuit brought by a client, and that Hanlon had been the subject of disciplinary action by the Financial Industry Regulatory Authority ("FINRA"). As a result of these misleading statements and omissions, Delta appeared to be operationally sound and much larger and more established than it really was.

2. Although Hanlon represented to Commission examination staff that Delta would disclose its poor financial condition to clients, Delta never did so. In addition, even after Commission examination staff asked Delta to correct its Form ADV to accurately reflect its assets under management and deregister, Delta continued to misrepresent its assets under management and did not withdraw its registration.

RESPONDENTS

3. **Delta** is a suspended California corporation based in Huntington Beach, California that registered with the Commission as an investment adviser on July 10, 2006. Hanlon wholly owns Delta. In 2009, Delta was providing discretionary advisory services to 209 accounts belonging to individuals, pension and profit-sharing plans, trusts, and corporations.

4. **Hanlon** is Delta's founder, president, and sole control person. At all relevant times, Hanlon was responsible for the management of Delta's business. From January 2005

[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.

through February 2007, Hanlon was associated with a registered broker-dealer, Delta Equity Services Corporation. FINRA suspended Hanlon from all registration capacities on June 29, 2010 for violating FINRA rules for failing to comply with an arbitration award.

BACKGROUND

RESPONDENTS MISREPRESENTED DELTA'S STATUS AS AN INVESTMENT ADVISER TO A REGISTERED INVESTMENT COMPANY AND ITS ASSETS UNDER MANAGEMENT

5. Between 2006 and 2008, Delta and Hanlon filed materially false Forms ADV that vastly exaggerated the significance and status of the firm. Specifically, Delta falsely claimed that it was eligible for registration with the Commission, that it served as an investment adviser to a registered investment company, and that it managed assets far in excess of its actual assets under management.

6. From September 1, 2006 through March 27, 2008, Delta's Form ADV filings claimed that the firm was eligible for investment adviser registration with the Commission because it served as the investment adviser to a registered investment company. During the relevant time period, Delta had entered into several consulting agreements with the sponsor of unit investment trusts (the "trusts"), which were registered under the Investment Company Act.[2] Pursuant to the consulting agreements, Delta assisted the sponsor in selecting a portfolio of securities for the trusts and received a one-time fee for these services. While Delta served as an investment adviser to the trusts' sponsor for the limited period in which Delta advised on selection of securities for the trusts, Delta did not have an advisory contract with the registered investment company. Thus, contrary to what it represented in its Form ADV filings, Delta was not acting as an investment adviser to a registered investment company (the trusts) and Delta was not eligible for registration on that basis.

7. From March 7, 2007 through July 6, 2008, Delta's Form ADV filings improperly included the trusts' assets as Delta's advisory assets under management, even though Delta did not provide continuous and regular supervision of the trusts' assets. The inclusion of the trusts' assets vastly overstated the firm's reported size: in four separate filings Delta claimed to manage between \$656 million and \$1.49 billion in assets. In fact, during this period, Delta's assets under management dropped to as low as \$9 million.

8. For nearly every period reflected in Delta's Form ADV filings, Delta did not have \$25 million or more in advisory assets under management and therefore was not eligible for

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2 Section 4(2) of the Investment Company Act defines a UIT as "an investment company, which (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument, (B) does not have a board of directors, and (C) issues only redeemable securities . . . ." Typically, these trusts do not have corporate officers, or an investment adviser. These trusts generally do not actively trade their investment portfolios – that is, a unit investment trust buys a relatively fixed portfolio of securities (for example, five, ten, or twenty specific stocks or bonds), and holds them with little or no change for the life of the trust.

registration on that basis. In addition, as of June 30, 2009 (the date of its most recent Form ADV filing), Delta did not have $25 million or more in advisory assets under management.

9. Delta similarly misrepresented its assets under management through its website. Delta's website included a section containing articles from Bloomberg, Reuters, and other news sources quoting Delta's employees, including Hanlon. Many of these articles falsely stated that Delta had assets under management of $1 billion or more. For example, Delta's website included a January 23, 2009 Bloomberg article that stated: "'Everybody wants to buy gold, and these have been very healthily subscribed issues,' Michael Pento, who helps oversee $1.5 billion at Delta Global Advisors . . . said in an interview." Similarly, a March 2, 2009 Bloomberg article on Delta's website stated: "'Silver's woken up recently, but it isn't flying yet,' said Chip Hanlon, president of Delta Global Advisors Inc. in Huntington Beach, California, which manages $1 billion."

10. At the time Delta filed its Forms ADV and posted articles to its website, Hanlon knew or was reckless in not knowing that the representations made about assets under management and providing advisory services to a registered investment company were materially false. In addition, even after Hanlon was advised by an investment advisory compliance firm and Commission staff that Delta was not acting as an investment adviser to a registered investment company and that it should not consider the trusts' assets as Delta's assets under management, Delta and Hanlon continued to post additional articles on Delta's website that included the trusts' assets as its assets under management.

11. In its July 7, 2008 Form ADV filing, Delta excluded the trusts' assets from its assets under management and no longer indicated that it provided investment advisory services to a registered investment company. In this filing, Delta indicated that it had $26 million in assets under management, but this was false. At that time Delta only had $16 million in assets under management.

12. Commission examination staff brought this matter to Hanlon's attention and, on March 31, 2009, Delta amended its Form ADV to reflect $16 million in assets under management, which was well below the $25 million threshold for registration. Only one day before Delta was required to file a Form ADV-W withdrawing its registration, Delta amended its Form ADV once again to reflect $26 million in assets under management. Hanlon admitted to Commission examination staff that Delta included $10 million in "hopeful" assets in this Form ADV filing as assets under management. Without these additional "hopeful" assets, Delta would not have been eligible for registration as an investment adviser. However, even after Commission examination staff requested that Delta correct its Form ADV and deregister, Delta continued to misrepresent its assets under management and did not withdraw its registration.

RESPONDENTS FAILED TO MAKE REQUIRED DISCLOSURES ABOUT DELTA'S POOR FINANCIAL CONDITION AND HANLON'S DISCIPLINARY HISTORY

13. In August 2009, Delta's financial condition was seriously impaired because it had minimal liquid assets and several overdue bills. On November 13, 2009, Delta informed Commission examination staff by letter that it was "in the process of communicating with all clients on this matter and will have completed this process by December 9, 2009." However, contrary to Delta's representations, Hanlon never disclosed Delta's financial condition to any clients.

14. On June 28, 2010, a default judgment was entered against Delta and Hanlon in a lawsuit filed by one of Delta's clients relating to Delta's advisory services. The lawsuit alleged breach of fiduciary duty, negligence, failure to supervise, negligent misrepresentation, and breach of contract, all relating to Hanlon and Delta's activities as investment advisers. Among other things, the plaintiff claimed that Delta and Hanlon (i) did not follow plaintiff's investment guidelines and objectives, and (ii) failed to disclose certain conflicts of interest. The judgment ordered Delta and Hanlon to pay $353,706 in damages. Neither Delta nor Hanlon has satisfied the judgment. In addition, Delta did not disclose the existence of this judgment to Delta's clients or its precarious financial condition as a result of the unsatisfied judgment, even though it was required to do so.

15. In June 2010, a FINRA arbitration panel ordered Hanlon to pay compensatory damages of $272,290 and $5,500 in fees arising from a complaint against him alleging breach of contract, slander, and fraud. Hanlon failed to comply with this arbitration award and consequently on June 29, 2010 FINRA suspended Hanlon from acting in any registered capacity. Delta did not disclose this disciplinary action to its clients, even though it was required to do so.

VIOLATIONS

16. As a result of the conduct described above, Hanlon willfully aided, abetted, and caused Delta's violations of, Section 203A of the Advisers Act for having improperly registered with the Commission.

17. As a result of the conduct described above, Hanlon willfully violated Sections 206(1) and 206(2) of the Advisers Act by employing devices, schemes or artifices to defraud clients or engaging in transactions, practices or courses of business that defrauded clients or prospective clients.

18. As a result of the conduct described above, Hanlon willfully violated Section 207 of the Advisers Act by making untrue statements of a material fact in registration applications or reports Delta filed with the Commission and willfully omitting to state in such applications or reports material facts which were required to be stated therein.

19. As a result of the conduct described above, Hanlon willfully aided, abetted, and caused Delta's violations of, Section 206(4) of the Advisers Act and Rules 206(4)-1(a)(5) and 206(4)-4(a)(1) and (2) thereunder by engaging in the following acts, practices or courses of business which were fraudulent, deceptive or manipulative: (a) publishing, circulating or distributing advertisements that contained untrue statements of material facts, or that were otherwise false or misleading; (b) failing to disclose to clients or prospective clients all material facts regarding the financial condition of the adviser that are reasonably likely to impair the adviser's ability to meet its contractual commitments to clients; and (c) failing to disclose a legal or disciplinary event that is material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients.

IV.

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

Accordingly, pursuant to Section 15(b) 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 Hanlon shall cease and desist from committing or causing any violations and any future violations of Sections 203A, 206(1), 206(2), 206(4), and 207 of the Advisers Act and Rule 206(4)-1(a)(5) promulgated thereunder.

B. Respondent Hanlon 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

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 Hanlon shall pay civil penalties of $50,000.00 to the United States Treasury. Payment shall be made in the following installments: $25,000.00 within 10 days of the entry of this Order; $6,250.00 within 90 days of the entry of this Order; $6,250.00 within 180 days of the entry of this Order; $6,250.00 within 270 days of the entry of this Order; and $6,250.00 within 360 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of 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. 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 Charles P. Hanlon 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 Bruce Karpati, Co-Chief, Asset Management Unit, New York Regional Office, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

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. 3283 / September 20 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29796 / September 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14329

In the Matter of **DELTA GLOBAL ADVISORS, INC. AND CHARLES P. HANLON,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AS TO DELTA GLOBAL ADVISORS, INC.**

I.

On April 7, 2011, the Securities and Exchange Commission ("Commission") instituted proceedings pursuant to Sections 203(e) 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 Delta Global Advisors, Inc. ("Delta" or "Respondent").

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 it 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 Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 and Section 9(b) of the Investment Company Act of 1940 as to Delta Global Advisors, Inc. ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

SUMMARY

1. This proceeding involved numerous materially misleading statements and omissions by Delta, an investment adviser registered with the Commission, and Charles P. Hanlon ("Hanlon"), Delta's principal and control person. During the relevant period, Delta misrepresented to existing and prospective investors its eligibility for Commission registration, including that it served as an investment adviser to a registered investment company and managed as much as $1.5 billion. In fact, Delta did not advise any such client and had at times no more than $9 million under management. These misrepresentations vastly exaggerated the significance and status of the firm. Moreover, Delta failed to disclose its poor financial condition, a default judgment entered against it in a breach of fiduciary duty lawsuit brought by a client, and that Hanlon had been the subject of disciplinary action by the Financial Industry Regulatory Authority ("FINRA"). As a result of these misleading statements and omissions, Delta appeared to be operationally sound and much larger and more established than it really was.

2. Although Hanlon represented to Commission examination staff that Delta would disclose its poor financial condition to clients, Delta never did so. In addition, even after Commission examination staff asked Delta to correct its Form ADV to accurately reflect its assets under management and deregister, Delta continued to misrepresent its assets under management and did not withdraw its registration.

RESPONDENTS

3. **Delta** is a suspended California corporation based in Huntington Beach, California that registered with the Commission as an investment adviser on July 10, 2006. Hanlon wholly owns Delta. In 2009, Delta was providing discretionary advisory services to 209 accounts belonging to individuals, pension and profit-sharing plans, trusts, and corporations.

4. **Hanlon** is Delta's founder, president, and sole control person. At all relevant times, Hanlon was responsible for the management of Delta's business. From January 2005 through February 2007, Hanlon was associated with a registered broker-dealer, Delta Equity Services Corporation. FINRA suspended Hanlon from all registration capacities on June 29, 2010 for violating FINRA rules for failing to comply with an arbitration award.

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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.

BACKGROUND

RESPONDENTS MISREPRESENTED DELTA'S STATUS AS AN INVESTMENT ADVISER TO A REGISTERED INVESTMENT COMPANY AND ITS ASSETS UNDER MANAGEMENT

5. Between 2006 and 2008, Delta and Hanlon filed materially false Forms ADV that vastly exaggerated the significance and status of the firm. Specifically, Delta falsely claimed that it was eligible for registration with the Commission, that it served as an investment adviser to a registered investment company, and that it managed assets far in excess of its actual assets under management.

6. From September 1, 2006 through March 27, 2008, Delta's Form ADV filings claimed that the firm was eligible for investment adviser registration with the Commission because it served as the investment adviser to a registered investment company. During the relevant time period, Delta had entered into several consulting agreements with the sponsor of unit investment trusts (the "trusts"), which were registered under the Investment Company Act.[2] Pursuant to the consulting agreements, Delta assisted the sponsor in selecting a portfolio of securities for the trusts and received a one-time fee for these services. While Delta served as an investment adviser to the trusts' sponsor for the limited period in which Delta advised on selection of securities for the trusts, Delta did not have an advisory contract with the registered investment company. Thus, contrary to what it represented in its Form ADV filings, Delta was not acting as an investment adviser to a registered investment company (the trusts) and Delta was not eligible for registration on that basis.

7. From March 7, 2007 through July 6, 2008, Delta's Form ADV filings improperly included the trusts' assets as Delta's advisory assets under management, even though Delta did not provide continuous and regular supervision of the trusts' assets. The inclusion of the trusts' assets vastly overstated the firm's reported size: in four separate filings Delta claimed to manage between $656 million and $1.49 billion in assets. In fact, during this period, Delta's assets under management dropped to as low as $9 million.

8. For nearly every period reflected in Delta's Form ADV filings, Delta did not have $25 million or more in advisory assets under management and therefore was not eligible for registration on that basis. In addition, as of June 30, 2009 (the date of its most recent Form ADV filing), Delta did not have $25 million or more in advisory assets under management.

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[2] Section 4(2) of the Investment Company Act defines a UIT as "an investment company, which (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument, (B) does not have a board of directors, and (C) issues only redeemable securities . . . ." Typically, these trusts do not have corporate officers, or an investment adviser. These trusts generally do not actively trade their investment portfolios – that is, a unit investment trust buys a relatively fixed portfolio of securities (for example, five, ten, or twenty specific stocks or bonds), and holds them with little or no change for the life of the trust.

9. Delta similarly misrepresented its assets under management through its website. Delta's website included a section containing articles from Bloomberg, Reuters, and other news sources quoting Delta's employees, including Hanlon. Many of these articles falsely stated that Delta had assets under management of $1 billion or more. For example, Delta's website included a January 23, 2009 Bloomberg article that stated: "'Everybody wants to buy gold, and these have been very healthily subscribed issues,' Michael Pento, who helps oversee $1.5 billion at Delta Global Advisors . . . said in an interview." Similarly, a March 2, 2009 Bloomberg article on Delta's website stated: "'Silver's woken up recently, but it isn't flying yet,' said Chip Hanlon, president of Delta Global Advisors Inc. in Huntington Beach, California, which manages $1 billion."

10. At the time Delta filed its Forms ADV and posted articles to its website, Hanlon knew or was reckless in not knowing that the representations made about assets under management and providing advisory services to a registered investment company were materially false. In addition, even after Hanlon was advised by an investment advisory compliance firm and Commission staff that Delta was not acting as an investment adviser to a registered investment company and that it should not consider the trusts' assets as Delta's assets under management, Delta and Hanlon continued to post additional articles on Delta's website that included the trusts' assets as its assets under management.

11. In its July 7, 2008 Form ADV filing, Delta excluded the trusts' assets from its assets under management and no longer indicated that it provided investment advisory services to a registered investment company. In this filing, Delta indicated that it had $26 million in assets under management, but this was false. At that time Delta only had $16 million in assets under management.

12. Commission examination staff brought this matter to Hanlon's attention and, on March 31, 2009, Delta amended its Form ADV to reflect $16 million in assets under management, which was well below the $25 million threshold for registration. Only one day before Delta was required to file a Form ADV-W withdrawing its registration, Delta amended its Form ADV once again to reflect $26 million in assets under management. Hanlon admitted to Commission examination staff that Delta included $10 million in "hopeful" assets in this Form ADV filing as assets under management. Without these additional "hopeful" assets, Delta would not have been eligible for registration as an investment adviser. However, even after Commission examination staff requested that Delta correct its Form ADV and deregister, Delta continued to misrepresent its assets under management and did not withdraw its registration.

RESPONDENTS FAILED TO MAKE REQUIRED DISCLOSURES ABOUT DELTA'S POOR FINANCIAL CONDITION AND HANLON'S DISCIPLINARY HISTORY

13. In August 2009, Delta's financial condition was seriously impaired because it had minimal liquid assets and several overdue bills. On November 13, 2009, Delta informed Commission examination staff by letter that it was "in the process of communicating with all clients on this matter and will have completed this process by December 9, 2009." However,

contrary to Delta's representations, Hanlon never disclosed Delta's financial condition to any clients.

14. On June 28, 2010, a default judgment was entered against Delta and Hanlon in a lawsuit filed by one of Delta's clients relating to Delta's advisory services. The lawsuit alleged breach of fiduciary duty, negligence, failure to supervise, negligent misrepresentation, and breach of contract, all relating to Hanlon and Delta's activities as investment advisers. Among other things, the plaintiff claimed that Delta and Hanlon (i) did not follow plaintiff's investment guidelines and objectives, and (ii) failed to disclose certain conflicts of interest. The judgment ordered Delta and Hanlon to pay $353,706 in damages. Neither Delta nor Hanlon has satisfied the judgment. In addition, Delta did not disclose the existence of this judgment to Delta's clients or its precarious financial condition as a result of the unsatisfied judgment, even though it was required to do so.

15. In June 2010, a FINRA arbitration panel ordered Hanlon to pay compensatory damages of $272,290 and $5,500 in fees arising from a complaint against him alleging breach of contract, slander, and fraud. Hanlon failed to comply with this arbitration award and consequently on June 29, 2010 FINRA suspended Hanlon from acting in any registered capacity. Delta did not disclose this disciplinary action to its clients, even though it was required to do so.

VIOLATIONS

16. As a result of the conduct described above, Delta willfully violated Section 203A of the Advisers Act for having improperly registered with the Commission.

17. As a result of the conduct described above, Delta willfully violated Sections 206(1) and 206(2) of the Advisers Act by employing devices, schemes or artifices to defraud clients or engaging in transactions, practices or courses of business that defrauded clients or prospective clients.

18. As a result of the conduct described above, Delta willfully violated Section 207 of the Advisers Act by making untrue statements of a material fact in registration applications or reports Delta filed with the Commission and willfully omitting to state in such applications or reports material facts which were required to be stated therein.

19. As a result of the conduct described above, Delta willfully violated Section 206(4) of the Advisers Act and Rules 206(4)-1(a)(5) and 206(4)-4(a)(1) and (2) thereunder by engaging in the following acts, practices or courses of business which were fraudulent, deceptive or manipulative: (a) publishing, circulating or distributing advertisements that contained untrue statements of material facts, or that were otherwise false or misleading; (b) failing to disclose to clients or prospective clients all material facts regarding the financial condition of the adviser that are reasonably likely to impair the adviser's ability to meet its contractual commitments to clients; and (c) failing to disclose a legal or disciplinary event that is material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients.

IV.

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

Accordingly, pursuant to Sections 203(e) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Delta shall cease and desist from committing or causing any violations and any future violations of Sections 203A, 206(1), 206(2), 206(4), and 207 of the Advisers Act and Rule 206(4)-1(a)(5) promulgated thereunder.

B. The registration of Respondent Delta as an investment adviser be, and hereby is, revoked.

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9261 / September 21, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 65372 / September 21, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3284 / September 21, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29813 / September 21, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14557

In the Matter of SPENCER D. MINDLIN, and ALFRED C. MINDLIN, CPA, Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Spencer D. Mindlin ("Spencer Mindlin"). The Commission also deems it appropriate and in the public interest that public cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act against Alfred C. Mindlin ("Alfred Mindlin" and together with Spencer Mindlin, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY OF ALLEGATIONS

1. These proceedings arise out of an insider trading scheme involving Spencer Mindlin and his father Alfred Mindlin, who traded while in possession of material nonpublic information concerning the trading intentions of Goldman, Sachs & Co. ("Goldman"), Spencer Mindlin's former employer. While working on Goldman's Exchange-Traded Funds Desk ("ETF Desk"), Spencer Mindlin obtained material nonpublic information concerning Goldman's plans to purchase and sell large amounts of securities underlying an exchange-traded fund ("ETF"), the SPDR S&P Retail ETF ("XRT"). Spencer and Alfred Mindlin then traded in these securities ahead of Goldman. Prior to Goldman placing large buy orders in securities underlying the XRT ("XRT underliers"), Spencer and Alfred Mindlin took long positions in those same securities. When Goldman placed large sell orders in XRT underliers, Spencer and Alfred Mindlin took short positions in those same securities.

