SECURITIES AND EXCHANGE COMMISSION

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Daniel M. Gallagher was sworn in as SEC Commissioner on November 7, 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

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

DANIEL L. GALLAGHER, COMMISSIONER

(38 Documents)

Chairman Schapiro
Commissioner Walter
not participating

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

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 65863 / December 1, 2011

Admin Proc. File No. 3-14252

In the Matter of the Application of RICHARD A. NEATON 3071 Rivershore Lane Port Charlotte, FL 33953 For Review of Disciplinary Action Taken by FINRA	ORDER DENYING MOTION FOR RECONSIDERATION

I.

On October 20, 2011, we issued an opinion (the "Opinion") sustaining the findings of violations and sanction imposed by the Financial Industry Regulatory Authority, Inc. ("FINRA") on Richard A. Neaton, formerly a registered representative of various member firms.[1] We found that Neaton violated NASD Conduct Rule 2110 and Membership Rule IM-1000-1 by willfully submitting Uniform Applications for Securities Industry Registration or Transfer ("Forms U4") that did not disclose, and willfully failing to update Forms U4 to disclose, disciplinary actions and sanctions imposed on him by a state bar disciplinary board.[2] We sustained FINRA's sanction determination and costs imposed. We also found that Neaton is subject to a statutory disqualification because his failures to disclose were willful.[3] On October 31, 2011, Neaton filed a Motion for Reconsideration of the Opinion (the "Motion").

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1 *Richard A. Neaton*, Securities Exchange Act Rel. No. 65598 (Oct. 20, 2011), http://www.sec.gov/litigation/opinions/2011/34-65598.pdf.

2 NASD Conduct Rule 2110 requires members to observe "high standards of commercial honor and just and equitable principles of trade." NASD Membership Rule IM-1000-1 prohibits the filing, in connection with membership or registration as a registered representative, of information so incomplete or inaccurate as to be misleading.

3 Securities Exchange Act Section 3(a)(39), 15 U.S.C. § 78c(a)(39) (defining "statutory disqualification").

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] Neaton may not use a motion for reconsideration to reiterate arguments previously made or to cite authority previously available,[6] nor may he advance arguments that he could have made previously but chose not to make.[7] Absent extraordinary circumstances, a motion for reconsideration is not an appropriate 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] Neaton's Motion does not meet this rigorous standard.

A. In general, Neaton's Motion reiterates arguments he already made and we specifically considered. For example, Neaton claims that the Commission erred in finding harm "because at the February 2009 hearing, counsel for FINRA conceded the absence of harm in his closing argument." Neaton does not identify, and we do not see, where in the hearing transcript FINRA

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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 (Jun. 23, 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 (Jun. 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 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 & Willcox Asset Mgmt. Corp.*, 56 S.E.C. 1264, 1269 n.18 (2003) (denying reconsideration)).

made such a concession. Even if FINRA had conceded the absence of harm, we conducted a *de novo* review. We concluded in the Opinion that

> we disagree with Neaton's assertion that "no one was harmed by [his] failure to amend [his] U4 in a timely manner." Neaton deprived Securian, Mutual, FINRA, and his customers of information on which to determine whether to hire him, and if so, whether he required heightened supervision, whether to do business with him, or whether to permit him to register.

Neaton also claims that it was error for the Commission to find that he stipulated to the Discipline Board's findings. The record contains three notices sent to Neaton from the Michigan State Bar dated June 5, 1995, August 26, 1996, and February 2, 2001, respectively, that summarize the misconduct that Neaton was found to have committed or to which he pleaded no contest. FINRA used these notices as the basis for citing the Discipline Board's findings. Neaton concedes that he stipulated that the Discipline Board issued the three notices. He argues, however, that the notices "are not the opinion or the findings of the hearing panel or the Discipline Board," and that "[t]he best evidence of the Discipline Board's findings are the orders and opinions in each case," including "the actual order" that reflected "a consent agreement and no contest plea." Moreover, he argues that FINRA found, based on the findings in one of the notices, that he submitted false affidavits to a court even though the Discipline Board made no such finding.

Neaton urges us to reconsider remanding the proceeding so that FINRA can consider evidence of what he claims are the actual findings of the Discipline Board. Neaton did not offer below or on appeal the documents that he claims accurately set forth the Discipline Board's findings or any further explanation as to why these documents should alter the conclusion that Neaton violated NASD Conduct Rule 2110 and Membership Rule IM-1000-1.[10] Remanding under these circumstances would undermine both the fairness and the efficiency of these proceedings and improperly circumvent the finality of our review of the disciplinary process.[11]

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10 Reconsideration is properly denied when respondents cite arguments in a motion for reconsideration that could have been, but were not, developed in the original appeal briefs. *See KPMG LLP v. SEC*, 289 F.3d 109, 120 (D.C. Cir. 2002) (stating that "[a]n argument cannot be merely intimated or hinted at to be raised; it must be 'pressed' to be preserved").

11 *See Feeley & Willcox Asset Mgmt. Corp.*, 56 S.E.C. at 1270 (declining reconsideration to adduce or incorporate new evidence that was available before the Commission's opinion issued, finding that "there are fairness as well as efficiency concerns that would be implicated were we to accept the material at this point"); *The Rockies Fund, Inc.*, Exchange Act Rel. No. 56344 (Aug. 31, 2007), 91 SEC Docket 1418, 1420 (finding that a motion for reconsideration that was "based on a reworking of arguments and facts previously

(continued...)

In his Motion, Neaton repeats other arguments that were rejected in the Opinion, including that (1) his job performance should be considered in reviewing FINRA's sanctions; (2) FINRA improperly determined that Dennis Harrelson, a witness who testified about a conversation he had with Neaton, was credible and that Neaton was not; and (3) the Hearing Panel wrongly struck affirmative defenses alleging that FINRA staff prevented him from settling this matter before the issuance of a complaint and failed to provide him notice that he was entitled to have counsel present at an on-the-record interview. We will not readdress those matters here.

B. Neaton claims that the Commission improperly determined that he failed to demonstrate that the violations would cease in the future. Neaton does not, however, point to any record evidence demonstrating manifest error in the Commission's conclusion. Neaton does not dispute the Commission's finding that he continued to respond "no" to Question 14(D)(1)(a) (asking whether he had been found to have made a false statement or omission or to have engaged in dishonest, unfair or unethical conduct) in his amended Form U4 filed in 2007. Instead, Neaton asserts that he committed a ministerial error, that he should not be held accountable for his failure to recognize that he should have made the proper disclosure, and that his firm prepared the document and directed him to sign. As the Opinion made clear, "securities industry registrants 'must take responsibility for compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements.'"[12]

Neaton disputes the Commission's finding that he failed to disclose in his 2007 Form U4 the bases for the Discipline Board's several actions against him. He contends that "the [Disclosure Reporting Page ("DRP")] does not ask for the bases" and that he provided the following brief description of the allegations in Item 7 in the DRP: "Misrepresentation, Conversion, Misappropriation, and False Statement." Form U4 Section 14 instructs a registrant to "complete all details of all events or proceedings on [the] appropriate DRP(s)" if he or she answers "yes" to certain questions about the existence of any regulatory actions, among other actions or events. While we recognize that the amount of space provided in Item 7 in the DRP to describe the allegations is limited, Neaton clearly did not address "all details of all events or proceedings" related to the violations he committed. Moreover, he had the option of supplementing his answer in the space provided in Item 13 in the DRP, which permits a registrant to "provide a brief summary of the circumstances leading to an action, as well as the current status or disposition and/or findings."

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11 (...continued)
considered and rejected by the Commission and the Court of Appeals" was "an inappropriate attempt to avoid the finality of the Commission's administrative process.").

12 *Neaton, supra* note 1, at 10-11 & n.19 (citing *Guang Lu*, Exchange Act Rel. No. 51047 (Jan. 14, 2005), 84 SEC Docket 2639, *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006)).

C. The Opinion states that FINRA fined Neaton $5,000 and barred him.[13] Upon further review of the record, we conclude that while the Hearing Panel imposed a $5,000 fine on Neaton, the National Adjudicatory Council ("NAC") did not.[14] As we have held, it is "the decision of the NAC, not the decision of the Hearing Panel, that is the final action of FINRA which is subject to Commission Review."[15] For the reasons stated in the Opinion, our finding that a bar is neither excessive nor oppressive and will adequately serve the public interest and protect investors remains unchanged in light of Neaton's violative conduct.[16]

Therefore, IT IS ORDERED that Richard A. Neaton's October 31, 2011 Motion for Reconsideration be, and it hereby is, denied.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

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13 *Id.* at 17.

14 *Dept. of Enforcement v. Richard A. Neaton*, Complaint No. 2007009082902 (Jan. 7, 2011), http://disciplinaryactions.finra.org/viewdocument.aspx?DocNB=12076, at 15.

15 *Harry Friedman*, Exchange Act Rel. No. 64486 (May 13, 2011), http://www.sec.gov/litigation/opinions/2011/34-64486.pdf, at 10 n.21 (citing *Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), 97 SEC Docket 22027, 22035 n.16).

16 *Neaton*, *supra* note 1, at 17-20.

Commissioner Walter
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65882 / December 5, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3339 / December 5, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14651

In the Matter of MARK A. KONYNDYK, 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 Mark A. Konyndyk ("Respondent" or "Konyndyk") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

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

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Konyndyk, age 33, was at all relevant times a certified public accountant. Although his CPA licenses are now inactive, he was licensed to practice in the State of North Carolina from February 21, 2005 until his licensed lapsed on June 30, 2011. He also was licensed in the State of Georgia from June 20, 2007 until December 31, 2009. He worked in the Transactions Advisory Services group (last serving as a Manager) at Ernst & Young LLP ("E&Y") from 2003 until his resignation on November 2, 2007.

2. On November 21, 2011, a final judgment was entered by consent against Konyndyk, permanently enjoining him from future violations of Section 14(e) of the Exchange Act and Rule 14e-3 thereunder, in the civil action entitled Securities and Exchange Commission v. Mark A. Konyndyk, ("SEC v. Konyndyk") (Civil Action Number 11-CV-02055-GK), in the United States District Court for the District of Columbia. Konyndyk also was ordered to pay $9,725.00 in disgorgement of ill-gotten gains from his sales of stock while participating in the fraud, and $1,789.28 in prejudgment interest, and a $9,725.00 civil money penalty.

3. The Commission's complaint in SEC v. Konyndyk alleged, among other things, that Konyndyk traded in Activision Inc. call options during the last week before the public announcement that Vivendi S.A. had agreed to acquire Activision by tender offer; and that he did so despite having performed buy-side due-diligence work on the underlying acquisition talks for E&Y's client, Vivendi, while employed at E&Y. The complaint further alleged that Konyndyk knew or had reason to know the information he possessed about the Activision acquisition talks was material and nonpublic. The complaint also alleged that at the time of Konyndyk's Activision options trading, substantial steps had been taken in furtherance of the tender offer.

IV.

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

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

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

B. After two years (or 24 months) 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
Commissioner Paredes
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65909 / December 8, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3331 / December 8, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14655

In the Matter of **DEAN ZENON PINARD** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Dean Zenon Pinard ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Section 203(f) 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 Respondent's Offer, the Commission finds that:

Summary

1. This matter involves Respondent's role, beginning in 1999, in certain improper bidding practices that occurred at Banc of America Securities LLC, now known as Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger ("BAS")[1], from at least 1998 through 2002 (the "relevant time period"), involving the temporary investment of proceeds of tax-exempt municipal securities in reinvestment products, such as guaranteed investment contracts ("GICs"), repurchase agreements ("Repos"), and forward purchase agreements ("FPAs"). As described below, these practices affected the prices of the reinvestment products and jeopardized the tax-exempt status of the underlying municipal securities.

Respondent

2. **Pinard**, age 42, is a resident of Charlotte, North Carolina. From April 1999 through December 2003, Pinard served as a dual officer of BAS and Bank of America, N.A. ("BANA"), a federally-chartered bank and a provider of municipal reinvestment instruments. He remained an officer of BANA through April 2007. During the relevant time period, Pinard worked in BAS's and BANA's Municipal Reinvestment and Risk Management Group (the "Desk") -- initially as a marketer of investment agreements and other municipal finance contracts and, beginning in January 2003, as the head of the Desk. In those roles, Pinard focused on selling derivative products associated with the issuance of municipal debt. In January 2007, the Antitrust Division of the Department of Justice ("DOJ") conditionally granted Bank of America Corporation ("BAC"), a public company that serves as the ultimate parent corporation of both BAS and BANA, amnesty from criminal prosecution because, among other things, it voluntarily self-reported possible anticompetitive bidding practices involving municipal reinvestment products to DOJ before DOJ had begun an investigation into the matter and because of its continuing cooperation. Pinard is also a beneficiary of that grant of amnesty.

Other Relevant Entity

3. **BAS** was a Delaware limited liability corporation with its principal place of business in New York, New York. During the relevant time period, BAS was the investment banking subsidiary of BAC, a financial holding company organized and existing under the laws of the State of Delaware with its principal place of business in Charlotte, North Carolina. BAS was registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act and as an investment adviser pursuant to Section 203(c) of the Advisers Act. On December 7, 2010, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings and

1 On November 1, 2010, BAS was merged into Merrill Lynch, Pierce, Fenner & Smith Incorporated, an indirect wholly-owned subsidiary of Bank of America Corporation, which is registered with the Commission as a broker-dealer.

Imposing Remedial Sanctions and a Cease-and-Desist Order against BAS for its role in certain improper bidding practices. Without admitting or denying the Commission's findings, BAS consented to the entry of an order censuring it, requiring it to cease-and-desist from committing or causing any violations and any future violations of Section 15(c)(1)(A) of the Exchange Act, and requiring it to pay disgorgement plus prejudgment interest totaling $36,096,442 to 88 specific payees.

Background

4. State and local governmental entities in the United States from time to time issue tax-exempt bonds and notes, the proceeds of which are temporarily invested pending their use for the original purpose of the offering. A significant portion (over $100 billion a year) of such proceeds is invested in financial instruments tailored to meet specific collateral and spend-down needs. Under the relevant IRS regulations, proceeds of tax-exempt municipal securities must generally be invested at fair market value. The most common way of establishing fair market value is through a competitive bidding process, which generally occurs contemporaneously with the offer and sale of the municipal securities. Moreover, compliance with the IRS's detailed regulations concerning the competitive bidding process for certain types of investments of bond proceeds creates a conclusive safe harbor for establishing the fair market value of the reinvestment instruments. These detailed regulations require the issuer to make a bona fide solicitation for the purchase of the reinvestment instruments. A bona fide solicitation requires, among other things, that the issuer:

a. Forward in a timely manner written bid specifications containing all material terms of the bid to potential providers;

b. Include in the bid specifications a statement notifying potential providers that the submission of a bid is a representation that:

i. the potential provider did not consult with any other potential provider about its bid;

ii. the bid was determined without regard to any other formal or informal agreement that the potential provider has with the issuer or any other person (whether or not in connection with the bond issue); and

iii. the bid was not being submitted solely as a courtesy to the issuer or any other person for purposes of satisfying the requirements of the receipt of three bids from disinterested providers or the receipt of at least one bid from a reasonably competitive provider;[2]

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2 More specifically, IRS regulations require the issuer to receive bids from at least three potential providers that do not have a material financial interest in the issue. A lead underwriter in a negotiated underwriting transaction (or a provider related to the lead underwriter) is deemed to have a material financial interest in the issue until 15 days after the issue date for the underlying security. Furthermore, one of the three disinterested bids received must be from a reasonably competitive provider.

c. Solicit bids from at least three reasonably competitive providers; and

d. Afford all potential providers an equal opportunity to bid; for example, no potential provider is to be given the opportunity to review other bids (i.e., a last look) before providing a bid.

5. To obtain the benefit of the safe harbor provisions, the issuer must also select the highest yielding bona fide bid or the lowest cost bona fide bid, whichever is appropriate under the circumstances.

6. The IRS regulations also contemplate that an issuer may use an agent to conduct the bidding process as long as the agent does not bid to provide the reinvestment product.

7. In this matter, bidding agents at times steered business to favored providers through a variety of mechanisms, including giving them information on competing bids ("last looks") and deliberately obtaining off-market courtesy bids or purposefully non-winning bids so that the favored providers could win the transaction ("set-ups"). In return, the bidding agents were at times rewarded with, among other things, undisclosed, gratuitous payments and kickbacks. This misconduct primarily affected the bond issuers and purchasers, which relied on inaccurate certifications executed by the providers (and on most occasions also the bidding agents) to the effect that the bids were competitive, i.e., not tainted by undisclosed consultations, agreements, or payments and reflected fair market value for the purchase of the reinvestment instrument.

Improper Bidding Practices

8. From the inception of the Desk in 1998 through at least 2002, Respondent, beginning in April 1999, as well as many other members of the Desk, participated in and condoned improper practices in connection with the bidding of reinvestment instruments. During the relevant time period, the Desk was a marketing group comprised of 4 to 9 members that focused on selling derivative products associated with the issuance of municipal debt. The Desk generated business through, among other things, client relationships in commercial lending and securities underwriting performed by BAS. The Desk also generated business through independent advisors, bidding agents, and brokers. During the relevant time period, Respondent and the Desk were based in Charlotte, North Carolina, with one Desk member in New York, New York for a portion of that time. During the relevant time period, Respondent was a dual officer of both BAS and BANA.

9. As part of the conduct described herein, bidding agents at times steered business to the Respondent and other Desk members, through last looks and set-ups. As a result, the Desk won the bids for 88 affected reinvestment instruments.

10. In return, Respondent and other Desk members, among other things, at times steered business to bidding agents and submitted courtesy and purposefully non-winning bids upon request.

11. On occasion, Respondent and other Desk members also paid bidding agents that favored the Desk monies in addition to the fees disclosed as brokerage fees. These additional monies were sometimes mischaracterized as payments for services rendered in connection with swaps and marketing pricing letters.

12. In certain transactions, Respondent and other Desk members misstated in BAS's bid submissions and/or provider's certificates that, among other things: its bids were arms-length bids; the Desk did not consult with any other potential provider about its bids; its bids were determined without regard to any other formal or informal agreement that the Desk had with the issuer or any other person (whether or not in connection with the bond issue); and that its bids were not submitted solely as a courtesy to the issuer or any other person for purposes of satisfying the requirements that (a) the issuer receive at least three bids from providers that the issuer solicited under a bona fide solicitation and (b) at least one of the three bids received was from a reasonably competitive provider.

Representative Transaction

13. BAS underwrote a $65,225,000 offering of special assessment bonds and, in March and April of 2002, the Respondent, along with the then head of the Desk, helped the Desk win the bids for two distinct instruments in which the offering proceeds would be invested. The head of the Desk, Respondent's supervisor, recommended the hiring of a certain bidding agent to bid the reinvestment instruments for this deal. During the relevant time period, certain bidding agents would favor the firm that had both underwritten the bonds and arranged for the bidding agent's hiring. Such favoritism generally took the form of either a last look or a set-up. Here, the two bids associated with this transaction – with the help of Respondent and the head of the Desk – were set-up for the Desk to win. This transaction included a refunding escrow that was bid in March 2002 and a debt service reserve fund that was bid in April 2002. Respondent provided the bidding agent with the Desk's pricing indications for the instruments that were the subject of the bids, which allowed the bidding agent to advise other prospective bidders where they should not bid. In addition to the brokerage fees that were paid to the bidding agent, the Desk, at the direction of the head of the Desk, paid the bidding agent an additional $50,000 as purported fees for a market pricing letter in another transaction. In reality, the additional $50,000 was payment for the favored treatment that the bidding agent showed the Desk in steering these bids in favor of the Desk. The Desk misstated collectively in bid submissions and provider's certificates for these instruments that, among other things, its bids were arms-length bids; based on market prices; and/or were determined without regard to any other formal or informal agreement that the potential provider had with the issuer or any other person.

Legal Discussion

14. Section 15(c)(1)(A) of the Exchange Act prohibits any broker or dealer from using the mails or other means of interstate commerce "to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security . . . by means of any manipulative, deceptive, or other fraudulent device or contrivance." Exchange Act Rule 15c1-2 defines such means to include "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," and "any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading."

15. As described above, BAS, using the mails or any means or instrumentality of interstate commerce, engaged in improper bidding practices such as set-ups, last looks, the submission of courtesy and purposefully non-winning bids, and other conduct that it knew or had reasonable grounds to believe was misleading. As a result of such conduct, BAS willfully violated Exchange Act Section 15(c)(1)(A).

16. As a result of the conduct described above, Pinard willfully aided and abetted and caused BAS's violation of Exchange Act Section 15(c)(1)(A).

Cooperation

17. In determining to accept Respondent's Offer, the Commission considered the cooperation of Respondent in connection with the Commission's investigation and investigations conducted by other law enforcement agencies, including DOJ.

IV.

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

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act and Section 203(f) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Pinard cease and desist from committing or causing any violations and any future violations of Section 15(c)(1)(A) of the Exchange Act.

B. Respondent Pinard be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, or municipal advisor.

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

D. Respondent shall, within 30 days of the entry of this Order, pay disgorgement of $32,489 and prejudgment interest of $9,294 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Dean Zenon Pinard 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, Chief, Municipal Securities and Public Pensions Unit and Associate Regional Director, Securities and Exchange Commission, Philadelphia Regional Office, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

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. 3332 / December 9, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14657

In the Matter of **KEVIN KRAMER,** **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 Kevin Kramer ("Kramer" 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. Kramer was the President and Chief Operating Officer of West End Financial Advisors ("West End") from at least 2006 through June 2009. West End is a New York-based, unregistered hedge fund adviser to a collection of hedge funds (the "West End funds"). West End is affiliated with Sentinel Investment Management Corporation ("Sentinel"), which has been registered with the Commission since 1986. Kramer, 60 years old, is a resident of Wilmington, Delaware. Sentinel has been registered as an investment adviser with the Commission since 1986.

2. On November 22, 2011, a final judgment was entered by consent against Kramer, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, Section 17(a) of the Securities Act of 1933, 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 amended complaint alleged, among other things, that Kramer committed securities law violations at West End and Sentinel. According to the amended complaint, from at least June 2008 to May 2009, Kramer knew, or was reckless in not knowing, that West End faced severe financial problems and that the West End funds were not performing as represented to investors. Kramer also knew, or was reckless in not knowing, that West End was improperly tapping a reserve account to satisfy its cash shortfalls. Nevertheless, Kramer misrepresented the condition of the West End funds to new and existing investors as he continued to market them through April 2009.

IV.

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

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

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro
Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65923 / December 9, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3333 / December 9, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14658

In the Matter of **TOURADJI CAPITAL MANAGEMENT, L.P.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C 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 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against Touradji Capital Management, L.P. ("Touradji Capital" or "Respondent").

II.

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

III.

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

Summary

1. These proceedings arise out of a violation of Rule 105 of Regulation M of the Exchange Act by Touradji Capital, an unregistered investment adviser and hedge fund manager located in New York, New York. Rule 105 prohibits buying an equity security made available through a public offering, conducted on a firm commitment basis, from an underwriter or broker or dealer participating in the offering after having sold short the same security during the restricted period as defined therein.

2. On three occasions, from October 2007 through July 2008, Touradji Capital bought offered shares from an underwriter or broker or dealer participating in a follow-on public offering after having sold short the same security during the restricted period. These violations collectively resulted in profits of approximately $834,000.

3. The trading decisions that gave rise to the foregoing violations of Regulation M were made by two former employees of Touradji Capital whose employment ended in late 2008.

4. During the relevant period, although Touradji Capital had provided some training to its employees concerning Rule 105, it did not have policies, procedures and controls in place sufficient to prevent or detect Rule 105 violations.

Respondent

5. Touradji Capital is a limited partnership organized under Delaware law and located in New York, New York. During the relevant period, Touradji Capital managed three hedge funds: Touradji Global Resources Master Fund Ltd., Touradji Deeprock Master Fund Ltd. and Touradji Diversified Master Fund Ltd. Touradji Capital effected the trades that are the subject of these proceedings on behalf of funds that it managed.

Legal Framework

6. Rule 105 prohibits short selling securities during a restricted period and then purchasing the same securities in a public offering. 17 C.F.R. § 242.105; see Short Selling in Connection with a Public Offering, Rel. No. 34-56206, 72 Fed. Reg. 45094 (Aug. 10, 2007) (effective Oct. 9, 2007). The Rule 105 restricted period is the shorter of the period: (1) beginning five business days before the pricing of the offered securities and ending with such pricing; or (2) beginning with the initial filing of a registration statement or notification on Exchange Act Form 1-A or Form 1-E and ending with pricing. "The goal of Rule 105 is to promote offering prices that are

based upon open market prices determined by supply and demand rather than artificial forces." Final Rule: Short Sales, Exchange Act Release No. 50103. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

Touradji Capital's Violations of Rule 105 of Regulation M

7. On October 31, 2007, Touradji Capital sold short 3,472 shares of McMoran Exploration Co. ("McMoran") at a price of $12.18 per share. On November 1, 2007, McMoran announced the pricing of a follow-on offering of 16.25 million shares of its common stock at $12.40 per share. Touradji Capital received an allocation of 3,227 shares in that offering. Because the offering price was greater than both the price at which Touradji Capital sold short during the restricted period and the market price on the day of the follow-on offering, Touradji Capital did not profit as a result of this violation.

8. On March 25, 2008, Touradji Capital sold short a total of 277,800 shares of Chesapeake Energy Corporation ("Chesapeake Energy") at prices ranging between $46.2674 and $46.4147. On March 27, 2008, Chesapeake Energy announced the pricing of a follow-on offering of 20 million shares of its common stock at $45.75 per share. Touradji Capital received an allocation of 400,000 shares in that offering. The difference between Touradji Capital's proceeds from the restricted period short sales of Chesapeake Energy shares and the price for 277,800 shares purchased in the offering was $171,423. Touradji Capital also improperly obtained a benefit of $19,809 by purchasing the remaining 122,200 offering shares at a discount from Chesapeake Energy's market price.

9. On July 11, 2008, Touradji Capital sold short a total of 47,900 shares of GMX Resources, Inc. ("GMX") at a price of $81.7903 per share. On July 17, 2008, GMX announced the pricing of a follow-on offering of 2 million shares of its common stock at $70.50 per share. Touradji Capital received an allocation of 100,000 shares in the offering. The difference between Touradji Capital's proceeds from the restricted period short sales of GMX shares and the price for 47,900 GMX shares purchased in the offering was $540,805. Touradji Capital also improperly received a benefit of $101,939 by purchasing the remaining 52,100 offering shares at a discount from GMX's market price.

10. In total, Touradji Capital's violations of Rule 105 resulted in profits of $833,976.

Violations

11. As a result of the conduct described above, Touradji Capital violated Rule 105 of Regulation M under the Exchange Act willfully.[1]

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

Touradji Capital's Remedial Efforts

12. After Touradji Capital learned of its Rule 105 violations, it developed and implemented policies, procedures and controls to prevent or detect Rule 105 violations. In determining to accept the Offer, the Commission considered Touradji Capital's remedial efforts.

IV.

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

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

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

B. Touradji Capital is censured;

C. Touradji Capital shall within fourteen (14) days of the entry of this Order pay disgorgement in the amount of $833,976, prejudgment interest in the amount of $119,360, and a civil monetary penalty in the amount of $350,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 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 Touradji Capital 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 Gerald Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-6109.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter,
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65930 / December 9, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14659

In the Matter of

ZVI GOFFER,

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 Zvi Goffer ("Goffer" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.2, III.3 and III.5 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. Goffer, age 34, resides in New York, New York. During the relevant time period, Goffer was a registered representative and proprietary trader at Schottenfeld Group LLC, a New York limited liability company and registered broker-dealer based in New York, New York. Goffer held Series 7, 55, 63 and 65 securities licenses.

2. On December 5, 2011, a final judgment was entered by consent against Goffer, 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. Galleon Management, LP, et al., Civil Action Number 09-CV-8811, in the United States District Court for the Southern District of New York.

3. On December 8, 2011, a final judgment was entered by consent against Goffer, 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. Arthur J. Cutillo, et al., Civil Action Number 09-CV-9208, in the United States District Court for the Southern District of New York.

4. The Commission's complaints alleged, inter alia, that, while working as a trader at Schottenfeld in 2007, Goffer was tipped material, nonpublic information concerning Hilton Hotels Corporation ("Hilton"), Kronos Inc. ("Kronos"), Alliance Data Systems Corp. ("ADS"), Avaya Inc. ("Avaya"), Axcan Pharma Inc. ("Axcan") and 3Com Corp. ("3Com"), which information had been conveyed in violation of a duty. The complaints further allege that Goffer traded in the securities of Hilton, Kronos, Avaya and 3Com, based on that material, nonpublic information, and also tipped the material, nonpublic information to others.

5. On June 13, 2011, Goffer was found guilty of two counts of conspiracy to commit securities fraud and twelve counts of securities fraud in violation of Title 18 United States Code, Sections 2 and 371, and Title 15 United States Code, Sections 78j(b) and 78ff, in the U.S. District Court for the Southern District of New York, in United States v. Zvi Goffer, 10-CR-56.

6. The counts of the criminal indictment to which Goffer was found guilty alleged, inter alia, that Goffer, 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 Goffer's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Goffer be, and hereby is barred from association with any broker or dealer, investment adviser, municipal securities dealer or transfer agent, and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Paredes
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9282 / December 9, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 65932 / December 9, 2011

In the Matter of **WACHOVIA BANK, N.A., now known as WELLS FARGO BANK, N.A., successor by merger.** Respondent.	**ORDER UNDER SECTION 27A(b) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b) OF THE SECURITIES EXCHANGE ACT OF 1934, GRANTING WAIVERS OF THE DISQUALIFICATION PROVISIONS OF SECTION 27A(b)(1)(A)(ii) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b)(1)(A)(ii) OF THE SECURITIES EXCHANGE ACT OF 1934**

Wachovia Bank, N.A., now known as Wells Fargo Bank, N.A., successor by merger ("Wachovia") has submitted a letter on behalf of themselves and any of their current and future affiliates, dated December 5, 2011, for a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 ("Securities Act") and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 ("Exchange Act") arising from its settlement of an injunctive action instituted by the Commission.

On December 8, 2011, the Commission filed a civil injunctive complaint against Wachovia in the United States District Court for the District of New Jersey alleging that Wachovia violated Section 17(a) of the Securities Act.

Pursuant to an Offer of Settlement from Wachovia, Wachovia simultaneously filed a "Consent of Wachovia Bank, N.A., now known as Wells Fargo Bank, N.A., successor by merger" in which it agreed, without admitting or denying the allegations of the Commission's complaint, to the entry of a Final Judgment against it. Among other things, the Final Judgment permanently enjoins Wachovia from violating Section 17(a) of the Securities Act, and orders Wachovia to pay $46,078,591 in disgorgement, penalties and interest. In its complaint the Commission alleges that Wachovia was involved in a bid-rigging scheme related to tax-exempt municipal securities.

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

Based on the representations set forth in Wachovia's December 5, 2011 request, the Commission has determined that, under the circumstances, the request for a waiver of the disqualifications resulting from the entry of the Final Judgment is appropriate and should be granted.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Paredes
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9283 / December 9, 2011

In the Matter of **WACHOVIA BANK, N.A., now known as WELLS FARGO BANK, N.A., successor by merger.** Respondent.	**ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE DISQUALIFICATION PROVISIONS OF RULES 602(b)(4) AND 602(c)(2)**

Wachovia Bank, N.A., now known as Wells Fargo Bank, N.A., successor by merger ("Wachovia") has submitted a letter, dated December 5, 2011, requesting a waiver of the disqualification from the exemption from registration under Regulation E arising from the settlement with the Commission of a civil injunctive proceeding.

On December 8, 2011, the Commission filed a civil injunctive complaint against Wachovia in the United States District Court for the District of New Jersey alleging that Wachovia violated Section 17(a) of the Securities Act of 1933 ("Securities Act").

Pursuant to an Offer of Settlement from Wachovia, Wachovia simultaneously filed a "Consent of Wachovia Bank, N.A., now known as Wells Fargo Bank, N.A., successor by merger" in which it agreed, without admitting or denying the allegations of the Commission's complaint, to the entry of a Final Judgment against it. Among other things, the Final Judgment permanently enjoins Wachovia from violating Section 17(a) of the Securities Act, and orders Wachovia to pay $46,078,591 in disgorgement, penalties and interest. In its complaint the Commission alleges that Wachovia was involved a bid-rigging scheme related to tax-exempt municipal securities.

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

Based on the representations set forth in Wachovia's December 5, 2011 request, the Commission has determined that, pursuant to Rule 602(e), a showing of good cause has been made and that it is not necessary under the circumstances that the exemption be denied as a result of the Final Judgment or as a result of any related injunction entered by a U.S. state or territorial court addressing the same activities as the settled injunctive proceeding.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter, Commissioner Paredes, Commissioner Gallagher not participating

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC -29881; 812-13987]

Wells Fargo Bank, N.A., et al.; Notice of Application and Temporary Order

December 9, 2011

Agency: Securities and Exchange Commission ("Commission").

Action: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against Wells Fargo Bank, N.A. ("Wells Fargo Bank") on December 9, 2011 by the United States District Court for the District of New Jersey ("Injunction") until the Commission takes final action on an application for a permanent order. Applicants also have applied for a permanent order.

Applicants: Wells Fargo Bank, First International Advisors, LLC ("First International"), Metropolitan West Capital Management, LLC ("Metropolitan West"), Golden Capital Management, LLC ("Golden Capital"), Alternative Strategies Brokerage Services, Inc. ("Alternative Strategies Brokerage"), Alternative Strategies Group, Inc. ("Alternative Strategies"), Wells Fargo Funds Management, LLC ("WF Funds Management"), Wells Capital Management Incorporated ("Wells Capital Management"), Peregrine Capital Management, Inc. ("Peregrine"), Galliard Capital Management, Inc. ("Galliard"), Nelson Capital Management ("Nelson"), and Wells Fargo Funds Distributor, LLC ("WF Funds Distributor") (each an "Applicant" and collectively, the "Applicants").[1]

[1] Applicants request that any relief granted pursuant to the application also apply to any existing company of which Wells Fargo Bank is or may become an affiliated person within the meaning of section 2(a)(3) of the Act (together with the Applicants, the "Covered Persons").

Filing Date: The application was filed on December 8, 2011 and two amendments were filed on December 9, 2011.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 3, 2012, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicants: Wells Fargo Bank, 101 North Phillips Avenue, Sioux Falls, SD 57104; First International, 30 Fenchurch Street, London, England, UK EC3M 3BD; Metropolitan West, 610 Newport Center Drive, Suite 1000, Newport Beach, CA 92660; Golden Capital, 5 Resource Square, Suite 400, 10715 David Taylor Drive, Charlotte, NC 28262; Alternative Strategies Brokerage, 401 South Tryon Street, Charlotte, NC 28288; Alternative Strategies, 401 South Tryon Street, TH3, Charlotte, NC 28288; WF Funds Management and WF Funds Distributor, 525 Market Street, 12th Floor, San Francisco, CA 94105; Wells Capital Management, 525 Market Street, 10th Floor, San Francisco, CA 94105; Peregrine, 800 LaSalle Avenue, Suite 1850, Minneapolis, MN 55402; Galliard, 800 LaSalle Avenue, Suite 1100, Minneapolis, MN 55402; and Nelson, 1860 Embarcadero Road, #140, Palo Alto, CA 94303.

For Further Information Contact: Jean E. Minarick, Senior Counsel, at 202-551-6811 or Daniele Marchesani, Branch Chief, at 202-551-6821 (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a temporary order and summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or an applicant using the Company name box, at http://www.sec.gov/search/search.htm, or by calling (202) 551-8090.

Applicants' Representations:

1. Wells Fargo Bank is a national banking association. On March 20, 2010, Wachovia Bank, N.A. ("Wachovia Bank") merged with and into Wells Fargo Bank. Wells Fargo Bank is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act") and serves as an investment adviser to a Fund (as defined below). No existing company of which Wells Fargo Bank is an affiliated person (other than the Applicants) currently serves as investment adviser, sub-adviser, or depositor of any registered investment company or business development company ("BDC") or principal underwriter for any registered open-end investment company, registered unit investment trust ("UIT"), or registered face amount certificate company, or investment adviser of any employees' securities company, as defined in section 2(a)(13) of the Act ("ESC") ("Fund Service Activities"). "Funds" refers to the registered investment companies, BDCs or ESCs for which a Covered Person provides Fund Service Activities. Wells Fargo & Company ("Wells Fargo") directly owns 37.51% of Wells Fargo Bank and indirectly owns the remainder. Through its direct and indirect subsidiaries, Wells Fargo, a registered financial holding company and bank holding company under the Bank Holding Company Act of 1956, as amended, offers banking, brokerage, advisory and other financial services to institutional and individual customers worldwide. Wells Fargo also is the ultimate parent of the other Applicants, who, as direct or indirect subsidiaries of the same ultimate parent, are under common control with Wells Fargo Bank.

2. First International, Metropolitan West, Golden Capital, Alternative Strategies, WF Funds Management, Wells Capital Management, Peregrine, Galliard and Nelson are registered as investment advisers under the Advisers Act and serve as investment advisers or sub-advisers to various Funds. Alternative Strategies Brokerage and WF Funds Distributor are registered as broker-dealers under the Securities Exchange Act of 1934, as amended and each serves as principal underwriter to various Funds.

3. On December 9, 2011, the United States District Court for the District of New Jersey entered a judgment, which included the Injunction, against Wells Fargo Bank ("Judgment") in a matter brought by the Commission.[2] The Commission alleged in the complaint ("Complaint") that from at least 1997 through at least 2005, Wachovia Bank engaged in fraudulent practices and made misrepresentations and omissions in connection with bidding on and sale of municipal reinvestment instruments. The Complaint alleged that these fraudulent practices, misrepresentations, and omissions affected the prices of certain reinvestment instruments, deprived certain municipalities of a presumption that their reinvestment instruments were purchased at fair market value, and/or jeopardized the tax-exempt status of certain securities. Based on the alleged misconduct described above, the Complaint alleged that Wachovia Bank violated section 17(a) of the Securities Act of 1933. Without admitting or denying any of the allegations in the Complaint (other than those relating to the jurisdiction of the District Court over it and the subject matter, solely for purposes of this action), Wells Fargo Bank consented to the entry of the Injunction and other relief, including disgorgement and civil monetary penalties.

[2] U.S. Securities and Exchange Commission v. Wells Fargo Bank, N.A., Case No. 2:11-cv-07135-WJM-MF (D.N.J. Dec. 9, 2011).

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security, or in connection with activities as an underwriter, broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company or BDC or a principal underwriter for any registered open-end investment company, registered UIT, or registered face-amount certificate company or as investment adviser of an ESC. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include, among others, any person directly or indirectly controlling, controlled by, or under common control, with the other person. Applicants state that Wells Fargo Bank is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3) of the Act. Applicants state that, as a result of the Injunction, they would be subject to the prohibitions of section 9(a) of the Act.

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) of the Act if it is established that these provisions, as applied to the Applicants, are unduly or disproportionately severe or that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting them and other Covered Persons from the disqualification provisions of section 9(a).

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and

disproportionately severe and that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the alleged conduct giving rise to the Injunction did not involve any of the Applicants engaging in Fund Service Activities. Applicants also state (i) none of the current or former directors, officers, or employees of the Applicants (other than Wells Fargo Bank) had any knowledge of, or had any involvement in, the conduct alleged in the Complaint to have constituted the violations that provided a basis for the Injunction; (ii) the personnel at Wells Fargo Bank who were involved in the conduct that constituted the violations that provided a basis for the Injunction have had no, and will not have any future, involvement in providing Fund Service Activities to the Funds on behalf of the Applicants or other Covered Persons; and (iii) because the personnel of the Applicants (other than Wells Fargo Bank) did not have any involvement in the alleged misconduct, shareholders of Funds that received Fund Service Activities from the Applicants were not affected any differently than if those Funds had received services from any other non-affiliated investment adviser, depositor or principal underwriter.

5. Applicants state that the inability of the Applicants to engage in Fund Service Activities would result in potentially severe financial hardships for the Funds they serve and the Funds' shareholders. Applicants state that they will distribute written materials, including an offer to meet in person to discuss the materials, to the boards of directors of the Funds (the "Boards"), including the directors who are not "interested persons," as defined in section 2(a)(19) of the Act, of such Funds, and their independent legal counsel as defined in rule 0-1(a)(6) under the Act, if any, describing the circumstances that led to the Injunction, any impact on the Funds, and the application. Applicants state that they will provide the Boards with the

information concerning the Injunction and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also state that, if they were barred from providing Fund Service Activities to registered investment companies, BDCs and ESCs, the effect on their businesses and employees would be severe. Applicants state that they have committed substantial resources to establish an expertise in providing Fund Service Activities. Applicants further state that prohibiting them from providing Fund Service Activities would not only adversely affect their businesses, but would also adversely affect more than 1600 employees that are involved in those activities.

7. Applicants state that Applicants and certain other affiliated persons of the Applicants have previously received orders under section 9(c) of the Act, as the result of conduct that triggered section 9(a), as described in greater detail in the application.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order:

The Commission has considered the matter and finds that the Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

IT IS HEREBY ORDERED, pursuant to section 9(c) of the Act, that Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a), solely with respect to the Injunction, subject to the condition in the application, from December 9, 2011, until the Commission takes final action on their application for a permanent 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. 65937 / December 12, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-13263

In the Matter of **STEPHEN R. MOYNAHAN,** **Respondent.**	**ORDER DISCHARGING PLAN ADMINISTRATOR AND TERMINATING FAIR FUND**

On February 2, 2009, the Securities and Exchange Commission (the "Commission") published a Notice of Proposed Distribution Plan and Opportunity for Comment (the "Plan of Distribution") in connection with this proceeding (Exchange Act Release No. 59339). The Plan of Distribution proposed that the funds be distributed pro-rata to the four victimized school districts that constituted Eligible Investors. No comments were received, and on April 9, 2009 the Plan of Distribution was approved (Exchange Act Release No. 59693). On November 30, 2009, the Commission issued an order directing the disbursement of the Fair Fund consisting of $136,951.00 (Exchange Act Release No. 61069). On or about December 10, 2009, those funds were disbursed to the four (4) Eligible Investors in this matter. After the distribution, $131.88 in residual funds remains.

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 of Distribution, all tax obligations have been satisfied and the $131.88 in residual funds have been transmitted to the U.S. Treasury.

Accordingly, IT IS ORDERED the Fair Fund is terminated.

IT IS FURTHER ORDERED THAT the Plan Administrator is discharged.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Lynn M. Powalski
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

Release No. 34-65942; File No. S7-38-11

RIN 3235-AL04

Prohibition Against Conflicts of Interest in Certain Securitizations

AGENCY: Securities and Exchange Commission

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Securities and Exchange Commission is extending the comment period for a release proposing a new rule to implement Section 621 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") on material conflicts of interest in connection with certain securitizations (the "ABS Conflicts Proposal"). The original comment period for the ABS Conflicts Proposal is scheduled to end on December 19, 2011. The Commission is extending the time period in which to provide the Commission with comments on the ABS Conflicts Proposal until January 13, 2012. This action will allow interested persons additional time to analyze the issues and prepare their comments.

DATES: Comments should be received on or before January 13, 2012.

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

Electronic Comments:

Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-38-11 on the subject line; or
- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-38-11. 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 Internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F 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: Elizabeth Sandoe, Senior Special Counsel, Anthony Kelly, Special Counsel, or Barry O'Connell, Attorney Advisor, Office of Trading Practices, 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.

SUPPLEMENTARY INFORMATION: The Commission has requested comment on Proposed Rule 127B under the Securities Act of 1933 ("Securities Act") in the ABS Conflicts Proposal to implement Section 621 of the Dodd-Frank Act.[1] 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

[1] Exchange Act Release No. 34-65355 (September 19, 2011), 76 FR 60320 (September 28, 2011).

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. The ABS Conflicts Proposal was published in the Federal Register on September 28, 2011.

The Commission originally requested that comments on the ABS Conflicts Proposal be received by December 19, 2011, including comment about any potential interplay[2] between Proposed Rule 127B and the "Volcker Rule Proposal."[3] The Volcker Rule Proposal would implement Section 619 of the Dodd-Frank Act concerning prohibitions and restrictions on proprietary trading and certain interests in, and relationships with, hedge funds and private equity funds. The Volcker Rule Proposal was published in the Federal Register on November 7, 2011 and the comment period for that proposal ends on January 13, 2012.

In an effort to provide the public with a better opportunity to consider any potential interplay between the ABS Conflicts and Volcker Rule Proposals, the Commission has determined to provide the public additional time to consider simultaneously the ABS Conflicts Proposal and the Volcker Rule Proposal. This extended opportunity to submit comprehensive comments regarding the ABS Conflicts Proposal and any potential interplay with the Volcker Rule Proposal would benefit the Commission in its consideration of any final rules. Therefore, the Commission is extending the comment period for the ABS Conflicts Proposal to January 13,

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[2] See, e.g., 76 FR 60320, 60341.

[3] Exchange Act Release No. 34-65545 (October 12, 2011), 76 FR 68846 (November 7, 2011).

2012, to coincide with end of the Volcker Rule Proposal's comment period. The Commission would consider a further extension of the ABS Conflicts Proposal comment period if the Volcker Rule Proposal comment period were extended beyond January 13, 2012.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

December 13, 2011

Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65950 / December 14, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3344 / December 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14339

In the Matter of Kempisty & Company, Certified Public Accountants, P.C., Philip C. Kempisty, CPA, and John Anthony Rubino, CPA, Respondents.	ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e)(1)(ii) AND (iii) OF THE COMMISSION'S RULES OF PRACTICE

I.

On April 8, 2011, the Securities and Exchange Commission ("Commission") issued an Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934 and Public Administrative Proceedings pursuant to Section 4C[1] of the Securities Exchange Act of 1934 and Rule 102(e)[2] of the Commission's Rules of

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1 Section 4C provides, in relevant part, that:

The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

2 Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may...deny, temporarily or permanently, the privilege of appearing or practicing before it...to any person who is found...to have engaged in unethical or improper professional conduct.

Rule 102(e)(1)(iii) provides, in pertinent part, that:

Practice, and Notice of Hearing against Kempisty and Company, Certified Public Accountants, P.C. ("Kempisty & Company"), Philip C. Kempisty, CPA ("Kempisty") and John Anthony Rubino, CPA ("Rubino") (collectively, "Respondents").

II.

Respondents have each submitted an Offer of Settlement ("Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e)(1)(ii) and (iii) of the Commission's Rules of Practice ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[3] that:

A. SUMMARY

These proceedings arise out of quarterly reviews and an audit performed by Kempisty & Company of the financial statements of its client, Kentucky Energy, Inc. ("Kentucky Energy"),[4] for the year ended December 31, 2005. In these financial statements, Kentucky Energy improperly accounted for warrants and convertible notes it had issued to third parties. Kempisty & Company rendered an unqualified report stating that, in the firm's opinion, the financial statements presented fairly the financial position of the company in conformity with[5] generally accepted accounting principles ("GAAP"). In fact, the financial statements were not presented in conformity with GAAP and the resulting errors were material. Moreover, the firm failed to comply with Public Company Accounting Oversight Board (the "Board") auditing standards ("AU")[6] in carrying out the relevant audits and reviews.

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.

[3] 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.

[4] The company was named Quest Minerals and Mining Corp. during the relevant time.

[5] The Kempisty & Company report did contain an explanatory paragraph describing substantial doubt about the entity's ability to continue as a going concern and an emphasis of matter paragraph describing that potential adverse rulings in ongoing litigation could result in a loss of the company's operating assets.

[6] "AU" refers to the specific sections of the codification of the American Institute of Certified Public Accountants ("AICPA") professional standards, known as the Statements on Auditing Standards, as issued by the Auditing Standards Board of the AICPA. These standards have been adopted by the Board following passage of the Sarbanes-Oxley Act of 2002. References in this order are to the standards in effect at the time of the relevant conduct.

B. RESPONDENTS

1. **Kempisty & Company, Certified Public Accountants, P.C.** is an audit firm with offices in New York City. It is a public accounting firm registered with the Board. Kempisty & Company was the independent auditor for Kentucky Energy at all relevant times from 2003 until the company dismissed it on February 13, 2009.

2. **Philip C. Kempisty**, CPA, 62, is the founding partner and majority shareholder of Kempisty & Company, an audit firm with offices in New York City. He has been licensed as a CPA in the state of New York since 1974. Kempisty & Company was the independent auditor for Kentucky Energy at all relevant times from 2003 until the company dismissed it on February 13, 2009. During the relevant period its partners were Kempisty and John Anthony Rubino, CPA ("Rubino"). Kempisty's current accounting practice involves tax preparation, accounting services and other private company and individual audit services.

3. **John Anthony Rubino, CPA,** 68, had been employed with Kempisty & Company since 1989. He has an undergraduate degree from Pace University in New York City and is licensed as a CPA in the states of New York and Nevada. Rubino continues to practice public accounting through a professional corporation, John Anthony Rubino & Co., CPA, P.C. but no longer has clients that are registered with or reporting to the Commission. Rubino has no disciplinary history related to his accounting work. On the Kentucky Energy audit and reviews discussed in this memorandum, Rubino acted as engagement partner.

C. FACTS

Issuance of convertible notes and warrants by Kentucky Energy

1. Kentucky Energy's 2005 financial statements, like those for the preceding year, were prepared by a consultant to the company. This consultant's father was the Vice President, Secretary and a director of Kentucky Energy. Kempisty and Rubino had no specific knowledge of the consultant's education or experience in accounting.

2. Beginning in 2004 and continuing into 2005, Kentucky Energy obtained a series of loans from third parties evidenced by notes convertible into common stock.[7] As an additional incentive to the lenders, Kentucky Energy issued warrants along with each note. Kentucky Energy's consultant needed to account for warrants for the first time in preparing the company's financial statements for inclusion in its Form 10-KSB for the year ended December 31, 2004. Rubino had never previously dealt with the issue of

[7] One series of notes issued during 2005 was not convertible and one note did not have warrants attached, however.

how to account for warrants or a beneficial conversion feature of a convertible note, both of which are derivatives.

Improper accounting for warrants and beneficial conversion feature

3. Rubino told the consultant that he would need to value the warrants using the Black-Scholes option pricing model. Accordingly, the consultant found a Black-Scholes calculator on the internet. This calculator called for him to fill in variables for the warrants' "equity price," "strike price," "volatility," "riskless interest rate," and "time to maturity," and would then generate a Black-Scholes valuation. For "volatility" and "interest rate," however, the consultant simply inserted the generic numbers provided as an example by the website, rather than calculate the actual volatility of Kentucky Energy stock and determine the real riskless interest rate. In fact, Kentucky Energy's stock price was far more volatile than that listed in the website example.

4. Using this method, the consultant arrived at a value for the warrants issued during the last quarter of 2004. He recorded that value as an expense on the company's statement of operations and sent his draft financial statements to Kempisty & Company.

5. Rubino, however, contacted the consultant and told him that he should have recorded the warrant valuation as an asset on the company's balance sheet, rather than as an expense on its statement of operations, and that he should then have amortized that amount over the life of the underlying convertible notes. Not only was this accounting treatment incorrect, but both Rubino and the consultant ignored the necessity to provide for the beneficial conversion feature of the notes.

6. In fact, accounting for the warrants in accordance with GAAP required that the proper inputs be used in the Black-Scholes option pricing model. Kentucky Energy should have allocated the loan proceeds first to the notes and the warrants; and then, from the portion allocated to the notes, reallocated that to the notes and the beneficial conversion feature of the notes. The amount of proceeds allocable to the warrants and the beneficial conversion feature would be accounted for as paid-in-capital and as a discount to the face amount of the note. The note should have been recorded net of this discount on the balance sheet and the discount should have been amortized to interest expense in the statement of operations over the life of the notes.

7. Rubino testified that he did not know what the consultant's accounting background was, or whether he was familiar with GAAP. Even after he decided that the consultant's first set of financial statements was incorrectly prepared, Rubino took no further steps to verify the consultant's competence.

GAAP failures

8. For the first quarter of 2005, using the same methodology established in 2004, the consultant arrived at a value of $15,694,422 for the warrants, and that amount less amortization of $1,881,139, or $13,813,283 was recorded as an asset on the

company's balance sheet. In the subsequent quarters of 2005, the consultant continued to calculate the warrant valuation improperly and to record it as an asset which, for each of the first two quarters, amounted to over 60% of Kentucky Energy's total assets. On the company's statements of operations, the warrant amortization expense increased correspondingly, and on its 2005 year-end statement of operations amounted to 70% of Kentucky Energy's net loss. Throughout this period, the consultant continued to fail to consider the effect of the beneficial conversion feature of the promissory notes. The combined valuation of the warrants and the beneficial conversion features should not have exceeded the proceeds the company had received from the notes, which amounted to $1,875,000 at the end of the first quarter and $3,105,000 at the end of 2005, and they should not have been recorded as an asset.

9. For its year ended December 31, 2005, as a result of its improper accounting for the warrants and convertible notes, Kentucky Energy recorded the warrant asset in the amount of $3,097,903 on its balance sheet, reflecting the ensuing quarters' amortization as an expense on its statements of operations. In so doing, the company overstated total assets by 43% and overstated its net loss by 197%. It also materially overstated paid-in capital, retained deficit, shareholders' equity and expenses. This improper accounting was material to balance sheets and statements of operations contained in its quarterly filings for 2005 as well. For example, its assets were overstated by approximately $13.8 million, or 213%, in the financial statements contained in its Form 10-Q for the first quarter of 2005 and its net loss was overstated by approximately 174% for the second quarter of 2005.

Audit and Reviews

10. Kempisty & Company conducted quarterly reviews and a year-end audit of Kentucky Energy's financial statements for the 2005 year. In the report filed with the Form 10-KSB filed by the company on May 9, 2006, Kempisty & Company stated that the financial statement presented fairly the financial position of the company at December 31, 2005. On these engagements, Rubino was the engagement partner and Kempisty was the concurring review partner. They were the only auditors who worked on this engagement, and in fact were the only partners and auditors in the firm at the time.

The Board's auditing standards failures by Rubino as the engagement partner

Lack of training and proficiency

11. Rubino lacked the necessary training and proficiency as an auditor to properly interpret the professional guidance under GAAP having to do with accounting for warrants and convertible notes. The workpapers reflect no analysis to support treating the warrants as assets on Kentucky Energy's balance sheet. Nevertheless, he sought no outside advice on these issues. In fact, Rubino did not realize that in accounting for the warrants he was dealing with derivative instruments requiring a careful analysis for proper accounting.

12. The Board's auditing standards require that the audit be performed by "a person or persons having adequate technical training and proficiency as an auditor." AU § 210.01. The Board's Auditing Standards further require that "[t]he auditor with final responsibility for the engagement should know, at a minimum, the relevant professional accounting and auditing standards . . . ." AU § 230.06.

