SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for **May 2014**, 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 JO WHITE, CHAIR

LUIS A. AGUILAR, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

KARA M. STEIN, COMMISSIONER

MICHAEL S. PIWOWAR, COMMISSIONER

(74 Documents)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

November 15, 2013

In The Matter Of	:	
	:	
Sovereign Lithium, Inc.	:	**ORDER OF SUSPENSION OF TRADING**
	:	
File No. 500-1	:	

It appears to the Securities and Exchange Commission that the public interest and the protection of investors require a suspension of trading in the securities of Sovereign Lithium, Inc. ("Sovereign Lithium") because of concerns regarding the accuracy and adequacy of information in the marketplace and potentially manipulative transactions in Sovereign Lithium's common stock. Sovereign Lithium is a Delaware corporation based in Denver, Colorado. It is quoted on OTC Link under the symbol SLCO.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EST on November 15, 2013 through 11:59 p.m. EST on November 29, 2013.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3740 / December 17, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15647

In the Matter of Frank Dappah, 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 Frank Dappah ("Respondent" or "Dappah").

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 herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Frank Dappah, age 33, is a resident of Charlotte, North Carolina. From at least

November 2010 through at least September 2013, Dappah was the principal of Yatalie Capital Management, a/k/a Yatalie Capital Management Co, Creato Funds L.P., a/k/a Yatalie Capital, Inc., a/k/a Creato Funds, L.P., a/k/a Yatalie Capital Management Co. (collectively, "Yatalie"), an investment adviser registered with the Commission since November 2010.

2. On November 21, 2013, a judgment was entered by consent against Dappah, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 203A, 204, 206(1), 206(2), 206(4) and 207 of the Advisers Act and Rules 204-2 and 206(4)-1 thereunder, in the civil action entitled Securities and Exchange Commission v. Frank Dappah, et al., Civil Action Number 3:13-cv-00546, in the United States District Court for the Western District of North Carolina.

3. The Commission's complaint against Dappah alleged that he and Yatalie, which Dappah controlled, made false and misleading statements to clients and prospective clients concerning the amount of assets under management at Yatalie, the number of clients at Yatalie, and the experience of Yatalie as an investment adviser. The Commission's complaint further alleged that Dappah and Yatalie wrongfully charged and then deducted fees from client accounts, without the authorization or consent of clients. The Commission's complaint further alleged that Dappah and Yatalie improperly registered with the Commission, failed to maintain required books and records of an investment adviser, and published a purported client testimonial that concerned the advice and other services rendered by Dappah and Yatalie.

IV.

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 10, 2014

IN THE MATTER OF	:	
Amogear Inc.	:	**ORDER OF SUSPENSION OF TRADING**
File No. 500-1	:	

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Amogear Inc. ("Amogear"), quoted under the ticker symbol AMOG, because the company has recently been the subject of spam e-mails touting the company's shares and because of potentially manipulative conduct in the trading of the company's shares.

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

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 8:30 a.m. EST on February 10, 2014 through 11:59 p.m. EST on February 24, 2014.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

March 27, 2014

In the Matter of **Advanced Cannabis Solutions, Inc.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Advanced Cannabis Solutions, Inc. ("Advanced Cannabis"), a Colorado corporation headquartered in Colorado Springs, Colorado. Advanced Cannabis is dually-quoted under the stock symbol "CANN" on the Over-the-Counter Bulletin Board ("OTC BB") and OTC Link. There are questions regarding whether certain undisclosed affiliates and shareholders of Advanced Cannabis common stock engaged in an unlawful distribution of securities through the OTC BB and OTC Link.

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

Therefore, it is ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended from the period 9:30 a.m. EDT, March 27, 2014, through 11:59 p.m. EDT, on April 9, 2014.

By the Commission.

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

April 10, 2014

In the Matter of **GrowLife, Inc.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that the public interest and the protection of investors require a suspension of trading in the securities of GrowLife, Inc. ("GrowLife") because of concerns regarding the accuracy and adequacy of information in the marketplace and potentially manipulative transactions in GrowLife's common stock. GrowLife is a Delaware corporation based in Woodland Hills, California. It is quoted on OTCBB and OTC Link under the symbol PHOT.

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

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on April 10, 2014, through 11:59 p.m. EDT on April 24, 2014.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72072 / May 1, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15861

In the Matter of

JAUYO ("JASON") LEE

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 Jauyo ("Jason") Lee ("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, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and 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. Lee, 29 years old, is currently imprisoned at the Lompoc Federal Correctional Complex in Lompoc, California. From June 2009 to April 2011, Lee worked as an investment banking analyst in the San Francisco office of Leerink Swann, LLC ("Leerink"), registered with the Commission as a broker-dealer and, during this time period, an investment advisor. From June 2011 to October 2012, Lee was a registered representative associated with another broker-dealer registered with the Commission.

2. On April 24, 2014, a final judgment was entered by consent against Lee, permanently enjoining him from future violations of Sections 10(b) and 14(e) of the Exchange Act and Rules 10b-5 and 14e-3 thereunder, in the civil action entitled SEC v. Lee, et al., Civil Action No. C 12-05031 RS in the United States District Court for the Northern District of California, San Francisco Division.

3. The Commission's complaint, filed on September 27, 2012, alleged that Lee, in breach of his duty of confidentiality to Leerink, provided his friend Victor Chen ("Chen") with material, nonpublic information about two pending corporate acquisitions of medical device companies. Chen subsequently purchased securities of both companies based on this material, nonpublic information, profiting more than $600,000 in illegal profits.

4. Specifically, the Commission's complaint alleged that Lee, as an investment analyst at Leerink, had access to confidential information regarding two of Leerink's clients. Lee learned that Leerink client Syneron Medical, Ltd. was negotiating an acquisition of Candela Corporation ("Candela") in 2009. Lee subsequently learned that Covidien plc. was negotiating an acquisition of Leerink client Somanetics Corporation ("Somanetics") in 2010. In the days leading up to the public announcements of the acquisitions of Candela and Somanetics, Lee and Chen engaged in a number of communications that were unusual in frequency, and Chen made sizable purchases of stock and call options in Candela and Somanetics. Although Chen had never invested in either Candela or Somanetics, he spent a significant portion of his available cash to buy these securities. Further, within days of the public announcement of the Candela acquisition, Lee withdrew large sums of cash from his bank account in late August to early September 2009 and, within 24 hours, Chen spent comparable sums of money to purchase shares of Candela.

5. On April 16, 2013, Lee pled guilty to one count of conspiracy to commit securities fraud in violation of Title 18 United States Code, Section 371 and one count of securities fraud in violation of Title 15 United States Code, Sections 78j(b) and 78ff before the United States District Court for the Northern District of California in United States v. Jauyo Lee a/k/a Jason Lee, Case No. CR 13-0180-001 RS. On July 24, 2013, a judgment in the criminal case was entered against Lee wherein he was sentenced to a prison term of 16 months followed by two years of supervised release.

6. The counts of the criminal information to which Lee pled guilty alleged that Lee engaged in a conspiracy (with Chen) to commit securities fraud by, among other things, providing material, nonpublic information to Chen in breach of Lee's duty of trust and confidentiality to Leerink and its clients and, in furtherance of the conspiracy, Chen purchased securities in Candela and Somanetics based on the material, nonpublic information, resulting in $610,099 in unlawful profits. In connection with the plea, Lee admitted that:

a. He gained access to material, nonpublic information concerning the acquisitions of Candela and Somanetics from his employer Leerink;

b. He communicated to Chen about the acquisitions of Candela and Somanetics, in breach of his duty of trust to Leerink and its clients;

c. By communicating to Chen information about the acquisitions of Candela and Somanetics, which was material and nonpublic, he acted with an intent to deceive and defraud;

d. Chen used the material, nonpublic information to purchase Candela and Somanetics stock and options, which he sold for substantial profits; and

e. He expected to benefit from the scheme.

IV.

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

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

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9581 / May 1, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 72073 / May 1, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3828 / May 1, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31037 / May 1, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15518

In the Matter of **DIEGO F. HERNANDEZ, THE WEALTH MANAGEMENT PARTNERS, LLC, WEALTH FINANCIAL, LIMITED LIABILITY COMPANY, DFHR INVESTMENTS, INC., and HD MILE HIGH MARKETING, INC.,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AS TO DIEGO F. HERNANDEZ AND HD MILE HIGH MARKETING, INC.**

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 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 Diego F. Hernandez ("Hernandez") and pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act against HD Mile High Marketing ("Mile High" or together with Hernandez "Respondents").

II.

Following the institution of administrative proceedings against Respondents on September 24, 2013, Respondents 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, Respondents consent, without admitting or denying the Commission's findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, to the entry of this Order Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to 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 ("Order"), as set forth below.

III.

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

A. Summary

1. Between July 2011 and approximately April 2013, Hernandez, through Wealth Management, Wealth Financial, DFHR, and HD Mile High, willfully violated the antifraud provisions of the Securities Act and the Exchange Act by raising and misappropriating approximately $921,000 from 13 Colorado investors through a fraudulent offering of securities. Hernandez carried out his fraudulent offering by meeting with each investor and telling them that he, through his entities, would invest their money in corporate bonds or other "safe" investments that would pay a guaranteed, above-market annual interest rate. In reality, Hernandez, through Wealth Management, Wealth Financial, DFHR, and HD Mile High, willfully misappropriated investor funds for (1) personal expenses, (2) business expenses, and (3) to repay other investors. HD Mile High is the only Hernandez entity still in existence; the other entities are now defunct.

2. Between July 2011 and January 2013, in connection with his fraudulent offering and through Wealth Management, Wealth Financial, and DFHR, Hernandez and his entities also willfully operated as unregistered brokers.

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

B. Respondents

3. Diego Hernandez, age 39, is a Colombian national who has been a lawful permanent resident of the United States since he was a child. He resides in Lone Tree, Colorado. Hernandez held a Series 6 license from 1998 until January 2013. From 1998 to January 2013, Hernandez was a registered representative associated with three broker dealers registered with the Commission.

4. The Wealth Management Partners, LLC was a Colorado limited liability company with its principal place of business in Lakewood, Colorado. Hernandez owned and controlled Wealth Management. Wealth Management was not registered with the Commission in any capacity, but Wealth Management acted as an unregistered broker-dealer in connection with the offer and sale of securities to investors between April 2012 and January 2013. Wealth Management never conducted a registered offering or registered a class of securities with the Commission. Hernandez used Wealth Management to receive customer funds. Wealth Management is now a defunct entity.

5. Wealth Financial, Limited Liability Company was a Colorado limited liability company with its principal place of business in Lakewood, Colorado. Hernandez owned and controlled Wealth Financial. Wealth Financial was not registered with the Commission in any capacity, but Wealth Financial acted as an unregistered broker-dealer in connection with the offer and sale of securities to investors between April 2012 and January 2013. Wealth Financial never conducted a registered offering or registered a class of securities with the Commission. Hernandez used Wealth Financial to receive customer funds. Wealth Financial is now a defunct entity.

6. DFHR Investments, Inc. was a Colorado corporation that was in delinquent status with the Colorado Secretary of State since May 1, 2011. Hernandez owned and controlled DFHR. DFHR was not registered with the Commission in any capacity, but DFHR acted as an unregistered broker-dealer in connection with the offer and sale of securities to investors between July 2011 and January 2012. DFHR never conducted a registered offering or registered a class of securities with the Commission. Hernandez used DFHR to receive customer funds. DFHR is a defunct entity.

7. HD Mile High Marketing, Inc. is a Colorado corporation with its principal place of business in Lakewood, Colorado. Hernandez owns and controls HD Mile High. HD Mile High has never conducted a registered offering or registered a class of securities with the Commission. HD Mile High is a marketing agency that focuses on advertising boards placed in elevators, lobbies, and restrooms. Hernandez used HD Mile High to receive customer funds.

C. Facts Regarding the Respondents

8. From August 2005 to April 2012, Hernandez was a registered representative associated with broker-dealer registered with the Commission. From April 12, 2012 to January 31, 2013, Hernandez was a registered representative associated with a dually-registered broker-dealer and investment adviser registered with the Commission. During his fraudulent offering, Hernandez was selling away from both firms, while also targeting their retail customers.

9. In 2009, Hernandez incorporated DFHR. During the relevant time, Hernandez controlled DFHR, including its bank accounts. Between July 2011 and January 2012, Hernandez instructed four investors to provide investment funds to DFHR.

10. In December 2011, Hernandez incorporated HD Mile High. During the relevant time, Hernandez controlled HD Mile High, including its bank accounts. In 2012, in connection with his fraudulent offering, Hernandez instructed three investors to provide investment funds to HD Mile High.

11. In March 2012, Hernandez organized Wealth Management. During the relevant time, Hernandez controlled Wealth Management, including its bank account. Between April 2012 and January 2013, Hernandez instructed 10 investors to provide investment funds to Wealth Management.

12. From approximately May 2012 to January 2013, Hernandez used "Wealth Financial, LLC" as his d/b/a for his brokerage business. In February 2013, Hernandez organized Wealth Financial. During the relevant time, Hernandez controlled Wealth Financial, including its bank account. Between approximately May 2012 and April 2013, Hernandez used Wealth Financial in connection with his fraudulent securities transactions. In January 2013, one investor provided investment funds to Wealth Financial.

13. Hernandez failed to disclose adequately to the two broker-dealers with which he was associated his outside business activities at DFHR, HD Mile High, and Wealth Management. Hernandez also failed adequately to disclose to one broker-dealer with which he was associated from April 2012 to January 2013, his outside business activities at Wealth Financial.

The Respondents Engaged in a Fraudulent Offering of Securities and a Scheme and Fraudulent Practices or Course of Business

14. Hernandez generally carried out his fraudulent offering by meeting with the investors face-to-face and convincing them to invest their money with him based on numerous material false statements and omissions.

15. To generate funds for the fraudulent offering, Respondents targeted Hernandez's customers who were retail investors, almost all of whom were individuals.

16. Hernandez advised several investors to surrender out of their existing annuities, and he assisted his customers with completing the paperwork necessary to complete the surrenders. Hernandez also advised various customers to provide him with their cash savings and funds they removed from their 401(k) plans.

17. Hernandez told at least two investors that he would provide them with a six to eight percent monetary "bonus" for agreeing to transfer their funds as he advised.

18. Investors provided Respondents with funds because they sought to make a profit from the above-market annual interest rates promised by Respondents.

19. Hernandez told investors that he would invest their funds and he instructed them to direct payment to one or more of his entities. The Respondents then pooled investor funds in the Respondents' bank accounts, which were controlled by Hernandez.

20. The investors had an expectation of profits to be derived solely from the efforts of the Respondents; after investing, the investors were passive and had no control over the use of their funds.

The Respondents Made Material False Statements, Misrepresentations, and Omissions

21. Between July 2011 and January 2013, Hernandez, through his entities, made material misrepresentations, false statements, and omissions, both orally and in writing, when offering and selling securities to approximately 13 investors.

22. Hernandez falsely told investors that he, through his entities, would be investing their funds in corporate bonds. The account statements for Wealth Management and Wealth Financial, which were drafted by Hernandez and provided to some investors, also described the investment as a "corporate bond." The account statements also falsely stated that there was a "market" for the "corporate bonds," and that Wealth Management was a "fund."

23. Hernandez also told investors that he, through DFHR or Wealth Management, would be placing their money in another "safe" investment, such as mutual funds or annuities.

24. Hernandez failed to disclose to investors that the Respondents would be the sole recipients of their funds, that their funds would be treated as a "loan" to the Respondents, that their funds would be used to pay the business and personal expenses of the Respondents, and that their funds would be used to repay other investors.

25. Hernandez also falsely touted the safety of the investments, and he both misrepresented and failed to disclose the risks. He told numerous investors that the securities he offered and sold were "safe." Hernandez also assured investors that the securities he offered provided both flexibility and liquidity. For example, he told one investor that if she liquidated her 401(k) and provided the funds to him, he and his entities could liquidate her "corporate bond" account on demand so that she could use the funds for a down payment on a home. Similarly, he told another investor that at least $10,000 of her $50,000 would be available to her on demand and penalty free so that she could cover her school and living expenses.

26. Hernandez told investors that the securities he offered and sold would pay a guaranteed, above-market, annual interest rate. Numerous investors were assured by Hernandez that the investments he was putting them into would result in a higher rate of return than the investment products they currently held.

27. Hernandez knew that these statements were false because the Respondents did not have any means of generating interest on the investor funds, much less a "guaranteed" above-market interest rate.

28. Hernandez failed to inform investors that their funds would not be maintained in a separate "account," as was stated on their account statements. Instead, investor funds remained in bank accounts controlled by the Respondents, where they were comingled with the funds of other investors, as well as other funds deposited by the proposed Respondents.

29. All of these misrepresentations, false statements, and omissions were material to investors.

30. Hernandez knew that his statements regarding the use of investor proceeds were false because he controlled Wealth Management, Wealth Financial, DFHR, and HD Mile High, and he knew that neither he nor any of those entities were purchasing or issuing corporate bonds or using investor funds to purchase any other security or investment product for which there was a "market." Hernandez also knew that Wealth Management, which he owned and controlled, was not a "fund." Hernandez also knew that all of these statements were false because he and his entities were misappropriating investors' funds.

31. Hernandez knew that the investments were not safe, liquid, or risk-free, and that his statements regarding these material facts were false. Hernandez knew that the Respondents misappropriated investors' funds, that the Respondents took no measures to protect investor funds, and that, other than raising funds from other investors, and the Respondents had no means to generate sufficient revenue to repay investors on demand.

The Respondents Misappropriated Investor Funds

32. The Respondents spent investor funds on a variety of business and personal expenses; none of which provide any promise for protecting principal or generating "guaranteed" interest. Examples of such spending include tens of thousands of dollars in cash withdrawals, repayments of Hernandez's personal debts, payments to the Respondents' employees, payments to restaurants and bars, payments related to vehicles, residential rent payments, and payments to other investors.

Hernandez, Wealth Management, Wealth Financial and DFHR, acted as unregistered brokers

33. Hernandez, through Wealth Management, Wealth Financial, and DFHR, was involved throughout the entire investment process. He solicited investors, met with investors, explained the investments, drafted account statements, accepted investor deposits, and controlled the Respondents' bank accounts into which investor funds were placed and from which investor funds were spent.

34. Hernandez, Wealth Management, Wealth Financial, and DFHR received transaction-based compensation in the form of investors' funds, which they misappropriated.

35. The investors relied upon Hernandez for all of their information about these investments. Hernandez, through Wealth Management, Wealth Financial, and DFHR, told investors that the investments were safe and were good investments.

36. Wealth Management, Wealth Financial, and DFHR were not registered as broker-dealers at the time of the sales.

37. Hernandez was not registered as a broker or associated with a registered broker-dealer in connection with these sales. Hernandez was conducting a securities business beyond the scope of his employment at two broker-dealers; therefore, his affiliation with those broker-dealers does not exempt him from registering as a broker.

D. Violations

38. As a result of the conduct described above, Respondents 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 or sale of securities and in connection with the purchase or sale of securities.

39. Hernandez willfully violated Section 15(a) of the Exchange Act which makes it unlawful for any broker or dealer to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security, unless such broker or dealer is registered in accordance with subsection (b) of Section 15.

IV.

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

According, 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 Hernandez 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) and 15(a) of the Exchange Act and Rules 10b-5 thereunder;

B. Respondent HD Mile High 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 Rules 10b-5(a) and (c) thereunder;

C. Respondent Hernandez 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.

Any reapplication for association by Hernandez 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 Hernandez, 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. Hernandez shall, within 10 days of the entry of this Order, pay disgorgement of $710,000 and prejudgment interest of $69,010.71, joint and severally with HD Mile High as to $121,000 disgorgement and $8,076.36 prejudgment interest, and a civil penalty of $710,000 to the Securities and Exchange Commission.

E. HD Mile High shall, within 10 days of the entry of the Order, pay disgorgement of $121,000 and prejudgment interest of $8,076.36, joint and severally with Hernandez, and a civil penalty of $121,000 to the Securities and Exchange Commission.

If timely payment is not made by Respondents, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 31 U.S.C. §3717. Payment must be made in one of the following ways:

(1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Hernandez's name as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Nancy Gegenheimer, Esq., Division of Enforcement, Securities and Exchange Commission, 1801 California Street Suite 1500, Denver, CO 80202

F. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agrees that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72065 / May 1, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15860

In the Matter of **New York Stock Exchange LLC,** **NYSE Arca, Inc.,** **NYSE MKT LLC** **f/k/a NYSE Amex LLC, and** **Archipelago Securities, L.L.C.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 19(h)(1) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 19(h)(1) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against New York Stock Exchange LLC, NYSE Arca, Inc., NYSE MKT LLC f/k/a NYSE Amex LLC, and Archipelago Securities, L.L.C. (collectively, "Respondents" or "NYSE Entities").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") that 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 19(h)(1) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Introduction

Congress has subjected national securities exchanges to significant regulatory compliance obligations because of their critical role in the national market system. The Exchange Act requires self-regulatory organizations, including national securities exchanges, to comply with their own rules and the federal securities laws. As part of that process, the Exchange Act requires exchanges to file with the Commission rule proposals or rule changes, and states that no proposed rule change shall take effect unless it is approved by the Commission or otherwise is permitted to become effective and operative as provided by the Exchange Act and the rules thereunder.