2. Specifically, on four occasions, in December 2007 and March 2008, Spencer Mindlin and Alfred Mindlin traded XRT underliers with knowledge of Goldman's trading intentions, reaping illicit profits in excess of $57,000. Spencer Mindlin learned of Goldman's trading intentions through e-mail communications shortly before he and Alfred Mindlin placed their trades in XRT underliers.

3. Spencer Mindlin did not conduct any of the trading in XRT underliers through his own account at Goldman. Instead, Spencer and Alfred Mindlin placed almost all of their trades in a brokerage account in the name of a family member.

4. By virtue of their conduct, Spencer Mindlin and Alfred Mindlin willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. RESPONDENTS

5. **Spencer Mindlin**, age 33, resides in New York, New York. From September 2007 until his resignation in August 2009, Spencer Mindlin was an employee on Goldman's ETF Desk. Spencer Mindlin previously worked as an analyst at Goldman Sachs Execution & Clearing, L.P. and its predecessor firm Spear, Leeds & Kellogg from June 2001 through September 2007. Currently, he is involved with developing technologies relating to the securities industry. Since 2003, he has held Series 7, 55 and 63 licenses.

6. **Alfred Mindlin**, age 68, resides in Massapequa, New York and Delray Beach, Florida. He is a certified public accountant licensed in New York but has not

practiced before the Commission. Alfred Mindlin is the president and sole employee of Alfred Carl Mindlin, C.P.A., P.C.

C. OTHER RELEVANT ENTITIES

7. **Goldman** is a Delaware corporation headquartered in New York, New York. Goldman is the principal U.S. broker-dealer of The Goldman Sachs Group, Inc., a global investment banking, securities and investment management firm.

8. **Sport Supply Group Inc.** ("Sport Supply") is a Delaware corporation headquartered in Dallas, Texas. In August 2010, Sport Supply was acquired by a private equity firm, Onex Corporation. Prior to the acquisition, Sport Supply's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the American Stock Exchange under the symbol "RBI."

9. **PC Mall, Inc.** ("PC Mall") is a Delaware corporation headquartered in Torrance, California. PC Mall is a direct marketer of technology products and services to businesses, governments and educational institutions. PC Mall's securities are registered with the Commission pursuant to Section 12(b) of the Exchange Act, and its stock trades on the Nasdaq under the symbol "MALL."

10. **Stage Stores, Inc.** ("Stage Stores") is a Nevada corporation headquartered in Houston, Texas. Stage Stores is a specialty department store retailer that focuses on small and mid-sized markets. Stage Stores' securities are registered with the Commission pursuant to Section 12(b) of the Exchange Act, and its stock trades on the New York Stock Exchange under the symbol "SSI."

11. **ValueVision Media, Inc.** ("ValueVision") is a Minnesota corporation headquartered in Eden Prairie, Minnesota. ValueVision is a multi-media retailer, engaged in marketing, selling and distributing products directly to consumers through various digital platforms. ValueVision's securities are registered with the Commission pursuant to Section 12(b) of the Exchange Act, and its stock trades on the Nasdaq under the symbol "VVTV."

D. ALLEGATIONS

Insider Trading

12. Spencer and Alfred Mindlin made over $57,000 in profits by trading XRT underliers with knowledge of Goldman's nonpublic trading intentions in December 2007 and March 2008. Prior to December 2007, neither Spencer nor Alfred Mindlin had ever purchased or sold XRT underliers around an index rebalance. Rather than use Spencer Mindlin's personal brokerage account, Spencer and Alfred Mindlin chose to execute almost all of these trades in a brokerage account at TD Ameritrade, Inc. ("TD Ameritrade") held in the name of a family member. Early on, Spencer and Alfred Mindlin also traded in one of Alfred Mindlin's brokerage accounts.

13. The XRT is an equal-weighted ETF, composed of a mix of U.S.-based apparel, automotive and bargain retailers. The XRT is designed to replicate the S&P Retail Select Industry Index ("S&P Retail Index") and rebalances quarterly on the third Friday of the last month of the quarter (the "Rebalance Effective Date") to mirror the S&P Retail Index. The securities to be added and deleted from the S&P Retail Index are published before each Rebalance Effective Date. On the Rebalance Effective Date, the XRT adds and deletes the same securities from its holdings as the S&P Retail Index adds and deletes from its holdings.

14. During the relevant period, Goldman maintained a large net long position in the XRT. In fact, Goldman was the largest institutional holder of XRT in December 2007 and March 2008.

15. To hedge its large net long position in the XRT, Goldman shorted XRT underliers. Each quarter, Goldman purchased securities that the XRT deleted from its holdings and sold short securities that the XRT added to its holdings. When an XRT underlier was removed from the XRT, Goldman covered its short position in that XRT underlier to perfect its hedge of XRT securities. When an XRT underlier was added to the XRT, Goldman sold short the XRT underlier to perfect its hedge of XRT securities. As a result, on the quarterly Rebalance Effective Dates, Goldman placed large buy orders in securities deleted from the XRT and large sell orders in securities added to the XRT in response to the rebalancing of the XRT.

16. By virtue of his position on Goldman's ETF Desk, Spencer Mindlin knew that Goldman maintained a large net long position in XRT. Spencer Mindlin also knew that Goldman sold short securities added to the S&P Retail Index and purchased securities deleted from the S&P Retail Index in order to hedge this position in XRT. Spencer Mindlin also understood that XRT was an equal-weighted ETF as opposed to a traditional market-capitalization weighted ETF because it holds stocks in equal amounts rather than by market capitalization.

December 2007 Trades in Sport Supply

17. In December 2007 -- three months after Spencer Mindlin started working on Goldman's ETF Desk -- father and son embarked on their scheme with their trading in Sport Supply put options. Specifically, Spencer and Alfred Mindlin used nonpublic information about Goldman's intentions to sell Sport Supply stock. Spencer Mindlin obtained this information via emails from his colleagues at Goldman and by virtue of his position on the ETF Desk. Spencer and Alfred Mindlin reaped a total profit of $24,608 from trading Sport Supply securities in the family member's account at TD Ameritrade and in Alfred Mindlin's brokerage account.

18. Spencer Mindlin did not disclose these brokerage accounts to Goldman, even though Goldman's policies required their disclosure.

19. Spencer Mindlin sought nonpublic information from his colleagues about Goldman's trading intentions in Sport Supply days after learning that it would be added to the XRT. On December 12, 2007, Standard & Poor's Financial Services LLC announced the securities that would be added and deleted from the S&P Retail Index, which the XRT mirrors, on the Rebalance Effective Date of December 21, 2007. One of the securities to be added, Sport Supply, had an average daily trading volume of less than 30,000 shares.

20. On December 17, 2007 at 1:30 p.m., Spencer Mindlin emailed a Goldman employee on the floor of the New York Stock Exchange, asking "you got 10 min to talk about this rebal trade?" The email further stated that Spencer Mindlin "just want[ed] to better understand how we put together the rebalance trade and the piece to short in advance."

21. Shortly after Spencer Mindlin sought this nonpublic information about Goldman's rebalance strategy, he calculated the critical piece of nonpublic information that he and his father relied on to trade Sport Supply securities. At 5:21 p.m. on December 17, 2007, Spencer Mindlin sent an email to his colleagues on the ETF Desk stating that the desk would need to rebalance its hedge of 3.85 million shares of XRT on the Rebalance Effective Date. This nonpublic data provided sufficient information for Spencer Mindlin to calculate Goldman's trading intentions in those underlier securities to be added to and deleted from the XRT.

22. Spencer Mindlin knew that Goldman's trading intentions would place significant downward pressure on the price of Sport Supply stock on the Rebalance Effective Date. On December 17, 2007, a Goldman employee emailed Spencer Mindlin and his former colleagues on the ETF Desk a spreadsheet with the subject line "XRT Q4 rebalance." According to this spreadsheet, Goldman would have to sell short 2,931.38 shares of Sport Supply per 50,000 shares of XRT to modify its hedge of XRT, which is a calculation based on public information. Therefore, to hedge its 3.85 million share position in XRT, Goldman would have to sell short approximately 225,000 shares of Sport Supply, which amounted to more than seven times the average daily volume of Sport Supply.

23. Spencer and Alfred Mindlin were in unusually close communication on the same day that Spencer Mindlin calculated the ETF Desk's nonpublic position in XRT. On December 17, 2007, Spencer Mindlin placed five telephone calls to Alfred Mindlin's office phone number, as well as two back-to-back calls to Spencer Mindlin's parents' residence, at 8:45 p.m. and 9:52 p.m., which lasted approximately sixty-seven minutes and sixteen minutes, respectively. Earlier in the day, Spencer and Alfred Mindlin engaged in an instant message exchange concerning puts. Spencer Mindlin concluded the exchange by writing "that's enough convo." On December 18, 2007, Spencer Mindlin's office telephone line and Alfred Mindlin's residence exchanged at least eight calls or attempted calls.

24. After receiving nonpublic information about Goldman's position in XRT on December 17, 2007, Spencer and Alfred Mindlin traded XRT underliers the next day. On Tuesday, December 18, 2007 at 12:00 p.m., Spencer Mindlin emailed his father, instructing

him to "ask him to do it with a $.35 limit. Be sure to get that limit on the trade." On the same day, Alfred Mindlin purchased 60 Sport Supply put option contracts with a strike price of $10 in his brokerage account at Citigroup Global Markets, Inc. ("Citigroup"). All of these put options were set to expire three days later on December 21, 2007 -- the same day as the Rebalance Effective Date. The limit price on the Sport Supply put options was $.35, as Spencer Mindlin had instructed in his email.

25. On December 18, 2007 at 12:37 p.m., Alfred Mindlin phoned TD Ameritrade to upgrade the family member's account to allow for the trading of options. While on hold with the TD Ameritrade representative, Alfred Mindlin received a call on another line from Spencer Mindlin. Because Alfred Mindlin's call with TD Ameritrade was recorded, Spencer and Alfred Mindlin's conversation was also captured on tape. Father and son proceeded to engage in the following exchange before the TD Ameritrade representative returned to the call:

> *Alfred Mindlin:* It's done.
> *Spencer Mindlin:* It's done?
> *Alfred Mindlin:* Yep.
> *Spencer Mindlin*: Okay. What price?
> *Alfred Mindlin*: Three-Five.
> *Spencer Mindlin*: Okay. Great.
> *Alfred Mindlin:* Okay.
> *Spencer Mindlin:* Actually, did I tell you what happened? I mean why I started freaking out?
> *Alfred Mindlin*: No. No, you didn't tell me **anything**.
> *Spencer Mindlin*: But, I did. I was talking to you before. I told you, right?

(Emphasis in the original).

26. According to Spencer Mindlin's cellular phone records, father and son spoke for another seven minutes after the TD Ameritrade phone call ended. Approximately five minutes later, at 12:51 p.m., the TD Ameritrade account purchased a total of 30 Sport Supply put option contracts with a strike price of $10 that were set to expire on December 21, 2007. At 2:06 p.m., Spencer Mindlin telephoned TD Ameritrade, pretending to be his father and sought advice concerning the mechanics of covering his short option position with a market-on-close purchase order on Friday, when the options were set to expire. This telephone conversation was recorded by TD Ameritrade. In response to the TD Ameritrade representative's questions concerning why he needed to place a market-on-close order, Spencer Mindlin stated, "I believe it is going to close at the lowest [price]." Spencer Mindlin further stated that he did not want TD Ameritrade's risk group "to be buying stock all day Friday."

27. Spencer and Alfred Mindlin added to their bearish position hours prior to Goldman's market-moving sales in Sport Supply stock and shortly after receiving further assurances of Goldman's nonpublic trading intentions. On the Rebalance Effective Date of Friday, December 21, 2007 at 10:56 a.m., a colleague on Goldman's ETF Desk emailed

Spencer with a subject line reading "FW: XRT trade based on 4,350,000 shares." As stated above, Goldman's current position in XRT, 4,350,000 shares, is the only nonpublic information required to calculate Goldman's trading intentions in XRT underliers. On that same day, Spencer Mindlin impersonated his father on at least three calls to TD Ameritrade, all of which were recorded by TD Ameritrade. Throughout these conversations, Spencer Mindlin repeatedly stressed that TD Ameritrade's Risk Department should not purchase Sport Supply securities throughout the day because this would "chew into my profit -- my profit on this trade." At 2:19 p.m., during his last call of the day with TD Ameritrade, Spencer Mindlin attempted to purchase an additional 22 Sport Supply put option contracts with a strike price of $10 notwithstanding the fact that the options were set to expire in less than 90 minutes and cost $1.25 per contract. At the time, Sport Supply was trading at $9.09 per share. This purchase was highly risky because Spencer and Alfred Mindlin would lose money unless the price of Sport Supply fell below $8.75 within a short window. Because of margin requirements, however, Spencer Mindlin was able to purchase only 7 additional put option contracts. During the same call, Spencer Mindlin placed a market-on-close order to purchase 3,700 shares of Sport Supply, which would cover the exercise of the 37 put option contracts. After placing this order, Spencer Mindlin said, "Okay. I'll see you in the money .... Great. Thank you so much."

28. As Spencer Mindlin predicted in his call with TD Ameritrade, Goldman and other large traders caused the price of Sport Supply stock to plummet in the final hour of trading on December 21, 2007. During the last hour of trading on December 21, 2007, the price of Sport Supply fell from $9.05 to $7 per share, a decline of approximately 22 percent. During this same hour, Goldman was a large and significant seller of Sport Supply stock. There was no significant news about Sport Supply during the week of December 21, 2007.

29. The put options in the TD Ameritrade account and in Alfred Mindlin's Citigroup account were exercised at the market close on December 21, 2007, and the accounts collectively purchased 9,700 shares of Sport Supply to cover the short position created by the exercised put options, resulting in a total profit of $24,608.

March 2008 Trades in PC Mall, Stage Stores and ValueVision Media

30. During the next quarterly index rebalancing, Spencer and Alfred Mindlin traded XRT underliers using nonpublic information about Goldman's trading intentions that Spencer Mindlin had obtained from emails with his Goldman colleagues. These trades proved yet again to be profitable, resulting in a total profit of $32,873.

31. The trades in March 2008 were again placed in the family member's brokerage account, which Spencer Mindlin had not disclosed to Goldman, even though Goldman's policies required disclosure.

32. Spencer Mindlin received nonpublic information concerning Goldman's position in XRT shortly before his and his father's decision to trade XRT underliers in March 2008. On March 17, 2008 at 4:26 p.m., Spencer Mindlin received an email stating

that the two desks involved in the XRT rebalance had a total of over $30 million in XRT inventory. As stated above, this data was sufficient to calculate Goldman's trading intentions in the securities to be added to and deleted from the XRT. PC Mall, Stage Stores, and ValueVision were three of the least liquid stocks to be deleted from the XRT. Spencer Mindlin, therefore, knew that Goldman would need to purchase a large block of these securities in order to rebalance its hedge of the XRT.

33. Throughout this period, Spencer and Alfred Mindlin exchanged timely calls followed by Spencer Mindlin seeking and obtaining information concerning Goldman's trading intentions from his co-workers. On March 18, 2008, Alfred Mindlin sent his son an instant message asking Spencer Mindlin to call him later that evening. A call lasting approximately six minutes took place between Spencer Mindlin's office telephone and Alfred Mindlin's residential telephone line that night. The next morning, Spencer Mindlin sent an email with the subject "[r]e: [u]pcoming rebalances" to a colleague at Goldman asking "do you have an update on how this trade is going you're sending out." The body of the email contained an earlier email that referenced the rebalance of the XRT and another ETF. On March 19, 2008 at 10:20 a.m., Spencer Mindlin received an email listing a position in XRT of over 9.5 million shares for the ETF Desk and the synthetic products group desk, which handled the hedging of Goldman's lending inventory in XRT.

34. Spencer Mindlin traded XRT underliers within hours after receiving Goldman's nonpublic XRT position contained in the March 19 email. On March 19, 2008 at 1:59 p.m., Spencer Mindlin logged onto the TD Ameritrade account. Minutes later, an order was placed in the TD Ameritrade account to purchase 500 shares of PC Mall stock and 400 shares of ValueVision stock. That evening, father and son had three calls lasting approximately 6 minutes, 35 minutes and 14 minutes each.

35. Spencer and Alfred Mindlin added to their bullish positions minutes after receiving further assurances of Goldman's trading intentions. On March 20, 2008 at 10:55 a.m., Spencer Mindlin received an email attachment containing additional nonpublic information about Goldman's rebalance trades in the XRT underliers. As expected from the earlier emails, three of the largest purchases listed in the March 20 email attachment were in PC Mall, ValueVision and Stage Stores. Upon receiving this email attachment, Spencer Mindin logged onto the TD Ameritrade account. Minutes later, orders were placed in the TD Ameritrade account to purchase 30 PC Mall call option contracts, 30 ValueVision call option contracts and 25 Stage Stores call option contracts. All of the option contracts were set to expire within five hours of purchase. Later that day, market-on-close orders were placed to sell short 3,000 shares of PC Mall and ValueVision and 2,500 shares of Stage Stores to cover the position created by the exercised call options, and market-on-close orders were placed to sell 500 shares of PC Mall and 400 shares of ValueVision to close the long positions created on March 19, 2008.

36. Goldman and other large traders caused the price of PC Mall, ValueVision, and Stage Stores to rise sharply toward the market close on March 20, 2008. During the last hour of trading on March 20, 2008, the stock price of PC Mall, ValueVision and Stage Stores increased approximately 62, 49, and 7 percent, respectively. In that same hour,

Goldman was a large and significant purchaser of PC Mall, ValueVision, and Stage Stores stock. There was no significant news about PC Mall, ValueVision, and Stage Stores during the week of March 20, 2008.

37. The market-on-close orders in the TD Ameritrade account executed at the close on March 20, 2008. The TD Ameritrade account made $21,287.05, $7,995.31 and $3,590.81 from the trades in PC Mall, ValueVision and Stage Stores, respectively.

Spencer Mindlin's Duty to Keep Confidential All Material Nonpublic Information About Goldman's Trading Intentions

38. As an employee of Goldman, Spencer Mindlin had a duty to keep confidential all material nonpublic information concerning Goldman, including information concerning its trading intentions.

39. The Goldman Sachs Equities General Compliance Training specifically prohibited employees from trading "when in possession of or with knowledge of material proprietary information." The policy defined proprietary information as "nonpublic information, analyses and plans that are created or obtained by [Goldman] for [Goldman's] business purposes," and included "trading positions" and "trading intentions" as examples of proprietary information. The policy further prohibited the use of proprietary information for an employee's "personal benefit or shared with others for their personal gain."

40. Spencer Mindlin attended a training session on September 11, 2007 that covered the Goldman Sachs Equities General Compliance Training.

Spencer and Alfred Mindlin Acted with the Requisite Scienter

41. Spencer Mindlin knowingly or recklessly, for his direct or indirect benefit, in breach of a duty to Goldman (a) purchased and sold shares of XRT underliers while in possession of material nonpublic information and (b) communicated to Alfred Mindlin, in words or in substance, material nonpublic information concerning Goldman's trading intentions.

42. Alfred Mindlin knew, or acted with reckless disregard of the fact, that: (a) Spencer Mindlin was aware of material nonpublic information concerning Goldman's trading intentions; (b) Spencer Mindlin communicated to Alfred Mindlin, in words or in substance, material nonpublic information concerning Goldman's trading intentions; and (c) Spencer Mindlin's conveyance of this material nonpublic information to Alfred Mindlin constituted a breach of a duty to keep confidential all material nonpublic information obtained from Goldman.

E. VIOLATIONS

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

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent Spencer Mindlin pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Respondent Spencer Mindlin pursuant to Section 203(f) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203(j) and (i) of the Advisers Act, respectively;

D. What, if any, remedial action is appropriate in the public interest against Respondent Spencer Mindlin pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9(e) and (d) of the Investment Company Act, respectively; and

E. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent Spencer Mindlin should be ordered to cease and desist from committing or causing violations or future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; whether Respondents should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act and civil penalties pursuant to Section 8A(g) of the Securities Act and Section 21B(a)(2) of the Exchange Act.

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

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

G. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent Alfred Mindlin should be ordered to cease and desist from committing or causing violations or future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; and whether Respondents should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act and civil penalties pursuant to Section 8A(g) of the Securities Act and Section 21B(a)(2) of the Exchange Act.

IV.

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

IT IS FURTHER ORDERED that 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 Respondents personally or by certified mail.

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

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

By the Commission.

Elizabeth M. Murphy

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. 65377 / September 21, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3322 / September 21, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14558

In the Matter of LARRY LEE CRAWFORD (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 Larry Lee Crawford ("Respondent" or "Crawford") 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 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. Crawford, 63, is and has been a certified public accountant licensed to practice in North Carolina, New Jersey, and Pennsylvania. He was Escala Group, Inc.'s ("Escala") Chief Financial Officer and Executive Vice President from April 2001 until May 2006.