Failure to exercise due professional care and skepticism and to obtain sufficient competent evidential matter

13. Rubino also failed to obtain and sufficiently examine, read and understand all of the underlying documents evidencing the note/warrant transactions. The workpapers did not contain copies of all the relevant agreements underlying the convertible note financings. There is no evidence that Rubino evaluated this documentation to understand how the transactions should be accounted for under GAAP.

14. Rubino knew that Kentucky Energy's consultant had limited knowledge of accounting and GAAP, yet he failed to review in sufficient detail the Black-Scholes assumptions and analysis the consultant had used, therefore failing to discover that he had merely used the generic volatility and interest rate numbers off the website rather than obtain the correct numbers for Kentucky Energy.

15. The Board's auditing standards require that "[d]ue professional care is to be exercised in the planning and performance of the audit and the preparation of the report." AU § 230.01. Among other things, due professional care requires that an auditor exercise professional skepticism, defined as "an attitude that includes a questioning mind and a critical assessment of audit evidence." AU § 230.07. Gathering and objectively evaluating audit evidence requires the auditor to consider the competency and sufficiency of the evidence. AU § 230.08. In exercising professional skepticism, the auditor should not be satisfied with less than persuasive evidence because of a belief that management is honest. AU § 230.09.

16. The Board's auditing standards also require that "[s]ufficient competent evidential matter is to be obtained through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under audit." AU § 326.01. To be competent, evidence, regardless of its form, must be both valid and relevant. AU § 326.21. In addition, the auditor should "recognize the possibility that the financial statements may not be fairly presented in conformity with generally accepted accounting principles ..." and should "consider relevant evidential matter regardless of whether it appears to corroborate or contradict the assertions in the financial statements." AU § 326.25. Management representations "are part of the evidential matter the independent auditor obtains, but they are not a substitute for the application of those auditing procedures necessary to afford a reasonable basis for an opinion regarding the financial statements under audit." AU § 333.02.

Failure to comply with relevant auditing standards regarding auditing of derivatives

17. In fact, the Board's auditing standards provide specific guidance to auditors in planning and performing auditing procedures for assertions about derivative instruments that are made in an entity's financial statements. AU§ 332. This guidance states that the auditor may need special skills or knowledge to plan and perform auditing procedures for certain assertions about derivatives and securities. AU§ 332.05.

18. Rubino failed to, among other things:

- Understand the application of generally accepted accounting principles for assertions about derivatives (AU§ 332.05)
- Understand the determination of fair value of derivatives, including the reasonableness of key assumptions (AU§ 332.05 and AU§ 332.40)
- Alter its risk assessment and audit procedures based on the entity's inexperience with a derivative (AU§ 332.08)
- Obtain evidence supporting management's assertion about fair value of the derivative (AU§ 332.35) and
- Evaluate whether the presentation and disclosure of derivatives are in conformity with generally accepted accounting principles (AU§ 332.49).

Thus, Rubino failed to fulfill his responsibilities under the Board's auditing standards for auditing those instruments.

The Board's auditing standards review failures by Rubino as the engagement partner

19. In addition to the audit failures, Rubino failed to comply with the specific standards applicable to interim reviews of Kentucky Energy's 2005 quarterly financial statements. These standards, set forth in AU § 722, provide guidance on the nature, timing and extent of the procedures to be performed by an independent accountant when conducting a review of interim financial information.

20. The objective of a review of interim financial information is to provide the accountant with a basis for communicating whether he or she is aware of any material modifications that should be made to the interim financial information for it to conform with GAAP. AU § 722.07. The standards specifically require the accountant to perform certain procedures when conducting a review of interim financial information, including, but not limited to inquiring of management about unusual or complex situations that may have an effect on the interim financial information, and matters about which questions have arisen in the course of applying the review procedures and significant journal entries and other adjustments. AU § 722.18.

21. The unusual or complex situations, referred to in the above paragraph, specifically include the use of derivative instruments and unique terms for debt that could affect classification. AU § 722.55 (Appendix B). Rubino, however, did not give

adequate consideration to the analysis and classification of the derivative instruments recorded in the financial statements.

22. Finally, the same standards relating to adequate technical training and proficiency, due professional care and professional skepticism apply to reviews as well as audits. AU § 722.01. Therefore, Rubino's audit failures for Kentucky Energy's year ended December 31, 2005 apply equally to the quarterly reviews.

The Board's auditing standards failures by Kempisty as the concurring review partner

23. Kempisty, as the concurring review partner, was responsible for performing an objective review of significant auditing, accounting, and financial reporting matters that came to his attention, and was an integral part of the resolution of matters prior to the issuance of the firm's audit report. SEC Practice Section ("SECPS") §1000.39 (Appendix E).[8] On the basis of that review, Kempisty was required to conclude that no matters came to his attention that caused him to believe that the financial statements of Kentucky Energy were not in conformity with GAAP in all material respects, and that the firm's audit was performed in accordance with the standards of the Board.

24. Kempisty was required, among other things, to review documentation of the resolution of significant accounting, auditing and financial reporting matters. His review of the financial statements and management documentation should have alerted him to the mistakes in valuing and classifying the warrants.

25. Kempisty had additional specific responsibilities with respect to the concurring review of Kentucky Energy's interim financial statements. For a review conducted on interim financial information on financial statements in an SEC client's quarterly Form 10-Q or 10-QSB filing, a member firm's policies and procedures should require discussion with the concurring partner reviewer, prior to the completion of the review, about any matters identified in the review that involve a significant risk of material misstatement of the financial statements. Any such involvement should be documented. SECPS §1000.39 (Appendix E).

26. Although testimony indicates that Kempisty did discuss the warrant/convertible note accounting issue with Rubino, the workpapers for the interim reviews do not contain any documentation of such discussions nor of matters identified in the review that involve a significant risk of material misstatement of the financial statements.

27. Finally, as a general matter, Kempisty as concurring reviewer was required to have "sufficient relevant technical expertise and experience" to perform his

[8] This references concurring partner review standards set by the AICPA which were adopted by the Board following passage of the Sarbanes-Oxley Act of 2002. Kempisty & Company was a member of the SEC Practice Section of the AICPA from 1991until the formation of the Board, making it subject to these standards.

duties. SECPS §1000.39 (Appendix E). In this matter he was therefore required to have technical expertise and experience in the area of accounting for derivatives, including warrants and convertible notes. The standards also require that a concurring reviewer seek assistance from other individuals to supplement his knowledge when necessary.

28. As concurring reviewer for both the interim reviews and year-end audit, Kempisty lacked the expertise and experience necessary to understand that the instruments involved in the transactions were derivatives. He also failed to seek outside professional assistance to understand how to properly account for such items.

Misstatement in Audit Report

29. In this matter, Kempisty & Company's audit report falsely states that they conducted the audit in accordance with the standards of the Board, and that in its opinion the financial statements of Kentucky Energy were presented fairly, in all material respects, in conformity with accounting principles generally accepted in the United States of America. In fact, they were not.

D. VIOLATIONS

30. Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder require issuers with securities registered under Section 12 of the Exchange Act to file quarterly and annual reports with the Commission and to keep this information current. The obligation to file such reports embodies the requirement that they be true and correct. *See, e.g.*, *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979).

31. As discussed above, for the year ended December 31, 2005, Kempisty & Company, Kempisty and Rubino caused Kentucky Energy to file false and misleading quarterly and annual reports with the Commission that misrepresented the financial results of Kentucky Energy, overstating total assets and net loss. By their conduct described above, Kempisty & Company, Kempisty and Rubino willfully aided and abetted and caused Kentucky Energy's violations of Section 13(a) of the Exchange Act, and Rules 12b-20, 13a-1, and 13a-13 thereunder.

E. FINDINGS

1. Based on the foregoing the Commission finds that Kempisty & Company, Kempisty and Rubino willfully aided and abetted and caused Kentucky Energy's violations of Section 13(a) of the Exchange Act, and Rules 13a-1, 13a-13 and 12b-20 thereunder.

2. Based on the foregoing, the Commission finds that Kempisty & Company, Kempisty and Rubino engaged in improper professional conduct pursuant to Section 4C(a)(2) of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice, and willfully aided and abetted and caused Kentucky Energy's violation of the

federal securities laws, pursuant to Section 4C(a)(3) of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately that:

A. Respondents Kempisty & Company, Kempisty and Rubino shall cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1 and13a-13 promulgated thereunder.

B. Kempisty & Company, Kempisty and Rubino are denied the privilege of appearing or practicing before the Commission as an accountant.

C. After one year from the date of this Order, Kempisty may request that the Commission consider his reinstatement. After three years from the date of this Order, Rubino may request that the Commission consider his reinstatement.

D. Respondents Kempisty and Rubino may separately request that the Commission consider their 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 Kempisty's or Rubino'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. Kempisty or Rubino, or the public accounting firm with which he is associated, is registered with the Board in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

b. Kempisty or Rubino, 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. Kempisty and/or Rubino 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. Kempisty and/or Rubino acknowledges his responsibility, as long as that 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.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Chapter II

[Release Nos. 33-9284, 34-65960, 39-2482, IA-3336, IC-29886; File No. S7-43-11]

List of Rules to be Reviewed Pursuant to the Regulatory Flexibility Act

AGENCY: Securities and Exchange Commission.

ACTION: Publication of list of rules scheduled for review.

SUMMARY: The Securities and Exchange Commission is today publishing a list of rules to be reviewed pursuant to Section 610 of the Regulatory Flexibility Act. The list is published to provide the public with notice that these rules are scheduled for review by the agency and to invite public comment on them.

DATES: Comments should be submitted by [insert date 30 days after publication].

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 S7-43-11 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 No. S7-43-11. 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 also are available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. 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"), codified at 5 U.S.C. 600-611, requires an agency to review its rules that have a significant economic impact upon a substantial number of small entities within ten years of the publication of such rules as final rules. 5 U.S.C. 610(a). The purpose of the review is "to determine whether such rules should be continued without change, or should be amended or rescinded . . . to minimize any significant economic impact of the rules upon a substantial number of such small entities." 5 U.S.C. 610(a). The RFA sets forth specific considerations that must be addressed in the review of each rule:

- the continued need for the rule;
- the nature of complaints or comments received concerning the rule from the public;
- the complexity of the rule;
- the extent to which the rule overlaps, duplicates or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and

- the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. 5 U.S.C. 610(c).

The Securities and Exchange Commission, as a matter of policy, reviews all final rules that it published for notice and comment and, therefore, the list below is broader than that required by the RFA, and may include rules that do not have a significant economic impact on a substantial number of small entities. Where the Commission has previously made a determination of a rule's impact on small businesses, the determination is noted on the list. The Commission particularly solicits public comment on whether the rules listed below affect small businesses in new or different ways than when they were first adopted.

The rules and forms listed below are scheduled for review by staff of the Commission during the next twelve months. The list includes rules from 2000. When the Commission implemented the Act in 1980, it stated that it "intend[ed] to conduct a broader review [than that required by the RFA], 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).

List of Rules to be Reviewed

Title:	Rule 17f-7
Citation:	17 CFR 270.17f-7
Authority:	15 U.S.C. 80a-6(c), 80a-7(d), 80a-17(f), 80a-37(a)
Description:	Rule 17f-7 under the Investment Company Act of 1940 sets certain requirements for maintaining the assets of a registered management investment company with a foreign securities depository, including the requirement that the fund's contract with its global custodian must obligate the custodian to analyze and monitor the custody risks of using the depository and provide information about the risks to the fund or its adviser. If a custody arrangement with a securities depository no longer

meets the requirements of the rule, the assets must be withdrawn from the depository as soon as reasonably practicable.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC- 24424, which the Commission issued on April 27, 2000. Comments to the proposing release and any comments to the Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Revised Transfer Agent Form and Related Rule.

Citation: 17 CFR 240.17Ac2-2, 17 CFR 249b.102, 17 CFR 240.17a-24.

Authority: 15 U.S.C. 78a *et seq.*

Description: These rules amended Rule 17Ac2-2 and Form TA-2 under the Securities Exchange Act of 1934 ("Exchange Act") and rescinded Rule 17a-24 under the Exchange Act to obtain more comprehensive information from transfer agents about their activities while making Form TA-2 clearer and easier for transfer agents to complete.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34-42892, which was approved by the Commission on June 2, 2000. No comment in response to the initial regulatory flexibility analysis was received, and no comment specifically addressed that analysis. One commenter, however, indicated that the proposed amendments would not require significant modifications to existing procedures or systems. The Commission stated that the rule amendments, as adopted, would not have an additional significant economic impact on a substantial number of small entities.

* * * * *

Title: Rule 237

Citation: 17 CFR 230.237

Authority: 15 U.S.C. 77s(a), 77z-3

Description: Rule 237 under the Securities Act of 1933 ("Act") exempts from registration under the Act certain securities offered to individuals who reside in or are present in the United States, and who contribute to or receive the income and assets from a Canadian retirement account or sold to such accounts. Among other conditions, rule 237 requires written offering materials for these securities to disclose that the securities are not registered with the Commission and that the securities may not be offered or sold in the United States unless registered or exempt from registration.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC-24491, which was issued by the Commission on June 7, 2000. Comments to the proposing release and any comments to the Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 7d-2

Citation: 17 CFR 270.7d-2

Authority: 15 U.S.C. 80a-37(a)

Description: Rule 7d-2 under the Investment Company Act of 1940 excludes from the definition of "public offering" under the Act offerings of certain securities to natural persons who reside in or are present in the United States, and who contribute to or receive the income and assets from a Canadian retirement account or sales of certain securities to such accounts. Among other conditions, rule 7d-2 requires written offering materials for these securities to disclose that (i) the securities are not registered with the Commission and that the securities may not be offered or sold in the United States unless registered or exempt from registration and (ii) the investment company that issued the securities is not registered with the Commission.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC-24491, which was issued by the Commission on June 7, 2000. Comments to the proposing release and any comments to the Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Privacy of Consumer Financial Information (Regulation S-P).

Citation: 17 CFR Part 248.

Authority: 15 U.S.C. 6801 *et seq.*, 15 U.S.C. 78a *et seq.*, 15 U.S.C. 80a-1 *et seq.*, 15 U.S.C. 80b-1 *et seq.*

Description: Regulation S-P consists of rules that implemented, with respect to investment advisers registered with the Commission, brokers, dealers, and investment companies, provisions in Title V of the Gramm-Leach-Bliley Act requiring the provision of consumer financial privacy notices, restricting disclosures of nonpublic personal information, and mandating that the Commission establish standards to protect customer information.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 as summarized in Release No. 34-42974, which was approved by the Commission on June 22, 2000. No comment in response to the initial regulatory flexibility analysis was received, although commenters who addressed the proposed rules suggested that the Commission reduce compliance burdens by, among other things, providing model forms, providing additional examples, adding additional flexibility for providing initial privacy notices, and extending the rules' effective date. In response, the Commission provided an Appendix with sample clauses that could be used in privacy notices under appropriate circumstances, an extended compliance date to allow more time to comply and more opportunity to include initial notices with other mailings, an additional example permitting the householding of annual privacy notices with prospectuses or investor reports delivered under the Commission's householding rules, and revisions permitting the delivery of an initial notice within a reasonable time after establishing a customer relationship in two additional circumstances.

* * * * *

Title: Selective Disclosure and Insider Trading.

Citation: 17 CFR 243.100 – 103, 17 CFR 240.10b5-1 and 10b5-2.

Authority: 15 U.S.C. 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a-29, unless otherwise noted.

Description: These rules address the selective disclosure by issuers of material nonpublic information; when insider trading liability arises in connection with a trader's "use" or "knowing possession" of material nonpublic information; and when the breach of a family or other non-business relationship may give rise to liability under the misappropriation theory of insider trading. The rules are designed to promote the full and fair disclosure of information by issuers, and to clarify and enhance existing prohibitions against insider trading.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33-7881, approved by the Commission on August 15, 2000, which adopted Regulation FD and the related rules and revisions. Comments to the proposing release were considered at that time.

* * * * *

Title: Financial Statements and Periodic Reports for Related Issuers and Guarantors.

Citation: 17 CFR 210.3-10, 17 CFR 210.3-16, 17 CFR 240.12h-5, 17 CFR 249.220f.

Authority: 15 U.S.C. 77a *et seq.*, 15 U.S.C. 78a *et seq.*, 15 U.S.C. 80a-1 *et seq.*

Description: These rules provide financial reporting rules for related issuers and guarantors of guaranteed securities and provide an exemption from Exchange Act periodic reporting for subsidiary issuers and subsidiary guarantors of these securities.

Prior Commission Determination Under 5 U.S.C. 601: Pursuant to the Regulatory Flexibility Act (15 U.S.C. § 605(b)), the Chairman of the Commission certified at the proposal stage on February 26, 1999 in Release No. 33-7649 that the revisions to rules and forms would not have a significant economic impact on a substantial number of small entities. The Commission received no comments specifically addressing the certification.

* * * * *

Title: Unlisted Trading Privileges.

Citation: 17 CFR 240.12f-2(a).

Authority: 15 U.S.C. 78a *et seq.*

Description: This rule amended Rule 12f-2(a) under the Exchange Act to provide that a national securities exchange extending unlisted trading privileges to an initial public offering security listed on another exchange would no longer be required to wait until the day after trading had commenced on the listing exchange to allow trading in that security, but instead would be permitted to begin trading an initial public offering issue immediately after the listing exchange's reporting of the first trade in the security to the Consolidated Tape.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34-43217, which was approved by the Commission on August 29, 2000. No comment in response to the initial regulatory flexibility analysis was received, and no comment specifically addressed that analysis. Commenters did, however, offer support for the proposal on the basis that a one-day trading delay imposed a burden on competition. Based in part on comments, the Commission decided to adopt the rule amendment as proposed.

* * * * *

Title: Amendments to Rule 9b-1 Under the Securities Exchange Act of 1934 Relating to the Options Disclosure Document.

Citation: 17 CFR 240.9b-1.

Authority: 15 U.S.C. 78a *et seq.*

Description: The Commission adopted minor or technical amendments to Rule 9b-1 under the Exchange Act to revise certain language in the rule to better reflect the disclosure requirements regarding standardized options.

Prior Commission Determination Under 5 U.S.C. 601: Pursuant to 15 U.S.C. 605(b), the Chairman of the Commission certified at the proposal stage, on June 25, 1998, that the proposed amendments to Rule 9b-1 under the Exchange Act would not have a significant economic impact on a substantial number of small entities. The Commission received no comment specifically addressing the certification, and the Commission adopted the rule amendments substantially as proposed on October 19, 2000.

* * * * *

Title: Form ADV-NR

Citation: 17 CFR 279.4

Authority: 15 U.S.C. 77s(a), 15 U.S.C. 78w(a), 15 U.S.C. 77sss(a), 15 U.S.C. 78a-

37(a), and 15 U.S.C. 80b-3(c)(1), 80b-4, and 80b-11(a).

Description: Form ADV-NR is a form for the appointment of an agent for service of process by a non-resident general partner and non-resident managing agent of an investment adviser. Each non-resident general partner or managing agent of an investment adviser must file this form pursuant to rule 0-2 [17 CFR 275.0-2] under the Investment Advisers Act of 1940.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IA-1897, which was approved by the Commission on September 12, 2000. Comments to the proposing release and any comments to the Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Form ADV-H

Citation: 17 CFR 279.3

Authority: 15 U.S.C. 80b-3(c)(1), 80b-4, and 80b-11(a)

Description: An investment adviser must file Form ADV-H pursuant to rule 203-3 [17 CFR 275.203-3] under the Investment Advisers Act of 1940 to request a temporary hardship exemption or apply for a continuing hardship exemption from the requirement to make Advisers Act filings electronically with the Investment Adviser Registration Depository (IARD).

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IA-1897, which was approved by the Commission on September 12, 2000. Comments to the proposing release and any comments to the Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Delivery of Proxy Statements and Information Statements to Households.

Citation: 17 CFR 230.154, 17 CFR 240.14a-2 and 14a-3, 17 CFR 240.14a-7, 17 CFR 240.14a-101, 17 CFR 240.14b-1 and 14b-2, 17 CFR 240.14c-3, 17 CFR 240.14c-101.

Authority: 15 U.S.C. 77a *et seq.*, 15 U.S.C. 78a *et seq.*, 15 U.S.C. 80a-1 *et seq.*

Description: These amendments permit companies and intermediaries to satisfy the delivery requirements for proxy statements and information statements with respect to two or more security holders sharing the same address by delivering a single proxy statement or information statement to those security holders. These amendments also modify the rules for householding annual reports and permit householding of proxy statements combined with prospectuses.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7912, approved by the Commission on October 27, 2000, which adopted the amendments. Comments to the proposing release were considered at that time. The Commission received no comments on the Initial Regulatory Flexibility Analysis.

* * * * *

Title: Rule 203-3

Citation: 17 CFR 275.203-3

Authority: 15 U.S.C. 80b-3(c)(1) and 80b-11(a)].

Description: Rule 203-3 under the Investment Advisers Act of 1940 Advisers Act provides a temporary hardship exemption and a "continuing hardship exemption" from the requirement to make Advisers Act filings electronically with the Investment Adviser Registration Depository (IARD).

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IA-1897, which was approved by the Commission on September 12, 2000. Comments to the proposing release and any comments to the Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Disclosure of Order Routing Practices.

Citation: 17 CFR 240.11Ac1-5 and 240.11Ac1-6, *renumbered* 17 CFR 242.605 and 242.606.

Authority: 15 U.S.C. 78a *et seq.*

Description: The Commission adopted Rule 11Ac1-5 under the Exchange Act to require market centers that trade national market system securities to make available to the public monthly electronic reports that include uniform statistical measures of execution quality. It adopted Rule 11Ac1-6 under the Exchange Act to require broker-dealers that route customer orders in equity and option securities to make publicly available quarterly reports that, among other things, identify the venues to which customer orders are routed for execution, and, in addition, to disclose to customers, on request, the venues to which their individual orders were routed.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34-43590, which was approved by the Commission on November 17, 2000. No comment in response to the initial regulatory flexibility analysis was received, and no comment specifically addressed that analysis. Some commenters stated, however, that they believed compliance with the proposed rules, particularly Rule 11Ac1-5, could be significantly more burdensome for smaller firms than for large ones. The Commission did not agree that compliance with the rules would be unduly burdensome for firms considered small entities for purposes of the Regulatory Flexibility Act, particularly after the omission from the final rules of a proposed requirement of a narrative discussion and analysis of order routing objectives and results.

* * * * *

Title: Firm Quote and Trade-Through Disclosure Rules for Options.

Citation: 17 CFR 240.11Ac1-1, *renumbered* 17 CFR 242.602, and 11Ac1-7, *11Ac1-7 repealed December 27, 2002.*

Authority: 15 U.S.C. 78a *et seq.*

Description: The Commission amended Rule 11Ac1-1 under the Exchange Act to require options exchanges and options market makers to publish firm quotes and adopted Rule 11Ac1-7 under the Exchange Act to require a broker-dealer to disclose to its customer when its customer's order for listed options is executed at a price inferior to a better published quote and what that better quote was, unless the transaction was effected on a market that is a participant in an intermarket options linkage plan approved by the Commission.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34-43591, which was approved by the Commission on November 17, 2000. No comment in response to the initial regulatory flexibility analysis was received, and no comment specifically addressed that analysis.

* * * * *

Title: Revision of the Commission's Auditor Independence Requirements.

Citation: 17 CFR 210.2-01, 17 CFR 240.14a-101.

Authority: 15 U.S.C. 77c *et seq.*, 15 U.S.C. 78c *et seq.*, 15 U.S.C. 79e *et seq.*, 15 U.S.C. 80a *et seq.*

Description: The Commission amended Rule 2-01 in Regulation S-X and Item 9 in Schedule 14A under the Securities Exchange Act to modernize its guidance for determining whether an auditor is independent in light of investments by auditors (or the auditor's family members) in audit clients, employment relationships between auditors (or the auditor's family members) and audit clients, and the scope of services provided by audit firms to their audit clients.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33-7919, which was approved by the Commission on November 21, 2000. In response to multiple public comments, the Commission made modifications to reduce the impact of the new rules on small entities. In light of those modifications, the Commission concluded that the rules as adopted would not have a significant impact on a substantial number of small entities.

* * * * *

Title: Options Price Reporting Authority.

Citation: 17 CFR 240.11Aa3-2, *renumbered* 17 CFR 242.608.

Authority: 15 U.S.C. 78a *et seq.*

Description: The Commission adopted amendments to the Options Price Reporting Authority ("OPRA") Plan, a national market system plan approved by the

Commission pursuant to Section 11A of the Exchange Act and Rule 11Aa3-2 thereunder, to allocate, among the options exchanges, OPRA's peak period message handling capacity.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34-43621, which was approved by the Commission on November 27, 2000. The Commission received one comment directly relating to the initial regulatory flexibility analysis. The comment, from an OPRA participant exchange, stated that all its members would be affected if quotation capabilities were reduced and, as a result, small businesses would be impacted by the proposed OPRA Plan amendments because many of this commenter's members were small entities. Although the Commission included certain recommendations from commenters in the final OPRA Plan amendments, it did not believe that entities other than the OPRA participant exchanges, none of which was a small entity for purposes of the Regulatory Flexibility Act, would be directly affected by the amendments, or that the OPRA Plan amendments, as adopted, established any new reporting, recordkeeping, or compliance requirements for small entities.

By the Commission

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: December 15, 2011

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65961 / December 15, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14664

In the Matter of AHMED AWAN, 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 Ahmed Awan ("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 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. Awan is 39 years old and lives in Brooklyn, New York. From approximately August 2000 until November 2002, Awan was a registered representative associated with a series of broker-dealers.

2. On November 30, 2011, a judgment was entered by consent against Awan, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. OCC Holdings et al., 04 Civ. 1122, in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged, among other things, that, in 2002, while associated with a broker-dealer, Awan made material misrepresentations and omitted material facts in the sale of promissory notes to investors as part of a fraudulent scheme orchestrated by defendants Khurram Tanwir and Alan Labineri.

IV.

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

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

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

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65962 / December 15, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14665

In the Matter of

YAKOV KOPPEL,

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 Yakov Koppel ("Koppel" 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 finding 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. Koppel is 39 years old and lives in Brooklyn, New York. From approximately January 1994 to February 2004, Koppel was a registered representative associated with a series of broker-dealers.

2. On November 30, 2011, a judgment was entered by consent against Koppel, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. OCC Holdings et al., 04 Civ. 1122, in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged, among other things, that, in 2002, while associated with a broker-dealer, Koppel made material misrepresentations and omitted material facts in the sale of purported private placement securities and promissory notes to investors as part of a fraudulent scheme orchestrated by defendants Khurram Tanwir and Alan Labineri.

IV.

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

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

Chairman Schapiro
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3337 / December 15, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14666

In the Matter of **RETIREHUB, INC. and SUNIL K. BHATIA,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

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

II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

SUMMARY

This proceeding involves the making of statements that were untrue as to material facts and omissions of material facts on the uniform investment adviser application form, Form ADV, by RetireHub, an investment adviser registered with the Commission, and Sunil Bhatia, RetireHub's founder, chief executive officer, and chairman of the board. From at least May 7, 2003 to its withdrawal of registration on February 28, 2011, RetireHub's Form ADV inaccurately stated that it qualified for Commission registration, by stating that it was an "Internet investment adviser," a term that is specifically defined in Rule 203A-2(f) promulgated under the Advisers Act, and that it managed assets of more than $25 million.[1] In fact, RetireHub did not qualify as an Internet investment adviser and did not have $25 million in assets under management. RetireHub also overstated its number of accounts on Form ADV. Moreover, RetireHub failed to file its required annual amendments to Form ADV in 2004, 2006, 2007, and 2009.

RESPONDENTS

1. RetireHub.com was an investment adviser registered with the Commission from May 7, 2003 through February 28, 2011. RetireHub was formerly known as LTSave, Inc. and Invesra.

2. Sunil K. Bhatia was the founder, chief executive officer, and chairman of the board of RetireHub from at least 2003 to 2011. From October 1991 to September 1996, Bhatia was a vice president and registered representative of a broker-dealer/investment adviser registered with the Commission. From April 1998 to April 2001, he was the chief executive officer of a broker-dealer registered with the Commission. Bhatia, 53 years old, lives in Boston, Massachusetts.

RESPONDENTS MISREPRESENTED RETIREHUB'S QUALIFICATIONS TO REGISTER WITH THE COMMISSION, ITS ASSETS UNDER MANAGEMENT, ITS NUMBER OF ACCOUNTS, AND THE NATURE OF ITS SERVICES

3. Between 2003 and 2010, RetireHub and Bhatia filed with the Commission Forms ADV with various materially inaccurate statements, including false bases for registration with the Commission. All of RetireHub's Forms ADV inaccurately stated that it was an "Internet investment adviser," and certain of its Forms ADV also inaccurately stated that (a) it had more than $25 million in assets under management; (b) the firm had

[1] All references to Rule 203A-2(f) refer to the version of the rule in effect when the violations occurred. Effective September 19, 2011, the Commission renumbered Rule 203A-2(f) as Rule 203A-2(e), but otherwise did not amend the requirements for an Internet investment adviser.

almost 1,000 accounts; and (c) it provided continuous and regular supervisory or management services to those accounts.

4. In 2007, RetireHub obtained a contract with an employer group, a university. In this three-year contract, RetireHub was to provide retirement investment consulting services to the university's employees who enrolled in the university's 403(b) retirement plan. RetireHub's only clients came through this contract.

5. From May 7, 2003 through May 2, 2008, RetireHub's Form ADV filings claimed that the firm was eligible for investment adviser registration with the Commission because it was an "Internet investment adviser." To qualify as an Internet investment adviser, Advisers Act Rule 203A-2(f) requires that the adviser "provide investment advice to all of its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding twelve months."

6. Contrary to what it represented in its filings, RetireHub was not an Internet investment adviser because it did not provide investment advice exclusively through its website. Instead, RetireHub staff supplanted and overrode the investment advice generated by RetireHub's website and manually chose and executed trades in the accounts of its users. Additionally, RetireHub employed on-campus representatives at the university who provided investment advice to university employees. RetireHub provided investment advice in ways other than its website to more than the maximum of 14 people permitted under the Advisers Act rule.

7. RetireHub did not meet the definition of an Internet investment adviser from 2003 to 2007 because it was not providing investment advice to users through an interactive website during that period of time. It also did not meet the definition of an Internet investment adviser from 2007 to 2010 because it did not provide investment advice exclusively through a website, and advised more clients than permitted through face-to-face and telephone contacts. RetireHub was therefore not eligible for registration with the Commission on that basis.

8. At the time of the violations, Advisers Act Section 203A prohibited investment advisers from registering with the Commission unless they managed at least $25 million in assets or met a designated exemption.[2] Advisers Act, Sections 203A(a)(1)(A) & 203A(c). Advisers Act Section 203A(a)(2) defines "assets under management" as the "securities portfolios with respect to which an adviser provides

[2] Effective July 21, 2011, Advisers Act Section 203A generally prohibits an adviser that has assets under management between $25 million and $100 million from registering with the Commission. *See* Advisers Act Section 203A(a)(2) (amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act")); *Final Rule: Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 3221 (June 22, 2011).

continuous and regular supervisory or management services."[3] The instructions to Form ADV explain this definition and prescribe the method advisers must use to calculate assets under management. From February 25, 2008 through March 29, 2010, RetireHub's Form ADV filings listed assets under management greater than $25 million as a basis for SEC registration. In each of its filings during that time period, RetireHub stated that it had exactly $26 million in assets under management ($4 million in discretionary assets under management and $22 million in non-discretionary assets under management). RetireHub improperly included assets of account holders for whom RetireHub did not provide continuous and regular supervisory or management services. RetireHub did not have any assets that fit the definition of assets under management in the Form ADV instructions.

9. RetireHub included on its Forms ADV $22 million in non-discretionary assets under management that consisted of its "self-managed" accounts. In reality, for these accounts RetireHub merely made recommendations for investments and it was the client's responsibility to accept the recommendations or not, and to effect any purchases or sales of securities. The instructions for Form ADV provide general criteria and additional factors to consider in determining whether an adviser provides "continuous and regular supervisory or management services" to an advisory account and may, therefore, include the value of the securities portfolios in that account when calculating the adviser's assets under management. RetireHub did not meet the general criteria for non-discretionary accounts because it does not have ongoing responsibility to select or make investment recommendations <u>and</u> to effect or arrange for the purchase and sale of those investments if they are accepted by the client. Form ADV: Instructions for Part 1A, instr. 5.b. RetireHub also did not meet any of the additional factors provided in the instructions to Form ADV. Thus, RetireHub did not provide continuous and regular supervisory or management services to those accounts and was not entitled to include the $22 million value of the securities portfolios in those accounts as non-discretionary assets under management. Accordingly, RetireHub was not entitled to register with the SEC as an adviser with greater than $25 million in assets under management.

10. RetireHub's Forms ADV listed $4 million in discretionary assets under management that consisted of its "managed" accounts. In reality, RetireHub provided only investment rebalancing at the beginning of an account holder's use of the site and quarterly thereafter for these accounts. RetireHub did not provide the continuous and regular advisory services necessary to qualify its discretionary accounts as assets under management. Form ADV Instructions concerning "Continuous and Regular Supervisory or Management Services" state that "You <u>do not</u> provide continuous and regular supervisory or management services for an account if you: … (d) provide advice on an intermittent or periodic basis (such as... on a specific date (e.g., the account is reviewed and adjusted quarterly))." Form ADV: Instructions for Part 1A, instr. 5.b.(3). To be included as an adviser's assets under management, the account must receive continuous and regular supervisory or management services. Section 203A(a)(2); Form ADV: Instructions for Part

[3] All references to Advisers Act Section 203A(a)(2) refer to the version of the statute in effect when the violations occurred. Effective July 21, 2011, Advisers Act Section 203A(a)(2) was renumbered as Section 203A(a)(3), but the definition of "assets under management" was not amended. *See* Advisers Act Section 203A(a)(3) (amended by the Dodd-Frank Act).

1A, instr. 5.b. Thus, it was improper for RetireHub to count the $4 million in assets of these accounts toward assets under management.

11. Accordingly, none of the assets from RetireHub's accounts should have been counted toward its assets under management in its Form ADV filings. RetireHub never had $25 million or more in advisory assets under management and therefore was not eligible for registration on that basis.

12. RetireHub's Form ADV filings on May 7, 2003; May 13, 2003; February 25, 2008; May 2, 2008; and March 29, 2010, stated that RetireHub provided continuous and regular supervisory services to its clients in response to Part 1A, Item 5F(1). Those responses were untrue as to a material fact.

13. RetireHub listed inflated numbers of accounts on its Forms ADV filed on February 25, 2008; May 2, 2008; and March 29, 2010. On each of those Forms ADV, in Part 1A, Item 5F, it listed between 357 and 975 total accounts (26 of which were identified as discretionary accounts). Bhatia admitted that RetireHub included all of the people who had begun the internet registration process but had not completed it or given RetireHub access to their investment information and accounts, and that RetireHub had not given these people investment advice. Thus, RetireHub's Form ADV filings contained inaccurate information concerning the number of its accounts.

14. RetireHub did not file the required annual Form ADV amendments in 2004, 2006, 2007 and 2009.

15. As a result of the conduct described above, RetireHub willfully violated Section 203A of the Advisers Act by improperly registering with the Commission, and Bhatia willfully aided and abetted and caused RetireHub's violations.

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

17. As a result of the conduct described above, RetireHub willfully violated Section 204 of the Advisers Act and Rule 204-1 thereunder by failing to file annual amendments to RetireHub's Form ADV, and Bhatia willfully aided and abetted and caused RetireHub's violations.

IV.

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

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

A. Respondents RetireHub and Bhatia cease and desist from committing or causing any violations and any future violations of Sections 203A, 204, and 207 of the Advisers Act and Rule 204-1 promulgated thereunder.

B. Respondents RetireHub and Bhatia are censured.

C. Respondent Bhatia shall pay a civil money penalty in the amount of $25,000 to the United States Treasury. Respondent Bhatia shall satisfy this obligation by paying (1) $6,250 within ten (10) business days from the entry of this Order; (2) $6,250 within 90 days from the entry of this Order; (3) $6,250 within 180 days from the entry of this Order; and (4) $6,250 within 270 days from 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 31 U.S.C. § 3717, shall be due and payable immediately, without further application. 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 Bhatia as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and wire transfer, money order or check shall be sent to John T. Dugan, Associate Regional Director, Division of Enforcement, United States Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, Boston, MA 02110.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65982 / December 15, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3339 / December 15, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14668

In the Matter of KEVIN KING, Respondent.	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Kevin King ("King" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. King, age 56, resides in Freehold, New Jersey. From May 1997 to January 2005, he was a securities lending representative associated with Van der Moolen Specialist USA, LLC ("VDM"), a broker-dealer registered with the Commission, and from June 2006 to September 2008 he was a securities lending representative associated with KDC Merger Arbitrage Fund, LP, a broker-dealer and investment adviser registered with the Commission.

2. On July 21, 2009, King pled guilty to one count of conspiracy to commit securities and wire fraud in violation of Title 18 United States Code, Section 1349 before the United States District Court for the Eastern District of New York, in United States v. Kevin King, Crim. No. 09-464.

3. The count of the criminal information to which King pled guilty alleged, inter alia, that King knowingly and intentionally conspired to execute a scheme to defraud VDM and others by means of false and fraudulent pretenses, representations and promises, and to deprive VDM and others of the right to honest services of their employees, in connection with securities of issuers with a class of securities registered under Section 12 of the Exchange Act.

IV.

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

Accordingly, it is hereby ORDERED that pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent King be, and hereby is barred from association with any broker, dealer, or investment adviser.

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

Chairman Schapiro
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65981 / December 15, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3338 / December 15, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14667

In the Matter of

KENNETH SUAREZ,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Kenneth Suarez ("Suarez" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Suarez, age 60, resides in Staten Island, New York. From September 2003 to May 2007, he was a securities lending representative with Schonfeld Securities, LLC ("Schonfeld"), a broker-dealer registered with the Commission, and from August 2007 to April 2009 he was employed as a securities lending representative with Wedbush Morgan Securities, Inc., a broker-dealer and investment adviser registered with the Commission.

2. On October 3, 2008, Suarez pled guilty to two counts of conspiracy to commit securities and wire fraud in violation of Title 18 United States Code, Sections 1348 and 1349 before the United States District Court for the Eastern District of New York, in United States v. Ken Suarez, Crim. No. 08-337. He was sentenced to serve 5 years probation and ordered to make restitution in the amount of $391,187.

3. The counts of the criminal information to which Suarez pled guilty alleged, inter alia, that Suarez knowingly and intentionally conspired to execute a scheme to defraud Schonfeld and others by means of false and fraudulent pretenses, representations and promises, and to deprive Schonfeld and others of the right to honest services of their employees, in connection with securities of issuers with a class of securities registered under Section 12 of the Exchange Act.

IV.

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

Accordingly, it is hereby ORDERED that pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Suarez be, and hereby is barred from association with any broker, dealer, or investment adviser.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65983 / December 15, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14669

In the Matter of RONALD GARCIA, 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 Ronald Garcia ("Garcia" 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. Garcia, age 63, resides in Hudson, New York. From June 2006 to November 2007, he was a securities lending representative associated with Strong City Securities, LLC, a broker-dealer registered with the Commission.

2. On December 22, 2009, Garcia pled guilty to one count of conspiracy to commit securities fraud in violation of Title 18 United States Code, Section 1349 before the United States District Court for the Eastern District of New York, in United States v. Ronald Garcia, et. al., Crim. Indictment No. 08-CR-675. He was sentenced to 3 years probation, 150 hours of community service and ordered to make restitution in the amount of $300,422.

3. The count of the criminal indictment to which Garcia pled guilty alleged, inter alia, that Garcia did knowingly and intentionally conspire to execute a scheme and artifice to defraud and obtain money and property from Schonfeld Securities, LLC (Schonfeld) and others by means of false and fraudulent pretenses, representations and promises, and to deprive Schonfeld and others of its right to honest services of its employees, in connection with securities of issuers with a class of securities registered under Section 12 of the Securities Exchange Act of 1934.

IV.

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

Accordingly, it is hereby ORDERED:

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro,
Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65998 / December 16, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29887 / December 16, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14324

In the Matter of Capital Financial Services, Inc. and Brian W. Boppre Respondents.	ORDER MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AS TO BRIAN W. BOPPRE

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to enter this Order Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") as to Brian W. Boppre ("Respondent" or "Boppre").

II.

Following the institution of these proceedings on April 6, 2011, 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 as to Brian W. Boppre ("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 Capital Financial Services, Inc.'s failure to perform reasonable due diligence on numerous private placement offerings prior to recommending them to customers where the offerings turned out to be a classic Ponzi scheme and offering fraud.

Respondent

1. Respondent was the president and a registered principal at Capital Financial Services, Inc. ("Capital Financial"), a broker-dealer registered with the Commission from October 2008 until July 2010. Respondent, 47 years old, is a resident of Minot, North Dakota.

Other Relevant Entities

2. Capital Financial is a wholly owned subsidiary of Capital Financial Holdings, Inc., and has been registered with the Commission and a member of the NASD (now FINRA) since 1980. Capital Financial operates as a general securities broker-dealer and is headquartered in Minot, North Dakota. Capital Financial has a network of approximately 273 offices housing over 332 registered representatives. The majority of Capital Financial's revenue is generated from the sale of mutual funds, variable insurance products, and private placements.

3. Provident Royalties, LLC ("Provident") was a Delaware limited liability company with its principal offices in Dallas, Texas. Provident purportedly invested in oil and gas extraction interests through a group of 23 affiliated entities (collectively the "Provident Rule 506 Entities"). Provident is a beneficial owner in each of the Provident Rule 506 Entities. On June 22, 2009, Provident and 26 affiliated entities filed a voluntary petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of Texas. Provident is currently in receivership.

4. Provident Asset Management, LLC ("PAM") was a Delaware limited liability company which was registered with the Commission as a broker-dealer since March 9, 2004. PAM was the managing broker-dealer for the Provident offerings and exclusively sold the Provident Rule 506 Entity offerings. Capital Financial entered into a selling agreement with PAM for each Provident offering. FINRA expelled PAM from membership on March 18, 2010. PAM is currently in receivership.

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

5. Provident Rule 506 Entities ("Provident offerings") were a series of companies that have effected private placements claiming exemption from registration of the offered securities under Rule 506 of Regulation D. The offerings sold by Capital Financial included the following companies: Provident Energy 1, LP; Provident Energy 2, LP; Provident Energy 3, LP; Shale Royalties II, Inc.; Shale Royalties 3, LLC; Shale Royalties 4, Inc.; Shale Royalties 5, Inc.; Shale Royalties 6, Inc.; Shale Royalties 7, Inc.; Shale Royalties 9, Inc.; Shale Royalties 12, Inc.; Shale Royalties 14, Inc.; Shale Royalties 17, Inc.; Shale Royalties 18, Inc. The entities are headquartered in Provident's offices in Dallas, Texas. All the Provident Entities are controlled by a court-appointed receiver.

Background

6. From at least September 2006 through January 2009, Capital Financial marketed, recommended to investors, and sold Provident preferred stock and limited partnership interests in a series of 14 private placements. The Provident offerings each claimed an exemption from registration of its offering pursuant to Rule 506 of Regulation D of the federal securities laws. The Provident offerings designated as Shale Royalties, Inc., numbered II through 18, offered two series of non-convertible redeemable cumulative preferred stock, while the offerings designated as Provident Energy, LP, numbered 1 through 3 offered limited partnership interests. The promised return on the Provident offerings was between 15%-18% per year depending on the term.

7. Provident Royalties' purported business plan included the acquisition of a combination of producing and non-producing sub-surface oil and gas mineral interests, working interests and real property located within the United States. According to the Provident offerings' Private Placement Memoranda ("PPM"), selling broker-dealers were paid commissions ranging from 5% to 9%. The sales commission varied by the offering, and by share class, with the longer term, Class A share class, paying a larger sales commission. Each PPM, with the exception of Provident Energy 1 and Provident Energy 3, disclosed the selling broker-dealer would be paid a 1% due diligence fee in addition to the sales commission.

8. Although a portion of the proceeds of the Provident offerings were used for the acquisition and development of oil and gas activities, millions of dollars of investor funds were transferred from the later Provident offerings' bank accounts to the Provident Royalties' operating account and then used for undisclosed and, often, undocumented loans to earlier Provident offerings. The loan proceeds were then used to pay dividends and returns of capital to investors in earlier Provident offerings in a classic Ponzi scheme.

9. Boppre participated in Capital Financial's due diligence process. Boppre was responsible for reviewing new offerings and had the authority to approve the Provident offerings for Capital Financial to recommend to investors. Boppre received assistance conducting due diligence from Jeffrey A. Lindsey ("Lindsey"), senior vice president and due diligence officer at Capital Financial until June 15, 2010.

10. Capital Financial was first introduced to Provident during the summer of 2006 by Darren Gibson ("Gibson"), a Provident wholesaler employed by PAM. Gibson provided Lindsey with a Provident PPM and other offering materials. Lindsey had no experience or background in the oil and gas industry.

11. On August 24, 2006, PAM paid Lindsey's expenses to conduct an on-site "due diligence" visit to Provident's Dallas offices. While at Provident, Lindsey met with Provident's principals, Gibson, various Provident land men, and a Provident geologist. The meeting consisted of a presentation of Provident's business plan, followed by a question and answer session. Lindsey also took a tour of the Provident offices. Lindsey did not receive any financial information or review any of the books or records of Provident during his visit. Boppre reviewed the materials provided to Capital Financial by Provident.

12. On September 20, 2006, Capital Financial signed its first selling agreement with PAM for Shale Royalties, II ("Shale II"). Lindsey and Boppre approved Shale II based on the offering materials received from PAM, Lindsey's on-site visit, and the knowledge that other broker-dealers were selling the Provident offerings. Boppre and Lindsey eventually approved fourteen Provident offerings for sale by Capital Financial, even though they had no experience in the oil and gas industry, they only reviewed documents provided by PAM, Lindsey only visited PAM on two occasions to meet with PAM representatives and listen to a presentation on the offerings, and they had performed no independent investigation of any of the Provident offerings.

13. Capital Financial, through its registered principal, Boppre, failed to conduct due diligence on the Provident offerings sufficient to establish reasonable basis suitability before recommending the securities to its customers. Capital Financial never independently investigated any of the information in the offering materials provided by Provident. Capital Financial also never received audited or even unaudited financial statements for any of the Provident offerings. The only financial information Capital Financial received regarding Provident was an unaudited consolidated balance sheet review. However, even the unaudited consolidated balance sheet reviews were not included in the materials Capital Financial received until Shale Royalties 9. Capital Financial received this limited financial information after it approved the recommendation and sale to investors of the Provident offerings covered in those reports.

14. As each Provident offering became fully subscribed, Capital Financial signed selling agreements with PAM for later Provident offerings. In total, Capital Financial recommended and sold fourteen different Provident offerings between September 2006 and January 26, 2009 when Provident suspended sales. Lindsey and Boppre approved each Provident offering for Capital Financial registered representatives to recommend and sell to Capital Financial customers.

15. Capital Financial registered representatives placed approximately 1,087 Provident trades for roughly $63,000,000. Capital Financial was typically paid an 8% sales commission plus a 1% due diligence fee on the amount of subscription proceeds. This resulted in Capital

Financial receiving over $5,000,000 in sales commissions, and over $600,000 in due diligence fees on the Provident offerings.

16. Capital Financial's due diligence process for each successive Provident offering was similar to the process for Shale II. For each new Provident offering, Capital Financial received a due diligence packet from PAM. The packet typically contained; a lead broker-dealer bio, certificate of insurance, PPM, certificate of incorporation, corporate bylaws, prior activities, escrow agreement, investor subscription agreement, managing broker dealer agreement, soliciting broker dealer agreement, Form D, news articles, general industry geology reports regarding U.S. shale plays, sample mineral deed, and contact information. Lindsey did not visit Provident before approving each successive Provident offering. Capital Financial did not receive information from any other source before approving any Provident offering.

17. To assist with promoting the Provident offerings, PAM retained the third-party due diligence law firm, Mick & Associates, PC ("Mick") to draft a third-party due diligence report ("Mick report") on each Provident offering. Provident paid all fees for the due diligence reports. Upon request, Mick reports were provided at no cost to Capital Financial. Mick reports were available on all Provident offerings.

18. Capital Financial's due diligence process did not require a Mick Report or any other third party due diligence prior to approving a Provident offering. Capital Financial only requested Mick reports on eight of the fourteen offerings it sold, and all eight of those Mick reports were requested by Capital Financial only after it had already approved and started recommending and selling the offering. Boppre did not review any Mick reports prior to approving Provident offerings for sale by Capital Financial.

19. The PPM's for all of the Provident offerings disclosed that the selling broker-dealer would receive a due diligence fee of 1%. However, Capital Financial did not spend any of the 1% due diligence fee conducting due diligence. Although it received over $600,000 for due diligence fees on the fourteen Provident offerings, Capital Financial incurred no due diligence expenses. At no time did Capital Financial hire independent counsel, an accounting firm, contact third parties regarding Provident's business, or hire consultants to review the Provident offerings.

20. Along with failing to conduct any meaningful due diligence with respect to the Provident offerings prior to recommending them to investors, Capital Financial also ignored significant red flags raised by Mick. The Mick reports beginning with Shale Royalties 9 issued in March 2008, raised concerns about Provident. The Shale Royalties 9 report highlighted Provident's lack of audited financial statements, and raised questions regarding conflicts of interest. The Mick report noted that the earlier Provident offerings were collectively reporting a net operating loss and the limited financial information lacked transparency.

21. Capital Financial failed to question these red flags brought up in the Mick reports with either Provident or Mick. After receiving the Shale 9 Mick report, Capital Financial recommended and sold an additional $32,000,000 of the Provident offerings. Capital Financial received and purportedly reviewed Mick reports for Shale Royalties 12 and Shale Royalties 18.

Both reports raised the same red flags, only emphasizing those concerns by bolding or underlining the type. Although the Mick reports raised concerns about the Provident offerings, Capital Financial failed to provide its registered representatives with copies of these reports and did not take steps to address whether this information was disclosed to customers.

22. Capital Financial's due diligence responsibility for the Provident offerings was heightened by the fact that Provident was a relatively new company, Provident's management had very little experience in the oil and gas industry, Provident failed to produce audited or unaudited financial statements, and before Capital Financial entered into a sales agreement for the first time with Provident, Provident had only effected two prior offerings, both beginning in July 2006 involving a combined total of ten investors. Also, Provident paid a high dividend, and was a very risky investment.

23. Capital Financial had an obligation to conduct a reasonable investigation of a security before recommending that a customer buy that security. Instead, Capital Financial approved the Provident offerings for sale by Capital Financial registered representatives based entirely on information provided by PAM without conducting any independent investigation.

24. Capital Financial lacked information regarding the Provident offerings (e.g., financial information) because it had failed to conduct a reasonable investigation of those offerings, and did not inform customers that it lacked this information and did not inform them of the risks associated with making an investment decision while lacking such information. In addition, although the Mick reports contained significant red flags, information regarding those red flags was never passed along to customers. These failures to disclose constitute material omissions.

25. Broker-dealers cannot recommend a security without having an adequate and reasonable basis for making such recommendation, and cannot rely exclusively upon the issuer for information concerning a company. Lindsey and Boppre knew that neither they nor anyone else at Capital Financial had performed any independent investigation of the Provident offerings, yet they approved the Provident offerings for sale by Capital Financial registered representatives.

26. Lindsey and Boppre knew that they were allowing registered representatives to recommend the Provident offerings for sale without informing them that Capital Financial lacked certain information regarding the Provident offerings (e.g., information on Provident's financial situation, and Provident's relationship with other oil and gas companies) or that they failed to conduct a reasonable investigation of those offerings. Without such information, registered representatives could not have informed customers that Capital Financial was recommending the Provident offerings on the basis of limited information or the risks associated with making an investment decision with limited information.

27. Boppre knew that the Provident offering materials stated that selling broker-dealers would receive a 1% fee to pay for due diligence. This disclosure to investors suggested that Capital Financial conducted independent due diligence in approving the Provident offerings as

appropriate to recommend and sell to Capital Financial customers. However, Capital Financial did not perform any independent due diligence.

28. Boppre knew Capital Financial failed to perform adequate due diligence before approving the Provident offerings for sale. Boppre knew they were relying exclusively on Provident for doing their due diligence. Customers were not told that although the Provident offering materials disclosed a 1% due diligence fee and Capital Financial was paid over $630,000 in due diligence fees, Capital Financial conducted no independent due diligence.

29. Boppre acted at least with severe recklessness. The duty to investigate was heightened by the fact that Provident was a relatively new company operated by individuals with little or no experience in the field of oil and gas, lacked audited financial statements, and promised high returns. Lindsey and Boppre approved Provident offerings without obtaining third-party Mick reports, and failed to question red flags brought to their attention through the few Mick reports received.

30. As a result of the conduct described above, Boppre willfully 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, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

Undertakings

Respondent Boppre undertakes to:

31. Provide to the Commission, within 30 days after the end of the two-year bar 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 Respondent Boppre's Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act and Section 9(b) of the Investment Company Act it is hereby ORDERED that:

A. Respondent Boppre shall 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 Boppre be, and herby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; 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 two (2) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

D. Respondent shall pay a civil money penalty in the amount of $25,000 to the United States Treasury. Payment shall be made in the following installments: $5,000 within 10 days of the entry of this Order, and four payments of $5,000 every 90 days thereafter. 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 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 Brian W. Boppre 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 Karen L. Martinez, Division of Enforcement, Securities and Exchange Commission, 15 W. South Temple, Suite 1800, Salt Lake City, UT 84101.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

MINUTE COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65998 / December 16, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29887 / December 16, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14324

In the Matter of **Capital Financial Services, Inc. and Brian W. Boppre** **Respondents.**	**ORDER MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AS TO BRIAN W. BOPPRE**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to enter this Order Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") as to Brian W. Boppre ("Respondent" or "Boppre").

II.

Following the institution of these proceedings on April 6, 2011, 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 as to Brian W. Boppre ("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 Capital Financial Services, Inc.'s failure to perform reasonable due diligence on numerous private placement offerings prior to recommending them to customers where the offerings turned out to be a classic Ponzi scheme and offering fraud.

Respondent

1. Respondent was the president and a registered principal at Capital Financial Services, Inc. ("Capital Financial"), a broker-dealer registered with the Commission from October 2008 until July 2010. Respondent, 47 years old, is a resident of Minot, North Dakota.