The obligation of national securities exchanges such as New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc. ("Arca"), and NYSE MKT LLC f/k/a NYSE Amex LLC ("Amex") (collectively, the "Respondent Exchanges") to operate in compliance with their own rules is fundamental. It enables the exchange's members and all participants in the trading that occurs on each exchange, as well as all persons seeking access to the facilities of the exchanges, to understand on what terms and conditions trading will be conducted on that exchange, thereby fostering a fair, orderly, and free and open market. The Exchange Act requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, protect investors and the public interest.[1] Additionally, the rules of an exchange may not be designed, among other things, to permit unfair discrimination between customers, issuers, brokers, or dealers.[2]

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1 *See* Exchange Act Section 6(b)(5).

2 *Id.*

This matter primarily involves a number of episodes in which the Respondent Exchanges engaged in business practices without having effective exchange rules in place,[3] or operated in a manner that did not comply with the exchange rules then in effect or the federal securities laws. In addition, Archipelago Securities L.L.C. ("ArcaSec"), the wholly-owned routing broker for the Respondent Exchanges, failed to establish, maintain, and enforce policies and procedures in connection with error account trading that were reasonably designed to prevent the misuse of material, nonpublic information by the broker or any person associated with the broker. ArcaSec also violated the Exchange Act and rules thereunder by effecting transactions in securities without sufficient net capital and failing to provide timely notice of the net capital deficiency to the Commission.

The Respondent Exchanges devoted insufficient attention to ensuring that the business operations of the exchanges and of their affiliated broker-dealer were conducted in accordance with effective exchange rules and the federal securities laws. In particular, during the relevant periods, the Respondent Exchanges lacked comprehensive and consistently-applied policies and procedures for determining whether new business practices required an exchange rule or rule change and evaluating whether business operations were being conducted fully in accordance with existing exchange rules and the federal securities laws. Further, the exchanges lacked adequate policies and procedures for ensuring that proposed rules and rule changes that were filed with the Commission accurately reflected the manner in which a particular business operation or practice actually would function. Moreover, in certain of the scenarios described below, the Respondent Exchanges continued to operate without effective exchange rules or in violation of an existing rule for extended periods of time because they failed to promptly file appropriate rule proposals for already ongoing exchange operations that required a rule or filed rule proposals despite having been informed informally by the Commission's staff that a particular proposal was likely not consistent with the Exchange Act.

As a result of this conduct, NYSE, Arca, and Amex each violated Sections 19(b) and 19(g) of the Exchange Act. Arca also violated Rule 612(a) of Regulation NMS. ArcaSec violated Sections 15(c)(3), 15(g), and 17(a)(1) of the Exchange Act, and Rules 15c3-1 and 17a-11(b)(1) thereunder.

Respondents

New York Stock Exchange LLC is a national securities exchange registered with the Commission pursuant to Section 6 of the Exchange Act. NYSE currently is a New York limited liability company and an indirect, wholly-owned subsidiary of IntercontinentalExchange, Inc. ("ICE"). NYSE's parent, NYSE Euronext, merged with ICE on November 13, 2013.

3 As used in this Order, "effective exchange rule" means an exchange rule that has been approved by the Commission, either directly or pursuant to delegated authority to the Commission staff; or has become effective through operation of law. *See* Exchange Act Section 19(b) and Rule 19b-4 thereunder.

The Commission previously has brought three enforcement actions against NYSE. In 1999, the Commission found that NYSE had failed to detect and halt unlawful proprietary trading by independent floor brokers. *In the Matter of New York Stock Exchange, Inc.*, Exchange Act Release No. 41574, 1999 WL 430863 (June 29, 1999). In 2005, the Commission found that NYSE had failed to detect, investigate, and discipline widespread unlawful proprietary trading by specialists on the floor of the exchange. *In the Matter of New York Stock Exchange, Inc.*, Exchange Act Release No. 51524, 2005 WL 840452 (April 12, 2005). In 2012, the Commission found that NYSE violated Regulation NMS Rule 603 by failing to distribute market data information to market participants on terms that were "fair and reasonable" and "not unreasonably discriminatory." *In the Matter of New York Stock Exchange LLC and NYSE Euronext*, Exchange Act Release No. 67857, 2012 WL 4044880 (Sept. 14, 2012).

NYSE Arca, Inc. is a national securities exchange registered with the Commission pursuant to Section 6 of the Exchange Act. Arca is a Delaware corporation and an indirect, wholly-owned subsidiary of ICE. In 2000, the Commission found that Arca's predecessor, Pacific Exchange, Inc., failed to discharge its duties as a self-regulatory organization by enforcing compliance with a number of the exchange's options trading rules. *In the Matter of Certain Activities of Options Exchanges*, Exchange Act Release No. 43268, 2000 WL 1277616 (Sept. 11, 2000).

NYSE MKT LLC f/k/a NYSE Amex LLC is a national securities exchange registered with the Commission pursuant to Section 6 of the Exchange Act. Amex currently is a Delaware limited liability company and an indirect, wholly-owned subsidiary of ICE.

The Commission previously brought two enforcement actions against Amex prior to its merger with NYSE Euronext in 2008. In 2000, the Commission found that Amex did not discharge its duties as a self-regulatory organization by failing to enforce compliance with a number of the exchange's options trading rules. *In the Matter of Certain Activities of Options Exchanges*, Exchange Act Release No. 43268, 2000 WL 1277616 (Sept. 11, 2000). In 2007, the Commission found that Amex failed to enforce certain order handling rules and recordkeeping obligations. *In the Matter of American Stock Exchange LLC*, Exchange Act Release No. 55507, 2007 WL 2744640 (March 27, 2007).

Archipelago Securities, L.L.C. is a broker-dealer registered pursuant to Section 15 of the Exchange Act and is a member of each of the Respondent Exchanges, the Financial Industry Regulatory Authority, Inc. ("FINRA"), and several other national securities exchanges. ArcaSec currently is a Delaware limited liability company and an indirect, wholly-owned subsidiary of ICE. ArcaSec operates as a facility of each of the Respondent Exchanges that provides outbound routing between each exchange and other market centers, and among the Respondent Exchanges, subject to certain conditions. The operation of ArcaSec as a facility of the Respondent Exchanges is subject to oversight by those exchanges and the Commission, and also by FINRA, its designated examining authority as a broker-dealer. Each exchange is required to file proposed rule changes with the Commission in accordance with Section 19(b) of the Exchange Act and Rule 19b-4 thereunder relating to the functions to be performed by ArcaSec in its role as an exchange facility.

Facts

In each of the instances described below, one or more of the Respondent Exchanges either conducted a new or modified business practice for which an exchange rule was required, but without having one in place, or conducted such business practice in a manner that was inconsistent with the exchange rule then in effect, or the federal securities laws. Similarly, ArcaSec did not have an adequate written policy to prevent a potential misuse of material, nonpublic information, failed to maintain adequate net capital, and did not timely notify the Commission of a net capital deficiency that occurred in January 2010.

A. NYSE, Arca, and Amex Conducted Error Account Trading Through ArcaSec Without Effective Exchange Rules

ArcaSec has functioned as a routing broker for Arca since 2005,[4] for NYSE since 2007[5], and for Amex since 2008.[6] From its inception as a routing broker for Arca, ArcaSec's functions have been strictly limited and it is "not [to] engage in any business other than its Outbound Router function . . . and other activities approved by the Commission."[7]

In 2005, Arca established an "error account" at ArcaSec. Arca (and later NYSE and Amex) used the ArcaSec error account to trade out of securities positions that the Respondent Exchanges assumed from time to time in the course of their operations as a result of, among other things, computer system malfunctions or outages, unmatched orders, errors from routing to other exchanges, or accommodations. However, in 2005, Arca did not file a proposed rule seeking Commission approval to maintain and use the ArcaSec error account to liquidate securities positions caused by Arca's operations.

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[4] In connection with the merger between PCX Holdings, Inc. and Archipelago Holdings LLC, the Commission in 2005 approved ArcaSec's functioning as the routing broker for the resulting Archipelago Exchange. *See* Exchange Act Release No. 52249 (Aug. 12, 2005), 70 Fed. Reg. 48611 (Aug. 18, 2005); Exchange Act Release No. 52497 (Sept. 22, 2005), 70 Fed. Reg. 56949 (Sept. 29, 2005). When Archipelago Holdings LLC merged with NYSE Group, Inc. in 2006, ArcaSec continued to function as the routing broker for Arca pursuant to the prior Commission orders. A rule confirming ArcaSec as the routing broker for Arca became effective in 2011. *See* Exchange Act Release No. 64730 (June 23, 2011), 76 Fed. Reg. 38235 (June 29, 2011) (approving Arca Equities Rule 7.41 (now Rule 7.45)); Exchange Act Release No. 55590, fn. 10 (April 5, 2007), 72 Fed. Reg. 18707 (April 13, 2007).

[5] ArcaSec's permitted function as the routing broker for NYSE is set forth in NYSE Rule 17, which became effective in April 2007. *See* Exchange Act Release No. 55590.

[6] ArcaSec's permitted function as the routing broker for Amex is set forth in Amex Equities Rule 17, which became effective in November 2008. *See* Exchange Act Release No. 59009 (Nov. 24, 2008), 73 Fed. Reg. 73363 (Dec. 2, 2008).

[7] *See* Exchange Act Release No. 52497 (Sept. 22, 2005), 70 Fed. Reg. at 56953 (Sept. 29, 2005).

Similarly, when exchange rules became effective for ArcaSec to act as a routing broker for NYSE, in April 2007, and for Amex, in November 2008, respectively, those rules did not provide for the existence and use of an error account at ArcaSec to liquidate securities positions resulting from the exchanges' operations.[8] Over the years, error account trading was conducted on numerous occasions on behalf of each of the Respondent Exchanges when each exchange lacked an effective exchange rule that permitted trading through an error account.

On January 11, 2010, a trading systems testing error occurred at Arca that caused ArcaSec to acquire erroneous long and short positions in twelve securities with a total value in excess of $4 billion, composed of approximately $2 billion in long positions and $2 billion in short positions on both sides of the twelve securities. As a result, ArcaSec held net long positions of approximately $232 million in three securities and net short positions of approximately $271 million in nine other securities. On that day, an Arca information technology employee, in the course of conducting a system test, mistakenly connected an automated testing tool to Arca's live trading environment, rather than to a testing environment where the testing was to have been performed. Over the course of approximately fifteen minutes, the testing tool generated more than 18,000 purchase and sale orders that resulted in executions of buy and sell orders totaling over 28 million shares. The erroneously-acquired positions were placed into ArcaSec's error account.

Prior to any notice being provided to the Commission by ArcaSec that the incident had occurred, Arca employees on the Arca Trade Operations Desk ("TOD"),[9] acting under the direction of a senior Arca official and with the knowledge of NYSE senior management, and in their dual capacities as registered representatives associated with ArcaSec, traded out of the positions in the ArcaSec error account during the after-hours market on January 11 and during market hours the morning of January 12. The trading resulted in ArcaSec sustaining a net loss of $1,175,274.

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8 ArcaSec's approved functions as the routing broker for the Respondent Exchanges were limited to the following, in pertinent part:

> 1. The Routing Broker(s) will receive routing instructions from the Exchange, to route orders to other market centers and report such executions back to the Exchange. The Routing Broker(s) cannot change the terms of the order or the routing instructions, nor does the Routing Broker(s) have any discretion about where to route an order.
>
> 2. The broker-dealer affiliate of the Exchange that acts as a Routing Broker will not engage in any other business other than (a) its outbound router function and (b) any other activities it may engage in as approved by the Commission.

NYSE Rule 17; Amex Equities Rule 17; Arca Equities Rule 7.41.

9 ArcaSec did not employ traders. Rather, certain employees who worked on Arca's Trade Operations Desk, who also were registered representatives associated with ArcaSec, were assigned by Arca management to conduct error account trading on behalf of all of the Respondent Exchanges.

Arca provided notice of the testing error and error account trading to the Commission staff on January 13, 2010. The Commission's Office of Compliance Inspections and Examinations ("OCIE") conducted an examination following the January 2010 trading incident. In late February 2010, the Commission staff told Arca senior management that error account trading at ArcaSec on behalf of Arca and the other affiliated exchanges should be described in an effective exchange rule.

Nevertheless, Arca and NYSE continued to trade in the ArcaSec error account on at least thirty-one additional occasions through the end of 2010 even though neither exchange had an effective rule permitting such trading. In January 2011, NYSE submitted to the Commission's staff an initial draft rule proposal that, consistent with prior practice, provided for error account trading to be conducted by Arca TOD personnel.[10]

In February 2011, NYSE Euronext compliance officials instructed Arca and ArcaSec management to discontinue using the ArcaSec error account until there were effective exchange rules allowing the Respondent Exchanges to do so. Notwithstanding the express direction from NYSE Euronext compliance officials prohibiting the use of the error account, on several additional occasions in 2011 Arca and NYSE used the ArcaSec error account to trade out of positions, twice by TOD personnel and, beginning in June 2011, six times by an unaffiliated, third party broker. In those instances, Arca management notified NYSE Euronext legal staff and Commission staff prior to trading. However, the Respondent Exchanges conducted the error account trading without having an effective exchange rule in place and the Commission never approved or authorized the trading.

In March 2012, Arca filed a rule proposal seeking approval for its practice of using a third-party broker for trading out of positions in the ArcaSec error account. That rule became effective in May 2012.[11] In October 2012, NYSE and Amex filed substantially identical rule proposals that became effective later that same month.[12]

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10 Although the draft rule proposal was submitted by NYSE, it was intended to be a model for subsequent error account rule proposals from Arca and Amex. The Commission's staff provided comments on the draft and on subsequent draft rule proposals submitted by the Respondent Exchanges over the course of the following twenty months. Throughout this informal comment process, the Commission's staff consistently informed the Respondent Exchanges of concern regarding the consistency with the Exchange Act of any rule proposal that provided for trading in the ArcaSec error account by Arca TOD personnel. Specifically, staff highlighted concerns that TOD staff potentially could access certain material nonpublic information when trading in the error account, as described below.

11 Exchange Act Release No. 66963, 77 Fed. Reg. 28919 (May 16, 2012) (Arca Equities Rule 7.45).

12 Exchange Act Release No. 68066, 77 Fed. Reg. 65030 (Oct. 24, 2012) (Amex Rule 17-Equities); Exchange Act Release No. 68067, 77 Fed. Reg. 65040 (Oct. 24, 2012) (NYSE Rule 17).

B. ArcaSec Violated Exchange Act Section 15(g) With Regard to Error Account Trading

Section 15(g) of the Exchange Act requires registered brokers and dealers to "establish, maintain, and enforce written policies and procedures reasonably designed, in light of the nature of the broker's or dealer's business, to prevent the misuse . . . of material nonpublic information" by the broker or dealer or any associated person.[13] From 2005 until October 2010, the Arca TOD employees who conducted error account trading on behalf of the Respondent Exchanges did so from their computer workstations on the TOD. Arca TOD personnel could open and run a number of programs on their monitors at each workstation. In addition to a program that allowed the Arca TOD personnel to conduct trading, those employees simultaneously could access and run a separate program (the Global Trade Manager or "GTM") that showed the Respondent Exchanges' entire depth of book,[14] including non-displayed liquidity,[15] for securities listed on NYSE and Arca. The information supplied by the GTM included material, nonpublic information, as it allowed Arca TOD personnel to view all non-displayed buy and sell orders for each listed security, which could have enabled them to anticipate possible shifts in a security's price from pending non-displayed orders. This information was intended solely for use by the Arca TOD personnel in tracking orders, facilitating efficient trading on the exchanges, and ensuring orderly markets in listed securities.

At all times prior to October 2010, ArcaSec lacked policies, procedures, and systems reasonably designed to prevent Arca TOD personnel who, in their capacity as ArcaSec registered representatives, were conducting error account trades on behalf of the Respondent Exchanges from accessing the non-displayed liquidity data at their TOD workstations while conducting such trading. Although NYSE Euronext had policies and procedures prohibiting misuse of material, nonpublic information by employees conducting personal trading, those policies and procedures did not address the possible misuse of such information, including use of non-displayed liquidity information, during error account trading. Arca TOD personnel were not trained by Arca or ArcaSec on whether they were allowed to use the non-displayed liquidity information when trading in the error account. ArcaSec had no electronic systems or barriers that prevented Arca TOD personnel from accessing the non-displayed liquidity when conducting error trading.

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13 There is no requirement under Section 15(g) that there be an underlying insider trading violation or any other violation of the Exchange Act or the rules thereunder. *See In the Matter of Certain Market Making Activities on NASDAQ,* Exchange Act Release No. 40910, 1999 WL 6176, at *6 fn. 3 (Jan. 11, 1999); *In the Matter of Gabelli & Co., Inc., et al.*, Exchange Act Release No. 35057, 1994 WL 684627 (Dec. 8, 1994).

14 An exchange's "depth of book" reflects the amount of open buy and sell orders on that exchange for a security at different prices. The depth of book provides an indication of the liquidity and investor interest in a security on that exchange.

15 "Non-displayed liquidity" means information that is not available to the public regarding pending buy or sell orders for a security.

ArcaSec also failed to conduct any surveillance to monitor whether Arca TOD personnel accessed this confidential information while conducting error account trading.

The Commission's staff notified ArcaSec management of this deficiency in February 2010, but ArcaSec did not restrict access to the desktop trading platform for Arca TOD personnel or adopt any policy or procedure reasonably designed to prevent the potential misuse of such information in connection with error account trading until October 2010. At that time, ArcaSec instituted a new procedure that required error account trading to be conducted exclusively at a workstation that did not provide access to the non-displayed liquidity information. During the period from February 2010 until the new procedure was established in October 2010, trading in the ArcaSec error account was conducted without restrictions on the Arca TOD personnel's access to the depth of book and non-displayed liquidity information for stocks on the NYSE and Arca order books.

C. ArcaSec Violated the Net Capital Rule and Failed to Provide Timely Notice of the Violation to the Commission

As a result of the January 2010 trading incident, ArcaSec incurred a net capital deficiency of approximately $99 million over the course of two days during the incident, which violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder. Moreover, ArcaSec failed to provide written notice of this net capital deficiency to the Commission on the days of these events, as is required by Section 17(a)(1) of the Exchange Act and Rule 17a-11(b)(1) thereunder. ArcaSec did not provide the requisite written notice to the Commission until eleven days after the deficiency had occurred.

D. NYSE Provided Co-location Services Without An Effective Exchange Rule

"Co-location" is a service offered by some securities exchanges that enables market participants to transmit orders to, and receive information from, exchanges with reduced delay (or "latency").[16] Typically, market participants that receive co-location services enter orders through the same gateway as those who do not co-locate, but co-location reduces physical distance and enables their orders to reach the exchange's matching engine more quickly, and therefore interact with the matching engine sooner, than the orders sent at the same time by non-co-locating

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16 The Commission has used the following definition of co-location:

> Co-location is a service offered by trading centers that operate their own data centers and by third parties that host the matching engines of trading centers. The trading center or third party rents rack space to market participants that enables them to place their servers in close physical proximity to a trading center's matching engine. Co-location helps minimize network and other types of latencies between the matching engine of trading centers and the servers of market participants.

Concept Release on Equity Market Structure, Exchange Act Release No. 61358 (Jan. 14, 2010), 75 Fed. Reg. 3594 (Jan. 21, 2010).

participants. The provision of co-location services is a material aspect of the operation of the facilities of a national securities exchange.

From at least 2006 until September 2010, NYSE – through a number of affiliates[17] – offered co-location services to customers at data centers located in Brooklyn and in Manhattan (the "Legacy Data Centers"). Prior to offering co-location services, NYSE did not file a proposed rule with the Commission relating to co-location, nor did any rule of the exchange in effect at that time provide for or permit the operation of the co-location business. Initially, co-location was not offered as a stand-alone product, but was bundled together with other technological services. By 2008, however, NYSE had begun contracting with customers to provide co-location at the Legacy Data Centers as a stand-alone service. The fees that were charged for co-location at the Legacy Data Centers were not transparent or made publicly available. In addition, the fees that NYSE charged for co-location services at the Legacy Data Centers were not uniform for all customers, and were the product of discrete negotiations with each customer, such that each customer negotiated its own fees. As a result, not all Legacy Data Center customers paid the same fees for the same types of services. In mid-2009, NYSE began standardizing the fees for new co-location customers, but it allowed pre-existing Legacy Data Center customers to continue paying the fees for which they previously had contracted.

In February 2009, following an inspection of Arca's regulation of access to its market, OCIE staff recommended that Arca (which, at that time, was offering co-location services at a data center in Weehawken, New Jersey) propose appropriate rules specifying the fees and practice of co-location access. Shortly thereafter, NYSE Euronext legal staff discussed with Commission staff potential rule filings by the Respondent Exchanges regarding co-location services. In June 2009, a senior official in the Division of Trading and Markets informed NYSE Euronext senior management that the fees charged for co-location services were required to be filed as a proposed rule change, which would allow the Commission to review whether the fees were equitably apportioned, not unfairly discriminatory, and not a burden on competition. In August 2009, NYSE provided an informal draft rule to Trading and Markets staff for review and comment.