2. Escala, which was known as Greg Manning Auctions, Inc. until September 28, 2005, was a Delaware corporation. Escala was a global network of companies in the collectibles market. Escala's common stock was listed on the NASDAQ National Market until February 7, 2007. In May, 2009, Escala changed its name to Spectrum Group International, Inc. ("Spectrum"). Spectrum's common stock is now traded over-the-counter and quoted on the Pink Sheets under the trading symbol SPGZ.PK.

3. On September 9, 2011, a final judgment was entered against Crawford, permanently enjoining him from future violations of Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5, 13b2-1, 13b2-2, and 13a-14 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder, in the civil action entitled Securities and Exchange Commission v. Escala Group, Inc., et al., Civil Action Number 09-cv-2646, in the United States District Court for the Southern District of New York. Crawford was also ordered to pay $43,495 in disgorgement, and $21,089.75 in prejudgment interest, and a $100,000 civil money penalty.

4. The Commission's complaint alleged, among other things, that Crawford violated the antifraud and reporting provisions of the federal securities laws by: (1) failing to disclose the related-party status of the company that owned and published the Brookman Catalogue, resulting in control of that catalogue and failing to disclose the revenues obtained by virtue of Escala's former parent and its former CEO's control of the prices in the Brookman Catalogue for stamp collections that Escala sold to its former parent; (2) falsely representing that Escala sold its former parent company several large stamp archives at prices determined by reference to independent stamp catalogues and appraisals when in fact Escala's former CEO set

the catalogue prices and influenced and edited the appraisals; and (3) improperly booking the sale of certain antiques.

IV.

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

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

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

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

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

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3286 / September 22, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14560

In the Matter of **JANIS BARSUK,** **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 Janis Barsuk ("Barsuk" 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 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. Barsuk was Controller of West End Financial Advisors ("West End") from January 2006 to at least May 2009. West End is a New York-based, unregistered investment adviser. West End is affiliated with Sentinel Investment Management Corporation ("Sentinel"), which has been registered with the Commission since 1986. Barsuk, 59 years old, is a resident of Tenafly, New Jersey.

2. On September 8, 2011, a final judgment was entered by consent against Barsuk, permanently enjoining her from future violations of 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. William Landberg, et al., Civil Action Number 11-CV-0404 (PKC), in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged that Barsuk aided and abetted securities law violations by other officers of West End and Sentinel. According to the complaint, Barsuk, among other things, facilitated the improper commingling of money between various West End fund accounts, including money in an account held for the benefit of a bank that had extended credit to West End, and also facilitated the West End chief executive's misappropriations of investor funds for personal use.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Barsuk 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

Elizabeth M. Murphy
Secretary

Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3285 / September 22, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29818 / September 22, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14559

In the Matter of **BARR M. ROSENBERG,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, AND SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act"), and Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Barr M. Rosenberg ("Rosenberg").

II.

In anticipation of the institution of these proceedings, Rosenberg 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, Rosenberg consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 9(b) of the Investment Company Act of 1940, and Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Rosenberg's Offer, the Commission finds[1] that:

Overview

1. This matter concerns an institutional money manager specialized in quantitative investment strategies that concealed from investors a material error in its computer code. AXA Rosenberg Group LLC ("ARG") is the holding company of AXA Rosenberg Investment Management LLC ("ARIM"), the institutional money manager and SEC-registered investment adviser that utilized the code, and Barr Rosenberg Research Center LLC ("BRRC"), the SEC-registered investment adviser that developed the code. Rosenberg co-founded the firms now known as BRRC and ARG and developed and programmed BRRC's complex automated models and an "optimization" process (the "Model") that ARIM and affiliated offshore investment advisers ("Affiliated Advisers") used to create and manage client portfolios. During the relevant period, Rosenberg owned or controlled a 21% interest in ARG, and Rosenberg was ARG's Chairman.

2. In late June 2009, a BRRC employee discovered an error in the Model's computer code that had been introduced in 2007 and that effectively eliminated one of the key components in the Model for controlling for certain types of risk. This employee later discussed his finding in a meeting with Rosenberg, BRRC's Director, and a small group of BRRC employees who were working under Rosenberg's guidance on an enhancement to the Model. Rosenberg directed the others to keep quiet about the error and to not inform others about it, and he directed that the error not be fixed at that time. Before and after discovery of the error, ARIM's clients were expressing dissatisfaction with their portfolios' underperformance. During the several months that Rosenberg and the BRRC employees concealed the error, ARG, ARIM, and BRRC failed to disclose the error, misrepresented the Model's ability to control risk, and ascribed underperformance to market volatility and factors having nothing to do with the error. Due to Rosenberg's directive, ARG's Global CEO did not learn of the error as soon as he should have. The error was disclosed to the Global CEO in November 2009. The error impacted more than 600 client portfolios and caused approximately $217 million in losses. ARG disclosed the error to clients on April 15, 2010.

3. By virtue of this conduct, Rosenberg willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser.

Respondent

4. Barr M. Rosenberg, age 68, resides in Sea Ranch, California. He is the co-founder of AXA Rosenberg Group, LLC, the owner of the Barr Rosenberg Research Center. He was the developer and original programmer of the Model. During the relevant period, Rosenberg owned or controlled a 21% interest in ARG, was ARG's Chairman, and provided investment advisory services to ARIM and the Affiliated Advisers. He also sat on a specially created governing board that acted as a "tie-breaker" if the ARG Board deadlocked on any issue.

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

Background

5. Rosenberg pioneered the use of quantitative techniques – embodied in BRRC's Model – to implement investment strategies. The Model was comprehensive in its ability to capture and process a substantial amount of publicly available information, such as financial data for particular companies, news, and industry information, and to make investment decisions largely without human interaction. The Model consisted of three components: the Alpha Model, Risk Model, and Optimizer. The Alpha Model evaluates public companies based on their earnings and valuation. The Risk Model identifies risk on two primary bases – specific stock risk and common factor risks. Common factor risks include, among other things: (i) specific industry risks, which are risks associated with certain industries (such as oil, automobiles, or airlines); (ii) country risks, which are risks associated with particular countries; and (iii) stock fundamental risks, which capture price to earnings ratios and similar metrics. The Optimizer takes the output from the Alpha and Risk Models, balances them against each other, and recommends an optimal portfolio for the client based on a benchmark chosen by the client, such as the S&P 500.

6. Rosenberg created earlier versions of the Model that BRRC provided to ARIM and the Affiliated Advisers for their exclusive use in constructing and managing their client portfolios. He was considered the leading quantitative expert within BRRC, was widely regarded throughout BRRC as its intellectual leader, and oversaw important research projects associated with improving and enhancing the Model. Rosenberg also led an informal but undisclosed "micro group" consisting largely of a small group of long-time and trusted BRRC employees. Only Rosenberg and the micro group had full access to all components of the Model and all of its underlying code. Rosenberg exercised significant authority throughout ARG, ARIM, or BRRC by virtue of his position as ARG's Chairman, his significant ownership stake, his "founder" status, and his mastery of the Model. Rosenberg also received sizeable distributions from ARG derived from advisory fees earned by ARIM and the Affiliated Advisers, as well as compensation for the consulting services he provided, during the relevant time period.

Discovery and Concealment of the Error

7. In April 2007, BRRC put into production a new version of the Risk Model. BRRC assigned two programmers the task of writing the computer code that would link this new Risk Model with the Optimizer. When these two programmers linked the Risk Model to the Optimizer, they made an error in the Optimizer's computer code.

8. Starting in 2009, a BRRC employee began work as part of BRRC's effort to implement an enhanced version of the Risk Model. Rosenberg oversaw this effort. In June 2009, this employee noticed certain unexpected results when comparing the new Risk Model to the existing one that was rolled out in April 2007. He learned that the Optimizer was not processing the Risk Model's assessment of common factor risks correctly because a required scaling of information was not performed due to an error in the code. Some Risk Model components sent information to the Optimizer in decimals while other components reported information in percentages; therefore the Optimizer had to convert the decimal information to

percentages in order to effectively consider all the information on an equal footing. Because proper scaling did not occur, certain decimal information was not converted to percentages and the Optimizer did not give the intended weight to common factor risks.

9. In late June 2009, this BRRC employee informed Rosenberg and certain other BRRC employees of the error, and presented his findings to them in a meeting. Rosenberg, BRRC's Director, and those BRRC employees then met again soon after to further discuss the error. The BRRC employee who discovered the error advocated that the error be fixed immediately. Rosenberg, however, disagreed and stated that the error should be corrected when the new Risk Model was released. He directed BRRC employees with knowledge of the error to keep quiet about the discovery of the error and to not inform others about it. The BRRC employee who discovered the error asked Rosenberg whether ARG's Global Chief Investment Officer should be informed, and Rosenberg instructed that he should not be told. Finally, Rosenberg failed to conduct or to request any meaningful materiality analysis of the error's impact.

10. On September 24, 2009, ARG's Investment Committee authorized changes to the Model that fixed the error for U.S.-managed portfolios. Certain members of the Investment Committee, however, were not informed about the error or that the changes were in fact meant to correct the error.

11. Rosenberg's directive to conceal the error and BRRC employees' initial compliance with that directive, resulted in ARG, ARIM and BRRC making material misrepresentations and omissions concerning the error to ARIM's clients, including (i) omitting to disclose the error and its impact on client performance, (ii) attributing the Model's underperformance to market volatility rather than the error, and (iii) misrepresenting the Model's ability to control risks.

12. Rosenberg also omitted to disclose the error to ARG's Board. In mid-to-late 2009, ARG convened a series of Board meetings to discuss the Model's performance. Many of the meetings addressed client complaints about underperformance and industry overexposure. Rosenberg attended the meetings and participated in these discussions. In early October 2009, the Board had a discussion about the Model and its performance. At one point, a director asked a question relating to the Model's underperformance. Rosenberg replied that "mistakes if there were any will not be made in the future" and that he was "not aware of significant" mistakes in the Model.

13. While the error was fixed for U.S. managed portfolios in September 2009 and for other portfolios in late October and early November 2009, BRRC employees followed Rosenberg's directive not to disclose the error until September 2009, when other employees learned of it. ARG's CEO remained in ignorance of the error until November 2009, when a BRRC employee felt compelled to inform him.

14. On March 31, 2010, Commission examination staff arrived at ARIM's and BRRC's offices to begin an examination of the firms. At the end of that day, ARG informed the Commission staff of the error. On April 15, 2010, ARG informed clients of the error.

Rosenberg's Violations of Sections 206(1) and 206(2) of the Advisers Act

15. As a result of the conduct described above, Rosenberg willfully violated Sections 206(1) and 206(2) of the Advisers Act. Advisers Act Section 206(1) prohibits any investment adviser from, directly or indirectly, employing any device, scheme, or artifice to defraud any client or prospective client. Advisers Act Section 206(2) prohibits any investment adviser from engaging in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client. Pursuant to Sections 206(1) and 206(2), Rosenberg has a fiduciary duty that requires him to act in the best interests of his clients and to make full and fair disclosure of all material facts.

16. By directing others to keep quiet about the error and delaying to fix the error, Rosenberg breached his fiduciary duty to ARIM and the Affiliated Advisers. During the relevant period, clients of ARIM and the Affiliated Advisers were expressing concerns about their overexposure to certain industries and underperformance, both of which were in part attributable to the error. Although Rosenberg was aware of these concerns, he did not disclose the error and directed others not to do so. As a result, ARIM and BRRC personnel misrepresented in client presentations that the underperformance was attributable to factors other than the error and inaccurately stated that the Risk Model's common factor risks were functioning when in fact they had been disabled due to the error. In addition, Rosenberg's direction to delay fixing the error allowed it to remain uncorrected for several additional months. Because of his conduct, certain clients continued to sustain losses from an error that could have been but was not promptly corrected.

17. Rosenberg knew that that the Model was used to manage ARIM's and the Affiliated Advisers' client portfolios, and that the error could potentially have adverse effects on the performance of portfolios managed using the Model. Yet, Rosenberg did not conduct or otherwise direct any analysis to estimate the error's impact.

IV.

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

Accordingly, pursuant to Section 9(b) of the Investment Company Act and Sections 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Rosenberg cease and desist from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act.

B. Respondent Rosenberg 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; and prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

C. Any reapplication for association by Rosenberg 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 Rosenberg, 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. Rosenberg shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $2.5 million 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 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 Rosenberg 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 Bruce Karpati, Co-Chief of the Asset Management Unit, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, Suite 400, New York, NY 10281.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65391 / September 23, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14562

In the Matter of

MANUEL LOPEZ-TARRE,

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 Respondent Manuel Lopez-Tarre ("Respondent" or "Lopez-Tarre").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) 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[1] that:

SUMMARY

1. These proceedings arise out of Lopez-Tarre's failure reasonably to supervise Guillermo Clamens ("Clamens"), the sole owner of FTC Capital Markets, Inc. ("FTC"), a registered broker-dealer, and Lina Lopez, an FTC employee, with a view towards preventing and detecting their violations of the federal securities laws. From at least April 2008 through November 2008, Clamens fraudulently engaged in tens of millions of dollars of unauthorized trading in the brokerage accounts of two FTC customers, ultimately causing those customers to lose over $20 million. Lina Lopez assisted Clamens by, among other things, creating and sending the customers fake account statements to help conceal the fraud. Lopez-Tarre, FTC's chief compliance officer, was specifically charged with responsibility for supervising Clamens' handling of customer accounts and for reviewing correspondence, including email correspondence. Lopez-Tarre failed to follow the established procedures for reviewing Clamens' customer accounts and did not review email correspondence. In addition, Lopez-Tarre failed to respond to several "red flags" that should have alerted him to Lina Lopez's participation in the fraud. Had Lopez-Tarre followed the established procedures and reviewed Clamens' customers' accounts and correspondence, it is likely he would have prevented and detected Clamens' violations of the securities laws. In addition, had Lopez-Tarre reviewed the correspondence of Lina Lopez or responded to red flags raised by wire transfers, it is likely that he would have prevented and detected her violations of the federal securities laws.

RESPONDENT

2. **Lopez-Tarre**, age 39, is a permanent resident of the United States who maintains a residence in Brooklyn, New York. At all relevant times, Lopez-Tarre was FTC's chief compliance officer who was specifically tasked with supervising Clamens and Lina Lopez.

OTHER RELEVANT PERSONS AND ENTITIES

3. **FTC** was registered as a broker-dealer with the Commission from August 7, 2003 until June 15, 2009. At all relevant times, the firm was headquartered in midtown Manhattan and had an office in Miami, Florida.

4. **Clamens**, age 47, was, throughout the relevant period, the sole owner, chairman and chief executive officer of FTC, as well as the president of FTC Emerging Markets. Throughout the relevant period, Clamens was a Venezuelan citizen, and a permanent resident of the United States who maintained a residence in New York, New York.

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

5. **Lina Lopez (a/k/a Nazly Cucunuba Lopez)**, age 36, is a citizen of Columbia who maintains a residence in Miami, Florida. During the relevant period, Lopez worked out of FTC's office in Miami, Florida.

6. **FTC Emerging Markets, also d/b/a FTC Group, (collectively "Emerging Markets")** is a Panamanian-based FTC affiliate. During the relevant period, Clamens was the president of Emerging Markets. Emerging Markets purported to advise non-U.S. entities and individuals on investments in securities and maintained brokerage accounts at several U.S. broker-dealers, through which it engaged in securities transactions.

7. **Citgo Petroleum Corporation** is a Delaware corporation, headquartered in Houston, Texas that is wholly owned by PDV Holding, a Delaware corporation owned by the Bolivarian Republic of Venezuela. Citgo is a refiner and marketer of gasoline and petroleum products.

FACTS

A. The Underlying Violations

8. Throughout the relevant period, FTC engaged in a general securities business, transacting in debt and equity securities on behalf of mostly South American institutional customers. The firm was relatively small; it had thirteen employees, twelve of whom were registered, and served as introducing broker for approximately 110 customer accounts, which cleared through BNP Paribas Securities Corporation ("BNP") or Penson Financial Services, Inc.

9. In April 2008, Citgo and its parent company opened brokerage accounts with FTC, with Clamens as the registered representative on the accounts. Over the next six months, until the fraud came to light, Clamens, with the assistance of Lina Lopez, engaged in tens of millions of dollars of unauthorized trades in Citgo's accounts, including purchasing millions of dollars worth of bonds issued by an FTC affiliate. Lina Lopez assisted Clamens in carrying out the fraud by communicating to Citgo fabricated rates of return on securities that FTC was not authorized to sell and by creating and emailing to Citgo false account statements showing holdings in certificates of deposit and money market funds – the investments Citgo had authorized FTC to make on its behalf, which FTC had not made – instead of the unauthorized investments.

10. As a result of this conduct, Clamens and Lina Lopez violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and aided and abetted FTC's violations of Section 15(c) of the Exchange Act.

11. On May 19, 2009, the Commission filed a civil enforcement action against Clamens, Lina Lopez, FTC, and Emerging Markets alleging, among other things, violations of the antifraud provisions of the federal securities laws, based on the fraud on Citgo, Securities and Exchange Commission v. FTC Capital Markets, Inc., et al., Civil Action Number 09 Civ. 4755 (S.D.N.Y.). On August 26, 2010, a final judgment was entered by consent against Clamens and Lopez, that, among other things, permanently enjoined them from violating Section 17(a) of the

Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and from aiding and abetting violations of Section 15(c) of the Exchange Act.

12. On October 16, 2009, Lina Lopez pleaded guilty to criminal charges arising out of the fraud on Citgo in a case entitled United States v. Nazly Cucunuba Lopez, 09 Cr. 985 (RPP).

B. Lopez-Tarre Was Responsible for Supervising Clamens' Dealings with Customers and Reviewing All Correspondence.

13. Lopez-Tarre, who had a background in information technology and operations, joined FTC in January 2007 as vice president of operations. In January 2008, he obtained his principal's license and was appointed FTC's chief compliance officer. In compliance with National Association of Securities Dealers Rule 3010, which requires broker-dealers to establish and implement written procedures reasonably designed to prevent violations of the securities laws and regulations, FTC maintained written procedures assigning supervisory responsibilities to specific employees. Under those procedures, Lopez-Tarre had sole responsibility for all supervisory reviews of customer account activity, including activity in the accounts of Clamens' customers. Lopez-Tarre was also responsible for reviewing correspondence, including reviewing e-mail or other electronic correspondence on a regular basis.

C. Lopez-Tarre Failed to Review Clamens' Customer Accounts and Electronic Correspondence.

14. After opening their accounts with FTC in April 2008, Citgo and its parent company collectively deposited approximately $560 million in the accounts over the following six months, quickly becoming FTC's largest customers. As Clamens and Lina Lopez knew, Citgo's sole purpose for opening and maintaining the accounts with FTC was to invest the company's excess cash from operations in short-term, low-risk, liquid investments. Contrary to that goal and unbeknownst to Citgo, Clamens purchased for the accounts tens of millions of dollars of illiquid bonds, including $60 million in bonds issued by FTC International, an unregistered affiliate of FTC.

15. Citgo requested on-line access to account information and needed a report immediately after month-end for internal reporting purposes. Clamens told Citgo that he was trying to arrange with FTC's technology staff for such on-line access. In the interim, he offered to have Lina Lopez, who functioned as Clamens' executive assistant, prepare and e-mail daily and monthly account statements to Citgo.

16. For approximately six months, Lina Lopez repeatedly e-mailed Citgo false information about the transactions in its accounts. Every day, she emailed the interest rates purportedly available on certain money market funds and BNP certificates of deposit, rates that she got from Clamens, who made them slightly higher than market rates, to entice Citgo to entrust more money to FTC.[2] In addition, Lina Lopez emailed Citgo a daily report – the "Leverage

[2] FTC was not authorized by BNP to offer BNP CDs.

Trades Finance Report" – that purported to show the positions in each account, including the interest rate, principal amount, and amount of accrued interest. Lina Lopez also e-mailed Citgo fake monthly account statements, which reflected the same investments in short-term CDs and money markets funds. Clamens was copied on all emails transmitting the daily reports and monthly statements.

17. According to FTC's written supervisory procedures, Lopez-Tarre was responsible for reviewing incoming and outgoing e-mail or other electronic correspondence on a regular basis and for reviewing the activity in Clamens' customers' accounts at least monthly for suitability. Lopez-Tarre did not adequately review electronic correspondence or the activity in Clamens' customers' accounts. Had Lopez-Tarre fulfilled these responsibilities, it is likely that he could have detected or prevented the fraud perpetrated by Clamens and Lopez.

18. Moreover, if Lopez-Tarre had reviewed Lina Lopez's email correspondence, he would have seen that she was sending confirmations and account statements, which was not customary given that Citgo could have had on-line access to its accounts through the clearing broker, BNP. Had Lopez-Tarre reviewed those confirmations and statements in accordance with the firm's supervisory guidelines, he likely would have discovered the discrepancy between the actual activity in the accounts and the activity reflected on the confirmations and statements that Lina Lopez was creating and sending to Citgo. In addition, had he reviewed the transactions in the Citgo accounts for suitability in accordance with the supervisory guidelines, he likely would have discovered the discrepancy between the actual activity in the accounts and the activity that Lopez was reporting.