Other Relevant Entities

2. Capital Financial is a wholly owned subsidiary of Capital Financial Holdings, Inc., and has been registered with the Commission and a member of the NASD (now FINRA) since 1980. Capital Financial operates as a general securities broker-dealer and is headquartered in Minot, North Dakota. Capital Financial has a network of approximately 273 offices housing over 332 registered representatives. The majority of Capital Financial's revenue is generated from the sale of mutual funds, variable insurance products, and private placements.

3. Provident Royalties, LLC ("Provident") was a Delaware limited liability company with its principal offices in Dallas, Texas. Provident purportedly invested in oil and gas extraction interests through a group of 23 affiliated entities (collectively the "Provident Rule 506 Entities"). Provident is a beneficial owner in each of the Provident Rule 506 Entities. On June 22, 2009, Provident and 26 affiliated entities filed a voluntary petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of Texas. Provident is currently in receivership.

4. Provident Asset Management, LLC ("PAM") was a Delaware limited liability company which was registered with the Commission as a broker-dealer since March 9, 2004. PAM was the managing broker-dealer for the Provident offerings and exclusively sold the Provident Rule 506 Entity offerings. Capital Financial entered into a selling agreement with PAM for each Provident offering. FINRA expelled PAM from membership on March 18, 2010. PAM is currently in receivership.

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

5. Provident Rule 506 Entities ("Provident offerings") were a series of companies that have effected private placements claiming exemption from registration of the offered securities under Rule 506 of Regulation D. The offerings sold by Capital Financial included the following companies: Provident Energy 1, LP; Provident Energy 2, LP; Provident Energy 3, LP; Shale Royalties II, Inc.; Shale Royalties 3, LLC; Shale Royalties 4, Inc.; Shale Royalties 5, Inc.; Shale Royalties 6, Inc.; Shale Royalties 7, Inc.; Shale Royalties 9, Inc.; Shale Royalties 12, Inc.; Shale Royalties 14, Inc.; Shale Royalties 17, Inc.; Shale Royalties 18, Inc. The entities are headquartered in Provident's offices in Dallas, Texas. All the Provident Entities are controlled by a court-appointed receiver.

Background

6. From at least September 2006 through January 2009, Capital Financial marketed, recommended to investors, and sold Provident preferred stock and limited partnership interests in a series of 14 private placements. The Provident offerings each claimed an exemption from registration of its offering pursuant to Rule 506 of Regulation D of the federal securities laws. The Provident offerings designated as Shale Royalties, Inc., numbered II through 18, offered two series of non-convertible redeemable cumulative preferred stock, while the offerings designated as Provident Energy, LP, numbered 1 through 3 offered limited partnership interests. The promised return on the Provident offerings was between 15%-18% per year depending on the term.

7. Provident Royalties' purported business plan included the acquisition of a combination of producing and non-producing sub-surface oil and gas mineral interests, working interests and real property located within the United States. According to the Provident offerings' Private Placement Memoranda ("PPM"), selling broker-dealers were paid commissions ranging from 5% to 9%. The sales commission varied by the offering, and by share class, with the longer term, Class A share class, paying a larger sales commission. Each PPM, with the exception of Provident Energy 1 and Provident Energy 3, disclosed the selling broker-dealer would be paid a 1% due diligence fee in addition to the sales commission.

8. Although a portion of the proceeds of the Provident offerings were used for the acquisition and development of oil and gas activities, millions of dollars of investor funds were transferred from the later Provident offerings' bank accounts to the Provident Royalties' operating account and then used for undisclosed and, often, undocumented loans to earlier Provident offerings. The loan proceeds were then used to pay dividends and returns of capital to investors in earlier Provident offerings in a classic Ponzi scheme.

9. Boppre participated in Capital Financial's due diligence process. Boppre was responsible for reviewing new offerings and had the authority to approve the Provident offerings for Capital Financial to recommend to investors. Boppre received assistance conducting due diligence from Jeffrey A. Lindsey ("Lindsey"), senior vice president and due diligence officer at Capital Financial until June 15, 2010.

10. Capital Financial was first introduced to Provident during the summer of 2006 by Darren Gibson ("Gibson"), a Provident wholesaler employed by PAM. Gibson provided Lindsey with a Provident PPM and other offering materials. Lindsey had no experience or background in the oil and gas industry.

11. On August 24, 2006, PAM paid Lindsey's expenses to conduct an on-site "due diligence" visit to Provident's Dallas offices. While at Provident, Lindsey met with Provident's principals, Gibson, various Provident land men, and a Provident geologist. The meeting consisted of a presentation of Provident's business plan, followed by a question and answer session. Lindsey also took a tour of the Provident offices. Lindsey did not receive any financial information or review any of the books or records of Provident during his visit. Boppre reviewed the materials provided to Capital Financial by Provident.

12. On September 20, 2006, Capital Financial signed its first selling agreement with PAM for Shale Royalties, II ("Shale II"). Lindsey and Boppre approved Shale II based on the offering materials received from PAM, Lindsey's on-site visit, and the knowledge that other broker-dealers were selling the Provident offerings. Boppre and Lindsey eventually approved fourteen Provident offerings for sale by Capital Financial, even though they had no experience in the oil and gas industry, they only reviewed documents provided by PAM, Lindsey only visited PAM on two occasions to meet with PAM representatives and listen to a presentation on the offerings, and they had performed no independent investigation of any of the Provident offerings.

13. Capital Financial, through its registered principal, Boppre, failed to conduct due diligence on the Provident offerings sufficient to establish reasonable basis suitability before recommending the securities to its customers. Capital Financial never independently investigated any of the information in the offering materials provided by Provident. Capital Financial also never received audited or even unaudited financial statements for any of the Provident offerings. The only financial information Capital Financial received regarding Provident was an unaudited consolidated balance sheet review. However, even the unaudited consolidated balance sheet reviews were not included in the materials Capital Financial received until Shale Royalties 9. Capital Financial received this limited financial information after it approved the recommendation and sale to investors of the Provident offerings covered in those reports.

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Financial receiving over $5,000,000 in sales commissions, and over $600,000 in due diligence fees on the Provident offerings.

16. Capital Financial's due diligence process for each successive Provident offering was similar to the process for Shale II. For each new Provident offering, Capital Financial received a due diligence packet from PAM. The packet typically contained; a lead broker-dealer bio, certificate of insurance, PPM, certificate of incorporation, corporate bylaws, prior activities, escrow agreement, investor subscription agreement, managing broker dealer agreement, soliciting broker dealer agreement, Form D, news articles, general industry geology reports regarding U.S. shale plays, sample mineral deed, and contact information. Lindsey did not visit Provident before approving each successive Provident offering. Capital Financial did not receive information from any other source before approving any Provident offering.

17. To assist with promoting the Provident offerings, PAM retained the third-party due diligence law firm, Mick & Associates, PC ("Mick") to draft a third-party due diligence report ("Mick report") on each Provident offering. Provident paid all fees for the due diligence reports. Upon request, Mick reports were provided at no cost to Capital Financial. Mick reports were available on all Provident offerings.

18. Capital Financial's due diligence process did not require a Mick Report or any other third party due diligence prior to approving a Provident offering. Capital Financial only requested Mick reports on eight of the fourteen offerings it sold, and all eight of those Mick reports were requested by Capital Financial only after it had already approved and started recommending and selling the offering. Boppre did not review any Mick reports prior to approving Provident offerings for sale by Capital Financial.

19. The PPM's for all of the Provident offerings disclosed that the selling broker-dealer would receive a due diligence fee of 1%. However, Capital Financial did not spend any of the 1% due diligence fee conducting due diligence. Although it received over $600,000 for due diligence fees on the fourteen Provident offerings, Capital Financial incurred no due diligence expenses. At no time did Capital Financial hire independent counsel, an accounting firm, contact third parties regarding Provident's business, or hire consultants to review the Provident offerings.

20. Along with failing to conduct any meaningful due diligence with respect to the Provident offerings prior to recommending them to investors, Capital Financial also ignored significant red flags raised by Mick. The Mick reports beginning with Shale Royalties 9 issued in March 2008, raised concerns about Provident. The Shale Royalties 9 report highlighted Provident's lack of audited financial statements, and raised questions regarding conflicts of interest. The Mick report noted that the earlier Provident offerings were collectively reporting a net operating loss and the limited financial information lacked transparency.

21. Capital Financial failed to question these red flags brought up in the Mick reports with either Provident or Mick. After receiving the Shale 9 Mick report, Capital Financial recommended and sold an additional $32,000,000 of the Provident offerings. Capital Financial received and purportedly reviewed Mick reports for Shale Royalties 12 and Shale Royalties 18.

Both reports raised the same red flags, only emphasizing those concerns by bolding or underlining the type. Although the Mick reports raised concerns about the Provident offerings, Capital Financial failed to provide its registered representatives with copies of these reports and did not take steps to address whether this information was disclosed to customers.

22. Capital Financial's due diligence responsibility for the Provident offerings was heightened by the fact that Provident was a relatively new company, Provident's management had very little experience in the oil and gas industry, Provident failed to produce audited or unaudited financial statements, and before Capital Financial entered into a sales agreement for the first time with Provident, Provident had only effected two prior offerings, both beginning in July 2006 involving a combined total of ten investors. Also, Provident paid a high dividend, and was a very risky investment.

23. Capital Financial had an obligation to conduct a reasonable investigation of a security before recommending that a customer buy that security. Instead, Capital Financial approved the Provident offerings for sale by Capital Financial registered representatives based entirely on information provided by PAM without conducting any independent investigation.

24. Capital Financial lacked information regarding the Provident offerings (e.g., financial information) because it had failed to conduct a reasonable investigation of those offerings, and did not inform customers that it lacked this information and did not inform them of the risks associated with making an investment decision while lacking such information. In addition, although the Mick reports contained significant red flags, information regarding those red flags was never passed along to customers. These failures to disclose constitute material omissions.

25. Broker-dealers cannot recommend a security without having an adequate and reasonable basis for making such recommendation, and cannot rely exclusively upon the issuer for information concerning a company. Lindsey and Boppre knew that neither they nor anyone else at Capital Financial had performed any independent investigation of the Provident offerings, yet they approved the Provident offerings for sale by Capital Financial registered representatives.

26. Lindsey and Boppre knew that they were allowing registered representatives to recommend the Provident offerings for sale without informing them that Capital Financial lacked certain information regarding the Provident offerings (e.g., information on Provident's financial situation, and Provident's relationship with other oil and gas companies) or that they failed to conduct a reasonable investigation of those offerings. Without such information, registered representatives could not have informed customers that Capital Financial was recommending the Provident offerings on the basis of limited information or the risks associated with making an investment decision with limited information.

27. Boppre knew that the Provident offering materials stated that selling broker-dealers would receive a 1% fee to pay for due diligence. This disclosure to investors suggested that Capital Financial conducted independent due diligence in approving the Provident offerings as

appropriate to recommend and sell to Capital Financial customers. However, Capital Financial did not perform any independent due diligence.

28. Boppre knew Capital Financial failed to perform adequate due diligence before approving the Provident offerings for sale. Boppre knew they were relying exclusively on Provident for doing their due diligence. Customers were not told that although the Provident offering materials disclosed a 1% due diligence fee and Capital Financial was paid over $630,000 in due diligence fees, Capital Financial conducted no independent due diligence.

29. Boppre acted at least with severe recklessness. The duty to investigate was heightened by the fact that Provident was a relatively new company operated by individuals with little or no experience in the field of oil and gas, lacked audited financial statements, and promised high returns. Lindsey and Boppre approved Provident offerings without obtaining third-party Mick reports, and failed to question red flags brought to their attention through the few Mick reports received.

30. As a result of the conduct described above, Boppre willfully 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, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

Undertakings

Respondent Boppre undertakes to:

31. Provide to the Commission, within 30 days after the end of the two-year bar 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 Respondent Boppre's Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act and Section 9(b) of the Investment Company Act it is hereby ORDERED that:

A. Respondent Boppre shall 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 Boppre be, and herby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; 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 two (2) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

D. Respondent shall pay a civil money penalty in the amount of $25,000 to the United States Treasury. Payment shall be made in the following installments: $5,000 within 10 days of the entry of this Order, and four payments of $5,000 every 90 days thereafter. 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 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 Brian W. Boppre 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 Karen L. Martinez, Division of Enforcement, Securities and Exchange Commission, 15 W. South Temple, Suite 1800, Salt Lake City, UT 84101.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro
Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66000 / December 16, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14324

In the Matter of Capital Financial Services, Inc. and Brian W. Boppre Respondents.	ORDER MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO CAPITAL FINANCIAL SERVICES, INC.

I.

On April 6, 2011, the Securities and Exchange Commission ("Commission") issued an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940 against Capital Financial Services, Inc. ("Respondent" or "Capital Financial").

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 as to Capital Financial Services, Inc. ("Order"), as set forth below.

III.

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

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

Summary

These proceedings arise out of Capital Financial Services, Inc.'s failure to perform reasonable due diligence on numerous private placement offerings prior to recommending them to customers where the offerings turned out to be a classic Ponzi scheme and offering fraud.

Respondent

1. Capital Financial is a wholly owned subsidiary of Capital Financial Holdings, Inc., and has been registered with the Commission and a member of the NASD (now FINRA) since 1980. Capital Financial operates as a general securities broker-dealer and is headquartered in Minot, North Dakota. Capital Financial has a network of approximately 273 offices housing over 332 registered representatives. The majority of Capital Financial's revenue is generated from the sale of mutual funds, variable insurance products, and private placements.

Other Relevant Entities

2. Provident Royalties, LLC ("Provident") was a Delaware limited liability company with its principal offices in Dallas, Texas. Provident purportedly invested in oil and gas extraction interests through a group of 23 affiliated entities (collectively the "Provident Rule 506 Entities"). Provident is a beneficial owner in each of the Provident Rule 506 Entities. On June 22, 2009, Provident and 26 affiliated entities filed a voluntary petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of Texas. Provident is currently in receivership.

3. Provident Asset Management, LLC ("PAM") was a Delaware limited liability company which was registered with the Commission as a broker-dealer since March 9, 2004. PAM was the managing broker-dealer for the Provident offerings and exclusively sold the Provident Rule 506 Entity offerings. Capital Financial entered into a selling agreement with PAM for each Provident offering. FINRA expelled PAM from membership on March 18, 2010. PAM is currently in receivership.

4. Provident Rule 506 Entities ("Provident offerings") were a series of companies which have effected private placements claiming exemption from registration of the offered securities under Rule 506 of Regulation D. The offerings sold by Capital Financial included the following companies: Provident Energy 1, LP; Provident Energy 2, LP; Provident Energy 3, LP; Shale Royalties II, Inc.; Shale Royalties 3, LLC; Shale Royalties 4, Inc.; Shale Royalties 5, Inc.; Shale Royalties 6, Inc.; Shale Royalties 7, Inc.; Shale Royalties 9, Inc.; Shale Royalties 12, Inc.; Shale Royalties 14, Inc.; Shale Royalties 17, Inc.; Shale Royalties 18, Inc. The entities are headquartered in Provident's offices in Dallas, Texas. All the Provident Entities are controlled by a court-appointed receiver.

5. Jeffrey A. Lindsey ("Lindsey"), age 47, was a senior vice president and due diligence officer at Capital Financial until June 15, 2010. Lindsey resides in Libertyville, Illinois.

6. Brian W. Boppre ("Boppre"), age 47, was the president and a registered principal at Capital Financial until July 2010. Boppre resides in Minot, North Dakota.

Background

7. From at least September 2006 through January 2009, Capital Financial marketed, recommended to investors, and sold Provident preferred stock and limited partnership interests in a series of 14 private placements. The Provident offerings each claimed an exemption from registration of its offering pursuant to Rule 506 of Regulation D of the federal securities laws. The Provident offerings designated as Shale Royalties, Inc., numbered II through 18, offered two series of non-convertible redeemable cumulative preferred stock, while the offerings designated as Provident Energy, LP, numbered 1 through 3 offered limited partnership interests. The promised return on the Provident offerings was between 15%-18% per year depending on the term.

8. Provident Royalties' purported business plan included the acquisition of a combination of producing and non-producing sub-surface oil and gas mineral interests, working interests and real property located within the United States. According to the Provident offerings' Private Placement Memoranda ("PPM"), selling broker-dealers were paid commissions ranging from 5% to 9%. The sales commission varied by the offering, and by share class, with the longer term, Class A share class, paying a larger sales commission. Each PPM, with the exception of Provident Energy 1 and Provident Energy 3, disclosed the selling broker-dealer would be paid a 1% due diligence fee in addition to the sales commission.

9. Although a portion of the proceeds of the Provident offerings were used for the acquisition and development of oil and gas activities, millions of dollars of investor funds were transferred from the later Provident offerings' bank accounts to the Provident Royalties' operating account and then used for undisclosed and, often, undocumented loans to earlier Provident offerings. The loan proceeds were then used to pay dividends and returns of capital to investors in earlier Provident offerings in a classic Ponzi scheme.

10. Capital Financial's due diligence process was run by Boppre and Lindsey. Boppre was responsible for reviewing new offerings and had the authority to approve the Provident offerings for Capital Financial to recommend to investors.

11. Capital Financial was first introduced to Provident during the summer of 2006 by Darren Gibson ("Gibson"), a Provident wholesaler employed by PAM. Gibson provided Lindsey with a Provident PPM and other offering materials. Lindsey had no experience or background in the oil and gas industry.

12. On August 24, 2006, PAM paid Lindsey's expenses to conduct an on-site "due diligence" visit to Provident's Dallas offices. While at Provident, Lindsey met with Provident's principals, Gibson, various Provident land men, and a Provident geologist. The meeting consisted of a presentation of Provident's business plan, followed by a question and answer session. Lindsey also took a tour of the Provident offices. Lindsey did not receive any financial information or review any of the books or records of Provident during his visit. Boppre reviewed the materials provided to Capital Financial by Provident.

13. On September 20, 2006, Capital Financial signed its first selling agreement with PAM for Shale Royalties, II ("Shale II"). Lindsey and Boppre approved Shale II based on the offering materials received from PAM, Lindsey's on-site visit, and the knowledge that other broker-dealers were selling the Provident offerings. Boppre and Lindsey eventually approved fourteen Provident offerings for sale by Capital Financial, even though they had no experience in the oil and gas industry, they only reviewed documents provided by PAM, Lindsey only visited PAM on two occasions to meet with PAM representatives and listen to a presentation on the offerings, and they had performed no independent investigation of any of the Provident offerings.

14. Capital Financial, through its registered principal, Boppre, failed to conduct due diligence on the Provident offerings sufficient to establish reasonable basis suitability before recommending the securities to its customers. Capital Financial never independently investigated any of the information in the offering materials provided by Provident. Capital Financial also never received audited or even unaudited financial statements for any of the Provident offerings. The only financial information Capital Financial received regarding Provident was an unaudited consolidated balance sheet review. However, even the unaudited consolidated balance sheet reviews were not included in the materials Capital Financial received until Shale Royalties 9. Capital Financial received this limited financial information after it approved the recommendation and sale to investors of the Provident offerings covered in those reports.

15. As each Provident offering became fully subscribed, Capital Financial signed selling agreements with PAM for later Provident offerings. In total, Capital Financial recommended and sold fourteen different Provident offerings between September 2006 and January 26, 2009 when Provident suspended sales. Lindsey and Boppre approved each Provident offering for Capital Financial registered representatives to recommend and sell to Capital Financial customers.

16. Capital Financial registered representatives placed approximately 1,087 Provident trades for roughly $63,000,000. Capital Financial was typically paid an 8% sales commission plus a 1% due diligence fee on the amount of subscription proceeds. This resulted in Capital Financial receiving over $5,000,000 in sales commissions, and over $600,000 in due diligence fees on the Provident offerings.

17. Capital Financial's due diligence process for each successive Provident offering was similar to the process for Shale II. For each new Provident offering, Capital Financial received a due diligence packet from PAM. The packet typically contained; a lead broker-dealer bio, certificate of insurance, PPM, certificate of incorporation, corporate bylaws, prior activities, escrow agreement, investor subscription agreement, managing broker dealer agreement, soliciting broker dealer agreement, Form D, news articles, general industry geology reports regarding U.S. shale plays, sample mineral deed, and contact information. Lindsey did not visit Provident before approving each successive Provident offering. Capital Financial did not receive information from any other source before approving any Provident offering.

18. To assist with promoting the Provident offerings, PAM retained the third-party due diligence law firm, Mick & Associates, PC ("Mick") to draft a third-party due diligence report ("Mick report") on each Provident offering. Provident paid all fees for the due diligence reports. Upon request, Mick reports were provided at no cost to Capital Financial. Mick reports were available on all Provident offerings.

19. Capital Financial's due diligence process did not require a Mick report or any other third party due diligence prior to approving a Provident offering. Capital Financial only requested Mick reports on eight of the fourteen offerings it sold, and all eight of those Mick reports were requested by Capital Financial only after it had already approved and started recommending and selling the offering. Boppre did not review any Mick reports prior to approving Provident offerings for sale by Capital Financial.

20. The PPM's for all of the Provident offerings disclosed that the selling broker-dealer would receive a due diligence fee of 1%. However, Capital Financial did not spend any of the 1% due diligence fee conducting due diligence. Although it received over $600,000 for due diligence fees on the fourteen Provident offerings, Capital Financial incurred no due diligence expenses. At no time did Capital Financial hire independent counsel, an accounting firm, contact third parties regarding Provident's business, or hire consultants to review the Provident offerings.

21. Along with failing to conduct any meaningful due diligence with respect to the Provident offerings prior to recommending them to investors, Capital Financial also ignored significant red flags raised by Mick. The Mick reports beginning with Shale Royalties 9 issued in March 2008, raised concerns about Provident. The Shale Royalties 9 report highlighted Provident's lack of audited financial statements, and raised questions regarding conflicts of interest. The Mick report noted that the earlier Provident offerings were collectively reporting a net operating loss and the limited financial information lacked transparency.

22. Capital Financial failed to question these red flags brought up in the Mick reports with either Provident or Mick. After receiving the Shale 9 Mick report, Capital Financial recommended and sold an additional $32,000,000 of the Provident offerings. Capital Financial received and purportedly reviewed Mick reports for Shale Royalties 12 and Shale Royalties 18. Both reports raised the same red flags, only emphasizing those concerns by bolding or underlining the type. Although the Mick reports raised concerns about the Provident offerings,

Capital Financial failed to provide its registered representatives with copies of these reports and did not take steps to address whether this information was disclosed to customers.

23. Capital Financial's due diligence responsibility for the Provident offering was heightened by the fact that Provident was a relatively new company, Provident's management had very little experience in the oil and gas industry, Provident failed to produce audited or unaudited financial statements, and before Capital Financial entered into a sales agreement for the first time with Provident, Provident had only effected two prior offerings, both beginning in July 2006 involving a combined total of ten investors. Also, Provident paid a high dividend, and was a very risky investment.

24. Capital Financial had an obligation to conduct a reasonable investigation of a security before recommending that a customer buy that security. Instead, Capital Financial approved the Provident offerings for sale by Capital Financial registered representatives based entirely on information provided by PAM without conducting any independent investigation.

25. Capital Financial lacked information regarding the Provident offerings (e.g., financial information) because it had failed to conduct a reasonable investigation of those offerings, and did not inform customers that it lacked this information and did not inform them of the risks associated with making an investment decision while lacking such information. In addition, although the Mick reports contained significant red flags, information regarding those red flags was never passed along to customers. These failures to disclose constitute material omissions.

26. Broker-dealers cannot recommend a security without having an adequate and reasonable basis for making such recommendation, and cannot rely exclusively upon the issuer for information concerning a company. Lindsey and Boppre knew that neither they nor anyone else at Capital Financial had performed any independent investigation of the Provident offerings, yet they approved the Provident offerings for sale by Capital Financial registered representatives.

27. Lindsey and Boppre knew that they were allowing registered representatives to recommend the Provident offerings for sale without informing them that Capital Financial lacked certain information regarding the Provident offerings (e.g., information on Provident's financial situation, and Provident's relationship with other oil and gas companies) or that they failed to conduct a reasonable investigation of those offerings. Without such information, registered representatives could not have informed customers that Capital Financial was recommending the Provident offerings on the basis of limited information or the risks associated with making an investment decision with limited information.

28. Lindsey and Boppre knew that the Provident offering materials stated that selling broker-dealers would receive a 1% fee to pay for due diligence. This disclosure to investors suggested that Capital Financial conducted independent due diligence in approving the Provident offerings as appropriate to recommend and sell to Capital Financial customers. However, Capital Financial did not perform any independent due diligence.

29. Lindsey and Boppre knew Capital Financial failed to perform adequate due diligence before approving the Provident offerings for sale. Lindsey and Boppre knew they were relying exclusively on Provident for doing their due diligence. Customers were not told that although the Provident offering materials disclosed a 1% due diligence fee and Capital Financial was paid over $630,000 in due diligence fees, Capital Financial conducted no independent due diligence.

30. Lindsey and Boppre acted at least with severe recklessness. The duty to investigate was heightened by the fact that Provident was a relatively new company operated by individuals with little or no experience in the field of oil and gas, lacked audited financial statements, and promised high returns. Lindsey and Boppre approved Provident offerings without obtaining third-party Mick reports, and failed to question red flags brought to their attention through the few Mick reports received.

Violations

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

Undertakings

Respondent has undertaken to:

32. Within 60 days of the date of the entry of the Order, at Capital Financial's expense, retain the services of a qualified Independent Consultant ("Consultant"), not unacceptable to the staff of the Division of Enforcement, to: (i) conduct a comprehensive review of Respondent's due diligence policies, practices, and procedures; (ii) determine the adequacy of such due diligence policies and practices; and (iii) prepare a written report, referenced below, reviewing the adequacy of Respondent's due diligence policies, practices, and procedures and making recommendations regarding how Respondent should modify or supplement its due diligence policies and practices. Respondent shall provide a copy of the engagement letter detailing the Consultant's responsibilities to Commission staff;

33. Cooperate fully with the Consultant, including providing the Consultant with access to Respondent's files, books, records, and personnel as reasonably requested for the above-mentioned review, and obtaining the cooperation of respective employees or other persons under Respondent's control;

34. Require the Consultant to report to Commission staff on his/her/its activities as the staff shall request;

35. Permit the Consultant to engage such assistance, clerical, legal or expert, as necessary and at a reasonable cost, to carry out his/her/its activities, and the cost, if any, of such assistance shall be borne exclusively by Respondent;

36. Within one hundred twenty (120) days of the issuance of this Order, unless otherwise extended by Commission staff for good cause, require the Consultant to complete the review described in subparagraph 29 above and prepare a written preliminary report ("Preliminary Report") that: (i) evaluates the adequacy of the Respondent's due diligence policies, practices, and procedures; and (ii) makes any recommendations about modifications thereto or additional or supplemental procedures deemed necessary to remedy any deficiencies described in the Preliminary Report. Respondent shall require the Consultant to provide the Preliminary Report simultaneously to both Commission staff and Respondent;

37. Within ninety (90) days of Respondent's receipt of the Preliminary Report, adopt and implement all recommendations set forth in the Preliminary Report; provided, however, that as to any recommendation that Respondent consider to be, in whole or in part, unduly burdensome or impractical, Respondent may submit in writing to the Consultant and Commission staff, within thirty (30) days of receiving the Preliminary Report, an alternative policy, practice, or procedure designed to achieve the same objective or purpose. Respondent shall then attempt in good faith to reach an agreement with the Consultant relating to each recommendation that Respondent considers to be unduly burdensome or impractical and request that the Consultant reasonably evaluate any alternative policy, practice, or procedure proposed by Respondent. Within fourteen (14) days after the conclusion of the discussion and evaluation by Respondent and the Consultant, Respondent shall require that the Consultant inform Respondent and Commission staff of his/her/its final determination concerning any recommendation that Respondent consider to be unduly burdensome or impractical. Respondent shall abide by the determinations of the Consultant and, within sixty (60) days after final agreement between Respondent and the Consultant or final determination by the Consultant, whichever occurs first, Respondent shall adopt and implement all of the recommendations that the Consultant deems appropriate;

38. Within fourteen (14) days of Respondent's adoption of all of the recommendations that the Consultant deems appropriate, certify in writing to the Consultant and Commission staff that Respondent has adopted and implemented all of the Consultant's recommendations;

39. Apply to Commission staff for an extension of the deadlines described above before their expiration and, upon a showing of good cause by Respondent, Commission staff may, in its sole discretion, grant such extensions for whatever time period it deems appropriate;

40. To ensure the independence of the Consultant, not have the authority to terminate the Consultant without prior written approval of Commission staff and shall compensate the Consultant and persons engaged to assist the Consultant for services rendered pursuant to this Order at their reasonable and customary rates;

41. 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 Capital Financial, 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 Division of Enforcement, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Capital Financial, 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.

42. 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 Karen L. Martinez, Esq. Salt Lake Regional Office, 15 W. South Temple, Suite 1800, Salt Lake City, Utah 84101 with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

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

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

A. Respondent Capital Financial 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 Capital Financial is censured.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65996 / December 16, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3347 / December 16, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14671

In the Matter of Stuart W. Fuhlendorf, 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 Stuart W. Fuhlendorf ("Respondent" or "Fuhlendorf") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

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

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

II.

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

III.

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

1. Fuhlendorf, age 49, is the former Chief Financial Officer of Isilon Systems, Inc. ("Isilon"), having served in that capacity from approximately May 2004 to October 2007. Fuhlendorf is a resident of Golden, Colorado.

2. Isilon was, at all relevant times, a Delaware corporation headquartered in Seattle, Washington, which sold clustered storage systems and software for digital content. From December 2006 through November 2010, Isilon's common stock was registered under Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and was quoted on the Nasdaq.

3. On November 23, 2011, a final judgment was entered against Fuhlendorf, permanently enjoining him from future violations of Sections 17(a)(2) and (3) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13b2-1, 13b2-2, and 13a-14 thereunder, in the civil action entitled Securities and Exchange Commission v. Stuart W. Fuhlendorf, Civil Action Number 2:09-CV-01292-MJP, in the United States District Court for the Western District of Washington. The final judgment also prohibits Fuhlendorf from acting as an officer or director of a public company for a period of three years.

4. The Commission's complaint alleged, among other things, that Fuhlendorf engaged in a financial reporting fraud which caused Isilon to materially overstate revenue in periodic reports filed with the Commission during a three-quarter period in 2006 and 2007. The Complaint alleged that Fuhlendorf participated in recording revenue from sales transactions with improper terms that materially increased Isilon's quarterly revenue in a departure from Generally Accepted Accounting Principles ("GAAP").

IV.

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

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

A. Fuhlendorf 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 an accountant.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro
Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66009 / December 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14673

In the Matter of **PETER J. BROOKS,** **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 Peter J. Brooks ("Brooks" 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. From at least early 2008 through approximately August 2008, Brooks managed two sales offices in California that offered and sold securities issued by Delta Onshore Management, LLC. As the manager of these offices, he directed employees to sell the above-described securities, and he personally offered and sold them as well. In so doing, he participated at key points in the distribution of those securities and received compensation related to the transactions. No registration statement was filed with the Commission or in effect at the time of Respondent's offers or sales of the above-referenced securities; nor were the transactions exempt from registration. Further, Respondent was not registered with the Commission as a broker or dealer. Brooks, 66 years old, is a resident of Woodland Hills, California.

2. On December 6, 2011, a permanent injunction was entered by consent against Brooks, permanently enjoining him from future violations of Sections 5(a) and 5(c) of the Securities Act of 1933, and Section 15(a)(1) of the Exchange Act in the civil action entitled Securities and Exchange Commission v. Delta Onshore Management, LLC, et al., Civil Action Number 08-1278-MLB, in the United States District Court for the District of Kansas.

3. The Commission's complaint alleged that, in connection with the offering of the above-referenced securities, the named defendants collectively raised approximately $2.8 million from investors nationwide, over half of whom were 60 years old or older. The complaint alleged that the promoters hired sales agents, such as Respondent, to market the offering, and falsely advised the sales agents that they had acquired two drilling rigs that were "ready to go to work" earning annual returns of 25% to 36%. The sales agents marketed the securities by including this false information in their sales pitches to investors. In fact, at the time of the offering, the Delta Onshore venture had not acquired any drilling rigs, and investors received none of the promised 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 Brooks's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Brooks be, and hereby is:

barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent; and

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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
Commissioner Gallagher
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66014 / December 20, 2011

Admin. Proc. File No. 3-14175

In the Matter of the Application of

KENT M. HOUSTON
2256 Plazuela Street
Carlsbad, California 92009

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Violations of Conduct and Procedural Rules

Engaging in Outside Business Activities Without Providing Written Notice to Member Firm

Failing to Appear for On-The-Record Interview

Conduct Inconsistent with Just and Equitable Principles of Trade

Former general securities representative of a member of registered securities association engaged in outside business activities without providing his member firm with written notice and failed to appear for an on-the-record interview with association staff. *Held*, association's findings of violations are *sustained*, sanction imposed is *vacated*, and proceedings are *remanded* for redetermination of sanction to be imposed.

APPEARANCES:

Kent M. Houston, pro se.

Marc Menchel, *Michael Garawski*, and *Jennifer C. Brooks*, for FINRA.

Appeal filed: January 4, 2011
Last brief received: April 13, 2011

I.

Kent M. Houston, formerly a general securities representative with First Wall Street Corp. ("First Wall Street" or "the Firm"), a former NASD member firm, seeks review of disciplinary action taken by NASD.[1] NASD found that Houston violated NASD Rules 3030 and Rule 2110 by engaging in outside business activities without providing his member firm with written notice. NASD further found that Houston violated NASD Rules 8210 and 2110 by failing to appear for an on-the-record interview ("OTR") with NASD staff.[2] NASD barred Houston from associating with any NASD member firm in all capacities. We base our findings on an independent review of the record.

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[1] On July 26, 2007, the Commission approved a proposed rule change filed by the National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and the member regulation, enforcement, and arbitration functions of the New York Stock Exchange ("NYSE"). *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517 (SR-NASD-2077-053). Because the disciplinary action here was instituted before that date, we continue to use the designation NASD.

[2] Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are those that existed on December 14, 2008. The substantive rules that apply are those that existed at the time of the conduct at issue. *John B. Busacca,* Exchange Act Rel. No. 63312 (Nov. 12, 2010), 99 SEC Docket 34481, 34482, n.2.

II.

A. Background

1. Houston Appointed Trustee And Receives Compensation from Trust

In 1971, Walter L. Boyd and Veta M. Boyd, Houston's great uncle and aunt, established a trust under which they designated a national bank as trustee and directed the trustee to pay the trust's net income to the Boyds on a monthly basis. The trust provided that the trustee was entitled to compensation for its services. Walter Boyd died in 1986; on April 24, 2001, Veta Boyd appointed Houston to act as co-trustee with her. The amendment to the trust agreement effecting this change provided that Houston would serve as sole trustee if Veta Boyd was unwilling or unable to serve.

On April 26, 2001, Houston opened an account for the trust at First Wall Street (the "Boyd Trust Account"). The account application listed Veta Boyd and Houston as co-successor trustees and Houston as the account representative. As co-trustee, Houston was able to write checks on the Boyd Trust Account without Mrs. Boyd's signature. In June 2005, Houston became the trust's sole trustee after Mrs. Boyd's physicians determined that she was unable to manage her financial affairs. Mrs. Boyd died in June 2006.

From October 2001 through January 2006, Houston received more than $400,000 from the trust. From October 2001 through 2002, Mrs. Boyd wrote checks for approximately $99,000 payable to Houston. From 2003 until Mrs. Boyd died in June 2006, Houston signed all the checks drawn on the Boyd Trust Account. In 2003, Houston wrote five checks from the Boyd Trust Account payable to himself totaling $41,600. In 2004, Houston wrote seven checks payable to himself or to Countrywide Bank (the holder of his home equity line of credit), totaling $167,000. In 2005, Houston wrote three checks totaling $119,000 to Countrywide. In January 2006, Houston wrote a final check to Countrywide in the amount of $27,500.[3]

2. Houston Fails to Provide Written Notice of His Trustee Activities to Firm

Although Houston was listed as co-successor trustee on the Boyd Trust Account application, he did not otherwise give First Wall Street written notice that he was acting as trustee for Mrs. Boyd's trust or that he was receiving compensation for this activity. In fact, over a period of several years, he repeatedly failed to disclose his activity with the trust when requested by the Firm to provide information on his outside business activities. Houston did not disclose his trustee activities on the Firm's "Independent Contractor Agreement" that he signed and dated December 31, 2002 (the "2002 Agreement"). The 2002 Agreement stated that Houston was to notify the Firm of any outside business activities in which he was engaged or intended to

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[3] In addition to these payments, Houston also received commissions for transactions in the Boyd Trust Account.

engage and expressly mentioned acting as a trustee as an example of an outside business activity. Appended to the 2002 Agreement was an "Outside Business Activity Notification Form" (the "Notification Form"). Houston initialed the Notification Form blank but otherwise left it blank. In 2003, Houston similarly failed to disclose his trustee activities to First Wall Street when he completed the Firm's Independent Contractor Agreement in December 2003, including the same outside business notification provisions and appended Notification Form as the 2002 Agreement, which Houston again left blank.

In December 2004, rather than appending a notification form, First Wall Street required submission of a separate "Outside Business Activities Statement" ("2004 Statement"). Houston acknowledged in the 2004 Statement that he understood the Firm's policies and procedures regarding the required disclosure to the Firm of all outside business activities and checked the box next to the statement, "I have NOT conducted any outside business activities during the past year."

On August 29, 2005, First Wall Street's compliance department issued a memorandum to its registered representatives and staff regarding potential conflicts of interest arising from the registered representatives' involvement in clients' personal matters. The memorandum instructed the recipients to contact the Firm's compliance department "immediately in writing if you are currently listed as a trustee, . . . or if you perform any duties that involve compensation of any kind that does not come through the [F]irm in the form of commissions and is not included on your [Uniform Application for Securities Industry Registration or Transfer ("Form U4")] as an approved outside business activity." Houston did not report on his Forms U4 dated July 29, 2005 and October 20, 2005 that he was engaged in an outside business activity, nor did he notify the Firm's compliance department in writing of his trusteeship.

The Firm's compliance department distributed a second memorandum in September 2005 that reminded its registered representatives that they were required to request written approval for, among other things, acting as a trustee.[4] Along with the memorandum, the compliance department attached a "Disclosure of Appointment" form that required registered representatives to disclose all trusteeship appointments regardless of whether they had received prior approval by the Firm. In October 2005, although he had already served as co-trustee of the Boyd Trust

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4 In a memorandum issued shortly before the September 2005 memorandum, the Firm advised its registered representatives that "it is wise to obtain approval of outside business activities in conjunction with services offered at the earliest possible opportunity" in order to minimize the risk to the registered representative and to the firm that could arise from these outside business activities. The memorandum also reminded registered representatives that they are required to "[c]ontact the compliance department immediately in writing" if they are appointed to serve as a trustee of a client's account or if they "perform any duties that involve compensation of any kind that does not come through the firm in the form of commissions and is not included on [the registered representative's] form U4 as an approved outside business activity."

Account for more than four years, Houston completed the form and checked the box next to the statement, "I have NOT accepted any appointment as trustee, successor trustee, executor, or power of attorney over any client including my immediate family during the past year." The Firm's employee files have no record of any notification from Houston advising the Firm concerning his status or compensation for his services as trustee.

3. First Wall Street Investigates Houston's Trustee Activities

In December 2005, during an NASD examination, First Wall Street's chief compliance officer, Katrina L. Dudley, discovered that Houston had check-writing authority on the Boyd Trust Account. The Firm then began an internal investigation of Houston's activities with the Boyd Trust Account. Dudley requested that Houston provide updated account information. In January 2006, Houston informed Dudley that he had become sole trustee of the Boyd trust. Dudley requested documentation from Houston, including the appropriate form for firm approval, and informed Houston that he could not engage in any transaction until First Wall Street approved the activity.

By February 2006, the Firm had a new chief compliance officer, Fred A. Princiotta, and on February 14, Houston informed Princiotta that Mrs. Boyd was unable to continue acting as trustee and asked whether there would be any problem if Houston were to be appointed trustee in her place. Houston failed to disclose to Princiotta that he had, in fact, already been appointed sole trustee eight months earlier. Not realizing that Houston was acting as trustee already, Princiotta told Houston that the Firm did not generally permit registered representatives to act as trustees other than for their immediate family because of the potential conflicts of interest and the need for heightened supervision.

Following his conversation with Houston, Princiotta reviewed the recent activity in the Boyd Trust Account and noticed multiple large withdrawals in amounts ranging up to $49,000 and the absence of key documents relating to the trust. For example, although the file contained handwritten memos referencing amended trust documents, the only formal document in the file was the original 1971 trust agreement. The file contained no documentation indicating that Houston would be receiving compensation for his services as co-trustee. There was no written documentation of Houston's later appointment as sole trustee. Princiotta asked Houston to provide him with copies of all the trust amendments and asked Houston to explain the reason(s) for the large disbursements from the trust. Houston told Princiotta that he had check-writing authority for the Boyd Trust Account and that the disbursements were made to care for Ms. Boyd, although he could not recall the specific details surrounding these disbursements.

Princiotta simultaneously asked Houston to provide an accounting of the checks drawn on the Boyd Trust Account and the Firm's back office to provide copies of five checks drawn on the Account. Although Houston said that he would provide the accounting, he did not do so despite repeated requests from Princiotta. When Princiotta received copies of the five requested checks from the back office, he noticed that three of the five checks were payable to the same account number at Countrywide Bank. Countrywide Bank informed Princiotta that the account was held in the name of "Kent Houston," and that Mrs. Boyd had no interest in the account. When Princiotta asked Houston to explain the circumstances of the five checks, Houston falsely answered that they had been deposited into Mrs. Boyd's account to pay down her home equity loan.

Princiotta asked Houston to provide him with copies of the Countrywide bank statements and information about the checks. On May 4, 2006, after Houston failed to provide an accounting of the disbursements, and copies of the trust amendments and bank statements, Princiotta informed Houston that the Firm had opened a formal investigation into "possible fraudulent activity" in the Boyd Trust Account and was freezing the Account until the investigation was completed to determine that there had been no violations of the securities laws. Princiotta advised Houston that, if the documents were not provided by May 8, 2006, Houston would be "immediately suspended" from acting as a registered representative for the Firm and his accounts, including the Boyd Trust Account, would be frozen pending review. The next day Houston provided the Firm with copies of the trust amendments, but none of the other requested documents or accounting information. On May 10, 2006, Princiotta emailed Houston a request for an accounting of the checks drawn on the Boyd Trust Account. Houston replied on May 12 that he would not provide the accounting without first receiving a waiver from Mrs. Boyd, and that, pursuant to her direction, he had started the process of transferring the Boyd Trust Account out of First Wall Street.

First Wall Street terminated Houston's employment on May 15, 2006 for his failure to cooperate with the Firm's investigation. On May 16, 2006, the Firm filed a Uniform Termination Notice for Securities Industry Registration on Form U5 stating that it had terminated Houston for "failure to abide by firm policy by failure to supply documents in an internal investigation." The Firm further explained that Houston's termination resulted from his failure to provide the Firm with updates to the trust documents in a timely fashion and his refusal to supply the Firm with an accounting of the checks he wrote and disbursements he made from the Boyd Trust Account.

After Mrs. Boyd's death in June 2006, Houston liquidated the securities in the Boyd Trust Account. On September 14, 2006, Houston issued checks totaling about $576,000 to thirteen trust beneficiaries. Houston, as a beneficiary under the trust, received a check for $5,000.

4. NASD Investigates Houston and Requests Houston Appear for OTR

After First Wall Street terminated Houston, NASD staff began an investigation into his possible misconduct at the Firm. In May and August, 2006, pursuant to NASD Rule 8210, NASD staff sent information requests to First Wall Street seeking information about the payments that Houston received from Veta Boyd's trust. First Wall Street responded to these requests.

NASD staff issued NASD Rule 8210 information requests to Houston in June and August, 2006, to gather more information about Veta Boyd's trust, including how the funds were used to either benefit Mrs. Boyd or comply with the covenants of her trust. Houston responded to these requests. NASD sent a third request to Houston in September, 2006. Houston responded to this request, but because NASD did not consider his response to be complete, it sent follow-up letters in October and November repeating the request from September. Houston responded to each of these two follow-up letters, but never provided complete responses to the information sought in the September request.

On September 7, 2007, NASD staff sent Houston a letter requesting that he appear for on-the-record testimony ("OTR") at its Los Angeles office on September 27, 2007. NASD's letter informed Houston that he was obligated to appear on the date and at the time specified in the letter. Houston responded to NASD's letter on September 10, 2007, requesting that the staff provide him with certain information "and at that time [we] will be able to set [a] date for any future hearing."[5] NASD staff sent Houston a letter dated September 17, 2007, reminding him that he was required by Rule 8210 to testify at the scheduled September 27 OTR, that he could not impose conditions on his testimony, and that his failure to appear and testify at the OTR would be "grounds for formal disciplinary action that can result in a fine, a suspension, and/or a bar."[6] On September 21, 2007, Houston requested to postpone his OTR for thirty days while he sought legal counsel to represent him. NASD staff rescheduled the OTR for October 19, 2007. In its letter rescheduling the OTR, NASD staff again reminded Houston that, pursuant to Rule 8210, he was "obligate[d] . . . to appear on the date and at the time specified" in the letter.

On October 10, 2007, NASD staff received a phone call from attorney Thomas Fehn who told staff that he would be representing Houston and that he was not available to attend the OTR on October 19. NASD staff agreed to reschedule the OTR for November 27, 2007, and confirmed its understanding that Fehn was representing Houston, and the rescheduled November 27 date for the OTR, in a letter dated October 10, 2007, a copy of which was sent to Houston. NASD staff received a letter from Houston dated November 21, 2007, stating that he had "nothing further to add and will not be attending the (OTR) scheduled on the 27th." Houston did not appear for the OTR nor did he contact NASD staff afterwards to explain his failure to appear.

B. Procedural History

NASD's Department of Enforcement filed a two-cause complaint against Houston on February 1, 2008. The first cause alleged that Houston violated NASD Rules 3030 and 2110 when he failed to provide First Wall Street with written notice of outside business activities

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[5] Houston requested, among other items, that NASD staff provide him with "the wording of the 2110 violation in question," "[s]entencing guidelines on violation 2110 & 3030," and "[r]ecent broker history of sentences handed down and accepted by accused on the above mentioned violations."

[6] In its letter, NASD staff directed Houston to the location of the text of Rule 2110 on NASD's website, NASD's Sanction Guidelines, synopses of settled disciplinary actions, and the text of Hearing Panel and National Adjudicatory Council decisions.

related to his acting as trustee for Mrs. Boyd's trust. The complaint also alleged that Houston violated NASD Rules 8210 and 2110 when he failed to appear for the OTR before NASD staff. In his answer, Houston "admit[ted] to being responsible for not providing my firm with written notice of this business activity" and to "to being responsible for signing an incorrect disclosure doc[ument]."

Houston waived his right to a hearing before the NASD Hearing Panel. In lieu of a hearing, the Hearing Panel considered the parties' written submissions, which included narrative statements about the case and documentary evidence. The Hearing Panel found Houston liable for the allegations as alleged in the complaint. For failing to provide First Wall Street with written notice of his outside business activities, the Hearing Panel fined Houston $100,000 and suspended him for one year in all capacities. For his failure to appear for testimony, the Hearing Panel barred Houston.

The National Adjudicatory Council ("NAC") affirmed the Hearing Panel's findings of violation, as well as the bar. The NAC determined that, although the evidence established that Houston failed to meet his obligations under NASD Rules 3030 and 2110, the record did not support a fine exceeding the maximum $50,000 recommended by the NASD Sanction Guidelines. The NAC found instead that it would be appropriate to suspend Houston for one year and fine him $50,000 for his violation of NASD Rules 3030 and 2110, but chose not to impose these sanctions in light of the bar imposed upon Houston for his failure to provide testimony. This appeal followed.

III.

A. Conduct Rule 3030, which governs any outside business activity of an associated person, prohibits a person associated with a member from being employed by, or from accepting compensation from, any other person as a result of any business activity outside the scope of the associated person's employment with the member, unless the associated person provides prompt written notice to the member. Conduct Rule 2110 requires adherence to high standards of commercial honor and just and equitable principles of trade. Conduct that violates other NASD rules is inconsistent with the requirements of Rule 2110 and therefore also violates this Rule.[7]

Houston does not dispute that he did not give First Wall Street written notice that he was acting as trustee for the Boyd Trust Account or that he was receiving compensation for this activity. In fact, the record is replete with his admissions that he did not give the Firm such written notice. Rather, he argues that the Firm "had all the trust documents on file. We discussed many times my responsibilities as a Trustee . . . [the Firm] . . . never questioned my transacting of business and check writing authority in the trust."

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[7] *See, e.g., Wanda P. Sears*, Exchange Act Rel. No. 58075, n. 28 (July 1, 2008), 93 SEC Docket 7395, _______.

The record indicates that the Firm did not, in fact, have many of the key documents relating to the trust on file until Princiotta asked Houston to provide them in 2006 in connection with the Firm's internal investigation of Houston. Houston provides no support for his contention that he "discussed" his trusteeship with anyone at the Firm, and in any event, Rule 3030 requires that written notice be provided and Houston admits he did not do so.

Houston asserts that his actions in connection with the trust were based on, and consistent with, advice from Mrs. Boyd's estate counsel. However, Houston is not charged here with malfeasance with respect to the trust, but rather with failure to disclose his activities in connection with the trust to the Firm. He does not suggest that Mrs. Boyd's counsel advised him not to disclose his actions to the Firm.

Accordingly, we find that Houston failed to provide written notice to the Firm of his outside business activities and thereby violated NASD Rules 3030 and 2110.

B. NASD Rule 8210 requires persons associated with a member firm to provide information with respect to any matter involved in an NASD investigation, complaint, examination, or proceeding. It is undisputed that Houston did not appear for the November 27, 2007 OTR, despite receiving notice of the OTR and being advised by NASD of the disciplinary consequences that could result if he failed to appear. Even after NASD accommodated him by rescheduling the OTR twice, including after consultation with attorney Fehn, Houston advised NASD that he would not appear for the OTR and, in fact, did not appear.

Houston denies that he retained counsel or that he authorized Fehn to seek an extension. Houston's November 21 letter to NASD (in which he refuses to appear at the scheduled November 27 OTR) evidences that Houston received his copy of NASD's October 10 letter to Fehn confirming the November 27 date. Yet Houston's letter does not object to Fehn's having rescheduled the OTR on Houston's behalf. More importantly, whether Houston hired Fehn is immaterial to whether Houston failed to provide the requested testimony.

We, therefore, find that Houston violated NASD Rules 8210 and 2110 by failing to appear for an OTR with NASD staff.

IV.

Pursuant to Exchange Act Section 19(e)(2), we will sustain NASD's sanction unless we find, having due regard for the public interest and the protection of investors, that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition.[8] Exchange Act Section 15A requires that self-regulatory organizations ("SRO"), such as NASD, enforce compliance by its members and their associated persons with the Exchange Act, the

[8] 15 U.S.C. § 78s(e)(2). Houston does not claim, and the record does not show, that NASD's action imposes an unnecessary or inappropriate burden on competition.

Exchange Act rules, and the SRO's rules.[9] While the Exchange Act imposes an obligation on NASD to enforce compliance by its members and associated persons, NASD does not have subpoena power to assist it in carrying out this duty. It must, instead, "rely upon Rule 8210 in connection with its obligation to police the activities of its members and associated persons."[10] Rule 8210 "provides a means, in the absence of subpoena power, for the NASD to obtain from its members information necessary to conduct investigations."[11] This rule is at the "heart of the self-regulatory system for the securities industry"[12] and is an "essential cornerstone of NASD's ability to police the securities markets and should be rigorously enforced."[13]

In reaching its decision to bar Houston, NASD looked to its Sanction Guidelines in effect in 2007. Those Guidelines provide that, absent mitigating circumstances, "a bar should be [the] standard" sanction when an individual fails to respond "in any manner" in violation of Rule 8210.[14] They provide that, if the violation is one in which "mitigation exists, or the person did not respond in a timely manner" to a request pursuant to Rule 8210, the maximum recommended sanction is a two-year suspension and a $25,000 fine.[15]

NASD deemed Houston's failure to appear for the OTR as a failure to respond in any manner to a request for information issued pursuant to Rule 8210, and concluded that there were no mitigating factors. NASD determined that this complete failure to respond rendered Houston "presumptively unfit for employment in the securities industry because the self-regulatory system

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9 15 U.S.C. § 78o-3. The reason for this SRO mandate, as we recently noted, is "[b]ecause of limited Commission resources, Congress has given NASD and other securities industry self-regulatory organizations significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations." *Charles C. Fawcett, IV*, Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3157.

10 *Howard Brett Berger*, Exchange Act Rel. No. 58950 (Nov. 14, 2008), 94 SEC Docket 11615, 11620 (quoting *Joseph Patrick Hannan*, 53 S.E.C. 854, 858-59 (1998)).

11 *Id.* (quoting *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993).

12 *Id.*

13 *Jay Alan Ochanpaugh*, Exchange Act Rel. No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653, 2661.

14 NASD Sanction Guidelines at 35 (2007 ed.).

15 Sanction Guidelines at 35.

of securities regulation cannot function without compliance with Rule 8210 requests," citing our decision in *PAZ*.[16]

However, in addition to the OTR requests, NASD sent several Rule 8210 requests seeking written answers to questions and the production of documents. Houston responded, apparently to NASD's satisfaction, to the first two of these requests, and at least partially to the third request. Although Houston's failure to respond completely to the third request and its two follow-up letters was not charged by NASD, all of these requests for written information and documents were part of the same investigation by NASD aimed at uncovering whether there were improprieties in Houston's conduct with respect to the trust. Therefore, because Houston did respond in some manner to NASD's request, any sanction imposed, whether a bar or otherwise, should analyze factors other than the presumptive unfitness indicated by a failure to respond in any manner.

We addressed a similar situation in *Rooney A. Sahai*.[17] There, we reviewed NASD's determination, on remand from the Commission, to impose a bar for Sahai's violation of Rule 8210.[18] NASD, in support of the bar, asserted that Sahai failed to respond "in any manner" to two letters requesting information. In rejecting this basis for NASD's bar, we noted that, although NASD was correct in its assertion of Sahai's failure to respond to two letter requests, Sahai had responded to five other requests for information to some extent. On the basis of the record before us in that proceeding, and based on the Sanction Guidelines, we determined to reduce the permanent bar to a two-year suspension.

We recognize that the Sanction Guidelines "do not provide fixed sanctions for particular violations" and "are not intended to be absolute."[19] We also note that NASD found that there were aggravating factors. In applying the Sanction Guidelines's two Principal Considerations regarding a Rule 8210 violation, i.e., (1) the nature of the information requested; and (2) whether the requested information was provided,[20] NASD found that Houston's testimony was important because NASD was attempting to investigate whether Houston was misappropriating funds from his great aunt's trust and the information requested was not provided because Houston never appeared for the OTR. NASD deemed these to be aggravating factors. However, its determination that the bar was warranted appears to have been based on its finding that Houston

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16 *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket __.