In September 2009, in response to the NYSE draft rule proposal, the staff told NYSE Euronext legal personnel that NYSE's practice of individually negotiating fees for co-location services created concerns as to whether fees were being equitably allocated among members and other persons using the exchange's facilities, and indicated that a rule filing that failed to address NYSE's legacy co-location contracts would be subject to the same concerns. Notwithstanding this concern, in March 2010, NYSE filed a proposed rule relating to co-location services at the Legacy Data Centers that provided standard fees for new co-location customers, but retained the previously negotiated disparate fees for pre-existing co-location customers, noting that such fees would not be offered to any co-location customer after September 1, 2010, in connection with the opening of a new data center.

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17 The contracting entities were NYSE TransactTools, Inc. and NYSE Technologies.

Shortly after the March 2010 rule filing, Commission staff put NYSE's rule filing on hold for additional review because it incorporated the non-standard individually negotiated fees and thus would require additional analysis and consultation within the Commission. NYSE did not submit a revised rule proposal and, in July 2010, withdrew the pending rule filing and continued to provide co-location services at the Legacy Data Centers without an effective exchange rule until September 2010, when all co-location customers were re-located to a data center in Mahwah, New Jersey, and the co-location fees were standardized pursuant to a subsequent rule filing.[18]

E. <u>NYSE Failed to Operate the New York Block Exchange In Accordance With the Effective Exchange Rule</u>

The New York Block Exchange ("NYBX") was a trading facility that was developed and operated by a joint venture of NYSE and another, unaffiliated, entity in order to provide an all-electronic facility to handle trading in large blocks of securities. In November 2008, NYSE filed a proposed rule change with the Commission that described the intended functions and operations of NYBX. The rule filing became effective on January 22, 2009 and NYBX began operations on January 29, 2009.[19] NYSE Rule 1600 specifically indicated that when processing orders the NYBX facility would have access to NYSE's order book, known as Display Book ("DBK"), including information about non-displayed liquidity that was available on DBK.[20] However, NYBX did not operate in the manner described in the exchange rule.

During the development of NYBX, NYSE's Market Data group was responsible for ensuring that a new data feed providing the DBK's non-displayed liquidity information (the "hidden feed") would be operational before NYBX began executing trades. However, the hidden feed had not yet been installed when NYBX began operations on January 29, 2009. As a result, certain orders sent to the NYBX facility, which would only execute if the NYBX facility determined there was sufficient contraside non-displayed liquidity in the DBK to satisfy the order, failed to execute because the lack of the hidden feed meant that the NYBX facility was unable to "see" any non-displayed liquidity in the DBK.

The inability of the NYBX system to operate from inception in the manner described in the exchange rule resulted from failures by the NYSE rule writing group and the software design and operations staff to communicate and coordinate their functions effectively. The design and creation of the NYBX system software was carried out by Arca operations staff in Chicago, but the rule for the facility was drafted and filed by NYSE legal staff in New York. The Arca operations staff noted as early as July 2008 that the hidden feed functionality might not be operational at

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[18] *See* Exchange Act Release No. 62960 (Sept. 21, 2010), 75 Fed. Reg. 59310 (Sept. 27, 2010).

[19] NYSE Rule 1600 provided all of the operative provisions relating to the NYBX facility's operations. *See* Exchange Act Release No. 59282 (Jan. 22, 2009), 74 Fed. Reg. 5009 (Jan. 28, 2009).

[20] NYSE Equities Rule 1600(a), (b)(2)(E), (c)(3)(B)(iii), and (d)(1)(B)(i), provide that information about all non-displayed liquidity in NYSE's DBK would be available to the NYBX facility during its operation.

NYBX's inception and understood that the NYBX rule proposal that would be filed with the Commission would need to reflect that unavailability.

However, no one from the Arca operations staff informed the rule writing staff at NYSE before the proposed rule was filed with the Commission on November 13, 2008, that the hidden feed was not in place and might not be in place at the time the NYBX facility began operations. Consequently, the NYBX rule proposal that was filed described the NYBX system as having the hidden feed functionality. Similarly, after the NYBX rule became effective on January 22, 2009, and was circulated to senior management at Arca who were aware that the hidden feed was not operational, no one notified the NYSE's legal or compliance staff that NYBX's functionality did not conform to the effective exchange rule. NYBX was implemented and began operating on January 29, 2009, without the hidden feed functionality, which was inconsistent with the exchange rule then in effect.

On or about February 3, 2009, NYSE's partner in the NYBX venture discovered the defect and brought it to the attention of NYSE management. However, no corrective action was taken at that time. On February 5, 2009, NYSE notified Commission staff about the inconsistency between the rule and NYBX's functionality and NYBX customers were informed by the partner entity that the hidden feed was not available. A public announcement disclosing the problem was made by NYSE on February 12, 2009. Commission staff advised NYSE to file a proposed rule change to amend the rule to accurately describe NYBX's functionalities. NYSE submitted a draft proposed rule to reflect the lack of hidden data feed information on March 5, 2009. The hidden feed functionality became operational on April 3, 2009, rendering the then-pending draft rule change moot.[21]

F. <u>NYSE Distributed Closing Order Imbalance Information in Violation of the Effective Exchange Rule</u>

In May 2008, NYSE filed for immediate effectiveness an amendment to NYSE Rule 123C to permit NYSE to provide, on a subscription basis, a continuous electronic feed of closing order imbalance information to floor brokers' handheld devices starting at 3:40 p.m. on each trading day.[22] The rule change became effective on May 16, 2008. Under the rule, floor brokers were automatically subscribed to receive this information for stocks in which they had open orders. To obtain this information for other stocks, floor brokers could make a subscription request using their handheld devices.

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21 In February 2013, NYBX ceased operating. *See* Exchange Act Release No. 68861 (Feb. 7, 2013), 78 Fed. Reg. 10226 (Feb. 13, 2013).

22 "Closing order imbalance" information is the amount of, and any imbalance between, Market "At-The Close" ("MOC") interest and marketable Limit "At-The-Close" ("LOC") interest to buy and MOC interest and marketable LOC interest to sell in a particular security. *See* Exchange Act Release No. 57862 (May 23, 2008), 73 Fed. Reg. 31174 (May 30, 2008).

In December 2008, NYSE reconfigured its systems to begin providing an automated feed of closing order imbalance information to its operations staff at 2:00 p.m. As a result of this system change, the closing order imbalance information feed inadvertently also was made available to all floor brokers at 2:00 p.m. Shortly thereafter, senior NYSE operational personnel became aware that floor brokers also were receiving an automated feed of closing order imbalance information at 2:00 p.m. NYSE, however, continued disseminating the feed to floor brokers at 2 p.m. without filing a proposed rule change with the Commission.

In October 2009, after learning of NYSE's practice, Commission staff informed NYSE personnel that distributing the automated feed of closing order imbalance information to floor brokers at 2:00 p.m. was inconsistent with NYSE Rule 123C and reminded NYSE of its obligation to file a proposed rule change if it wished to continue the practice. NYSE informed Commission staff that it intended to file a proposed rule change, but it did not discontinue the 2:00 p.m. feed in the interim period. In the early months of 2010, NYSE submitted and discussed several draft rules with Commission staff. In March 2010, Commission staff reiterated its view that NYSE was not in compliance with its rule as long as it continued to distribute the 2:00 p.m. feed without an effective exchange rule that permitted such earlier distribution. Despite these express warnings from the Commission staff that NYSE was acting inconsistently with its rule, NYSE continued to distribute the 2:00 p.m. feed to its floor brokers until May 17, 2010, when it discontinued the feed. Following further discussions with the staff, on June 9, 2010, NYSE filed a proposed rule change with the Commission, which became effective on September 15, 2010.[23]

NYSE's distribution of the 2:00 p.m. feed to floor brokers from December 2008 through May 17, 2010, did not comply with then-existing NYSE Rule 123C, which specifically stated that such a feed would first be distributed to floor brokers at 3:40 p.m. NYSE's non-compliance with its rule both prior to and during the eight months after NYSE personnel were told by the Commission's staff that NYSE was in violation of its rule afforded NYSE's floor brokers an informational advantage of which other market participants and the public were not aware.

G. <u>Arca Failed to Execute Mid-Point Passive Liquidity Orders in Accordance With the Effective Exchange Rule</u>

In July 2007, Arca Equities Rule 7.31(h)(5), which added Mid-Point Passive Liquidity Orders ("MPLO"),[24] became effective as an order option for securities trades. That rule stated, in pertinent part, that: "If the market is locked, the eligible MPL order will trade at the locked price."[25] In the fall of 2009, Arca decided to modify the manner in which MPLOs were executed, to prevent execution when markets were locked. On or about November 12, 2009, Arca operations

[23] *See* Exchange Act Release No. 62923 (Sept. 15, 2010), 75 Fed. Reg. 57541 (Sept. 21, 2010).

[24] Midpoint passive liquidity orders are undisplayed limit orders that are priced at the midpoint of the Protected Best Bid and Offer ("PBBO").

[25] A "locked" market is one in which the bid price equals the ask price.

received internal approval to change the software regarding MPLOs to ensure that orders would no longer execute in locked markets, but would wait until the bid and offer were no longer locked or crossed[26] before executing. The software changes for the modification were completed and were ready to be implemented into the live trading environment by mid-March 2010.

During the week of March 22, 2010, Arca implemented the MPLO change, which went into effect on March 29, 2010. However, this change was not reflected in an effective Arca exchange rule. On April 7, 2010, an Arca Operations employee noticed that the change in MPLO execution had become operational despite the lack of an effective exchange rule for the new procedure and notified a member of Arca's legal staff. However, Arca did not stop the practice at that time.

On April 9, 2010, Arca filed a proposed rule change for immediate effectiveness that reflected the change to MPLO executions in locked markets. The Commission staff rejected Arca's filing because it deemed that the filing did not comply with the advance notice requirements for immediately effective filings. Arca corrected the deficiency and refiled the rule proposal on April 21, 2010, and the rule change became effective on May 21, 2010.[27]

H. Arca Accepted Mid-Point Passive Liquidity Orders with Sub-Penny Limits in Violation of Regulation NMS

Rule 612(a) of Regulation NMS prohibits an exchange from, among other things, displaying, ranking, or accepting any order in any NMS stock priced in an increment smaller than $.01 if the order is priced equal to or greater than $1.00 per share. As the Commission has discussed, Rule 612(a) addresses the practice of "stepping ahead" of displayed limit orders by trivial amounts, and encourages the display of limit orders that improve the depth and liquidity of trading in NMS stocks.[28]

On November 28, 2008, Arca implemented a change to its trading system permitting the execution of certain orders in sub-penny increments. The purpose of the system change was to allow for the quotation and execution of orders in sub-penny increments for equities that were trading at less than $1.00 per share, while continuing to prevent the quotation and execution of orders in sub-penny increments for equities priced above $1.00. The system change also permitted MPLOs to execute in sub-penny increments at all price ranges, including for equities priced at greater than $1.00, which was consistent with Arca Rule 7.31(h)(5).[29]

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26 A "crossed" market is one in which the bid price exceeds the ask price.

27 *See* Exchange Act Release No. 62004 (Apr. 21, 2010), 75 Fed. Reg. 25013 (May 6, 2010).

28 *See* Exchange Act Release No. 51808, at 29 (June 9, 2005), 70 Fed. Reg. 37496 (June 29, 2005).

29 *See* Exchange Act Release No. 56072 (July 13, 2007), 72 Fed. Reg. 39867 (July 20, 2007).

The system change that was implemented by Arca in November 2008, however, also improperly allowed the Arca trading system to accept MPLOs with limit prices in sub-penny increments for NMS stocks priced equal to or greater than $1.00, which was not permitted by Arca Rule 7.31(h)(5) and violated Rule 612(a) of Regulation NMS. As a result, Arca's trading system became capable of accepting MPLOs with sub-penny limits on November 28, 2008, and accepted such orders in violation of Rule 612(a) from January 2, 2009, until October 18, 2010, when Arca re-programmed its trading system to prevent the entry of MPLOs with sub-penny limits.

Arca's improper acceptance of MPLOs with sub-penny limits was attributable to several factors. Arca did not have sufficient testing protocols to review systems changes for compliance with the provisions of Regulation NMS, and did not have adequate procedures to check that the functionality of the systems changes was consistent with Arca's rules and Regulation NMS. In addition, Arca did not have effective procedures to detect that the Arca trading system was accepting orders in non-permitted increments, only becoming aware of the problem after Arca was contacted by a customer on October 7, 2010.

Arca's failure to detect the problem is all the more problematic given that in October 2009 the OCIE staff recommended that Arca develop and implement procedures to monitor periodically its trading system to ensure that it rejected incoming quotations, orders, or indications of interest priced less than the minimum increment. In November 2009, Arca informed OCIE staff that Arca's trading system was designed to systematically enforce compliance with that requirement, and that Arca's quality assurance process was effective in helping to assure that Arca rejects orders priced less than the minimum increment. At the time Arca issued this response, its systems had been improperly accepting MPLOs with sub-penny limits for nearly a year, and continued to do so for another eleven months.

IV.

Legal Analysis

A. Section 19(b)(1) of the Exchange Act

Section 19(b)(1) of the Exchange Act requires every exchange to file any proposed rule change with the Commission and for the Commission to publish notice of the proposed rule change and to give interested persons an opportunity to submit written data, views, and arguments concerning the proposed rule change. Section 19(b)(1) further provides that "[n]o proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection." The "rules of an exchange" include the exchange's constitution, articles of incorporation, bylaws, and rules, but also such "stated policies, practices, and interpretations" of an exchange "as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors." Exchange Act Section 3(a)(27). A "stated practice, policy, or interpretation" means any material aspect of the operation of the facilities of a self-regulatory organization ("SRO") or any statement made generally available to, among others, the membership of, to all participants in, or to persons having or seeking access to the facilities of the SRO that establishes or changes any standard, limit, or guideline with respect to the rights, obligations or privileges of specified persons or the meaning, administration, or enforcement of an existing rule. Exchange Act Rule 19b-4(a)(6). A "stated policy, practice, or interpretation" of an SRO shall be deemed to be a proposed rule change unless it is reasonably and fairly implied by an existing rule of the SRO, or is concerned solely with the administration of the SRO and is not a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO. Exchange Act Rule 19b-4(c).

As a result of the conduct discussed above:

1. NYSE, Arca, and Amex violated Section 19(b)(1) by using the ArcaSec error account to assume and trade out of stock positions, including but not limited to those positions arising from the systems incident on January 11, 2010, without an effective exchange rule in place.

2. NYSE violated Section 19(b)(1) by offering co-location services without an effective exchange rule in place.

B. <u>Section 19(g)(1) of the Exchange Act</u>

Among other things, Section 19(g)(1) of the Exchange Act requires every exchange to comply with the provisions of the Exchange Act, the rules and regulations thereunder, and its own rules. 15 U.S.C. § 78s(g)(1); *see In the Matter of National Stock Exchange, et al.*, Exchange Act Release No. 51714, 2005 WL 1185531, at *5 (May 19, 2005). The Commission has previously found exchanges to be in violation of Section 19(g)(1) where they acted in a manner inconsistent with their own rules. *See In the Matter of EDGX Exchange, Inc.*, Exchange Act Release No. 65556, 2011 WL 4860052 (Oct. 13, 2011); *In the Matter of National Stock Exchange,* Exchange Act Release No. 51714, 2005 WL 1185531 (May 19, 2005).

As a result of their conduct described above:

1. NYSE, Arca, and Amex violated Section 19(g)(1) of the Exchange Act by permitting ArcaSec to assume and trade out of securities positions in a manner inconsistent with their rules, which limited ArcaSec's activity to outbound and inbound routing of orders on behalf of those Exchanges.

2. NYSE violated Section 19(g)(1) by operating the NYBX in a manner inconsistent with its rules.

3. NYSE violated Section 19(g)(1) by distributing an automated feed of closing order imbalance information to its floor brokers in a manner inconsistent with its rules.

4. Arca violated Section 19(g)(1) by executing Mid-Point Passive Liquidity Orders in a manner inconsistent with its rules.

C. Section 15(g) of the Exchange Act

Section 15(g) of the Exchange Act requires broker-dealers to establish, maintain and enforce written policies and procedures, reasonably designed, taking into consideration the nature of the broker's or dealer's business, to prevent the misuse, in violation of the Exchange Act or the rules and regulations thereunder, of material nonpublic information by such broker or dealer or any person associated with such broker or dealer. The Commission has consistently made clear that broker-dealers must take seriously their responsibilities to design and enforce sufficiently robust policies and procedures to prevent the misuse of material nonpublic information. *See, e.g., In the Matter of Goldman, Sachs & Co.*, Exchange Act Release No. 66791, 2012 WL 1242363 (April 12, 2012); *In the Matter of Merrill Lynch, Pierce, Fenner & Smith Inc.*, Exchange Act Release No. 63760, 2011 WL 231575 (Jan. 25, 2011). The mere establishment of policies and procedures alone is not sufficient to prevent the misuse of material nonpublic information. It also is necessary to implement measures to monitor compliance with and enforcement of those policies and procedures. *See, e.g., In the Matter of Morgan Stanley & Co. Inc., et al.*, Exchange Act Release No. 54047, 2006 WL 1749842 (June 27, 2006) (finding Section 15(f) violation where Morgan Stanley failed to enforce existing policies and procedures concerning surveillance over a four-year period). These obligations are important even if no questionable trading has occurred.

ArcaSec violated Section 15(g) by failing to establish and enforce policies and procedures reasonably designed to prevent the misuse of material nonpublic information by TOD personnel that were conducting error account trading through ArcaSec's error account on behalf of NYSE Arca, NYSE, and NYSE Amex. Until October 2010, ArcaSec had no written policies or procedures specifically addressing the access to non-displayed liquidity information by TOD personnel liquidating securities positions in the ArcaSec error account. ArcaSec also lacked any systems that would have prevented TOD personnel from accessing such information while they were conducting such trading. ArcaSec also lacked any policy or procedure for surveilling whether the TOD personnel acting on its behalf were accessing material nonpublic information while trading in the error account.

D. Violations Relating to Net Capital Rule

A broker-dealer violates Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder when it uses the mails, or any means or instrumentality of interstate commerce, to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than exempt securities) while not maintaining its required minimum net capital. ArcaSec computes its minimum required net capital under the "alternative standard" prescribed by Rule 15c3-1(a)(1)(ii), which requires it not to permit its net capital to be less than the greater of $250,000 or 2 percent of aggregate debit items computed in accordance with the Formula for Determination of Reserve Requirements for Brokers and Dealers in Appendix A to Exchange Act Rule 15c3-3(a). As a result of the January 2010 trading incident, ArcaSec violated Section 15(c)(3) and Rule 15c3-1 thereunder by allowing its net capital to decline below the minimum amount of net capital required under the net capital rule by over $99 million on January 11, 2010 and January 12, 2010.

Section 17(a) of the Exchange Act and Rule 17a-11(b)(1) thereunder further requires every broker-dealer whose net capital declines below the minimum amount required pursuant to Rule 15c3-1 to give notice of the deficiency to the principal office of the Commission in Washington, D.C., the regional office of the Commission for the region in which the broker-dealer has its principal place of business, and the broker-dealer's designated examining authority of which such broker-dealer is a member, on the same day of the deficiency. ArcaSec's net capital declined below the minimum required by the net capital rule on January 11, 2010 and continued through the following day. ArcaSec, however, did not provide the requisite written notice of the deficiency to the Division of Trading and Markets and the Chicago Regional Office until January 23, 2010, in violation of Section 17(a) and Rule 17a-11(b)(1) thereunder.

E. Violations of Rule 612(a) of Regulation NMS

Rule 612(a) of Regulation NMS prohibits an exchange from displaying, ranking, or accepting any order in a sub-penny amount for NMS stocks trading at a price greater than $1.00 per share. Between January 2, 2009, and October 7, 2010, Arca repeatedly violated Rule 612(a) by accepting mid-point passive liquidity orders with sub-penny limits.

V.

Undertakings

The Respondent Exchanges have undertaken to do the following:

A. The Respondent Exchanges shall within four (4) months of the issuance of this Order review and, as appropriate, begin implementing changes to, their existing policies, procedures, internal controls, and training for determining whether:

> (1) a new or change to an existing business practice requires the filing of a proposed rule or rule change pursuant to Section 19(b)(1) of the Exchange Act; and
>
> (2) business practices that require an exchange rule are conducted pursuant to and in accordance with an effective exchange rule.

(hereinafter, the "Rule Compliance Programs").