D. Lopez-Tarre Failed to Respond to Red Flags Raised by Wire Transfers.

19. In October 2008, Citgo began to deposit funds in its account for overnight investment and request that those funds – and the interest that the funds had purportedly earned – be wired to its bank account the following day. Because Clamens was quoting inflated daily money market rates to Citgo, the account did not generate enough interest to send the entire amount that Citgo requested. As a result, on six occasions, Lina Lopez wired the shortfall to Citgo's bank account from Emerging Markets' bank account. Each time, she sent an e-mail to Clamens, informing him that Citgo had submitted a withdrawal request and the amount of funds available Citgo's account and expressly stating that she was going to send the difference from Emerging Markets' account. On two of the emails, Lina Lopez copied Lopez-Tarre.

20. FTC's written supervisory procedures specifically charged Lopez-Tarre with reviewing the transmittal of funds between customers and FTC representatives. Lopez-Tarre never questioned why there were insufficient funds in Citgo's account to cover its withdrawal requests or why the shortfall was being paid from the account of Emerging Markets, an FTC affiliate. Had he followed up on these red flags, Lopez-Tarre would have discovered that the shortfall in the account was due to Clamens' inflating the interest rate and unauthorized trading and would have further discovered Clamens' and Lina Lopez's violations of the federal securities laws.

LOPEZ-TARRE FAILED REASONABLY TO SUPERVISE CLAMENS AND LINA LOPEZ

21. Lopez-Tarre was responsible for supervising Clamens in Clamens' dealings with customers and for reviewing incoming and outgoing email correspondence and wire transfers. Yet he failed to review the email correspondence between Lina Lopez and Citgo. In addition, he failed to respond to the red flags raised by the transfers of funds from the FTC affiliate Emerging Markets to Citgo. Had he fulfilled his assigned supervisory responsibilities with respect to the firm's two largest customer accounts, Lopez-Tarre would likely have discovered that Clamens and Lina Lopez were reporting transactions to the customer that had not in fact occurred in the accounts.

22. As a result of the conduct described above, Lopez-Tarre failed reasonably to supervise Clamens and Lina Lopez, persons subject to his supervision within the meaning of Section 15(b)(4)(E) of the Exchange Act, with a view to preventing and detecting their violations of the federal securities laws.

CIVIL PENALTIES

23. Respondent has submitted a sworn Statement of Financial Condition dated May 30, 2011 and other evidence and has asserted his inability to pay a civil penalty.

IV.

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

Accordingly, pursuant to Section 15(b)(6) of the Exchange, it is hereby ORDERED:

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 in a supervisory capacity, with a right to reapply for association after one year 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.

Based upon Respondent's sworn representations in his Statement of Financial Condition dated May 30, 2011 and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent.

The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3288 / September 23, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14563

In the Matter of **Bruce F. Prévost and David W. Harrold,** **Respondents.**	**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 Bruce F. Prévost ("Prévost") and David W. Harrold ("Harrold," and together with Prévost, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondents consent 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 Offers, the Commission finds that:

1. From 2004 until September 2008, Prévost and Harrold operated and associated with an investment adviser, Palm Beach Capital Management LLC ("PB Adviser"), which, in turn, served as an investment adviser to two private funds: (i) Palm Beach Finance Partners, LP ("PBFP"); and (ii) Palm Beach Finance II, LP ("PBFII" and together with PBFP, the "Palm Beach Funds"). Both PBFP and PBFII purported to purchase promissory notes (the "Notes") from Petters Company, Inc. to finance inventory transactions brokered by Thomas J. Petters and Petters Company, Inc.

2. On April 22, 2011, a Judgment of Permanent Injunction and Other Relief, was entered against Prévost and Harrold, permanently enjoining them from future violations of Sections 17(a)(1), 17(a)(2), and 17(a)(3) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206-4(8) thereunder in the civil action entitled Securities and Exchange Commission v. Bruce F. Prévost, David W. Harrold, Palm Beach Capital Management LP, and Palm Beach Capital Management LLC, No. 0:10-cv-04235-PAM-SRN, in the United States District Court for the District of Minnesota.

3. The Commission's complaint alleged that from 2004 through at least as late as June 2008, Prévost and Harrold directed money into a Ponzi scheme operated by Thomas J. Petters by selling interests in the Palm Beach Funds to investors throughout the United States. The complaint alleged that Prévost and Harrold misled the Palm Beach Funds, including their investors, by, among other things, engaging in several improper note exchange transactions. The complaint alleged that they exchanged groups of mature Notes held by the Palm Beach Funds that were due to be repaid for newly-issued Notes from Petters that were not due to be paid for six months and that purported to be collateralized by merchandise underlying different transactions. The complaint alleged that instead of receiving cash payments and then reinvesting that cash in new Notes as they had done in the past, Prévost and Harrold exchanged old IOUs for new ones. The complaint alleged that the purpose of these exchanges was to conceal that Petters was not able to make payments on the mature Notes. The complaint further alleged that, at the same time, Prévost and Harrold continued to improperly report, in monthly communications, that the Palm Beach Funds were generating the same steady profits that they had generated from their inceptions and that the overstated rates of return resulted in the payment of excessive management fees and performance allocations to Prévost and Harrold.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondents Prévost and Harrold be, and hereby are, barred from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization;

Any reapplication for association by Respondents Prévost and/or Harrold 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 Respondents, 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. 65390 / September 23, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-11572

In the Matter of Franklin Advisers, Inc., **Respondent.**	**ORDER DISCHARGING PLAN ADMINISTRATOR AND TERMINATING FAIR FUND**

On August 2, 2004, the Commission issued an Order instituting and simultaneously settling public administrative and cease-and-desist proceedings ("the Order") against Franklin Advisers, Inc. ("Franklin") in this matter (Investment Advisers Act Release No. 2271). In the Order, the Commission found that Franklin allowed improper market timing in mutual funds for which Franklin served as the investment adviser. The Order established a Fair Fund, comprised of $50 million in disgorgement and penalties paid by Franklin, and provided that the Fair Fund was to be distributed pursuant to a plan developed by an Independent Distribution Consultant. On May 9, 2008, the Commission approved a distribution plan (Securities Exchange Act Release No. 57808).

The distribution plan ("Plan") provides that the Fair Fund, plus any accrued interest, be distributed by a Fund Administrator to investors in mutual funds affected by market timing activity, according to the methodology set forth in the Plan. Beginning in September 2008, a total of $43,576,905.64 was distributed to investors. In May 2010, a total of $11,402,009.02 then remaining in the Fair Fund was distributed to the mutual funds affected by the market timing, as provided in the Plan. This completed the distribution process.

The Plan provides that amounts which cannot be distributed to investors or the affected mutual funds be transferred to the U.S. Treasury. Consistent with this provision, the staff requested authorization to transfer the $54,615.08 remaining in the Fair Fund to the U.S. Treasury, as well as any funds returned to the Fair Fund in the future. The staff also requested authorization to transfer to the U.S. Treasury all tax refunds paid to the Fair Fund after the completion of the distribution process.

The staff also requested that the Commission approve the Final Accounting of the Fair Fund, which was submitted and approved pursuant to Rule 1105(f) of the Commission's Rules on Fair Fund and Disgorgement Plans.

Accordingly, IT IS ORDERED that:

A. the Fair Fund is terminated:

B. the Fund Administrator, Boston Financial Data Services, is discharged;

C. the $54,615.08 remaining in the Fair Fund, including a tax return that was returned to the fund, shall be transferred to the U.S. Treasury; and

D. any funds returned in the future to the Fair Fund shall be transferred to the U.S. Treasury.

By the Commission.

Elizabeth M. Murphy
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 201 and 204

[Release No. 34-65385]

Consolidation of the Office of the Executive Director with the Office of the Chief Operating Officer

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is amending its rules to reflect the consolidation of the Office of the Executive Director with the Office of the Chief Operating Officer, including amendments to replace references to the Executive Director with references to the Chief Operating Officer.

EFFECTIVE DATE: [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Jeffery Heslop, Chief Operating Officer, at (202) 551-2105, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION

I. Discussion

Until recently, the support functions of the Commission were allocated primarily to the Office of the Executive Director ("OED"). In 2010, however, the Commission established the Office of the Chief Operating Officer ("OCOO") and allocated some support and administrative functions to OCOO. Then, on April 19, 2011, the Commission approved the consolidation of the OED with the OCOO in an effort to streamline the organizational structure of the agency and add clarity and efficiency to the functions of the Chief Operating Officer.

These amendments harmonize the Commission's rules with the consolidation already approved by replacing references to the Executive Director with references to the Chief Operating Officer. These include references to the Executive Director in rules describing the responsibilities of the Executive Director and officers serving under the Executive Director; rules delegating authority to the Executive Director and officers serving under the Executive Director; and rules relating to the classification and declassification of national security information and material. As a result of these amendments, these rules now will apply to the Chief Operating Officer and officers serving under the Chief Operating Officer, as applicable.

The amendments also make conforming changes to Commission rules relating to the offices that report to the OCOO. They amend provisions relating to the Office of the Comptroller to reflect that this office is now known as the Office of Financial Management and headed by the Chief Financial Officer. They amend provisions relating to the Office of Administrative and Personnel Management to reflect that the functions of this office are now performed by the Office of Human Resources and the Office of Administrative Services. They amend provisions relating to the former Office of Freedom of Information and Privacy Act Operations to reflect that this Office is now known as the Office of FOIA, Records Management, and Security. And, they remove a reference to the Office of Filings and Information Services, to reflect that this Office no longer exists.

Finally, the amendments would remove from the description of the functions of the COO (previously the description of the functions of the Executive Director) the functions of prescribing procurement regulations, entering into contracts, designating contracting officers, and making procurement determinations. We believe it is appropriate to retain for the Chairman the flexibility to designate the person or persons who shall perform these functions, rather than to specify by rule that these functions are allocated to the COO.

II. Related Matters

A. Administrative Procedure Act and Other Administrative Laws

The Commission has determined that these amendments to its rules relate solely to the agency's organization, procedure, or practice. Accordingly, the provisions of the Administrative Procedure Act regarding notice of proposed rulemaking and opportunity for public participation are not applicable.[1] The Regulatory Flexibility Act, therefore, does not apply.[2] Because these rules relate solely to the agency's organization, procedure, or practice and do not substantially affect the rights or obligations of non-agency parties, they are not subject to the Small Business Regulatory Enforcement Fairness Act.[3] Finally, these amendments do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.[4]

B. Cost-Benefit Analysis

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1 5 U.S.C. 553(b).

2 5 U.S.C. 601 - 612.

3 5 U.S.C. 804.

4 44 U.S.C. 3501 - 3520.

The Commission is sensitive to the costs and benefits imposed by its rules. The amendments adopted today are procedural in nature and will produce the benefit of facilitating the efficient operation of the Commission. The Commission also believes that these rules will not impose any costs on non-agency parties, or that if there are any such costs, they are negligible.

C. Consideration of Burden on Competition

Section 23(a)(2) of the Exchange Act requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition. The Commission does not believe that the amendments that the Commission is adopting today will have any impact on competition because they impose no new burden upon market participants and are intended to facilitate the efficient operation of the Commission.

STATUTORY AUTHORITY

The amendments to the Commission's rules are adopted pursuant to 15 U.S.C. 77o, 77s, 77sss, 77d, 78d-1, 78d-2, 78w, 78ll(d), 78mm, 80a-37, 80b-11, and 7202.

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

List of Subjects in 17 CFR Part 201

Administrative practice and procedure, Brokers, Claims, Confidential business information, Equal access to justice, lawyers, Penalties, Securities.

List of Subjects in 17 CFR Part 204

Claims, Government employees, Income taxes, Reporting and recordkeeping requirements, Wages.

TEXT OF AMENDMENTS

In accordance with the preamble, the Commission hereby amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 200 – ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

SUBPART A – ORGANIZATION AND PROGRAM MANAGEMENT

1. The authority citation for Part 200, Subpart A, continues to read, in part, as follows:

Authority: 15 U.S.C. 77o, 77s, 77sss, 77d, 78d-1, 78d-2, 78w, 78ll(d), 78mm, 80a-37, 80b-11, and 7202, unless otherwise noted.

* * * * *

2. The authority citation for Part 200, Subpart J, is revised to read as follows:

Authority: 15 U.S.C. 77s; 11 U.S.C. 901, 1109(a); E.O. 12356, 47 FR 14874, Apr. 6, 1982; Information Security Oversight Office Directive No. 1 (47 FR 27836, June 25, 1982).

* * * * *

3. In 17 CFR Part 200, remove the words "Executive Director" and add, in their place, the words "Chief Operating Officer" in the following places:

a. Section 200.13, heading and paragraphs (a) introductory text, (b), and (c);

b. Section 200.17, introductory text;

c. Section 200.21(a);

d. Section 200.30-3(a)(80);

e. Section 200.30-15, heading and text;

f. Section 200.503, introductory text and paragraph (a);

g. Section 200.504, introductory text;

h. Section 200.505(c);

i. Section 200.508(a);

j. Section 200.510(a); and

k. Section 200.511(a).

4. In Section 200.13:

a. In paragraph (a), remove the phrase "the Office of Administrative and Personnel Management, the Office of the Comptroller, the Office of Filings and Information Services, the Office of Freedom of Information and Privacy Act Operations" and add, in its place, the phrase "the Office of Human Resources, the Office of Administrative Services, the Office of Financial Management, the Office of FOIA, Records Management, and Security";

b. In paragraph (c), remove the phrase ", prescribes procurement regulations, enters into contracts, designates contracting officers, and makes procurement determinations" and add a period after the word "payments".

c. In paragraph (d), remove the phrase "As the Chief Operating Officer of the Commission, the Executive Director" and add, in its place, the phrase "The Chief Operating Officer";

5. Remove Section 200.20c.

6. In Section 200.21(a), remove the words "Office of Administrative and Personnel Management" and add, in their place, the words "Office of Human Resources".

7. In Section 200.24:

a. remove the words "Office of the Comptroller" in the heading and add, in their place, the words "Office of Financial Management";

b. remove the words "Associate Executive Director of the Office of the Comptroller" and add, in their place, the words "Chief Financial Officer"; and

c. remove the words "Executive Director" and add, in their place, the words "Chief Operating Officer";

8. Remove and reserve Section 200.25.

9. In Section 200.30-13 remove the words "Associate Executive Director of the Office of Financial Management" in the heading and introductory text and add, in their place, the words "Chief Financial Officer"; and

10. In Section 200.503, remove the authority citation following Section 503(b).

PART 201 – RULES OF PRACTICE

11. The authority citation for Part 201 is revised to read as follows:

Authority: 15 U.S.C. 77s, 77sss, 78w, 78x, 80a–37, and 80b–11; 5 U.S.C. 504(c)(1).

Sections 201.700 and 201.701 are also issued under sec. 916, Pub. L. 111–203, 124 Stat. 1376.

* * * * *

12. In Section 201.59, remove the word "Comptroller" and add, in its place, the words "Chief Financial Officer".

PART 204 – RULES RELATING TO DEBT COLLECTION

13. The authority citation for Part 204, Subpart B, continues to read as follows:

Authority: 5 U.S.C. 5514, 5 CFR 550.1104.

* * * * *

14. In Section 204.32, in the definition of Program Official, remove the word "Comptroller" and add, in its place, the words "Chief Financial Officer".

15. In Section 204.34(d), remove the words "Comptroller's office" and add, in their place, the words "Office of Financial Management".

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: September 23, 2011

Commissioner Walter
not participating,
Commissioner Paredes
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9262 / September 27, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 65404 / September 27, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3289 / September 27, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14564

In the Matter of **RBC Capital Markets, LLC (formerly known as RBC Capital Markets Corp.),** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTION 203(e) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against RBC Capital Markets, LLC ("Respondent" or "RBCCM").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-

Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 15(b) of the Securities Exchange Act of 1934, and Section 203(e) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the "Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

1. These proceedings arise out of the sale of $200 million of credit-linked notes that were tied to the performance of synthetic collateralized debt obligations holding a portfolio of 100+ credit default swaps referencing corporate bond obligations (the "CDO Investments").[2] Respondent RBCCM, a U.S. broker-dealer affiliated with the CDO Investment arranger Royal Bank of Canada Europe Limited ("RBC Europe"), marketed and sold the CDO Investments to five school districts in Wisconsin (the "School Districts") in three separate transactions between June and December 2006.

2. RBCCM violated Sections 17(a)(2) and 17(a)(3) of the Securities Act by negligently selling the CDO Investments to the School Districts, despite significant concerns within RBCCM about the suitability of the product for municipalities like the School Districts. These CDO Investments were unsuitable for the School Districts. RBCCM's marketing materials also failed to explain adequately the risks associated with the CDO Investments. The School Districts lacked sufficient knowledge and sophistication to appreciate the nature of such investments.

Respondent

3. RBC Capital Markets Corp., now known as RBC Capital Markets, LLC, was a Minnesota corporation headquartered in New York, New York.[3] RBC Capital Markets Corp. merged with and into RBC Dain Rauscher Inc. in 2008 and changed its name to RBC Capital Markets, LLC in 2010. RBC Capital Markets Corp. has been registered with the Commission as a broker-dealer since 1936 and has been registered as an investment adviser since 1977. At all relevant times, RBCCM has been a wholly-owned indirect subsidiary of the Royal Bank of Canada.

Other Relevant Entities

4. School District of West Allis-West Milwaukee ("WAWM"), Kenosha School District No. 1 ("Kenosha"), School District of Waukesha ("Waukesha"), Kimberly Area School District ("Kimberly"), and School District of Whitefish Bay ("Whitefish Bay") (collectively, the

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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] For simplicity, this Order will refer to the credit-linked notes as "the CDO Investments" since the notes were a means of simulating an investment in a CDO.

[3] As used herein, the name "RBCCM" refers to RBC Capital Markets Corp. and all predecessor and successor entities, including RBC Capital Markets, LLC.

"School Districts") are school districts located in eastern Wisconsin. Each of the School Districts operates through a superintendent of schools, a business services department and a school board made up of seven to nine district residents elected to a term of three years.

5. Royal Bank of Canada Europe Limited ("RBC Europe") is a United Kingdom bank, and is an indirect wholly-owned subsidiary of the Royal Bank of Canada. RBC Europe is not registered with the Commission in any capacity. RBC Europe acted as the arranger of the credit-linked notes in which the School Districts invested.

6. Royal Bank of Canada ("RBC"[4]) is a Canadian bank, and is the parent organization of RBCCM and RBC Europe. RBC is not registered with the Commission in any capacity, although some of its subsidiaries are registered broker-dealers or investment advisers. As a result of the structure of the CDO Investments, RBC was ultimately the counterparty to the transactions with the School Districts on the CDO Investments, meaning that it paid the promised interest on the CDO Investments and was the purchaser of default protection on the CDO portfolio.

7. Stifel, Nicolaus & Co., Inc. ("Stifel"), incorporated in Missouri, is a retail and institutional brokerage and investment banking firm based in St. Louis, Missouri. Stifel is registered with the Commission as a broker-dealer and investment adviser, and is the primary subsidiary of Stifel Financial Corp. On August 10, 2011, the Commission filed a civil injunctive action in the United States District Court for the Eastern District of Wisconsin, Case No. 02-11:755, against Stifel and one of its former employees, relating to the sale of the CDO Investments to the School Districts.

Funding of School Districts' OPEB Liabilities

8. In addition to providing their employees with traditional pensions, the School Districts had contractually agreed to provide former and current employees with other post-employment benefits ("OPEB"), such as healthcare and life insurance. Prior to 2005, the School Districts had not funded these OPEB liabilities, instead opting to pay them as they arose each year using money out of their annual operating budgets. Over time, the OPEB liabilities had grown significantly.

9. With the assistance of Stifel, the School Districts' financial adviser, the School Districts explored investment opportunities as a way to fund their OPEB liabilities, specifically seeking investments rated AA- or higher by the rating agencies.

10. Stifel devised a plan whereby the School Districts would raise and contribute funds to OPEB trusts for investment, and then the OPEB trusts would borrow additional funds from a specific lender to leverage the School Districts' contributions into a more sizable investment (the "GOAL Program"). Under the GOAL Program, most of the funds contributed by the School

[4] There was significant cross-entity work done within Royal Bank of Canada's corporate family for these transactions. For example, RBCCM served as the United States broker-dealer for the sale of the CDO Investments, RBC Europe was arranger of the CDO Investments, and Royal Bank of Canada employees also worked on the transaction. Royal Bank of Canada's senior management team was also extensively involved in the review and approval of the transaction. This Order will refer to the corporate family generally as "RBC."