17 Exchange Act Rel. No. 55046 (Jan. 5, 2007), 89 SEC Docket 2402, _______.

18 The remand was necessitated by our determination that, on the record before us in the initial appeal, we could not assess "the appropriateness of the bar imposed on Sahai."

19 Sanction Guidelines at 1.

20 Sanction Guidelines at 35.

failed to appear at the OTR and was therefore presumptively unfit to remain in the securities industry.

A remand is appropriate here. NASD is the proper authority to determine the sanction for the Rule 8210 violation in the first instance, based on the correct application of its Sanction Guidelines to the full record. In this regard, we are mindful that "vigorous enforcement of Rule 8210 helps ensure the continued strength of the self-regulatory system -- and thereby enhances the integrity of the securities markets and protects investors -- by preventing members and their associated persons who demonstrate their unfitness by failing to respond in any manner to Rule 8210 requests from remaining in the securities industry."[21] We have observed that "attempts to delay and ultimately avoid [an appearance for testimony] are especially troubling given the importance of Rule 8210 . . . [in] enabl[ing] NASD to carry out its self-regulatory functions."[22] NASD should not have to bring disciplinary proceedings, as it was required to do here, in order to obtain compliance with its rules governing its investigations.[23] We note that the General Principles Applicable to All Sanction Determinations provide that

> Adjudicators should design sanctions that are significant enough to prevent and discourage future misconduct by a respondent, to deter others from engaging in similar misconduct, and to modify and improve business practices. Depending on the seriousness of the violations, Adjudicators should impose sanctions that are significant enough to ensure effective deterrence. When necessary to achieve this goal, Adjudicators should impose sanctions that exceed the range recommended in the applicable guideline.[24]

We also note that Houston made many arguments that NASD rejected based on its determination that Houston was presumptively unfit for employment in the securities industry, and that NASD's weighing of these arguments might differ absent this presumption.

Moreover, NASD determined not to impose the sanctions it deemed warranted for Houston's failure to disclose his outside business activities, the suspension and fine, because it was imposing a bar for the Rule 8210 violation. It may wish to reconsider this determination on remand.

We do not intend to suggest any view as to a particular outcome.

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[21] *Berger*, 94 SEC Docket at 11621.

[22] *Toni Valentino*, 57 S.E.C. 330, 339 (2004).

[23] *Id.*; *Robert A. Quiel*, 53 S.E.C. 165, 168 (1997).

[24] Sanction Guidelines at 2.

An appropriate order will issue.[25]

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

Elizabeth M. Murphy
Secretary

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

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66014 / December 20, 2011

Admin. Proc. File No. 3-14175

In the Matter of the Application of

KENT M. HOUSTON
2256 Plazuela Street
Carlsbad, California 92009

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING IN PART AND REMANDING IN PART

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

ORDERED that the findings of violations made by FINRA against Kent M. Houston be, and they hereby are, sustained; and it is further

ORDERED that the sanction imposed by FINRA on Kent M. Houston in this proceeding be, and it hereby is, vacated; and it is further

ORDERED that this proceeding be, and it hereby is, remanded to FINRA for further proceedings in accordance with that opinion.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Paredes not participating

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 229, 239 and 249

[RELEASE NOS. 33-9286; 34-66019; File No. S7-41-10]

RIN 3235-AK83

MINE SAFETY DISCLOSURE

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to our rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1503(a) of the Act requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8-K disclosing the receipt of certain orders and notices from the Mine Safety and Health Administration.

DATES: Effective Date: [insert date 30 days after publication in Federal Register].

FOR FURTHER INFORMATION CONTACT: Jennifer Zepralka, Senior Special Counsel, or Jennifer Riegel, Special Counsel, Division of Corporation Finance at (202) 551-3300, at the Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adding new Item 104 to Regulation S-K,[1] amending Item 601 of Regulation S-K,[2] and amending Forms 8-K,[3] 10-Q,[4] 10-K,[5] 20-F[6] and 40-

[1] 17 CFR 229.10 et seq.

[2] 17 CFR 229.601.

F[7] under the Securities Exchange Act of 1934 ("Exchange Act").[8] In addition, we are amending General Instruction I.A.3(b) of Form S-3[9] under the Securities Act of 1933 ("Securities Act").[10]

I. BACKGROUND AND SUMMARY

On December 15, 2010, we proposed amendments to our rules and forms relating to mine safety disclosure.[11] We proposed these rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").[12] Section 1503(a) of the Act requires issuers that are required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose specified information about mine health and safety in their periodic reports filed with the Commission.[13] Section 1503(b) of the Act requires each issuer that is an operator, or that has a subsidiary that is an operator, of a coal or other mine to file a current report on Form 8-K with the Commission reporting receipt of certain shutdown orders and notices of patterns or potential patterns of violations.[14]

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[3] 17 CFR 249.308.

[4] 17 CFR 249.308a.

[5] 17 CFR 249.310.

[6] 17 CFR 249.220f.

[7] 17 CFR 249.240f.

[8] 15 U.S.C. 78a et seq.

[9] 17 CFR 239.13.

[10] 15 U.S.C. 77a et seq.

[11] See Release No. 33-9164, 34-63548 (December 15, 2010) [75 FR 80374] (the "Proposing Release").

[12] Pub. L. No. 111-203 (July 21, 2010).

[13] Section 1503(a) of the Act.

[14] Section 1503(b) of the Act.

As discussed in the Proposing Release, the disclosure requirements set forth in Section 1503 of the Act refer to and are based on the safety and health requirements applicable to mines under the Federal Mine Safety and Health Act of 1977 (the "Mine Act"),[15] which is administered by the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA"). Under the Mine Act, MSHA is required to inspect surface mines at least twice a year and underground mines at least four times a year[16] to determine whether there is compliance with health and safety standards or with any citation, order or decision issued under the Mine Act and whether an imminent danger exists. MSHA also conducts spot inspections[17] and inspections pursuant to miners' complaints.[18] If violations of safety or health standards are found, MSHA inspectors will issue citations or orders to the mine operators. Among other activities under the Mine Act, MSHA also assesses and collects civil monetary penalties for violations of mine safety and health standards.[19] MSHA maintains a data retrieval system on its website that allows users to examine, on a mine-by-mine basis, data on inspections, violations, and accidents, as well as information about dust samplings, at all mines in the United States.[20]

In addition, an independent adjudicative agency, the Federal Mine Safety and Health Review Commission (the "FMSHRC"), provides administrative trial and appellate review of

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[15] 30 U.S.C. 801 et seq.

[16] 30 U.S.C. 813(a). Seasonal or intermittent operations are inspected less frequently. See Mine Safety and Health Administration, Program Policy Manual, Volume I, Section 103, available at http://www.msha.gov/REGS/COMPLIAN/PPM/PMMAINTC.HTM.

[17] 30 U.S.C. 813(i).

[18] 30 U.S.C. 813(g).

[19] 30 U.S.C. 820. See also "MSHA's Statutory Functions" available at http://www.msha.gov/MSHAINFO/MSHAINF1.HTM.

[20] See http://www.msha.gov/DRS/DRSHOME.HTM.

legal disputes arising under the Mine Act.[21] Most cases deal with civil penalties proposed by MSHA to be assessed against mine operators and address whether the alleged safety and health violations occurred, as well as the appropriateness of proposed penalties. Other types of cases include miners' complaints of safety- or health-related discrimination and miners' applications for compensation after a mine has been idled by a closure order.[22] The FMSHRC's administrative law judges decide cases at the trial level and the five-member FMSHRC provides appellate review. Appeals from the FMSHRC's decisions are to the U.S. courts of appeals.[23]

The disclosure requirements set forth in Section 1503 of the Act are currently in effect.[24] Issuers have been providing disclosure in their periodic and current reports filed with the Commission since the effective date of Section 1503. However, the Act states that the Commission is "authorized to issue such rules or regulations as are necessary or appropriate for the protection of investors and to carry out the purposes of [Section 1503]."[25] In order to facilitate consistent compliance with the Act's requirements by reporting companies, we proposed rule amendments that would implement the Act's requirements by codifying them into our disclosure rules and specifying their scope and application. We also proposed to require a limited amount of additional disclosure to provide context for certain items required by the Act.

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[21] 30 U.S.C. 815(d).

[22] See "About FMSHRC" on http://www.fmshrc.gov/fmshrc.html.

[23] 30 U.S.C. 816.

[24] See Section 1503(f) of the Act.

[25] Section 1503(d)(2) of the Act.

We received over 30 comment letters in response to the proposed amendments, and one letter, received prior to our proposal, relating to Section 1503 of the Act.[26] These letters came from investors and issuers, as well as professional and trade associations, trade unions, law firms and other interested parties. In general, the commentators supported the proposed amendments, although several commentators opposed some of the proposed amendments that would require additional disclosure to provide context to the information required by the Act. Many commentators suggested modifications or alternatives to the proposals.[27] As discussed in detail below, we have taken into consideration the comments received on the proposed amendments, as well as the staff's experience with the disclosure already being provided under Section 1503, and are adopting several amendments to our rules. In general, we have decided not to adopt the proposals that would have expanded the required disclosure beyond that required by Section 1503 since we are persuaded by comments asserting that the added burden of these proposed requirements likely would have outweighed the potential incremental benefits of the additional disclosure. The final rules we adopt today adhere closely to Section 1503 of the Act, and reflect changes made from the proposals in response to comments.

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[26] The public comments we received on the Proposing Release are available on our website at http://www.sec.gov/comments/s7-41-10/s74110.shtml. In addition, to facilitate public input on the Act, the Commission provided a series of e-mail links, organized by topic, on its website at http://www.sec.gov/spotlight/regreformcomments.shtml. The letter we received prior to publication of the Proposing Release on Section 1503 of the Act is available on our website at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml.

[27] We received three comment letters noting Executive Order No. 13563 (Jan. 18, 2011), which instructs federal agencies to, among other things, minimize burdens on the private sector and simplify and harmonize their regulations. See letters from Industrial Minerals Association – North America ("IMA-NA"), National Stone, Sand, Gravel Association ("NSSGA") and Wyoming Mining Association ("WMA"). As these commentators acknowledge, the Executive Order does not apply to the Commission. (We note that, subsequent to the submission of these comment letters, the President issued a comparable Executive Order, No. 13579 (July 11, 2011), directed to independent regulatory agencies.) However, these commentators assert that it would be within the spirit of the Executive Order if the final rules implemented Section 1503 by simply reiterating the statutory provision in the regulatory text of 17 CFR Parts 229, 239 and 249. While we are not adopting in its entirety the approach recommended by these commentators, as discussed in more detail in this release, we are modifying some of the disclosure requirements from the proposals so that the final rules adhere closely to the statutory text.

We are adopting amendments to Form 10-K, Form 10-Q, Form 20-F and Form 40-F to require the disclosure required by Section 1503(a) of the Act. We are adopting new Item 104 of Regulation S-K, which sets forth the disclosure requirements for Forms 10-Q and 10-K, and amending Item 601 of Regulation S-K to add a new exhibit to Form 10-K and Form 10-Q for provision of this information. We are also adopting amendments to Forms 20-F and 40-F to include the same disclosure requirements as those adopted for issuers that are not foreign private issuers. In addition, we are adding a new item to Form 8-K to implement the requirement imposed by Section 1503(b) of the Act, and amending Form S-3 to add the new Form 8-K item to the list of Form 8-K items the untimely filing of which will not result in loss of Form S-3 eligibility.

II. DISCUSSION OF THE AMENDMENTS

A. Required Disclosure in Periodic Reports

1. <u>Scope</u>

a. Proposed Amendments

Section 1503(a) of the Act mandates that specified disclosure be provided in each periodic report filed with the Commission by every issuer that is required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and that is "an operator, or that has a subsidiary that is an operator, of a coal or other mine." The Act specifies that the term "operator" has the meaning given such term in Section 3 of the Mine Act.[28] The Act also

[28] Section 1503(e)(3) of the Act. Section 3(d) of the Mine Act provides that an "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine. 30 U.S.C. 802.

specifies that the term "coal or other mine" means a coal or other mine as defined in Section 3 of the Mine Act,[29] that is subject to the provisions of the Mine Act.[30]

We proposed to include references to these definitions in new items of Regulation S-K, the instructions to a new item of Form 20-F and the notes to a new paragraph of General Instruction B of Form 40-F. The proposed rules did not provide for any other defined terms, but the Proposing Release noted our view that the definition of "subsidiary" in Item 1-02(x) of Regulation S-X[31] would apply to this disclosure in the absence of another definition.

The Proposing Release also explained that, because the Act's definition of "coal or other mine" is limited to those mines that are subject to the provisions of the Mine Act, and the Mine Act applies only to mines located in the United States,[32] the proposed mine safety disclosure

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[29] Section 3(h) of the Mine Act:

(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

[30] Section 1503(e)(2) of the Act.

[31] Under Item 1-02(x) of Regulation S-X, a "subsidiary" of a specified person is "an affiliate controlled by such person directly, or indirectly through one or more intermediaries." This definition is identical to the definition of "subsidiary" in Rule 12b-2 under the Exchange Act and Rule 405 under the Securities Act.

[32] The Mine Act covers each "coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine…" 30 U.S.C. 803. "'Commerce' means trade, traffic, commerce, transportation, or communication among the several States, or

would be required only for coal or other mines (as defined in the Mine Act) located in the United States. Under the proposed rules, this disclosure would be made for each distinct mine covered by the Mine Act, and issuers would not be permitted to group mines by project or geographic region.

The proposed rules would include smaller reporting companies and foreign private issuers[33] within the scope of the rules implementing Section 1503(a) of the Act.

The Proposing Release requested comment on whether the special provisions of Form 10-K and Form 10-Q permitting the omission of certain information by wholly-owned subsidiaries and asset-backed issuers should apply to the proposed mine safety disclosure.

b. Comments on the Proposed Amendments

Many commentators supported the proposal to apply the disclosure requirements of Section 1503 only to mines that are subject to the Mine Act, and not to mines located outside the United States.[34] These commentators generally agreed with our view that references to the Mine Act in Section 1503 indicate that the statutory disclosures are required only for coal or other mines covered by the Mine Act. One commentator noted its belief that it would be impractical to apply the disclosure provisions to mines in jurisdictions other than the United States because there is no common mine safety regulatory approach across jurisdictions, and warned that an attempt to do so would yield inconsistent and confusing standards in terms of the application of

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between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof." 30 U.S.C. 802(b). "'State' includes a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands." 30 U.S.C. 802(c).

[33] See the definition of "smaller reporting company" in 17 CFR 240.12b-2 and the definition of "foreign private issuer" in 17 CFR 240.3b-4.

[34] See letters from AngloGold Ashanti Limited ("AngloGold"), Barrick Gold Corporation ("Barrick Gold"), Cleary Gottlieb Steen & Hamilton LLP ("Cleary"), Davis Graham & Stubbs LLP ("DGS Law"), National Mining Association ("NMA"), New York State Bar Association ("NYSBA") and Rio Tinto plc ("Rio Tinto").

the standard both between companies and between operating locations.[35] Another commentator noted that, to the extent that mine safety information relating to an issuer's non-U.S. mines is material, disclosure would be required under the Commission's existing disclosure requirements.[36]

Other commentators, however, supported expanding the disclosure requirement to cover mines in all jurisdictions, noting their belief that the health and safety risks related to mines in all jurisdictions are as material to investors as health and safety concerns for U.S. mines,[37] and asserting that the data required to be disclosed under the Mine Act and Section 1503(a) is as readily available for an issuer's non-U.S. mines as it is for U.S. mines.[38]

Several commentators supported the proposed rule that would require disclosure to be provided for each mine for which the issuer or a subsidiary of the issuer is an operator, on a mine-by-mine basis.[39] One commentator stated its view that the statutory language should be interpreted to be consistent with a group of operations considered a "mine" for purposes of Mine Act reporting.[40] Other commentators similarly noted that this is how operators report information to MSHA, so issuers would be able to prepare the required disclosure on a mine-by-mine basis without a significant administrative burden.[41]

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[35] See letter from Rio Tinto.

[36] See letter from AngloGold.

[37] See e.g, letters from California Public Employees' Retirement System ("CalPERS"), EARTHWORKS' No Dirty Gold Campaign ("EARTHWORKS"), Social Investment Forum ("SIF") and Trillium Asset Management Corporation ("Trillium").

[38] See letters from SIF and Trillium.

[39] See letters from American Federal of Labor and Congress of Industrial Organizations ("AFL-CIO"), Barrick Gold, EARTHWORKS, John H. Estess ("Estess") and United Mine Workers of America ("UMWA").

[40] See letter from Barrick Gold.

[41] See letters from AFL-CIO, Barrick Gold and UMWA.

Conversely, three commentators requested that the final rules specify that issuers may group all integrated facilities of a mine site when complying with the disclosure requirements of the Act, notwithstanding the fact that some of those facilities may have been issued separate mine identification numbers by MSHA.[42] These commentators claimed that doing so could help promote investor understanding because the health and safety information would then be reported in a manner consistent with the company's reporting of operating and financial data in their periodic reports.[43]

We received a comment requesting that we clarify that only those orders and citations issued to mines with an MSHA identification number are to be included in the disclosure.[44] Similarly, a few commentators requested clarification that the final rules require disclosure only of orders and citations issued directly to mine operator issuers and their subsidiaries, and not to contractors or other entities operating at the mining site, who would have their own MSHA identification numbers.[45]

Several commentators agreed that it is appropriate for the definition of the term "subsidiary" for purposes of Section 1503 to be consistent with the meaning of the term as defined under Item 1-02(x) of Regulation S-X, and supported our proposal not to adopt a different definition of "subsidiary."[46] One of these commentators suggested that this definition

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[42] See letters from Freeport-McMoRan Copper and Gold Inc. ("Freeport-McMoRan"), NMA and Rio Tinto.

[43] See letters from Freeport-McMoRan and NMA.

[44] See letter from NMA.

[45] See letters from Barrick Gold and DGS Law.

[46] See letters from AngloGold, Cleary, Estess, NMA, Rio Tinto, SIF and Trillium.

should be specified in the new rules.[47] However, one commentator stated that the definition of subsidiary and entity under the control of the corporation must be comprehensive and should include unconsolidated equity investees and joint ventures.[48]

Commentators generally concurred with our proposal that smaller reporting companies should not be exempted from the disclosure requirements, generally noting that Section 1503 of the Act does not contemplate an exception from disclosure for smaller reporting companies.[49] Similarly, commentators generally agreed with the proposal that foreign private issuers should not be exempted from the disclosure requirement.[50] Many commentators expressed the view that Section 1503 of the Act does not contemplate any exception from disclosure for foreign private issuers,[51] while others asserted that foreign private issuers are as likely to have risks associated with worker safety issues as domestic reporting companies and therefore should be required to report the same information.[52]

Commentators had differing views on whether either wholly-owned subsidiaries or asset-backed issuers should be permitted to omit the proposed mine safety disclosure in accordance with the special provisions in General Instruction I to Form 10-K and General Instruction H to Form 10-Q. Two commentators argued that wholly-owned subsidiaries should be permitted to

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[47] See letter from Estess.

[48] See letter from EARTHWORKS.

[49] See e.g, letters from AFL-CIO, CalPERS, California State Teachers' Retirement System ("CalSTRS"), EARTHWORKS, NMA, Rio Tinto, SIF, Trillium and UMWA. One commentator agreed that smaller reporting companies should be required to provide the disclosure, but noted concerns about the costs of compliance for smaller reporting companies and suggested the Commission consider a simpler disclosure system for such companies. See letter from Estess.

[50] See letters from CalPERS, CalSTRS, DGS Law, EARTHWORKS, NMA, Rio Tinto, SIF and Trillium.

[51] See letters from DGS Law, NMA and Rio Tinto.

[52] See letters from SIF and Trillium.

omit the disclosure if the information is disclosed by the wholly-owned subsidiary's parent entity.[53] Other commentators stated their view that the special provisions should not apply.[54]

c. Final Rule

We are adopting the final rules as proposed, with a clarifying change to the instructions regarding the definition of the term "subsidiary." The final rules apply only to mines in the United States. Although we have considered the views of commentators that request application of the disclosure requirement to non-U.S. mines, we continue to believe that the statutory language referencing the Mine Act clearly indicates that the Section 1503 disclosures are required only for coal or other mines covered by the Mine Act. We also agree with commentators who expressed concerns that application of the Act's disclosure requirement to non-U.S. mines would be difficult to implement and could result in different disclosure from jurisdiction to jurisdiction, which would not be directly comparable. Although the final rules are limited to implementing the requirements of the Act and, therefore, do not extend to foreign mines, we reiterate, as noted in the Proposing Release, that to the extent mine safety issues are material, under our current rules disclosure could be required pursuant to the following items of Regulation S-K: Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations), Item 503(c) (Risk Factors), Item 101 (Description of Business) or Item 103 (Legal Proceedings).

The final rules require disclosure on a mine-by-mine basis. We continue to believe that the disclosure of the information on a mine-by-mine basis accords with the plain language of the

[53] See letters from NMA and NYSBA.

[54] See letters from Estess and EARTHWORKS (neither wholly-owned subsidiaries nor asset-backed issuers should be permitted to omit the information); SIF and Trillium (no reason for exemptions for asset-backed issuers); and AFL-CIO and UMWA (information of wholly-owned subsidiaries should not be excluded).

Act. We understand the concern raised by commentators about groupings of mines that may more logically be reported together but for having separate MSHA mine identification numbers. However, we note that MSHA's data retrieval system provides information on a mine-by-mine basis using the MSHA mine identification number assigned to each mine or facility. MSHA has a detailed process for assigning identification numbers.[55] We believe it is more appropriate to require disclosure for each specific identified mine, consistent with MSHA reporting, as well as with Section 1503.

We note that orders and citations issued to independent contractors (who are not subsidiaries of the issuer) who are working at the issuer's mine site would not need to be reported by the issuer. This is consistent with the approach discussed above, under which the reporting will be for each mine that has an MSHA identification number, and is consistent with the Act's use of terms defined in the Mine Act. The definition of "operator" in the Mine Act includes independent contractors. Therefore, we note that independent contractors that are required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and are operators, or have a subsidiary that is an operator, of a coal or other mine would need to include the disclosure required by Section 1503 and our new rules in their reports. We recognize that the result of this approach could be some orders or citations will go unreported if the independent contractor is not a reporting company, but believe this approach is consistent with the way MSHA reports orders and citations, as well as with Section 1503. We note that if individual orders or citations, or a pattern of violations, at mines owned by an issuer but operated

[55] See MSHA Program Policy Manual Volume III. 41-1. For example, for coal mines, preparation plants that receive coal from only one underground or surface mine, and are located on the same property as that mine, share the mine's identification number, but preparation plants that share mine property with a surface or underground mine, but process coal from other mines, are to be given separate identification numbers.

by an independent contractor are material to the issuer, disclosure could be required under our existing rules pursuant to the applicable items of Regulation S-K.

The final rules will include an instruction noting that "subsidiary" is as defined in Exchange Act Rule 12b-2. This definition is identical to the definition of "subsidiary" found in Securities Act Rule 405 and Regulation S-X Item 1-02(x), which apply to other elements of issuers' periodic disclosure. As stated in Rule 12b-2, a subsidiary of a specified person is "an affiliate controlled by such person directly, or indirectly through one or more intermediaries." Issuers are accustomed to applying this definition in connection with their periodic reporting and we do not see a benefit to adding to issuers' compliance burden by specifying a different definition of "subsidiary" in the context of mine safety disclosure. We considered the suggestion raised by a commentator that "subsidiary" should be defined to specifically encompass unconsolidated equity investees and joint ventures. However, we believe that such an approach is inconsistent with the plain meaning of the term "subsidiary."

The final rules do not provide special treatment to smaller reporting companies or foreign private issuers. We continue to believe their inclusion is consistent with the plain language of Section 1503(a), which applies broadly to issuers that are required to file reports under Section 13(a) or 15(d) of the Exchange Act. In addition, we note that these issuers have been complying with the Section 1503 disclosure requirements since the effective date of that provision.

The final rules do not extend the special provisions of Form 10-K and Form 10-Q that permit the omission of certain information by wholly-owned subsidiaries and asset-backed issuers. Many commentators stated, and we agree, that such treatment is not necessary for the mine safety disclosure requirement. Section 1503 of the Act applies broadly to "each issuer that is required to file reports pursuant to" the Exchange Act, and does not appear to contemplate special treatment for particular types of issuers. We are making technical amendments to General Instructions I and J to Form 10-K and General Instruction H to Form 10-Q to delete the references to "Item 4, Submission of Matters to a Vote of Security Holders."

2. Location of Disclosure

The Act states that companies must include the disclosure in their periodic reports required pursuant to Section 13(a) or 15(d) of the Exchange Act.

a. Proposed Amendments

In order to implement the disclosure requirement set forth in Section 1503(a) of the Act, we proposed to add new Item 4 to Part II of Form 10-Q and new Item 4(b) to Part I of Form 10-K, which would require the information required by new Items 106 and 601(b)(95) of Regulation S-K; new Item 16J to Form 20-F; and new Paragraph (18) of General Instruction B of Form 40-F. As proposed, these items would be identical in substance and entitled, "Mine Safety Disclosure." The proposed items would require issuers to provide in their periodic reports and in exhibits to their periodic reports the information listed in Section 1503(a) of the Act and certain additional disclosure designed to provide context for such information.

The proposed rules would require issuers that have matters to report in accordance with Section 1503(a) to include brief disclosure in the body of the periodic report noting that they have mine safety violations or other regulatory matters to report in accordance with Section 1503(a), and that the required information is included in an exhibit to the filing. The exhibit would include the detailed disclosure about specific violations and regulatory matters required by Section 1503(a) as implemented in the proposed rules. The Proposing Release noted our view that this approach would facilitate access to the information about detailed mine safety matters without overburdening the traditional Exchange Act reports with extensive new disclosures.

We did not propose any particular presentation requirements for the new disclosure, although the Proposing Release encouraged issuers to use tabular presentations whenever possible, if to do so would facilitate investor understanding.

b. Comments on the Proposed Amendments

A broad spectrum of commentators supported the Commission's proposal to require the information to be presented in an exhibit to the periodic report, with brief disclosure in the body of the report noting that the issuer has mine safety matters to report and referring to the required exhibit.[56] We did not receive any comments opposing this approach, although two commentators requested that certain information, such as all fatal accidents or receipt of notice that a mine has a pattern of violations, be required to be included in the body of the periodic report so that investors would be made aware of significant events without looking to the exhibit.[57]

The Proposing Release requested comment on whether it would be preferable, and consistent with Section 1503, to provide for annual reporting only, instead of requiring the disclosure in every periodic report. Although a few commentators stated a belief that annual reporting would be preferable to quarterly reporting,[58] generally the commentators agreed that Section 1503(a) requires the mine safety disclosures to be included in each periodic report filed with the Commission.[59]

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[56] See letters from AFL-CIO, AngloGold, Chevron Corporation ("Chevron"), Cleary, Freeport-McMoRan, Estess, NMA, NYSBA, Rio Tinto and UMWA.

[57] See letters from AFL-CIO and UMWA.

[58] See, e.g., letters from Chevron and NSSGA. One commentator suggested that the Form 10-Q reporting requirement could be met by allowing issuers to incorporate by reference the required information from MSHA's data retrieval system and provide specific instructions as to how to access the information. See letter from Freeport-McMoRan.

[59] See, e.g., letters from Chevron, Estess and NMA.

We requested comment on whether the information required by Section 1503 should be included in registration statements, in addition to the periodic reporting requirement. Many commentators stated that the disclosure should not be included in registration statements, noting that Section 1503 specifies only that the disclosure is required in periodic reports.[60] However, two commentators stated their view that the disclosure should be required in registration statements.[61] On a related note, although we did not specifically request comment on the topic, we received a small number of comments expressing a view on whether the disclosure required under Section 1503(a) and the new rules should be filed with the Commission or instead deemed to be furnished, not filed.[62] Commentators who argued for the information to be "furnished" asserted that, because in their view the Section 1503 disclosure requirements are not aimed at providing investors with information material to investment decisions, Exchange Act Section 18 should not apply, the Section 1503 information should not be incorporated into any Securities Act filing, and the officer certifications required by Exchange Act Rules 13a-14 and 15d-14 should not extend to the Section 1503 disclosures.[63] However, other commentators expressed their view that information about health and safety risks related to mines operated by issuers is material to investors.[64]

Some commentators approved of the flexibility of the proposed rules, which did not specify any particular presentation requirements for the new disclosure and permitted each issuer

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[60] See letters from AngloGold, Cleary, DGS Law, NMA, NYSBA and Rio Tinto.

[61] See letters from EARTHWORKS and Estess.

[62] See letters from EARTHWORKS, SIF and Trillium (filed); and Cleary, NYSBA (furnished).

[63] See, e.g., letter from NYSBA.

[64] See letters from SIF and Trillium.

the flexibility to adopt a presentation it believes is appropriate for its disclosure.[65] An equal number of commentators, however, expressed a preference for requiring a specific tabular presentation.[66] One commentator stated that a specific tabular presentation would more readily allow an investor to compare results from different owners or operators and individual mines.[67] Another commentator requested that we provide an example of an acceptable presentation or format, stating that a specific tabular presentation format would be helpful to ensure the required information is presented in the correct form.[68]

Commentators generally were of the view that the Commission should not require the information to be provided in an interactive data format.[69] Among the reasons cited for this view was that requiring interactive data could make the reporting more complex and add costs to the system.[70] Another commentator noted its view that the purpose of the Commission's existing XBRL rules is to facilitate financial analysis by investors, and therefore asserted that requiring the Section 1503 information, which is non-financial in nature, to be submitted in interactive data format would not be consistent with this purpose.[71] A few commentators, however, expressed a preference that the disclosure be tagged in XBRL.[72]

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[65] See letters from AngloGold, Cleary, IMA-NA, NMA and WMA.

[66] See letters from Estess, NSSGA, Rio Tinto, SIF and Trillium.

[67] See letter from Rio Tinto.

[68] See letter from Chevron.

[69] See letters from AngloGold, Chevron, Cleary, DGS Law, Estess, NMA, NSSGA and Rio Tinto.

[70] See letter from Estess.

[71] See letter from AngloGold.

[72] See letters from AFL-CIO, SIF, Trillium and UMWA.

c. Final Rule

After considering comments received, we are adopting the final rules substantially as proposed, with minor technical changes. We are amending Form 10-Q to add new Item 4 to Part II and Form 10-K to add new Item 4 to Part I, which would require the information required by new Items 104 and 601(b)(95) of Regulation S-K; Form 20-F to add new Item 16H; and Form 40-F to add new Paragraph (16) of General Instruction B. As discussed in more detail below, the disclosure is required to be provided in each periodic report.[73]

As proposed, the amendments will require issuers that have matters to report in accordance with Section 1503(a) to include brief disclosure in Part II of Form 10-Q, Part I of Form 10-K and Forms 20-F and 40-F noting that they have mine safety violations or other regulatory matters to report in accordance with Section 1503(a), and that the required information is included in an exhibit to the filing. The exhibit would include the detailed disclosure about specific violations and regulatory matters required by Section 1503(a) as implemented in our new rules. Many issuers have already implemented this approach in their periodic reports that contain the disclosure required under Section 1503(a). Consistent with the proposal, the final rule does not require disclosure in the body of the periodic report of certain information, such as all fatal accidents or receipt of notice that a mine has a pattern of violations.[74] We do not believe it is necessary to require this additional disclosure in order to implement Section 1503; and we reiterate, as noted in the Proposing Release, that in the event that mine safety matters raise concerns that should be addressed in other parts of a periodic report, such as risk factors, the business description, legal proceedings or management's

[73] See Section II.A.3 below for a discussion of time periods covered.

[74] We note that under Section 1503(b), receipt of a notice from MSHA that a mine has a pattern of violations is a triggering event that would require disclosure on Form 8-K within four business days of receipt of the notice, as reflected in the new Form 8-K item we are adopting today.

discussion and analysis, inclusion of this new disclosure would not obviate the need to discuss mine safety matters in accordance with other rules as appropriate.

The amended rules, as proposed, do not specify any particular presentation requirements for the new disclosure, but we continue to encourage issuers to use tabular presentations whenever possible if to do so would facilitate investor understanding. Many issuers are currently providing the disclosure required by Section 1503(a) in tabular format in their periodic reports. We agree with commentators who suggested that the Commission's provision of an example of a possible tabular presentation may encourage uniformity and comparability of disclosures. After considering the comments received and examining current disclosure practices, we are including the below example of a potential tabular presentation. However, we note that issuers are free to present the required information in any presentation they believe is appropriate for the disclosure.

Mine or Operating Name/MSHA Identification Number	Section 104 S&S Citations (#)	Section 104(b) Orders (#)	Section 104(d) Citations and Orders (#)	Section 110(b)(2) Violations (#)	Section 107(a) Orders (#)	Total Dollar Value of MSHA Assessments Proposed ($)	Total Number of Mining Related Fatalities (#)	Received Notice of Pattern of Violations Under Section 104(e) (yes/no)	Received Notice of Potential to Have Pattern Under Section 104(e) (yes/no)	Legal Actions Pending as of Last Day of Period (#)	Legal Actions Initiated During Period (#)	Legal Actions Resolved During Period (#)

The use of footnotes, accompanying narrative disclosure or additional tables may also help to clarify information provided, as appropriate. For example, issuers choosing to use a tabular presentation similar to the one above may provide the additional detail described below that our final rules require about types of legal actions[75] in footnotes, accompanying narrative disclosure or an additional table.

[75] See new Item 104(a)(3) of Regulation S-K; Item 16H(c) of Form 20-F; Paragraph 16(c) of General Instruction B of Form 40-F; and the discussion in Section II.A.4.d(3) below.

We are not adopting a requirement to provide this information in interactive data format. Section 1503 does not require the disclosure to be submitted in interactive format. After considering the comments received, we believe that the added costs of imposing such a requirement would likely not be justified by the potential benefits to investors of having access to the information in interactive format.

The final rules require the disclosure in each periodic report filed with the Commission, and such disclosure will be considered "filed," not "furnished." We believe that this approach is consistent with the statutory language of Section 1503 -- which provides that an issuer must "include, [the required disclosure] in each periodic report filed with the Commission." Therefore, as is the case with other disclosure filed as part of a periodic report, Section 18 of the Exchange Act will apply and the disclosure is encompassed by the Exchange Act Rule 13a-14 and 15d-14 certifications. In addition, if the issuer files a Securities Act registration statement (such as Form S-3) that incorporates by reference its periodic reports, the disclosure included in Exchange Act reports in accordance with the new rules will be incorporated by reference.

3. Time Periods Covered

Section 1503(a) of the Act states that each periodic report must include disclosure "for the time period covered by such report."

a. Proposed Amendments

We proposed that each Form 10-Q would be required to include the required disclosure for any orders or citations received, penalties assessed, legal actions initiated or mining-related fatalities that occurred during the quarter covered by the report.[76] We also proposed that each

[76] As noted in Sections II.A.4.b(1) and II.A.4.d(1) below, we also proposed to require disclosure of the total amounts of assessments of penalties outstanding as of the last day of the quarter and of any developments material to previously reported legal actions that occur during the quarter.

Form 10-K would be required to include disclosure covering both the fourth quarter of the issuer's fiscal year and cumulative information for the entire fiscal year. For each of Forms 20-F and 40-F, the disclosure would be required for the issuer's fiscal year.

In addition, the Proposing Release noted that, based on the language of Section 1503(a) of the Act, the proposed rule would not allow issuers to exclude information about orders or citations that were received during the time period covered by the report but subsequently were dismissed or reduced. The proposed rules did not prohibit the inclusion of additional information, such as an explanation that certain orders or citations were dismissed or reduced.

b. Comments on the Proposed Amendments

There was support from commentators for the proposal to require an annual report on Form 10-K to include disclosures for orders, citations, assessments, legal actions and fatalities for the fourth quarter and also on an aggregate basis for the whole year.[77] Some of these commentators stated that it is important for investors to learn of trends in order to understand material changes in a mine's health and safety record, and that requiring the information for both the fourth quarter and the whole year would help reveal such trends.[78] However, other commentators expressed concerns about this aspect of the proposed rule.[79] These commentators argued that requiring issuers to include both fourth quarter and annual information would be unnecessary because to do so would not provide investors with additional significant information.[80] Some of these commentators asserted that the disclosure in the Form 10-K should

[77] See letters from AFL-CIO, EARTHWORKS, Estess, SIF, Trillium and UMWA.

[78] See letters from AFL-CIO and UMWA.

[79] See letters from Chevron, Cleary, DGS Law, Freeport-McMoRan, and NMA. NYSBA and Rio Tinto.

[80] See, e.g., letter from Freeport-McMoRan.

cover only the fiscal year.[81] Others preferred that the disclosure cover only the fourth quarter, which would provide the information disclosed on Form 10-K in a comparable period to the quarterly report on Form 10-Q.[82]

With respect to the disclosure of orders or citations that are dismissed or reduced in severity below the level that triggers disclosure under Section 1503(a), the comments were mixed. Many of the commentators supported the Commission's proposal that issuers should not be allowed to exclude such orders or citations from the disclosure.[83] One commentator stated that it would be simpler for the issuer to report all orders and citations received, rather than taking on the burden of reviewing the information at a later date to remove those that were reduced or dismissed. This commentator also noted that MSHA's summary data does not account for dismissals, and raised a concern that allowing issuers to omit dismissed orders and citations could result in confusion for those who refer to MSHA's site to compare the information.[84]

On the other hand, other commentators requested that the final rules allow issuers to exclude from disclosure orders or citations that have been subsequently dismissed or reduced below a reportable level prior to filing the periodic report.[85] One commentator asserted that such an approach would be consistent with the purposes of Section 1503, which the commentator characterized as providing accurate disclosure of violations that continue to be asserted or have

[81] See letters from Chevron, Freeport-McMoRan and Rio Tinto.

[82] See letters from Cleary, DGS Law, NMA and NYSBA.

[83] See letters from AFL-CIO, AngloGold, CalPERS, CalSTRS, Chevron, EARTHWORKS, J. Estess, SIF, Trillium and UMWA.

[84] See letter from Chevron.

[85] See letters from Barrick Gold, DGS Law, Freeport-McMoRan, NMA, NSSGA and Rio Tinto.

been adjudicated, rather than requiring disclosure of matters that the FMSHRC has dismissed or reduced below a reportable level.[86] Another commentator noted that vacated citations are removed entirely from MSHA's data retrieval system.[87]

Although comments were mixed on the disclosure of dismissed or reduced orders or citations, most of the commentators supported the Commission's approach of permitting issuers to include additional information and disclosures, such as disclosure of orders or citations that the issuer is contesting or annotated disclosure providing information about the status of such orders or citations.[88]

c. Final Rule

We are adopting the final rule with some modifications from the proposal. Consistent with the proposal, the final rule requires each Form 10-Q to include the required disclosure for the quarter covered by the report. For each of Forms 20-F and 40-F, the disclosure is required for the issuer's fiscal year. Similarly, in a change from the proposal, the final rule requires each Form 10-K to include disclosure of the information for the fiscal year only, not also for the fourth quarter.

We are persuaded by commentators that requiring information about both the fourth quarter and the entire year in the Form 10-K would add incrementally to the burden of the rule, is not required by the Act, and may not add significant useful information to the report. We believe the approach we are adopting is consistent with the Act, which requires disclosure in each periodic report "for the time period covered by the report," because the Form 10-K covers the

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[86] See letter from Freeport-McMoRan.

[87] See letter from DGS Law.

[88] See letters from AngloGold, Barrick Gold, CalPERS, CalSTRS, Chris Barnard ("Barnard"), Estess, NYSBA, Portland Cement Association ("PCA"), SIF, Trillium and UMWA.

fiscal year. While requiring both full year and fourth quarter data might provide some incremental additional useful information, we do not believe it is necessary to implement Section 1503 or that the benefits of the additional disclosure would clearly justify the burden of preparing it. Among issuers that have provided disclosure under the Act in their most recent annual report on Form 10-K, practices were mixed, with some providing the information for both the fourth quarter and the complete fiscal year, some providing the information for the complete fiscal year, and a minority providing the information for only the fourth quarter. Although we acknowledge that certain limited information is currently reported for the fourth quarter only in Form 10-K, we believe that the requirement to provide full-year information in the Form 10-K is more appropriate because it is consistent with the general Form 10-K requirement to report results as of the issuer's fiscal year-end.[89] We note that although the final rule requires disclosure covering the fiscal year, issuers are permitted, but not required, to also separately present the information for the fourth quarter.

The final rule does not allow issuers to exclude information about orders or citations that were received during the time period covered by the report but subsequently dismissed, reduced or vacated.[90] Although we understand that, because mine operators have the right to contest orders or citations they receive through the administrative process,[91] there is a possibility an operator's challenge would result in dismissal of the order or citation or in a reduction in the severity of the order or citation below the level that triggers disclosure under Section 1503(a), we believe the language of Section 1503(a) of the Act dictates that all orders or citations received

[89] See Articles 3 and 8 of Regulation S-X (17 CFR 210.3 and 210.8).

[90] The final rule also does not allow issuers to exclude information about orders or citations that it is contesting. See the detailed discussion of this topic under Section II.A.4.b below.

[91] See 30 U.S.C. 815(d).

from MSHA be disclosed. However, as supported by most commentators, the rule does not prohibit the inclusion of additional disclosure with regard to the status of orders or citations received. As noted in the Proposing Release, we would expect that issuers will include disclosure that complies with our existing disclosure requirements when providing any such information.

4. Required Disclosure Items

Section 1503(a) of the Act includes a list of items required to be disclosed in periodic reports. We proposed that those items be reiterated in proposed Item 106 of Regulation S-K.[92] As discussed in more detail below, we also proposed instructions to certain of the disclosure items specified in Section 1503(a) to clarify the scope of the disclosure we would expect issuers to provide in order to comply with the statute's requirements and proposed one additional disclosure item not required by the Act. We discuss each proposed disclosure item below. Those disclosure items on which we received little or no comment are discussed at the end of this section.

[92] In this release, we reference proposed Item 106 of Regulation S-K when discussing the proposed disclosure requirements, but note that the same analyses apply to the corresponding provisions in proposed Item 16J of Form 20-F and proposed Paragraph (18) of General Instruction B of Form 40-F, which are identical in all respects. The same approach applies to the references in this release to the final rules we are adopting as Item 104 of Regulation S-K, Item 16H of Form 20-F and Paragraph (16) of General Instruction B of Form 40-F.

a. <u>The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under Section 104 of the Mine Act for which the operator received a citation from MSHA.</u>

(1) Proposed Amendments

Section 1503(a)(1)(A) of the Act references violations that could "significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104" of the Mine Act. Section 104 of the Mine Act requires MSHA inspectors to issue various citations and orders for violations of health and safety standards.[93] A violation of a mandatory safety standard that is reasonably likely to result in a reasonably serious injury or illness under the unique circumstance contributed to by the violation is referred to by MSHA as a "significant and substantial" violation (commonly called an "S&S" violation).[94] In writing each citation or order, the MSHA inspector determines whether the violation is "S&S" or not.[95] The MSHA data retrieval system currently provides information about all citations and orders issued, and notes which of those citations or orders are "S&S."[96]

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[93] 30 U.S.C. 814.

[94] Secretary of Labor v. Mathies Coal Company, 6 FMSHRC 1 (January 1984). <u>See also</u> MSHA Program Policy Manual February 2003 (Release I-13) Vol. 1, p.21, located at <u>http://www.msha.gov/regs/complian/ppm/PDFVersion/PPM%20Vol%20I.pdf</u> ("MSHA Program Policy Manual Vol. 1") which provides guidelines for interpreting Section 104(d)(1) and (e)(1) of the Mine Act [30 U.S.C. 814(d)(1) and (e)(1)]. In determining whether conditions created by a violation could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, inspectors must determine whether there is an underlying violation of a mandatory health or safety standard, whether there is a discrete safety or health hazard contributed to by the violation, whether there is a reasonable likelihood that the hazard contributed to will result in an injury or illness, and whether there is a reasonable likelihood that the injury or illness in question will be of a reasonably serious nature. <u>Id</u>.

[95] MSHA Program Policy Manual Vol. 1, p. 23.

[96] The MSHA data retrieval system can be accessed at <u>http://www.msha.gov/drs/drshome.HTM</u>. Vacated citations and orders are removed from the data retrieval system.

The proposed rules would require disclosure under this item of all citations received under Section 104 of the Mine Act that note an S&S violation. We requested comment on whether the final rules should instead require disclosure of all citations received under Section 104.

(2) Comments on the Proposed Amendments

Most commentators supported the proposal to limit the required disclosure to S&S violations.[97] Commentators stated that such an approach is consistent with the explicit language of the Act, and asserted that expanding the requirement to all violations under Section 104 of the Mine Act would not be useful to investors and could detract from the information required by the Act.[98] However, a few commentators expressed the view that all Section 104 violations should be disclosed in order to provide full disclosure to investors.[99]

(3) Final Rule

We are adopting the provision as proposed. We continue to believe that the language of Section 1503(a)(1)(A) referencing violations that could "significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104" was intended to elicit disclosure only of citations received under Section 104 of the Mine Act that note an S&S violation. We agree with commentators that expanding the disclosure requirement to include non-S&S violations under Section 104 of the Mine Act would expand the scope of the disclosure beyond that called for by Section 1503 of the Act and likely would not

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[97] See letters from AFL-CIO, AngloGold, Chevron, Cleary, NMA, NYSBA, PCA, Rio Tinto and UMWA.

[98] See letters from NMA and Rio Tinto.

[99] See letters from Estess, SIF and Trillium.

result in additional useful information being provided to investors that would justify the increased burdens on issuers.

b. The total dollar value of proposed assessments from MSHA under the Mine Act.

(1) Proposed Amendments

Section 1503(a)(1)(F) requires issuers to disclose, for each mine, the "total dollar value of proposed assessments from [MSHA] under the [Mine] Act." The issuance of a citation or order by MSHA typically results in the assessment of a civil penalty against the mine operator. Penalties are assessed according to a formula that considers several factors, including a history of previous violations, size of operator's business, negligence by the operator, gravity of the violation, operator's good faith in trying to correct the violation promptly and the effect of the penalty on the operator's ability to stay in business.[100] When any civil penalty is proposed to be assessed by MSHA, the mine operator has 30 days following receipt of the notice of proposed penalty to pay the penalty or file a contest and request a hearing before an FMSHRC administrative law judge.[101]

The proposed rules would require that issuers disclose the total dollar amount of assessments of penalties proposed by MSHA during the time period covered by the report. Under the proposals, the disclosure would also include the cumulative total of all proposed assessments of penalties outstanding as of the last day of the period covered by the report. As proposed, this disclosure would include any dollar amounts of penalty assessments proposed during the time period that the issuer is contesting with the FMSHRC, although issuers would

[100] 30 U.S.C. 815(b)(1)(B).

[101] See 30 CFR § 100.7. If the proposed penalty is not paid or contested within 30 days of receipt, the proposed penalty becomes a final order of the FMSHRC and is not subject to review by any court or agency.

not be prohibited from including additional information noting that certain proposed assessments of penalties are being contested.

(2) Comments on the Proposed Amendments

Some commentators approved of the proposal to require the total dollar amount of proposed penalties assessed by MSHA during the time period covered by the report as well as the cumulative total of all proposed assessments of penalties outstanding as of the date of the report.[102] However, several other commentators expressed concerns about the proposal, in particular about the proposed requirement to disclose cumulative amounts of penalties outstanding as of the date of the report.[103] Commentators noted that such disclosure is not required by Section 1503 and asserted that such a requirement would go beyond the scope of the Act.[104] Some commentators expressed concern that the requirement could lead to inquiries to reconcile period-to-period changes,[105] and asserted that the disclosure would not necessarily be indicative of an issuer's safety record during the reporting period, but rather the issuer's decisions to pay or contest assessments.[106]

Several commentators agreed with the proposal that issuers should be required to include in the total dollar amount reported any proposed assessments of penalties that are being contested.[107] Some commentators expressed a concern that allowing issuers to omit contested matters until they are deemed final could provide an incentive for operators to contest MSHA

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[102] See letters from AFL-CIO, EARTHWORKS, SIF, Trillium and UMWA.

[103] See letters from Chevron, Cleary, DGS Law, Freeport-McMoRan, NMA and NYSBA.

[104] See, e.g., letters from Cleary, Freeport-McMoRan, NMA and Rio Tinto.

[105] See letters from Chevron and DGS Law.

[106] See letters from Chevron and Cleary.

[107] See letters from AFL-CIO, AngloGold, CalPERS, CalSTRS, Chevron, EARTHWORKS, Estess, SIF, Trillium and UMWA.

enforcement actions, which they believe would be contrary to public policy and could increase MSHA's backlog of pending cases.[108] Other commentators expressed concerns about this proposed requirement, and requested that the final rules permit issuers to exclude proposed assessments of penalties that are being contested.[109] Among the reasons asserted in support of such an approach is the commentators' view that requiring issuers to include proposed assessments of penalties that are being contested in the total dollar amount reported could, in essence, amount to denial of due process for the issuer because reporting such information has the potential to cause reputational harm for the issuer before resolution of the matter has been reached.[110]

Commentators generally agreed that if contested amounts are required to be reported, issuers should be permitted to note the contested amounts.[111] Some of these commentators asserted that contested amounts should be permitted to be reported separately.[112] Others agreed with the Commission's proposal to require disclosure of one total dollar amount that encompasses both contested and uncontested amounts, but were of the view that issuers should be permitted to provide additional disclosure to explain contested amounts if they choose.[113]

We received two comment letters suggesting that the disclosure required by this item should be limited to those penalties proposed for the type of violations required to be disclosed

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[108] See letters from AFL-CIO and UMWA.

[109] See letters from Barrick Gold, NMA and Rio Tinto.

[110] See letters from Barrick Gold and NMA.

[111] See letters from AFL-CIO, AngloGold, Chevron, NMA, Rio Tinto and UMWA.

[112] See letters from AngloGold and NMA.

[113] See letters from AFL-CIO, Chevron, Rio Tinto and UMWA.

under Section 1503(a), rather than for all penalties proposed during the time period.[114] These commentators stated their view that requiring disclosure of all penalties – not only those that relate to actions that have to be reported under Section 1503 – would go beyond the requirements of the Act and increase the burdens on issuers in preparing this disclosure.

(3) Final Rule

We are adopting a final rule that provides that disclosure is required in each periodic report of the total dollar amount of assessments proposed by MSHA during the period covered by the report. Therefore, each Form 10-Q is required to include the dollar amount of assessments proposed by MSHA during the quarter, while the Form 10-K, Form 20-F and Form 40-F must include the dollar amount of assessments proposed by MSHA during the fiscal year.

We are not adopting the proposed requirement to also disclose the cumulative total of all assessments outstanding as of the last day of the reporting period. After considering the comments received, we are persuaded that expanding the disclosure requirement in this manner beyond the scope of the Act is not necessary and likely would not result in additional useful information being provided to investors that would justify the increased burden on issuers. We note that the cumulative total of all outstanding assessments as of the last day of the reporting period is not mandated by Section 1503 of the Act, which requires, "for the time period covered by the report…the total dollar value of proposed assessments from the Mine Safety and Health Administration under [the Mine Act]." In addition, we believe the final rule is consistent with the information many issuers are currently providing in their periodic reports to comply with the Act.

[114] See letters from Oxford Resources Partners LP and Rio Tinto.

The final rule requires disclosure of the amount of all assessments of penalties proposed by MSHA during the reporting period relating to any type of violation, and regardless of whether such proposed assessments are being contested or were dismissed or reduced prior to the date of filing of the periodic report. We acknowledge commentators' concerns about the potential for reputational harm from disclosing proposed assessments before they are final, but we believe that the language of Section 1503 requires disclosure of all such proposed assessments. In addition, we note that information about proposed assessments that are being contested is already available on MSHA's website. We note that issuers may include additional disclosure explaining the status of these orders, citations and assessments. The final rule adds an instruction clarifying that contested amounts may neither be omitted from the disclosure nor reported separately, but that issuers are permitted to note the contested amounts and provide additional disclosure.

c. The total number of mining-related fatalities.

(1) Proposed Amendments

Section 1503(a)(1)(G) of the Act requires issuers to disclose, for each mine, "the total number of mining-related fatalities." Under the proposed rules, the requirement to disclose mining-related fatalities would apply to fatalities at mines that are subject to the Mine Act and not to mining-related fatalities in other jurisdictions. As proposed, issuers would report all such fatalities that are required to be disclosed under MSHA regulations, unless the fatality is determined to be "non-chargeable" to the mining industry.[115]

[115] See Section II.A.4.f of the Proposing Release [75 FR 80374 at 80379] for a discussion of MSHA's process for determining whether a fatality is "non-chargeable" to the mining industry.

(2) Comments on the Proposed Amendments

Several commentators supported the proposal to require disclosure of mining-related fatalities only at mines that are subject to the Mine Act.[116] Many of these commentators noted that this interpretation is consistent with the scope of Section 1503(a), which by its terms applies to mines that are subject to the Mine Act.[117] Commentators also raised concerns that if the disclosure requirement were to be expanded to cover mining-related fatalities outside of the United States, it would be difficult to apply a standard for what constitutes a "mining-related" fatality in non-U.S. jurisdictions.[118]

Other commentators stated that reporting on mining-related fatalities should apply to all mines operated by an issuer (or a subsidiary of the issuer) that files periodic reports with the Commission, regardless of the location of the issuer's mines worldwide.[119] Two of these commentators asserted that such information is material to investors and to the issuer.[120] The majority of the commentators who recommended applying the disclosure requirement to all mining-related fatalities regardless of the location of the mine also recommended that the MSHA framework should be applied to non-U.S. mining-related fatalities for reporting purposes.[121]

Several commentators concurred with the Commission's proposal to require disclosure of all fatalities required to be reported pursuant to MSHA regulations, unless the fatality has been

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[116] See letters from AngloGold, Barrick Gold, Cleary, Estess, NMA, NYSBA and Rio Tinto.

[117] See letters from AngloGold, Cleary, NMA, NYSBA and Rio Tinto.

[118] See letters from AngloGold, Estess, NMA and Rio Tinto.

[119] See letters from AFL-CIO, EARTHWORKS, SIF, Trillium and UMWA.

[120] See letters from SIF and Trillium.