B. The Respondent Exchanges shall no later than four (4) months after the issuance of this Order retain at their expense a qualified independent consultant (the "Consultant") not unacceptable to the staff of the Commission to conduct a comprehensive review of the Respondent Exchanges' Rule Compliance Programs. The Respondent Exchanges shall require the Consultant to assess whether the Rule Compliance Programs are reasonably designed and implemented to ensure compliance by the Respondent Exchanges with Section 19 of the Exchange Act and the rules and regulations thereunder and Respondent Exchanges' own rules. The Respondent Exchanges shall provide a copy of the engagement letter detailing the Consultant's responsibilities to Commission staff. The Respondent Exchanges may in the course of the Consultant's engagement provide the Consultant with the views of the Respondent Exchanges and the management and board of directors of the IntercontinentalExchange Group, Inc. ("ICE") with regard to the review and assessment of the Rule Compliance Programs, and shall permit the Consultant to solicit the views of others, as the Consultant deems appropriate.

C. The Respondent Exchanges shall require the Consultant, within six (6) months of the Consultant's engagement, to submit a report of his/her findings and recommendations (the "Initial Report") simultaneously to the respective Boards of Directors of each of the Respondent Exchanges and ICE and to the Commission's Divisions of Enforcement and Trading and Markets and Office of Compliance Inspections and Examinations ("OCIE"), that:

(1) sets forth the Consultant's findings about the adequacy of each Respondent Exchange's Rule Compliance Program; and

(2) if necessary, makes recommendations regarding how each Respondent Exchange should modify or supplement its Rule Compliance Program.

D. The Respondent Exchanges shall adopt and implement all recommendations made by the Consultant, subject to Section E, below.

E. If the Respondent Exchanges, in consultation with ICE, determine that any of the Consultant's recommendations in the Initial Report are unduly burdensome or impractical, or if they determine that the objectives of the recommendations can be more effectively achieved through another means, the Respondent Exchanges, or any of them, may propose that a recommendation not be implemented or propose an alternative reasonably designed to accomplish the same objectives, and shall notify the Consultant of any such proposals within thirty (30) days of receipt of the Initial Report. If, upon evaluating a Respondent Exchange's proposal(s), the Consultant determines that a recommendation should not be implemented or that a suggested alternative is reasonably designed to accomplish the same objectives as the recommendation in question, then the Consultant may withdraw the recommendation and/or accept the proposed alternative and notify in writing the Commission's Divisions of Enforcement and Trading and Markets and OCIE of any such withdrawn recommendations and/or accepted alternatives, and the Respondent Exchange(s) shall adopt and implement the accepted alternative(s). If, upon evaluating the Respondent Exchange's proposals, the Consultant concludes that the Consultant's recommendation should be implemented, the Consultant shall notify the Respondent Exchange within thirty (30) days of receipt of the alternative proposal and the Respondent Exchange and the Consultant shall, within fourteen (14) days of the Consultant's notification, jointly confer with the staff of the Division of Trading and Markets and OCIE to resolve the matter. In the event that, after conferring with the Commission staff, the Respondent Exchange and the Consultant are unable to agree on an alternative proposal, the Respondent Exchange shall adopt and implement the Consultant's recommendation.

F. Within six (6) months from the Respondent Exchanges' and ICE's receipt of the Initial Report, the Respondent Exchanges shall complete implementation of all of the Consultant's recommendations and/or accepted alternatives.

G. No sooner than six (6) months from the Respondent Exchanges' and ICE's receipt of the Initial Report, the Respondent Exchanges shall require the Consultant to conduct a review of the Respondent Exchanges' implementation of the Consultant's recommendations discussed above and, within twelve (12) months from the Respondent Exchanges' and ICE's receipt of the Initial Report, submit a written final report ("Final Report") to the Boards of the Respondent Exchanges and ICE and the Commission's Divisions of Enforcement and Trading and Markets and OCIE. The Final Report shall describe the review made of the Respondent Exchanges' implementation of the Consultant's recommendations and describe how the Respondent Exchanges have implemented and are complying with the Consultant's recommendations.

H. Within two (2) months from the Respondent Exchanges' and ICE's receipt of the Final Report, a senior executive officer of each of the Respondent Exchanges shall certify in writing to the Director of the Commission's Division of Enforcement that, to the best of his/her knowledge based on reasonable inquiry, all of the Consultant's recommendations and any alternatives approved by the Consultant have been adopted and implemented by that Respondent Exchange.

I. The Respondent Exchanges shall cooperate fully with the Consultant, including providing the Consultant with access to the files, books, records, and personnel of the Respondent Exchanges (and the Respondent Exchanges' relevant affiliated entities, including subsidiaries) as reasonably requested for the above-mentioned review, and obtaining the cooperation of employees or other persons under the Respondent Exchanges' control. Nothing in the foregoing shall be deemed to require the Respondent Exchanges to waive their attorney-client privileges or other privileges with respect to privileged documents.

J. The Respondent Exchanges shall require the Consultant to report to Commission staff on his/her activities as the staff may reasonably request.

K. To ensure the independence of the Consultant, the Respondent Exchanges shall 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.

L. The Respondent Exchanges shall expend sufficient funds to permit the Consultant to discharge all of his/her duties. The Respondent Exchanges shall permit the Consultant to engage such assistance, clerical, legal or expert, as necessary and at a reasonable cost, to carry out his/her activities, and the cost, if any, of such assistance shall be borne exclusively by the Respondent Exchanges.

M. The Respondent Exchanges shall bear the full expense of carrying out these undertakings, including the costs of retaining the Consultant and implementing the Consultant's recommendations.

N. The Respondent Exchanges shall require the Consultant to enter into an agreement that provides that for the period of engagement and for a period of two (2) years from completion of the engagement, the Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with ICE, NYSE Regulation, Inc., NYSE Euronext, or the Respondents, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Consultant in performance of his/her duties under this Order shall not, without prior written consent of Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with ICE, NYSE Regulation, NYSE Euronext, or the Respondents, 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 (2) years after the engagement. The agreement will also provide that the Consultant shall maintain the confidentiality of any confidential information of the Respondent Exchanges and/or their affiliates.

O. The Respondent Exchanges may apply to the Division of Enforcement for an extension of the deadlines described above before their expiration and, upon a showing of good cause by the Respondent Exchanges, the Division of Enforcement may, in its sole discretion, grant such extensions for whatever time period it deems appropriate.

VI.

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

Accordingly, pursuant to Sections 19(h)(1) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondents NYSE, Arca, and Amex cease and desist from committing or causing any violations and any future violations of Sections 19(b) and 19(g) of the Exchange Act, and Arca cease and desist from committing or causing any violations and any future violations of Rule 612(a) of Regulation NMS.

B. Pursuant to Section 21C of the Exchange Act, Respondent ArcaSec cease and desist from committing or causing any violations and any future violations of Sections 15(c)(3), 15(g) and 17(a)(1) of the Exchange Act and Rules 15c3-1 and 17a-11(b)(1) thereunder.

C. Pursuant to Section 19(h)(1) of the Exchange Act, Respondents NYSE, Arca and Amex are censured.

D. Pursuant to Section 21B(a)(2) of the Exchange Act, Respondents NYSE, Arca, Amex, and ArcaSec shall pay, jointly and severally, a civil money penalty in the amount of $4,500,000 to the United States Treasury within ten (10) days of the entry of this Order. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Such payment must be made in one of the following ways: (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying NYSE, Arca, Amex and ArcaSec as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Antonia Chion, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

E. The Respondent Exchanges shall comply with the undertakings enumerated above.

By the Commission.

Lynn M. Powalski
Deputy Secretary

Commissioner Gallagher
Commissioner Piwowar
Disapproved

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72079 / May 2, 2014

File No. S7-40-10

In the Matter of Exchange Act Rule 13p-1 and Form SD	)	**ORDER ISSUING STAY**

On April 14, 2014, the United States Court of Appeals for the District of Columbia Circuit issued a decision in National Association of Manufacturers, et al. v. SEC, et al., No. 13-5252 (D.C. Cir. April 14, 2014). That case involved a challenge to Exchange Act Rule 13p-1 and Form SD.[1] The rule and form were adopted pursuant to Section 13(p) of the Securities Exchange Act of 1934, which was added by Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[2] The Court of Appeals rejected all of the challenges to the rule based on the Administrative Procedure Act and the Exchange Act. The Court of Appeals, however, concluded that Section 13(p) and Rule 13p-1 "violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be "DRC conflict free."'"[3] In so concluding, the Court of Appeals specifically noted that there was no "First Amendment objection to any other aspect of the conflict minerals report or required disclosures."[4] In an order issued concurrently with the decision, the Court of Appeals withheld the issuance of its mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. As a result, the earliest date on which the Court of Appeals's mandate is likely to issue is June 5, 2014. Under Rule 13p-1, the first reports are due to be filed on June 2, 2014.

Section 705 of the Administrative Procedure Act provides that an agency may postpone the effective date of an action taken by it pending judicial review when it finds that "justice so requires." 5 U.S.C. 705. In light of the Court of Appeals's decision, the Commission finds that it is consistent with what justice requires to stay the effective date for compliance with those portions of Rule 13p-1 and Form SD that would require the

[1] Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b).

[2] PL 111-203, 124 Stat. 1376, 2213 (2010).

[3] Slip. Op. at 23.

[4] Slip. Op. at 17 n.8.

statements by issuers that the Court of Appeals held would violate the First Amendment. Among other things, a stay of those portions of the rule avoids the risk of First Amendment harm pending further proceedings. Moreover, limiting the stay to those portions of the rule requiring the disclosures that the Court of Appeals held would impinge on issuers' First Amendment rights furthers the public's interest in having issuers comply with the remainder of the rule, which was mandated by Congress in Section 1502 and upheld by the Court of Appeals.

Accordingly, it is ORDERED, pursuant to Section 705 of the Administrative Procedure Act, that the effective date for compliance with those portions of Rule 13p-1 and Form SD subject to the Court of Appeals's constitutional holding are hereby stayed pending the completion of judicial review, at which point the stay will terminate. For more detailed guidance regarding compliance, issuers should refer to the statement issued by the staff on April 29, 2014, and any further guidance subsequently provided.[5]

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

[5] On April 30, 2014, the National Association of Manufacturers, the Chamber of Commerce, and Business Roundtable filed a motion requesting that the Commission stay Rule 13p-1 in its entirety. In accordance with the above order, the motion is denied.

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-72087; File No. PCAOB-2013-03)

May 2, 2014

Public Company Accounting Oversight Board; Notice of Filing of Amendment No. 1, and Order Granting Accelerated Approval of Proposed Rules, Amendments to Conform the Board's Rules and Forms to the Dodd-Frank Act and Make Certain Updates and Clarifications, as Modified by Amendment No. 1

I. Introduction

On December 23, 2013, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 107(b)[1] of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") and Section 19(b)[2] of the Securities Exchange Act of 1934 (the "Exchange Act"), proposed amendments to conform the Board's rules and forms to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") and make certain updates and clarifications (collectively, the "Proposed Rules"). The Proposed Rules were published for comment in the Federal Register on February 3, 2014.[3] At the time the notice was issued, the Commission designated a longer period to act on the Proposed Rules, until May 5, 2014.[4] The Commission received one comment letter in response to the notice.[5] On March 13, 2014, the PCAOB filed

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[1] 15 U.S.C. 7217(b).

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

[3] See Release No. 34-71237 (January 6, 2014), 79 FR 6271 (February 3, 2014).

[4] Ibid.

[5] See letter to the Commission from Suzanne H. Shatto, dated March 6, 2014 ("Shatto Letter").

Amendment No. 1 to the Proposed Rules ("Amendment No. 1").[6] This order approves the Proposed Rules, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rules

The Proposed Rules include specific references to audits and auditors of brokers and dealers in the Board's rules and are necessary to ensure that the PCAOB can satisfy its explicit oversight authority granted under the Dodd-Frank Act with respect to audits and auditors of brokers and dealer that are registered with the Commission. The Proposed Rules also conform the Board's rules to the Dodd-Frank amendments that: (1) clarified the definition of "person associated with a public accounting firm,"[7] (2) permitted the Board to share certain information with foreign auditor oversight authorities,[8] and (3) clarified that the Board's sanctioning authority is not limited to persons who are supervisory personnel at the time a failure to supervise sanction is imposed.[9]

Beyond these conforming amendments, the Proposed Rules include three additional categories of amendments that tailor certain of the Board's rules to the audits of brokers and dealers, call for relevant broker and dealer audit client information on the Board's forms, and amend a number of rules in light of the Board's experience administering and enforcing these rules.

[6] In Amendment No. 1, the PCAOB added amendments to Rule 3526, Communication with Audit Committees Concerning Independence. These amendments were discussed in the Proposed Rules, but the amendments to Rule 3526 were inadvertently omitted from the Proposed Rules. The Amendment also proposes a non-substantive modification to a cross-reference in Item 3.2.e.1 of Form 4.

[7] See Section 2(a)(9)(C) of the Sarbanes-Oxley Act.

[8] See Section 105(b)(5)(C) of the Sarbanes-Oxley Act.

[9] See Section 105(c)(6)(A) of the Sarbanes-Oxley Act.

First, the PCAOB is tailoring the Board's professional practice standards to the audits of brokers and dealers. As amended, Rule 3521 (Contingent Fees), Rule 3522 (Tax Transactions) and Rule 3526 (Communication with Audit Committees Concerning Independence) apply to the audits of brokers and dealers to the same extent that they previously applied to the audits of issuers.

Second, the Board is amending its registration, withdrawal, and reporting forms (Forms 1, 1-WD, 2, 3, and 4), and the general instructions to these forms, to call for relevant broker and dealer audit client information. This information includes, among other things, information identifying each audit report issued by registered firms for broker and dealer audit clients during their annual reporting periods.

Finally, the Board is amending a number of rule provisions and form items in light of administrative experience and to make a number of updates to address events that have occurred since the last time the rules were updated. These amendments, for example, address circumstances where an issuer audit client encounters a change in its principal auditor and the issuer does not comply with the Commission's four business day reporting requirement concerning the change in auditors pursuant to Item 4.01 of Form 8-K.

In addition, Amendment No. 1 includes rule text for proposed amendments to Rule 3526 that was inadvertently omitted from the PCAOB's original rule filing and updates a cross-reference in Form 4 that would have become outdated by this Order.

The amendments to the PCAOB's rules, SEC Practice Section membership requirements, and Ethics Code will take effect on June 1, 2014. The amendments to Forms 1, 1-WD, 3, and 4 will take effect July 1, 2014. The amendments to Form 2 will take effect April 1, 2015.

III. Comment Letters

As noted above, the Commission received one comment letter concerning the Proposed Amendments, which expressed support for the Proposed Amendments.[10]

IV. The PCAOB's Emerging Growth Company Request

Section 103(a)(3)(C) of the Sarbanes-Oxley Act provides that any additional rules adopted by the PCAOB subsequent to April 5, 2012 do not apply to the audits of emerging growth companies ("EGCs"), unless the Commission determines that the application of such additional requirements is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation.[11] Having considered those factors, and as explained further below, the Commission finds that applying the Proposed Rules to audits of EGCs is necessary or appropriate in the public interest.

The PCAOB has proposed application of its Proposed Rules to audits of all issuers, as applicable, including EGCs; and the PCAOB requested that the Commission make the determination required by Section 103(a)(3)(C).[12] To assist the Commission in making its determination, the PCAOB prepared and submitted to the Commission its own EGC analysis.

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[10] See Shatto Letter.

[11] Section 103(a)(3)(C) of the Sarbanes-Oxley Act, as amended by Section 104 of the Jumpstart Our Business Startups Act (the "JOBS Act"). The term "emerging growth company" is defined in Section 3(a)(80) of the Exchange Act.

[12] To the extent that these proposed rules apply solely in connection with the obligations of registered brokers and dealers or the auditors of registered brokers and dealers pursuant to 17 CFR 240.17a-5, no separate determination is necessary under 15 U.S.C. § 7213(a)(3)(C).

The PCAOB's EGC analysis was included in the Commission's public notice soliciting comment on the Proposed Rules. No comments were received on the analysis.

Based on the analysis submitted, we believe the information in the record is sufficient for the Commission to make the requested EGC determination in relation to the Proposed Rules. The PCAOB's EGC analysis discussed its approach to developing the Proposed Rules, as well as the characteristics of EGCs and economic considerations. For the Proposed Rules that are not simply conforming amendments, the PCAOB stated that it has no reason to think the economic consequences for EGCs would differ significantly from those for issuers who are not EGCs, and that it estimated that the cost-related implications of these amendments would not be significant. Finally, the Commission takes note of the PCAOB's statements that the Proposed Rules that were made in light of the PCAOB's administrative experience generally are expected to reduce existing compliance burdens, facilitate more efficient use of PCAOB resources, and maintain or improve meaningfulness of information required to be reported by registered firms to the PCAOB.

V. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/pcaob.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number PCAOB-2013-03 on the subject line.

Paper comments:

- Send paper comments in triplicate to Kevin M. O'Neill, Deputy Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. PCAOB-2013-03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/pcaob.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rules that are filed with the Commission, and all written communications relating to the proposed rules between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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. Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without charge; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. PCAOB-2013-03 and should be submitted on or before [insert 21 days from publication in the Federal Register].

VI. Conclusion

The Commission has carefully reviewed and considered the Proposed Rules, as modified by Amendment No. 1, and the information submitted therewith by the PCAOB, including the PCAOB's EGC analysis. In connection with the PCAOB's filing and the Commission's review,

A. The Commission finds that the Proposed Rules, as modified by Amendment No. 1, are consistent with the requirements of the Sarbanes-Oxley Act and the securities laws and are necessary or appropriate in the public interest or for the protection of investors; and

B. Separately, the Commission finds that the application of the Proposed Rules, as modified by Amendment No. 1, to EGC audits as applicable is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation.

Additionally, the Commission finds good cause to approve the filing, as modified by Amendment No. 1 to the Proposed Rules, prior to the thirtieth day after the date of the publication of notice of the filing thereof in the Federal Register. The content of Amendment No. 1, which does not raise any novel issues, makes one technical amendment to the proposed rule to correct an inadvertent omission and one technical amendment to update a cross-reference in a Form that would become outdated if the proposed rules in the original rule filing are approved by the Commission. Accelerated approval would allow the PCAOB to update its rules immediately, thus providing users with greater clarity and certainty. Accordingly, the Commission finds that good cause exists to approve the filing, as modified by Amendment No. 1, on an accelerated basis.

IT IS THEREFORE ORDERED, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act, that the Proposed Rules (File No. PCAOB-2013-03), as modified by amendment No. 1, be and hereby are approved on an accelerated basis.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 5, 2014

IN THE MATTER OF
GENOSYS, INC.

File No. 500-1

ORDER OF SUSPENSION
OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of GeNOsys, Inc. ("Genosys") because Genosys has not submitted the following required periodic filings:

Filing	Due date
Annual report on Form 10-K for period ended Nov. 30, 2011	February 28, 2012
Quarterly report on Form 10-Q for period ended Feb. 29, 2012	April 16, 2012
Quarterly report on Form 10-Q for period ended May 31, 2012	July 16, 2012
Quarterly report on Form 10-Q for period ended August 31, 2012	October 15, 2012
Annual report on Form 10-K for period ended Nov. 30, 2012	February 28, 2013
Quarterly report on Form 10-Q for period ended Feb. 28, 2013	April 15, 2013
Quarterly report on Form 10-Q for period ended May 31, 2013	July 15, 2013
Quarterly report on Form 10-Q for period ended August 31, 2013	October 15, 2013
Annual report on Form 10-K for period ended Nov. 30, 2013	February 28, 2014
Quarterly report on Form 10-Q for period ended Feb. 28, 2013	April 14, 2014.

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

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on Monday, May 5, 2014 through 11:59 p.m. EDT on May 16, 2014.

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72093 / May 5, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15862

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Genosys (CIK No.0001145328) is a Utah corporation headquartered in Provo, Utah. Genosys is a medical research company focusing on the use of nitric oxide gas to treat human diseases and conditions. At all relevant times, the common stock of Genosys was registered with the Commission pursuant to Section 12(g) of the Exchange Act and quoted on OTC Link operated by OTC Markets Group, Inc.

B. DELINQUENT PERIODIC FILINGS

2. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers with classes of securities registered pursuant to Exchange Act Section 12 to file with the

Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires issuers to file quarterly reports.

3. Genosys filed its last annual report on Form 10-K on March 15, 2011 and its last quarterly report on Form 10-Q on November 25, 2011. Since then, it has not submitted the following required periodic filings:

Filing	Due date
Annual report on Form 10-K for period ended Nov. 30, 2011	February 28, 2012
Quarterly report on Form 10-Q for period ended Feb. 29, 2012	April 16, 2012
Quarterly report on Form 10-Q for period ended May 31, 2012	July 16, 2012
Quarterly report on Form 10-Q for period ended August 31, 2012	October 15, 2012
Annual report on Form 10-K for period ended Nov. 30, 2012	February 28, 2013
Quarterly report on Form 10-Q for period ended Feb. 28, 2013	April 15, 2013
Quarterly report on Form 10-Q for period ended May 31, 2013	July 15, 2013
Quarterly report on Form 10-Q for period ended August 31, 2013	October 15, 2013
Annual report on Form 10-K for period ended Nov. 30, 2013	February 28, 2014
Quarterly report on Form 10-Q for period ended Feb. 28, 2013	April 14, 2014.