Districts to the OPEB trusts would come from School District bond issuances, meaning that nearly the entire amount invested under the program would come from borrowed funds. The difference between the earnings from the investment and the costs of borrowing would be used to reduce the unfunded retiree benefits.

11. Stifel's GOAL Program depended on the use of leverage to provide the School Districts with a meaningful return on their investment, since the spread between any investment rated AA- or higher and the School Districts' costs of borrowing would be narrow. Indeed, traditional AA- investments such as corporate bonds did not provide sufficient yields in excess of the School Districts' and the trusts' costs of borrowing, causing Stifel to seek out nontraditional investments for the School Districts that could offer higher yields.

12. Stifel contacted RBCCM to discuss product offerings, including CDOs, that were rated AA- or higher that met the yield requirements of Stifel's investment program for the School Districts. RBCCM informed Stifel that it could offer synthetic CDO Investments referencing corporate bond obligations that were rated AA- or higher and offered the requisite yields.

Background of the CDO Investments

13. RBCCM sold the CDO Investments to the School Districts on three occasions, in June, September, and December 2006. The CDO Investments totaled $200 million, which included $37.3 million of funds contributed directly by the School Districts, and the remainder from the OPEB trusts' borrowings.

14. A collateralized debt obligation is a type of asset-backed security collateralized by a pool of fixed income assets. CDOs are often structured into a hierarchy of tranches, with each tranche representing a different level of risk and return. The lowest tranche typically absorbs the first losses in the portfolio until investments in that tranche are completely eliminated. At that point, the next tranche typically would begin absorbing losses, if any. The highest tranche traditionally would not suffer any losses until all of the lower tranches had suffered total losses. In certain CDOs, such as those sold by RBCCM, the tranches overlap, so that a higher tranche begins suffering losses before the lower tranche suffers total loss.

15. A synthetic CDO is comprised of derivative instruments such as credit default swaps. A credit default swap is essentially a contract in which one party insures the other party against losses on a bond or other reference asset due to the occurrence of a default or other credit event in exchange for premium payments. Here, the OPEB trusts invested in notes tied to the performance of synthetic CDOs comprised of a portfolio of 100 or more credit default swaps ("CDO Portfolio") referencing corporate bond obligations. The CDO Investments essentially transferred the risk of default on the bonds to the OPEB trusts through the synthetic CDO exposure, and ultimately to the School Districts, in exchange for the right to receive premium payments in the form of interest payments on the CDO Investments.

16. In essence, an investment in a tranche of a synthetic CDO is the economic equivalent of selling insurance on a portfolio of corporate bonds. The purchaser receives payments at an agreed-upon rate, as long as the losses within the underlying corporate credit portfolio do not

reach an agreed-upon level. If losses reach agreed-upon benchmarks, the investments in that synthetic CDO tranche are eroded or, potentially, wiped out. When losses reach an "attachment" level, the investor begins to lose its principal. When losses reach a "detachment" level, the investor loses its entire investment.

17. Here, in the three deals with the School Districts, the attachment points were approximately 3.95%, 4.50%, and 4.60%, respectively, and the detachment points were approximately 4.95%, 5.50%, and 5.60%, respectively. So, in the first deal, the investment would not begin to lose principal until losses in the portfolio reached 3.95%, but the investment would be wiped out if losses in the portfolio reached 4.95%. That is, there was only a 1% difference between receiving the expected return and a complete failure of the investment.

18. The CDO Investment portfolios were composed of credit default swaps referencing corporate bonds with ratings from AAA to BBB- in the first two deals, and from AAA to B+ in the third deal. Each of the CDO Investments was to be "managed" by a portfolio manager. The portfolio managers were responsible for selecting and managing the portfolio of credit default swaps, with the ability to trade certain credits out of the portfolio for new credits, subject to certain limitations.

19. The typical buyers of a CDO investment from RBC were entities such as hedge funds, pension funds, banks and insurance companies with significant fixed income assets. These entities tend to be highly sophisticated in financial and investment matters, and knowledgeable regarding the complexities – and risks – of these types of investments.

20. By contrast, the School Districts' board members and business managers had no prior experience investing in CDOs or instruments tied to CDOs. In fact, before 2006, the School Districts had invested mostly in cash-equivalent instruments and certificates of deposit. Compared to the typical buyers of instruments tied to CDOs, the School Districts were not sophisticated investors.

21. Nevertheless, as described below, RBCCM sold the CDO Investments to the School Districts without sufficiently assessing the suitability of these investments for the School Districts, and RBCCM's marketing materials and presentations did not explain adequately the risks in the CDO Investments. The School Districts lacked sufficient knowledge and sophistication to appreciate the nature of such investments.

<u>RBCCM's Failure to Adequately Assess Suitability</u>

22. RBCCM had a practice requiring one of its own CDO experts to meet with all clients purchasing CDO investments to ensure that they could understand the product and its inherent risks, as well as to determine whether such an investment was suitable for that client. From the outset, RBCCM acknowledged that selling the CDO Investments to the School Districts would require more than the usual type of inquiry to determine the suitability of the investments for the School Districts. RBCCM's lead salesperson had never sold CDOs to school districts, and there was heightened concern within RBCCM about whether the School Districts were capable of understanding this type of investment.

23. In May of 2006, RBCCM responded to a Request for Proposal ("RFP") from Stifel on behalf of two of the School Districts seeking investments that would fund their OPEB liabilities, and flagged in its response that assessing suitability was a "critical hurdle" to completing the transactions. RBCCM informed Stifel and the School Districts that "[a]dditional due diligence will be required by RBC to establish that the investor understands the structured and principal-at-risk nature of the product."

24. In connection with the transactions, RBCCM's lead salesperson consulted with RBCCM's Municipal Finance group to obtain the group's general impressions on the issue of suitability, as well as to evaluate Stifel's proposal to market its GOAL Program jointly with RBCCM to RBCCM's municipal clients. A senior member of the Municipal Finance group reviewed basic materials summarizing Stifel's investment program and, in a memorandum setting forth his views, wrote that Stifel's marketing materials for the investment program were "less than fully explanatory," and that "[Stifel's] quantitative analysis appears to be a bit flawed." He also noted that the program "doesn't appear to provide as significant a benefit as is being suggested."

25. Although the memo conceded at one point that the GOAL Program could generate significant revenue for RBCCM, it later concluded that this "clearly is not a concept that we want our bankers as a general group pitching to their clients out there." The memo's author further stated that if RBCCM were to go forward with marketing Stifel's program to its own clients, "I would think it only suitable for the most sophisticated governmental entities that have the finance staff expertise and resources to adequately assess synthetic CDOs as an investment vehicle."

26. RBCCM's Municipal Finance group subsequently declined the opportunity to work with Stifel to market the GOAL Program to RBCCM's own municipal clients due to concerns about the suitability of CDOs for their clients.

27. As for the sale of the CDO Investments to the School Districts, there were a number of discussions within RBCCM between May 2006 and September 2006 regarding how to address the suitability issue. Some RBCCM managers recommended meeting with the various school boards and ensuring that the School Districts fully understood the CDO Investments. Others at RBCCM noted that they could not be certain whether Stifel had explained all of the risks associated with the CDO Investments to the School Districts. Some senior executives at RBCCM and RBC raised significant concerns about whether the CDO Investments were suitable for the School Districts. One senior executive suggested that "[w]e need to ensure they are conscience [sic] of exactly what they are doing and not leave this solely to Stifel" since "they are further leveraging already heavily geared paper." He cautioned that RBCCM should not rely solely on Stifel's suitability determination, and asked "are these guys sure they know what they are getting into at effectively 80-100x leverage?"

28. However, others at RBCCM recommended a different approach. Certain RBCCM employees argued that RBCCM should not agree to "own suitability" for these deals and should not take additional steps to "know [Stifel's] customer." One RBCCM senior executive described any contact between the bank and the School Districts as a "bad fact" that could hinder RBCCM's desire to avoid responsibility for a suitability determination.

29. Nearly all of the internal discussions at RBCCM regarding suitability considered how best to insulate the bank from any liability if the CDO Investments failed. There was little discussion about whether the CDO Investments were in fact suitable for the School Districts and little desire within RBCCM to find the answer to that question.

30. Following these discussions, RBCCM decided not to meet with the school boards to assess the School Districts' suitability for the CDO Investments and the School Districts' understanding of the risks of that investment. Instead, RBCCM determined that it would rely on Stifel's assessment of suitability. For the June 2006 deal, which involved only one of the School Districts, RBCCM insisted that the CDO Investments pass through Stifel first, if only for an instant, before being purchased by WAWM, so that RBCCM could disclaim responsibility for the sale of the CDO Investments to WAWM.

31. RBCCM even threatened to walk away from the proposed $136 million deal if Stifel would not agree to act as a pass-through entity for the June 2006 deal with WAWM. At the time, RBCCM stated that it preferred not to do any deal at all, rather than engage any of the School Districts directly and make the required suitability determination. However, Stifel did not want to assume the sole responsibility for assessing suitability either, and initially refused to act as the principal for the transaction. Stifel's Chief Executive Officer explained that he wanted RBCCM to act as principal for the deal because he wanted RBCCM "in the boat with [Stifel]." Ultimately, Stifel agreed to act as a pass-through entity, but only if the amount of WAWM's investment was reduced from $136 million to $25 million.

32. As part of the first transaction, Stifel provided RBCCM with a letter from WAWM's OPEB trust, stating that the OPEB trust understood the investment risks, that it was financially sophisticated, and that it had determined this investment was suitable. Stifel subsequently provided RBCCM with similar letters from all of the School Districts' OPEB trusts in connection with the second and third transactions.

33. Nevertheless, internal RBCCM emails continued to demonstrate that RBCCM was concerned that the School Districts may not understand the risks they were assuming or that such a concentrated investment in one product type was potentially inappropriate.

34. RBCCM continued to market and recommend its CDO products to the School Districts following the June 2006 WAWM deal. In July of 2006, RBCCM employees attended a meeting with School District representatives, during which RBCCM and another CDO provider each pitched their CDO investment opportunities directly to the School Districts. RBCCM's presentation spoke to the merits of CDOs and, through historical analysis, attempted to demonstrate that the CDO investments it offered were safe investments. RBCCM's presentation and recommendation helped convince the School Districts to invest in CDOs.

35. For the September and December 2006 deals, RBCCM reversed its previous position and agreed to sell the CDO Investments directly to the School Districts, so long as Stifel provided a side letter addressing the suitability issue. RBCCM provided Stifel with a draft side letter for its signature. The draft side letter included a representation that Stifel had evaluated the

CDO Investments and determined that they were a suitable investment for the School Districts. Stifel significantly edited the letter it actually signed and provided to RBCCM, however, adding numerous qualifications to its representations.

36. Among other things, Stifel's side letter to RBCCM stated generally that synthetic CDOs rated at least AA- with a maturity of seven years or less were suitable for the OPEB trusts. However, Stifel made clear that it had "not undertaken any evaluation or independent investigation of the [s]ecurities or the financial assets that secure them." That is, Stifel represented that it never evaluated the particular CDO Investments beyond their rating and maturity. Stifel further stated that its suitability determination was "based in part upon representations made by the Districts and the Trusts in letters to [Stifel] and the issuer of the [s]ecurities and upon the legal opinions of the Districts' counsel." Thus, the side letter indicated that Stifel was relying on the School Districts themselves to determine the suitability of the CDO Investments.

37. RBCCM should have viewed Stifel's edits to the side letter as a cause for concern regarding suitability. It demonstrated that Stifel had not conducted a meaningful suitability assessment and was relying, at least in part, on the financially unsophisticated School Districts to determine their own suitability with respect to the CDO Investments. It also demonstrated that Stifel was refusing to take responsibility for determining that the CDO Investments were suitable for the School Districts. However, RBCCM accepted the letter and did not conduct any further investigation into whether the CDO Investments were suitable for the School Districts.

38. In fact, the CDO Investments were not suitable for the School Districts for a number of reasons, including those identified by RBCCM. These investments were incompatible with the School Districts' goals, lack of financial sophistication, and their sensitivity to losing principal. The CDO investments also came with far greater risk than the School Districts' traditional investments. The CDO Investments' structure was incompatible with the School Districts' inability to suffer a catastrophic loss in that the School Districts would suffer a total loss if the CDO Portfolio suffered losses of merely 5% to 6%.

39. In addition, the majority of the School Districts' board members and business managers were not sophisticated and experienced investors, especially in the area of structured finance, and they lacked the knowledge to evaluate independently the CDO Investments.

40. RBCCM also knew that the School Districts were risking their entire OPEB investment portfolio on the performance of these CDO Investments, without any diversification. Finally, the CDO Investments were highly leveraged through the trusts' use of borrowing. For three of the School Districts, their contribution to the CDO investments was derived entirely from borrowed funds. In total, $198.7 million of the $200 million investment came from borrowed funds.

<u>RBCCM's Inadequate Presentation of Default Risk</u>

41. Due to the fact that the School Districts lacked the financial sophistication and the investment experience of the typical CDO buyer, RBCCM recognized the need to highlight the investment risks in the marketing materials it created for the School Districts. In marketing the

CDO Investments to the School Districts, RBCCM prepared and used two PowerPoint presentations, both of which addressed the issue of default risk.

42. However, RBCCM's presentations understated the default risk inherent in the CDO Investments and created an inaccurate picture of safety that did not reflect the actual risk in the CDO Investment portfolios.

43. RBCCM's presentations to the School Districts included the historical average seven-year default rate for each seven-year period from 1981 to 2004 of a hypothetical portfolio of corporate credits with the same ratings as those in the CDO Investment portfolios. RBCCM applied a 40% recovery rate assumption to those historical default rates to determine the average expected losses in a similar portfolio in those previous seven-year periods.

44. RBCCM then compared those expected losses to the CDO Investments' attachment point in order to show that it would require multiples of historical losses to impair the School Districts' investments. One of RBCCM's presentations included this information in a section entitled "Evaluating Default Risk," which RBCCM used to explain to the School Districts that this was the appropriate way to evaluate default risk in the CDO Investments. Certain School District representatives were persuaded by this data that defaults within historical ranges would not impair their CDO Investments, and that it would take highly unusual levels of default to impair the investments. Certain School District representatives relied upon these demonstrative presentations of safety when evaluating whether to pursue these investment opportunities.

45. RBCCM's presentations further stated that the CDO portfolios would be built by the portfolio manager using "strong selection criteria." These disclosures and the portfolio management agreement gave the School Districts the impression that the credits included in the CDO Investments' portfolios would be handpicked by a portfolio manager based on the quality of the credits. In practice, however, credit selection was primarily conducted by RBCCM, which primarily chose credits based on their spread rather than their quality.

46. In order to offer the most competitive yields possible on its CDO Investments, while achieving the desired credit ratings for its CDO Investments, RBCCM utilized a portfolio optimizer program to select the credit default swaps that went into the CDO and which were paying higher spreads relative to the rating of the reference corporate entity. In this case, the "spread" on the credit default swap used by the portfolio optimizer was the premium offered to the seller of credit default protection expressed as the rate of return offered above the London Interbank Offered Rate ("LIBOR").

47. Most of the credits selected by RBCCM for the CDO Investments had above-average spreads for their rating, and many of the credits offered spreads that were more indicative of credits one or two ratings classes below the rating of those credits. For example, the portfolios contained credits with an A rating, but paid spreads that were more indicative of spread levels paid on BBB or even BB credits.

48. RBCCM's credit selection process increased the yield RBCCM could offer to the School Districts, but increased the risk inherent in the portfolio. The standard industry models used

to evaluate CDOs calculate the default risk in CDO portfolios based on credit spreads in the portfolio, rather than based on credit ratings. RBCCM's own internal model for valuing its CDO investments similarly evaluated default risk based on spread rather than rating.

49. RBCCM's presentations suggested that default risk of the CDO Investments could be evaluated based on the ratings of the underlying credits. However, the credits selected by RBCCM were not average credits within their rating classes, but included many of the riskiest credits for their rating. Given RBCCM's selection of high-spread credits for the investment portfolios, RBCCM's pitch materials painted a more comforting picture of default risk than was the reality.

Violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act

50. As a result of the conduct described above, RBCCM willfully violated: (i) Section 17(a)(2) of the Securities Act, which prohibits any person, in the offer or sale of any security, from obtaining money or property by means of any untrue statement of 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; and (ii) Section 17(a)(3) of the Securities Act, which prohibits any person, in the offer or sale of any security, from engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Section 15(b) of the Exchange Act, and Section 203(e) of the Advisers Act, it is hereby ORDERED that:

A. Respondent RBCCM cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

B. Respondent RBCCM is censured.

C. Respondent RBCCM shall, within 10 days of the entry of this Order, pay disgorgement of $6,600,000, prejudgment interest of $1,800,000, and a civil money penalty in the amount of $22,000,000. Respondent shall satisfy this obligation by disbursing the foregoing disgorgement and civil penalty pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002 as follows: Respondent shall make a $12,560,898 payment to and for the benefit of the School District of West Allis-West Milwaukee; Respondent shall make a $6,331,061 payment to and for the benefit of Kenosha School District No. 1; Respondent shall make a $10,417,322 payment to and for the benefit of the School District of Waukesha; Respondent shall make a $458,030 payment to and for the benefit of the Kimberly Area School District; and Respondent shall make a $632,689 payment to and for the benefit of the School District of Whitefish Bay. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 or 31 U.S.C. § 3717. Payments shall be accompanied with a notification that identifies RBCCM as the Respondent in these proceedings. Respondent shall simultaneously transmit a copy of such payment and notification to Anne McKinley, Assistant Regional Director, Chicago Regional Office, 175 W. Jackson Blvd., Suite 900, Chicago, IL 60604. Respondent will cooperate with the staff of the Commission to obtain evidence of receipt of the payments set forth herein. In the event that Respondent fails to complete the distribution under the terms set forth in this Order, payment of the full distribution amount (or the balance thereof) shall be due and payable immediately to the Commission, without further application.

D. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, a Fair Fund is created for the disgorgement, interest, and penalties referenced in Paragraph C above. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

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. 65409 / September 27, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3290 / September 27, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3323 / September 27, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14565

In the Matter of LPB Capital d/b/a Family Office Group, LLC and Gary J. Pappas Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted against LPB Capital d/b/a Family Office Group, LLC ("Family Office") pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and against Gary J. Pappas ("Pappas") pursuant to Sections 203(f) and 203(k) of the Advisers Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[1]

[1] Rule 102(e)(1)(iii) provides, in pertinent part, that:

> The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found...to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. LPB Capital d/b/a Family Office Group, LLC is a Delaware limited liability company and registered investment adviser headquartered in Pinehurst, North Carolina. As of September 30, 2009, Family Office was providing discretionary advisory services to 104 accounts belonging mostly to individuals. Beginning in 2008, Family Office was required to be regulated as an investment adviser in North Carolina. Family Office was not an adviser to a registered investment company.

2. Gary J. Pappas ("Pappas"), age 49, is Family Office's founder, majority owner, and Chief Executive Officer. At all relevant times, Pappas served as Family Office's Chief Compliance Officer. Pappas never held any securities licenses. He was licensed as a Certified Public Accountant in the state of New Jersey from April 6, 1990 to December 31, 2008, but that license is currently expired.

B. FAMILY OFFICE AND PAPPAS MISREPRESENTED FAMILY OFFICE'S ASSETS UNDER MANAGEMENT

3. Between June 2008 and May 2010, Family Office misrepresented its assets under management in various Forms ADV filed with the Commission and signed by Pappas.

4. Family Office registered with the Commission as an investment adviser on June 11, 2008. At that time, Family Office invoked Rule 203A-2(d), a registration prohibition exemption, thereby effectively representing that the firm expected to have $25 million in assets under management within 120 days.

5. On November 3, November 4, November 19, and December 26, 2008, Family Office filed amended Forms ADV in which the company claimed that it was eligible to remain registered with the Commission because it had $30 million in assets under management in 80 advisory accounts.

6. On March 27, August 6, and August 24, 2009, Family Office filed amended Forms ADV in which the company claimed that it had $72 million in assets under management in 689 advisory accounts.

7. On March 30 and May 11, 2010, Family Office filed amended Forms ADV in which the company claimed to have $128.6 million of assets under management in 1,564 advisory accounts.

8. In October 2009, Commission staff conducted an examination of Family Office. On October 16, 2009, at the commencement of the examination, Pappas signed and sent a letter to the Commission staff representing that Family Office had $98 million in assets under management as of September 30, 2009. In support of the letter, on behalf of Family Office, Pappas provided the examination staff with a spreadsheet that falsely identified as assets under management various client accounts and underlying assets that were not, in fact, managed by the firm. The spreadsheet was a document that Family Office was required to maintain pursuant to Rule 204-2(a)(8).