[121] See letters from AFL-CIO, Estess, SIF, Trillium and UMWA.

determined to be "non-chargeable" to the mining industry.[122] Two commentators stated that an instruction should be added to the rule specifying this interpretation of the disclosure requirement.[123] Two commentators also recommended that we add an instruction to the rule clarifying that fatalities are not required to be disclosed while under review by MSHA's Fatality Review Committee if the issuer has a good faith belief that the fatality is non-chargeable, and that if the fatality is ultimately determined to be chargeable, the issuer would include it in its next periodic report.[124] Similarly, other commentators asserted that it would be appropriate to require disclosure only of fatalities that, as of the last day of the reporting period, have been determined to be "chargeable" by MSHA's Fatality Review Committee.[125]

Other commentators stated that all fatalities should be required to be disclosed, whether chargeable or non-chargeable,[126] but noted that issuers should be permitted to explain non-chargeable incidents in their reports.[127]

(3) Final Rule

After consideration of the comments received, we are adopting the final rule as proposed, with an added instruction specifying that fatalities determined by MSHA not to be mining-related may be excluded.

The final rule requires disclosure of mining-related fatalities at mines that are subject to the Mine Act. Although we considered the views of those commentators who believe the

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[122] See letters from AFL-CIO, Barrick Gold, Cleary, DGS Law, Estess, NYSBA, PCA, Rio Tinto and UMWA.

[123] See letters from Cleary and Estess.

[124] See letters from Cleary and DGS Law.

[125] See letters from AngloGold, Chevron, MNA, NSSGA and Rio Tinto.

[126] See letters from EARTHWORKS, SIF and Trillium.

[127] See letters from SIF and Trillium.

disclosure requirement should encompass mines in all jurisdictions, we continue to believe that this disclosure requirement encompasses mining-related fatalities only at mines that are subject to the Mine Act. As we noted in the Proposing Release, Section 1503(a)(1)(G) is the only provision of the Act that does not specifically reference the Mine Act, a specific notice, order or citation from MSHA, or the FMSHRC, but we are of the view that interpreting Section 1503 as limited to mines that are subject to the provisions of the Mine Act is appropriate because it will result in consistency among reporting obligations.

MSHA regulations require mine operators to report to MSHA all fatalities that occur at a mine.[128] MSHA has also established policies and procedures for determining whether a fatality is unrelated to mining activity (commonly referred to as "non-chargeable" to the mining industry).[129] Since the MSHA regulations provide a comprehensive scheme of regulation, reporting and assessment for mining-related fatalities, we believe the disclosure required by this section is intended to include all fatalities that are required to be disclosed under MSHA regulations, unless the fatality is determined to be "non-chargeable" to the mining industry. The final rules specify that disclosure is required of all fatalities, unless the fatality is determined to be "non-chargeable." We appreciate the objection raised by some commentators about requiring reporting of fatalities that are under review by MSHA's Fatality Review Committee if the issuer has a good faith belief that the fatality is non-chargeable, but we believe it would be more consistent with Section 1503, our treatment of other disclosure items under Section 1503 (such as the reporting of contested matters under the final rules discussed above) and MSHA's

[128] See 30 CFR 50.10 and 50.20.

[129] See MSHA Accident/Illness Investigation Procedures Handbook, Chapter 2 Release 1 (June 2011) p. 21 located at http://www.msha.gov/READROOM/HANDBOOK/PH11-I-1.pdf ("MSHA Accident/Illness Handbook").

reporting of fatalities[130] to require reporting of all fatalities, other than those that have been determined by MSHA to be non-chargeable. Issuers that wish to provide additional information about fatalities, such as whether a fatality is under review by MSHA, are not prohibited from doing so under the final rules.

d. <u>Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.</u>

(1) Proposed Amendments

Section 1503(a)(3) requires disclosure of "[a]ny pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine." Under the proposed rules, any legal actions before the FMSHRC involving a coal or other mine for which the issuer or a subsidiary of the issuer is the operator would be disclosed in the periodic report covering the time period during which the legal action was initiated. As proposed, the rules would require the information about pending legal actions to be updated in subsequent periodic reports if there are developments material to the legal action that occur during the time period covered by such report. As proposed, the disclosure required by this item would include the date the pending legal action was instituted and by whom (e.g., MSHA or the mine operator), the name and location of the mine involved, and a brief description of the category of order or citation underlying the proceeding.

(2) Comments on the Proposed Amendments

We received comment letters supporting the proposal to require disclosure about pending legal actions in the periodic report covering the period in which the action was initiated, with

[130] We note that MSHA makes publicly available its reports of non-chargeable mining deaths, which include the date of the incident, the mine name and the name of the operating company on its website. See http://www.msha.gov/Fatals/NonChargeables/NonChargeableFatalshome.asp.

updates in subsequent reports for developments material to the pending action.[131] Certain commentators also stated that it was appropriate to require contextual information for each pending legal action.[132]

However, other commentators raised concerns about the proposed approach to this disclosure item.[133] Commentators found both the proposed updating requirement and the proposed requirement to include contextual information about each pending legal action to be problematic, noting that the language of Section 1503 does not require such information.[134] With respect to this disclosure, some commentators supported a requirement to report the number of pending legal actions,[135] while others supported an alternative approach that would require issuers to report the number of pending legal actions initiated during the time period covered by the periodic report.[136] One commentator expressed the view that it would be appropriate to allow issuers to disclose the number of matters pending before the FMSHRC, along with the number instituted and resolved in the reporting period, with a general description of the types of matters.[137]

Some commentators expressed concerns that a requirement to provide updating information would result in voluminous disclosure, be overly burdensome for issuers and potentially be complicated for users of the information, because legal actions would likely

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[131] See, e.g., letters from AFL-CIO, CalPERS, CalSTRS, EARTHWORKS, Estess, SIF, Trillium and UMWA.

[132] See letters from AFL-CIO, Estess, and UMWA.

[133] See letters from Chevron, Cleary, DGS Law, Freeport-McMoRan, NMA, NSSGA and NYSBA.

[134] See letters from Cleary, DGS Law, NMA and NYSBA.

[135] See letters from Cleary and NMA.

[136] See letters from Chevron and NSSGA.

[137] See letter from Freeport-McMoRan.

overlap multiple periods prior to resolution.[138] Many commentators also stated that the proposed requirement for disclosure of contextual information for each pending legal action would be voluminous and unhelpful, unnecessarily burdening both the issuer and the user of the information.[139] Commentators also noted that, due to the strict statutory language, no materiality standard can be applied to limit the number of legal actions that must be reported, and therefore determining what constitutes a "material" development in a case that may not be material to investors under our traditional materiality analysis may be problematic for issuers.[140]

(3) Final Rule

After considering the comments received on the proposed disclosure requirement, we are adopting a final rule that requires issuers to disclose, for each coal or other mine subject to the Mine Act, the identity of the mine and the number of legal actions involving such mine that were pending before the FMSHRC[141] as of the last day of the period covered by the periodic report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. Instead of the proposal to require a brief description of the category of order or citation underlying each proceeding, the final rule requires that the total number of legal actions pending before the FMSHRC as of the last day of the time

[138] See, e.g., letters from Chevron (noting its preference that disclosure be limited to pending legal actions initiated during the reporting period, but suggesting that if updates are required, they should be limited to aggregate information on final resolutions reached during the reporting period), Cleary, DGS Law and NMA.

[139] See letters from Chevron, Cleary, Freeport-McMoRan, NMA and NSSGA.

[140] See letters from DGS Law, Freeport-McMoRan and NMA.

[141] Other types of enforcement-related legal actions under the Mine Act may occur in federal district court or courts of appeal that do not involve FMSHRC at any stage. Although these legal actions are not within the scope of the disclosure requirement, we remind issuers of their obligation to report material legal proceedings under other provisions of our rules.

period covered by the report be categorized according to the type of proceeding, in accordance with the categories established in the Procedural Rules of the FMSHRC.[142] These categories are:

- contests of citations and orders, which typically are filed prior to an operator's receipt of a proposed penalty assessment from MSHA or relate to orders for which penalties are not assessed (such as imminent danger orders under Section 107 of the Mine Act). This category includes:
    - contests of citations or orders issued under section 104 of the Mine Act,
    - contests of imminent danger withdrawal orders under section 107 of the Mine Act, and
    - emergency response plan dispute proceedings (as required under the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493);[143]
- contests of proposed penalties, which are administrative proceedings before the FMSHRC challenging a civil penalty that MSHA has proposed for the violation contained in a citation or order;[144]
- complaints for compensation, which are cases under section 111 of the Mine Act that may be filed with the FMSHRC by miners idled by a closure order issued by MSHA who are entitled to compensation;[145]

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142 See the Federal Mine Safety and Health Review Commission's Procedural Rules, 29 CFR Part 2700 ("FMSHRC Procedural Rules").

143 See Subpart B of the FMSHRC Procedural Rules.

144 See Subpart C of the FMSHRC Procedural Rules.

145 See Subpart D of the FMSHRC Procedural Rules.

- complaints of discharge, discrimination or interference under section 105 of the Mine Act, which cover:
  - discrimination proceedings involving a miner's allegation that he or she has suffered adverse employment action because he or she engaged in activity protected under the Mine Act, such as making a safety complaint, and
  - temporary reinstatement proceedings involving cases in which a miner has filed a complaint with MSHA stating that he or she has suffered such discrimination and has lost his or her position;[146]
- applications for temporary relief, which are applications under section 105(b)(2) of the Mine Act for temporary relief from any modification or termination of any order or from any order issued under section 104 of the Mine Act (other than citations issued under section 104(a) or (f) of the Mine Act):[147] and
- appeals of judges' decisions or orders to the FMSHRC, including petitions for discretionary review and review by the FMSHRC on its own motion.[148]

We are not adopting the proposal to require certain additional information about the legal actions, such as the date the action was instituted and by whom, the location of the mine, or the proposal that would have required the information about legal actions to be updated for material developments in subsequent periodic reports. We recognize that this is a departure from the proposed requirement, but we agree with commentators who pointed out that the rule as

[146] See Subpart E of the FMSHRC Procedural Rules. See also "Guide to Commission Proceedings," available at http://www.fmshrc.gov/guides/englishguide.htm, Sections II.C and II.D.

[147] See Subpart F of the FMSHRC Procedural Rules.

[148] See Subpart H of the FMSHRC Procedural Rules.

proposed required information not necessary to implement Section 1503 and could result in voluminous disclosure of limited informational value. We note that Section 1503 calls for disclosure of "[a]ny pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine" but does not specify what information is required to be disclosed in accordance with this disclosure item.

We believe the final rule satisfies the statutory language and will provide users of this information with a clear picture of the extent and nature of mine operators' involvement in legal actions. Further, we believe that the requirement to provide the number of legal actions in specified categories will provide consistency in the disclosure, and provide users of this information with a general sense of the types of legal actions involving mine operators. Because all documents filed with the FMSHRC in these legal actions are served on all the involved parties, we believe that this information about legal actions is readily available to issuers. We do not believe that these requirements impose significant additional burdens on issuers.

Issuers who wish to provide additional information about pending legal actions are not prohibited from doing so under the final rules. In addition, we note that Item 103 of Regulation S-K (Legal Proceedings) continues to apply, so that to the extent a legal proceeding is required to be disclosed under that item, disclosure and updates for material developments would be required.

e. A brief description of each category of violations, orders and citations reported.

(1) Proposed Amendments

Although not required by Section 1503 of the Act, the proposed rules would require issuers to provide a brief description of each category of violations, orders and citations reported so that investors can understand the basis for the violations, orders or citations referenced.

(2) **Comments on the Proposed Amendments**

Some commentators expressed the view that the information otherwise provided as required by the Act would be sufficient without requiring the brief description of each category of violations, orders and citations reported.[149] Commentators particularly noted concerns about the expansion of the disclosure requirement beyond what is set forth in Section 1503.[150] One commentator raised a concern that the requirement would result in boilerplate language.[151] Others noted that investors who are interested in finding more detail and descriptions of the information reported can find the information on MSHA's website[152] or in the Mine Act.[153]

Several other commentators supported the proposal to require the additional disclosure.[154] Some commentators expressed the view that this information would be useful to investors beyond the statistics provided under Section 1503 because it would provide context that would allow investors to weigh the significance of the reported information.[155] Three commentators suggested that clarification of the requirement was needed, such as a generic description or glossary developed by the Commission that could be used in each

[149] See letters from NMA, Chevron, Cleary, IMA-NA and WMA.

[150] See letters from Cleary, IMA-NA and WMA.

[151] See letter from Cleary.

[152] See letter from Chevron.

[153] See letter from Cleary.

[154] See letters from AFL-CIO, DGS Law, EARTHWORKS, Estess, NYSBA, SIF, Trillium and UMWA.

[155] See letters from SIF and Trillium.

periodic report.[156] One commentator suggested that the basic descriptions should be provided once a year with the Form 10-K, and not be required to be included in every periodic report.[157]

(3) Final Rule

The final rules do not require a brief description of each category of violations, orders and citations reported. After considering the comments received, we believe that the disclosure that would be elicited by the proposed requirement would not be useful enough to investors to justify the expansion of the disclosure requirement beyond the scope of Section 1503. We note that the information is not required by Section 1503, and issuers, who have been providing the required disclosure since the effective date of Section 1503, have generally not been providing this information. However, issuers may provide additional information in their periodic reports to the extent they believe it would be useful to investors. In addition, we note that if particular mine safety issues are material and required to be disclosed under our other rules, then information about the nature of the violation likely would be necessary to satisfy our other disclosure requirements.

f. <u>Other disclosure items specified in Section 1503(a).</u>

In addition to the disclosure items discussed above, proposed Item 106 of Regulation S-K reiterated the language of Section 1503(a) with respect to several other items required to be disclosed under the Act. The Proposing Release did not request comment specifically on these items. We did, however, receive two supporting comments on some of these items, as discussed below. We are adopting these items as proposed.

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[156] <u>See</u> letters from NMA and PCA. <u>See also</u> letter from Chevron (stating its opposition to inclusion of the requirement, but suggesting this approach as a potential alternative).

[157] See letter from DGS Law.

(1) Proposed Amendments

i. The total number of orders issued under Section 104(b) of the Mine Act.

Section 1503(a)(1)(B) of the Act requires disclosure of "the total number of orders issued under section 104(b) of [the Mine Act]." Under our proposal, each issuer that is required under Section 1503(a) to provide mine safety disclosure would be required to provide the total number of orders issued under Section 104(b) of the Mine Act for each coal or other mine for the time period covered by the report. Section 104(b) of the Mine Act covers violations that had previously been cited under Section 104(a) that, upon follow-up inspection by MSHA, are found not to have been totally abated within the prescribed time period, which results in the issuance of an order requiring the mine operator to immediately withdraw all persons (except certain authorized persons) from the mine.

ii. The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health and safety standards under Section 104(d) of the Mine Act.

Under Section 104(d) of the Mine Act, an inspector issues a citation if the inspector finds a violation of a mandatory health or safety standard, and also finds that, while the conditions do not cause imminent danger, the violation could significantly and substantially contribute to the cause and effect of a safety or health hazard, and that the violation is caused by an unwarrantable failure of the operator to comply with the health and safety standards. If, in the same inspection or an inspection within 90 days, an inspector finds another violation of a mandatory health or safety standard and finds such violation to also be caused by an unwarrantable failure of the operator to comply with the health and safety standards, the inspector issues an order requiring the mine operator to immediately withdraw all persons (except certain authorized persons) from the mine. The proposed rule would implement the Act's requirement to disclose these citations and orders issued during the reporting period.

iii. The total number of flagrant violations under Section 110(b)(2) of the Mine Act.

Section 110(b)(2) of the Mine Act is a penalty provision that provides that violations that are deemed to be "flagrant" may be assessed a maximum civil penalty. The term "flagrant" with respect to a violation means "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."[158] The proposed rule would implement the Act's requirement to disclose the total number of flagrant violations under Section 110(b)(2) of the Mine Act for the reporting period.

iv. The total number of imminent danger orders issued under Section 107(a) of the Mine Act.

An imminent danger order is issued under Section 107(a) of the Mine Act if the MSHA inspector determines there is an imminent danger in the mine. The order requires the operator of the mine to cause all persons (except certain authorized persons) to be withdrawn from the mine until the imminent danger and the conditions that caused such imminent danger cease to exist. This type of order does not preclude the issuance of a citation under Section 104 or a penalty under Section 110. The proposed rule would implement the Act's requirement to disclose the total number of imminent danger orders issued under Section 107(a) of the Mine Act during the reporting period.

[158] 30 U.S.C. 820(b)(2).

v. A list of mines for which the issuer or a subsidiary received written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act.

If MSHA determines that a mine has a "pattern" of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, under Section 104(e) of the Mine Act and MSHA regulations the agency is required to notify the operator of the existence of such pattern. The proposed rule would implement the Act's requirement to disclose the receipt of such notices during the reporting period.

vi. A list of mines for which the issuer or a subsidiary received written notice from MSHA of the potential to have such a pattern.

MSHA regulations state that MSHA will give the operator written notice of the potential to have a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act.[159] The proposed rule would implement the Act's requirement to disclose the receipt of such notices during the reporting period.

(1) Comments on the Proposed Amendments

We received two comments supporting the proposed requirements that the total number of 104(b) orders, citations and orders for unwarrantable failures, flagrant violations and

[159] See 30 CFR 104.4.

imminent danger orders be reported.[160] We did not receive any comments on the proposed requirements to disclose a list of mines that receive notice of a pattern or potential pattern of violations.

(2) Final Rule

Consistent with the proposal, we are adopting final rules requiring each issuer that is required under Section 1503(a) to provide mine safety disclosure to provide, for each coal or other mine for the time period covered by the report:

- the total number of orders issued under Section 104(b) of the Mine Act;
- the total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health and safety standards under Section 104(d) of the Mine Act;
- the total number of flagrant violations under Section 110(b)(2) of the Mine Act;
- the total number of imminent danger orders issued under Section 107(a) of the Mine Act;
- a list of mines for which the issuer or a subsidiary received written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act; and
- a list of mines for which the issuer or a subsidiary received written notice from MSHA of a potential to have such a pattern of violations of mandatory health or safety standards.

[160] See letters from AFL-CIO and UMWA.

B. Form 8-K Filing Requirement

Section 1503(b) of the Act requires each issuer that is an operator, or has a subsidiary that is an operator, of a coal or other mine to report on Form 8-K the receipt of certain notices from MSHA.[161] We are adopting revisions to Form 8-K to add new Item 1.04 to implement this requirement.

2. Disclosure Requirements and Deadline

a. Proposed Amendments

We proposed to amend Form 8-K to add new Item 1.04, which would require filing of Form 8-K within four business days of the receipt by an issuer (or a subsidiary of the issuer) of:

- An imminent danger order under Section 107(a) of the Mine Act;[162]
- Written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act;[163] or
- Written notice from MSHA of the potential to have a pattern of such violations.[164]

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[161] Section 1503(b) of the Act.

[162] See Section II.A.4.f.(1)iv. above for a description of an imminent danger order issued under Section 107(a) of the Mine Act [30 U.S.C. 817(a)].

[163] See Section II.A.4.f.(1)v. above for a description of the written notice from MSHA regarding a pattern of violations under Section 104(e) of the Mine Act [30 U.S.C. 814(e)].

[164] See Section II.A.4.f(1)vi. above for a description of the written notice from MSHA of the potential to have a pattern of violations under Section 104(e) of the Mine Act [30 U.S.C. 814(e)].

For each such triggering event, we proposed that new Item 1.04 of Form 8-K require disclosure of the date of receipt of the order or notice, the category of order or notice, and the name and location of the mine involved.

b. Comments on the Proposed Amendments

The Proposing Release noted that the events that would trigger filing under proposed Item 1.04 are also events that are required to be disclosed in periodic reports under Section 1503(a) of the Act and our proposed Item 106 of Regulation S-K. We received comment letters supporting adoption of the rule as proposed, under which the orders and notices that trigger the Form 8-K filing requirement would also be disclosed in issuers' periodic reports.[165] Commentators noted that the events that would trigger the Form 8-K filing are significant, and expressed their view that because the events are already monitored by the issuer, there would not be an extra burden in reporting them twice.[166] However, other commentators indicated that the proposed rule should be revised to minimize duplicative disclosure.[167] One commentator stated that, because these orders and notices are required to be reported in the issuer's periodic reports, the proposed Form 8-K requirement is needlessly duplicative and burdensome.[168] Another commentator suggested eliminating duplicative reporting by removing the Form 8-K filing requirement and allowing the information to be reported only in the issuer's periodic reports.[169]

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[165] See letters from AFL-CIO, SIF, Trillium and UMWA.

[166] See letters from SIF and Trillium.

[167] See letters from Chevron, Estess, NMA and NSSGA.

[168] See letter from NSSGA.

[169] See letter from Chevron.

Commentators that expressed a view were generally supportive of the information proposed to be required in Item 1.04 of Form 8-K.[170] Commentators also indicated that no additional information beyond what was proposed should be required to be disclosed.[171]

Some commentators supported the proposed four business day filing period for a Form 8-K under proposed Item 1.04.[172] Others suggested different filing deadlines for the Form 8-K. Three commentators supported longer filing deadlines, such as seven or ten business days, in order to allow issuers to conduct analysis and provide more detail or complete information about the event.[173] One commentator, drawing a distinction between the type of information required to be disclosed under Section 1503 and other material items covered by Form 8-K, recommended that the Form 8-K be required once a year, allowing issuers to provide aggregate information about any such orders or notices received during the year.[174] In addition, one commentator requested clarification of the filing requirement for an order or notice vacated by MSHA prior to the filing deadline for the Form 8-K,[175] and another commentator recommended that the final rule provide that if the order triggering the Form 8-K filing is vacated, dismissed or reduced below a reportable level during the reporting period, the Form 8-K filing is not required.[176]

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170 See letters from Estess, SIF and Trillium.

171 See letters from Chevron, Cleary and Estess.

172 See letters from Estess, SIF and Trillium.

173 See letters from NMA (suggesting seven business day deadline), Chevron (suggesting ten business day deadline) and PCA (suggesting ten calendar day deadline).

174 See letter from NSSGA.

175 See letter from DGS Law (noting that vacated citations are removed entirely from the MSHA data retrieval system).

176 See letter from NMA.

c. Final Rule

After considering the comments, we are adopting new Item 1.04 to Form 8-K as proposed. Under the final rule, issuers are required to file a Form 8-K under new Item 1.04 no later than four business days after the receipt by the issuer (or a subsidiary of the issuer) of an imminent danger order under Section 107(a) of the Mine Act, written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act or written notice from MSHA of the potential to have a pattern of such violations. Item 1.04 of Form 8-K requires disclosure of the date of receipt of the order or notice, the category of order or notice, and the name and location of the mine involved.

As discussed above, these orders and notices are also required to be disclosed under Section 1503(a) of the Act in issuers' periodic reports. Although we have considered the views of commentators that the disclosure is duplicative, we believe the plain language of Section 1503 of the Act requires such orders and notices to be reported in both issuers' Forms 8-K and their periodic reports, and note that issuers generally seem to have been complying with these requirements since Section 1503(b) became effective. We have also considered commentators' views with respect to the filing deadline for the required Form 8-K. Although Section 1503(b) of the Act does not specify a filing deadline, we continue to believe that, because the triggering events are clear and do not require management to make rapid materiality judgments, the customary Form 8-K four business day deadline provides adequate time for issuers to prepare accurate and complete information.

We understand there is a possibility that an order or notice could be issued and subsequently vacated by MSHA within the four business day time period for filing the Form 8-K. However, as discussed above with respect to reporting of dismissed, reduced or contested matters,[177] we believe the language of Section 1503(b) of the Act dictates that the "receipt" of the specified orders or notices must be disclosed. We note that issuers may include additional disclosure explaining the status of these orders and notices if they choose to do so.[178]

3. Treatment of Foreign Private Issuers

a. Proposed Amendments

Our proposed rule would not extend the requirement to file current reports on Form 8-K to foreign private issuers. The Proposing Release noted that foreign private issuers are not required to file current reports on Form 8-K.[179] Instead, a foreign private issuer is required to furnish under the cover of Form 6-K[180] copies of all information that it makes, or is required to make, public under the laws of its jurisdiction of incorporation, files, or is required to file, under the rules of any stock exchange, or otherwise distributes to its security holders.[181]

b. Comments on the Proposed Amendments

Several commentators agreed with our proposed approach not to apply the current reporting requirements of Section 1503(b) of the Act to foreign private issuers. These commentators noted that this approach is consistent with the statutory text of Section 1503(b),

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[177] See Sections II.A.3 and II.A.4.b above.

[178] We note that between the effective date of Section 1503(b) and November 30, 2011, there have been 116 Form 8-Ks filed to comply with this provision, and only five of them report that the order was vacated within four business days of issuance of the order.

[179] See Exchange Act Rules 13a-11 and 15d-11 [17 CFR 240.13a-11 and 15d-11].

[180] Referenced in 17 CFR 249.306.

[181] See Exchange Act Rule 13a-6 [17 CFR 240.13a-16].

which refers only to Form 8-K, and with the Commission's current framework of reporting for foreign private issuers.[182] Other commentators indicated that foreign private issuers should be required to file a Form 8-K to disclose information about the receipt of the specified orders and notices.[183] One of these commentators expressed the view that the reporting requirements should be as equal as possible for all issuers so that U.S. issuers are not placed at a disadvantage.[184]

c. Final Rule

After considering the comments, we have determined not to apply the new Form 8-K reporting requirement to foreign private issuers and are adopting the requirement as proposed. Although we are mindful of concerns that the disclosure requirement should be as equal as possible in order to avoid disadvantaging U.S. issuers in comparison to foreign private issuers, we continue to believe that this approach is consistent with Section 1503(b) of the Act, which references Form 8-K, a form applicable only to domestic issuers, not to foreign private issuers, and the Commission's current framework of reporting for foreign private issuers.[185]

Although they will not be subject to the Form 8-K requirement, foreign private issuers will not be able to avoid disclosure of the orders and notices specified in Item 1.04 of Form 8-K. As described above, we are adopting amendments to Forms 20-F and 40-F that require a foreign private issuer to disclose in each annual report the items described in Section 1503(a) of the Act. This is the same information that is required of domestic issuers, including disclosure of the

[182] See letters from AngloGold, Cleary, NMA, NYSBA, and Rio Tinto. See also advance comment letter from Rio Tinto.

[183] See letters from Estess, SIF and Trillium.

[184] See letter from Estess.

[185] This approach is consistent with the manner in which the Commission implemented Sections 306 and 406 of the Sarbanes-Oxley Act of 2002. See *Insider Trades During Pension Fund Blackout Periods*, SEC Release No. 34-47225 (Jan. 22, 2003) [68 FR 4338], and *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002*, SEC Release No. 33-8177 (Jan. 23, 2003) [68 FR 5110].

receipt during the foreign private issuer's past fiscal year of any imminent danger order issued under Section 107(a) of the Mine Act, written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such a nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under Section 104(e) of the Mine Act, and written notice from MSHA of the potential to have a pattern of such violations.

C. Amendment to General Instruction I.A.3.(b) of Form S-3

a. Proposed Amendments

Under our existing rules, the untimely filing on Form 8-K of certain items does not result in loss of Form S-3 eligibility, so long as Form 8-K reporting is current at the time the Form S-3 is filed. Our existing rules also provide a limited safe harbor from liability under Section 10(b) or Rule 10b-5 under the Exchange Act for certain Form 8-K items.[186] We proposed to amend General Instruction I.A.3.(b) of Form S-3 to provide that an untimely filing on Form 8-K regarding new Item 1.04 would not result in loss of Form S-3 eligibility. We did not propose to include new Item 1.04 in the list in Rules 13a-11(c) and 15d-11(c) under the Exchange Act of Form 8-K items eligible for the limited safe harbor from liability.

b. Comments on the Proposed Amendments

Commentators generally supported our proposal to amend General Instruction I.A.3(b) of Form S-3 to add proposed Item 1.04 to the list of items on Form 8-K with respect to which an issuer's failure timely to file the Form 8-K will not result in the loss of Form S-3 eligibility.[187]

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[186] Rules 13a-11(c) and 15d-11(c) each provides that "[n]o failure to file a report on Form 8-K that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 5.02(e) or 6.03 of Form 8-K shall be deemed a violation of" Section 10(b) of the Exchange Act or Rule 10b-5 thereunder.

[187] See, e.g., letters from Chevron, Cleary, DGS Law, NMA, NYSBA, SIF and Trillium. One commentator noted with approval that, as a consequence, failure to file a Form 8-K with Section 1503(b) disclosure would not result in status as an "ineligible issuer" pursuant to Rule 405 under the Securities Act. See letter from Cleary.

One commentator indicated that proposed Item 1.04 is similar to the existing exceptions provided in Form S-3, and expressed its view that, but for the statutory requirement to file current reports, for a diversified company engaging in mining operations, an individual shutdown or notice would not be material to the company and shareholders.[188] Similarly, another commentator noted that when compared to other items that have been specified as not affecting Form S-3 eligibility, Item 1.04 would be no more significant than the other items, particularly in light of the absence of a materiality threshold for the reporting obligation under the proposed item and the range of issues, particularly under 107(a) of the Mine Act, that can trigger the disclosure requirement.[189] One noted that a delay in reporting information that is typically not material to the issuer should not affect the issuer's Form S-3 eligibility.[190]

We received some support for our proposal not to include Item 1.04 in the list of items in Rules 13a-11(c) and 15d-11(c) with respect to which the failure to file a report on Form 8-K will not be deemed to be a violation of Section 10(b) or Rule 10b-5.[191] However, other commentators indicated that the Commission should add Item 1.04 to the safe harbors.[192] One commentator noted that such information will be made public by the MSHA data retrieval system.[193] Others noted that disclosures regarding mine safety are typically immaterial events and the failure to

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[188] See letter from Chevron.

[189] See letter from DGS Law.

[190] See letter from NMA.

[191] See, e.g. letters from SIF and Trillium.

[192] See letters from AngloGold, Chevron, Cleary, NMA and NYSBA.

[193] See letter from AngloGold.

timely report them on Form 8-K should not be considered a violation of Section 10(b) or Rule 10b-5.[194]

c. **Final Rule**

The final rule adds Item 1.04 to the list of Form 8-K items in General Instruction I.A.3.(b) of Form S-3 to provide that untimely filing of the new item will not result in the loss of Form S-3 eligibility. Commentators were supportive of this approach, which we continue to believe is appropriate. Section 1503(b) of the Act does not address the Securities Act implications of a failure to timely file a Form 8-K. In addition, as noted in the Proposing Release, in the past when we have adopted new disclosure requirements that differed from the traditional periodic reporting obligations of companies, we have acknowledged concerns about the potentially harsh consequences of the loss of Form S-3 eligibility, and addressed such concerns by specifying that untimely filing of Forms 8-K relating to certain topics would not result in the loss of Form S-3 eligibility.[195]

Although we are mindful of commentators' concerns, we are not including Item 1.04 in the list of items in Rules 13a-11(c) and 15d-11(c) with respect to which the failure to file a report on Form 8-K will not be deemed to be a violation of Section 10(b) or Rule 10b-5. We continue to believe, as we expressed when we adopted the limited safe harbor from liability under Section 10(b) or Rule 10b-5 under the Exchange Act for certain Form 8-K items, that the safe harbor is appropriate if the triggering event for the Form 8-K requires management to make a rapid materiality determination.[196] The filing of an Item 1.04 Form 8-K is triggered by an event that

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[194] See letters from Chevron and NMA.

[195] See *Selective Disclosure and Insider Trading*, SEC Release No. 33-7881 (Aug. 15, 2000) [65 FR 51715]; *Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date*, SEC Release No. 33-8400 (March 16, 2004) [69 FR 15594] (the "Additional Form 8-K Disclosure Release").

[196] See Additional Form 8-K Disclosure Release at 69 FR 15607.

does not require management to make a rapid materiality determination, and we continue to believe that it is not necessary to extend the safe harbor to this new item.

III. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of the final amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[197] We published a notice requesting comment on the collection of information requirements in the Proposing Release for the rule amendments and we submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[198] The titles for the collection of information are:

(A) "Regulation S-K" (OMB Control No. 3235-0071);

(B) "Form 10-K" (OMB Control No. 3235-0063);

(C) "Form 10-Q" (OMB Control No. 3235-0070);

(D) "Form 8-K" (OMB Control No. 3235-0060);

(E) "Form 20-F" (OMB Control No. 3235-0288); and

(F) "Form 40-F" (OMB Control No. 3235-0381).

These regulations and forms were adopted under the Securities Act and the Exchange Act. They set forth the disclosure requirements for periodic and current reports filed by companies to inform investors.[199] The hours and costs associated with preparing disclosure,

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[197] 44 U.S.C. 3501 et seq.

[198] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[199] Forms 20-F and 40-F may also be used by foreign private issuers to register a class of securities under the Exchange Act. In addition, Form 20-F sets forth many of the disclosure requirements for registration statements filed by foreign private issuers under the Securities Act.

filing forms and retaining records constitute reporting and cost burdens imposed by each collection of information. 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.

B. Summary of the Final Rules

As discussed in more detail above, we are adopting new rule and form amendments to implement Section 1503 of the Act. Section 1503(a) requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8-K disclosing the receipt of certain orders and notices from MSHA.

We are adopting new Items 104 and 601(b)(95) of Regulation S-K and amending Forms 10-Q, 10-K, 20-F and 40-F under the Exchange Act to implement the disclosure requirement set forth in Section 1503(a) of the Act. We are adopting new Item 1.04 of Form 8-K to implement the requirement of Section 1503(b) of the Act. In addition, we are amending General Instruction I.A.3(b) of Securities Act Form S-3.

Issuers are currently required to comply with the provisions of Section 1503 of the Act; therefore, the Act has already increased the burdens and costs for issuers by requiring the disclosure set forth in Sections 1503(a) and (b) of the Act. We note that Section 1503 of the Act imposed the disclosure requirements set forth in Sections 1503(a) and (b) of the Act, regardless of whether the Commission adopts rules to implement those provisions. Our amendments incorporate the Act's requirements into Regulation S-K and related forms.

The disclosure requirement of Section 1503(a)(1)(G) of the Act, which requires disclosure of mining-related fatalities, overlaps to some extent with a disclosure requirement under MSHA rules. MSHA requires mine operators to report immediately any death of an individual at a mine,[200] which MSHA then makes available to the public through its data retrieval system on its website, www.msha.gov. MSHA's disclosure requirement applies to all mine operators under MSHA's jurisdiction, while the disclosure requirement of Section 1503(a)(1)(G) of the Act requires reporting by a subset of that group, specifically, issuers that are required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Exchange Act and that are operators (or have a subsidiary that is an operator) of a coal or other mine. We note that, while there is some overlap, the disclosure requirement of Section 1503(a)(1)(G) of the Act is currently in effect by operation of the statute, and the amendments we are adopting simply incorporate the Act's requirements into our rules and forms. We believe our rules must incorporate this provision of the Act in order to be consistent with the Act.

Most of the information called for by the new disclosure requirements is publicly disclosed by MSHA and readily available to issuers, who receive notices, orders and citations directly from MSHA and can also access the information via MSHA's data retrieval system. Information regarding pending legal actions is known to issuers, and certain information about orders and citations that are in contest before the FMSHRC is also available via MSHA's data retrieval system. Further, as noted above, the disclosure item for periodic reports requiring disclosure of mining-related fatalities is already subject to a collection of information under MSHA regulations,[201] and fatality information also is made public via MSHA's data retrieval

[200] See 30 CFR 50.10.
[201] 30 CFR 50.10 and 50.20.

system. Our amendments incorporate the Act's requirements into Regulation S-K and related forms.

We anticipate that new Items 104 and 601(b)(95) of Regulation S-K will increase the disclosure burdens for annual reports on Form 10-K and quarterly reports on Form 10-Q that existed prior to enactment of the Act. Because Regulation S-K does not apply directly to Forms 20-F and 40-F,[202] we are amending those forms to include the same disclosure requirements as those applicable to issuers that are not foreign private issuers, and therefore we anticipate that the disclosure burdens that existed prior to the enactment of the Act for annual reports on Forms 20-F and 40-F will increase.[203] We anticipate that new Item 1.04 of Form 8-K will increase the disclosure burden that existed prior to enactment of the Act for current reports on Form 8-K by requiring issuers to file a Form 8-K upon receipt of three types of notices or orders from MSHA relating to mine health and safety concerns and specifying the information required about the orders or notices required to be disclosed.

Compliance with the amendments by affected issuers will be mandatory. Responses to the information collections will not be kept confidential, and there will be no mandatory retention period for the information disclosed.

C. Summary of Comment Letters and Revisions to Proposals

In the Proposing Release, we requested comment on the PRA analysis. We received one comment letter that addressed our overall burden estimates for the proposed amendments.[204] The

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[202] While Form 20-F may be used by any foreign private issuer, Form 40-F is only available to a Canadian issuer that is eligible to participate in the U.S.-Canadian Multijurisdictional Disclosure System.

[203] See new Item 16H under Part II of Form 20-F and paragraph (16) to General Instruction B of Form 40-F.

[204] See letter from Rio Tinto.

commentator stated its belief that the estimates included in the Proposing Release were on the low end of the scale. The commentator noted its view that, due to the number and variety of operations that must be included in the reports and the corporate structure and segregation of responsibilities that are required in a multinational organization with a number of individual operating subsidiaries, the estimate of burden hours to manage, assemble, track, verify and prepare the reports should be higher. In the commentator's experience, the necessary internal procedures and controls to accurately assemble, track and report the Section 1503 mine safety information and the actual hourly burden alone would be 10 to 15 times the estimate made by the Commission, and the outside professional burden would likewise be several orders of magnitude greater than the estimate.

After consideration of the comment received, we have increased the hours and costs from the proposal, although we have not increased such estimates by the magnitude suggested by the commentator, taking into account several substantive modifications we have made to the proposed amendments. We are adopting final rules that in some respects are less burdensome than the proposals. We have simplified the reporting of information with respect to proposed assessments of penalties and pending legal actions, and we are not adopting the proposed additional disclosure item. We also have changed the time period requirement for periodic reporting in a manner that will lessen the burden for issuers by requiring disclosure only for the period covered by the report. Therefore, we have adjusted our estimates to reflect a decrease in hours and costs from the proposal, but also reflecting an increase in hours and costs based on the comment received.

D. Revisions to PRA Reporting and Cost Burden Estimates

We anticipate that the rule and form amendments will increase the burdens and costs for issuers subject to the amendments. For purposes of the PRA, in the Proposing Release we estimated the total annual increase in paperwork burden for all affected companies to comply with the proposed collection of information requirements to be approximately 1,677 hours of company personnel time and approximately $263,500 for the services of outside professionals. These estimates included the time and the cost of implementing disclosure controls and procedures, preparing and reviewing disclosure, filing documents and retaining records. As discussed above, as a result of the changes we have made from the proposals, and taking into consideration the comment received, we are increasing the total PRA burden and cost estimates that we originally submitted to OMB in connection with the proposed amendments. We estimate the annual incremental paperwork burden for all companies to prepare the disclosure required under our rule amendments to be approximately 5,775 hours of company personnel time and approximately $1,090,000 for the services of outside professionals.

In deriving our new estimates, we assume that:

- For Forms 10-K, 10-Q and 8-K, an issuer incurs 75% of the annual burden required to produce each form, and outside firms, including legal counsel, accountants and other advisors retained by the issuer, incur 25% of the annual burden required to produce the form at an average cost of $400 per hour; and
- For Forms 20-F and 40-F, a foreign private issuer incurs 25% of the annual burden required to produce each form, and outside firms retained by the issuer incur 75% of the burden require to produce each form at an average cost of $400 per hour.

The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

We have based our new burden hour and cost estimates of the effect that the adopted rule and form amendments would have on those collections of information primarily on our understanding that the information required to be disclosed is readily available to issuers, and that therefore the burden imposed by the disclosure requirements is mainly in formatting the information in order to comply with our disclosure requirements and ensuring that appropriate disclosure controls and procedures are in place to facilitate reporting of the information. In this regard, we note that mine operators receive the relevant notices, citations and similar information directly from MSHA, and that issuers could also access such information via MSHA's publicly available data retrieval system. Information regarding pending legal actions is known to issuers, and certain information about orders and citations that are in contest before the FMSHRC is also available via MSHA's data retrieval system. Further, mine operators are required by MSHA regulations to report all fatalities to MSHA immediately, and information about mining-related fatalities also is made public via MSHA's data retrieval system. In preparing the burden hour and cost estimates, we took into consideration the number of issuers that filed reports with the Commission including information required under Section 1503 since its effective date.

1. Regulation S-K

While the rule and form amendments make revisions to Regulation S-K, the collection of information requirements for that regulation are reflected in the burden hours estimated for Forms 10-K and 10-Q. The rules in Regulation S-K do not impose any separate burden. Consistent with historical practice, we are retaining an estimate of one burden hour to Regulation S-K for administrative convenience.

2. **Form 10-K**

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we estimate that, of the 13,545 Form 10-Ks filed annually, approximately 100 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore will be affected by the rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in its Form 10-K, and that preparation of the Form 10-K disclosure would involve gathering the information for the fourth quarter of the fiscal year, consolidating it with information reported in the prior quarters of the fiscal year, and formatting the information for inclusion in the annual report. We estimate that the rule and form amendments would add 20 burden hours to the total burden hours required to produce each Form 10-K.

3. **Form 20-F**

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we currently estimate that of the 942 Form 20-F annual reports filed annually by foreign private issuers, approximately 15 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in its Form 20-F. We estimate that the rule and form amendments would add 40 burden hours to the total burden hours required to produce each Form 20-F.

4. Form 40-F

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we currently estimate that of the 205 Form 40-F annual reports filed annually by foreign private issuers, approximately 15 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in its Form 40-F. As with Form 20-F, we estimate that the rule and form amendments would add 40 burden hours to the total burden hours required to produce each Form 40-F annual report.

5. Form 10-Q

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety matters in Commission filings in accordance with Section 1503 of the Act, we estimate that, of the 32,462 Form 10-Qs filed annually, approximately 300 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments.[205] For purposes of the PRA, we assume that each such filer would have disclosures about mine safety matters to include in each Form 10-Q. We further estimate that the rule and form amendments would add 15 burden hours to the total burden hours required to produce each Form 10-Q.

[205] We estimate that approximately 100 companies with a Form 10-Q filing obligation would be affected by the proposed rule and form amendments. Each such company would file three quarterly reports on Form 10-Q per year. 100 companies x 3 Forms 10-Q per year=300 Forms 10-Q.

6. Form 8-K

We estimate that companies annually file 116,860 Form 8-Ks. Only companies that are not foreign private issuers and are operators, or have subsidiaries that are operators, of mines subject to the Mine Act are required to comply with the new Form 8-K requirement. For purposes of the PRA, we estimate that there will be approximately 100 Form 8-K filers under new Item 1.04, which is based on our estimate of the number of Form 10-K filers that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the rule and form amendments. In addition, we understand that the triggering events for Form 8-K filing set forth in Section 1503(b)(2) – the receipt of written notice from MSHA that the coal or other mine has a pattern of violations or the potential to have such a pattern – are relatively rare, while the triggering event set forth in Section 1503(b)(1) – the receipt of an imminent danger order – is more common.[206] For purposes of this calculation, we assume that each potential filer under Item 1.04 of Form 8-K would file four Forms 8-K per year under new Item 1.04 and we estimate that the amendments to Form 8-K would add 2 burden hours to the total burden hours required to produce each Form 8-K.

E. Summary of Changes to Annual Compliance Burden in Collection of Information

The table below illustrates the total incremental annual compliance burden of the collection of information in hours and in cost under the amendments for annual reports, quarterly reports and current reports on Form 8-K under the Exchange Act (Table 1). There is no change to

[206] See U.S. Department of Labor, Office of Inspector General, *In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority*, Report Number 05-10-005-06-001 (Sept. 29, 2010). According to data available on MSHA's website, 549, 630 and 562 imminent danger orders under Section 107(a) were issued during fiscal 2011, 2010 and 2009, respectively. See Violations Data Set (as of December 9, 2011), available at http://www.msha.gov/OpenGovernmentData/OGIMSHA.asp (on file with the Division of Corporation Finance). Note that this number includes all imminent danger orders issued to all companies subject to MSHA's jurisdiction, not only to reporting companies that are subject to the disclosure requirements of Section 1503 of the Act.

the estimated burden of the collection of information under Regulation S-K because the burdens that Regulation S-K imposes are reflected in our revised estimates for the forms. The burden estimates were calculated by multiplying the estimated number of annual responses by the estimated average number of hours it would take a company to prepare and review the new disclosure requirements.

Form	Current Annual Response	Current Burden Hours	Increase in Burden Hours	Proposed Burden Hours	Current Professional Costs ($)	Increase in Professional Costs ($)	Proposed Professional Costs ($)
10-K	13,545	21,361,898	1,500	21,363,398	2,848,253,000	200,000	2,848,453,000
20-F	942	622,871	150	623,021	743,047,230	180,000	743,227,230
40-F	205	21,884	150	22,034	26,260,500	180,000	26,440,500
10-Q	32,462	4,559,793	3,375	4,563,168	607,972,400	450,000	608,422,400
8-K	116,860	502,839	600	503,439	67,045,200	80,000	67,125,200

IV. COST-BENEFIT ANALYSIS

A. Introduction

We are adopting the rule and form amendments discussed in this release to implement the disclosure requirements set forth in Section 1503 of the Act. Section 1503(a) of the Act requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8-K disclosing the receipt of certain orders and notices from the Mine Safety and Health Administration.

As discussed in detail above, the disclosure requirements set forth in Section 1503 of the Act refer to and are based on the safety and health requirements applicable to mines under the Mine Act and administered by MSHA. MSHA inspectors issue citations, orders and decisions directly to mine operators during the course of inspections and MSHA assesses and collects civil monetary penalties for violations. Mine operators receive the relevant notices, citations and similar information directly from MSHA, and this information is publicly available on MSHA's data retrieval system on its website on a mine-by-mine basis.[207] Information regarding pending legal actions is known to issuers, and certain information about orders and citations that are in contest before the FMSHRC is also available via MSHA's data retrieval system. Further, mine operators are required by MSHA regulations to report all fatalities to MSHA immediately, and information about mining-related fatalities also is made public via MSHA's data retrieval system. Therefore, we believe most of the information required to be disclosed under Section 1503 of the Act and our final rules is readily available to issuers. Further, because the disclosure requirements set forth in Section 1503 are currently in effect, we assume that issuers have already developed the necessary controls and procedures to review and prepare the information required by Section 1503 of the Act for filing with the Commission.

We are adopting amendments to Form 10-K, Form 10-Q, Form 20-F and Form 40-F to provide for the disclosure required by Section 1503(a) of the Act. New Item 104 of Regulation S-K, new Item 16H of Form 20-F and new Paragraph (16) of General Instruction B of Form 40-F detail the information to be disclosed in accordance with Section 1503(a) of the Act, and the amendment to Item 601 of Regulation S-K sets forth the exhibit requirement for Form 10-K and Form 10-Q for the information required to be disclosed under Item 104 of Regulation S-K. We are also adopting amendments to Form 8-K to add new Item 1.04 to implement the requirement imposed by Section 1503(b) of the Act. Finally, we are amending General Instruction I.A.3.(b) of Form S-3 to add new Form 8-K Item 1.04 to the list of Form 8-K items the untimely filing of which will not result in loss of Form S-3 eligibility.

[207] See http://www.msha.gov/DRS/DRSHOME.HTM.

We did not receive any comment letters addressing the cost-benefit analysis included in the Proposing Release. The Commission is sensitive to the costs and benefits that will be imposed by the rule and form amendments. The discussion below focuses on the costs and benefits of the decisions made by the Commission to fulfill the mandates of the Act, rather than the costs and benefits of the mandates of the Act itself. However, to the extent that the Commission helps achieve the benefits intended by the Act, the two types of benefits are not entirely separable.

The final rule adheres closely to the statutory mandate, which is already in effect. We have determined not to adopt the proposed requirements to provide additional disclosure in periodic reports addressing the categories of violations, orders or citations disclosed in response to the Section 1503(a) disclosure requirement, or total dollar values of proposed penalty assessments from MSHA outstanding as of the end of a reporting period. We are adopting a requirement to disclose the total number of legal actions involving each mine that were pending before the FMSHRC as of the last day of the reporting period, the aggregate number of legal actions instituted and the number resolved during the reporting period, and the numbers of such legal actions in specified categories, rather than the more burdensome proposed requirement to provide more detailed descriptions of legal actions pending before the FMSHRC and developments material to previously reported pending legal actions. As a consequence, we believe that the vast majority of the costs and benefits of our final rules are attributable to the provisions of Section 1503.

B. Benefits

The amended rules we are adopting today are intended to implement the requirements of Section 1503 of the Act. Our Regulation S-K and form amendments implement the requirements of the Act by reiterating the disclosure items listed in Section 1503, which are currently in effect. Our rule and form amendments specify for issuers how, in what form, and when to report the mine safety information required by the Act. These rules are designed to facilitate compliance with the new statutory requirements. We believe this should simplify the disclosure obligation, promote comparability and consistency of disclosure across issuers and time periods, and make the information more accessible for users, which will benefit investors in their consideration of information about issuers' mine health and safety matters.

We believe that the requirement to disclose the total number of legal actions involving each mine that were pending before the FMSHRC as of the last day of the reporting period, the aggregate number of legal actions instituted, the number resolved during the reporting period and the numbers of legal actions in specified categories will provide useful information to users about overall developments in legal actions and the extent of the mine operators' involvement in legal actions.

Our amendment to Form 8-K requires additional disclosure beyond that specifically designated by Section 1503(b) of the Act by specifying the information required about the orders or notices required to be disclosed, and specifying a four business day filing deadline for Forms 8-K filed under new Item 1.04. Our amendment to Form 8-K specifying that the form is to be filed within four business days of receipt of the order or notice designated under Section 1503(b) of the Act will provide issuers and investors with certainty about the timing of that disclosure requirement.

C. Costs

The vast majority of the costs resulting from the disclosures required by Section 1503 of the Act arise whether or not we adopt rules to implement the Section. Moreover, the information required to be disclosed under Section 1503 is already subject to an extensive recordkeeping regime under MSHA and, for the most part, is readily available to issuers via MSHA's data retrieval system. Certain information, such as information regarding pending legal actions and mining-related fatalities, is known to issuers, although they may have had to adopt new procedures to capture and report the information in order to comply with Section 1503. The primary costs to result from this rulemaking are costs associated with the formatting and filing of the information. We believe that there are no significant incremental costs imposed as a result of our codification of the Section 1503 requirements.[208]

V. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 23(a)(2) of the Exchange Act[209] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Section 2(b)[210] of the Securities Act and Section 3(f)[211] of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

[208] For purposes of the PRA, we estimate the total cost of the disclosure to be approximately 5,775 hours of company personnel time and approximately $1,090,000 for the services of outside professionals. However, this amount reflects the costs associated with the disclosure requirement set forth in Section 1503 of the Act. We do not believe our rules, which implement Section 1503, impose any additional costs beyond those imposed by the statute.

[209] 15 U.S.C. 78w(a).

[210] 15 U.S.C. 77b(b).

[211] 15 U.S.C. 78c(f).

We did not receive any comment letters addressing the discussion of these issues included in the Proposing Release. The amendments we are adopting will implement the requirements of Section 1503 of the Act, which imposed the substance of the disclosure requirements set forth in our new rules. We are not imposing any additional requirements in our rulemaking that will impose a burden on competition or have a significant impact on capital formation.

We believe that the rule and form amendments we are adopting will provide direction and consistency as to how, in what form, and when to report the relevant information. We believe that the specifications in the rulemaking will improve the efficiency of the reporting process for issuers and provide for a more efficient and effective review of the information by investors.

The loss of eligibility by an issuer to use Form S-3 could restrict the ability of the company to raise capital or increase an issuer's costs relating to capital raising, and may be a disproportionately large negative consequence of an untimely filing of a Form 8-K. To address this potential burden, we are revising the eligibility rules under Form S-3 so that an untimely filing of a report under new Item 1.04 of Form 8-K would not result in a loss of eligibility to use that form.

VI. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Final Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.[212] It relates to revisions to Regulation S-K and forms under the Securities Act and the Exchange Act regarding disclosure about mine safety.

A. Reasons for, and Objectives of, the Proposed Action

We are adopting rule amendments to implement the disclosure requirements set forth in Section 1503 of the Act. Section 1503(a) of the Act requires issuers that are operators, or that

[212] 5 U.S.C. 601.

have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8-K disclosing the receipt of certain orders and notices from MSHA.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the Initial Regulatory Flexibility Analysis ("IRFA"), including how the proposed amendments could achieve their objective while lowering the burden on small entities, the number of small entities that would be affected by the proposed amendments, the nature of the potential impact of the proposed amendments on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA. However, several commentators addressed aspects of the proposed rule amendments that could potentially affect small entities. In particular, several commentators stated their belief that smaller companies should not be exempted from all or part of the amendments,[213] while only one commentator urged that we adopt a modified reporting system for smaller companies.[214]

C. Small Entities Subject to the Final Amendments

The amendments will affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[215] The Commission's rules define "small business" and "small

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[213] See letters from AFL-CIO, CalPERS, CalSTRS, EARTHWORKS, NMA, Rio Tinto, SIF, Trillium and UMWA.

[214] See letter from Estess.

[215] 5 U.S.C. 601(6).

organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157[216] and Exchange Act Rule 0-10(a)[217] define a company, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. The new rules will affect small entities that (i) are required to file reports under Section 13(a) or 15(d) of the Exchange Act and (ii) operate, or have a subsidiary that operates, a coal or other mine that is subject to the Mine Act, and therefore are required to provide mine safety disclosure under Section 1503 of the Act. We estimate that there are approximately 25 companies that would currently be required to provide the Section 1503 disclosure and that may be considered small entities. We note that there are a significant number of small entities that are exploration stage mining companies that would be required to provide the Section 1503 disclosure if such companies were to become operators, or have subsidiaries that become operators, of coal or other mines subject to the Mine Act.

D. Reporting, Recordkeeping, and other Compliance Requirements

The disclosure requirements are intended to implement the disclosure requirements set forth in Section 1503 of the Act. These amendments require small entities that are required to file reports under Section 13(a) or 15(d) of the Exchange Act and operate, or have a subsidiary that operates, a coal or other mine to provide mine safety disclosure under applicable rules and forms.

Small entities will be required to include the disclosure in their annual report on Form 10-K, Form 20-F or Form 40-F and, if applicable, quarterly report on Form 10-Q and current report on Form 8-K. We are amending Form 10-K, Form 10-Q, Form 20-F and Form 40-F to require the

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[216] 17 CFR 230.157.