4. As a result of the foregoing, Genosys has 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 in the public interest that public administrative proceedings be instituted to determine:

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

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

IV.

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

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

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

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

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

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

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72110 / May 7, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15863

In the Matter of ATS Corporation, Clear Skies Solar, Inc., Debut Broadcasting Corporation, Inc., Physicians Healthcare Management Group, Inc., Technipower Systems, Inc. (a/k/a Solomon Technologies, Inc.), Theater Xtreme Entertainment Group, Inc., WorldGate Communications, Inc., and YTB International, Inc. (a/k/a 1803 International, Inc.), Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents ATS Corporation, Clear Skies Solar, Inc., Debut Broadcasting Corporation, Inc., Physicians Healthcare Management Group, Inc., Technipower Systems, Inc. (a/k/a Solomon Technologies, Inc.), Theater Xtreme Entertainment Group, Inc., WorldGate Communications, Inc., and YTB International, Inc. (a/k/a 1803 International, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. ATS Corporation (CIK No. 1325460) is a Delaware corporation located in McLean, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ATS Corporation 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, 2011.

2. Clear Skies Solar, Inc. (CIK No. 1402857) is a void Delaware corporation located in Farmingdale, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Clear Skies Solar, Inc. 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, 2011, which reported a net loss of $3,163,652 for the prior nine months. As of May 1, 2014, the company's stock (symbol "CSKH") 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. Debut Broadcasting Corporation, Inc. (CIK No. 1254371) is a defaulted Nevada corporation located in Nashville, Tennessee with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Debut Broadcasting Corporation, Inc. 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, 2011, which reported a net loss of $411,205 for the prior nine months. As of May 1, 2014, the company's stock (symbol "DBTB") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Physicians Healthcare Management Group, Inc. (CIK No. 1528006) is a Nevada corporation located in Miami, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Physicians Healthcare Management Group, Inc. 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, 2011, which reported a net loss of $5,238,240 since the company's February 14, 2005 inception. Moreover, the company has never filed a Form 10-K. As of May 1, 2014, the company's stock (symbol "PHYH") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Technipower Systems, Inc. (a/k/a Solomon Technologies, Inc.) (CIK No. 1240722) is a void Delaware corporation located in Danbury, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Technipower Systems is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of over $5,120,887 for the prior nine months. As of May 1, 2014, the company's stock (symbol "TECZ") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Theater Xtreme Entertainment Group, Inc. (CIK No. 1089775) is a dissolved Florida corporation located in Newark, Delaware with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Theater Xtreme Entertainment Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of over $987,815 for the prior three months. As of May 1, 2014, the company's stock (symbol "TXEGQ") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. WorldGate Communications, Inc. (CIK No. 1030058) is a forfeited Delaware corporation located in Trevose, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WorldGate Communications, Inc. 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, 2011, which reported a net loss of $4,470,000 for the prior nine months. On March 30, 2012, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Delaware, and the case was still pending as of March 10, 2014. As of May 1, 2014, the company's stock (symbol "WGATQ") was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. YTB International, Inc. (a/k/a 1803 International, Inc.) (CIK No. 852766) is a Delaware corporation located in Wood River, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). YTB International, Inc. 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, 2011, which reported a net loss of $668,000 for the prior three months. On March 1, 2013, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Illinois Southern, and although the Court approved and ordered the sale of all the company's assets to Jamraval, Inc., the case was still pending as of March 10, 2014. As of May 1, 2014, the company's stock (symbol "YTBLQ") was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

11. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 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 them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 7, 2014

In the Matter of **Clear Skies Solar, Inc.,** **Debut Broadcasting Corporation, Inc.,** **Physicians Healthcare Management Group, Inc.,** **Technipower Systems, Inc. (a/k/a Solomon Technologies, Inc.),** **Theater Xtreme Entertainment Group, Inc.,** **WorldGate Communications, Inc., and** **YTB International, Inc. (a/k/a 1803 International, Inc.),** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

Clear Skies Solar, Inc. (CIK No. 1402857) is a void Delaware corporation located in Farmingdale, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Clear Skies Solar, Inc. 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, 2011, which reported a net loss of $3,163,652 for the prior nine months. As of May 1, 2014, the company's stock (symbol "CSKH") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Clear Skies Solar, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

Debut Broadcasting Corporation, Inc. (CIK No. 1254371) is a defaulted Nevada corporation located in Nashville, Tennessee with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Debut Broadcasting Corporation, Inc. 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, 2011, which reported a net loss of $411,205 for the prior nine months. As of May 1, 2014, the company's stock (symbol "DBTB") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Debut Broadcasting Corporation, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

Physicians Healthcare Management Group, Inc. (CIK No. 1528006) is a Nevada corporation located in Miami, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Physicians Healthcare Management Group, Inc. 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, 2011, which reported a net loss of $5,238,240 since the company's February 14, 2005 inception. Moreover, the company has never filed a Form 10-K. As of May 1, 2014, the company's stock (symbol "PHYH") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Physicians Healthcare Management Group, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

Technipower Systems, Inc. (a/k/a Solomon Technologies, Inc.) (CIK No. 1240722) is a void Delaware corporation located in Danbury, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Technipower Systems is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of over $5,120,887 for the prior nine months. As of May 1, 2014, the company's stock (symbol "TECZ") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Technipower Systems, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

Theater Xtreme Entertainment Group, Inc. (CIK No. 1089775) is a dissolved Florida corporation located in Newark, Delaware with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Theater Xtreme Entertainment Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of over $987,815 for the prior three months. As of May 1, 2014, the company's stock (symbol "TXEGQ") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Theater Xtreme Entertainment Group, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

WorldGate Communications, Inc. (CIK No. 1030058) is a forfeited Delaware corporation located in Trevose, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WorldGate Communications, Inc. 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, 2011, which reported a net loss of $4,470,000 for the prior nine months. As of May 1, 2014, the company's stock (symbol "WGATQ") was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of WorldGate Communications, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

YTB International, Inc. (a/k/a 1803 International, Inc.) (CIK No. 852766) is a Delaware corporation located in Wood River, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). YTB International, Inc. 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, 2011, which reported a net loss of $668,000 for the prior three months. As of May 1, 2014, the company's stock (symbol "YTBLQ") was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of YTB International, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 7, 2014, through 11:59 p.m. EDT on May 20, 2014.

By the Commission.

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 7, 2014

In the Matter of **Cannabusiness Group, Inc.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Cannabusiness Group, Inc. because of questions regarding the accuracy of publicly available information about the company's operations. Cannabusiness Group, Inc. is a Nevada corporation with its principal place of business located in Irvine, California. Its stock is quoted on OTC Link, operated by OTC Markets Group Inc., under the ticker: CBGI.

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

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on May 7, 2014, through 11:59 p.m. EDT on May 20, 2014.

By the Commission.

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 8, 2014

In the Matter of	:	
Imaging Diagnostic Systems, Inc.	:	**ORDER OF SUSPENSION OF TRADING**
	:	
File No. 500-1	:	

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Imaging Diagnostic Systems, Inc. ("Imaging") because it has not filed certain periodic reports with the Commission.

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

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT, on May 8, 2014 through 11:59 p.m. EDT, on May 21, 2014.

By the Commission.

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72121 / May 8, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15864

In the Matter of **Imaging Diagnostic Systems, Inc.** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Imaging is a Florida corporation with its principal place of business located in Fort Lauderdale, Florida. Imaging's securities are registered under Section 12(g) of the Exchange Act and its common stock is quoted on the OTC Link (previously "Pink Sheets") operated by OTC Markets Group Inc. under the symbol "IMDS." Imaging is delinquent in its periodic filings with the Commission, having not filed its three most recent required filings including: its Form 10-K for the fiscal year ending June 30, 2013, its Form 10-Q for the quarter ending September 30, 2013, and its Form 10-Q for the quarter ending December 31, 2013. Imaging also did not file any Forms 12b-25 explaining its inability to timely file these periodic filings.

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission.

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

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3831 / May 8, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15865

In the Matter of **RONALD N. DENNIS,** **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 Ronald N. Dennis ("Dennis" or "Respondent").

II.

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

III.

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

1. Dennis, age 44, resides in Fort Worth, Texas. In at least 2008 and 2009, Dennis was a research analyst at CR Intrinsic Investors, LLC ("CR Intrinsic"), an unregistered investment adviser that was affiliated with the then-unregistered investment adviser S.A.C. Capital Advisors, L.P. Prior to working at CR Intrinsic, Dennis had been employed as an analyst for numerous other investment firms.

2. On April 22, 2014, a final judgment was entered by consent against Dennis, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Ronald N. Dennis, Civil Action Number 14-CV-1746, in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged that, in connection with the purchase or sale of securities, Dennis knew, recklessly disregarded, or should have known, that material nonpublic information he received indirectly from two corporate insiders was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence, and Dennis is liable for trading of certain securities by CR Intrinsic because he directly or indirectly caused CR Intrinsic to place trades and/or unlawfully tipped inside information to CR Intrinsic.

IV.

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

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

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-72125; File No. SR-OCC-2013-804)

May 8, 2014

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Withdrawal of an Advance Notice in Connection With a Proposed Change to its Operations in the Form of a Private Offering by OCC of Senior Unsecured Debt Securities

On June 10, 2013, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act")[1] and Rule 19b-4(n)(1)(i),[2] an advance notice relating to a proposal to permit OCC to issue senior unsecured debt securities in a private placement offering. Notice of the advance notice was published in the Federal Register on July 15, 2013.[3] The Commission did not receive any comments in response to the advance notice.

On January 15, 2014, OCC notified the Commission of its withdrawal of the advance notice (SR-OCC-2013-804) from consideration by the Commission.[4] The Commission is hereby publishing notice of the withdrawal.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

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1 12 U.S.C. 5465(e)(1).

2 17 CFR 240.19b-4(n)(1)(i).

3 See Securities Exchange Act Release No. 69955 (July 10, 2013), 78 FR 42125 (July 15, 2013), (SR-OCC-2014-804).

4 See Letter from Stephen M. Szarmack, Vice President and Associate General Counsel, The Options Clearing Corporation, to Office of the Secretary, Commission (January 15, 2014).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9583 / May 8, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 72133 / May 8, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3832 / May 8, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31041 / May 8, 2014

Admin. Proc. File No. 3-15024

In the Matter of WALTER V. GERASIMOWICZ, MEDITRON ASSET MANAGEMENT, LLC, and MEDITRON MANAGEMENT GROUP, LLC	ORDER DENYING MOTION FOR PERMISSION TO FILE LATE PETITION FOR REVIEW

Walter V. Gerasimowicz requests permission to file a late petition for review of an initial decision of an administrative law judge, which was issued on July 12, 2013.[1] The Division of Enforcement opposes Gerasimowicz's motion. For the reasons set forth below, we deny the motion.

I. Background

On May 3, 2013, we issued an order making findings and imposing remedial sanctions on Gerasimowicz and two affiliated investment advisers, Meditron Asset Management, LLC and Meditron Management Group, Inc., pursuant to an Offer of Settlement.[2] We found, among other things, that the respondents "misappropriate[ed] and misus[ed] client assets and repeatedly

1 *Walter V. Gerasimowicz, et al.*, Initial Decision Release No. 496, 2013 WL 3487073 (July 12, 2013).

2 *Walter V. Gerasimowicz, et al.*, Securities Exchange Act Release No. 69506, 2013 WL 1856014 (May 3, 2013).

[made] material misrepresentations and omissions to clients," in violation of antifraud provisions of the federal securities laws.[3] Based on these findings, we ordered that Gerasimowicz be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. We further ordered that he and the other respondents pay disgorgement and third-tier civil money penalties "in amounts to be determined by additional proceedings" before an administrative law judge. A law judge subsequently issued an Initial Decision ordering Gerasimowicz and the other respondents to pay, jointly and severally, disgorgement of $3,143,029.41, plus prejudgment interest, and a penalty of $1,950,000.

The Initial Decision stated that any appeal had to be filed within twenty-one days. Gerasimowicz did not appeal the Initial Decision[4] and, on September 17, 2013, we issued an order declaring the Initial Decision final.[5] Thereafter, Gerasimowicz neither filed a motion for reconsideration of the order of finality, nor sought judicial review, as he was permitted to do.[6] On March 25, 2014, a district court entered an opinion and order directing Gerasimowicz to comply with the Initial Decision by paying the required amounts.[7]

II. Gerasimowicz seeks review six months after decision became final.

On March 19, 2014, Gerasimowicz filed this motion seeking review, citing Commission Rule of Practice 100(c).[8] That rule permits us to disregard a party's failure to comply "with an otherwise applicable rule" where doing so "would serve the interests of justice and not result in prejudice to the parties to the proceeding." Gerasimowicz does not directly address why Rule 100(c) should apply here but, instead, blames his failure to file an appeal earlier on his former

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3 Exchange Act Section 10(b) and Rule 10b-5 thereunder, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5, respectively; Advisers Act Sections 206(1), (2), and (4) and Rules 206(4)-1, 2, and 8 thereunder, 15 U.S.C. § 80b-6(1), (2), and (4) and 17 C.F.R. § 206(4)-1, 2, and 8, respectively; and Securities Act Section 17(a), 15 U.S.C. § 77q(a).

4 The other respondents, which Gerasimowicz wholly owned, also did not appeal.

5 *Walter V. Gerasimowicz, et al.*, Exchange Act Release No. 70430, 2013 WL 5230822 (Sept. 17, 2013).

6 *See* 17 C.F.R. § 201.470 (permitting aggrieved parties to file a motion for reconsideration within ten days of a final order issued by the Commission); 15 U.S.C. § 78y(a) (permitting aggrieved parties, within sixty days after entry of the order, to request review by a United States Court of Appeals of a final order issued by the Commission).

7 *SEC v. Gerasimowicz*, 14-MC-30, ECF No. 1:14-mc-00030-P1 (S.D.N.Y. Mar. 25, 2014) (finding, among other things, that district court lacked jurisdiction to review the law judge's decision, that Gerasimowicz had not offered any valid defense to the enforcement of the Commission's final order, and requiring the respondents to comply with the order by paying the disgorgement and penalty amounts).

8 17 C.F.R. § 201.100(c).

attorney, who withdrew after the issuance of the Initial Decision.[9] According to Gerasimowicz, his former attorney failed to advise him that Gerasimowicz could appeal *pro se* and that, had he known "that this method was available to [him] . . . [he] would certainly have done so."

Gerasimowicz also claims that he has "meritorious defenses to the Commission's Disgorgement Order." He asserts that these defenses were included in a "sur-reply" brief that the law judge wrongfully refused to consider. Additionally, Gerasimowicz argues that he lacks the funds to pay the amounts assessed against him, but was not previously aware that he could seek "a waiver of the amounts to be paid on the basis of [his] inability to pay."[10]

In response, the Division argues that "the time to seek review has long since passed," which, in its view, "is sufficient reason to deny the petition."[11] The Division also contends that Gerasimowicz's sur-reply "was untimely, being filed almost a month after the close of briefing; violated the Court's scheduling order on the issue of damages, which did not provide for a sur-reply; and ignored Rule of Practice 154, which does not provide for sur-replies."[12] The Division further asserts that Gerasimowicz's ability to seek a waiver of the obligation to pay the disgorgement and civil penalty amounts ordered by the law judge "was discussed at length with

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9 Gerasimowicz represents that the lawyer withdrew because Gerasimowicz was unable to pay him "a retainer of an additional $50,000."

10 Gerasimowicz attaches to his motion information in support of his claim of inability to pay the disgorgement and civil penalty amounts.

Gerasimowicz further complains that he filed his request based on "written guidance" he received from a Division lawyer following a hearing before the district court in connection with the Division's efforts to enforce the Commission's order in this case. Gerasimowicz states that it was his "presumption" that the staff member provided this guidance "with the intent that [Gerasimowicz] act on the information he provided." We find nothing improper in the staff member's conduct. As his letter to Gerasimowicz makes clear, the staff member was not providing legal advice or recommending a course of action, but merely explaining two options Gerasimowicz had if he wished to seek a reduction, at this stage, in the amounts assessed against him and the other respondents by the law judge. The other option presented by the staff was to "request a compromise of the amount due based on inability to pay" supported by a sworn financial statement (the form of which the staff provided to Gerasimowicz). It is unclear whether Gerasimowicz has also pursued this option. We express no view as to whether such a waiver would be warranted.

11 The Division's opposition brief to Gerasimowicz's motion was filed two days late, and Gerasimowicz's reply to that opposition was filed one day late. Although we generally disfavor extension requests, we have determined, in our discretion, to consider both late-filed briefs. *See* 17 C.F.R. § 201.161 (providing the Commission authority to extend filing deadlines).

12 17 C.F.R. § 201.154.

Respondents' counsel," but that the respondents "failed to submit any sworn financial statements."[13]

III. The Rules of Practice do not provide for late appeals.

As a result of Gerasimowicz's failure to appeal and our determination not to review the case on our own initiative, the decision is now final.[14] Rule of Practice 410,[15] which is applicable to these proceedings, makes no provision to challenge a final order once the period for seeking reconsideration has, as here, expired.[16] As noted, Gerasimowicz argues that we should permit his late appeal pursuant to Rule 100(c). That rule would allow us to waive the filing deadline here, but only if doing so "would serve the interests of justice and not result in prejudice to the parties to the proceeding." There is no basis for making such a finding here. Gerasimowicz had several opportunities to appeal the Initial Decision within the various applicable time periods specified by rule and statute, but he failed to do so.

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13 *See* 17 C.F.R. § 201.630(b) (requiring respondents who assert an inability to pay disgorgement, interest or penalties to file a sworn financial disclosure statement).

14 *See* 17 C.F.R. § 201.411(c) (permitting the Commission to order review of an initial decision on its own initiative within 21 days after the end of the period established for filing a petition for review pursuant to Rule 410(b)); 17 C.F.R. § 201.360(d)(2) (stating that, if a party fails to file a petition for review and the Commission does not call the matter for review on its own initiative, the Commission will issue an order that the decision has become final).

15 17 C.F.R. § 201.410.

16 We note that Rule of Practice 420(b), which provides the "exclusive" procedure for seeking an extension of the deadline for filing an appeal to the Commission of determinations by self-regulatory organizations, mandates that we will grant an extension only on a showing of "extraordinary circumstances." *See* 17 C.F.R. § 201.420(b); *see also Lance E. Van Alstyne*, Exchange Act Release No. 40738, 53 SEC 1093, 1998 WL 830817, at *4 (Dec. 2, 1998) ("In the interests of finality, only under extraordinary circumstances will we authorize the filing of a late appeal from an SRO action that is subject to the Section 19(d)(1) filing requirement.").

That rule does not apply here because this was not a self-regulatory organization proceeding, but even if it did, we would deny Gerasimowicz's request because of the absence of such circumstances. *See, e.g., Orbixa Tech., Inc.*, Exchange Act Release No. 70893, 2013 WL 6044106, at *4 (Nov. 15, 2013) (finding that applicant had not shown "extraordinary circumstances" necessary to permit a late appeal where applicant waited over a year from the NYSE actions for which it sought review), *appeal docketed*, No. 13-4636 (2d Cir. Dec. 6, 2013); *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *3 (Mar. 1, 2013) (finding no extraordinary circumstances where applicant failed to file an application for review until almost two months after the applicable deadline, notwithstanding numerous communications from FINRA).

Indeed, Gerasimowicz took no action to challenge the sanctions and effectively ignored the proceeding following issuance of the Initial Decision, until efforts were instituted to enforce the decision in district court. Rewarding such conduct, by permitting this late appeal, would not serve the interest of justice. Gerasimowicz seeks to blame his former attorney for his failure to file *pro se*, but we have rejected similar claims.[17] Moreover, we have previously emphasized the need for finality in administrative proceedings. As we have noted, "[c]ourts have recognized that strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief."[18] Unmet deadlines may cut off substantive rights to review, but this is their function.[19] Given the circumstances, we see no basis for granting Gerasimowicz's request.

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17 *See, e.g., Perpetual Sec., Inc.*, Exchange Act Release No. 56613, 2007 WL 2892696, at *7 (Oct. 4, 2007) (rejecting applicant's defense that it failed to comply with NASD suspension order because its attorney had failed to inform applicant of the suspension order).

To the extent that Gerasimowicz is arguing that his former counsel did not provide effective representation because that attorney did not inform him that he could file a *pro se* appeal, we note that administrative proceedings generally do not trigger a specific right to the effective assistance of counsel. *Kevin Hall, CPA*, Exchange Act Release No. 61162, 2009 WL 4809215, at *21 n.84 (Dec. 14, 2009) (citing *Hammon Capital Mgmt. Corp.*, Investment Advisers Act Release No. 989, 48 SEC 264, 1985 WL 548332, at *2 (Sept. 24, 1985); *Williams & Wynne*, 533 F.3d 360, 369 (5th Cir. 2008) (finding Sixth Amendment inapplicable to an administrative hearing); *Father & Sons Lumber & Bldg. Supplies v. NLRB*, 931 F.2d 1093, 1096-97 (6th Cir. 1991) (finding that neither the Fifth Amendment nor the APA conferred a separate right to effective assistance of counsel in an administrative hearing)). Gerasimowicz made the same argument to the district court, which also rejected it. Further, there is nothing in the Rules of Practice that would suggest that *pro se* appeals are unavailable. Indeed, respondents frequently file Commission appeals *pro se*, which are entirely permissible. *See* Rule of Practice 102(a), 17 C.F.R. § 201.102(a) ("In any proceeding, an individual may appear on his or her own behalf.").