9. The disclosures described in Paragraphs 3 to 8 herein were false. In an October 1, 2010 letter to the Commission staff, Family Office acknowledged that it "fails to satisfy the $25 million threshold set forth in Section 203A of the Advisers Act." In that same letter, Family Office provided certain revised calculations of the firm's assets under management as follows:

Date	Number of Advisory Accounts	Assets Under Management
September 30, 2009	103	$6,124,645
December 31, 2009	169	$11,513,859
March 31, 2010	189	$13,230,722

10. Pappas knowingly inflated Family Office's assets under management by, among other things, including estimated values of prospective clients' assets in various calculations of Family Office's assets under management, which were included in Family Office's Form ADV filings described above in Paragraphs 4 through 7 and the October 16, 2009 letter and supporting spreadsheet described above in Paragraph 8.

11. Between June 2008 and May 2010, Pappas was responsible for all compliance functions at Family Office, including the calculation and reporting of assets under management to be included in Family Office's Forms ADV.

C. <u>FAMILY OFFICE FAILED TO DISLCOSE INFORMATION ABOUT ITS POOR FINANCIAL CONDITION</u>

12. As of August 31, 2009, around the time of the cause examination, Family Office had only approximately $3,000 in cash and cash equivalents. For its fiscal year 2009 (ended December 31, 2009), with total revenues of just $147,384, Family Office realized a net loss of $436,277. During 2010, several employees left the firm because it could not afford to pay their salaries and consultant fees. However, Family Office did not disclose its precarious financial condition to its clients.

D. VIOLATIONS

13. As a result of the conduct described above, Family Office willfully violated, and Pappas willfully aided and abetted, and/or caused violations of Section 203A of the Advisers Act, which generally prohibits an adviser that is regulated or required to be regulated in the state in which it has its principal office and place of business from registering with the Commission, unless it has assets under management in excess of $25 million or advises a registered investment company.

14. As a result of the conduct described above, Family Office willfully violated, and Pappas willfully aided and abetted, and/or caused violations of Section 204 of the Advisers Act and Rule 204-2(a)(8) thereunder. Section 204 of the Advisers Act requires every registered investment adviser to make and keep "such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors." Such records are subject to periodic examinations by the Commission. Rule 204-2 promulgated thereunder requires that an investment adviser "make and keep, true, accurate and current" books and records relating to its advisory business. Rule 204-2(a)(8) specifically requires an investment adviser to keep a "list or other record of all accounts in which the investment adviser is vested with any discretionary power with respect to the funds, securities or transactions of any client."

15. As a result of the conduct described above, Family Office willfully violated, and Pappas willfully aided and abetted and/or caused violations of Section 206(4) and Rule 206(4)-4(a)(1).[2] Section 206(4) of the Advisers Act prohibits an investment adviser from engaging "in any act, practice, or course of business which is fraudulent, deceptive or manipulative." Section 206(4) also authorizes the Commission to define, by rule, what acts, practices, or courses of business constitute fraudulent conduct. During the relevant period, Rule 206(4)-4(a)(1) provided that a registered investment adviser with discretionary authority over client funds or securities violates Section 206(4) if it fails to disclose to clients or prospective clients all material facts regarding the financial condition of the adviser that are reasonably likely to impair the adviser's ability to meet its contractual commitments to clients.

16. As a result of the conduct described above, Family Office and Pappas willfully violated Section 207 of the Advisers Act, which makes it unlawful "for any person willfully to make any untrue statements of material fact in any registration application or report filed with the Commission under Section 203 or 204, or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

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2 Rule 206(4)-4(a)(1) under the Advisers Act was repealed in Advisers Act Release No. 3060 (Sept. 13, 2010) (effective Oct. 12, 2010). Comparable requirements are now in Form ADV, Part 2A, Items 9 and 18.

17. As a result of the conduct described above, Pappas willfully violated and willfully aided and abetted Family Office's violations of the Federal securities laws and the rules and regulations thereunder pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Pappas pursuant to Section 203(f) of the Advisers Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act;

C. What, if any, remedial action is appropriate in the public interest against Family Office pursuant to Section 203(e) of the Advisers Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act;

D. Whether, pursuant to Section 203(k) of the Advisers Act, Family Office should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 203A, 204, 206(4) and 207 of the Advisers Act and Rules 204-2(a)(8) and 206(4)-4(a)(1) thereunder; and

E. Whether, pursuant to Section 203(k) of the Advisers Act, Pappas should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 203A, 204, 206(4), and 207 of the Advisers Act and Rules 204-2(a)(8) and 206(4)-4(a)(1) thereunder.

F. Whether, pursuant to Rule 102(e)(1)(iii), Pappas should be denied the privilege of appearing or practicing before the Commission as an accountant.

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9263 / September 27, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 65411 / September 27, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3291 / September 27, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29822 / September 27, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14566

In the Matter of

AMNON COHEN,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, and SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Amnon Cohen ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

SUMMARY

1. Between 2005 and 2008, Wextrust Capital LLC ("Wextrust Capital") and its affiliates (together, "Wextrust"), raised approximately $270 million from over 1,400 investors in at least 70 fraudulent private placement securities offerings for real estate, African diamond mining, commodities, and other ventures. On August 11, 2008, the Commission filed an emergency civil enforcement action against Wextrust and its principals in Federal District Court in the Southern District of New York in a case titled *SEC v. Byers, et al.*, No. 08-cv-7104 (S.D.N.Y.). Wextrust and its assets are now being administered by an equity receiver (the "Receiver") appointed in the case.

2. Amnon Cohen ("Cohen") joined Wextrust in 2000 when Wextrust's predecessor purchased Aspen Capital, LLC ("Aspen Capital"), a real estate brokerage firm in which Cohen was a 50 percent owner. Aspen Capital became the real estate brokerage arm for Wextrust's predecessor and later for Wextrust.

3. In addition to overseeing the real estate brokerage arm for Wextrust, Cohen also oversaw all loan originations for Wextrust's three "hard money" high yield real estate debt funds. The high yield debt funds were formed to provide high yield project loans secured by first or second mortgages. Cohen was identified in the three high yield debt funds' private placement memoranda as the manager of all loan originations. Between 2004 and 2008, the high yield debt funds raised approximately $43 million from investors including reinvestments.

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

4. Cohen was also an officer and 20 percent owner of Wextrust Capital, the managing member or sole member of the manager for each of the high yield debt funds. Wextrust Capital also formed Wextrust Commodity Managers, LLC ("WCM") for the sole purpose of serving as adviser to Wextrust's four commodity funds, each of which invested substantial assets in equity securities. Wextrust Capital owned 100 percent of WCM and exercised exclusive managerial authority over it, including authority for all investment decisions made for the commodity funds, and was compensated for doing so.

5. By late 2005 or early 2006, Cohen became aware that Joseph Shereshevsky ("Shereshevsky"), Wextrust Capital's Chief Operating Officer, and Steven Byers ("Byers"), Wextrust Capital's President and Chief Executive Officer, had misappropriated millions of dollars raised from the purchasers of preferred membership interests in GSA Investors, LLC, another Wextrust fund, by representing that the monies would be used to purchase and operate seven commercial properties that were leased to the United States General Services Administration ("GSA"). Cohen learned that, in reality, the GSA Investors, LLC offering was a sham and that Shereshevsky and Byers intended to use much of the proceeds of the offering for unrelated projects. In fact, none of the GSA properties were ever purchased. Instead, substantially all of the monies raised from investors to purchase the properties were diverted by Byers and Shereshevsky to unrelated projects and purposes including payments to other investors.

6. By July 2007, Cohen also learned that Shereshevsky and Byers had diverted monies from the high yield funds, used the monies to pay expenses of other Wextrust funds, and were commingling monies among various Wextrust entities.

7. Despite his knowledge that the GSA Investors, LLC offering was a sham and that Byers and Shereshevsky had diverted monies from the high yield funds, Cohen continued to manage investments for the high yield funds and to participate in the promotion of the high yield funds to investors.

RESPONDENT

8. **Cohen,** age 44, is a resident of Las Vegas, Nevada and owned twenty percent of Wextrust Capital. He was a principal of Wextrust and managed all loan origination efforts for high yield debt offerings. He joined Wextrust's predecessor in 2000 and previously was a partner of Aspen Capital, which Wextrust's predecessor bought in 2000, and a real estate lending officer for First Bank of The Americas. Cohen oversaw all of the loan originations for the high yield debt funds and originated the majority of their loans.[2]

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[2] Although Cohen is listed as a member of Wextrust Capital management in virtually all of the Wextrust private placement memoranda except for those involving diamond mining ventures in Africa, his primary responsibility was originating and managing the loans made by the high yield debt funds.

OTHER RELEVANT PERSONS AND ENTITIES

9. **Wextrust Capital** was an Illinois limited liability company formed by Steven Byers in 2003. Wextrust Capital solicited investments through private placement offerings into a variety of investment vehicles through its affiliated broker-dealer, Wextrust Securities, LLC, and managed those investments through other affiliates. Wextrust Capital was headquartered in Chicago, Illinois and maintained offices all over the United States, including in New York, New York, as well as Israel and South Africa. From 2005, acting through Wextrust Securities, LLC and affiliated entities, Wextrust Capital and its principals raised approximately $270 million from approximately 1,400 investors throughout the United States and abroad. Altogether, since the formation of Wextrust Securities, LLC in 2005, Wextrust Capital and its principals conducted approximately 70 private placement offerings and created approximately 150 entities in the form of limited liability companies or similar vehicles for the offerings. Wextrust Capital was the adviser to the high yield funds and it also formed and exercised exclusive managerial authority over the adviser to Wextrust's four commodity funds, which invested substantial assets in equity securities.

10. **Steven Byers**, age 48, was a resident of Oakbrook, Illinois until his arrest in August 2008. He was the Chairman of Wextrust Capital and President and Chief Executive Officer of Wextrust Equity Partners LLC, the arm of Wextrust focusing on income-producing properties, and also was an owner and controlling person of Wextrust Securities LLC. Together with Shereshevsky, he controlled Wextrust. On April 13, 2010, Byers pleaded guilty to one count of conspiracy to commit securities, mail and wire fraud, and one count of securities fraud in connection with the GSA Investors, LLC offering. On April 11, 2011, Byers was sentenced to 160 months imprisonment and ordered to pay $7.878 million in restitution jointly and severally with Shereshevsky and to forfeit $9.2 million. On February 7, 2011, the Commission entered an order on consent barring Byers from association with a broker or dealer.

11. **Joseph Shereshevsky**, age 53, resided in Norfolk, Virginia until his arrest in August 2008. Shereshevsky was Wextrust Capital's Chief Operating Officer, and had been a key person in building the private equity group, greatly increased Wextrust's access to capital and was instrumental in founding Wextrust Securities, LLC and in Wextrust's expansion into diamond mining investments in Africa. In March 1993, Shereshevsky was arrested for, among other things, bank fraud. In June 2003, he pleaded guilty to one felony count of conspiracy to commit bank fraud. On February 3, 2011, Shereshevsky pleaded guilty to one count of conspiracy to commit securities, mail, and wire fraud, one count of securities fraud, and one count of mail fraud in connection with the GSA Investors, LLC offering. On July 18, 2011, Shereshevsky was sentenced to 262 months imprisonment and ordered to pay $7.878 million in restitution jointly and severally with Byers and to forfeit $9.2 million. On June 20, 2011, the Commission entered an order on consent imposing collateral bars and a penny stock bar on Shereshevsky.

BACKGROUND

12. Byers formed Wextrust Capital in 2003. Prior to that time, Byers had been in the real estate financing business, and in 2002 he began to engage in private placement securities offerings as a way to refinance his real estate deals. Shereshevsky, who had worked as a property

manager for one of Byers' real estate deals, joined Byers at Wextrust Capital at around the time of its inception. Together, Byers and Shereshevsky controlled Wextrust.

13. In 2000, Wextrust's predecessor purchased Aspen Capital, which was 50 percent owned by Cohen. Cohen's expertise was in distressed real estate financings. Cohen became the primary loan originator for the company's real estate investments. He eventually became a 20 percent owner of Wextrust Capital. Although he had an ownership interest in Wextrust, he never received partnership distributions and during the relevant period he had no control over Wextrust's bank accounts, as a signatory or otherwise.

FACTS

Wexford High Yield Debt Fund I, Ltd.

14. On January 1, 2004, Wextrust issued the private placement memorandum ("PPM") for the Wexford High Yield Debt Fund I, LLC ("High Yield Debt Fund I"). Wextrust Capital was the managing member of the High Yield Debt Fund I, and Cohen was identified in the PPM as the Director of Loan Originations and a "key manager" for the fund. The investment strategy for the High Yield Debt Fund I was to fund high yield debt with short maturities secured by first or second mortgages on its own and in loan participations with unaffiliated third parties. The High Yield Debt Fund I also sold loans to the Wexford High Yield Debt Fund III, LLC., discussed below.

15. Between January 2004 and August 2006, the High Yield Debt Fund I raised approximately $24.3 million, including reinvestments, from approximately 141 investors.

Cohen Learns that the GSA Investors, LLC Offering is a Fraud.

16. On or about November 22, 2005, Wextrust issued a PPM for the purchase and sale of "preferred membership interests" in GSA Investors, LLC (the "GSA PPM"). According to the GSA PPM, GSA Investors, LLC was a company formed to purchase and operate seven commercial properties that were leased to the GSA (together, the "GSA Properties"). The GSA PPM specified that $9.2 million raised from investors, together with a mortgage of approximately $21 million, would be used to purchase the GSA Properties and cover related acquisition expenses. The operating agreement attached to the GSA PPM prohibited the commingling of GSA Investors, LLC monies with any other investments or entities and the loaning of GSA Investors, LLC monies to any person or entity.

17. By late 2005 or early 2006, Cohen learned that Shereshevsky and Byers intended to use much of the proceeds of the offering for unrelated projects. Shereshevsky and Byers told Cohen that GSA Investors, LLC was "a cheap way to raise" money for Wextrust that did not have to be paid back for ten years.

18. In fact, none of the GSA Properties were ever purchased. Instead, substantially all of the $9,394,874 raised from investors from December 2005 through August 2008 was diverted by Byers and Shereshevsky to unrelated projects and purposes including payments to other investors.

19. Despite knowing that the GSA Investors, LLC offering was a sham, Cohen continued to manage investments for the High Yield Debt Fund I and to participate in the promotion of the fund to investors.

<u>Wexford High Yield Debt Fund III, LLC</u>

20. On June 30, 2006, after Cohen learned that the GSA Investors, LLC offering was a sham, Wextrust issued a new PPM for the Wexford High Yield Debt Fund III, LLC ("High Yield Debt Fund III"). Wextrust Capital was the sole member of the manager of the High Yield Debt Fund III. Similar to the High Yield Debt Fund I, the investment strategy for the High Yield Debt Fund III was to provide high yield debt secured by senior and junior mortgages on real estate assets on its own and in loan participations with others. The High Yield Debt Fund III PPM provided that the fund would purchase loan assets from the High Yield Debt Fund I, it permitted loans to be sold to unaffiliated third parties, and it provided management discretion to use funds "for other similar purposes not presently contemplated." Cohen was identified in the High Yield Debt Fund III PPM as the Director of Merchant Banking and the manager of all loan originations for the fund.

21. Between June 2006 and August 2008, the High Yield Debt Fund III raised approximately $17 million, including reinvestments, from approximately 133 investors.

<u>Cohen Learns that Shereshevsky and Byers are Commingling Monies and Diverting Monies From the High Yield Debt Funds</u>

22. Beginning in at least July 2007, Cohen became aware that monies invested in the High Yield Debt Fund I and High Yield Debt Fund III were being diverted by Shereshevsky and Byers. Specifically, Cohen learned that monies that should have remained available for real estate loans to be made by these funds were not available for such purposes and that, instead, Shereshevsky and Byers had diverted those monies to other Wextrust entities.

23. During the same time period in July 2007, Cohen also learned that distributions of $192,000 in profits to investors in the High Yield Debt Fund I in 2006 had come from Wextrust affiliated entities and not from the High Yield Debt Fund I, which had not made any profits in 2006. The PPM for the High Yield Debt Fund I provided that the fund's profits would be distributed to investors. Nothing in the High Yield Debt Fund I advised potential investors that profits would be paid from any other source.

24. In November 2007, Cohen confronted Shereshevsky directly and accused him of commingling monies among Wextrust entities and using monies for purposes other than those specified in the various Wextrust offering documents.

<u>Cohen Helps to Launch the Wexford High Yield Debt Offshore Fund, Ltd.</u>

25. In late 2007, and notwithstanding his knowledge that the GSA Investors, LLC offering was a sham and that Shereshevsky and Byers had diverted and commingled investor funds raised in various Wextrust offerings including offerings for High Yield Debt Fund I and High Yield Debt Fund III, Cohen was instrumental in creating yet another fund – the Wexford High

Yield Debt Offshore Fund, Ltd. ("High Yield Debt Offshore Fund"). Wextrust Capital was the investment manager for the High Yield Debt Offshore Fund and Cohen was identified in the PPM for the High Yield Debt Offshore Fund, dated December 18, 2007, as one of the "principal members, managers and controlling persons of the Investment Manager" for the fund and as Director and manager of all loan originations.

26. The High Yield Debt Offshore Fund PPM provided that the fund would make loans similar to those made by the other high yield debt funds, either on its own or in participation with others. The High Yield Debt Offshore Fund's PPM provided that the loans it originated or purchased could be sold to third parties, and that management had discretionary authority to invest the assets of the fund. In fact, the High Yield Debt Offshore Fund did not originate any loans. Instead, it purchased all of its loans and loan participations from the High Yield Debt Fund III.

27. Cohen personally attended numerous meetings with salespeople who were promoting the fund; helped to create a PowerPoint presentation targeted at "sophisticated investors" for the fund; and signed the agreement retaining an offshore administrator for the fund.

28. On December 27, 2007, representatives of a hedge fund met with Wextrust employees including Cohen in Wextrust's office in New York City as part of their due diligence before making any investment decisions. At the meeting, Cohen was introduced as the person who "makes all chief investment decisions" for the fund and as being "responsible for the portfolio." At the meeting, Cohen assured the hedge fund representatives of the soundness of the fund's investments that he was responsible for and the security of the loan portfolios that he would manage. In a follow-up due diligence telephone call after the December 27 meeting, Cohen again reassured a hedge fund representative of the security of the loan portfolio that he was responsible for. When Cohen affirmatively represented the soundness of the loan portfolios to the hedge fund representatives, he failed to disclose the facts that that the GSA Investors, LLC offering was a sham and that Shereshevsky and Byers diverted monies from, and commingled monies among, other Wextrust funds. Subsequent to the telephone call, the hedge fund invested $500,000 in shares of the High Yield Debt Offshore Fund.

29. Between January 2008 and August 2008, the High Yield Debt Offshore Fund raised approximately $2,250,000 from 9 investors including the transfer of investments and investors from the High Yield Debt Fund III. None of the investors received any distributions prior to August 11, 2008, when the Wextrust fraud was halted and the Receiver appointed.

Cohen Promotes Wextrust on Israeli Television

30. On or about January 13, 2008, Cohen was interviewed on Israeli "Biz TV." Cohen appeared in the interview as a representative of Wextrust and promoted Wextrust during the interview.

31. In July 2007, Cohen also reviewed and approved a television commercial promoting Wextrust's real estate investments that was shown on Israeli television.

Cohen's Compensation in 2008

32. In 2008, after Cohen was aware that the GSA Investors, LLC offering was a sham and that Byers and Shereshevsky diverted monies from, and commingled monies among, other Wextrust funds, Cohen was paid approximately $437,000 in salary.

Cohen's Cooperation

33. In mid-2008, Cohen began cooperating with United States Attorneys' Office for the Southern District of New York ("USAO") and the ongoing examination of Wextrust Securities, LLC by the Commission's staff. Cohen cooperated without attempting to impose any conditions on his cooperation. Cohen's cooperation provided substantial assistance to the USAO in obtaining criminal convictions of Shereshevsky and Byers as well as helping the Commission develop evidence in this matter.

VIOLATIONS

Cohen Violated the Anti-Fraud Provisions of the Federal Securities Laws

34. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit any person, in connection with the purchase or sale of any security, from, directly or indirectly: (1) employing any device, scheme or artifice to defraud; (2) making an untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (3) engaging in any act, practice, or course of business that operates as a fraud or deceit upon any person, in connection with the purchase or sale of a security. Section 17(a) of the Securities Act contains similar prohibitions in the offer or sale of any security. A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988).

35. Here, Cohen represented to a prospective investor in High Yield Debt Offshore Fund the soundness of the fund's investments he was responsible for while omitting to disclose the material facts that the GSA Investors, LLC offering was a sham and that Shereshevsky and Byers diverted monies from, and commingled monies among, other Wextrust funds.

36. Accordingly, Cohen willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

DISGORGEMENT AND CIVIL PENALTIES

37. Respondent has submitted a sworn Statement of Financial Condition dated April 25, 2011 and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest or a civil penalty.