[217] 17 CFR 240.0-10(a).

disclosure required by Section 1503(a) of the Act. New Item 104 of Regulation S-K, new Item 16H of Form 20-F and new Paragraph (16) of General Instruction B of Form 40-F detail the information to be disclosed in accordance with Section 1503(a) of the Act, and the amendment to Item 601 of Regulation S-K sets forth the exhibit requirement for Form 10-K and Form 10-Q for the information required to be disclosed under new Item 104 of Regulation S-K. We are also adopting amendments to Form 8-K to add new Item 1.04 to implement the requirement imposed by Section 1503(b) of the Act. Finally, we are amending General Instruction I.A.3.(b) of Form S-3 to add new Form 8-K Item 1.04 to the list of Form 8-K items the untimely filing of which will not result in loss of Form S-3 eligibility.

E. Agency Action to Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the disclosure amendments, we considered the following alternatives:

(1) Establishing differing compliance or reporting requirements or timetables which take into account the resources available to smaller entities;

(2) Exempting smaller entities from coverage of the disclosure requirements, or any part thereof;

(3) The clarification, consolidation, or simplification of disclosure for small entities; and

(4) Use of performance standards rather than design standards.

Section 1503 of the Act requires all entities, including small entities, that are required to file reports under Section 13(a) or 15(d) of the Exchange Act and operate, or have a subsidiary that operates, a coal or other mine to provide mine safety disclosure under applicable rules and forms. These requirements apply without regard to whether we adopt rules to implement them.

The amendments implement the disclosure requirements set forth in Section 1503 of the Act. Given the statutory disclosure requirements in Section 1503 of the Act, the Act does not appear to contemplate separate compliance or reporting requirements for smaller entities.

Our amendments would require clear and straightforward disclosure of the information required by Section 1503 of the Act. We generally have used design rather than performance standards in connection with the amendments. By specifying in the Act the disclosure required, Congress appears to have contemplated that consistent, comparable disclosure would be provided. We believe that the specific disclosure requirements in the amendments will promote consistent and comparable disclosure among all companies that operate, or have a subsidiary that operates, a coal or other mine. Further, based on our past experience, we believe that specific disclosure requirements for this information would be more useful to investors than would a performance standard. However, we note that, although we encourage tabular presentation, we are not adopting a particular presentation requirement for the disclosure, so that each issuer has flexibility to adopt a presentation it believes is appropriate for its disclosure. We proposed additional disclosure requirements that would have given greater context to the information required to be disclosed by Section 1503. After further consideration, we are not requiring such additional disclosure, but issuers are permitted to include additional disclosure if they choose to do so.

Currently, small entities are subject to some different compliance or reporting requirements under Regulation S-K and the amendments would not affect these requirements. The disclosure requirements will apply to small entities to the same extent as larger issuers. We do not believe these disclosures will create a significant new burden, and we believe this approach is consistent with the requirements of the Act.

VII. STATUTORY AUTHORITY AND TEXT OF THE AMENDMENTS

The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act; Sections 12, 13, 15 and 23 of the Exchange Act and Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

List of Subjects

17 CFR Parts 229, 239 and 249

Reporting and recordkeeping requirements, Securities.

TEXT OF THE AMENDMENTS

For the reasons set out in the preamble, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229 - STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 - REGULATION S-K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Section 229.104 is added to read as follows:

§ 229.104 (Item 104) Mine safety disclosure.

(a) A registrant that is the operator, or that has a subsidiary that is an operator, of a coal or other mine shall provide the information specified below for the time period covered by the report:

(1) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)).

(iii) The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under section 104(d) of such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 et seq).

Instruction to Item 104(a)(1)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA relating to any type of violation during the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

Instruction to Item 104(a)(1)(vii): Registrants must report all fatalities occurring at a coal or other mine during the period covered by the report unless the fatality has been determined by MSHA to be unrelated to mining activity.

(2) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) A pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(ii) The potential to have such a pattern.

(3) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

Instruction to Item 104(a)(3): The registrant must report the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. With respect to the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, the registrant must also report the number of such legal actions that are (a) contests of citations and orders referenced in Subpart B of 29 CFR Part 2700; (b) contests of proposed penalties referenced in Subpart C of 29 CFR Part 2700; (c) complaints for compensation referenced in Subpart D of 29 CFR Part 2700; (d) complaints of discharge, discrimination or interference referenced in Subpart E of 29 CFR Part 2700; (e) applications for temporary relief referenced in Subpart F of 29 CFR Part 2700; and (f) appeals of judges' decisions or orders to the Federal Mine Safety and Health Review Commission referenced in Subpart H of 29 CFR Part 2700.

(b) *Definitions*. For purposes of this Item:

(1) The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).

(2) The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

(3) The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b-2 (17 CFR 240.12b-2).

Instructions to Item 104:

1. The registrant must provide the information required by this Item as specified by § 229.601(b)(95) of this chapter. In addition, the registrant must provide a statement, in an appropriately captioned section of the periodic report, that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in exhibit 95 to the periodic report.

2. When the disclosure required by this item is included in an exhibit to an annual report on Form 10-K, the information is to be provided for the registrant's fiscal year.

* * * * *

3. Amend § 229.601 by revising paragraphs (a)(36) through (a)(98) in the exhibit table in paragraph (a), and adding paragraph (b)(95), to read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

Exhibit Table

* * * * *

EXHIBIT TABLE													
	Securities Act Forms								Exchange Act Forms				
	S-1	S-3	S-4[1]	S-8	S-11	F-1	F-3	F-4[1]	10	8-K[2]	10-D	10-Q	10-K
* * * * *													
(36) through (94) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(95) Mine Safety Disclosure Exhibit												X	X
(96) through (98) [Reserved]													

[1] An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Form S–4 or F–4 to provide information about such company at a level prescribed by Form S–3 or F–3; and (2) the form, the level of which has been elected under Form S–4 or F–4, would not require such company to provide such exhibit if it were registering a primary offering.

[2] A Form 8–K exhibit is required only if relevant to the subject matter reported on the Form 8–K report. For example, if the Form 8–K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

* * * * *

(b) * * *

(95) <u>Mine Safety Disclosure Exhibit</u>. A registrant that is an operator, or that has a subsidiary that is an operator, of a coal or other mine must provide the information required by Item 104 of Regulation S-K (§ 229.104 of this chapter) in an exhibit to its Exchange Act annual or quarterly report. For purposes of this Item:

1. The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).

2. The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

3. The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b-2 (17 CFR 240.12b-2).

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

4. The authority citation for part 239 continues to read in part as follows:

<u>Authority</u>: 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(d), 77mm, 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 404 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

5. Amend Form S-3 (referenced in § 239.13) by revising General Instruction I.A.3.(b) to read as follows:

Note: The text of Form S-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S-3
REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form S-3 * * *

A. Registrant Requirements. * * *

3. * * *

(b) has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement, other than a report that is required solely pursuant to Item 1.01, 1.02, 1.04, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 5.02(e) of Form 8-K (§ 249.308 of this chapter). If the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b-25(b) (§ 240.12b-25(b) of this chapter) under the Exchange Act with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule.

* * * * *

PART 249 -- FORMS, SECURITIES EXCHANGE ACT OF 1934

6. 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.

* * * * *

7. Amend Form 20-F (referenced in § 249.220f) by adding Item 16H, and adding Instruction 16 to the Instructions as to Exhibits, of Form 20-F, to read as follows:

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 20-F

* * * * *

Item 16H. Mine Safety Disclosure

If the registrant is the operator, or has a subsidiary that is an operator, of a coal or other mine, include the information set forth below for the time period covered by the annual report. In an appropriately captioned section of the annual report, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in a specified exhibit to the annual report. Include the following information in an exhibit to the annual report.

(a) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b).

(iii) The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under section 104(d) of such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 et seq).

<u>Instruction to Item 16H(a)(vi)</u>: Registrants must provide the total dollar value of assessments proposed by MSHA relating to any type of violation during the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

<u>Instruction to Item 16H(a)(vii)</u>: Registrants must report all fatalities occurring at a coal or other mine during the period covered by the report unless the fatality has been determined by MSHA to be unrelated to mining activity.

(b) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) A pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(ii) the potential to have such a pattern.

(c) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

Instructions to Item 16H(c): The registrant must report the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. With respect to the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, the registrant must also report the number of such legal actions that are (a) contests of citations and orders referenced in Subpart B of 29 CFR Part 2700; (b) contests of proposed penalties referenced in Subpart C of 29 CFR Part 2700; (c) complaints for compensation referenced in Subpart D of 29 CFR Part 2700; (d) complaints of discharge, discrimination or interference referenced in Subpart E of 29 CFR Part 2700; (e) applications for temporary relief referenced in Subpart F of 29 CFR Part 2700; and (f) appeals of judges' decisions or orders to the Federal Mine Safety and Health Review Commission referenced in Subpart H of 29 CFR Part 2700.

* * * * *

Instructions to Item 16H

1. Item 16H only applies to annual reports, and not to registration statements on Form 20-F.

2. The exhibit described in this Item must meet the requirements under Instruction 19 as to Exhibits of this Form.

3. For purposes of this Item:

   a. The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).

b. The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

c. The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b-2 (17 CFR 240.12b-2).

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

16. The mine safety disclosure required by Item 16H.

A registrant that is the operator, or that has a subsidiary that is an operator, of a coal or other mine must provide the information specified in Item 16H in an exhibit to its annual report on Form 20-F.

17 through 99 [Reserved]

* * * * *

8. Amend Form 40-F (referenced in § 249.240f) by adding Paragraph (16) to General Instruction B to read as follows:

* * * * *

(16) Mine safety disclosure. If the registrant is the operator, or has a subsidiary that is an operator, of a coal or other mine, include the information set forth below for the time period covered by the annual report. In an appropriately captioned section of the annual report, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection

Act and this Item is included in a specified exhibit to the annual report. Include the following information in an exhibit to the annual report.

(a) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b).

(iii) The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under section 104(d) of such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 et seq).

Instruction to paragraph (16)(a)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA relating to any type of violation during the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

Instruction to paragraph (16)(a)(vii) Registrants must report all fatalities occurring at a coal or other mine during the period covered by the report unless the fatality has been determined by MSHA to be unrelated to mining activity.

(b) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) A pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(ii) the potential to have such a pattern.

(c) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

Instruction to paragraph (16)(c): The registrant must report the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, as well as the aggregate number of legal actions instituted and the aggregate number of legal actions resolved during the reporting period. With respect to the total number of legal actions that were pending before the Federal Mine Safety and Health Review Commission as of the last day of the time period covered by the report, the registrant must also report the number of such legal actions that are (a) contests of citations and orders referenced in Subpart B of 29 CFR Part 2700; (b) contests of proposed penalties referenced in Subpart C of 29 CFR Part 2700; (c) complaints for compensation referenced in Subpart D of 29 CFR Part 2700; (d) complaints of discharge, discrimination or interference referenced in Subpart E of 29 CFR Part 2700; (e) applications for temporary relief referenced in

Subpart F of 29 CFR Part 2700; and (f) appeals of judges' decisions or orders to the Federal Mine Safety and Health Review Commission referenced in Subpart H of 29 CFR Part 2700.

* * * * *

Notes to Paragraph (16) of General Instruction B:

For purposes of this Item:

1. The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).

2. The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

3. The term *subsidiary* has the meaning given the term in Exchange Act Rule 12b-2 (17 CFR 240.12b-2).

4. Instruction B(16) only applies to annual reports, and not to registration statements on Form 40-F.

* * * * *

9. Amend Form 8-K (referenced in § 249.308) by adding Item 1.04 under the caption "Information to Be Included in the Report" after the General Instructions to read as follows:

Note: The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8-K

* * * * *

General Instructions

* * * * *

Information to Be Included in the Report

* * * * *

Item 1.04 Mine Safety – Reporting of Shutdowns and Patterns of Violations.

(a) If the registrant or a subsidiary of the registrant has received, with respect to a coal or other mine of which the registrant or a subsidiary of the registrant is an operator

- an imminent danger order issued under section 107(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 817(a));
- a written notice from the Mine Safety and Health Administration that the coal or other mine has a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or
- a written notice from the Mine Safety and Health Administration that the coal or other mine has the potential to have such a pattern,

disclose the following information:

(1) The date of receipt by the issuer or a subsidiary of such order or notice.

(2) The category of the order or notice.

(3) The name and location of the mine involved.

Instructions to Item 1.04.

1. The term "coal or other mine" means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).

2. The term "operator" has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

* * * * *

10. Amend Form 10-Q (referenced in § 249.308a) by revising General Instruction H.2.b to delete the reference to Item 4, Submission of Matters to a Vote of Security Holders, and adding Item 4 in Part II to read as follows:

Note: The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 10-Q

* * * * *

PART II

* * * * *

Item 4. Mine Safety Disclosures* * *

If applicable, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and Item 104 of Regulation S-K (17 CFR 229.104) is included in exhibit 95 to the quarterly report.

* * * * *

11. Amend Form 10-K (referenced in § 249.310) by revising General Instructions I(2)(c) and J(1)(e) to delete the references to Item 4, Submission of Matters to a Vote of Security Holders, and adding Item 4 in Part I to read as follows:

Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 10-K

* * * * *

PART I

* * * * *

Item 4. Mine Safety Disclosures * * *

If applicable, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and Item 104 of Regulation S-K (17 CFR 229.104) is included in exhibit 95 to the annual report.

* * * * *

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

December 21, 2011

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230, 239, 270, and 275

Release Nos. 33-9287; IA-3341; IC-29891; File No. S7-04-11

RIN 3235-AK90

NET WORTH STANDARD FOR ACCREDITED INVESTORS

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to the accredited investor standards in our rules under the Securities Act of 1933 to implement the requirements of Section 413(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 413(a) requires the definitions of "accredited investor" in our Securities Act rules to exclude the value of a person's primary residence for purposes of determining whether the person qualifies as an "accredited investor" on the basis of having a net worth in excess of $1 million. This change to the net worth standard was effective upon enactment by operation of the Dodd-Frank Act, but Section 413(a) also requires us to revise our current Securities Act rules to conform to the new standard. We also are adopting technical amendments to Form D and a number of our rules to conform them to the requirements of Section 413(a) and to correct cross-references to former Section 4(6) of the Securities Act, which was renumbered Section 4(5) by Section 944 of the Dodd-Frank Act.

DATES: Effective Date: [insert date 60 days after publication in Federal Register].

FOR FURTHER INFORMATION CONTACT: Anthony G. Barone, Special Counsel; Karen C. Wiedemann, Attorney Fellow; or Gerald J. Laporte, Chief; Office of Small Business Policy, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F

Street, NE, Washington, DC 20549-3628, (202) 551-3460.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Rule 144(a)(3)(viii),[1] Rule 155(a),[2] Rule 215,[3] and Rule 501(a)(5)[4] and 501(e)(1)(i) of Regulation D[5] of our general rules under the Securities Act of 1933 ("Securities Act")[6]; Rule 500(a)(1)[7] of our Securities Act form rules; Form D[8] under the Securities Act; Rule 17j-1(a)(8)[9] under the Investment Company Act of 1940;[10] and Rule 204A-1(e)(7)[11] under the Investment Advisers Act of 1940.[12]

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[1] 17 CFR 230.144(a)(3)(viii).

[2] 17 CFR 230.155(a).

[3] 17 CFR 230.215.

[4] 17 CFR 230.501(a)(5).

[5] 17 CFR 230.501 through 230.508.

[6] 15 U.S.C. 77a *et seq.*

[7] 17 CFR 239.500(a)(1).

[8] 17 CFR 239.500.

[9] 17 CFR 270.17j-1(a)(8).

[10] 15 U.S.C. 80a-1 *et seq.*

[11] 17 CFR 275.204A-1(e)(7).

[12] 15 U.S.C. 80b-1 *et seq.*

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I. Background and Summary

On January 25, 2011, we proposed amendments to the accredited investor standards in our rules under the Securities Act of 1933[13] to implement the requirements of Section 413(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[14] The accredited investor standards, which are set forth in Rules 215 and 501 under the Securities Act, are used in determining the availability of certain exemptions from Securities Act registration for private and other limited offerings. Section 4(5) of the Securities Act exempts transactions involving offers or sales by an issuer solely to one or more accredited investors, if the aggregate offering price does not exceed $5,000,000, there is no advertising or public solicitation in connection with the transaction, and the issuer files a notice with the Commission. Pursuant to Regulation D under the Securities Act, an issuer conducting a limited offering of securities pursuant to the safe harbor of Rule 505 or 506 does not have to comply with the

[13] *See Net Worth Standard for Accredited Investors,* Release No. 33-9177 (Jan. 25, 2011) [76 FR 5307] (the "Proposing Release").

[14] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

information requirements of Rule 502(b) if sales are made only to accredited investors; and sales to accredited investors do not count towards the 35-purchaser limits under Rules 505 and 506.[15] Moreover, accredited investor status obviates the sophistication requirement that Rule 506 imposes on non-accredited investors.[16] One purpose of the accredited investor concept is to identify persons who can bear the economic risk of an investment in unregistered securities, including the ability to hold unregistered (and therefore less liquid) securities for an indefinite period and, if necessary, to afford a complete loss of such investment.[17]

Section 413(a) of the Dodd-Frank Act requires us to adjust the accredited investor net worth standard that applies to natural persons individually, or jointly with their spouse, to "more than $1,000,000 . . . excluding the value of the primary residence."[18] Previously, this standard required a minimum net worth of more than $1,000,000, but permitted the primary residence to be included in calculating net worth.[19] Under Section 413(a), the change to remove the value of the primary residence from the net worth calculation became effective upon enactment of the Dodd-Frank Act. As discussed in detail below, we are adopting amendments to our rules to conform them to the new standard.

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[15] *See* note 26 below.

[16] Under Rule 506, each purchaser who is not an accredited investor must, either alone or with a purchaser representative, have such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the prospective investment. 17 CFR 230.506(b)(2)(ii).

[17] *See*, Release No. 33-5487 [39 FR 15261] (1974), at 15264 (discussing the previous safe harbor for private placements under Rule 146), and Release No. 33-6339 [46 FR 41791] (1981), at 41793 (noting that the accredited investor concept was intended to "eliminat[e] the need for subjective judgments by the issuer about ... suitability", because investors that met the definition of accredited investor would be "presumed to meet the purchase qualifications").

[18] The text of Section 413(a) states that: "The Commission shall adjust any net worth standard for an accredited investor, as set forth in the rules of the Commission under the Securities Act of 1933, so that the individual net worth of any natural person, or joint net worth with the spouse of that person, at the time of purchase, is more than $1,000,000 (as such amount is adjusted periodically by rule of the Commission), excluding the value of the primary residence of such natural person, except that during the 4-year period that begins on the date of enactment of this Act, any net worth standard shall be $1,000,000, excluding the value of the primary residence of such natural person." *Id.*

[19] *See* 17 CFR 230.215(e) and 230.501(a)(5) (2010).

In the Proposing Release, we requested comment in nine specific areas. We received 43 comment letters in response.[20] In addition, we received 15 letters commenting on Section 413(a) of the Dodd-Frank Act before the publication of the Proposing Release.[21] These two sets of letters came from a variety of groups and constituencies, including state regulators, professional and trade associations, individual investors, broker-dealers and investment advisers, fund managers, consultants, academics and lawyers. Most comment letters expressed general support for the proposed amendments and the objectives that we articulated in the Proposing Release but suggested modifications to the proposals. The final rules reflect changes made in response to these comments, as well as other clarifying changes. As described in detail in the release, the most significant revisions from the proposal include the addition of (1) a grandfathering provision that permits the application of the former accredited investor net worth test in certain limited circumstances and (2) a provision addressing the treatment of incremental debt secured by the primary residence that is incurred in the 60 days before the sale of securities to the individual. Finally, the language of the proposed rules has been revised to make them clearer and easier to apply.

Section 413(b) specifically authorizes us to undertake a review of the definition of the term "accredited investor" as it applies to natural persons, and requires us to undertake a review of the definition in its entirety every four years, beginning four years after enactment of the Dodd-Frank Act. We are also authorized to engage in rulemaking to make adjustments to the

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[20] The comment letters we received on the Proposing Release are available on our website at http://www.sec.gov/comments/s7-04-11/s70411.shtml. In this release, we refer to these letters as the "comment letters" to differentiate them from the "advance comment letters" described in footnote 21.

[21] To facilitate public input on its Dodd-Frank Act rulemaking before issuance of rule proposals, the Commission provided a series of e-mail links, organized by topic, on its website at http://www.sec.gov/spotlight/regreformcomments.shtml. In this release, we refer to letters we received in response to this invitation as "advance comment letters." The advance comment letters we received in anticipation of this rule proposal are available at http://www.sec.gov/comments/df-title-iv/accredited-investor/accredited-investor.shtml.

definition after each such review. Section 415 of the Dodd-Frank Act requires the Comptroller General of the United States to conduct a "Study and Report on Accredited Investors" examining "the appropriate criteria for determining the financial thresholds or other criteria needed to qualify for accredited investor status and eligibility to invest in private funds."[22] The study is due three years after enactment of the legislation. We expect that the results of this study will be taken into account in any rulemaking that takes place in this area after the study is completed. Accordingly, we did not propose, and we are not adopting, any amendments to the definitions of "accredited investor" that are not related to Section 413(a) of the Dodd-Frank Act at this time.

In addition to the changes to the definition of "accredited investor" to implement the requirements of Section 413(a), we are also adopting today technical amendments to update cross-references that have changed as a result of the deletion of former Section 4(5) of the Securities Act and the renumbering of former Section 4(6) as Section 4(5).[23]

II. Discussion

A. Net Worth Standard for Accredited Investors

(1) Overview of the Amended Rules

As discussed above, Section 413(a) of the Dodd-Frank Act requires us to adjust the accredited investor net worth standard[24] that applies under our Securities Act rules to natural persons individually, or jointly with their spouse, to "more than $1,000,000 . . . excluding the value of the primary residence." Previously, the standard required a minimum net worth of more

[22] Pub. L. No. 111-203, § 415, 124 Stat. 1376, 1578 (to be codified at 15 U.S.C. 80b-18c).

[23] Pub. L. No. 111-203, § 944, 124 Stat. 1376, 1897 (renumbering Securities Act Section 4(6), 15 U.S.C. 77d(6) (2006), as Section 4(5), 15 U.S.C. 77d(5)). Former Section 4(5) exempted transactions involving mortgages with a minimum aggregate sales price per purchaser of $250,000, as well as the resales of those securities. 15 U.S.C. 77d(6) (2006).

[24] Neither the Securities Act nor our rules promulgated under the Securities Act define the term "net worth." The commonly understood, or basic, meaning of the term is the difference between the value of a person's assets and the value of the person's liabilities. See, *e.g.*, *Barron's Financial Guides*, Dictionary of Finance and Investment Terms, at 457 (7th ed. 2006).

than $1,000,000, but permitted the primary residence to be included in calculating net worth.

The relevant rules are Securities Act Rules 501 and 215.[25] Rule 501 defines the term "accredited investor" for purposes of non-public and limited offerings under Rules 504(b)(1)(iii), 505 and 506 of Regulation D.[26] The definition of "accredited investor" includes persons who come within any of eight listed categories, or whom the issuer reasonably believes come within one of those categories, at the time of the sale of securities to that person.[27] The $1 million individual net worth standard is one such category.[28]

Rule 215 defines the term "accredited investor" under Section 2(a)(15) of the Securities Act.[29] Section 2(a)(15) and Rule 215 set the standards for accredited investor status under Section 4(5) of the Securities Act, formerly Section 4(6), which permits offerings solely to accredited investors of up to $5 million, subject to certain conditions.[30] While Regulation D is frequently relied upon,[31] exclusive reliance on Section 4(5) is rare.[32]

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[25] 17 CFR 230.501(a)(5) and 230.215(e).

[26] Under Regulation D, issuers are subject to fewer regulatory requirements when the purchasers of their securities are accredited investors. Both Rule 505 and Rule 506 require that there be no more than, or the issuer reasonably believe there are no more than, 35 purchasers of securities in the offering. 17 CFR 230.505(b)(2)(ii) and 230.506(b)(2)(i). However, Rule 501(e) provides that accredited investors are not counted as purchasers for that purpose, with the result that an unlimited number of accredited investors may participate in an offering under Rule 505 or 506, provided that the other requirements of the rules are satisfied. Further, specific information requirements apply to issuers in Rule 505 and Rule 506 transactions if they sell to non-accredited investors, but not if they sell only to accredited investors. 17 CFR 230.502(b)(1). Thus, issuers in offerings under Rule 505 or 506 generally seek to establish that potential purchasers in the offering are accredited investors. In addition, Rule 504(b)(1)(iii) exempts offerings from the manner of offering and resale restrictions that generally apply under Rule 504, if they are made in accordance with certain state law exemptions from registration that limit sales to accredited investors. 17 CFR 230.504(b)(1)(iii).

[27] 17 CFR 230.501(a).

[28] Other categories include certain regulated financial institutions; certain entities with total assets in excess of $5 million; directors, executive officers and general partners of the issuer or its general partner; and natural persons who had an income of at least $200,000 in each of the two most recent years (or $300,000 together with their spouse) and have a reasonable expectation of reaching the same income level in the current year. *Id.*

[29] 15 U.S.C. 77b(a)(15).

[30] 15 U.S.C. 77d(5). As discussed above, former Section 4(6) of the Securities Act was renumbered Section 4(5) by Section 944 of the Dodd-Frank Act.

[31] In fiscal year 2010, we received 16,856 initial filings on Form D notifying us of claims of exemption under Rules 504(b)(1)(iii), 505 and 506, 17 CFR 230.504(b)(1)(iii), 230.505 and 230.506, the three exemptive provisions

Historically, the accredited investor standards under Rule 215 and Rule 501 have been identical. We are adopting identical language in the amendments to Rule 501 and Rule 215, so the two rules will implement Section 413(a) of the Dodd-Frank Act in the same way. As amended, the new individual net worth standard in the accredited investor definition is:

> Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000.
>
> (1) Except as provided in paragraph (2) of this section, for purposes of calculating net worth under this paragraph:
>
> (i) The person's primary residence shall not be included as an asset;
>
> (ii) Indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except that if the amount of such indebtedness outstanding at the time of the sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and
>
> (iii) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability.
>
> (2) Paragraph (1) of this section will not apply to any calculation of a person's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that:
>
> (i) such right was held by the person on July 20, 2010;
>
> (ii) the person qualified as an accredited investor on the basis of net worth at the time the person acquired such right; and
>
> (iii) the person held securities of the same issuer, other than such right, on July 20, 2010.

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in Regulation D where accredited investor status affects the availability of an exemption. This represented 96% of the 17,593 initial Form D filings we received for that year.

[32] In fiscal year 2010, we received 900 initial filings on Form D notifying us of a claim of exemption under Section 4(5), formerly Section 4(6), representing 5% of the 17,593 initial Form D filings we received for that year. Only 66 of those filings, or less than 0.4% of total initial Form D filings, claimed the Section 4(5) exemption exclusively. The other 834 of these Form D filings indicated that both Section 4(5) and a Regulation D exemption were being relied upon.

The final accredited investor definition is consistent with the approach taken in the Proposing Release with respect to the basic treatment of the primary residence and indebtedness secured by the primary residence.[33] We have revised the language of this provision to make it easier for issuers, investors and other market participants to apply the new net worth standard.[34] We have also included a provision addressing the treatment of incremental debt secured by the primary residence that is incurred in the 60 days before the sale of securities to the individual, and have revised the proposal so that that the prior accredited investor net worth test will apply in connection with the exercise of rights to acquire securities, so long as the rights were in existence on July 20, 2010, the day before enactment of the Dodd-Frank Act, the investor qualified as an accredited investor on the basis of net worth at the time the rights were acquired, and the investor held securities of the same issuer, other than the rights, on July 20, 2010.

(2) Treatment of Mortgage Debt

Under the final rules, as in the Proposing Release, individuals' net worth will be calculated excluding any positive equity they may have in their primary residence.[35] As we discussed in the Proposing Release, we believe this approach is the most appropriate way to conform our rules to Section 413(a). It reduces the net worth measure by the net amount that the

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[33] It is also consistent with the staff's initial analysis of Section 413(a). *See* Securities Act Rules Compliance & Disclosure Interpretation, Question No. 255.47 (July 23, 2010) (available at http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#255.47).

[34] We have also deleted a reference to measuring net worth at the time of the investor's purchase, as all standards under the accredited investor definition are measured "at the time of the sale of securities to that person." 17 CFR 230.501(a).

[35] Thus, for example, if an investor with a net worth of $2 million (calculated in the conventional manner before the enactment of Section 413(a)—that is, by subtracting from the investor's total assets, including primary residence, the investor's total liabilities, including indebtedness secured by the residence) has a primary residence with an estimated fair market value of $1.2 million and a mortgage loan of $800,000, the investor's net worth for purposes of the new accredited investor standard is $1.6 million. Before enactment of Section 413(a), the primary residence would have contributed a net amount of $400,000 to the investor's net worth for purposes of the accredited investor net worth standard—the value of the primary residence ($1.2 million) less the mortgage loan ($800,000). Under the amendments, exclusion of the value of the primary residence would reduce the investor's net worth by the same $400,000 amount.

primary residence contributed to net worth before enactment of Section 413(a), which we believe is what is commonly meant by "the value of a person's primary residence." Most comment letters supported defining "excluding the value of the primary residence" in this way.[36]

Three letters supported excluding the fair market value of the primary residence from net worth without excluding any associated debt.[37] This group of letters argued that our proposal to "net out" any associated debt from the fair market value of the primary residence misinterprets the plain language of Section 413(a), and incentivizes investors to increase the amount of debt secured by their primary residence to acquire other assets for the purpose of inflating their net worth as calculated under our rules. As we stated in the Proposing Release, we believe that reducing an investor's net worth by the value of the primary residence without also excluding associated indebtedness would not accord with the manner in which net worth reflected home equity before enactment of Section 413(a); excluding the residence alone would reduce net worth by more than the amount the residence contributes. We believe the approach in the final rule is the most appropriate approach and is consistent with Section 413(a).[38]

Five comment letters advocated excluding from the net worth calculation both the fair market value of the primary residence and all indebtedness secured by the primary residence,

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[36] *See, e.g.*, comment letters from Business Law Section of the American Bar Association ("ABA"), Cornell Securities Law Clinic ("Cornell"), Investment Adviser Association ("IAA"), Managed Funds Association, North American Securities Administrators Association ("NASAA"), Public Investors Arbitration Bar Association and Sullivan & Cromwell LLP ("S&C").

[37] *See* comment letters from Secretary of the Commonwealth of Massachusetts ("Massachusetts Securities Division"), Professors Manning G. Warren and Marc I. Steinberg; and David A. Marion.

[38] New paragraph (ii) of the final rule, discussed in Part I.A.2 below, prohibits excluding incremental indebtedness secured by the primary residence that is incurred in the 60 days before the sale of securities. We believe this provision will mitigate incentives to increase debt secured against the residence solely for purposes of qualifying as an accredited investor.

regardless of whether such indebtedness exceeds the fair market value of the primary residence.[39] Several of these commentators disagreed with our proposal on the basis that the proposal would require an estimate of the fair market value of the primary residence which, in their view, would make the net worth calculation problematic and uncertain and would force investors to incur additional expense to obtain a third party appraisal of their residence. These commentators argued that excluding both the value of the primary residence and all indebtedness secured by the primary residence would simplify and provide greater certainty regarding the net worth calculation.

We disagree with this view, as did many commentators.[40] In the first instance, estimating the value of the primary residence did not appear to cause problems before the Dodd-Frank Act, when that value was included in net worth for purposes of the definition of accredited investor. The rules did not then, and the rules we adopt today do not now, require a third party opinion on valuation, either for the primary residence or for any other assets or liabilities. All that is required is an estimate of fair market value.[41] Further, as we explained in the Proposing Release, if the amount of mortgage debt exceeds the value of the primary residence (*i.e.*, an underwater mortgage), excluding the entire debt from net worth for purposes of the accredited investor definition would result in a higher net worth than under a basic net worth calculation that takes into account all assets and all liabilities. Net worth would be effectively increased by the amount by which the mortgage exceeds the value of the primary residence, because that excess amount is

[39] *See* comment letters from Welton E. Blount, Investment Program Association ("IPA"), Real Estate Investment Securities Association ("REISA"), Steven J. Thayer and Georg Merkl. *See also* advance comment letters from April Hamlin and Michael Scillia.

[40] *See, e.g.*, letters from Massachusetts Securities Division, Cornell, International Association of Small Broker Dealers and Advisors, NASAA and the Public Investors Arbitration Association.

[41] *See, e.g.*, Release No. 33-6455 (Mar. 3, 1983) at Question 21 (confirming that, under the net worth standard in effect at the time, "the estimated fair market value" of a primary residence could be considered as an asset) and Question 45 (individual statement of net worth reflects estimated value of assets and liabilities).

treated as a liability in a basic net worth calculation but would be excluded under the standard proposed by these commentators. We do not believe it would be appropriate for us to implement Section 413(a) in a way that results in increased net worth compared to a basic calculation for individuals with underwater mortgages.[42]

Three comment letters argued that mortgage debt in excess of the value of the primary residence should be excluded from the net worth calculation if the borrower would not be subject to personal liability by reason of contractual terms or state anti-deficiency statutes or similar laws.[43] In these situations, indebtedness in excess of the value of the residence may not be legally collectible, either because the loan by its terms provides recourse only to the underlying asset, the residence, or because applicable law bars a lender from obtaining a judgment for the shortfall when the fair market value of the residence (or the price obtained in a foreclosure sale) is less than the loan amount.[44]

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[42] Where the amount of debt secured by the primary residence exceeds the estimated value of the residence, the new rules will not trigger any adjustment to net worth as calculated before the enactment of Section 413(a). In a pre-Section 413(a) basic net worth calculation involving an underwater mortgage, the fair market value of the residence and the amount of the mortgage up to that fair market value are included in the calculation but net to zero, and the excess of the amount of the mortgage over the fair market value of the primary residence is included as a liability. Under the final rules, the fair market value of the residence and the amount of the mortgage up to that fair market value are excluded from the calculation, and the excess of the amount of the mortgage over the fair market value of the primary residence is included as a liability. In both cases, the overall impact on net worth is a reduction equal to the underwater amount (*i.e.*, the excess of the amount of the mortgage over the fair market value of the residence). Take, for example, an investor whose primary residence has an estimated fair market value of $1.2 million, with a mortgage of $1.4 million. The excess of mortgage loan over the fair market value of the primary residence (in this case, $200,000) would be taken into account as a liability and serve to reduce net worth both under a conventional net worth calculation and under the accredited investor definition adopted today. If, on the other hand, all debt secured by the primary residence were excluded, including debt in excess of the estimated fair market value of the residence, the investor's net worth would be $200,000 higher than under a conventional calculation because the mortgage debt in excess of the value of the primary residence would not be treated as a liability.

[43] *See* comment letters from ABA and IPA and advance comment letter from Keith P. Bishop.

[44] *See* Ghent, Andra C. and Kudlyak, Marianna, "Recourse and Residential Mortgage Default: Theory and Evidence from U.S. States," (February 25, 2011), Federal Reserve Bank of Richmond Working Paper No. 09-10R. Available at SSRN: http://ssrn.com/abstract=1432437. In their Appendix A, the authors provide a summary of mortgage foreclosure procedures and anti-deficiency statutes in the 50 states and the District of Columbia. They classify 11 states (Alaska, Arizona, California, Iowa, Minnesota, Montana, North Carolina (for purchase mortgages only), North Dakota, Oregon, Washington and Wisconsin) as non-recourse states.

Under the final rules, any excess of indebtedness secured by the primary residence over the estimated fair market value of the residence is considered a liability for purposes of determining accredited investor status on the basis of net worth, whether or not the lender can seek repayment from other assets in default. In our view, the full amount of the debt incurred by the investor is the most appropriate value to use in determining accredited investor status. That is the basis on which interest accrues under the mortgage and the amount that third parties would look to in assessing creditworthiness. We do not believe that the treatment of a mortgage should vary solely because of state laws that limit the rights of the lender in an action to enforce the borrower's promise to repay. Such laws vary significantly in scope and procedural requirements, and their operation is often contingent on the specific foreclosure process chosen by the lender and other factors beyond the borrower's control.[45] We believe it would add substantial complexity to the rule if market participants were called upon to determine how an anti-deficiency statute would operate in the individual circumstances of each prospective investor. Moreover, the data available to us suggest that there would be no material difference in the number of households that qualify as accredited investors if we were to allow special treatment of non-recourse mortgages.[46] Accordingly, the final rules specify that debt secured against the primary residence in excess of the estimated fair market value of the primary residence must be treated as a liability in the net worth calculation.

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[45] *See id.*

[46] Using data from the 2007 Federal Reserve Board Survey of Consumer Finances, staff from our Division of Risk, Strategy and Financial Innovation estimate that in 2007 the same number of U.S. households (approximately 7.6 million) would have qualified for accredited investor status on the basis of net worth under our amendments and under an alternative net worth calculation that excluded both the fair market value of the primary residence and all indebtedness secured by the residence, even indebtedness in excess of the fair market value of the residence. Based on discussions with staff economists at the Federal Reserve Board, estimates derived from their unpublished 2009 supplemental update of the 2007 survey are qualitatively similar. For both 2007 and 2009, the data suggest that the number of households nationwide that qualify as accredited investors is not affected by whether the net worth calculation includes or excludes the underwater portion of debt secured by the primary residence.

(3) Increases in Mortgage Debt in the 60 Days Before Sale of Securities

We also solicited comment on whether the amendments should contain a timing provision to prevent investors from artificially inflating their net worth by incurring incremental indebtedness secured by their primary residence, thereby effectively converting their home equity—which is excluded from the net worth calculation under the rules adopted today—into cash or other assets that would be included in the net worth calculation. As an example, we indicated that the amendments could provide that the net worth calculation must be made as of a date 30, 60, or 90 days before the sale of the securities, as well as at the time of sale.

State securities regulators strongly supported this approach, noting that it would make the practice of advising investors to use equity in their primary residence to purchase securities less attractive, thereby helping to ensure that unregistered securities are not sold to investors with limited assets other than their homes, who may not be able to fend for themselves without the protections afforded by registration.[47] On the other hand, many commentators opposed having special rules for debt secured by a primary residence incurred close in time to the sale of securities, asserting that imposing such a timing provision would unduly complicate the calculation of net worth.[48] Some were particularly concerned that the date when accredited investor status has to be determined may not be known sufficiently in advance to permit a full net worth calculation 30, 60, or 90 days ahead of time, or that such a requirement would force delays in capital raising efforts.[49] We agree that we should avoid adding undue complexity in

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[47] Comment letter from NASAA. The other supporter of a timing provision was the Cornell Securities Law Clinic. *See* comment letter from Cornell ("The Clinic believes that a timing rule should not require the '60 day' calculation to be performed on the date 60 days before the purchase date; rather, the calculation should occur on the intended purchase date, and estimate the investor's net worth as it was on the date 60 days before the intended purchase date.").

[48] *See* letters from ABA, Robert Edgerton, Georg Merkl, REISA and S&C.

[49] *See* comment letters from ABA and Robert Edgerton.

the process for determination of accredited investor status; however, we believe that the rule should address potential incentives for individuals to incur debt secured by a primary residence for the purpose of inflating their net worth to qualify as accredited investors. If the rule does not address that issue, the population Congress intended to protect—individuals whose net worth is below $1 million unless their home equity is taken into account—may be incentivized (or urged by unscrupulous salespeople) to take on debt secured by their homes for the purpose of qualifying as accredited investors and participating in investments without the protection to which they are entitled.

We believe we have addressed this concern in a manner that manages the complexities noted by commentators that could arise from a requirement to calculate net worth far in advance of a possible sale of securities or to calculate net worth twice. The final rule provides a specific provision addressing the treatment of incremental debt secured by the primary residence that is incurred in the 60 days before the sale of securities.[50] As described above, debt secured by the primary residence generally will not be included as a liability in the net worth calculation under the rule, except to the extent it exceeds the estimated value of the primary residence. Under the final rule, any increase in the amount of debt secured by a primary residence in the 60 days before the time of sale of securities to an individual generally will be included as a liability, even if the estimated value of the primary residence exceeds the aggregate amount of debt secured by such primary residence.[51] Net worth will be calculated only once, at the time of sale of securities

[50] *See, e.g.*, New Rule501(a)(i)(B).

[51] The fair market value of the primary residence is determined as of the time of sale of securities, even if the investor has changed his or her primary residence during the 60-day period. The rule provides an exception to the 60-day look-back provision for increases in debt secured by a primary residence where the debt results from the acquisition of the primary residence. Without this exception, an individual who acquires a new primary residence in the 60-day period before a sale of securities may have to include the full amount of the mortgage incurred in connection with the purchase of the primary residence as a liability, while excluding the full value of the primary residence, in a net worth calculation. The 60-day look-back provision is intended to address incremental debt secured against a primary residence that is incurred for the purpose of inflating net worth. It is not intended to

(the same time as under current rules). The individual's primary residence will be excluded from assets and any indebtedness secured by the primary residence, up to the estimated value of the primary residence at of that time, will be excluded from liabilities, except if there is incremental debt secured by the primary residence incurred in the 60 days before the sale of securities. If any such incremental debt is incurred, net worth will be reduced by the amount of the incremental debt. In other words, the only additional calculation required by the 60-day look-back provision is to identify any increase in mortgage debt over the 60-day period preceding the purchase of securities.

This approach will make it more difficult for individuals to manipulate their net worth as calculated under our rules by borrowing against their primary residence shortly before seeking to qualify as an accredited investor, to take advantage of any positive equity in the primary residence. It should, therefore, significantly reduce the incentive for individuals to try to "game" the accredited investor net worth standard or for salespeople to attempt to induce individuals to take on incremental debt secured against their homes to facilitate a near-term investment in an offering. The new provision may impose additional costs and burdens on investors who increase the indebtedness secured by their primary residence shortly before seeking to invest in a Rule 506 offering if the proceeds of such refinancing are invested in the primary residence or are otherwise disposed of without acquiring an asset that is included in the net worth calculation, because in such circumstances the amount of such additional borrowing will be treated as a liability, but the proceeds will not be treated as an asset. If such an increase in liabilities causes an individual not to meet the $1,000,000 net worth test, and he or she does not otherwise qualify as an accredited investor, the individual may be excluded from investment opportunities if

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address debt secured by a primary residence that is incurred in connection with the acquisition of a primary residence within the 60-day period.

issuers are unable or unwilling to permit the participation of non-accredited investors. However, our approach should not present the same practical difficulties as requiring a full net worth calculation as of a date 30, 60, or 90 days before securities are sold to an investor, in which all assets and liabilities of the investor would have to be taken into account based on their values as of the specified date.

We have included a 60-day look-back period for this purpose because we believe a 60-day period is long enough to decrease the likelihood that parties will attempt to circumvent the standard by taking on new debt and waiting for the look-back period to expire, while minimizing the potential burden on investors who increase their mortgage debt for other reasons. Both letters that commented favorably on the possible requirement to calculate net worth as of a specified date before the sale of securities supported a 60-day look-back period.[52] Another alternative to address this practice would have been to provide that any debt secured by a primary residence that was incurred after the original date of purchase of the primary residence would have to be counted as a liability, whether or not the fair market value of the primary residence exceeded the value of the total amount of debt secured by the primary residence. We believe that such a standard would be overly restrictive and not provide for ordinary course changes to debt secured by a primary residence, such as refinancing and drawings on home equity lines.

(4) Transition Rules

We did not propose any rules for transition to the new accredited investor net worth standards. In the Proposing Release, we questioned whether any transition relief would be necessary or appropriate because the new standards became effective upon enactment of the

[52] *See* comment letters from Cornell (suggesting a 60-day period) and NASAA (suggesting a 60- or 90-day period).

Dodd-Frank Act on July 21, 2010. We did, however, solicit comment on whether we should adopt provisions to permit investors who ceased to qualify as accredited investors as a result of the changes effected by Section 413(a) to be treated as accredited for purposes of certain subsequent or "follow-on" investments.

Commentators generally supported a provision that would allow investors in that situation to participate in certain types of follow-on investments.[53] Some letters argued that such a provision would be appropriate to permit investors to protect their proportionate interest in an issuer or to exercise rights associated with an existing investment on the basis originally bargained for.[54] Others argued more broadly that investors should be permitted to maintain existing investment plans to avoid adverse tax or other consequences.[55] Commentators expressed a concern that issuers may be unwilling or unable to provide the information required to be provided to non-accredited investors under Rule 501(b)(1) of Regulation D,[56] and may simply exclude individuals from participating in securities offerings who no longer qualify as accredited investors.[57]

We are not persuaded that grandfathering or other transition provisions would be appropriate in all circumstances urged by commentators. In cases where securities would be

[53] *See* comment letters from ABA, Robert Edgerton, IAA, IPA, Georg Merkl, REISA, S&C, Sutherland Asbill & Brennan ("Sutherland") and Steven J. Thayer. Only one comment letter objected to a transition provision, arguing that Congressional intent is evident from the fact that Section 413(a) was effective immediately upon enactment of the Dodd-Frank Act and that investors who no longer qualify as accredited investors under Section 413(a) may participate in follow-on offerings as non-accredited investors. *See* letter from Cornell.

[54] Comment letters identified rights such as pre-emptive rights, rights of first refusal and buy-sell agreements, as well as provisions that impose dilution or other adverse consequences on investors who do not invest in future rounds of financing.

[55] *See, e.g.*, comment letters from REISA (roll over of real estate investments) and Sutherland (roll over of private placement insurance contracts).

[56] 17 CFR 230.501(b)(1).

[57] Several letters also argued that issuers would not attempt to rely on the broader Section 4(2) exemption because it would create unnecessary legal risk related to the offering process. *See, e.g.*, comment letters from Sutherland and Steven J. Thayer.

purchased based on an investment decision made before enactment of the Dodd-Frank Act (for example, a capital call that is not subject to conditions under the investor's control, under an agreement entered into before enactment of the Dodd-Frank Act), accredited investor status would have been determined at the time of the investment decision. A subsequent change in the investor's accredited status would not be relevant, so special accommodation would not be needed. With respect to new investment decisions, some situations for which commentators requested special treatment could raise significant investor protection concerns. For example, certain rights to acquire securities in existence before the enactment of the Dodd-Frank Act could involve different issuers than the original investment. In such circumstances, an investor may not have been sufficiently familiar with, or had an opportunity to conduct diligence with respect to, such different issuers at the time the investor met the accredited investor net worth standard and received such rights.

We note also that the change in the accredited investor net worth standard took effect in July 2010, upon enactment of Section 413(a) of the Dodd-Frank Act. No grandfathering or transition provisions were included in Section 413(a), so market participants have been operating under the new standard for over a year. In particular, where existing rights (for example, under derivative instruments such as options, warrants and convertibles) give rise to a continuous offering of the underlying securities, because no grandfathering was provided by statute, issuers have already had to address any concerns that arose upon the change in the accredited investor net worth standard.

We do believe, however, that limited grandfathering would be appropriate in connection with investors' exercise of certain pre-existing rights to acquire securities. The final rules, therefore, contain a provision under which the former accredited investor net worth test will apply to purchases of securities in accordance with a right to purchase such securities,[58] so long as (i) the right was held by a person on July 20, 2010, the day before the enactment of the Dodd-Frank Act; (ii) the person qualified as an accredited investor on the basis of net worth at the time the right was acquired; and (iii) the person held securities of the same issuer, other than the right, on July 20, 2010. For example, if an investor who qualified as accredited based on net worth at the time of her original investment owned common stock of an issuer on July 20, 2010, and on that date had pre-emptive rights to acquire additional common stock of that issuer, then when the issuer makes an offering of common stock that triggers the pre-emptive rights, the investor's net worth will be calculated as it was before enactment of the Dodd-Frank Act. Likewise, if the same investor owned Series A preferred stock of an issuer on July 20, 2010 and on that date had a right of first offer to purchase any equity securities offered by the issuer in a future sale, and the issuer proposed to sell Series B preferred stock at a future date, then the investor's net worth will be calculated as it was before enactment of the Dodd-Frank Act for purposes of exercising the right of first offer to purchase Series B preferred stock from the issuer. The provision is limited to persons who qualified as accredited investors on the basis of net worth at the time the relevant rights were originally acquired, and who held securities of the issuer other than the rights on July 20, 2010. We believe this approach strikes an appropriate balance between preserving investors' ability to exercise previously bargained-for rights, which otherwise may have been impaired by the change in accredited investor definition, and maintaining the investor protection benefits that Section 413(a) seeks to achieve.

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58 The grandfathering provision applies to the exercise of statutory rights, such as pre-emptive rights arising under state law; rights arising under an entity's constituent documents; and contractual rights, such as rights to acquire securities upon exercise of an option or warrant or upon conversion of a convertible instrument, rights of first offer or first refusal and contractual pre-emptive rights.

(5) **Other Issues Considered**

In our Proposing Release, we requested comment on two additional issues discussed below, which we determined do not require any change in our rules.

Defining "Primary Residence." We solicited comment on whether we should define the term "primary residence" for purposes of the rules we are amending. Our proposal did not contain a definition, consistent with our past policies in this area[59] and in an attempt to avoid unnecessary complexity in a rule that is intended to be straightforward in application.

Several comment letters agreed with us that the term "primary residence" is well understood, and does not require a legal definition.[60] Two comment letters advocated adoption of a legal definition, but did not agree on what definition should apply.[61]

We believe that "primary residence" has a commonly understood meaning as the home where a person lives most of the time. Consistent with the approach in Regulation D to reduce unnecessary complexity, we are not adopting a definition of the term "primary residence."

Proceeds of Debt Secured by Primary Residence Incurred to Invest in Securities. We solicited comment on whether the accredited investor definition should contain special provisions addressing the treatment of debt secured by a primary residence where the proceeds of the debt are used to invest in securities. Under the rules we are adopting today, debt

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[59] None of our three other rules that use the term "primary residence" have a definition of the term. *See* 17 CFR 240.17a-3(a)(17)(i)(A), 17 CFR 247.701(d)(1)(A) and 17 CFR 210.2-01(c)(1)(ii)(A)(*4*). Regulation D also did not define the similar term "principal residence," as used in Rule 501(e)(1)(i) of Regulation D. 17 CFR 230.501(e)(1)(i). Until now, Regulation D used the term "principal residence" to exclude any purchasers who are relatives or spouses of the purchaser and who share the same principal residence as the purchaser for purposes of calculating the number of purchasers in a Regulation D offering. As explained below, we are adopting amendments to change this reference from "principal residence" to "primary residence" so that it conforms to the terminology of the Dodd-Frank Act. *See* text accompanying note 66 below.

[60] *See, e.g.*, comment letters from ABA, S&C and Steven J. Thayer.

[61] *See* comment letter from Cornell (suggesting the definition in Internal Revenue Code § 121). A comment letter from an individual suggested that the Commission use the definition of the term "primary residence" of the Organization for Economic Cooperation and Development, at least for non-U.S. investors. *See* letter from Georg Merkl.

secured by the primary residence will generally be excluded from the calculation of net worth to the extent of the estimated fair market value of the primary residence. NASAA had urged in an advance comment letter that netting of such debt not be permitted if proceeds of the debt were used to invest in securities. NASAA's concern was that, without such a rule, we would create an incentive for unscrupulous salespeople to induce investors with significant equity in their home to borrow against their home for the purpose of investing in unsuitable unregistered offerings.[62]

NASAA made this suggestion again in its comment letter on the Proposing Release, which was the only comment letter supporting this idea.[63] The other comment letters that addressed this issue opposed it.[64] Critics asserted that such a change would add substantial complexity to the compliance process because of the difficulties of tracing loan proceeds, and suggested that the concerns articulated by NASAA could be better and more effectively addressed through enforcement of existing Securities Act and broker-dealer rules. After reviewing all the comment letters and further considering the issue, we have included the 60-day look-back provision discussed in Part II.A.3 above rather than a tracing provision. We believe that requiring incremental debt secured by the primary residence to be treated as a liability in the net worth calculation for 60 days after it is incurred will be a substantial disincentive to inappropriate sales practices, and will be much simpler and more certain in application than a tracing rule.[65]

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[62] Advance comment letter from NASAA.

[63] *See* letter from NASAA.

[64] *See, e.g.*, letters from ABA, REISA, S&C, Robert G. Edgerton, Georg Merkl and Steven J. Thayer.

[65] The standards governing broker-dealer sales practices will also apply in relation to the activities of broker-dealer personnel. NASD (now known as FINRA) Rule 2310 requires registered representatives of broker-dealers to make only suitable recommendations to their customers. *See* Financial Industry Regulatory Authority, NASD Rule 2310: Recommendations to Customers (Suitability) (2010) (available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3638). Depending on the facts and circumstances, such behavior may also rise to the level of fraud under Section 17(a) of the Securities Act, 15

B. Technical and Conforming Amendments

As proposed, we are changing the reference to "principal residence" currently in Rule 501(e)(1)(i) of Regulation D[66] to "primary residence," to conform it to the new language in Rule 501. We received one letter supporting this change,[67] and no letters objecting to this change.

Also as proposed, we are amending the references to former Securities Act Section 4(6) in Form D and several of our rules to refer to Section 4(5), as former Section 4(6) was renumbered by Section 944(a)(2) of the Dodd-Frank Act. Specifically, we are amending Rule 144(a)(3)(viii) (definition of "restricted securities") and Rule 155(a) (integration of abandoned offerings) of the general Securities Act rules; Rule 500(a)(1) of the Securities Act form rules; Item 6 and the General Instructions to Form D under the Securities Act; Rule 17j-1(a)(8) (personal investment activities of investment company personnel) under the Investment Company Act, and Rule 204A-1(e)(7) (investment adviser codes of ethics) under the Investment Advisers Act.

We are also removing the authority citation preceding the Preliminary Notes to Regulation D.

III. Paperwork Reduction Act

The amendments we are adopting do not contain a "collection of information" requirement within the meaning of the Paperwork Reduction Act of 1995.[68] Accordingly, the

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U.S.C. 77q(a), or Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), or the Commission's antifraud rules issued under those statutory provisions.

[66] For purposes of calculating the number of purchasers in a Regulation D offering, Rule 501(e)(1)(i) uses the term "principal residence" to exclude any purchasers who are relatives or spouses of a purchaser of a Regulation D security and who share the same "principal residence" as the purchaser of the security. 17 CFR 230.501(e)(1)(i).

[67] *See* letter from ABA.

[68] 44 U.S.C. 3501-3521.

Paperwork Reduction Act is not applicable.

IV. Cost-Benefit Analysis

A. Background and Summary of Proposals

As discussed above, we are adopting amendments to the accredited investor standards in our rules under the Securities Act to implement the requirements of Section 413(a) of the Dodd-Frank Act.

Section 413(a) of the Dodd-Frank Act requires the definitions of "accredited investor" in the Securities Act rules to exclude the value of a person's primary residence for purposes of determining whether the person qualifies as an "accredited investor" on the basis of having a net worth in excess of $1 million. Under the previous standard, individuals qualified as accredited investors if they had a net worth of more than $1 million, including the value of their primary residence. The substantive change to the net worth standard was effected by operation of the Dodd-Frank Act upon enactment; however, Section 413(a) also requires us to adjust the accredited investor definitions in our Securities Act rules to conform to the new standard. We are therefore adopting conforming amendments to Securities Act Rule 501(a)(5) of Regulation D and Securities Act Rule 215(e).