18 *Pennmont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *4 n.21 (Apr. 23, 2010) (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992) ("Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality."); *French Hosp. Med. Ctr. v. Shalala*, 89 F.3d 1411, 1420 (9th Cir. 1996) (noting "policy of finality embodied in [agency's] appeal deadline"); *In re GAC Corp.*, 640 F.2d 7, 8 (5th Cir. 1981) ("The time requirements contained in [the federal appellate rule for taking an appeal] derive from the need for finality of judgments and an end to litigation."); *In re Bushnell*, 273 B.R. 359, 369 (Bankr. D. Vt. 2001) (rejecting untimely appeal and acknowledging that the certainty created by appellate deadlines is essential to expedient resolution of appeals and an even playing field for all parties)).

19 *Cf. Carter v. Wash. Metro Area Transit Auth.*, 764 F.2d 854, 857 (D.C. Cir. 1985) ("[F]inality of outcome, regardless of the merits of the claim, is exactly the purpose of the statute of limitations that the legislature has enacted."); *Kavanagh v. Noble*, 332 U.S. 535, 539 (1947) (explaining that limitations "periods are established to cut off rights, justifiable or not, that might otherwise be asserted") (citations omitted).

Accordingly, IT IS ORDERED that Walter V. Gerasimowicz's motion for permission to file a late petition for review be, and it hereby is, denied.

By the Commission.

Lynn M. Powalski
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-72131; File No. SR-NSCC-2014-805)

May 8, 2014

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and No Objection to Advance Notice to Renew NSCC's Existing Credit Facility

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act")[1] and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934,[2] notice is hereby given that on April 21, 2014, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") advance notice SR-NSCC-2014-805 ("Advance Notice") as described in Items I, II and III below, which Items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the Advance Notice from interested persons and provide notice that the Commission does not object to the Advance Notice.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

NSCC is renewing its 364-day syndicated revolving credit facility ("Renewal"), as more fully described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the Advance Notice and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. NSCC has

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1 12 U.S.C. 5465(e)(1).

2 17 CFR 240.19b-4(n)(1)(i).

prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

1. Purpose

As part of its liquidity risk management regime, NSCC maintains a 364-day committed revolving line of credit with a syndicate of commercial lenders which is renewed every year. The terms and conditions of the current Renewal will be specified in the Thirteenth Amended and Restated Revolving Credit Agreement, to be dated as of May 13, 2014 ("Renewal Agreement"), among The Depository Trust Company ("DTC"), National Securities Clearing Corporation,[3] the Lenders party thereto and JPMorgan Chase Bank, N.A., as Administrative Agent, and are substantially the same as the terms and conditions of the existing credit agreement, dated as of May 14, 2013 ("Existing Agreement"),[4] among the same parties. The substantive terms of the Renewal are set forth in the Summary of Indicative Principal Terms and Conditions, dated March 17, 2014, which is not a public document. The aggregate commitments being sought under the Renewal will be for an amount of up to $15 billion for NSCC and DTC together, of which all but $1.9 billion aggregate commitments would be the commitments to NSCC as borrower, as provided in the Existing Agreement.

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3 The Renewal Agreement will provide for both DTC and NSCC as borrowers, with an aggregate commitment of $1.9 billion for DTC and the amount of any excess aggregate commitment for NSCC. The borrowers are not jointly and severally liable and each lender has a ratable commitment to each borrower. DTC and NSCC have separate collateral to secure their separate borrowings.

4 Last year, the Commission published notice of no objection to NSCC's advance notice filing with respect to NSCC's renewal beginning on May 14, 2013. See Release No. 34-69557 (May 10, 2013), 78 FR 28936 (May 16, 2013) (SR-NSCC-2013-803).

This agreement and its substantially similar predecessor agreements have been in place since the introduction of same day funds settlement at NSCC. NSCC requires same-day liquidity resources to cover the failure-to-settle of its largest Member or affiliated family of Members. If a Member defaults on its end of day settlement obligations, NSCC may borrow under the line to enable it, if necessary, to fund settlement among non-defaulting Members. Any borrowing would be secured principally by (i) securities deposited by Members in NSCC's Clearing Fund (i.e., the Eligible Clearing Fund Securities, as defined in NSCC's Rule 4, pledged by Members to NSCC in lieu of cash Clearing Fund deposits), and (ii) securities cleared through NSCC's Continuous Net Settlement System (CNS) that were intended for delivery to the defaulting Member upon payment of its net settlement obligation. NSCC's Clearing Fund[5] (which operates as its default fund) addresses potential exposure through a number of risk-based component charges calculated and assessed daily. As integral parts of NSCC's risk management structure, the line of credit and the Clearing Fund, together, provide NSCC liquidity to complete end-of-day money settlement.

2. Statutory Basis

The Renewal is consistent with Section 805(b) of the Clearing Supervision Act[6] and with Commission Rule 17Ad-22(d)(11)[7] (regarding default procedures) because it mitigates liquidity risk.

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5 NSCC's Clearing Fund now includes additional liquidity deposits by certain Members pursuant to NSCC's newly implemented Supplemental Liquidity Deposit rule (new Rule 4(A)). On December 5, 2013, the Commission approved rule filing SR-NSCC-2013-02, as amended on April 19, 2013, June 11, 2013, and on October 4 and 7, 2013 creating new Rule 4(A). See Release No. 34-70999 (Dec. 5, 2013), 78 FR 75413 (Dec. 11, 2013) (SR-NSCC-2013-02).

6 12 U.S.C. 5461(b). The Financial Stability Oversight Council ("FSOC") designated NSCC a systemically important financial market utility ("SIFMU") on July 18, 2012. See FSOC 2012 Annual Report, Appendix A,

(B) Clearing Agency's Statement on Comments on the Advance Notice Received from Members, Participants, or Others

Written comments on the Advance Notice have not yet been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

(C) Advance Notice Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

1. Description of Change

The terms and conditions to be specified in the Renewal Agreement are substantially the same as the terms and conditions specified in the Existing Agreement, except that, in order to help protect against concentration risk, an enhancement is being added for a back-up Administrative Agent and Collateral Agent in case the primary Administrative Agent and Collateral Agent is unable to perform its obligations.

2. Anticipated Effect on and Management of Risks

As noted, the committed revolving line of credit is a cornerstone of NSCC risk management and this Renewal is critical to the NSCC risk management infrastructure. The Renewal does not otherwise affect or alter the management of risk at NSCC.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the

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http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf ("FSOC Designation"). Therefore, NSCC is required to comply with the Clearing Supervision Act.

7 17 CFR 240.17Ad-22(d)(11).

Commission is received. NSCC shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing NSCC with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies NSCC in writing that it does not object to the proposed change and authorizes NSCC to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

NSCC shall post notice on its website of proposed changes that are implemented.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Advance Notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-NSCC-2014-805 on the subject line.

Paper Comments:

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

All submissions should refer to File No. SR-NSCC-2014-805. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the Advance Notice that are filed with the Commission, and all written communications relating to the Advance Notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on NSCC's website at http://dtcc.com/en/legal/sec-rule-filings.aspx.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NSCC-2014-805 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Commission Findings and Notice of No Objection

Although the Clearing Supervision Act does not specify a standard of review for advance notices, the Commission believes that the stated purpose of the Clearing Supervision Act is instructive.[8] The stated purpose is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for SIFMUs.[9]

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8 12 U.S.C. 5461(b).

9 Id.

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities and financial institutions engaged in designated activities for which it is the supervisory agency or the appropriate financial regulator.[10] Section 805(b) of the Clearing Supervision Act states that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to:

- promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.[11]

The Commission adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act on October 22, 2012 ("Clearing Agency Standards").[12] The Clearing Agency Standards became effective on January 2, 2013 and require registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for their operations and risk management practices on an ongoing basis.[13] As such, it is appropriate for the Commission to

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10 12 U.S.C. 5464(a)(2).

11 12 U.S.C. 5464(b).

12 Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

13 The Clearing Agency Standards are substantially similar to the risk management standards established by the Board of Governors of the Federal Reserve System governing the operations of SIFMUs that are not clearing entities and financial institutions engaged in designated activities for which the Commission or the Commodity Futures Trading Commission is the Supervisory Agency. See Financial Market Utilities, 77 FR 45907 (Aug. 2, 2012).

review advance notices against the objectives and principles for risk management standards as described in Section 805(b) of the Clearing Supervision Act,[14] as well as the applicable Clearing Agency Standards promulgated under Section 805(a) of the Clearing Supervision Act.[15]

The Advance Notice is a proposal to enter into a renewed credit facility, as described above, which is designed to help mitigate the risk that NSCC would be unable to meet payment or settlement obligations in the event of a Member default. Consistent with Section 805(b) of the Clearing Supervision Act,[16] the Commission believes the proposal promotes robust risk management, as well as the safety and soundness of NSCC's operations, while reducing systemic risks and supporting the stability of the broader financial system, by providing a readily available source of liquidity for NSCC.

Additionally, Commission Rule 17Ad-22(d)(11),[17] adopted as part of the Clearing Agency Standards,[18] requires that registered clearing agencies "establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable ... establish default procedures that ensure that the clearing agency can take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a participant default."[19] Here, as described above, the renewed credit facility will help NSCC continue to

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14 See 12 U.S.C. 5464(b).

15 See 12 U.S.C. 5464(a).

16 See 12 U.S.C. 5464(b).

17 17 CFR 240.17Ad-22(d)(11).

18 Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

19 17 CFR 240.17Ad-22(d)(11).

meet its respective obligations in a timely fashion in the event of a Member default, thereby helping to contain losses and liquidity pressures from that default.

Finally, Commission Rule 17Ad-22(b)(3),[20] also adopted as part of the Clearing Agency Standards,[21] requires a central counterparty ("CCP"), like NSCC,[22] to "establish, implement, maintain and enforce written policies and procedures reasonably designed to … [m]aintain sufficient financial resources to withstand, at a minimum, a default by the participant family to which it has the largest exposure in extreme but plausible market conditions …."[23] Here, as described above, NSCC's proposal to enter into a renewed credit facility will help it maintain sufficient financial resources to withstand, at a minimum, a default by an NSCC Member to which NSCC has the largest exposure.

As described in Item III above, Section 806(e)(1)(G) of the Clearing Supervision Act provides that a designated SIFMU may implement a change contained in an advance notice if it has not received an objection to the proposed change within the applicable 60 day period.[24] However, Section 806(e)(1)(I) of the Clearing Supervision Act allows the Commission to issue a non-objection prior to the 60th day.[25] If the Commission chooses to issue no objection prior to the 60th day, it must notify the SIFMU in writing that it does not object and authorize

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20 17 CFR 240.17Ad-22(b)(3).

21 Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

22 See FSOC Designation, supra note 6.

23 17 CFR 240.17Ad-22(b)(3).

24 See 12 U.S.C. 5465(e)(1)(G).

25 12 U.S.C. 5465(e)(1)(I).

implementation of the change on an earlier date.[26] If the Commission chooses to object prior to the 60th day, it must similarly notify the SIFMU.[27]

In its filing with the Commission, NSCC requested that the Commission notify NSCC, under Section 806(e)(1)(I) of the Clearing Supervision Act, that the Commission has no objection to the Advance Notice no later than Thursday, May 8, 2014, three business days before the existing credit facility is set to expire on Tuesday, May 13, 2014, to ensure that there is no period of time that NSCC operates without a credit facility.

For the reasons stated above, the Commission does not object to the Advance Notice.

VI. Conclusion

IT IS THEREFORE NOTICED, pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act,[28] that the Commission DOES NOT OBJECT to the change described in advance notice SR-NSCC-2014-805 and that NSCC be and hereby is AUTHORIZED to implement the change as of the date of this notice.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

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26 Id.

27 12. U.S.C. 5465(e)(1)(E).

28 12 U.S.C. 5465(e)(1)(I).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-72132; File No. SR-DTC-2014-805)

May 8, 2014

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and No Objection to Advance Notice to Renew DTC's Existing Credit Facility

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act")[1] and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934,[2] notice is hereby given that on April 21, 2014, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") advance notice SR-DTC-2014-805 ("Advance Notice") as described in Items I, II and III below, which Items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the Advance Notice from interested persons and provide notice that the Commission does not object to the Advance Notice.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

DTC is renewing its 364-day syndicated revolving credit facility ("Renewal"), as more fully described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the Advance Notice and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. DTC has

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1 12 U.S.C. 5465(e)(1).

2 17 CFR 240.19b-4(n)(1)(i).

prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

1. Purpose

As part of its liquidity risk management regime, DTC maintains a $1.9 billion 364-day committed revolving line of credit with a syndicate of commercial lenders which is renewed every year. The terms and conditions of the current Renewal will be specified in the Thirteenth Amended and Restated Revolving Credit Agreement, to be dated as of May 13, 2014 ("Renewal Agreement"), among The Depository Trust Company, National Securities Clearing Corporation ("NSCC"),[3] the Lenders party thereto and JPMorgan Chase Bank, N.A., as Administrative Agent, and are substantially the same as the terms and conditions of the existing credit agreement, dated as of May 14, 2013 ("Existing Agreement"),[4] among the same parties. The substantive terms of the Renewal are set forth in the Summary of Indicative Principal Terms and Conditions, dated March 17, 2014, which is not a public document. The aggregate commitments being sought under the Renewal will be for an amount of up to $15 billion for NSCC and DTC together, with a $1.9 billion aggregate commitment to DTC, as provided in the Existing Agreement.

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3 The Renewal Agreement will provide for both DTC and NSCC as borrowers, with an aggregate commitment of $1.9 billion for DTC and the amount of any excess aggregate commitment for NSCC. The borrowers are not jointly and severally liable and each lender has a ratable commitment to each borrower. DTC and NSCC have separate collateral to secure their separate borrowings.

4 Last year, the Commission published notice of no objection to DTC's advance notice filing with respect to DTC's renewal beginning on May 14, 2013. See Release No. 34-69556 (May 10, 2013), 78 FR 28933 (May 16, 2013) (SR-DTC-2013-802).

This agreement and its substantially similar predecessor agreements have been in place since the introduction of same day funds settlement at DTC. DTC requires same-day liquidity resources to cover the failure-to-settle of the Participant or affiliated family of Participants with the largest net settlement obligation. If a Participant fails to satisfy its end-of-day net settlement obligation, DTC may borrow under the line to enable it, if necessary, to fund settlement among non-defaulting Participants. Any borrowing would be secured principally by securities that were intended to be delivered to the defaulting Participant upon payment of its net settlement obligation and securities previously designated by the defaulting Participant as collateral. The liquidity facility is built into DTC's primary risk management controls, the net debit cap and collateral monitor, which together require that the end-of-day net funds settlement obligation of a Participant cannot exceed DTC's liquidity resources and is fully collateralized.

2. Statutory Basis

The Renewal is consistent with Section 805(b) of the Clearing Supervision Act[5] and with Commission Rule 17Ad-22(d)(11)[6] (regarding default procedures) because it mitigates liquidity risk.

(B) Clearing Agency's Statement on Comments on the Advance Notice Received from Members, Participants, or Others

Written comments on the Advance Notice have not yet been solicited or received. DTC will notify the Commission of any written comments received by DTC.

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5 12 U.S.C. 5461(b). The Financial Stability Oversight Council ("FSOC") designated DTC a systemically important financial market utility ("SIFMU") on July 18, 2012. See FSOC 2012 Annual Report, Appendix A, http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf ("FSOC Designation"). Therefore, DTC is required to comply with the Clearing Supervision Act.

6 17 CFR 240.17Ad-22(d)(11).

(C) Advance Notice Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

1. Description of Change

The terms and conditions to be specified in the Renewal Agreement are substantially the same as the terms and conditions specified in the Existing Agreement, except that, in order to help protect against concentration risk, an enhancement is being added for a back-up Administrative Agent and Collateral Agent in case the primary Administrative Agent and Collateral Agent is unable to perform its obligations.

2. Anticipated Effect on and Management of Risks

As noted, the committed revolving line of credit is a cornerstone of DTC risk management and this Renewal is critical to the DTC risk management infrastructure. The Renewal does not otherwise affect or alter the management of risk at DTC.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. DTC shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing DTC with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies DTC in writing that it does not object to the proposed change and authorizes DTC to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

DTC shall post notice on its website of proposed changes that are implemented.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Advance Notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-DTC-2014-805 on the subject line.

Paper Comments:

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

All submissions should refer to File No. SR-DTC-2014-805. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the Advance Notice that are filed with the Commission, and all written communications relating to the Advance Notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTC's website at http://dtcc.com/en/legal/sec-rule-filings.aspx.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-DTC-2014-805 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Commission Findings and Notice of No Objection

Although the Clearing Supervision Act does not specify a standard of review for advance notices, the Commission believes that the stated purpose of the Clearing Supervision Act is instructive.[7] The stated purpose is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for SIFMUs.[8]

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities and financial institutions engaged in designated activities for which it is the supervisory agency or the appropriate financial regulator.[9] Section 805(b) of the Clearing Supervision Act states that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to:

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7 12 U.S.C. 5461(b).

8 Id.

9 12 U.S.C. 5464(a)(2).

- promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.[10]

The Commission adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act on October 22, 2012 ("Clearing Agency Standards").[11] The Clearing Agency Standards became effective on January 2, 2013 and require registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for their operations and risk management practices on an ongoing basis.[12] As such, it is appropriate for the Commission to review advance notices against the objectives and principles for risk management standards as described in Section 805(b) of the Clearing Supervision Act,[13] as well as the applicable Clearing Agency Standards promulgated under Section 805(a) of the Clearing Supervision Act.[14]

The Advance Notice is a proposal to enter into a renewed credit facility, as described above, which is designed to help mitigate the risk that DTC would fail to meet its settlement

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10 12 U.S.C. 5464(b).

11 Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

12 The Clearing Agency Standards are substantially similar to the risk management standards established by the Board of Governors of the Federal Reserve System governing the operations of SIFMUs that are not clearing entities and financial institutions engaged in designated activities for which the Commission or the Commodity Futures Trading Commission is the Supervisory Agency. See Financial Market Utilities, 77 FR 45907 (Aug. 2, 2012).

13 See 12 U.S.C. 5464(b).

14 See 12 U.S.C. 5464(a).

obligations event that a Participant would fail to satisfy its end-of-day net settlement obligation. Consistent with Section 805(b) of the Clearing Supervision Act,[15] the Commission believes the proposal promotes robust risk management, as well as the safety and soundness of DTC's operations, while reducing systemic risks and supporting the stability of the broader financial system, by providing a readily available source of liquidity for DTC.

Additionally, Commission Rule 17Ad-22(d)(11) regarding default procedures,[16] adopted as part of the Clearing Agency Standards,[17] requires that registered clearing agencies "establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable … establish default procedures that ensure that the clearing agency can take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a participant default."[18] Here, as described above, the renewed credit facility will help DTC continue to meet its respective obligations in a timely fashion in the event that a Participant fails-to-settle, thereby helping to contain losses and liquidity pressures from that failure.

As described in Item III above, Section 806(e)(1)(G) of the Clearing Supervision Act provides that a SIFMU may implement a change contained in an advance notice if it has not received an objection to the proposed change within the applicable 60 day period.[19] However, Section 806(e)(1)(I) of the Clearing Supervision Act allows the Commission to issue no

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15 See 12 U.S.C. 5464(b).

16 17 CFR 240.17Ad-22(d)(11).

17 Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

18 17 CFR 240.17Ad-22(d)(11).

19 See 12 U.S.C. 5465(e)(1)(G).

objection prior to the 60th day.[20] If the Commission chooses to issue no objection prior to the 60th day, it must notify the SIFMU in writing that it does not object and authorize implementation of the change on an earlier date.[21] If the Commission chooses to object prior to the 60th day, it must similarly notify the SIFMU.[22]

In its filing with the Commission, DTC requested that the Commission notify DTC, under Section 806(e)(1)(I) of the Clearing Supervision Act, that the Commission has no objection to the Advance Notice no later than Thursday, May 8, 2014, three business days before the existing credit facility is set to expire on Tuesday, May 13, 2014, to ensure that there is no period of time that DTC operates without a credit facility.

For the reasons stated above, the Commission does not object to the Advance Notice.

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20 12 U.S.C. 5465(e)(1)(I).

21 Id.

22 12. U.S.C. 5465(e)(1)(E).

VI. Conclusion

IT IS THEREFORE NOTICED, pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act,[23] that the Commission DOES NOT OBJECT to the change described in advance notice SR-DTC-2014-805 and that DTC be and hereby is AUTHORIZED to implement the change as of the date of this notice.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

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23 12 U.S.C. 5465(e)(1)(I).