COHEN'S REMEDIAL EFFORTS

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

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

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

B. Respondent Cohen 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
>
> prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

C. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against 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 $437,000 and prejudgment interest of $53,375, but payment of such amount is waived based upon Respondent's sworn representations in his Statement of Financial Condition dated April 25, 2011 and other documents submitted to the Commission. Based upon Respondent's sworn representations in his Statement of Financial Condition dated April 25, 2011 and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent.

E. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3292 / September 27, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14567

In the Matter of DONALD LONGUEUIL, 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 Donald Longueuil ("Longueuil" 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, 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. Longueuil, age 35, resides in New York, New York. From July 2008 to June 2010, Longueuil was a portfolio manager at CR Intrinsic Investors, LLC, an unregistered investment advisor that is affiliated with SAC Capital Management LLC and based in Stamford, Connecticut. From June 2004 to June 2008, Longueuil was an analyst and ultimately a managing director at Empire Capital Management, LLC ("Empire Capital"), an unregistered investment adviser and hedge fund located in Westport, Connecticut. Empire Capital was a registered investment advisor from January 2006 until December 2006.

2. On February 8, 2011, the Commission filed a civil action against Longueuil in SEC v. Longoria et al., Civil Action No. 11-CV-0753 (S.D.N.Y.). On September 12, 2011, the Court entered an order permanently enjoining Longueuil, by consent, from future violations of 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 or sale of securities, Longueuil knew, recklessly disregarded, or should have known, that material non-public information he received from a tipper was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence, and Longueuil is liable for the trading that occurred in Empire Capital because he directly or indirectly caused Empire Capital to place trades and/or unlawfully tipped inside information to Empire Capital.

4. On April 28, 2011, Longueuil pled guilty to one count of securities fraud and one count of conspiracy to commit securities fraud and wire fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. § 371 before the United States District Court for the Southern District of New York, in United States v. Donald Longueuil, 11-CR-000161 (JSR).

5. The counts of the criminal indictment to which Longueuil pled guilty alleged, inter alia, that Longueuil, and others, participated in a scheme to defraud by executing securities trades based on material nonpublic information that had been disclosed or misappropriated in violation of duties of trust and confidence, and that he 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 Longueuil's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Longueuil 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. 65412 / September 27, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14568

In the Matter of MAS Acquisition XX Corp., National Healthcare Financial Services, Inc., Neuromedical Technologies, Inc., and Note Bankers of America, Inc. (n/k/a Facit Group Holdings, 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 MAS Acquisition XX Corp., National Healthcare Financial Services, Inc., Neuromedical Technologies, Inc., and Note Bankers of America, Inc. (n/k/a Facit Group Holdings, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. MAS Acquisition XX Corp. (CIK No. 1093990) is a dissolved Indiana corporation located in Evansville, Indiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MAS Acquisition XX is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 1999, which reported a net loss of $5 for the prior three months.

2. National Healthcare Financial Services, Inc. (CIK No. 1159061) is a dissolved Florida corporation located in Pompano Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). National Healthcare Financial Services is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2003, which reported a net loss of over $20,000 for the prior three months.

3. Neuromedical Technologies, Inc. (CIK No. 845605) is a void Delaware corporation located in Herndon, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Neuromedical Technologies is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1993, which reported a net loss of over $909,000 for the prior six months.

4. Note Bankers of America, Inc. (n/k/a Facit Group Holdings, Inc.) (CIK No. 707452) is a Texas corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Note Bankers of America 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, 1998, which reported a net loss of $934 for the prior three months.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

A. Whether the allegations contained in Section II 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. 65416 / September 28, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14570

In the Matter of MICHAEL L. ROTHENBERG, 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 Michael L. Rothenberg ("Respondent" or "Rothenberg") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the

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

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

Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.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. Rothenberg, age 32, is and has been an attorney licensed to practice in the states of Georgia and New York.

2. On June 2, 2011, the Commission filed a complaint against Rothenberg and Four Five, LLC ("Four Five") in SEC v. Michael L. Rothenberg, et al. (Civil Action No. 1:11-cv-01803) in the United States District Court for the Northern District of Georgia. On July 1, 2011, the court entered an order permanently enjoining Rothenberg, by consent, from future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

3. The Commission's complaint alleged, among other things, that between at least February 2010 and March 2010, Rothenberg, through his co-defendant Four Five, used misrepresentations and omissions of material fact to induce investors to participate in a secret and allegedly risk-free trading platform or trading facility. This trading platform or trading facility purportedly involved transactions among international banks that would generate substantial return on a recurring basis. Specifically, Rothenberg represented that the trading platform would produce returns in excess of 300% every fourteen days. Rothenberg and Four Five also represented to investors, both orally and in writing, that the majority of their funds would remain at all times in Rothenberg's attorney trust account, and that all funds invested, along with the profits, would be returned to the investors at the conclusion of the trades. Rothenberg further represented to the investors that the investment was risk-free because their funds would remain in his attorney trust account. Contrary to Rothenberg's representations, a risk-free trading process providing the returns promised by Rothenberg does not exist. Moreover, contrary to Rothenberg's representations that investor funds would remain in his attorney trust account, Rothenberg began disbursing investor funds within days of receipt of those funds. Between March 2010 and October 2010, at least $210,000 in investor funds were transferred to a bank account designated for contributions to Rothenberg's judicial election campaign. Rothenberg used another $190,000 of investor funds for personal expenses. Although Rothenberg ultimately returned approximately $910,000 to investors, he misappropriated at least $800,000 of investor funds.

IV.

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

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

Rothenberg 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9264 / September 30, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 65450 / September 30, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14574

In the Matter of GILFORD SECURITIES, INCORPORATED, RALPH WORTHINGTON, IV, DAVID S. KAPLAN, and RICHARD W. GRANAHAN, Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER AS TO GILFORD SECURITIES, INCORPORATED, RALPH WORTHINGTON, IV, DAVID S. KAPLAN, AND RICHARD W. GRANAHAN

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Gilford Securities, Incorporated ("Gilford"), Ralph Worthington, IV ("Worthington"), David S. Kaplan ("Kaplan"), and Richard W. Granahan ("Granahan") (collectively "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

Summary

1. The matter involves the failure to supervise M.S. Gregg Berger ("Berger"), a former registered representative engaged in unregistered distributions of securities in connection with international pump-and-dump schemes, by his employer, Gilford Securities, Inc., ("Gilford"), and Worthington, Gilford's Chief Executive Officer and the trading desk supervisor, and Kaplan, Berger's supervisor and the sales manager of Gilford's New York office. On February 1, 2011, the Commission filed a civil injunctive action against Berger, alleging that Berger, along with ten other individuals and entities, engaged in schemes to pump and dump the securities of at least eight U.S. microcap stocks of issuers, primarily headquartered in the People's Republic of China, Israel and Canada, and facilitated unregistered sales of millions of shares of these issuers' stocks that generated proceeds in excess of $33 million. See SEC v. Gregg M.S. Berger, et al., 2:11-cv-10403 (E.D. Mich. Feb. 1, 2011). Also on February 1, 2011, a superseding indictment against Berger was unsealed charging him with one count of conspiracy to commit securities fraud and wire fraud in violation of 18 U.S.C. Sections 1343, 1348 and 1349 based on the same conduct described in the Commission's Complaint. See U.S. v. Gregg M.S. Berger, 2:07-cr-20627 (E.D. Mich. Feb. 1, 2011). On April 21, 2011, Berger pleaded guilty to the conspiracy charge.

2. From at least January 2005 through May 2006 ("relevant period"), Berger resold over 30 million shares of securities through at least 20 customer accounts at Gilford when there was no resale registration statement on file or in effect with the Commission with respect to those securities and there was no valid exemption available for the resales. Berger's facilitation of the unregistered sales went undetected by Gilford as a result of its failure to develop reasonable systems to implement its policies and procedures regarding supervision of registered representatives at the firm with respect to facilitating customers' unregistered sales of securities. During the relevant time period, Worthington, as Chief Executive Officer, had ultimate authority and responsibility for developing Gilford's supervisory policies, procedures and implementation of these policies and procedures. Kaplan had ultimate responsibility for supervising Berger. Gilford, Worthington, and Kaplan all failed reasonably to supervise Berger's unregistered sales of securities.

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

3. Gilford's deficiencies were not confined to its failure reasonably to supervise Berger. Gilford also violated the federal securities laws by: (a) permitting customers to deliver in and sell millions of shares of stock without the registered representatives and officers at the firm conducting reasonable inquiry into the source of the stock being sold to the public; (b) not fulfilling its obligations under the Currency and Financial Transactions Reporting Act of 1970 (commonly referred to as the Bank Secrecy Act ("BSA")), 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951-1959, and 31 U.S.C. §§ 5311, with regard to Suspicious Activity Reports ("SARs"); (c) allowing employees to improperly execute customer orders without the requisite trading licenses; (d) failing to make and keep current either a questionnaire or application for employment for these employees; and (e) violating Regulation S-P by sharing nonpublic customer information with unauthorized third parties. As described below, Worthington and Kaplan aided and abetted some of Gilford's violations. In addition, Granahan, Gilford's Chief Compliance Officer ("CCO") and Anti-Money Laundering ("AML") Officer, aided and abetted Gilford's SARs violation.

Respondents

4. Gilford Securities, Inc. is incorporated in New York and headquartered in New York City. It has been registered as a broker-dealer with the Commission since 1979 when it was formed by Worthington. During the relevant period, Gilford employed approximately 113 registered representatives, and had branch offices in New York, New Jersey, California, and Texas.

5. Ralph Worthington, IV, age 65, resides in New York City, New York. Worthington is one of the founders of Gilford, and since at least January 2005, he has been the Chief Executive Officer and Chairman of the Board of Directors of Gilford. He holds Series 1, 4, 7, 24, 40, 55, 63, and 101 securities licenses.

6. David S. Kaplan, age 50, resides in Muttontown, New York. During the relevant period, Kaplan was Berger's supervisor and has been the sales manager of the New York office, a board member, and a 10 to 14 percent owner of Gilford. He holds Series 7, 8, 24, 55, 63, and 101 securities licenses.

7. Richard W. Granahan, age 73, resides in Dix Hills, New York. From 1998 to 2009, he was the CCO and AML Officer at Gilford. He is currently employed as a compliance and research supervisor at a registered broker-dealer. He holds Series 4, 12, 14, 24, 65, and 87 securities licenses.

Other Relevant Individual

8. Gregg M.S. Berger, age 47, resides in Yonkers, New York. From 2002 through May 2006, he was a retail broker at Gilford. He holds Series 3, 7, 31, and 63 securities licenses.

Berger's Role in the Schemes and his Unregistered Sales of Securities

9. From at least January 2005 through December 2007, Berger participated and assisted in the fraudulent pump-and-dump schemes and facilitated the sale of millions of shares of securities in the eight issuers while he was employed at Gilford and another broker-dealer. These schemes generated proceeds of over $33.6 million. Each scheme was primarily organized and devised either by Francis A. Tribble, a stock promoter, How Wai Hui, a.k.a. "John Hui" and Kwong-Chung Chan, a.k.a., "Bernard Chan," prominent Chinese businessmen and former officers of China World Trade Corporation ("CWTD"), or Berger who arranged and organized the pump and dump of one of the issuer's stock. These individuals identified above, along with certain corporate officers and directors of the issuers (collectively Berger's "co-defendants") perpetrated their fraud by paying for false spam e-mail campaigns that often caused sudden spikes in both the price and volume of these issuers' securities. Berger's co-defendants then sold millions of shares of these securities into the pump and/or hyped market through customer accounts at Gilford or the other broker-dealer, reaping millions of dollars in profits.

10. Six of the eight issuers' stocks were the subject of the schemes and were resold pursuant to unregistered transactions through customer accounts while Berger was employed at Gilford. These issuers were CWTD, China Digital Media Corporation ("CDGT"), Pingchuan Pharmaceuticals, Inc. ("PGCN"), Worldwide Biotech and Pharmaceuticals, Inc. ("WWBP"), China Mobility Solutions, Inc. ("CHMS") (now Global Peopleline Telecom, Inc.), and m-Wise, Inc. ("MWIS").

11. During the relevant period, Berger's retail brokerage business consisted almost exclusively of sell-side trading in low-priced, thinly-traded microcap stocks. Berger and Gilford employees referred to the business as a "liquidation" business. Berger facilitated the sale of over 30 million shares of these six issuers through at least 20 Gilford customer accounts. In these customer accounts, Berger's co-defendants deposited large blocks of shares of these six issuers which often represented the only stock traded in the customer accounts. After the co-defendants deposited the shares, at the direction of the co-defendants, Berger caused the shares to be sold. The sales corresponded with spam e-mail campaigns and release of corporate news. Prior to the spam e-mail campaigns, there was little or no trading volume in these stocks, which traded on the over-the-counter markets at prices often below $1. Berger then, at the direction of his co-defendants, immediately wired out the entire proceeds of those sales to overseas bank accounts, located primarily in China and Cyprus, in the names of his customers whom he knew or was reckless in not knowing were nominees for his co-defendants. Berger generated approximately $1.1 million in sales commissions from the unregistered sales of these six issuers' stocks.

12. Berger, acting at the direction of his co-defendants or others, opened 20 brokerage accounts at Gilford. The co-defendants provided Berger with the account opening documentation for the brokerage accounts, which typically included a new account form, passport, and tax forms in the names of the nominees who were typically Chinese nationals or entities that were beneficially owned by Chinese nationals. The co-defendants names did not appear on the accounts, and they did not have written trading authorization or power of attorney over such accounts. Berger, nevertheless, routinely, sometimes daily, through his Gilford e-mail account,

shared with his co-defendants and the individuals who spammed the issuers what purported to Gilford to be customer information in these accounts. This information included customer names, addresses, transaction records, cash and share balances, wire transfer information, and online username and passwords.

13. Berger's liquidation business made Berger one of the top revenue producing brokers in the firm during the relevant period. He previously had been a low-to-mid revenue producing broker and earned modest income.

14. As a result of the conduct described above, Berger violated Sections 5(a), 5(c) and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Gilford's Violations of Section 5(a) and 5(c) of the Securities Act

15. Gilford and Berger facilitated the unregistered, non-exempt resale of over 30 million shares of CWTD, CDGT, MWIS, CHMS, WWBP, and PGCN stock through 20 customer accounts. Consequently, Gilford acted as an underwriter when it facilitated these sales through its customer accounts. Gilford made no inquiries and ignored obvious red flags concerning the unregistered resales. Gilford repeatedly allowed customers, many of whom had direct ties to the issuers, to deliver in large blocks of low-priced, little known securities, without undertaking any inquiry into the source of the shares to ensure that they were not restricted or control shares.

16. As a result of the conduct described above, Gilford willfully[2] violated Sections 5(a) and 5(c) of the Securities Act by directly or indirectly, offering to sell and selling shares of CWTD, CDGT, MWIS, CHMS, WWBP, and PGCN through the use of any means or instrumentality of transportation, communication in interstate commerce, or of the mails when these securities were not the subject of an effective registration statement and there was no exemption available for the resale of the securities.

Failure Reasonably to Supervise Berger With Respect to Unregistered Sales

17. Gilford failed reasonably to supervise Berger because it did not have a system to implement its policies and procedures regarding the prevention and detection of Berger's sales of securities in violation of Section 5. From at least January 2005 through August 2005, Gilford's only policies and procedures that addressed possible unregistered distributions concerned the sale of stock pursuant to Rule 144. This unwritten policy required that registered representatives obtain a broker's representation letter, seller's representation letter, Form 144 notice-of-sale, and a legal opinion prior to executing a customer's order. Gilford did not, however, have a system to implement this policy, and this policy was not uniformly followed for many sales that were made purportedly under the safe harbor provision of Rule 144. As a result, required documentation was

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[2] As used throughout this Order with respect to Gilford, Worthington, Kaplan and Granahan, 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)).

not obtained or reviewed for many of the violative transactions conducted by Berger on behalf of his customers. Had Gilford had a system to implement its policies and procedures regarding unregistered sales of stock, the documentation of the sales purportedly pursuant to the Rule 144 exemption from registration could have been collected and reviewed by Berger's supervisors and his violative conduct could have been prevented and detected.

18. Gilford did not have a system to implement its policies and procedures with respect to reviewing order tickets. Had there been a system to implement Gilford's policies and procedures regarding the review of order tickets, such a review could have revealed to supervisors that Berger's customers sold large blocks of low-priced, little known securities where execution prices varied anywhere from $2 to $15 within days and these unusual trading patterns could have led the firm to prevent and detect Berger's Section 5 violations.

19. During the relevant period, Worthington, a founder, Chief Executive Officer, and Chairman of the Board of Directors at Gilford, was responsible for supervising the Compliance department and trading desk, and he retained ultimate responsibility for Gilford's supervisory policies, procedures, and implementation of these policies and procedures. Worthington delegated responsibility for drafting Gilford's supervisory policies and procedures to Granahan, Gilford's CCO, but Worthington retained responsibility for final approval of the policies and procedures, as well as developing systems to implement the policies and procedures, including implementation of policies and procedures related to detecting Section 5 violations. Worthington failed to supervise Berger with a view towards preventing the Section 5 violations because he failed to ensure that Gilford had systems to implement the policies and procedures regarding sales of securities through customer accounts in potential violation of Section 5. This supervisory failure resulted in unreasonable systems to address whether registered representatives' facilitation of customers' sales of securities that purported to rely on Rule 144 was appropriate and whether order tickets were being reviewed to identify potentially suspect unregistered distributions of securities. Had Worthington reasonably implemented these systems, Berger's violations of Section 5 could have been prevented and detected.

20. Worthington also failed reasonably to supervise Berger because he failed to respond to red flags that should have alerted him to Berger's sales of securities in violation of Section 5. These red flags included, among other things: (a) Berger's principal business consisted of selling on behalf of customers large volumes of low-priced, little known securities that were transferred into customer accounts by customers who were purportedly located overseas and were sold by customers shortly after the customers deposited the securities in their accounts; and (b) Berger's liquidation business was an aberration from his typical retail business and made him a top revenue producer at Gilford. If Worthington had responded reasonably to these red flags, he could have prevented and detected Berger's Section 5 violations.

21. During the relevant period, Kaplan was the sales manager at Gilford's headquarters in New York, and he was ultimately responsible for supervising all of the registered representatives in that office, including Berger. Kaplan failed to follow Gilford's policies and procedures relating to the review of internal e-mail correspondence. Gilford's written supervisory procedures required Kaplan to review internal e-mail correspondence on a daily basis. Kaplan did not perform the

required review. Instead he assigned that responsibility to another Gilford employee, but ultimately retained responsibility for the review. Despite this, he only reviewed e-mail correspondence occasionally - typically on a weekly basis or if correspondence was shown to him. Had Kaplan reviewed the firm's internal e-mail correspondence on a regular basis, he could have prevented and detected Berger's repeated sharing nonpublic customer information with unauthorized third parties who were also depositing stock into the customer accounts and providing Berger with wire instructions.

22. Kaplan also failed reasonably to supervise Berger because he failed to respond to red flags that could have alerted him to Berger's misconduct. Kaplan failed to respond to several red flags that arose in the context of the activity in Berger's customer accounts. These red flags included that: (a) Berger's customers repeatedly deposited large blocks of low-priced, little known securities in their accounts and immediately sold these shares and then wired out the proceeds of the resales; (b) these were often the only securities sold in these accounts; and, (c) the liquidation business represented a complete change in Berger's retail business. Had Kaplan responded to these red flags, it is likely that he could have prevented and detected Berger's Section 5 violations.

23. The Commission has emphasized that the "responsibility of broker-dealers to supervise their employees by means of effective, established procedures is a critical component in the federal investor protection scheme regulating the securities markets." See e.g., Dean Witter Reynolds, Inc., Exchange Act Rel. No. 46578 (October 1, 2002). Section 15(b)(4)(E) of the Exchange Act allows for the imposition of a sanction against a broker or dealer who "has failed reasonably to supervise, with a view to preventing violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision." Section 15(b)(6) incorporates by reference Section 15(b)(4)(E) and allows for the imposition of sanctions against persons associated with a broker or dealer for failing reasonably to supervise.

24. As a result of the conduct described above, Gilford, Worthington and Kaplan failed reasonably to supervise Berger with a view to detecting and preventing his violations of Sections 5(a) and 5(c) of the Securities Act.

Gilford's Failure to File SARS

25. In April 2002, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The Patriot Act amended provisions of the BSA and substantially expanded a broker-dealer's obligations to detect and prevent money laundering. The regulations implementing the BSA mandate that, effective December 31, 2002, broker-dealers report suspicious transactions by filing a SAR with the Financial Crimes Enforcement Network to report any transaction (or a pattern of transactions of which the transaction is a part) involving or aggregating to at least $5,000 that it "knows, suspects, or has reason to suspect:" (1) involves funds derived from illegal activity or is conducted to disguise funds derived from illegal activities; (2) is designed to evade any requirements of the BSA; (3) has no business or apparent lawful purpose and the broker-dealer knows of no reasonable explanation for the transaction after examining the available facts; or (4) involves use of the broker-dealer to facilitate criminal activity. 31 C.F.R. § 1023.320(a)(2).