This analysis focuses on the costs and benefits to the economy of including the specific amendments described below, rather than on the costs and benefits of the new accredited investor net worth standard itself. The new standard was mandated by Congress in Section 413(a) of the Dodd-Frank Act and does not reflect the exercise of our rulemaking discretion.

The language we are adopting reflects our exercise of discretion in choosing a method to implement the statutory language set forth in Section 413(a) (namely, that net worth for purposes of accredited investor qualification should be calculated excluding the positive equity, if any, in the primary residence) over two other possible methods to implement the statutory language. As explained in our Proposing Release, these two other methods of implementation of the Section 413(a) language are: (1) excluding from net worth the fair market value of the primary residence, but including all indebtedness secured by the primary residence; and (2) excluding from net worth the fair market value of the primary residence and all indebtedness secured by the primary residence, even if it exceeds the fair market value of the primary residence. We also exercised our discretion in requiring that incremental debt secured by the primary residence that is incurred in the 60 days before the accredited investor determination is made (other than debt incurred in connection with the acquisition of a primary residence) must be treated as a liability in the net worth calculation (*i.e.*, may not be netted against the value of the residence, even if the value of the residence exceeds the amount of debt secured against it), and in adding a limited grandfathering provision under which, in certain circumstances, the former accredited investor net worth standard will apply in connection with acquisitions of securities pursuant to rights held by a person before enactment of the Dodd-Frank Act.

B. Comments on the Cost-Benefit Analysis

In the Proposing Release, we requested qualitative and quantitative feedback on the nature of the benefits and costs described and any benefits and costs we may have overlooked. No comment letters expressly addressed the cost-benefit analysis in the Proposing Release, but some comment letters cited certain costs and benefits consistent with those described in this release in the course of making a variety of suggestions and observations. For example, the rules that we are adopting, which may result in individuals' having to estimate the value of their primary residence in order to determine whether the amount of debt secured against the residence exceeds the estimated fair market value of the residence, was criticized by some commentators on the basis that it would increase compliance costs.[69] As indicated above, individuals were required to estimate the value of their primary residence to calculate net worth as defined before enactment of the Dodd-Frank Act, and the Commission is not aware that this caused a problem for individuals seeking to qualify as accredited investors on that basis. Others asserted that the failure to include grandfathering or other transition provisions in the new rules would impose costs on investors (who may be unable to protect their existing investments from dilution or to exercise pre-existing rights) and on issuers (which may have a harder time raising capital).[70] We have attempted to respond to that comment by providing for limited grandfathering.

C. Benefits

We believe the rules we are adopting provide the most appropriate method to implement Section 413(a), and will result in the following benefits compared to other possible methods to implement Section 413(a):

- We believe the final amendments most accurately reflect the manner in which individual net worth has traditionally been determined and understood, and what is commonly understood by "the value of a person's primary residence." We believe investors and issuers will benefit from implementing rules that are easy to understand and consistent with conventional net worth calculation concepts through reduced transaction costs relative to other alternatives.[71]
- The amendments will result in a larger pool of accredited investors than the first alternative method of implementation, under which all indebtedness secured by the primary residence would be included as a liability in the net worth calculation. The

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[69] *See* letters from IPA, Georg Merkl.

[70] *See e.g.*, letters from ABA, Investment Advisers Association, Investment Program Association, Real Estate Investment Securities Association, S&C, Sutherland Asbill & Brennan and Steven J. Thayer.

[71] *See* notes 35-36 above and accompanying text.

available data suggest that there is no material difference in the size of the accredited investor pool between the alternative we are adopting and the second alternative method, under which all indebtedness secured by the primary residence would be excluded from the net worth calculation, even if in excess of the estimated value of the primary residence.[72] To the extent that exempt offerings to accredited investors are less costly for issuers to complete than registered offerings, a larger pool of accredited investors that may participate in these offerings could result in cost savings for issuers conducting these offerings.

- The additional provision in the final rules that requires incremental debt secured against the primary residence to be treated as a liability in the net worth calculation for 60 days after it is incurred will eliminate individuals' ability to inflate their net worth for purposes of the accredited investor definition by taking on incremental debt secured against their primary residence shortly before securities are sold to them. The look-back period will reduce incentives to manipulate net worth calculations, should make investors whose net worth reaches the accredited investor threshold only if

[72] Using data from the 2007 Federal Reserve Board Survey of Consumer Finances, our Division of Risk, Strategy and Financial Innovation estimates that in 2007 approximately 8.3 million households (7.2% of U.S. households) would have qualified as accredited under the standards in our new rules on the basis of net worth, annual income or both. Approximately 7.6 million of such households (6.5% of U.S. households) would have qualified on the basis of net worth. If we adopted a standard based on an alternative method of implementation of Section 413(a) that excludes from the net worth calculation the fair market value of the primary residence but not any indebtedness secured by the primary residence, only 7.8 million households (6.7%) would have qualified as accredited. Conversely, if we adopted a standard under which both the fair market value of the primary residence and all indebtedness secured by the primary residence, even indebtedness in excess of the fair market value of the primary residence, were excluded from the net worth calculation, the number of accredited U.S. households would have been the same as under the approach we are adopting. More information regarding the survey may be obtained at http://www.federalreserve.gov/pubs/oss/oss2/scfindex.html. *See also* note 46 above and accompanying text. Staff at the Federal Reserve also informed us that based on an unpublished 2009 supplemental Survey of Consumer Finances, which surveyed the same households that were surveyed in 2007, estimates of the number of qualifying households in 2009 under the various methods of implementation of Section 413(a) are qualitatively similar to estimates derived from the 2007 survey. For both 2007 and 2009, the data suggest that the number of households nationwide that qualify as accredited investors is not affected by whether the net worth calculation includes or excludes the underwater portion of debt secured by the primary residence.

value of available home equity is included as part of a net worth calculation less susceptible to high-pressure sales tactics, and generally will provide investor protection benefits to households which, under the criteria of Section 413(a), are less able to bear the economic risk of an investment in unregistered securities.

- The provision in the final rules will apply the pre-Dodd-Frank Act accredited investor net worth test to acquisitions of securities pursuant to rights held on July 20, 2010 by persons who qualified as accredited investor on the basis of net worth at the time the rights were acquired and who held securities of the issuer other than the rights on July 20, 2010. Under this provision, investors who no longer qualify as accredited investors under the new net worth standard, but who would qualify under the former standard, will qualify as accredited investors in that limited context. This should provide a benefit to both investors and issuers, in that investors who have ceased to qualify as accredited investors because of the change in net worth standard will be able to exercise pre-existing rights even if the issuer is unable or unwilling to permit exercise by non-accredited investors, and at lower cost than if the individuals did not qualify as accredited investors.

D. Costs

Like our analysis of the benefits, our analysis of the costs focuses on the costs attributable to our adopted language on how to treat the primary residence and debt secured by the primary residence in the calculation of net worth, including the treatment of debt incurred in the 60 days before the net worth calculation is performed, and on the costs attributable to the transition provision included in the final rules.

Many of the potential costs of our amendments are dependent on a number of factors.

Costs may include the following:

- Our amendments involve more complex calculations than the two alternative possible approaches we have identified.[73] Although no third party appraisal is required, our amendments may require estimating the fair market value of the investor's primary residence to determine whether it exceeds the amount of indebtedness secured by the primary residence. In contrast, both of the alternative net worth calculations could be performed merely by ignoring the primary residence as an asset in determining the net worth amount, and in the case of the second alternative method of implementation also ignoring the indebtedness secured by the primary residence. However, this would appear to be a manageable cost. Investors had to estimate the fair market of their primary residence to calculate net worth under the net worth standard for accredited investor that applied before enactment of the Dodd-Frank Act, and the Commission is not aware that market participants found the need for such an estimate to be problematic.
- Where indebtedness secured by the primary residence has increased in the 60 days preceding the net worth calculation, other than in connection with the acquisition of the primary residence, our amendments will also require determining the amount of that increase, and treating that amount as a liability in the net worth calculation.
- The amendments could encourage investors (or incentivize salespeople to encourage investors) to take on indebtedness secured by their primary residence with the primary motive of inflating their net worth in order to satisfy the new accredited investor net worth standard. As noted above, we believe the requirement to treat as a liability any incremental debt secured by the primary residence that is incurred in the 60 days before

[73] Some commentators objected to the proposal on this basis. *See* note 39 and accompanying text.

the accredited investor determination will reduce this incentive by requiring 60 days to pass before assets obtained with the proceeds of incremental indebtedness secured by the primary residence could result in an increase in net worth under the rule.

- Our amendments require that an investor's net worth calculation include as a liability any amount by which the indebtedness secured by the investor's primary residence exceeds the estimated fair market value of the residence. It is possible that our amendments will result in a smaller pool of eligible accredited investors than if we implemented an alternative approach that would exclude all indebtedness secured by the primary residence, even amounts in excess of the value of the residence. The data available to us do not support this view. The 2007 Federal Reserve Board Survey of Consumer Finances suggests that there is no difference in the number of households that would have qualified under the two standards in 2007 (that is, subject to sampling error, there were no households that had a net worth of $1 million or less if the underwater portion of the mortgage was considered as a liability but greater than $1 million if it was disregarded).[74] Staff at the Federal Reserve have informed us that based on an unpublished 2009 supplemental Survey of Consumer Finances, estimates of the number of qualifying households in 2009 under the two methods of implementation are qualitatively similar to estimates derived from the 2007 survey. Nevertheless, if our amendments result in a smaller pool of accredited investors than would otherwise be the case, that could result in increased costs for companies and funds that are seeking accredited investors to participate in their exempt offerings.
- The treatment of indebtedness secured by the primary residence that is incurred within 60

[74] *See* note 46 above.

days before the accredited investor determination may result in some individuals failing to meet the $1 million net worth threshold for 60 days after entering into new financing or refinancing arrangements, who would have met such threshold if no look-back provision applied, if the proceeds of such refinancing are invested in the primary residence or are otherwise disposed of without acquiring an asset that is included in the net worth calculation. Such individuals may lose investment opportunities if issuers are not willing or able to allow them to participate in offerings conducted during the period in which they do not qualify as accredited investors.

- The transition provision we are including will, in limited circumstances, permit investors who do not qualify as accredited investors under the new net worth standard, but who do qualify under the previous standard, to acquire securities pursuant to pre-existing rights without the protections afforded to non-accredited investors. This will impose costs to the extent that such investors would have benefited from such protections. The transition provision applies only in limited circumstances, which may prevent some investors from participating in some offerings and may cause issuers to incur the cost of seeking out other investors.

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

Section 2(b) of the Securities Act requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. In the Proposing Release, we considered our proposed amendments and requested comment on their potential impact in light of those standards. We believe the amendments adopted today may facilitate capital formation and promote efficiency, relative to an alternative method of implementation that would exclude only the fair market value of the primary residence from the net worth calculation and would not provide grandfathering to facilitate exercise of pre-existing rights under certain circumstances. We do not anticipate that the amendments will have any effects on competition.

We believe the amendments impose no significant burden on efficiency, competition and capital formation beyond any that may have been imposed by enactment of the Dodd-Frank Act. As discussed in the cost-benefit analysis in Part IV above, however, the language of Section 413(a) could be subject to alternative methods of implementation if our rules do not provide standards for how to calculate the value of the primary residence. In this regard, we added explanatory language to our rules on how to treat the primary residence and indebtedness secured by the primary residence in determining whether a person qualifies under the accredited investor net worth standard. We believe these amendments further the purposes underlying the requirements of Section 413(a) of the Dodd-Frank Act.

The adopted explanatory language requires that in calculating net worth:

- the primary residence not be included as an asset; and
- debt secured by the primary residence not be included as a liability, except that
  - if the amount of debt secured by the primary residence has increased in the 60 days preceding the accredited investor determination, other than in connection with the acquisition of the residence, the amount of such increase must be included as a liability; and
  - if the amount of debt secured by the primary residence exceeds the estimated fair market value of the primary residence, the amount of such excess must be included as a liability.

As described above, we believe the approach we are adopting is generally consistent with what is commonly understood by "the value of a person's primary residence," and is preferable to either of the two alternative approaches. The addition of provisions related to any net increase in the amount of debt secured by the primary residence in the 60 days preceding a sale of securities is a straightforward provision to safeguard against manipulation of the general rule. Several comment letters addressed the burden and uncertainty on investors and issuers inherent in an approach that relies on a determination of the fair market value of the primary residence, which is necessary in order to determine whether any indebtedness secured by the primary residence exceeds the value of the residence.[75] These letters favored an approach that excludes from the net worth calculation both the value of the primary residence and all indebtedness secured by the primary residence, which they argue would provide investors and their advisors with certainty regarding the net worth calculation. We believe, however, that it would be inappropriate to implement Section 413(a) in this way, because it would result in a higher net worth for investors with "underwater" mortgages as compared to the same investors' basic net worth calculated without excluding the value of the primary residence.[76] Furthermore, we note that, before the enactment of the Dodd-Frank Act, a net worth calculation in connection with determining accredited investor status required estimating the fair market value of the primary residence. The existing pool of accredited investors and issuers should be familiar with this kind of estimate, which should mitigate the burdens cited in these letters.

The final amendments may result in a pool of accredited investors that is larger than the first alternative approach, which would not net out debt secured by the primary residence.[77] To

[75] *See* letters from IPA, Georg Merkl, REISA and Steven J. Thayer.

[76] *See* note 42 above and accompanying text.

[77] *See* note 72 above and accompanying text.

the extent that exempt offerings to accredited investors are less costly for issuers to complete compared to registered offerings, issuers conducting these exempt offerings under the new amendments could potentially experience greater cost savings than under the first alternative standard. Based on the available data, the second alternative approach to excluding the value of the primary residence under Section 413(a) (excluding from net worth the fair market value of the primary residence and all indebtedness secured by the primary residence, including all such indebtedness in excess of the fair market value of the property) would not result in a measurably larger pool of eligible accredited investors than under our amendments, and therefore would not appear to result in additional cost savings compared to our amendments.[78]

We believe that the provisions in the final rules dealing with the treatment of debt secured by the primary residence will not significantly affect the costs of compliance for most market participants, and therefore will not have a significant effect on efficiency or capital formation. Where the estimated fair market value of the primary residence may be less than the amount of debt secured by the residence, individuals will have to estimate such fair market value in order to establish whether any portion of the debt secured by the primary residence must be included as a liability in the net worth calculation. The rules require an estimated fair market value only; no third party valuation will be required.

There is some further complexity to the net worth calculation for individuals who have increased the amount of debt secured by their primary residence in the 60 days before seeking to qualify as accredited investors, in that they will be required to treat the incremental debt as a liability. This provision may also result in some individuals' ceasing to satisfy the $1 million net worth threshold for 60 days after entering into new financing arrangements that increase the

[78] *See* note 46 above and accompanying text.

amount of indebtedness secured by their primary residence, if the proceeds of such financing are invested in the primary residence or are otherwise disposed of without creating an asset for net worth purposes. This may result in the individuals' losing investment opportunities, and issuers' losing qualified investors during such 60-day period.

Several commentators expressed concern that not providing grandfathering could impose costs on both investors and issuers, including increased transaction costs for offerings that no longer qualify for exemption or that include non-accredited investors;[79] dilution or other impairment of existing investments for investors that are excluded from follow-on investment opportunities because they no longer qualify as accredited;[80] investors being forced to abandon investment strategies;[81] investors losing the benefit of previously bargained-for rights;[82] burdens on issuers because existing investors may be ineligible to make follow-on investments;[83] and the impact on private company capital formation attributable to a decrease in the number of accredited investors and the withdrawal of broker-dealers from the private placement market.[84]

While the Commission acknowledges these potential costs, there are no available data tracking Regulation D investment by household, so we cannot develop quantitative estimates of the economic impact of eliminating from the pool of accredited investors the households that no longer qualify based on the new net worth standard, or of providing exemptive or other relief from the new standard, which would keep such households in the accredited investor pool. This

[79] Georg Merkl; REISA.

[80] Georg Merkl; S&C; Sutherland; ABA; IPA; REISA; IAA; Steven J. Thayer.

[81] Sutherland; IAA.

[82] Robert G. Edgerton; S&C; IAA; Steven J. Thayer.

[83] IPA; REISA; IAA.

[84] REISA.

impact arises principally as a result of the enactment of Section 413(a) of the Dodd-Frank Act and only to a limited extent from our exercise of rulemaking discretion.

The final rules provide for limited transition relief by applying the former accredited investor net worth test to acquisitions of securities pursuant to rights to acquire securities, if the rights were held on July 20, 2010, the person qualified as an accredited investor on the basis of net worth at the time the rights were acquired, and the person held securities of the issuer other than the rights on July 20, 2010. We believe this provision strikes an appropriate balance between preserving investors' ability to exercise previously bargained-for rights, which otherwise may have been impaired by the change in the accredited investor definition, and maintaining the investor protection benefits that Section 413(a) seeks to achieve.

Where the transition provision is unavailable, the new accredited investor net worth test will apply. This may prevent some investors from participating in some offerings and cause issuers to seek out other investors. However, we believe the final rules will provide benefits for individuals who would meet the $1 million accredited investor net worth standard only if their home equity were taken into account, to the extent they are protected by the enhanced disclosures required in registered offerings and offerings involving non-accredited investors, or become ineligible to participate in investments in restricted securities pursuant to Regulation D or Section 4(5), which are generally substantially less liquid than securities issued in registered offerings and may entail substantial additional risks.

We do not believe the amendments affect competition beyond what is required by Section 413(a). The amendments would apply equally to all issuers participating in exempt offerings under Regulation D and Section 4(5), in respect of all of their investors. We also do not believe that Section 413(a) itself places a burden on competition that our rules should ameliorate, except to the extent provided by the transition provision.

In addition to the effects described above, the amendments may positively affect efficiency and capital formation in other ways by providing a clear standard to calculate and exclude the value of the primary residence. This should generally benefit issuers and investors by making the requirements of Section 413(a) easier to apply and comply with, reducing the risk of sales to investors who do not meet the new accredited investor net worth standards, as well as the risk that an issuer may violate Securities Act registration requirements. Clear rules will also serve to promote efficiency by reducing the risk of issuers' inability to raise capital because of uncertainty in interpreting our rules. Greater clarity and certainty in our accredited investor net worth standards also should foster greater confidence in our private placement markets and ultimately reduce the cost of capital, promoting increased capital formation, especially small business capital formation, which Regulation D was originally designed to promote.

VI. Final Regulatory Flexibility Act Analysis

This final regulatory flexibility analysis has been prepared in accordance with the Regulatory Flexibility Act.[85] This final regulatory flexibility analysis relates to amendments to our accredited investor rules under the Securities Act to implement the requirements of Section 413(a) of the Dodd-Frank Act.

A. Reasons for and Objectives of the Amendments

The reason for the amendments is to implement the requirements of the Dodd-Frank Act, primarily the requirements of Section 413(a) of that statute. Section 413(a) requires the definitions of "accredited investor" in the Securities Act rules to exclude the value of a person's

[85] 5 U.S.C. §§ 601 *et seq.*

primary residence for purposes of determining whether the person qualifies as an "accredited investor" on the basis of having a net worth in excess of $1 million. Under the previous standard, individuals qualified as accredited investors if they had a net worth of more than $1 million, including the value of their primary residence. The change to the net worth standard was effective upon enactment by operation of the Dodd-Frank Act; but Section 413(a) also requires us to revise the Securities Act accredited investor definitions to conform to the new standard, which we are doing by revising Securities Act Rule 501(a)(5) of Regulation D and Rule 215(e).

Our primary objective is to implement the requirements for a new accredited investor net worth standard in Section 413(a) of the Dodd-Frank Act. We note that Section 413(a) does not prescribe the method for calculating the value of the primary residence, nor does it address specifically the treatment of indebtedness secured by the residence for purposes of the net worth determination. Accordingly, we are exercising our discretion by providing explicit requirements regarding the treatment of the primary residence and indebtedness secured by the primary residence in the calculation of net worth. We believe this standard is generally consistent with conventional and commonly understood methods of determining net worth, and what is commonly understood by "the value of a person's primary residence" (with the addition of a provision for the special treatment of debt secured by a primary residence that is incurred in the 60 days preceding a sale of securities), and is preferable to other possible methods of implementation of the statutory language, such as: (1) excluding from net worth the fair market value of the primary residence without netting out indebtedness secured by the primary residence; and (2) excluding from net worth the fair market value of the primary residence and all indebtedness secured by the primary residence, regardless of whether it exceeds the fair market value of the primary residence.

We are describing how to treat the primary residence and indebtedness secured by the primary residence in the calculation of net worth, so that implementation proceeds efficiently, with a minimum amount of uncertainty. We believe these amendments will help to reduce the cost of exempt offerings under Regulation D and Section 4(5), relative to the cost of such transactions with less specific implementation of Section 413(a), by reducing uncertainty among issuers and investors in applying the new accredited investor net worth standard mandated by Section 413(a) of the Dodd-Frank Act. By providing greater specificity, we are attempting to remove a possible impediment to issuers using these forms of offering, thereby potentially lowering the cost of capital generally and facilitating capital formation, especially for smaller issuers, while protecting investors.

The final amendments also address incremental indebtedness secured by the primary residence that is incurred within 60 days before the relevant sale of securities. This provision will eliminate individuals' ability to artificially inflate their net worth for purposes of the accredited investor definition by taking on incremental debt secured against their residence shortly before participating in an exempt offering.

The final amendments also include a transition provision, under which the former accredited investor net worth test will apply to acquisitions of securities pursuant to rights to acquire securities, if the rights were held on July 20, 2010, the person qualified as an accredited investor on the basis of net worth at the time the rights were acquired, and the person held securities of the issuer other than the rights on July 20, 2010. This provision should facilitate the exercise of rights held at the time of enactment of the Dodd-Frank Act by persons who would qualify as accredited investors under the former test but not the new test in limited circumstances that should not give rise to significant investor protection concerns.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on every aspect of the initial regulatory flexibility analysis ("IRFA"), including the number of small entities that would be affected by the proposed amendments, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA.

C. Small Entities Subject to the Rule

The amendments will affect issuers that are small entities, because issuers that are small entities must believe or have a reasonable basis to believe that prospective investors are accredited investors at the time of the sale of securities if they are relying on the definition of "accredited investor" for an exemption under Regulation D or Section 4(5). For purposes of the Regulatory Flexibility Act under our rules, an issuer is a "small business" or "small organization" if it has total assets of $5 million or less as of the end of its most recent fiscal year.[86] For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. The amendments apply to all issuers that rely on the accredited investor net worth standards in the exemptions to Securities Act registration in Regulation D and Section 4(5).

All issuers that sell securities in reliance on Regulation D and Section 4(5) must file a

[86] 17 CFR 230.157.

notice on Form D with the Commission. However, the vast majority of companies and funds filing notices on Form D are not required to provide financial reports to the Commission. For the fiscal year ended September 30, 2010, 22,941 issuers filed a notice on Form D. We believe that many of these issuers are small entities, but we currently do not collect information on total assets of all issuers to determine if they are small entities for purposes of this analysis. We note, however, that for the fiscal year ended September 30, 2010, the median offering size for offerings under Regulation D was approximately $1 million, which is consistent with the prevalence of small issuers.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

None of our amendments will increase the information or time required to complete the Form D that must be filed with the Commission in connection with sales under Regulation D and Section 4(5). Our amendments adjust our rules so they comply with the requirements of Section 413(a) of the Dodd-Frank Act, including adding an anti-evasion provision with respect to debt secured by a primary residence incurred within the 60 days before a sale of securities and a limited transition provision. The rules would not require any further disclosure than is currently required in offerings made in reliance on Regulation D and Section 4(5). To the extent that the amendments provide standards on how to treat the primary residence and indebtedness secured by the primary residence in calculating net worth under the accredited investor definition, we believe that they will eliminate potential ambiguity and facilitate compliance with the accredited investor net worth standard mandated by the Dodd-Frank Act.

E. Agency Action to Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective of our amendments, while minimizing any significant adverse impact on small entities. In connection with the amendments, we considered the following alternatives:

- the establishment of different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- the clarification, consolidation, or simplification of the rule's compliance and reporting requirements for small entities;
- the use of performance rather than design standards; and
- an exemption from coverage of the amendments, or any part thereof, for small entities.

With respect to the establishment of special compliance requirements or timetables under our amendments for small entities, we do not think this is feasible or appropriate. Our amendments do not establish any compliance requirements or timetables for compliance that we could adjust to take into account the resources available to small entities. Moreover, the amendments are designed to eliminate uncertainty among issuers and investors that may otherwise result from inserting only the bare operative language from Section 413(a) of the Dodd-Frank Act in our rules. Providing greater specificity in our rules should provide issuers, including small entities, and investors with greater certainty concerning the availability of the Regulation D and Section 4(5) exemptions to Securities Act registration that rely on the accredited investor definition. This should facilitate efficient access to capital for both large and small entities consistent with investor protection.

Likewise, with respect to potentially clarifying, consolidating, or simplifying compliance and reporting requirements, the amendments do not impose any new compliance or reporting requirements or change any existing requirements.

With respect to using performance rather than design standards, we do not believe doing so in this context would be consistent with our objective or with the statutory requirement. Our amendments seek to specify how issuers should calculate the value of a person's primary residence for purposes of excluding its value in determining whether the person qualifies as an accredited investor on the basis of net worth. Specifying that issuers should calculate net worth by excluding the value of the primary residence and leaving the method of calculation to the discretion of the issuer, as a performance standard would, frustrates our purpose and denies small entities and others of the benefits of certainty that the amendments are designed to provide.

With respect to exempting small entities from coverage of these amendments, we believe such a provision would have no impact on the regulatory burdens on small entities, since Section 413(a) became effective upon enactment. Our amendments are designed to provide for the protection of investors without unduly burdening both issuers and investors, including small entities and their investors. They also are designed to minimize confusion among issuers and investors. Exempting small entities could potentially increase their regulatory burdens and increase confusion. We have endeavored to minimize the regulatory burden on all issuers, including small entities, while meeting our regulatory objectives.

VIII. Statutory Authority and Text of the Amendments

The amendments described in this release are being adopted under the authority set forth in Sections 2(a)(15), 3(b), 4(2), 19 and 28 of the Securities Act, as amended,[87] Section 38(a) of the Investment Company Act,[88] Section 211(a) of the Investment Advisers Act[89] and Sections 413(a) and 944(a) of the Dodd-Frank Act.

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[87] 15 U.S.C. 77b(a)(15), 77c(b), 77d(2), 77s and 77z-3.

[88] 15 U.S.C. 80a-38(a).

[89] 15 U.S.C. 80b-11(a).

List of Subjects in 17 CFR Parts 230, 239, 270 and 275

Reporting and recordkeeping requirements, Securities.

For the reasons set out above, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The general authority citation for Part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

2. Amend § 230.144, paragraph (a)(3)(viii), by removing the reference to "4(6) (15 U.S.C. 77d(6))" and adding in its place "4(5) (15 U.S.C.77d(5))".

3. Amend § 230.155, paragraph (a), by removing the references to "4(6)" and "77d(6)" and adding in their places "4(5)" and "77d(5)", respectively.

4. Amend § 230.215 by revising paragraph (e) to read as follows:

§ 230.215 Accredited investor.

* * * * *

(e) Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000.

(1) Except as provided in paragraph (e)(2) of this section, for purposes of calculating net worth under this paragraph (e):

(i) The person's primary residence shall not be included as an asset;

(ii) Indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except that if the amount of such indebtedness outstanding at the time of the sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and

(iii) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence shall be included as a liability.

(2) Paragraph (1) of this section will not apply to any calculation of a person's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that:

(i) Such right was held by the person on July 20, 2010;

(ii) The person qualified as an accredited investor on the basis of net worth at the time the person acquired such right; and

(iii) The person held securities of the same issuer, other than such right, on July 20, 2010.

* * * * *

5. Amend Part 230 by removing the authority citation after the undesignated center heading "Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933" and preliminary notes preceding §§ 230.501 to 230.508.

6. Amend § 230.501 by:

a. revising paragraph (a)(5); and

b. removing the word "principal" and adding in its place the word "primary" in paragraph (e)(1)(i).

The revision reads as follows:

§ 230.501 Definitions and terms used in Regulation D.

* * * * *

(a) * * *

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000.

(i) Except as provided in paragraph (a)(5)(ii) of this section, for purposes of calculating net worth under this paragraph (a)(5):

(A) The person's primary residence shall not be included as an asset;

(B) Indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and

(C) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability;

(ii) Paragraph (a)(5)(i) of this section will not apply to any calculation of a person's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that:

(A) Such right was held by the person on July 20, 2010;

(B) The person qualified as an accredited investor on the basis of net worth at the time the person acquired such right; and

C) The person held securities of the same issuer, other than such right, on July 20, 2010.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

7. The general authority citation for Part 239 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78o-7 note, 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

8. Amend § 239.500 by removing the reference to "4(6)" and adding in its place "4(5)" in the heading and in the first sentence of paragraph (a)(1).

9. Amend Item 6 in Form D (referenced in § 239.500) by:

a. Removing the phrase "Securities Act Section 4(6)" and adding in its place "Securities Act Section 4(5)" next to the appropriate check box; and

b. Removing the reference to "4(6)" and adding in its place "4(5)" in the first sentence of the first paragraph of the General Instructions.

Note: The text of Form D does not, and the amendments will not, appear in the Code of Federal Regulations.

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

10. The general authority citation for Part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a-1 *et seq.*, 80a-34(d), 80a-37, and 80a-39, unless otherwise noted.

* * * * *

11. Amend § 270.17j-1, paragraph (a)(8), by removing the references to "4(6)"and "77d(6)" and adding in their places "4(5)" and "77d(5)", respectively.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

12. The authority citation for Part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(11)(H), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

13. Amend § 275.204A-1, paragraph (e)(7) by removing the references to "4(6)" and "77d(6)" and adding in their places "4(5)"and "77d(5)", respectively.

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: December 21, 2011

Kevin M. O'Neill
By: Kevin M. O'Neill
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 240

[Release No. 34-66020; File No. S7-19-10]

RIN 3235-AK69

Extension of Temporary Registration of Municipal Advisors

AGENCY: Securities and Exchange Commission.

ACTION: Interim final temporary rule; extension.

SUMMARY: The Securities and Exchange Commission ("Commission") is amending interim final temporary Rule 15Ba2-6T, which provides for the temporary registration of municipal advisors under the Securities Exchange Act of 1934 ("Exchange Act"), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), to extend the date on which Rule 15Ba2-6T will sunset from December 31, 2011 to September 30, 2012. Under the amendment, all temporary registrations submitted pursuant to Rule 15Ba2-6T will expire no later than September 30, 2012.

DATES: Effective Date: December 31, 2011. Interim final temporary Rule 15Ba2-6T will expire on September 30, 2012.

FOR FURTHER INFORMATION CONTACT: Victoria Crane, Assistant Director, Office of Market Supervision, at (202) 551-5744; Yue Ding, Attorney-Adviser, Office of Market Supervision, at (202) 551-5842; Mary Simpkins, Senior Special Counsel, Office of Municipal Securities, at (202) 551-5683; Dave Sanchez, Attorney Fellow, Office of Municipal Securities, at (202) 551-5540; John L. McWilliams, III, Attorney Fellow, Office of Municipal Securities, at (202) 551-5688; or any of the above at Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-6628.

SUPPLEMENTARY INFORMATION: The Commission is extending the expiration date for interim final temporary Rule 15Ba2-6T under the Exchange Act.

I. DISCUSSION

Section 15B(a)(1) of the Exchange Act,[1] as amended by Section 975(a)(1)(B) of the Dodd-Frank Act,[2] makes 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 with the Commission. Section 15B(a)(2) of the Exchange Act,[3] as amended by Section 975(a)(2) of the Dodd-Frank Act, provides that a municipal advisor may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning the municipal advisor and any person associated with the municipal advisor as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The registration requirement for municipal advisors became effective on October 1, 2010. On September 1, 2010, the Commission adopted interim final temporary Rule 15Ba2-6T under the Exchange Act,[4] which permits municipal advisors to temporarily satisfy the statutory registration requirement by completing Form MA-T[5] through the Commission's public website.[6]

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1 15 U.S.C. 78o-4(a)(1).

2 Pub. L. 111-203, 124 Stat. 1376 (2010).

3 15 U.S.C. 78o-4(a)(2).

4 17 CFR 240.15Ba2-6T.

5 17 CFR 249.1300T.

6 See Securities Exchange Act Release No. 62824, 75 FR 54465 (September 8, 2010) ("Interim Release"). The Commission received seven comment letters on the Interim

Rule 15Ba2-6T serves as a transitional step to the implementation of a permanent registration program, makes relevant information available to the public and municipal entities, and permits municipal advisors to continue their business after October 1, 2010.

Under existing Rule 15Ba2-6T, all temporary registrations submitted pursuant to that rule will expire on the earlier of: (1) the date that the municipal advisor's registration is approved or disapproved by the Commission pursuant to a final rule adopted by the Commission establishing another manner of registration of municipal advisors and prescribing a form for such purpose;[7] (2) the date on which the municipal advisor's temporary registration is rescinded by the Commission; or (3) on December 31, 2011.[8] Further, existing Rule 15Ba2-6T will expire on December 31, 2011.[9]

As stated in the Interim Release, the Commission believes that providing a temporary registration process for municipal advisors, pursuant to an interim final temporary rule, is a necessary and appropriate way to proceed, is consistent with the intent of Congress in enacting Section 975 of the Dodd-Frank Act, and is a tailored way to provide investors and municipal entities with basic and important information while the Commission considers a permanent

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Release. See letters from Brad R. Jacobsen, dated September 7, 2010; John J. Wagner, Kutak Rock LLP, dated September 28, 2010; Joy A. Howard, Principal, WM Financial Strategies, dated October 5, 2010; Steve Apfelbacher, President, National Association of Independent Public Finance Advisors, dated October 8, 2010; Carolyn Walsh, Vice President and Senior Counsel, Center for Securities, Trust and Investments, American Bankers Association, Deputy General Counsel, ABA Securities Association, dated October 13, 2010; Amy Natterson Kroll and W. Hardy Callcott, Bingham McCutchen LLP, on behalf of the National Association of Energy Service Companies, dated October 13, 2010; and Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated November 15, 2010.

7 On December 20, 2010, the Commission proposed for public comment rules for the permanent registration of municipal advisors. See Securities Exchange Act Release No. 63576; 76 FR 824 (January 6, 2011) ("Proposing Release").

8 See 17 CFR 240.15Ba2-6T(e).

9 See 17 CFR 240.15Ba2-6T(f).

registration program. As noted above, however, existing Rule 15Ba2-6T will expire on December 31, 2011. Accordingly, the Commission has determined that it is necessary and appropriate to extend the expiration date of Rule 15Ba2-6T to September 30, 2012, to provide a method for municipal advisors to continue to temporarily satisfy the registration requirement under Section 15B of the Exchange Act until the Commission promulgates a final rule establishing another manner of registration of municipal advisors, prescribing a form for such purpose, and developing an electronic registration system. This extension will prevent a gap between the time at which the temporary rule expires and at which municipal advisors must be registered with the Commission under a permanent registration regime. The Commission notes that it is adopting amendments to Rule 15Ba2-6T only to extend the expiration date of that rule. The Commission is not making any other amendments to Rule 15Ba2-6T or Form MA-T.

Specifically, the Commission is amending Rule 15Ba2-6T(e) to provide that all temporary registrations submitted pursuant to Rule 15Ba2-6T will expire on the earlier of: (1) the date that the municipal advisor's registration is approved or disapproved by the Commission pursuant to a final rule adopted by the Commission establishing another manner of registration of municipal advisors and prescribing a form for such purpose; (2) the date on which the municipal advisor's temporary registration is rescinded by the Commission; or (3) on September 30, 2012. The Commission is also amending Rule 15Ba2-6T(f) to provide that the interim final temporary rule will expire on September 30, 2012. Thus, absent further action by the Commission, Rule 15Ba2-6T will expire on September 30, 2012 at 11:59 p.m. Eastern Time.

The Commission has considered the seven comment letters received on the Interim Release[10] and, given the limited nature of this extension and the Commission's ongoing process

[10] See supra note 6.

of considering permanent rules for the registration of municipal advisors, the Commission is not making any other changes to the temporary registration rule and Form MA-T. The Commission believes that making other changes to the temporary rule and Form MA-T could cause those relying on the rule or form to need to make adjustments to their operations or amendments to their forms that may be applicable only until the permanent rules are considered by the Commission. The Commission also notes that the comment letters received in response to the Interim Release were addressed in the Proposing Release, and were considered for purposes of the proposed rules for the registration of municipal advisors.

The amendments to Rule 15Ba2-6T will be effective on December 31, 2011. The Administrative Procedure Act ("APA") generally requires an agency to publish notice of a proposed rulemaking in the Federal Register.[11] This requirement does not apply, however, if the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[12] The Commission notes that extending the expiration date of Rule 15Ba2-6T will not affect the substantive provisions of that rule, and will allow municipal advisors to continue to comply with the statutory registration requirement until a permanent registration regime becomes effective. Further, the Commission notes that extending the expiration date of Rule 15Ba2-6T will prevent a regulatory gap from developing between the time at which the temporary rule expires and at which municipal advisors must be registered with the Commission under a permanent registration regime. For these reasons, and the reasons discussed throughout this release, the Commission believes that there is good cause to extend the

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

12 5 U.S.C. 553(b)(B).

expiration date of Rule 15Ba2-6T to September 30, 2012, and to find that notice and solicitation of comment on the extension is impracticable, unnecessary, or contrary to the public interest.[13]

The APA also generally requires that an agency publish a substantive rule in the Federal Register not less than 30 days before its effective date.[14] However, this requirement does not apply if the agency finds good cause and publishes such cause with the rule.[15] For reasons similar to those explained above, the Commission finds good cause not to delay the effective date of the extension.

In connection with the adoption of Rule 15Ba2-6T and Form MA-T, the Commission submitted to the Office of Management and Budget ("OMB") a request for approval of the "collection of information" requirements contained in the temporary rule and form in accordance with the Paperwork Reduction Act of 1995.[16] OMB initially approved the collection of information on an emergency basis with an expiration date of March 31, 2011. The Commission subsequently submitted a request for extension of the approval, and OMB extended the approval to March 31, 2014. The collection of information to which Rule 15Ba2-6T and Form MA-T relates is "Rule 15Ba2-6T and Form MA-T – Temporary Registration of Municipal Advisors." The OMB control number for the collection of information is 3235-0659. Since the Commission

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13 This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rule amendments to become effective notwithstanding the requirements of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are "impracticable, unnecessary or contrary to the public interest," a rule "shall take effect at such time as the Federal agency promulgating the rule determines"). Because the Commission is not publishing the rule amendments in a notice of proposed rulemaking, no analysis is required under the Regulatory Flexibility Act. <u>See</u> 5 U.S.C. 601(2) (for purposes of the Regulatory Flexibility Act, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking).

14 <u>See</u> 5 U.S.C. 553(d).

15 <u>See</u> 5 U.S.C. 553(d)(3).

16 44 U.S.C. 3501 <u>et seq.</u>

is not amending Rule 15Ba2-6T or the disclosure requirements contained in Form MA-T other than extending the expiration date for Rule 15Ba2-6T, this amendment will not change the "collection of information" previously approved by the OMB.

The Commission is sensitive to the costs and benefits of its rules. The Commission has previously considered and discussed the costs and benefits of Rule 15Ba2-6T.[17] Since the Commission is not amending Rule 15Ba2-6T and Form MA-T other than to extend the expiration date for that rule, the Commission believes that the same general analysis will continue to apply for the period of the extension. An important benefit of extending the expiration date for Rule 15Ba2-6T, however, will be to allow municipal advisors to continue to comply with the statutory registration requirement until a permanent registration regime becomes effective, and to avoid a regulatory gap from developing between the time at which the temporary rule expires and at which municipal advisors must be registered with the Commission under a permanent registration regime.

Since the Commission is only extending the expiration date for Rule 15Ba2-6T and is not substantively changing Rule 15Ba2-6T and Form MA-T, the Commission's estimated burden for each municipal advisor to complete and amend Form MA-T remains unchanged.[18] However, the Commission estimates that as a result of the amendment, approximately 162[19] new municipal

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17 For a detailed description of the costs and benefits of Rule 15Ba2-6T, see Interim Release, supra note 6 at 54474-75.

18 The Commission notes that in the Interim Release, it had estimated that approximately 1,000 municipal advisors would be required to complete Form MA-T. See Interim Release, supra note 6 at 54473. It further conservatively estimated that all 1,000 municipal advisors would have to amend their forms once between September 1, 2010 and December 31, 2011, recognizing that the actual number would likely be lower than 1,000. See id. As of November 31, 2011, the Commission has received 967 initial registrations, 102 amendments and 33 withdrawals.

19 The Commission estimates that, between January 1, 2012 and September 30, 2012, there will be approximately 18 initial registrations per month, which is the average number of

advisors will register between January 1, 2012 and September 30, 2012 at a total labor cost of approximately $168,000.[20] With regard to the 162 new municipal advisors and the municipal advisors already registered pursuant to Rule 15Ba2-6T, the Commission estimates that, between January 1, 2012 and September 30, 2012, there will be approximately 160[21] amendments and withdrawals at a total labor cost of approximately $22,000.[22]

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition and capital formation.[23] In addition, Section

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initial registrations the Commission has received per month during the first eleven months of 2011.

20 162 (estimated number of initial registrations) × 2.5 hours (estimated time to complete Form MA-T) = 405 hours; 405 hours × $273 (hourly rate for a Compliance Manager) = $110,565. 162 (estimated number of new municipal advisors that will hire outside counsel) × 1 hour (estimated time spent by outside counsel to help a new municipal advisor to comply with the rule) × $354 (hourly rate for an Attorney) = $57,348. $110,565 + $57,348 = $167,913. See Interim Release, supra note 6 at 54473-74. The estimated burden for each municipal advisor to complete Form MA-T and the estimated use of outside counsel by each municipal advisor remains unchanged from the Interim Release. The $273 per hour figure for a Compliance Manager and the $354 per hour figure for an Attorney are from SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified by Commission staff to account for an 1,800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

21 The Commission estimated the number of amendments and withdrawals based on the number of amendments to, and withdrawals from, registration on Form MA-T that the Commission has received as of November 31, 2011.

22 160 (estimated number of amendments and withdrawals) × 0.5 hours (estimated time to amend Form MA-T) = 80 hours; 80 hours × $273 (hourly rate for a Compliance Manager) = $21,840. See Interim Release, supra note 6 at 54473-74. The $273 per hour figure for a Compliance Manager is from SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified by Commission staff to account for an 1,800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

23 See 15 U.S.C. 78c(f).

23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[24] Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[25] In the Interim Release, the Commission considered the effects of Rule 15Ba2-6T on efficiency, competition, and capital formation.[26] Since the Commission is not amending Rule 15Ba2-6T and Form MA-T other than extending the expiration date for Rule 15Ba2-6T, the Commission believes that the same analysis applies, and continues to believe that Rule 15Ba2-6T, as extended, will not result in a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

II. STATUTORY AUTHORITY AND TEXT OF RULE AND AMENDMENTS

Pursuant to the Exchange Act, and particularly Section 15B (15 U.S.C. 78o-4), the Commission is amending § 240.15Ba2-6T of Title 17 of the Code of Federal Regulations in the manner set forth below.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Municipal advisors, Temporary registration requirements.

TEXT OF RULE AND AMENDMENTS

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

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24 See 15 U.S.C. 78w(a)(2).

25 See id.

26 See Interim Release, supra note 6 at 54475.

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

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

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

§ 240.15Ba2-6T [Amended]

2. In § 240.15Ba2-6T, remove the words "December 31, 2011" and add, in their place, the words "September 30, 2012".

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

December 21, 2011

cf

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66024 / December 21, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3349 / December 21, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14674

In the Matter of **ERIC JON STRASSER,** **Respondent.**	**ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate to issue an order of forthwith suspension of Eric Jon Strasser ("Strasser") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. §200.102(e)(2)].[1]

II.

The Commission finds that:

1. Strasser, age 47, is a resident of Las Vegas, Nevada. Between approximately 2005 and 2009, Strasser was a consultant to Soyo Group, Inc. ("Soyo") who acted as its de facto controller in that he prepared Soyo's periodic filings with the Commission and was a liaison between Soyo and its auditor. In the mid-1980s, Strasser worked as an auditor and passed the examination to become a certified public accountant, but he never obtained a license.

2. On April 22, 2011, an amended judgment of conviction was entered against Strasser in *United States v. Strasser*, No. 2:10-cr-00266-LDG-LRL-1, in the United States

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1 Rule 102(e)(2) provides in pertinent part: "Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

District Court for the District of Nevada, finding him guilty of one count of misprision of a felony under 18 U.S.C. §4.

3. As a result of this conviction, Strasser was sentenced to 5 years of probation and ordered to pay restitution in the amount of $190,000.[2]

III.

In view of the foregoing, the Commission finds that Strasser has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that Eric Jon Strasser is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

2 On June 25, 1992, a judgment of conviction was entered against Strasser for one count of computer fraud under 18 U.S.C. §1030(a)(4) in *United States v. Strasser*, No. 1:91-cr-00836-DNE-1, in the United States District Court for the Southern District of New York. As a result of this conviction, Strasser was sentenced to 16 months of imprisonment.

DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency
12 CFR Part 44
Docket No. OCC-2011-0014
RIN 1557-AD44

FEDERAL RESERVE SYSTEM
12 CFR Part 248
Docket No. 2011-1432
RIN 7100-AD 82

FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Part 351
RIN 3064-AD85

U.S. SECURITIES AND EXCHANGE COMMISSION
17 CFR Part 255
Release No. 34-66057; File No. S7-41-11
RIN 3235-AL07

Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and U.S. Securities and Exchange Commission (SEC).

ACTION: Proposed rule; extension of comment period.

SUMMARY: On November 7, 2011, the OCC, Board, FDIC, and SEC (collectively, the "Agencies") published in the Federal Register a joint notice of proposed rulemaking for public comment to implement section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") which contains certain prohibitions and restrictions on the ability of a banking entity and nonbank financial company supervised by the Board to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund ("proposed rule").

Due to the complexity of the issues involved and to facilitate coordination of the rulemaking among the responsible agencies as provided in section 619 of the Dodd-Frank Act, the Agencies have determined that an extension of the comment period until February 13, 2012 is appropriate. This action will allow interested persons additional time to analyze the proposed rules and prepare their comments.

DATES: Comments on the proposed rule must be received on or before February 13, 2012.

ADDRESSES: You may submit comments by any of the methods identified in the proposed rule.[1] Please submit your comments using only one method.

FOR FURTHER INFORMATION CONTACT:

OCC: Deborah Katz, Assistant Director, or Ursula Pfeil, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090; Roman Goldstein, Senior Attorney, Securities and Corporate Practices Division, (202) 874-5210; Kurt Wilhelm, Director for Financial Markets Group, (202) 874-4660; Stephanie Boccio, Technical Expert for Asset Management Group, or Joel Miller, Group Leader for Asset Management Group, (202) 874-4660, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219.

Board: Christopher M. Paridon, Counsel, Legal Division, (202) 452-3274; Sean D. Campbell, Deputy Associate Director, Division of Research and Statistics, (202) 452-3761; David Lynch, Manager, (202) 452-2081, or Jeremy R. Newell, Division of Bank Supervision and Regulation, (202) 452-3239, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

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[1] See 76 FR 68846.

FDIC: Bobby R. Bean, Associate Director, Capital Markets (202) 898-6705, or Karl R. Reitz, Senior Capital Markets Specialist, (202) 898-6775, Division of Risk Management Supervision; Michael B. Phillips, Counsel, (202) 898-3581, or Gregory S. Feder, Counsel, (202) 898-8724, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429-0002.

SEC: Josephine Tao, Assistant Director, Elizabeth Sandoe, Senior Special Counsel, David Bloom, Branch Chief, or Angela Moudy, Attorney Advisor, Office of Trading Practices, Division of Trading and Markets, (202) 551-5720; Daniel S. Kahl, Assistant Director, Tram N. Nguyen, Branch Chief, Michael J. Spratt, Senior Counsel, Paul Schlichting, Senior Counsel, or Parisa Haghshenas, Law Clerk, Office of Investment Adviser Regulation, Division of Investment Management, (202) 551-6787, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

On November 7, 2011, the proposed rule was published in the Federal Register.[2] The proposed rule implements section 619 of the Dodd-Frank Act which added a new section 13 to the Bank Holding Company Act of 1956 ("BHC Act") and contains certain prohibitions and restrictions on the ability of a banking entity and nonbank financial company supervised by the Board to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund.

In recognition of the complexities of the issues involved and the variety of considerations involved in its impact and implementation, the Agencies requested that

[2] See id.

commenters respond to numerous questions. The proposed rule stated that the public comment period would close on January 13, 2012.[3]

The Agencies have received requests from the public for an extension of the comment period to allow for additional time for comments related to the provisions of the proposed rule.[4] The Agencies believe that the additional period for comment will facilitate public comment on the provisions of the proposed rule and the questions posed by the Agencies, and coordination of the rulemaking among the responsible agencies as provided in section 619 of the Dodd-Frank Act. Therefore, the Agencies are extending the comment period for the proposed rule from January 13, 2012 to February 13, 2012.

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[3] See id.

[4] See, e.g., comment letters to the Agencies from Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce (November 17, 2011); American Bankers Association et al. (November 30, 2011); and Representative Neugebauer et al. (December 20, 2011).

[THIS SIGNATURE PAGE RELATES TO THE EXTENSION OF COMMENT PERIOD OF THE PROPOSED RULE IMPLEMENTING SECTION 619 OF THE DODD-FRANK ACT]

John Walsh

Date: 12/22/11

John Walsh

Acting Comptroller of the Currency.

[THIS SIGNATURE PAGE RELATES TO THE EXTENSION OF COMMENT PERIOD OF THE PROPOSED RULE IMPLEMENTING SECTION 619 OF THE DODD-FRANK ACT]

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary under delegated authority, December 23, 2011.

Jennifer J. Johnson,
Secretary of the Board.

BILLING CODE 6210-01-P

[THIS SIGNATURE PAGE RELATES TO THE AMENDED NOTICE OF PROPOSED RULEMAKING ENTITLED "PROHIBITIONS AND RESTRICTIONS ON PROPRIETARY TRADING AND CERTAIN INTERESTS IN, AND RELATIONSHIPS WITH HEDGE FUNDS AND PRIVATE EQUITY FUNDS"]

By delegated authority from the Board of Directors of the Federal Deposit Insurance Corporation.

Dated at Washington, D.C. this 23rd day of December, 2011.

FEDERAL DEPOSIT INSURANCE CORPORATION

Robert E. Feldman

Executive Secretary

[SEAL]

079523

[THIS SIGNATURE PAGE RELATES TO THE EXTENSION OF COMMENT PERIOD OF THE PROPOSED RULE IMPLEMENTING SECTION 619 OF THE DODD-FRANK ACT]

By the Securities and Exchange Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

Date: December 23, 2011

Billing code: 8011-01p

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66051 / December 23 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3350/ December 23, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14675

In the Matter of **CRAIG ON (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 Craig On ("Respondent" or "On") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondent

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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.

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. Craig On, age 59, is and has been a certified public accountant licensed to practice in the State of California. He served as Interim Chief Financial Officer of UCBH Holdings, Inc. ("UCBH") from May 2008 until October 2008 and Chief Financial Officer from October 2008 until November 2009.

2. UCBH was, at all relevant times, a Delaware corporation with its principal place of business in San Francisco, California. UCBH was a holding company for subsidiary United Commercial Bank, a California state-chartered bank. At all relevant times, UCBH's common stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and listed on the NASDAQ Global Select Market.

3. On December 14, 2011, a final judgment was entered against On, permanently enjoining him from future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933, Section 13(b)(5) of the Exchange Act and Rules 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-11 thereunder, in the civil action entitled Securities and Exchange Commission v. Thomas S. Wu, et al., Civil Action No. 11-CV-4988-JSW, in the United States District Court for the Northern District of California. On was also ordered to pay a $150,000 civil money penalty.

4. The Commission's Complaint alleged, among other things, that On failed to ensure the accuracy of the financial statements in the UCBH annual report on Form 10-K for the fiscal year ended December 31, 2008. The Complaint alleged that UCBH's 2008 Form 10-K contained materially false and misleading financial statements because these financial statements understated loan losses and reserves. The Complaint alleged that On knew or should have known of losses on certain loans and other assets, but failed to disclose full and accurate information about these loans and assets to UCBH's independent auditors. In addition, the Complaint alleged On certified false financial statements in the 2008 Form 10-K, failed to implement a system of internal accounting controls, and falsified or caused to be falsified certain books, records, and accounts. The Complaint also alleged On aided and abetted UCBH's violations of provisions requiring accurate annual reports and periodic filings, accurate books and records, and an adequate system of internal controls.

IV.

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

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

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

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

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

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

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

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

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

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

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The

Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

Release No. 34-66058; File No. S7-38-11

RIN 3235-AL04

Prohibition Against Conflicts of Interest in Certain Securitizations

AGENCY: Securities and Exchange Commission

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Securities and Exchange Commission is extending the comment period for a release proposing a new rule to implement Section 621 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") on material conflicts of interest in connection with certain securitizations (the "ABS Conflicts Proposal"). The original comment period for the ABS Conflicts Proposal was scheduled to end on December 19, 2011. On December 13, 2011, the comment period was extended until January 13, 2012. Today, the Commission is again extending the time period in which to provide the Commission with comments on the ABS Conflicts Proposal until February 13, 2012. This action will allow interested persons additional time to analyze the issues and prepare their comments.

DATES: Comments should be received on or before February 13, 2012.

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

Electronic Comments:

Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-38-11 on the subject line; or
- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-38-11. 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 Internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F 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: Elizabeth Sandoe, Senior Special Counsel, Anthony Kelly, Special Counsel, or Barry O'Connell, Attorney Advisor, Office of Trading Practices, 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.

SUPPLEMENTARY INFORMATION: The Commission has requested comment on Proposed Rule 127B under the Securities Act of 1933 ("Securities Act") in the ABS Conflicts Proposal to implement Section 621 of the Dodd-Frank Act.[1] 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

[1] Exchange Act Release No. 34-65355 (September 19, 2011), 76 FR 60320 (September 28, 2011).

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. The ABS Conflicts Proposal was published in the Federal Register on September 28, 2011.