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72144 / May 9, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15560

In the Matter of SHAWN H. MOORE, Respondent.	CORRECTED ORDER MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b)(6) OF THE SECURITIES EXCHANGE ACT OF 1934

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 Pursuant to Sections 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act") against Shawn H. Moore ("Respondent" or "Moore").

II.

Following the institution of these proceedings on October 9, 2013, Respondent submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Making Findings, and Imposing Remedial Sanctions Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 as to Shawn H. Moore ("Order"), as set forth below.

III.

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

Summary

These proceedings arise out of an investigation conducted by the Division of Enforcement ("Division").

Respondent

1. Moore, 47, is a resident of Draper, Utah. Moore previously was employed by VesCor Capital Corp ("VesCor"), a company that owned or was affiliated with approximately 150 entities. Moore was identified as a manager of some of those entities. From at least January 2000 until February 2008, the Commission alleges Moore acted as an unregistered broker or dealer in violation of the federal securities laws by soliciting investors to purchase investment contracts issued by VesCor for first trusts deed notes in real property owned by VesCor, guaranteeing between 10.5% and 16% return on their investments. Moore maintained investment records for many VesCor investors, was involved in the preparation of investor documents such as prospectuses and monthly investment statements, and balanced investor payment reports with accounting reports on a monthly basis. Between January 2000 and February 2008, Moore earned at least $325,773 in performance bonuses, some of which were shown as commissions and consulting fees from VesCor for the money he raised from investors. Moore has never been registered with the Commission or any other regulatory agency.

2. On November 18, 2008, the State of Utah charged Moore with four counts of securities fraud in violation of Utah Code Ann. § 61-1-1 (a second-degree felony), four counts of sales of securities by an unlicensed agent in violation of Utah Code Ann. § 61-1-3(1) (a third-degree felony), and one count of pattern of unlawful activity in violation of Utah Code Ann. § 76-10-1601 (a second-degree felony) in State of Utah v. Shawn H. Moore, Criminal No. 081908861 (3rd Dist. Utah). On February 6, 2013, Moore was convicted of five second-degree felony counts, including four counts of securities fraud and one count of pattern of unlawful activity, and four third-degree felony counts of the sale of securities by an unlicensed agent.

3. The counts of the criminal information to which Moore was found guilty alleged, among other things, that Moore defrauded eight investors and obtained money by means of materially false and misleading statements in connection with the fraudulent sale of unregistered promissory notes while Moore was not registered as a broker or dealer.

IV.

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

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

barred from association with any broker, dealer, investment adviser, municipal securities dealer, and 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 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.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72145 / May 9, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3833 / May 9, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15867

In the Matter of GURUDEO PERSAUD, 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 Gurudeo Persaud ("Persaud" or "Respondent").

II.

In anticipation of the institution of these proceedings, Persaud 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, Persaud 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 Persaud's Offer, the Commission finds that:

1. From 2005 until August 2010, Persaud was a registered representative with Money Concepts Capital Corporation, an entity located in Palm Beach Gardens Florida and dually registered with the Commission as a broker-dealer and investment adviser. Persaud held Series 7, 63, and 66 securities licenses during that time. He resigned from Money Concepts in August 2010. Persaud, 48, resided in Orlando, Florida during this time.

2. On April 18, 2014, a final judgment was entered by consent against Persaud in the civil action entitled Securities and Exchange Commission v. Gurudeo Persaud, Case No. 6:12-cv-932-Orl-28G-JK, pending in the United States District Court for the Middle District of Florida. Among other things, the final judgment permanently enjoined Persaud from future violations of Sections 206(1), 206(2), and 206(4), and Rules 206(4)-(8)(a)(1) and (2) of the Advisers Act. Previously in the same case the District Court had granted summary judgment in favor of the Commission and enjoined Persaud from future violations of Sections 5(a) and (c) and 17(a) of the Securities Act of 1933 ("Securities Act"), and Exchange Act Section 10(b) and Rule 10b-5.

3. The Commission's complaint alleged that, while associated with Money Concepts, Persaud started his own company, White Elephant Trading Company LLC. The complaint further alleged that from no later than July 2007 until at least January 2011, Persaud raised more than $1 million from investors by promising them 6 to 18 percent annual returns and a risk-free investment in White Elephant's private equity fund, which would invest in the futures and other markets. Persaud made numerous misrepresentations and omissions to investors, including guaranteeing their investments were secure, failing to disclose his trading strategies were based on lunar cycles and the gravitational pull between the Earth and the moon, and that he misappropriated nearly half the investors' contributions for personal use.

4. In connection with the same conduct, Persaud entered into a written agreement to plead guilty to, and has been convicted of and sentenced for, one count of mail fraud in violation of 18 U.S.C. § 1341, in the case of United States v. Persaud, Case No. 6:13-cr-25-Orl-36DAB, also pending in the Middle District of Florida. In connection with his plea and conviction, Persaud admitted the facts set forth in his Plea Agreement.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Persaud 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; 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.

Jill M. Peterson
Jill M. Peterson,
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72140 / May 9, 2014

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3553 / May 9, 2014

Admin. Proc. File Nos. 3-14872, 3-15116

In the Matter of BDO CHINA DAHUA CPA CO., LTD., ERNST & YOUNG HUA MING LLP, KPMG HUAZHEN (SPECIAL GENERAL PARTNERSHIP), DELOITTE TOUCHE TOHMATSU CERTIFIED PUBLIC ACCOUNTANTS LTD., and PRICEWATERHOUSECOOPERS ZHONG TIAN CPAS LIMITED	ORDER GRANTING LEAVE TO ADDUCE ADDITIONAL EVIDENCE AND GRANTING THE PETITIONS FOR REVIEW

These administrative proceedings, instituted pursuant to Rule of Practice 102(e)(1)(iii), center on respondents' alleged willful refusal to provide the Commission with audit work papers in violation of their obligations under Section 106 of the Sarbanes-Oxley Act as amended by Section 929J of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[1] Four of the five respondents, Ernst & Young Hua Ming LLP (E&Y), KPMG Huazhen (Special General Partnership) (KPMG), Deloitte Touche Tohmatsu Certified Public Accountants Ltd. (DTTC), and PricewaterhouseCoopers Zhong Tian CPAs Limited (PwC), have petitioned for review of the initial decision issued by the law judge on January 22, 2014.[2] The Division of Enforcement (Division) has filed a petition for review as to the scope of the remedies imposed by the initial decision. In addition, the same four respondents also filed a motion for leave to adduce additional evidence. The Division opposes this motion and, in the alternative, seeks leave to adduce its own additional evidence. We have determined to grant the motions to adduce additional evidence and the petitions for review.

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1 15 U.S.C. § 7216(b)(1); 17 C.F.R. § 201.102(e)(1)(iii).

2 *BDO China Dahua CPA Co.*, Initial Decision Release No. 553, 2014 WL 242879 (Jan. 22, 2014). The remaining respondent, BDO China Dahua CPA Co., Ltd., did not file a petition for review. Its counsel, DLA Piper LLP, filed a notice of withdrawal of appearance, which the Division has moved to strike. These matters will be addressed by a separate order, which is being issued concurrently with this one.

BACKGROUND

A. The orders instituting proceedings

We issued the orders instituting proceedings in May 2012 and December 2012 and consolidated them for hearing.[3] The OIPs alleged that each respondent is a foreign public accounting firm located in China and, within China, supervised and regulated by, *inter alia*, the China Securities Regulatory Commission (CSRC). Respondents performed audit work for ten clients—DTTC Client A and Clients A through I—based in China. The Division had or has ongoing fraud investigations concerning those clients, each of which is a U.S. issuer whose securities were registered with the Commission.

According to the OIPs, at various times between March 2011 and April 2012, the Division served requests for audit work papers pertaining to those clients on respondents through respondents' designated U.S. agents. These requests were made pursuant to Section 106(b) of the Sarbanes-Oxley Act, which provides that a foreign accounting firm that, among other things, "issues an audit report, performs audit work, or conducts interim reviews" is required to "produce the audit work papers . . . and all other documents of the firm related to any such audit work or interim review to the Commission . . . , upon request of the Commission."[4] The OIPs alleged that each respondent, after receiving the Commission's requests, informed the staff that it would not produce the documents on the ground that it interpreted Chinese law as preventing firms from giving audit work papers directly to U.S. regulators. As of the issuance of the OIPs, the Commission did not have possession of any of the requested work papers.

The OIPs alleged that respondents violated Section 106(e), which provides that a "willful refusal" of an accounting firm to "comply, in whole or in part, with any request by the Commission . . . shall be deemed a violation" of the Sarbanes-Oxley Act.[5] The Division sought to impose remedies under Rule of Practice 102, which provides that the "Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found by the Commission" to have "willfully violated . . . any provision of the Federal securities laws."[6]

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3 *Deloitte Touche Tohmatsu Certified Pub. Accountants Ltd.*, Exchange Act Release No. 66948, 2012 WL 1612081 (May 9, 2012); *BDO China Dahua CPA Co.*, Exchange Act Release No. 68335, 2012 WL 5994345 (Dec. 3, 2012).

4 15 U.S.C. § 7216(b)(1). Unless otherwise specified, all references to statutory sections will be to the Sarbanes-Oxley Act, as amended by Section 929J of the Dodd-Frank Act.

5 *Id.* § 7216(e). A violation of the Sarbanes-Oxley Act is "treated for all purposes in the same manner as a violation" of the Securities Exchange Act of 1934. *Id.* § 7202(b)(1).

6 17 C.F.R. § 201.102.

B. The law judge's initial decision

Before the law judge, respondents argued that they did not "willfully refuse" to comply with the Commission's requests and that they acted in good faith. They claimed that they were willing to produce the requested work papers, but that Chinese law prevented them from doing so directly. They argued that they had offered to provide the CSRC with the documents and believed that the Commission would be able to obtain them after discussions with the CSRC. After hearing testimony, the law judge issued an initial decision finding that respondents had willfully violated Section 106 and imposing remedies pursuant to Rule 102(e).

In large part, the law judge credited respondents' assertion that their refusal to produce the work papers was "driven by their concerns over potentially draconian Chinese law."[7] But he concluded that, as a matter of law, the motive for respondents' refusal was immaterial to whether they had "willfully refused" to comply with the Commission's requests within the meaning of Section 106(e).[8] According to the initial decision, "'willful refusal to comply' means 'choosing not to act after receiving notice that action was requested,' without regard to good faith."[9]

Next, the initial decision rejected respondents' reliance on Section 106(f), which provides that "the staff of the Commission . . . may allow a foreign public accounting firm . . . to meet production obligations . . . through alternate means, such as through foreign counterparts of the Commission."[10] Respondents argued that the Commission had tried to obtain the work papers for certain clients through the CSRC, and therefore could not sanction them for refusing to directly produce the work papers. The law judge disagreed. He concluded that Section 106 authorized the Commission to pursue "multiple possible avenues for obtaining documents" and that "[n]othing compels the Commission to use one avenue rather than another."[11]

Turning to the issue of remedies, the initial decision denied, for a period of six months, the privilege of practicing or appearing before the Commission to the four appealing respondents; it also censured respondent Dahua. The law judge determined, among other things, that remedial measures were warranted on the ground that "future violations [were] virtually certain because Respondents consider themselves unable to produce audit work papers directly to the Commission even under any future Sarbanes-Oxley 106 request."[12]

Finally, the law judge denied respondents' post-hearing motion to supplement the record with exhibits showing, in respondents' view, that the Commission can feasibly obtain work

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7 *BDO China Dahua CPA Co.*, 2014 WL 242879, at *80.

8 *Id.* at *70.

9 *Id.* at *64.

10 15 U.S.C. § 7216(f).

11 *BDO China Dahua CPA Co.*, 2014 WL 242879, at *76.

12 *Id.* at *78.

papers through the CSRC. According to respondents, several sets of work papers have already been turned over to the Commission and substantial progress has been made with respect to the remainder. The law judge stated that the evidence, which respondents sought to add after the close of the record, was "potentially exculpatory."[13] But he found that there was "no good cause to reopen the record" because the "probative value" of the evidence was "unclear" and because he could not "evaluate the relevance and weight of such evidence without hearing from live witnesses."[14] He believed that the "better approach" was for respondents "to petition the Commission to adduce additional evidence" when the matter was appealed.[15]

DISCUSSION

We have determined to grant respondents' motion for leave to adduce additional evidence, the Division's cross-motion in the alternative for leave to adduce other additional evidence, and the petitions for review.

A. The motion and cross-motion for leave to adduce additional evidence

Respondents seek leave to adduce the exhibits that the law judge declined to admit, as well as several other documents reflecting subsequent production activity through the CSRC ("Respondents' Additional Evidence").[16] They argue that the evidence proves that their production obligations as to many of the requested work papers have already "been satisfied under Section 106(f)." They also argue that it demonstrates that the "CSRC is an alternative means of production," which both vindicates respondents' good faith and makes the Section 106 requests unenforceable. Respondents further contend that their additional evidence "undermines the sanction proposed by the Initial Decision" by showing that the Commission will be able to obtain work papers through the CSRC in the future.

The Division opposes respondents' motion on the ground that Respondents' Additional Evidence is not, in the Division's view, material. According to the Division, that evidence merely "support[s] legal theories that the Initial Decision and other [law judge] rulings properly rejected." It argues that the evidence has "no bearing" on whether respondents violated Section 106(e) or the remedial measures to be imposed under Rule 102 because the "Initial Decision rejected all of respondents' legal arguments that could conceivably make [Respondents'] Additional Evidence relevant." Finally, and in the alternative, the Division cross-moves for

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13 *Id.* at *83.

14 *Id.*

15 *Id.*

16 Respondents' Additional Evidence consists of proposed Exhibits 654 through 677.

leave to adduce its own evidence (the "Division's Additional Evidence") that provides context as to the extent, completeness, and timeliness of the productions through the CSRC.[17]

We have determined to grant respondents' motion and the Division's cross-motion. Rule of Practice 452 permits a party to submit additional evidence "at any time prior to issuance of a decision by the Commission" as long as the party can "show with particularity" (1) that such additional evidence is material" and (2) "that there were reasonable grounds for failure to adduce such evidence previously."[18] Each of these elements is satisfied here.

We find that the materiality element of Rule 452 is satisfied at this juncture of the proceedings. We appreciate that the parties fundamentally disagree as the correct construction of Section 106 and as to the inferences that should be drawn from the proffered evidence. At bottom, the Division's opposition is premised on the immateriality of the evidence in light of the Division's *own* reading of Section 106. In other words, the Division argues that the evidence could not possibly make a difference under its theory of the case, which prevailed before the law judge. We are unwilling to deny respondents' motion on this basis, as doing so would be tantamount to summarily affirming the initial decision.[19] Instead, we will defer assessment of the probative value that should ultimately be afforded the additional evidence until we have received the benefit of full briefing and argument, reviewed the record in its entirety, and resolved the merits of the petitions for review.[20] Like any other ruling on admissibility, our ruling in this regard is by nature subject to revision until issuance of a final decision.[21]

It is undisputed that Rule 452's timeliness element is satisfied, and we so find. The developments relating to productions through the CSRC did not take place until after the close of

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17 The Division's Additional Evidence consists of proposed Exhibits 359 through 375. Respondents do not oppose the cross-motion to adduce the Division's Additional Evidence.

18 17 C.F.R. § 201.452.

19 *Cf.* Rule 411(e)(2), 17 C.F.R. § 201.411(e)(2) ("The Commission may grant summary affirmance if it finds that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument.").

20 Put another way, we will take into consideration the additional evidence, but we do not in so doing commit ourselves to giving it any particular—or, indeed, any—weight in exculpation or mitigation. *See generally Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1131 (11th Cir. 2012); *Time Warner Entm't Co., L.P. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995).

21 *optionsXpress, Inc.*, Exchange Act Release No. 70698, 2013 WL 5635987, at *3 & n.12 (Oct. 16, 2013). As respondents correctly recognize, the "Commission can resolve the exact legal import" of the additional evidence "in the course of [the] appeal."

the hearing and the evidence, which reflects those developments, was unavailable earlier.[22] We find that there are "reasonable grounds for failure to adduce" the evidence earlier.

For the above reasons, we have determined that the requirements of Rule 452 are satisfied as to Respondents' Additional Evidence and the Division's Additional Evidence. Accordingly, it is ORDERED that respondents' motion to adduce additional evidence and the Division's cross-motion to adduce additional evidence are GRANTED. Respondents' Additional Evidence and the Division's Additional Evidence are hereby received into the record.

B. The petitions for review

We turn next to the parties' petitions for review. Upon due consideration, and pursuant to Rule of Practice 411, the petitions for review of the law judge's initial decision are GRANTED.[23] Pursuant to Rule of Practice 411(d), the Commission also will determine what sanctions, if any, are appropriate in this matter.[24]

We designate respondents as the side that will file the opening brief.[25] Accordingly, IT IS ORDERED, pursuant to Rule of Practice 450(a), that briefs shall be filed as follows:[26]

> Respondents' opening brief: E&Y, KMPG, DTTC, and PwC shall file a single consolidated brief, not to exceed 28,000 words, by June 23, 2014.
>
> Division's principal and response brief: The Division shall file a brief, not to exceed 28,000 words, by August 7, 2014. This brief must address the issues presented by the Division's petition for review and respond to respondents' opening brief.

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22 *E.g.*, *Citizens Capital Corp.*, Exchange Act Release No. 67313, 2012 WL 2499350, at *8 (June 29, 2012); *Vladlen Larry Vindman*, Exchange Act Release No. 53654, 2006 WL 985308, at *9 n.51 (Apr. 14, 2006).

23 17 C.F.R. § 201.411.

24 17 C.F.R. § 201.411(d).

25 Adopting Release, *Rules of Practice*, Exchange Act Release No. 35833, 1995 WL 368865, at *91 (June 9, 1995), 60 Fed. Reg. 32738, 32778 (June 23, 1995).

26 17 C.F.R. § 201.450(a).

Respondents' response and reply brief: E&Y, KMPG, DTTC, and PwC shall file a single consolidated brief, not to exceed 16,000 words, by August 27, 2014.

Division's reply brief: The Division may file a reply brief, not to exceed 2,000 words, by September 8, 2014. This brief must be limited to the issues presented by the Division's petition for review.

By separate order, the Commission shall provide for briefing on the Division's petition for review insofar as it seeks to challenge the scope of remedies imposed on Dahua.[27] As provided by Rule of Practice 450(a), no briefs in addition to those specified in this schedule may be filed without leave of the Commission.[28] Pursuant to Rule of Practice 180(c), failure to file a brief in support of the petition may result in dismissal of this review proceeding.[29]

It is further ORDERED that the parties shall confer and prepare an appendix that reproduces without argument or commentary the foreign law materials in the record upon which they rely (including any applicable orders, regulations, directives, or letters), along with translations of any document in a foreign language.[30] The materials shall be set out in chronological order by date of issuance or promulgation and must be consecutively paginated to facilitate citation to the appendix in the parties' briefs. The appendix must contain a table of contents describing each item included, the original location of that item in the record, and the page of the appendix on which it begins. Respondents shall file and serve the appendix at the same time that they file and serve their opening brief.

Finally, it is ORDERED that the Stipulated Protective Order entered by the law judge on May 9, 2013, as modified by the Joint Stipulation and Amendment to Stipulated Protective Order entered July 29, 2013, shall remain in effect. Two versions of each document containing information subject to the protective order must be filed: (1) a complete version of the document marked "CONFIDENTIAL" for filing under seal and (2) a redacted version of the same document for the public file. The Commission reserves the authority to reach a different

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27 *See supra* note 2.

28 Attention also is called to Rules of Practice 150-153, 17 C.F.R. §§ 201.150-153, with respect to form and service, and Rule of Practice 450(b) and (c), 17 C.F.R. §§ 201.450(b), 201.450(c), with respect to content and length limitations (except as modified in this order). Requests for extensions of time to file briefs or for additional words are disfavored.

29 17 C.F.R. § 201.180(c).

30 Where an agreed translation is unavailable, each party shall submit its own preferred version along with any applicable translator's certificate. *See, e.g.*, *Pittway Corp. v. United States*, 88 F.3d 501, 503 n.1 (7th Cir. 1996).

conclusion regarding the confidentiality of the information covered by the May 9 and July 29 orders at any time before it finally determines the issues raised in this proceeding.[31]

By the Commission.

Lynn M. Powalski
Deputy Secretary

[31] *See, e.g.*, *Kevin Hall*, Exchange Act Release No. 60346, 2009 WL 2149222, at *2 (July 20, 2009).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72155 / May 13, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15870

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Christopher D. Wiest ("Wiest" 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 except as otherwise provided herein in paragraph IV.C, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing 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 involve insider trading by Wiest in the securities of InfoLogix, Inc. ("InfoLogix") in advance of the public announcement on December 15, 2010 that Stanley Black & Decker, Inc. ("Stanley") had agreed to acquire InfoLogix.

Respondent

2. **Christopher D. Wiest**, age 36, is a resident of Kenton County, Kentucky and is a lawyer licensed in Ohio and Kentucky.

Other Relevant Entities

3. **Stanley Black & Decker, Inc**. is a Connecticut corporation with its principal place of business in New Britain, Connecticut. Its common stock is registered pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange, under the symbol SWK.