26. Exchange Act Rule 17a-8 requires broker-dealers to comply with the reporting, recordkeeping and record retention requirements of the rules promulgated under the BSA. The failure to file a SAR as required by the SAR Rule is a violation of Section 17(a) of the Exchange Act and Rule 17a-8 thereunder.

27. During the relevant period, Granahan was Gilford's CCO and AML officer. In these roles, he was responsible for daily reviews of employee and customer transactions, monthly customer account reviews, and filing SARs on behalf of Gilford.

28. Granahan knew, or should have known, the nature of Berger's liquidation business and the suspicious circumstances that triggered Gilford's obligation to file a SAR, including the suspiciously timed trading in low-priced, little known securities corresponding with the issuance of spam e-mail, $30 million in international wire activity primarily to China and Cyprus, the CEO of one of the issuers acting as a undisclosed beneficial owner in one of Berger's customer accounts, Berger's sharing of non-public customer information with unauthorized third parties, and the forgery of two Form 144 documents by Berger's Chinese intern.

29. Gilford did not file, and Granahan did not cause Gilford to file, a SAR with respect to any of this activity. Granahan knew, or should have known, of his obligation to assist Gilford in fulfilling its requirement to file SARs, and knew, or should have known, the suspicious activity was not being reported by Gilford.

30. As a result of the conduct described above, Gilford willfully violated Section 17(a) of the Exchange Act and Rule 17a-8 thereunder, and Granahan willfully aided and abetted and caused Gilford's violations of Section 17(a) of the Exchange Act and Rule 17a-8 thereunder.

Violations of Sections 15(b)(7) and 17(a) of the Exchange Act and
<u>Rules 15b7-1 and 17a-3(a)(12) thereunder</u>

31. Rule 15b7-1, promulgated under Section 15(b)(7) of the Exchange Act, provides in pertinent part that "[n]o registered broker or dealer shall effect any transaction in, or induce the purchase or sale of, any security unless any natural person associated with such broker or dealer who effects or is involved in effecting such transaction is registered or approved in accordance with the standards of training, experience, competence and other qualification standards...established by the rules of any national securities exchange or national securities association of which such broker or dealer is a member."

32. During the relevant period, the orders placed in Berger's customer accounts while Berger was at Gilford were executed by Berger and by two employees who sat on Gilford's trading desk that did not possess the requisite qualifications and trading licenses to effect securities transactions by executing and "working" millions of dollars worth of securities trades for Berger's customers. Under Gilford's written supervisory procedures, Worthington was responsible for supervising Gilford's trading desk and, as such, knew or was reckless in not knowing that two unlicensed employees were improperly executing Berger's customer orders.

33. As a result of the conduct described above, Gilford willfully violated Section 15(b)(7) of the Exchange Act and Rule 15b7-1 thereunder, and Worthington willfully aided and abetted and caused Gilford's violations.

34. Rule 17a-3(a)(12)(i), promulgated under Section 17(a) of the Exchange Act, requires registered brokers and dealers to make and keep current a questionnaire or application for employment executed by each associated person of the broker-dealer. The requirement to make this record under Rule 17a-3(a)(12)(i) is commonly met by retaining a complete and accurate copy of the Form U-4 application submitted for the associated person when they register as a representative of the broker or dealer. Gilford failed to make and keep current either a questionnaire or application for employment for two individuals who were executing customer orders without the requisite qualifications and trading licenses. As trading desk supervisor, Worthington was responsible for signing the questionnaire or application for their employment.

35. As a result of the conduct described above, Gilford willfully violated Exchange Act Rule 17a-3(a)(12), and Worthington willfully aided and abetted and caused Gilford's violation.

Violations of Regulation S-P

36. Rule 10(a) under Regulation S-P provides, in part, that broker-dealers may not "directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party unless…(iii) [y]ou have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and (iv) [t]he consumer does not opt out."

37. As a result of the conduct described above in which Berger used Gilford's computer system to disseminate confidential customer information to unauthorized third parties, Gilford willfully violated Rule 10(a) of Regulation S-P (17 C.F.R. § 248.10(a)). Kaplan also aided and abetted and caused Gilford's violations because he knew, or should have known, that Berger was improperly sharing this information.

Undertakings

38. Gilford has undertaken to:

a. Retain, within 30 days of the date of entry of the Order, at its own expense, the services of an Independent Consultant not unacceptable to the staff of the Division of Enforcement of the Commission (the "Commission staff"), to (i) review Gilford's written supervisory policies and procedures, including, but not limited to Gilford's AML policies and procedures; (ii) review Gilford's system for implementing its supervisory policies and procedures; and (iii) make recommendations concerning these policies and procedures with a view to assuring compliance with supervisory responsibilities.

b. No later than ten (10) days following the date of the Independent Consultant's engagement, provide to the Commission staff a copy of the engagement letter detailing the Independent Consultant's responsibilities pursuant to paragraph 38(a) above.

c. Require the Independent Consultant, at the conclusion of the review, which in no event shall be more than 120 days after the entry of the Order, to submit a report to Gilford and the Commission staff. The report shall address the supervisory issues described above and shall include a description of the review performed, the conclusions reached, the Independent Consultant's recommendations for changes or improvements to the policies, procedures, and practices of Gilford and a procedure for implementing the recommended changes or improvements to such policies, procedures, and practices.

d. Adopt, implement and maintain all policies, procedures, and practices recommended in the report of the Independent Consultant within 150 days of the date of entry of the Order. As to any of the Independent Consultant's recommendations about which Gilford and the Independent Consultant do not agree, such parties shall attempt in good faith to reach agreement within 180 days of the date of the entry of the Order. In the event that Gilford and the Independent Consultant are unable to agree on an alternative proposal, Gilford will abide by the determinations of the Independent Consultant and adopt those recommendations deemed appropriate by the Independent Consultant.

e. Cooperate fully with the Independent Consultant in its review, including making such information and documents available as the Independent Consultant may reasonably request, and by permitting and requiring Gilford's employees and agents to supply such information and documents as the Independent Consultant may reasonably request.

f. In order to ensure the independence of the Independent Consultant, Gilford (i) shall not have the authority to terminate the Independent Consultant without the prior written approval of the Commission staff; (ii) shall compensate the Independent Consultant, for services rendered pursuant to the Order at their reasonable and customary rates.

g. Require the Independent 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 Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Gilford, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent 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 Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Philadelphia Regional Office, Division of Enforcement, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Gilford, 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.

h. Certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Mary P. Hansen, Assistant Regional Director, Philadelphia Regional Office, with a copy to the Office of Chief Counsel of the Division of Enforcement, no later than sixty (60) days from the date of the completion of the undertakings.

i. Gilford may apply to the Commission staff for an extension of the deadlines described above before their expiration, and upon a showing of good cause by Gilford, the Commission staff may in its sole discretion, grant such extensions for whatever time period it deems appropriate.

39. Worthington and Kaplan have each undertaken to:

a. Provide to the Commission, within 15 days after the end of the twelve month suspension period described below, an affidavit that he has complied fully with the sanctions described in Section IV below.

IV.

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

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

A. Gilford

1. Respondent Gilford shall cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act, Sections 15(b)(7) and 17(a) of the Exchange Act and Rules 15b7-1, 17a-3(a)(12) and 17a-8 thereunder, and Rule 10(a) of Regulation S-P (17 C.F.R. § 248.10(a)).

2. Respondent Gilford is censured.

3. Respondent Gilford shall, within 30 days of the entry of this Order, pay disgorgement of $275,000, prejudgment interest of $77,113, and a civil penalty of $260,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 or 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 Gilford as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Associate Regional Director, Securities and Exchange Commission, Philadelphia Regional Office, 701 Market Street, Suite 2000, Philadelphia, Pennsylvania 19106.

4. Respondent Gilford shall comply with the undertakings enumerated in paragraphs 38(a)-(i) above.

B. Worthington

1. Respondent Worthington shall cease and desist from committing or causing any violations and any future violations of Sections 15(b)(7) and 17(a) of the Exchange Act and Rules 15b-7 and 17a-3(a)(12) thereunder.

2. Respondent Worthington be, and hereby is suspended from association in a supervisory capacity with any broker or dealer for a period of twelve months, effective on the second Monday following the entry of this Order.

3. Respondent Worthington shall, within 30 days of the entry of this Order, pay a civil penalty of $45,000 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 Worthington as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Associate Regional Director, Securities and Exchange Commission, Philadelphia Regional Office, 701 Market Street, Suite 2000, Philadelphia, Pennsylvania 19106.

4. Respondent Worthington shall comply with the undertaking enumerated in paragraph 39(a) above.

C. Kaplan

1. Respondent Kaplan shall cease and desist from committing or causing any violations and any future violations of Rule 10(a) of Regulation S-P (17 C.F.R. § 248.10(a))..

2. Respondent Kaplan be, and hereby is suspended from association in a supervisory capacity with any broker or dealer for a period of twelve months, effective on the second Monday following the entry of this Order.

3. Respondent Kaplan shall, within 30 days of the entry of this Order, pay disgorgement of $225,000, prejudgment interest of $63,092 and a civil penalty of $30,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 or 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 Kaplan as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Associate Regional Director, Securities and Exchange Commission, Philadelphia Regional Office, 701 Market Street, Suite 2000, Philadelphia, Pennsylvania 19106.

4. Respondent Kaplan shall comply with the undertaking enumerated in paragraph 39(a).

D. Granahan

1. Respondent Granahan shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-8 thereunder.

2. Respondent Granahan is censured.

3. Respondent Granahan shall, within 30 days of the entry of this Order, pay a civil penalty of $20,000 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 Granahan as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Associate Regional Director, Securities and Exchange Commission, Philadelphia Regional Office, 701 Market Street, Suite 2000, Philadelphia, Pennsylvania 19106.

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. 65446 / September 30, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14573

In the Matter of **BRIAN DVORAK, Esq.** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3)(i) OF THE COMMISSION'S RULES OF PRACTICE**

I.

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

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, temporarily suspend from appearing or practicing before it any attorney . . . who has been by name: (A) [p]ermanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating . . . any provision of the Federal securities laws or of the rules and regulations thereunder; or (B) [f]ound by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated (unless the violation was found not to have been willful) . . . any provision of the Federal securities laws or of the rules and regulations thereunder.

II.

The Commission finds that:

A. RESPONDENT

1. Dvorak is an attorney licensed to practice in the State of Nevada.

B. COURT CONCLUSIONS & INJUNCTION

2. On July 25, 2011, the U.S. District Court for the District of Nevada issued an order concluding that Dvorak violated Section 5 of the Securities Act of 1933 ("Section 5"). On August 1, 2011 the court entered final judgment against Dvorak, permanently enjoining him from future violations of Section 5; ordering him to disgorge $318,843 in ill-gotten gains, together with $90,795.31 in prejudgment interest, for a total of $409,638.11(sic); and permanently barring him "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." Securities and Exchange Commission v. CMKM Diamonds, Inc., et al., Case Number 2:08-00437.

3. The court concluded that Dvorak and others engaged in the offer and sale of hundreds of billions of unregistered shares of CMKM stock in violation of Section 5. In writing "approximately 440 opinion letters to stock transfer agents justifying the issuance of unregistered CMKM stock by falsely claiming that the stocks were subject to a statutory exemption," the court concluded Dvorak was "both a necessary participant and substantial factor in the sale of unrestricted CMKM stock in violation of Section 5." The court further noted, "but for [his] participation with CMKM, there would not have been a sale of unregistered securities … [which is] not a de minimis act: Dvorak's participation was a crucial and integral role in the overall scheme to sell unregistered securities."

III.

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

IT IS HEREBY ORDERED that Dvorak be, and hereby is, temporarily suspended from appearing or practicing before the Commission. This Order will be effective upon service on the Respondent.

IT IS FURTHER ORDERED that Dvorak may, within thirty days after service of this Order, file a petition with the Commission to lift the temporary suspension. If the Commission receives no petition within thirty days after service of the Order, the suspension will become permanent pursuant to Rule 102(e)(3)(ii).

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Chairman Schapiro not participating

CORRECTED

SECURITIES AND EXCHANGE COMMISSION

[Release No. IA-3297; File No. S7-39-11]

Approval of Filing Fees for Exempt Reporting Advisers and Private Fund Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Notice of intent to approve filing fees for exempt reporting advisers filing Form ADV and private fund advisers filing Form PF.

SUMMARY: The Securities and Exchange Commission ("Commission") is providing notice of its intent to approve filing fees for exempt reporting advisers filing Form ADV and, consistent with one of its recent rule proposals, private fund advisers filing Form PF.

DATES: The fee for exempt reporting advisers would apply starting with the date on which the order approving the fee is published in the Federal Register. If the Form PF proposal is adopted, the fees for private fund advisers would apply starting with the effective date of rule 204(b)-1 under the Investment Advisers Act of 1940 ("Advisers Act").

HEARING OR NOTIFICATION OF HEARING: An order approving the filing fees will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary. Hearing requests should be received by the Commission by 5:30 p.m. on October 21, 2011. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

ADDRESS: Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

FOR FURTHER INFORMATION CONTACT: Keith Kanyan, IARD System Manager, at 202-551-6737, or Iarules@sec.gov, Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION:

Exempt Reporting Adviser Filing Fee

On June 22, 2011, the Commission adopted new rule 204-4, which requires exempt reporting advisers to file portions of Form ADV with the Commission.[1] As with registered advisers, exempt reporting advisers must file Form ADV through the Investment Adviser Registration Depository system ("IARD") and pay the Financial Industry Regulatory Authority ("FINRA"), which operates the system, a filing fee that the Commission approves.[2] FINRA has submitted to Commission staff a letter recommending that the filing fee for exempt reporting advisers be set at $150 for each initial and annual report.[3] Moreover, based on projections of expected revenues and expenses (including those resulting from future system enhancements) relating to the exempt adviser reporting, the Commission believes that this fee amount would reflect costs reasonably associated with these filings and the development and maintenance of the system. This fee would apply starting with the date on which the order approving the fee is published in the Federal Register.

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1 "Exempt reporting advisers" are investment advisers relying on the exemption from registration under section 203(l) or 203(m) of the Advisers Act. *See Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. IA-3221 (June 22, 2011), 76 FR 42950 (July 19, 2011) ("Implementing Adopting Release").

2 *See* section 204(c) of the Advisers Act and rule 204-4(d).

3 FINRA letter dated September 28, 2011, available at http://www.sec.gov/rules/other/2011/finraletter092811-pferafees.pdf.

In the Implementing Adopting Release, we indicated that, at the time, we expected the filing fees for exempt reporting advisers would be the same as those charged registered investment advisers.[4] On further consideration, we believe at this time that a tiered filing fee structure is unnecessary for exempt reporting advisers. The lowest fee charged to registered advisers is for advisers having under $25 million in assets under management. Few exempt reporting advisers are likely to have less than $25 million in assets under management because advisers under that threshold are generally prohibited from registering with the Commission under section 203A of the Advisers Act and, therefore, would not be relying on the applicable exemptions. In addition, although we expect that many exempt reporting advisers will have assets under management that would place them in the group of registered advisers paying the highest filing fees, we have estimated that exempt reporting advisers will use the IARD less during the year than registered advisers.[5] We agree, therefore, that a single fee is appropriate for these advisers regardless of their assets under management.

Form PF Filing Fees

On January 26, 2011, the Commission and the Commodity Futures Trading Commission released a joint proposal that would require hedge fund advisers and other private fund advisers

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4 *See* Implementing Adopting Release, *supra* note 1, at nn. 169 and 566 and accompanying text. Currently, the fees charged registered investment advisers for both initial and annual reports on Form ADV are set at $40 for advisers with assets under management under $25 million; $150 for advisers with assets under management from $25 million to $100 million; and $225 for advisers with assets under management of $100 million or higher. *See Order Approving Investment Adviser Registration Depository Filing Fees*, Investment Advisers Act Release No. 3126 (Dec. 22, 2010), 75 FR 82097 (Dec. 29, 2010).

5 *See* Implementing Adopting Release, *supra* note 1, at nn. 708 and 741 and accompanying text (estimating that each registered adviser will, on average, file one interim amendment each year while only 20% of exempt reporting advisers will, on average, file an interim amendment during that time).

to report certain information regarding the private funds they advise.[6] Under the proposal, registered investment advisers managing one or more private funds would periodically file all or part of the proposed Form PF. The Commission would make the information they report available to the Financial Stability Oversight Council for use in monitoring systemic risk.

The proposal would require advisers to file Form PF electronically but left the selection of the filing system and operator for later consideration. Having considered the options for such a filing system, the Commission has determined that, if Form PF is adopted, FINRA will develop and maintain the filing system as an extension of the existing IARD.[7] The Commission believes that FINRA, as the current operator of the IARD, is uniquely situated to develop and deploy the Form PF filing system in a timely manner. Also, as discussed in the Form PF Proposing Release, the Commission believes that certain efficiencies, both for the Commission and for advisers, would be realized by having FINRA expand its existing platform to accommodate the

6 The Commission proposed to adopt a new rule 204(b)-1, which would require advisers that are registered with the Commission and managing private funds ("private fund advisers") to file proposed Form PF periodically. *See* section II.C of *Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF*, Investment Advisers Act Release No. 3145 (January 26, 2011), 76 FR 8068 (February 11, 2011) ("Form PF Proposing Release"). "Private fund" is defined in section 202(a)(29) of the Advisers Act.

7 In 2000, the Commission designated FINRA as the operator of IARD, which is the electronic filing system for Form ADV. This designation was made pursuant to the Commission's authority under section 204(c) of the Advisers Act, which allows the Commission to require investment advisers to file forms "through any entity designated [by it] for that purpose" and "to pay the reasonable costs associated with [these] filings...." (This authority was added to the Advisers Act as section 203A(d) by section 303(a) of the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416; moved to section 204(b) by section 7 of the Military Personnel Financial Services Protection Act, Pub. L. No. 109-290, 102 Stat. 1317 (2006); and re-designated as section 204(c), effective July 21, 2011, by section 404(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).) *See* *Designation of NASD Regulation, Inc., to Establish and Maintain the Investment Adviser Registration Depository; Approval of IARD Fees*, Investment Advisers Act Release No. 1888 (July 28, 2000), 65 FR 47807 (Aug. 3, 2000). (FINRA was formerly known as NASD.)

confidential filing of Form PF.[8] Commenters who responded to the Form PF Proposing Release and addressed this aspect of the proposal supported having FINRA develop the reporting system as an extension of the IARD platform if Form PF is adopted.[9]

Section 204(c) of the Advisers Act authorizes the Commission to require that investment advisers pay the reasonable costs associated with filings, and under the Commission's proposed rule, private fund advisers would pay fees to the operator of the Form PF filing system in connection with the filing of Form PF.[10] Following discussions with Commission staff, FINRA submitted a schedule of recommended filings fees for proposed Form PF.[11] The recommended fees are $150 for the proposed quarterly filings and $150 for the proposed annual filings.[12] As the Commission indicated in the Form PF Proposing Release, because advisers filing on a quarterly basis would use the system more frequently and would report more information than advisers filing on an annual basis, total annual fees would be higher for quarterly filers. Based on projections of expected revenues and expenses (including those resulting from future system

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8 *See* section II.E of the Form PF Proposing Release (discussing efficiencies of expanding existing IARD platform to accommodate filings of Form PF). *See also* Form PF Proposing Release at note 39 and accompanying text (discussing confidentiality of Form PF information).

9 *See* comment letter of the Alternative Investment Management Association (Apr. 12, 2011) (agreeing that using the IARD and FINRA is a "sensible solution"); comment letter of the Managed Funds Association (Apr. 8, 2011). We explained in the Form PF Proposing Release that the filing system would need to be programmed with special confidentiality protections designed to ensure the heightened confidentiality protections created for Form PF filing information under the Dodd-Frank Act. *See* Form PF Proposing Release at note 39 and accompanying text and section II.E. These commenters expressed the view that maintaining the confidentiality of Form PF data is an important consideration in developing the filing system. If Form PF is adopted, Commission staff will work closely with FINRA in designing procedures and systems to ensure that Form PF data is handled and used in a manner consistent with the protections established in the Dodd-Frank Act.

10 *See* proposed rule 204(b)-1(d).

11 *See* note 3 above.

12 Under the proposal, advisers managing $1 billion or more in hedge fund assets, combined liquidity fund and registered money market fund assets or private equity fund assets would file Form PF on a quarterly basis. All other private fund advisers would file on an annual basis. *See* sections II.B and II.C of the Form PF Proposing Release.

enhancements) relating to the filing of the proposed Form PF, the Commission believes that these fees would reflect costs reasonably associated with these filings and the development and maintenance of the system. If the proposal is adopted, these fees would apply starting with the effective date of rule 204(b)-1.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: September 30, 2011