The Commission originally requested that comments on the ABS Conflicts Proposal be received by December 19, 2011, including comment about any potential interplay[2] between Proposed Rule 127B and the "Volcker Rule Proposal."[3] The Volcker Rule Proposal would implement Section 619 of the Dodd-Frank Act concerning prohibitions and restrictions on proprietary trading and certain interests in, and relationships with, hedge funds and private equity funds. The original comment period for the Volcker Rule Proposal was scheduled to end on January 13, 2012.

On December 13, 2011, the Commission extended the ABS Conflicts Proposal comment period from December 19, 2011 to January 13, 2012 to coincide with the end of the comment period for the Volcker Rule Proposal. The Commission extended the Volcker Rule Proposal comment period until February 13, 2012.[4] In an effort to provide the public with a better opportunity to consider any potential interplay between the ABS Conflicts and Volcker Rule Proposals, the Commission is also extending the ABS Conflicts Proposal comment period until February 13, 2012.

The Commission has determined to provide the public additional time to consider simultaneously the ABS Conflicts and the Volcker Rule Proposals. This extended opportunity to

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[2] See, e.g., 76 FR 60320, 60341.

[3] Exchange Act Release No. 34-65545 (October 12, 2011), 76 FR 68846 (November 7, 2011).

[4] Exchange Act Release No. 34-66057.

submit comprehensive comments regarding the ABS Conflicts Proposal and any potential interplay with the Volcker Rule Proposal would benefit the Commission in its consideration of any final rules. Therefore, the Commission is again extending the comment period for the ABS Conflicts Proposal until February 13, 2012 to coincide with end of the Volcker Rule Proposal comment period.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

December 23, 2011

Commissioner Walter
Commissioner Paredes
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9288 / December 23, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 66053 / December 23, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3342 / December 23 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29893 / December 23, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14676

In the Matter of **Eric David Wanger and Wanger Investment Management, Inc.** **Respondents.**	**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(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Sections 203(e), 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 Eric David Wanger and Wanger Investment Management, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Eric David Wanger ("Wanger"), age 48, is a resident of Chicago, Illinois and is the owner, chief compliance officer, and president of a registered investment adviser, Wanger Investment Management, Inc. He is the sole managing member of the general partner to the Wanger Long Term Opportunity Fund II, LP and serves as its sole portfolio manager. From January 2007 through January 2009, he also served as a director of AltiGen Communications, Inc.

2. Wanger Investment Management, Inc. ("Wanger Management") is a registered investment adviser based in Chicago, Illinois. Wanger Management registered with the Commission effective April 6, 2009. It serves as adviser to the Wanger Long Term Opportunity Fund II, LP.

B. OTHER RELEVANT ENTITIES

3. AltiGen Communications, Inc. ("AltiGen") is a Delaware corporation headquartered in San Jose, California that designs, manufactures, and markets phone systems and call center products that use the Internet and public telephone networks. During the relevant period, its common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and was traded on the NASDAQ under the symbol ATGN. On or about March 3, 2010, AltiGen announced that it would delist from the NASDAQ. On or about November 2, 2010, it filed a Form 15 Certification and Notice of Termination of Registration Under Section 12(g) of the Exchange Act or Suspension of Duty to File Reports Under Sections 13 and 15(d) of the Exchange Act.

4. The Wanger Long Term Opportunity Fund II, LP (the "Fund") is a hedge fund that claims to seek long-term capital appreciation by investing in small and microcap companies. It is not registered with the Commission.

C. BACKGROUND

5. Wanger formed the Fund on January 1, 2002. The initial investment in the Fund at that time amounted to approximately $2,000,000, consisting of money from family and friends. At its highest point, in April 2008, the Fund had a net asset value ("NAV") of approximately $14.5 million.

6. Beginning in November 2007, Wanger stated that he wanted to grow the Fund to $100 million, but he was only able to raise approximately $3.5 million from November 2007 through April 2008.

7. The Fund began acquiring shares of AltiGen in 2006. During the relevant period, one of the Fund's largest holdings was stock in AltiGen.

8. Wanger used the Fund's external broker ("Broker") for approximately 90% of the Fund's orders. Wanger relied on Broker's expertise and resources to execute orders for the Fund.

9. Wanger and Broker regularly discussed the best way for the Fund to buy shares for any particular day. Wanger and Broker exchanged instant messages regarding, among other things, their strategy to accumulate AltiGen shares given the stock's thinly-traded history.

10. Wanger instructed Broker in writing through various instant messages that he wanted "best execution," he was "price sensitive," and "not to trash the market." In response, Broker informed Wanger that he would purchase AltiGen stock for the Fund using his expertise, which was to be "stealthy" and to buy stock with "no market impact."

11. While the Fund was accumulating AltiGen shares, Wanger and Broker talked about suspicious end-of-the-day trading by others in AltiGen stock. Wanger understood that trading at the end of the day to raise the price of a thinly-traded stock was disruptive to investors and companies. He also understood that there could be a short-term benefit to the Fund's performance numbers when the price of AltiGen stock increased at the end of the day and, particularly, at the end of a month or quarter.

D. WANGER AND WANGER MANAGEMENT MARKED THE CLOSE ON FIFTEEN DIFFERENT OCCASIONS

12. "Marking the close" involves the placing and execution of orders shortly before the close of trading on any given day to artificially affect the closing price of a security.

13. From January 31, 2008 through September 30, 2010, Wanger, as owner, president and chief compliance officer of Wanger Management, repeatedly marked the close by placing bids in certain thinly-traded securities held by the Fund that were the last trade of the day of the final trading session of a month or quarter.

14. Specifically, Wanger marked the close on at least fourteen occasions on ten separate days, at month and quarter ends, in 2008, 2009, and 2010. He also marked the close on June 20, 2008, the date he transferred AltiGen securities from his own account to the Fund's account as part of an improper transaction as alleged in paragraphs 30-37 below. In addition, he attempted to mark the close on at least three other occasions.

15. Wanger marked the close in shares of AltiGen ("ATGN") (at least nine times), Clicksoftware Technologies Ltd., ("Clicksoftware" or "CKSW") (at least twice), Derma Sciences, Inc., ("Derma Sciences" or "DSCI") (at least twice) and Woodbridge Holdings Corp ("Woodbridge" or "WDGH") (at least once) to artificially improve the Fund's reported monthly and quarterly performance.

16. Wanger marked the close on the following dates in the following securities:

Trade Date	Security	Last Sale Prior to or During Wanger's Trade Activity	Closing Price Obtained by Wanger
01/31/08	ATGN	$1.60	$1.63
03/31/08	ATGN	$1.42	$1.65
04/30/08	ATGN	$1.44	$1.56
05/30/08	ATGN	$1.33	$1.45
06/20/08	ATGN	$1.37	$1.38
09/30/08	ATGN	$0.93	$0.99
09/30/08	DSCI	$0.54	$0.56
10/31/08	ATGN	$.68	$0.69
10/31/08	CKSW	$2.85	$2.90
02/27/09	ATGN	$0.84	$0.85
02/27/09	DSCI	$0.47	$0.54
03/31/09	CKSW	$3.68	$3.72
03/31/09	WDGH	$0.40	$0.62
05/28/10	ATGN	$0.72	$0.76
09/30/10	ATGN	$0.60	$0.75

17. Wanger did not use Broker to place the orders for the trades that marked the close. Rather, he placed the orders for the trades for the Fund himself.

18. In addition, Wanger's trading style in connection with the marking the close transactions differed from the trading style he had instructed Broker to follow.

19. Wanger's manipulative trading improperly inflated the Fund's monthly reported performance by amounts ranging from approximately 3.60% to 5,908.71%, and

artificially increased the Fund's NAV by amounts ranging from approximately .24% to 2.56%.

20. From January 1, 2008 through September 30, 2010, the value of AltiGen as a share of the Fund's portfolio ranged from a low of approximately 8.99% in March 2010 to a high of approximately 14.91% in December 2008. AltiGen shares accounted for approximately 10% or more of the Fund's month-end value in thirty-one of the thirty-three months in this time period.

21. During the periods in which he marked the close in the following securities, they accounted for the following portions of the Fund's total portfolio: i.) Clicksoftware ranged from a low of approximately 7.41% to a high of approximately 11.5%; ii.) Derma Sciences ranged from a low of approximately 3% to a high of approximately 4.12%; and iii.) Woodbridge represented approximately .7% of the portfolio on March 31, 2009.

22. Wanger and Wanger Management provided Fund investors and prospective investors with figures that reflected performance results and their proportionate share of the Fund's NAV that were improperly inflated as a result of Wanger's manipulative trading. Wanger and Wanger Management provided the artificially inflated results directly to investors and prospective investors through a variety of means, including the Wanger Management website, mailings, e-mail, and oral presentations.

23. Wanger and Wanger Management included the artificially inflated performance results in marketing materials, which they distributed to prospective and existing Fund investors in order to solicit additional investments in the Fund.

24. Wanger communicated directly with Fund investors or their representatives regarding the Fund's performance.

25. For example, Wanger responded to inquiries from Fund investors and their representatives about the Fund's performance in the spring of 2008, with statements such as "despite a truly awful market, we finished the quarter down only a bit more than 3%. . . Thanks for your continued faith in us." However, Wanger did not inform existing or prospective investors or their representatives that the Fund's performance during the first quarter of 2008 was artificially inflated due to his marking the close transactions. Among these, the orders he placed at the end of the day on March 31, 2008 artificially increased the Fund's NAV by nearly 2%, without which the reported performance for the month would have been approximately 30% lower than reported.

26. Wanger and Wanger Management received more management fees from the Fund as a result of the marking the close transactions and did not fulfill their obligations to obtain the best prices for shares purchased by the Fund.

27. Wanger also marked the close of AltiGen stock on June 20, 2008 in an attempt to obtain a higher valuation of AltiGen stock he transferred from his personal account to the Fund's account as alleged in paragraphs 30 thru 37 below.

28. By marking the closing price of certain stocks held in the Fund's portfolio to artificially inflate the Fund's performance results and by communicating the inflated performance results to existing and prospective investors, Wanger and Wanger Management engaged in a scheme to defraud and engaged in a practice that operated as a fraud.

29. Wanger and Wanger Management also made material misrepresentations and omissions when they reported the artificially inflated performance results to existing and potential investors.

E. WANGER AND WANGER MANAGEMENT ENGAGED IN IMPROPER TRANSACTIONS WITH THE FUND

30. Section 206(3) of the Advisers Act provides that it is unlawful for an investment adviser, "acting as principal for his own account, knowingly to sell any security to or purchase any security from a client . . . without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction."

31. In 2008 and 2009, Wanger, acting through Wanger Management, directed the transfer of funds from the Fund's brokerage accounts to Wanger Management's bank accounts to pay investment adviser operating expenses and payroll in amounts totaling approximately $300,000 and approximately $200,000, respectively. These transfers were not specifically authorized by the Fund.

32. In June 2008 and June 2009, Wanger and Wanger Management partially repaid the Fund by engaging in at least two improper principal securities transactions.

33. On or about June 20, 2008, Wanger transferred 37,344 shares of AltiGen, and other securities, from his personal account to the Fund's account.

34. Wanger marked the closing price of AltiGen stock on June 20, 2008, which could have had the effect of increasing the price the Fund paid for the securities had the AltiGen shares remained in the Fund's account with a transfer date of June 20, 2008.

35. In July 2008, these AltiGen securities and certain of the other securities were transferred back to Wanger's personal account.

36. In June 2009, Wanger transferred AltiGen stock and another security from his personal account to the Fund again. The transferred securities were 37,344 AltiGen shares valued at approximately $47,053 and 29,000 Woodbridge shares valued at approximately $33,060 (approximately $80,113 total).

37. Wanger and Wanger Management did not provide the Fund with written disclosure or obtain the Fund's consent prior to engaging in the principal securities transactions with the Fund described in paragraphs 30 to 36 above, as required by Section 206(3) of the Advisers Act.

F. WANGER AND WANGER MANAGEMENT'S FAILURE TO TIMELY FILE FORMS 4

38. Wanger served as a member of the AltiGen Board of Directors from January 2007 through January 2009.

39. The Fund was a 10% owner of AltiGen stock from at least July 2008 through 2010.

40. During this time, Wanger failed to timely file the requisite Forms 4 with the Commission regarding at least eight personal transactions in AltiGen securities.

41. Wanger Management also failed to timely file the requisite Forms 4 for the Fund regarding at least forty transactions in AltiGen securities.

42. Section 16(a) of the Exchange Act and Rule 16a-3 thereunder require directors and persons owning more than 10% of a company's stock to file a Form 4 within two business days of the acquisition or disposition of the security.

43. AltiGen filed a Form 8-K, dated January 8, 2009, stating:

> In late 2008, we were informed by Eric Wanger, a Board member, that he had failed to timely file his Forms 3, 4 and/or 5, in connection with a significant number of purchases of AltiGen common stock during the period beginning on January 23, 2007 and ending on September 30, 2008. In response, the company, with the assistance of outside counsel, reviewed Mr. Wanger's trading activities and discovered that certain of the purchases of AltiGen's common stock by Mr. Wanger, or entities affiliated with Mr. Wanger, in April of 2007, March of 2008, June of 2008 and September through November of 2008, constituting approximately 25 separate trades in the aggregate amount of approximately $100,000, violated AltiGen's blackout period set forth in our insider trading policy. The Board was informed of these matters and has carefully reviewed them.
>
> On January 8, 2009, our Board decided to not nominate Mr. Wanger for re-election to the Board.

44. Wanger resigned from the AltiGen Board on January 26, 2009.

45. In connection with the conduct described above, Respondents Wanger and Wanger Management acted recklessly, or at least, negligently.

G. VIOLATIONS

46. As a result of the conduct described above, Wanger willfully violated Sections 17(a)(1) and 17(a)(3) of the Securities Act, and Section 10(b) of the Exchange Act

and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

47. As a result of the conduct described above, Wanger Management willfully violated Section 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

48. As a result of the conduct described above, Wanger willfully violated Section 16(a) of the Exchange Act and Rule 16a-3 thereunder, which require timely and accurate filings of Forms 4 with the Commission.

49. As a result of the conduct described above, Wanger Management willfully aided and abetted and caused the Fund's violations of Section 16(a) of the Exchange Act and Rule 16a-3 thereunder, which require timely and accurate filings of Forms 4 with the Commission.

50. As a result of the conduct described above, Wanger and Wanger Management willfully violated Section 206(3) of the Advisers Act, which states that it is unlawful for an investment adviser, "acting as principal for his own account, knowingly to sell any security to or purchase any security from a client . . . without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction."

51. As a result of the conduct described above, Wanger and Wanger Management willfully violated Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which prohibit fraudulent conduct by an investment adviser.

52. As a result of the conduct described above, Wanger willfully aided and abetted and caused Wanger Management's violations of Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, which prohibit fraudulent conduct by an investment adviser.

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;

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Sections 203(e) and (f) of the Advisers Act and Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Sections 9(e) and 9(d) of the Investment Company Act and Sections 203(i) and (j) of the Advisers Act; and

C. Whether, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, and 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 Section 17(a) of the Securities Act, Sections 10(b) and 16(a) of the Exchange Act and Rules 10b-5 and 16a-3 thereunder, and Sections 206(1), 206(2), 206(3), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, whether Respondents should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act, Section 21B(a) of the Exchange Act, Section 9(d) of the Investment Company Act, and Section 203(i) of the Advisers Act, and whether Respondents should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act, Sections 21B(e) and 21C(e) of the Exchange Act, and Section 203(j) 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

Commissioner Paredes
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66055 / December 23 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3343 / December 23 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14677

In the Matter of INVESTMENT PLACEMENT GROUP and ADOLFO GONZALEZ-RUBIO, Respondents.	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTIONS 203(e) AND 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 , MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Investment Placement Group ("IPG") and Adolfo Gonzalez-Rubio ("Gonzalez-Rubio") (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 Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

Summary

These proceedings arise out of the failure reasonably to supervise Aurelio Rodriguez ("Rodriguez"), a former registered representative and trader who engaged in a fraudulent interpositioning scheme. IPG was Rodriguez's employer, and Gonzalez-Rubio, then IPG's chief operating officer, was Rodriguez's direct supervisor. From approximately January through November 2008 ("relevant period"), while Rodriguez was associated with IPG, he perpetrated a fraudulent interpositioning scheme involving a Mexican investment adviser, InvesTrust, and utilizing a separate Mexican brokerage firm. Rodriguez, acting in concert with InvesTrust, 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 by needlessly interposing the Mexican brokerage firm into securities transactions between IPG and InvesTrust's institutional clients, including four Mexican pension funds. As a result of Rodriguez's misconduct, the pension funds paid approximately $65 million more for certain credit-linked notes than they would have had the Mexican brokerage firm not been unnecessarily interposed as a "middleman." IPG and Rodriguez each received more than $6 million as a result of Rodriguez's fraudulent scheme.

Rodriguez's fraudulent scheme went undetected by IPG due to its failure to establish adequate policies and procedures and a system for implementing those procedures which would reasonably be expected to prevent and detect interpositioning by its traders. During the relevant period, Gonzalez-Rubio was directly responsible for supervising Rodriguez and overseeing the trading room. Gonzalez-Rubio, however, delegated supervisory oversight of the trading to Rodriguez, which effectively allowed Rodriguez to supervise himself. Further, Gonzalez-Rubio failed to respond to red flags regarding Rodriguez's fraudulent scheme, including a dramatic rise in revenue resulting from the interpositioned transactions. As a result, IPG failed reasonably to supervise Rodriguez within the meaning of Section 15(b)(4)(E) of the Exchange Act and Section 203(e)(c) of the Advisers Act. As a result, Gonzalez-Rubio failed reasonably to supervise Rodriguez within the meaning of Section 15(b)(4)(E) as incorporated by Section 15(b)(6) of the Exchange Act and Section 203(e)(c) of the Advisers Act.

Respondents

1. **Investment Placement Group** is a California corporation with its principal place of business in San Diego, California. It has been registered with the Commission as a broker-dealer since 1991 and as an investment adviser from January 2006 until June 2010, when it withdrew its registration. IPG is owned, directly or indirectly through family trusts, by several individuals associated with the firm. In February 2010, IPG's owners registered a new entity called IPG Investment Advisors, LLC as an investment adviser with the Commission.

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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.

2. **Adolfo Gonzalez-Rubio**, age 49, resides in Coronado, California. He joined IPG in 1990 and has since held positions of increasing responsibility. During the relevant period, he was IPG's chief operating officer, directly responsible for supervising Rodriguez and overseeing the trading room. In 2009, Gonzalez-Rubio became IPG's chief executive officer, a position he currently holds. He currently owns 26% of the firm.

Other Relevant Person

3. **Aurelio Rodriguez**, age 42, formerly of Coronado, California, currently resides in Zapopan, Mexico. Rodriguez is not currently associated with a registered broker-dealer. Rodriguez was a registered representative with IPG from 1995 until November 12, 2010, when he resigned from the firm.

Background

4. In 2001, an IPG registered representative approached IPG with a proposal from InvesTrust. In exchange for placing institutional client trades through IPG and referring clients, InvesTrust would receive 70% of the markups that IPG earned from trading by InvesTrust's institutional clients. IPG agreed to the proposal and opened a separate proprietary trading account with its clearing firm ("IPG Proprietary Account") through which Rodriguez executed principal trades on behalf of IPG, with IPG acting as a counterparty to InvesTrust's institutional clients. The remaining 30% of the markups earned in the IPG Proprietary Account would be split evenly among the registered representative, IPG, and Rodriguez.

5. Between 2001 through 2007, InvesTrust invested primarily in Mexican government and corporate bonds and steadily increased the size and number of institutional trades it placed through IPG. Beginning in 2008, InvesTrust invested its pension fund clients in credit-linked notes, dramatically increasing the number trades it placed through IPG. By this time, InvesTrust had also increased its share of the markups generated from these trades to 75%, with the registered representative, IPG, and Rodriguez splitting the remaining 25% equally.

The Interpositioning Scheme

6. From January through November 2008, Rodriguez, acting in concert with InvesTrust, acquired ten different credit-linked notes in the IPG Proprietary Account. Rodriguez knew that the notes were slated for InvesTrust's pension fund clients. IPG, through Rodriguez, added a markup of roughly 1.5% to 4.5% to the purchase price, and then sold the notes to the Mexican brokerage firm. Within a day or so, IPG, through Rodriguez, repurchased the notes from the Mexican brokerage firm (at a slightly higher price), added another markup, and then sold the securities to InvesTrust's pension fund clients. In some instances, Rodriguez repeated the buy/sell pattern with the Mexican brokerage firm multiple times, driving up the price with each successive trade, before finally selling the notes to the pension funds at artificially inflated prices.

7. For each transaction, InvesTrust specified in advance the trade date, the amount of securities to be bought and sold by IPG and the Mexican brokerage firm, the successively higher prices to be paid (and thus the markup to be charged on each trade), and the final price to be paid by its pension fund clients. Rodriguez received the instructions for the fraudulent transactions

from InvesTrust at his San Diego, California office. From there, he confirmed the order with the Mexican brokerage firm via e-mail and then submitted the principal trade electronically to IPG's U.S.-based clearing firm for processing.

8. Beginning in July 2008, the number of interpositioned trades between IPG and the Mexican brokerage firm increased as the pension funds purchased new credit-linked notes. The interpositioning scheme added about 12% to 14% to the cost of four new notes the pension funds purchased from IPG between July and November 2008.

Failure Reasonably to Supervise Rodriguez

9. IPG failed reasonably to supervise Rodriguez because it did not establish adequate policies and procedures and a system to implement the procedures which would reasonably be expected to prevent and detect Rodriguez's fraudulent interpositioning scheme. IPG's written supervisory procedures ("WSP") listed interpositioning as a prohibited activity but only summarily stated that "[a] trader may not interpose IPG or any account or any other dealer between a customer order and the best available market." Aside from this statement in the WSP, IPG failed to establish sufficient procedures for reviewing transactions in the IPG Proprietary Account, where Rodriguez executed the InvesTrust trades, to monitor for suspicious trading, such as interpositioning. If IPG had procedures that required periodic supervisory review of transactions in the IPG Proprietary Account, the firm could have reasonably discovered that Rodriguez was interposing the Mexican brokerage firm between IPG and the ultimate purchasers of the securities, thereby generating millions in improper markups.

10. During the relevant period, Gonzalez-Rubio, IPG's chief operating officer, was directly responsible for supervising Rodriguez and overseeing the trading room. Gonzalez-Rubio failed reasonably to supervise Rodriguez with a view towards preventing Rodriguez's antifraud violations because he unreasonably delegated oversight of activity in the IPG Proprietary Account to Rodriguez, which resulted in Rodriguez effectively supervising himself. Gonzalez-Rubio knew that no one except Rodriguez executed trades for InvesTrust. While in response to Gonzalez-Rubio's daily inquiries, Rodriguez repeatedly assured Gonzalez-Rubio verbally that everything was fine with InvesTrust, Gonzalez-Rubio did not independently review InvesTrust's overall trading activity in the IPG Proprietary Account. As a result, Rodriguez was able to use the IPG Proprietary Account to carry out the interpositioning scheme and charge additional markups without detection.

11. Gonzalez-Rubio also failed reasonably to supervise Rodriguez because he failed to respond to red flags that could have led to discovery of Rodriguez's misconduct. These red flags included: (a) a dramatic increase in IPG's 2008 revenues, 78% of which was derived from the additional markups that IPG earned from the interposed trades; and (b) Gonzalez-Rubio's discovery in August 2008 that InvesTrust had been receiving 70% of the markups in the IPG Proprietary Account generated from trades by InvesTrust's institutional clients; and (c) InvesTrust's insistence that its share of the markups be deposited directly into a foreign bank account held in name of a related Nevis-based entity, rather than into U.S. bank accounts, as had been its prior practice. Had Gonzalez-Rubio responded to these red flags, it is likely that he could have prevented and detected Rodriguez's antifraud violations.

Violations

12. As a result of the conduct described above, Rodriguez 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.

13. 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." 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., Gilford Sec., Inc., et al., Securities Act Rel. No. 9264, 2011 SEC LEXIS 3419 (Sept. 30, 2011). 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. Similarly, Sections 203(e) and 203(f) of the Advisers Act authorize the Commission to sanction an investment adviser or person associated with an investment adviser for failure to supervise. The Commission has repeatedly emphasized that the duty to supervise is a critical component of the federal regulatory scheme. See, e.g., Thomas C. Palmer and Aeneas Capital Mgmt., L.P., Advisers Act Rel. No. 1693, 2008 SEC LEXIS 1693 (July 23, 2008).

14. As a result of the conduct described above, IPG and Gonzalez-Rubio failed reasonably to supervise Rodriguez with a view to detecting and preventing Rodriguez's willful violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

IPG's Remedial Efforts

15. In determining to accept the Offers, the Commission considered remedial acts promptly taken by the Respondents and the cooperation afforded the Commission staff.

Undertakings

16. IPG has undertaken to review its policies, procedures, and systems regarding the detection and prevention of interpositioning violations. Within ninety days of the entry of this Order, unless otherwise extended by the staff of the Commission for good cause shown, IPG shall submit a report to the Commission describing the review performed and the conclusions and changes made as a result of this review. Further, at the time that IPG submits the report, IPG shall certify to the Commission in writing that it has established procedures, and a system for applying such procedures, which are reasonably expected to prevent and detect, insofar as practicable, the violations described in this Order.

17. Gonzalez-Rubio has undertaken to provide to the Commission, within 15 days after the end of the three-month suspension period described below, an affidavit that he has complied fully with the sanctions described in Section IV below.

18. IPG undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in this Order. In connection with such cooperation, IPG has undertaken:

a. To produce, without service of a notice or subpoena, any and all documents and other information reasonably requested by the Commission's staff, with a custodian declaration as to their authenticity, if requested;

b. To use its best efforts to cause IPG's current and former employees to be interviewed by the Commission's staff, at the option of the staff with representatives of other government agencies present, at such times and places as the staff reasonably may direct. Live interviews on one week's notice at the Commission's Los Angeles office, or at any U.S or state government office in San Diego, California, and telephone interviews on 72 hours notice, at the option of the staff, shall be deemed to be reasonable.

c. To use its best efforts to cause IPG's employees to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be reasonably requested by the Commission's staff; and

d. In connection with any interviews of IPG employees to be conducted pursuant to this undertaking, requests for such interviews may be provided by the Commission's staff to Sean T. Prosser, Morrison & Foerster LLP, 12531 High Bluff Drive, Suite 100, San Diego, CA 92130-2040, or such other counsel that may be substituted by IPG.

In determining whether to accept the Offers, the Commission has considered IPG's undertakings.

19. IPG undertakes to certify, in writing, compliance with the undertaking(s) set forth above. The certification shall identify the undertaking(s), 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 IPG agrees to provide such evidence. The certification and supporting material shall be submitted to Michele Wein Layne, Associate Regional Director, Los Angeles Regional Office, Securities and Exchange Commission, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

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

A. Respondent IPG is censured.

B. Respondent IPG shall, within 30 days of the entry of this Order, pay a civil penalty in the amount of $260,000 to the United States Treasury. It is further ordered that Respondent IPG shall pay disgorgement of $3,572,015.56 and prejudgment interest of $240,012.37 to the United States Treasury. Payment shall be made in the following installments. Respondent IPG shall, within 30 days of the entry of the Order, pay $1,000,000. The remaining balance of $2,812,027.93, plus post-judgment interest pursuant to SEC Rule of Practice 600, shall be paid in sixteen (16) equal installments. Each installment shall be due within ten (10) days after the end of the quarter for the sixteen (16) quarters following the entry of this Order.

C. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. §3717, shall be due and payable immediately, without further application. 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 IPG as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Michele Wein Layne, Associate Regional Director, Securities and Exchange Commission, 5670 Wilshire Blvd., Suite 1100, Los Angeles, CA 90036.

D. Respondent IPG shall comply with the undertakings enumerated in Section III, Paragraphs 16 and 19, above.

E. Respondent Gonzalez-Rubio be, and hereby is, suspended from association in a supervisory capacity with any broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization for a period of three (3) months, effective on the second Monday following the entry of this Order.

F. Respondent Gonzalez-Rubio shall comply with the undertaking enumerated in Section III, Paragraph 17, above.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9289 / December 23 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 66056 / December 23, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3344/ December 23 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29894 / December 23, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14678

In the Matter of **AURELIO RODRIGUEZ,** **Respondent.**	**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, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to 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 Aurelio Rodriguez ("Rodriguez" or "Respondent").

II.

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

III.

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

Summary

These proceedings arise out of a fraudulent interpositioning scheme perpetrated by Aurelio Rodriguez ("Rodriguez"), a former registered representative and trader of Investment Placement Group ("IPG"), a San Diego-based registered broker-dealer and investment adviser. Rodriguez's scheme involved a Mexican investment adviser, InvesTrust, and a separate Mexican brokerage firm. From approximately January through November 2008 ("relevant period"), while he was associated with IPG, Rodriguez, acting in concert with InvesTrust, violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by needlessly interposing the Mexican brokerage firm into securities transactions between IPG and InvesTrust's institutional clients, including four Mexican pension funds. As a result of Rodriguez's misconduct, the pension funds paid approximately $65 million more for certain credit-linked notes than they would have had the Mexican brokerage firm not been unnecessarily interposed as a "middleman." As a result of his misconduct, Rodriguez received more than $6 million in additional markups generated from the interpositioned transactions.

Respondent

1. **Aurelio Rodriguez**, age 42, formerly of Coronado, California, currently resides in Zapopan, Mexico. Rodriguez is not currently associated with a registered broker-dealer. Rodriguez was a registered representative with IPG from 1995 until November 12, 2010, when he resigned from the firm.

Other Relevant Entity and Person

2. **Investment Placement Group** is a California corporation with its principal place of business in San Diego, California. It has been registered with the Commission as a broker-dealer since 1991 and as investment adviser from January 2006 until June 2010, when it withdrew its registration. IPG is owned, directly or indirectly through family trusts, by several individuals associated with the firm. In February 2010, IPG's owners registered a new entity called IPG Investment Advisors, LLC as an investment adviser with the Commission.

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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.

3. **Adolfo Gonzalez-Rubio**, age 49, resides in Coronado, California. He joined IPG in 1990 and has since held positions of increasing responsibility. During the relevant period, he was IPG's chief operating officer, directly responsible for supervising Rodriguez and overseeing the trading room. In 2009, Gonzalez-Rubio became IPG's chief executive officer, a position he currently holds. He currently owns 26% of the firm.

Background

4. In 2001, an IPG registered representative approached IPG with a proposal from InvesTrust. In exchange for placing institutional client trades through IPG and referring clients, InvesTrust would receive 70% of the markups that IPG earned from trading by InvesTrust's institutional clients. IPG agreed to the proposal and opened a separate proprietary trading account with its clearing firm ("IPG Proprietary Account") through which Rodriguez executed principal trades on behalf of IPG, with IPG acting as a counterparty to InvesTrust's institutional clients. The remaining 30% of the markups earned in the IPG Proprietary Account would be split evenly among the registered representative, IPG, and Rodriguez.

5. Between 2001 through 2007, InvesTrust invested primarily in Mexican government and corporate bonds and steadily increased the size and number of institutional trades it placed through IPG. Beginning in 2008, InvesTrust invested its pension fund clients in credit-linked notes, dramatically increasing the number trades it placed through IPG. By this time, InvesTrust had also increased its share of the markups generated from these trades to 75%, with the registered representative, IPG, and Rodriguez splitting the remaining 25% equally.

The Interpositioning Scheme

6. From January through November 2008, Rodriguez, acting in concert with InvesTrust, acquired ten different credit-linked notes in the IPG Proprietary Account. Rodriguez knew that the notes were slated for InvesTrust's pension fund clients. IPG, through Rodriguez, added a markup of roughly 1.5% to 4.5% to the purchase price, and then sold the notes to the Mexican brokerage firm. Within a day or so, IPG, through Rodriguez, repurchased the notes from the Mexican brokerage firm (at a slightly higher price), added another markup, and then sold the securities to InvesTrust's pension fund clients. In some instances, Rodriguez repeated the buy/sell pattern with the Mexican brokerage firm multiple times, driving up the price with each successive trade, before finally selling the notes to the pension funds at artificially inflated prices.

7. For each transaction, InvesTrust specified in advance the trade date, the amount of securities to be bought and sold by IPG and the Mexican brokerage firm, the successively higher prices to be paid (and thus the markup to be charged on each trade), and the final price to be paid by its pension fund clients. Rodriguez received the instructions for the fraudulent transactions from InvesTrust at his San Diego, California office. From there, he confirmed the order with the Mexican brokerage firm via e-mail and then submitted the principal trade electronically to IPG's U.S.-based clearing firm for processing.

8. Beginning in July 2008, the number of interpositioned trades between IPG and the Mexican brokerage firm increased as the pension funds purchased new credit-linked notes.

The interpositioning scheme added about 12% to 14% to the cost of four new notes the pension funds purchased from IPG between July and November 2008.

Violations

9. As a result of the conduct described above, Rodriguez 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.

Disgorgement and Civil Penalties

10. Respondent has submitted a sworn Statement of Financial Condition dated August 31, 2011 and other evidence and has asserted his inability to pay full disgorgement plus prejudgment interest and a civil penalty.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, Section 203(f) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Rodriguez 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 Rodriguez 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 shall, within 30 days of entry of this Order, pay disgorgement of $6,041,810.46 and prejudgment interest of $613,666.85, but that payment of such amount except for $1 million is waived and the Commission is not imposing a penalty based upon Respondent's sworn representations in his Sworn Financial Statement dated August 31, 2011 and other documents submitted to the Commission. The payment required by this Order shall be made to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Rodriguez as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Michele Wein Layne, Associate Regional Director, Securities and Exchange Commission, 5670 Wilshire Blvd., Suite 1100, Los Angeles, CA 90036.

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 disgorgement, prejudgment interest, and the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement, interest, and a penalty should not be ordered; (3)

contest the amount of disgorgement and interest to be ordered, or 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, Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66060 / December 28, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14679

In the Matter of **ANDREW CACCIOPPOLI,** **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 Andrew Caccioppoli ("Caccioppoli" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III. 3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, 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. Caccioppoli, age 51, resides in Mahopac, New York. From December 1991 to July 2005, he was a securities lending representative associated with Janney Montgomery Scott, LLC ("Janney"), a broker-dealer registered with the Commission.

2. On September 24, 2007, the Commission filed an amended complaint against Caccioppoli in the United States District Court for the Eastern District of New York alleging that he violated the antifraud provisions of the federal securities laws, *SEC v. Joseph Simone, et al.*, 07-cv-3928 (JG)(RML). The Commission's complaint alleges, among other things, that between 2002 and 2005, Caccioppoli knowingly engaged in a scheme to defraud Janney in connection with the lending and borrowing of securities.

3. On December 13, 2011, the court entered a consent judgment which, among other things, permanently enjoined Caccioppoli from violating Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

IV.

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

Accordingly, it is hereby ORDERED:

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

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

By the Commission.

Elizabeth M. Murphy

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. 3347 / December 29, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14552

In the Matter of

VINAYAK S. GOWRISH,

Respondent.

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

I.

On September 16, 2011, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Vinayak S. Gowrish ("Gowrish" 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 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. Gowrish, 33 years old, is a resident of San Francisco, California. During the relevant period, Gowrish was an associate at TPG Capital, L.P. ("TPG"), which at the time was an unregistered investment adviser.

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. On July 15, 2011, the district court entered a final judgment against Respondent Gowrish in which the court, in addition to permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, ordered him to pay disgorgement of $12,000 (and prejudgment interest thereon) and a $100,000 civil penalty. Respondent Gowrish has paid the ordered disgorgement (and prejudgment interest thereon) and civil penalty to the Commission in accordance with the court's order.

IV.

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

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

Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9290 / December 29, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 66066 / December 29, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3345 / December 29, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29895 / December 29, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14680

In the Matter of

CALHOUN ASSET MANAGEMENT, LLC, and KRISTA LYNN WARD A/K/A KRISTA LYNN KARNEZIS

Respondents.

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(e), 203(f), AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e), 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 Calhoun Asset Management, LLC ("Calhoun") and Krista Lynn Ward a/k/a Krista Lynn Karnezis ("Ward") (collectively, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. This matter concerns materially false and misleading statements made by Calhoun, the investment adviser to two funds of funds, and Ward, its principal. Ward raised the assets managed by Calhoun by grossly exaggerating Calhoun's assets under management. Ward also made misleading statements about Calhoun's due diligence process, and filed numerous false Forms ADV with the Commission. In addition to making false and misleading statements, Ward failed to maintain records to support the performance that Calhoun claimed in its marketing materials.

B. RESPONDENTS

2. Calhoun is an Illinois limited liability company located in Chicago, Illinois, that was registered with the Commission as an investment adviser from August 31, 2007 until it withdrew its registration on April 22, 2010. Calhoun was the investment adviser to a master fund, "Calhoun Master Fund SPC, Ltd.," a Cayman Islands company, and two feeder funds: "Calhoun Multi-Series Fund LP (f/k/a Triumph Multi-Series Fund)," a Delaware limited partnership, and "Calhoun Fund SPC, Ltd. (f/k/a Calhoun Market Neutral Fund)," a Cayman Islands company. Calhoun has no disciplinary history.

3. Ward, age 41, resides in Park Ridge, Illinois. Ward was the managing member, sole owner, and sole full-time employee of Calhoun. Ward has no disciplinary history.

C. OTHER RELEVANT ENTITIES

4. Skore Financial Management, LLC a/k/a Taipan Wealth Advisors LLC a/k/a FQ Advisors, LLC ("Skore") was an Illinois limited liability company located in Chicago, Illinois, that was registered with the Commission as an investment adviser from January 7, 2002 until February 14, 2011, when its registration was cancelled. Skore was dissolved as a corporate entity on September 11, 2009. Prior to Skore's dissolution, Ward was its CEO and Chief Compliance Officer. Skore has no disciplinary history.

5. Skore Investment Advisory Services, LLC ("SIAS") is a Nevis, West Indies corporation. SIAS is not registered with the Commission. SIAS is the investment adviser to "Triumph Offshore Fund," an offshore fund-of-funds open only to insurance companies. Ward is the managing member of SIAS.

D. ALLEGATIONS

The Calhoun Hedge Funds

6. In 2006, Ward started two hedge funds – Triumph Multi-Series Fund, a Delaware limited partnership (later renamed Calhoun Multi-Series Fund LP) (the "CMSF Fund"), and Calhoun Market Neutral Fund, a Cayman Islands company (later renamed Calhoun Fund SPC, Ltd.) (the "Calhoun Fund") (together, the "Funds"). The CMSF Fund offered limited partnership interests to investors, while the Calhoun Fund offered several different classes of shares of stock.

7. Calhoun managed the two Funds, and Ward was the managing member and sole full-time employee of Calhoun. Ward set up the CMSF Fund and the Calhoun Fund to each be a fund of funds, investing only in other hedge funds. The stated strategy of the Funds was to seek long term capital growth and positive returns through the selection of investment managers across a widely diversified pool of strategies.

8. Ward attracted capital to the Funds by aggressively marketing herself as an experienced hedge fund manager, despite having no experience in portfolio management. In an effort to promote the Funds, Ward attended various asset management conferences, distributed marketing materials, and established an Internet website. She solicited some investments for the Funds directly from individuals she met at conferences.

False and Misleading Statements to Orizon

9. In 2006, Ward entered into discussions with Orizon Investment Counsel, LLC, an asset management firm registered with the Commission as an investment adviser, in an attempt to attract new investors. During these discussions, Ward told executives at Orizon that she had several hundred million dollars under management.

10. On the due diligence questionnaire filled out by Ward (on behalf of Calhoun and SIAS) and given to Orizon in 2006, in response to the "current assets under management" question, Ward wrote that she had "[a]pproximately $237 million under advisement." In the following question on the questionnaire, which asks about "the growth of assets under management over the last five years," Ward stated that her assets under management grew from $27 million in 1999 to $200 million. At the time she filled out the questionnaire, however, Ward had never had more than $3 million under management.

11. Orizon entered into an Advisory Fee Sharing Agreement with Calhoun in September 2006 (the "Orizon Agreement"). The Orizon Agreement contemplated that Orizon would recommend certain of its advisory clients to invest in the CMSF Fund. Orizon communicated to its advisory clients that Calhoun had a substantial amount of assets under management, based on what Ward had told Orizon. Orizon also gave a copy of the due diligence questionnaire filled out by Ward to some of its advisory clients.

12. Approximately twenty of Orizon's advisory clients purchased limited partnership interests in the CMSF Fund, making Orizon the largest source of investors in Calhoun's Funds. Ward's representations that she had hundreds of millions of dollars under management were instrumental in convincing Orizon to recommend that its clients invest in the CMSF Fund.

Calhoun's Marketing Materials

13. Ward created various marketing materials in an attempt to attract investors. Ward distributed the marketing materials to prospective investors at conferences and through third parties, and made them available on an Internet website. These marketing materials contain various misrepresentations and unsupported performance claims.

14. The marketing materials refer to a 10-year track record with 11+% average annual returns. Ward, however, did not maintain documentation supporting this track record. Ward only maintained records dating back to 2007, and her recordkeeping was scattered and disorganized.

15. The marketing materials also contain misrepresentations about performance returns. In a PowerPoint presentation Ward provided to prospective and current investors, via Orizon and through her marketing activities, Ward included a full-page chart of monthly and annual performance returns from 1999 through 2009. The legend at the bottom of the page states that "[t]hese returns represent our flagship fund, Calhoun Fund SPC, Ltd." Calhoun Fund SPC, Ltd., however, did not commence operations until January 1, 2007 – and therefore the fund had no performance return data from 1999 through 2006.

16. Calhoun's marketing materials state that Ward "Grew [Skore] from $0 to $313M" – suggesting that Skore had over $300 million under management. Skore, however, never had any assets under management.

False and Misleading Statements Regarding Due Diligence

17. Calhoun touted its due diligence capabilities in marketing materials, written by Ward and provided to prospective and current investors, which described the criteria for selecting managers: past performance; diversification in relation to other managers; assets under management; absence of significant conflicts of interest; overall integrity and reputation; percentage of business time devoted to investment activities; and fees charged.

18. Calhoun also described a network of sources for identifying prospective managers. Calhoun represented that its due diligence included regular monitoring and performance reviews of managers, conducted at least monthly, along with periodic visits to managers. In materials available on its Internet website and authored by Ward, Calhoun stated that "we take every precaution necessary to complete **thorough due diligence and research** on every manager we recommend" (emphasis in original).

19. Calhoun's actual due diligence, however, was virtually nonexistent. Indeed, Ward did not even perform the due diligence herself, instead outsourcing the due diligence to a third party, Second City Alternatives, LLC ("Second City"). Once Ward outsourced

the due diligence to Second City, Ward did not perform any due diligence services, nor did she oversee Second City. According to Ward, Second City breached its agreement to perform the due diligence, did not provide any due diligence reports, and only substantiated its services with some handwritten notes.

False and Misleading Statements on Forms ADV

20. On the Forms ADV she filed with the Commission, Ward repeatedly misrepresented Calhoun's assets under management. Ward first registered Calhoun as an investment adviser on August 31, 2007. On Calhoun's Form ADV, which Ward herself completed and electronically signed in her capacity as the managing member of Calhoun, Ward stated that Calhoun had $30 million in assets under management. In reality, at the time, Calhoun had less than $6 million under management.

21. On February 18, 2009, Ward filed an amendment to Calhoun's Form ADV. Ward herself completed and electronically signed the amendment in her capacity as the "owner" of Calhoun. Ward represented that Calhoun had $79.8 million in assets under management. In reality, at the time, Calhoun had approximately $7 million under management. Ward never amended the Form ADV to reflect Calhoun's actual assets under management.

22. Ward also misrepresented Skore's assets under management throughout its existence. From 2004 through 2008, in Forms ADV which Ward herself completed and electronically signed, Ward reported figures for Skore's assets under management ranging from $24 million to $335 million. In reality, Skore never had any assets under management.

E. VIOLATIONS

23. As a result of the conduct described above, Calhoun and Ward 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;

24. As a result of the conduct described above, Calhoun willfully violated, and Ward willfully aided and abetted and caused Calhoun's violations of, Section 203A of the Advisers Act by registering with the Commission as an investment adviser despite being prohibited from doing so;

25. As a result of the conduct described above, Calhoun willfully violated, and Ward willfully aided and abetted and caused Calhoun's violations of, Section 204 of the Advisers Act and Rule 204-2(a)(16) thereunder by failing to keep all documents that are necessary to form the basis for, or demonstrate the calculation of, the performance or rate of return of any or all managed accounts that it used in advertisements or other communications distributed to 10 or more persons;

26. As a result of the conduct described above, Calhoun and Ward willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder by making false or misleading statements to, or otherwise defrauding, investors or prospective investors in a pooled investment vehicle; and

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

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;

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Sections 203(e) and 203(f) of the Advisers Act, including, but not limited to, disgorgement and prejudgment interest pursuant to Section 203(j) of the Advisers Act and civil penalties pursuant to Section 203(i) of the Advisers Act;

C. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act; and

D. Whether, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, and 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 Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 203A, 204, 206(4), and 207 of the Advisers Act and Rules 204-2(a)(16) and 206(4)-8 thereunder.

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

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 **December 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

(3 Documents)

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66017 / December 21, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14646

In the Matter of **AEC, I, Inc.,** **Aegir Ventures, Inc.,** **American Toy Vending, Inc.,** **Biometric Security Corp. (a/k/a Pender Financial Group Corp.), and** **Bridge-It Corp.,** **Respondents.**	**ORDER MAKING FINDINGS AND REVOKING REGISTRATION OF SECURITIES PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO BIOMETRIC SECURITY CORP. (a/k/a PENDER FINANCIAL GROUP CORP.)**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors to accept the Offer of Settlement submitted by Biometric Security Corp. (a/k/a Pender Financial Group Corp.) ("Biometric" or "Respondent") pursuant to Rule 240(a) of the Rules of Practice of the Commission, 17 C.F.R. § 201.240(a), for the purpose of settlement of these proceedings initiated against Respondent on November 28, 2011, pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act").

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 as to Biometric Security Corp. (a/k/a Pender Financial Group Corp.) ("Order"), as set forth below.

III.

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

1. Biometric (CIK No. 1000168) is a Wyoming corporation located in Vancouver, British Columbia, Canada. At all times relevant to this proceeding, the securities of Biometric have been registered under Exchange Act Section 12(g).

2. Biometric has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 or 13a-16 thereunder because it has not filed any periodic reports with the Commission since the period ended September 30, 1999.

IV.

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

Accordingly, it is hereby ORDERED that:

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

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

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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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.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65947 / December 13, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14661

In the Matter of Ramco Energy PLC (n/k/a SeaEnergy PLC), RTI, Inc., RTICA Corp., Runcorp, Inc. (f/k/a Remote Utilities Network, Inc.), Source Scientific, Inc., Spectacular Attractions, Inc., SpectraCom, Inc., Sportsco, Inc., and Stationmate, Inc. (n/k/a Oxysure, 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 Ramco Energy PLC (n/k/a SeaEnergy PLC), RTI, Inc., RTICA Corp., Runcorp, Inc. (f/k/a Remote Utilities Network, Inc.), Source Scientific, Inc., Spectacular Attractions, Inc., SpectraCom, Inc., Sportsco, Inc., and Stationmate, Inc. (n/k/a Oxysure, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

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1. Ramco Energy PLC (n/k/a SeaEnergy PLC) (CIK No. 1032347) is a Scottish corporation located in Aberdeen, Scotland, United Kingdom with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Ramco is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 1999, which reported a net loss of over £1.7 million for the prior twelve months. As of December 7, 2011, the company's stock (symbol "SEYXF") was traded on the over-the-counter markets.

2. RTI, Inc. (CIK No. 81699) is a dissolved New York corporation located in Sunland Park, New Mexico with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). RTI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 1999, which reported a net loss of $402,152 for the prior three months.

3. RTICA Corp. (CIK No. 1061015) is an Ontario corporation located in Stoney Creek, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). RTICA 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 May 31, 2002, which reported a deficit of over $10.4 million (Canadian) for the prior twelve months.

4. Runcorp, Inc. (f/k/a Remote Utilities Network, Inc.) (CIK No. 1082703) is a Nevada corporation located in Calgary, Alberta, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Runcorp 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 $377,273 for the prior nine months.

5. Source Scientific, Inc. (CIK No. 312835) is a suspended California corporation located in Garden Grove, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Source Scientific is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 1997, which reported a net loss of over $1 million for the nine month period ended March 31, 1996.

6. Spectacular Attractions, Inc. (CIK No. 1139529) 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). Spectacular Attractions 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 May 1, 2001, which reported a deficit of $2,372 from the the company's December 3, 1999 organization to November 30, 2000.

7. SpectraCom, Inc. (CIK No. 704410) is a Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SpectraCom is delinquent in its periodic filings with the

Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2000, which reported a net loss of $6,236 since the company's March 21, 1997 inception.

8. Sportsco, Inc. (CIK No. 1434097) is a dissolved Wyoming corporation located in Cheyenne, Wyoming with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Sportsco 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, 2008, which reported a net loss of $70 for the prior twelve months.

9. Stationmate, Inc. (n/k/a Oxysure, Inc.) (CIK No. 1433715) is a dissolved Wyoming corporation located in Cheyenne, Wyoming with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Stationmate 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, 2008, which reported a net loss of $142 for the prior twelve months.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65891 / December 5, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14652

In the Matter of **Regenesis Centers, Inc.,** **Regenex, Inc.,** **A.J. Ross Logistics, Inc.,** **Southern Gourmet Products, Inc.,** **Status Game Corp., and** **Suncast Network, 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 Regenesis Centers, Inc., Regenex, Inc., A.J. Ross Logistics, Inc., Southern Gourmet Products, Inc., Status Game Corp., and Suncast Network, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Regenesis Centers, Inc. (CIK No. 1317971) is a dissolved Florida corporation located in Boca Raton, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Regenesis 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, 2007, which reported a net loss of $8,011 for the prior three months.

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2. Regenex, Inc. (CIK No. 863187) is a void Delaware corporation located in Chicago, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Regenex 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, 1993, which reported a net loss of over $1.6 million for the prior nine months.

3. A.J. Ross Logistics, Inc. (CIK No. 760031) is a New Jersey corporation located in Keasbey, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). A.J. Ross Logistics is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended February 28, 1993, which reported a net loss of $547,909 for the prior three months.

4. Southern Gourmet Products, Inc. (CIK No. 791302) is a dissolved Florida corporation located in Miami Lakes, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Southern Gourmet is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended August 31, 1993, which reported a net loss of $179,624 for the prior six months.

5. Status Game Corp. (CIK No. 714285) is a forfeited Delaware corporation located in Newington, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Status Game is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended February 28, 1993.

6. Suncast Network, Inc. (CIK No. 1448717) is a delinquent Delaware corporation located in Arlington Heights, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Suncast is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10 registration statement on October 31, 2008, which reported a net loss of $524,233 for the six months ended June 30, 2008.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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 **December 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.

Kathleen L. Casey served as SEC Commission
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

(3 Documents)

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65985 / December 15, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3345 / December 15, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14670

In the Matter of **JUAN CARLOS GUILLÉN ZERPA** **Respondent.**	**ORDER OF FORTHWITH SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Juan Carlos Guillén Zerpa ("Guillén") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. § 200.102(e)(2)].[1]

II.

The Commission finds that:

1. Since 1989, Guillén has been licensed as a certified public accountant in the Bolivarian Republic of Venezuela.

2. On December 14, 2011, a judgment was entered convicting Guillén of one count of conspiracy to obstruct an official proceeding in violation of Title 18 United States Code, Section 1512(k), before the United States District Court for the District of Connecticut, in United States v. Juan Carlos Guillén Zerpa, 3:11-cr-76 (SRU).

[1] Rule 102(e)(2) provides, in pertinent part, "[A]ny person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

3. As a result of his conviction, Guillén was sentenced to 14 months incarceration, two years supervised release and was ordered to pay a $10,000 fine. He was also ordered to forfeit $315,000.

III.

In view of the foregoing, the Commission finds that Guillén has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that Juan Carlos Guillén Zerpa is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

December 9, 2011

In the Matter of **Brendan Technologies, Inc.,** **CenterStaging Corp.,** **PGMI, Inc.,** **Thermal Energy Storage, Inc., and** **Trinity3 Corporation,** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Brendan Technologies, Inc. because it has not filed any periodic reports since the period ended March 31, 2008.

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of PGMI, Inc. because it has not filed any periodic reports since the period ended December 31, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Thermal Energy Storage, Inc. because it has not filed any periodic reports since the period ended March 31, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Trinity3 Corporation because it has not filed any periodic reports since the period ended September 30, 2006.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on December 9, 2011, through 11:59 p.m. EST on December 22, 2011.

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 65920 / December 9, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14656

In the Matter of Brendan Technologies, Inc., CenterStaging Corp., PGMI, Inc., Thermal Energy Storage, Inc., and Trinity3 Corporation, Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Brendan Technologies, Inc., CenterStaging Corp., PGMI, Inc., Thermal Energy Storage, Inc., and Trinity3 Corporation.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Brendan Technologies, Inc. ("BDTE") [1] (CIK No. 846732) is a defaulted Nevada corporation located in Carlsbad, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BDTE is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2008, which reported a net loss of $2,325,354 for the prior nine months. As of April 19, 2011, the common stock of BDTE was quoted on OTC Link, had five market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

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

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2. CenterStaging Corp. ("CNSC") (CIK No. 1172939) is a void Delaware corporation located in Burbank, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CNSC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2007, which reported a net loss of $4,473,599 for the prior three months. As of April 19, 2011, the common stock of CNSC 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. PGMI, Inc. ("PGMC") (CIK No. 1127005) is an expired Utah corporation located in Honolulu, Hawaii with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PGMC 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, 2006, which reported a net loss of $3,928,867 for the prior six months. As of April 19, 2011, the common stock of PGMC was quoted on OTC Link, had four market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

4. Thermal Energy Storage, Inc. ("THES") (CIK No. 313277) is a delinquent Colorado corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). THES 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, 2005, which reported a net loss of $1,000 for the prior three months. On August 26, 1999, THES consented to the entry of a order that it cease and desist from committing or causing any violations, and committing or causing any future violations of Exchange Act Sections 17(a)(3) and 17A(d)(1) and Rule 17Ad-18 thereunder. *Bassett Furniture Industries, Inc. and Thermal Energy Storage, Inc.*, Admin Proc. File No. 3-9988 (Aug. 26, 1999). As of December 7, 2011, the common stock of THES was quoted on OTC Link, had seven market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

5. Trinity3 Corporation ("TRYT") (CIK No. 1090051) is a void Delaware corporation located in Newport Beach, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TRYT 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 $469,838 for the prior nine months. As of April 19, 2011, the common stock of TRYT 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

6. 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.

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

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

III.

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

A. Whether the allegations contained in Section II 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