4. **InfoLogix, Inc**. was a Delaware corporation with its principal place of business in Hatboro, Pennsylvania. Prior to its acquisition by Stanley, InfoLogix common stock was registered pursuant to Section 12(b) of the Exchange Act and was listed on The NASDAQ Stock Market, LLC, under the symbol "IFLG." On October 21, 2010, InfoLogix stock was delisted by NASDAQ and was quoted on the OTC Bulletin Board under the same symbol until Stanley's acquisition of InfoLogix was completed on January 18, 2011. InfoLogix is no longer registered with the Commission in any capacity.

Background

5. During the summer of 2010, Stanley approached InfoLogix to determine if there was an interest in a strategic combination between the two companies. Stanley and InfoLogix entered into a confidentiality agreement, engaged in negotiations and, on October 7, 2010, signed a term sheet outlining the parameters for Stanley's acquisition of InfoLogix. In the term sheet, Stanley agreed, among other things, to pay $4.75 for each share of InfoLogix common stock.

6. At that time, Wiest was employed at a law firm which had a long-standing retainer agreement with Stanley to provide certain legal services. Pursuant to this agreement, Wiest, on numerous prior occasions, had provided legal services in connection with Stanley's potential acquisition of other companies.

7. On October 21, 2010, Stanley, through one of its agents, requested that Wiest provide legal services relating to the proposed acquisition of InfoLogix. Stanley, through the same

agent, simultaneously provided Wiest with material, nonpublic information concerning the proposed acquisition. This information, which was dated October 15, 2010 and marked "Confidential," included a written presentation prepared by Stanley which identified the key terms of the proposed transaction, including the proposed purchase of InfoLogix common stock at a price of $4.75 per share.

8. Wiest owed Stanley and his employer a duty to keep the information confidential and to use it only in connection with the provision of legal services to Stanley.

9. Between October 28, 2010 and November 16, 2010, Wiest, on the basis of the material, nonpublic information that he received from Stanley, purchased a total of 35,000 shares of InfoLogix common stock in his brokerage account for his 401(k) plan at prices ranging from $2.84 to $1.95. Wiest did not inform Stanley or his employer of his plans to make these purchases.

10. Wiest knew or was reckless in not knowing that these securities transactions were in breach of his duty to Stanley and his employer.

11. On November 18, 2010, Wiest placed a day limit order to sell 25,000 shares of InfoLogix stock common stock. Due to market conditions, the order was only partially executed and resulted in Wiest selling only 13,510 shares of such stock at a loss. Wiest retained his remaining 21,490 shares of InfoLogix common stock.

12. After the market close on December 15, 2010, Stanley publicly announced that it was acquiring InfoLogix at $4.75 per share. The following day, the price of InfoLogix stock opened at $4.61 per share and remained in that range throughout the day, ultimately closing at $4.64 per share, which was a 158% increase from the prior day's closing price of $1.80 per share.

13. On December 16, 2010, Wiest sold his remaining 21,490 shares of InfoLogix stock, earning profits of $56,292 on these 21,490 shares.

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Wiest cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent shall pay disgorgement of $56,292, prejudgment interest of $5,122.97 and civil penalties of $56,292, for a total of $117,706.97 to the Securities and Exchange Commission. Payment shall be made in the following installments: $81,000 within 14 days of the entry of the Order and $36,706.97 within 180 days of the entry of the Order. No post-order interest is imposed if Respondent makes payments in accordance with the foregoing schedule. If any payment is not made by the date the payment is required or in the amount 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 must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or
(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Christopher D. Wiest as a Respondent in these proceedings, and the file number of these proceedings. For any payments made on or before May 30, 2014, a copy of the cover letter and check or money order must be sent to Sharon B. Binger, Regional Director, Philadelphia Regional Office, Securities and Exchange Commission, 701 Market St., Suite 2000, Philadelphia, PA 19106. For any payments made after May 30, 2014, a copy of the cover letter and check or money order must be sent to Sharon B. Binger, Regional Director, Philadelphia Regional Office, Securities and Exchange Commission, 1617 John F Kennedy Blvd., Suite 520, Philadelphia, PA 19103-1844.

C. Solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in the Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other order, consent order, judgment, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

2a-4(a)(4) under the Company Act. In the Commission's preliminary view, in order to make an "appropriate provision . . . for Federal income taxes" under rule 2a-4(a)(4), Copley must make a provision for the full federal income tax liability that would arise if all of the Fund's existing unrealized gains were realized. Making such a provision would result in purchases and redemptions of Copley's redeemable securities being effected, under rule 22c-1 under the Company Act, at a price based on a net asset value that reflects a fair and equitable treatment of all of Copley's shareholders. In contrast, the exemption from rule 22c-1 requested in the application to provide for less than the full federal income tax liability, could result in, among other things, redemptions of Copley's redeemable securities at prices based on a potentially significantly higher net asset value per share for some shareholders while the net asset value of shares held by the remaining shareholders may be reduced correspondingly when the full federal income tax liability is accrued, producing an unfair and inequitable result among Copley's shareholders.

16. The Application discusses Copley's "willingness to convert to RIC status in the event unforeseen circumstances caused [unrealized] gains to be realized that consumed the entire amount of accumulated deferred income taxes it has recognized" as a way for the Fund to avoid having to pay more in federal income taxes than the amount provided for under the Proposed Method. Copley's suggested potential conversion to RIC status, however, does not change our analysis. In order to successfully convert to a RIC at a point in time, Copley would be required to comply with the Code's RIC requirements at all times during the taxable year, which may not be possible if Copley encountered the "unforeseen circumstances" mid-year or late-year.[37]

[37] *See* section 851 of the Code.

existing unrealized gains were realized, also is consistent with GAAP. The Application, however, requests an "exemption" from rule 4-01(a)(1) of Regulation S-X for Copley to use a non-GAAP methodology in recording its federal income tax liability in its financial statements.[40] If Copley were to use two different methodologies in calculating its net asset value – a GAAP-consistent methodology for purposes of pricing Copley's redeemable securities for purchases and redemptions under rules 2a-4 and 22c-1 under the Company Act, and a non-GAAP methodology in its financial statements -- in the Commission's preliminary view, the result may be unnecessarily confusing to investors and contrary to the policy behind the Company Act's disclosure requirements. Accordingly, absent a request for a hearing that is granted by the Commission, the Commission intends to deny Copley's request for an exemption from rule 4-01(a)(1) of Regulation S-X as not necessary or appropriate in the public interest and as not consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Company Act.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

[40] The Application does not state how Copley would present the amount of its federal income tax liability in its financial statements if the Commission granted the requested exemption. The Commission assumes that Copley would present the amount according to its Proposed Method in lieu of presenting the amount determined in accordance with GAAP.

III.

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

A. Tennessee Commerce Bancorp, Inc., (CIK No. 0001323033) is a Tennessee Corporation located in Franklin, Tennessee with a class of securities currently registered with the Commission pursuant to Section 12(g) of the Exchange Act. Bancorp was the bank holding company for the now defunct Tennessee Commerce Bank, which was closed on January 27, 2012 by the Tennessee Department of Financial Institutions, which appointed the Federal Deposit Insurance Corporation as receiver. Bancorp's shares were formerly listed on the NASDAQ exchange under the stock symbol "TNCC" before it was delisted on March 5, 2012. Currently, the common stock of Bancorp (TNCC: Grey Market) is traded on the over-the-counter markets, is not listed, traded or quoted on any U.S. stock exchange, has no market makers, and is not eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. Bancorp has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission in that it has not filed an Annual Report on Form 10-K since April 18, 2011, or quarterly reports on Form 10-Q for any fiscal period subsequent to its fiscal quarter ending June 30, 2011.

IV.

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

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

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.

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

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

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Piwowar Not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72182 / May 16, 2014

Admin. Proc. File Nos. 3-15350, 3-15351

In the Matter of the Application of

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

For Review of Actions Taken by
Self-Regulatory Organizations

ORDER ESTABLISHING PROCEDURES AND REFERRING APPLICATIONS FOR REVIEW TO ADMINISTRATIVE LAW JUDGE FOR ADDITIONAL PROCEEDINGS

I.

The Securities Industry and Financial Markets Association ("SIFMA"), an industry trade group, has filed several applications for review challenging, pursuant to Section 19(d) of the Securities Exchange Act of 1934,[1] certain self-regulatory organization ("SRO") rule changes affecting fees that a number of SROs charge for non-core market data. On July 3, 2013, we directed the parties to provide briefing on preliminary procedural issues relating to the applications for review filed in Administrative Proceedings 3-15350 (the "'50 Proceeding") and 3-15351 (the "'51 Proceeding") (collectively, the "Proceedings").[2] Among other things, the SROs argued that the fees at issue do not constitute "denials of access" and, therefore, cannot be challenged under Exchange Act Section 19(d). Having now considered the parties' briefs in response to our prior order, we refer the '50 Proceeding, which we consolidate with one rule challenge from the '51 Proceeding, to an administrative law judge for further proceedings consistent with this order.

1 15 U.S.C. § 78s(d). Exchange Act Section 19(d) requires the Commission, upon timely "application by any person aggrieved," to review, among other things, action by an SRO that "prohibits or limits" "access to services offered by" the SRO to any person. The relevant standard of review is specified in Section 19(f). 15 U.S.C. § 78s(f).

2 SIFMA later filed additional applications related to other fees, which remain pending.

II.

BACKGROUND

Because an understanding of prior proceedings before the Commission and the United States Court of Appeals for the District of Columbia Circuit, along with changes in applicable law, is important to our consideration of the initial issues and to provide context for further development of the record, we set out in detail below the relevant history of prior challenges to SRO fee rules by SIFMA and NetCoalition[3] and the background of the Proceedings.

A. NYSE Arca filed a proposed rule change establishing fees for its ArcaBook "depth-of-book" market data service.

On May 23, 2006, NYSE Arca, Inc. ("NYSE Arca") filed a proposed rule (the "2006 ArcaBook Fee Rule") with the Commission pursuant to which NYSE Arca would begin to charge fees for access to ArcaBook, a proprietary "depth-of-book" data product previously provided to customers free of charge.[4] ArcaBook contains "a compilation of all limit orders resident in the NYSE Arca limit order book, available on a real-time basis."[5]

The Commission requires SROs to provide certain "core data" to central data processors for consolidation and distribution pursuant to joint industry plans.[6] For each NMS security, this core data includes: "(1) [a] national best bid and offer ('NBBO') with prices, sizes, and market center identifications; (2) the best bids and offers from each SRO that include prices, sizes, and market center identifications; and (3) last sale reports from each SRO."[7] In contrast, "[a]n exchange's depth-of-book order data includes displayed trading interest at prices *inferior* to the best-priced quotations that exchanges are required to provide for distribution in the core data

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[3] NetCoalition is an advocacy group that represents "leading global Internet and technology companies." http://netcoalition.com (last visited April 8, 2014). It was reported in October 2012 that NetCoalition was winding down operations following the launch of the Internet Association. http://thehill.com/blogs/hillicon-valley/technology/263793-netcoalition-winds-down-operations (last visited April 8, 2014).

[4] Form 19b-4, SR-NYSEArca-2006-21, filed May 23, 2006, *available at* http://www.nyse.com/nysenotices/nysearca/rule-filings/pdf?file_no=SR-NYSEArca-2006-21&seqnum=1 (last visited April 8, 2014).

[5] Notice of Filing of Proposed Rule Change Relating to Approval of Market Data Fees for NYSE Arca Data, Securities Exchange Act Release No. 53592, File No. SR–NYSEArca–2006–21 (June 6, 2006), 71 Fed. Reg. 33,496, 33,497 (June 9, 2006).

[6] *See* Rule 603(b) of Regulation NMS, 17 C.F.R. § 242.603(b).

[7] Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, Exchange Act Release No. 59039, File No. SR–NYSEArca–2006–21 (Dec. 2, 2008), 73 Fed. Reg. 74,770, 74,780 (Dec. 9, 2008) ("2008 ArcaBook Approval Order").

feeds."[8] SROs are not required to make "non-core data," like depth-of-book data, available to central data processors for consolidation.[9] Nor are broker-dealers required to purchase depth-of-book or other non-core data to satisfy their duty of best execution.[10]

Under then applicable law, the Commission was required to determine whether the proposed ArcaBook fee rule was consistent with the Exchange Act before it could go into effect.[11] Although the procedural framework has changed (as discussed below), the relevant substantive requirements of the Exchange Act as to market data fees (for both core and non-core data)[12] remain the same today as in 2006. Among other things, Exchange Act Section 6 requires that an exchange's rules provide for the "equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,"[13] not "permit unfair discrimination between customers, issuers, brokers, or dealers,"[14] and "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act.[15] And, when as here, an SRO distributes information with respect to quotations or transactions on an exclusive basis on its own behalf, it acts as an "exclusive processor"[16] and must distribute data on "fair and reasonable" and "not unreasonably discriminatory" terms.[17]

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8 *Id.* (emphasis in original); *see also NetCoalition v. SEC*, 615 F.3d 525, 529–30 (D.C. Cir. 2010) ("*NetCoalition I*").

9 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,779 ("[I]ndividual exchanges and other market participants distribute non-core data voluntarily.").

10 *Id.* ("[T]he Commission does not believe that broker-dealers are required to purchase depth-of-book order data, including the NYSE Arca data, to meet their duty of best execution.").

11 *NetCoalition I*, 615 F.3d at 528 ("As an SRO, an exchange must also file any proposed rule change (including a fee change) with the SEC for approval. . . . The SEC notices a rule change proposal for public comment and either approves it if it is consistent with the requirements of the Exchange Act or disapproves it.").

12 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,779 ("The standards in section 6 of the Exchange Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data.").

13 Exchange Act Section 6(b)(4), 15 U.S.C. § 78f(b)(4).

14 Exchange Act Section 6(b)(5), 15 U.S.C. § 78f(b)(5).

15 Exchange Act Section 6(b)(8), 15 U.S.C. § 78f(b)(8).

16 Exchange Act Section 3(a)(22)(B), 15 U.S.C. § 78c(a)(22)(B).

17 Exchange Act Section 11A(c)(1)(C)–(D), 15 U.S.C. § 78k–1(c)(1)(C)–(D); *see also* Rule 603(a) of Regulation NMS, 17 C.F.R. § 242.603(a) (same).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 15, 2014

In the Matter of **Cybermesh International Corp.,** **Golden Harvest Corporation (a/k/a Disability Access Corporation),** **Mirenco, Inc.,** **Newport Digital Technologies, Inc.,** **Resource Holdings, Inc.,** **SCOLR Pharma, Inc., and** **Titan Global Holdings, Inc.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

Cybermesh International Corp. (CIK No. 1367617) is a defaulted Nevada corporation located in Albuquerque, New Mexico with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Cybermesh International Corp. 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, 2011, which reported a net loss of $930,580 since the company's August 27, 2008 inception. As of May 6, 2014, the company's stock (symbol "CYTL") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Cybermesh

International Corp. because it has not filed any periodic reports since the period ended August 31, 2011.

Golden Harvest Corporation (a/k/a Disability Access Corporation) (CIK No. 1382085) 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). Golden Harvest Corporation 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, 2011, which reported a net loss of $222,768 for the prior nine months. As of May 6, 2014, the company's stock (symbol "DBYC") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Golden Harvest Corporation because it has not filed any periodic reports since the period ended September 30, 2011.

Mirenco, Inc. (CIK No. 1041609) is an Iowa corporation located in Radcliffe, Iowa with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Mirenco, Inc. 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, 2011, which reported a net loss of $120,842 for the prior three months. As of May 6, 2014, the company's stock (symbol "MREO") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Mirenco, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

Newport Digital Technologies, Inc. (CIK No. 1019216) is a revoked Nevada corporation located in Newport Beach, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Newport Digital Technologies is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2011, which reported a net loss of $65,343 for the prior three months. As of May 6, 2014, the company's stock (symbol "NPDTE") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Newport Digital Technologies, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

Resource Holdings, Inc. (CIK No. 1439746) is a defaulted Nevada corporation located in Tustin, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Resource Holdings, Inc. 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, 2011. As of May 6, 2014, the company's stock (symbol "SMSA") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Resource Holdings, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

SCOLR Pharma, Inc. (CIK No. 934936) is a delinquent Delaware corporation located in Bellevue, Washington with a class of securities registered with the

Commission pursuant to Exchange Act Section 12(g). SCOLR Pharma, Inc. 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, 2011, which reported a net loss of $2,519,000 for the prior nine months. As of May 6, 2014, the company's stock (symbol "SCLR") was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of SCOLR Pharma, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

Titan Global Holdings, Inc. (CIK No. 770471) is a Utah corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Titan Global Holdings is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended November 30, 2008, which reported a net loss of over $6,583,000 for the prior three months. As of May 6, 2014, the company's stock (symbol "TTGL") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Titan Global Holdings, Inc. because it has not filed any periodic reports since the period ended November 30, 2008.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 15, 2014, through 11:59 p.m. EDT on May 29, 2014.

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72166 / May 15, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15866

In the Matter of **Cybermesh International Corp., Golden Harvest Corporation (a/k/a Disability Access Corporation), Mirenco, Inc., Newport Digital Technologies, Inc., Resource Holdings, Inc., SCOLR Pharma, Inc., and Titan Global Holdings, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Cybermesh International Corp., Golden Harvest Corporation (a/k/a Disability Access Corporation), Mirenco, Inc., Newport Digital Technologies, Inc., Resource Holdings, Inc., SCOLR Pharma, Inc., and Titan Global Holdings, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Cybermesh International Corp. (CIK No. 1367617) is a defaulted Nevada corporation located in Albuquerque, New Mexico with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Cybermesh International

Corp. 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, 2011, which reported a net loss of $930,580 since the company's August 27, 2008 inception. As of May 6, 2014, the company's stock (symbol "CYTL") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Golden Harvest Corporation (a/k/a Disability Access Corporation) (CIK No. 1382085) 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). Golden Harvest Corporation 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, 2011, which reported a net loss of $222,768 for the prior nine months. As of May 6, 2014, the company's stock (symbol "DBYC") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Mirenco, Inc. (CIK No. 1041609) is an Iowa corporation located in Radcliffe, Iowa with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Mirenco, Inc. 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, 2011, which reported a net loss of $120,842 for the prior three months. As of May 6, 2014, the company's stock (symbol "MREO") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Newport Digital Technologies, Inc. (CIK No. 1019216) is a revoked Nevada corporation located in Newport Beach, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Newport Digital Technologies is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2011, which reported a net loss of $65,343 for the prior three months. As of May 6, 2014, the company's stock (symbol "NPDTE") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Resource Holdings, Inc. (CIK No. 1439746) is a defaulted Nevada corporation located in Tustin, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Resource Holdings, Inc. 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, 2011. As of May 6, 2014, the company's stock (symbol "SMSA") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. SCOLR Pharma, Inc. (CIK No. 934936) is a delinquent Delaware corporation located in Bellevue, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SCOLR Pharma, Inc. 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, 2011, which

reported a net loss of $2,519,000 for the prior nine months. As of May 6, 2014, the company's stock (symbol "SCLR") was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. Titan Global Holdings, Inc. (CIK No. 770471) is a Utah corporation located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Titan Global Holdings is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended November 30, 2008, which reported a net loss of over $6,583,000 for the prior three months. As of May 6, 2014, the company's stock (symbol "TTGL") was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

10. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 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 them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9584 / May 15, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 72174 / May 15, 2014

Admin. Proc. File No. 3-13927

In the Matter of GORDON BRENT PIERCE	ORDER DENYING MOTION FOR RECONSIDERATION

Gordon Brent Pierce seeks reconsideration of our March 7, 2014 opinion and order (the "Opinion")[1] finding that Pierce violated Section 5 of the Securities Act of 1933.[2] As explained below, we deny Pierce's motion because it fails to meet the standard for such motions set forth in our Rule of Practice 470 and cases applying that Rule.

I. Background

Pierce was found to have violated Section 5 in two proceedings. In the first proceeding, Pierce was charged with violating Section 5 by selling shares of stock of Lexington Resources, Inc. ("Lexington") from a personal account when no registration statement was filed or in effect as to the stock and no exemption from registration was available (the "First Proceeding").[3] In the second proceeding, Pierce was charged with violating Section 5 by selling Lexington stock from two corporate accounts he controlled without registration or an exemption from registration (the "Second Proceeding"). He asserted the defense of res judicata, but the law judge rejected the defense and found Pierce liable for the Section 5 violations.

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1 *Gordon Brent Pierce*, Securities Exchange Act Release No. 71664, 2014 SEC LEXIS 839 (Mar. 7, 2014).

2 15 U.S.C. § 77e.

3 *Lexington Res., Inc.*, Initial Decision Release No. 379, 2009 SEC LEXIS 2057 (June 5, 2009).

On appeal, Pierce reasserted the defense of res judicata. We rejected this defense, finding that Pierce failed to show the required identity of the causes of action in both the earlier and later suits. We stated:

> Because registration is transaction-specific, whether an offer or sale of securities violates §5 requires an inquiry into whether those securities have been registered, or whether an exemption applies, with respect to that *particular* offer or sale. Similarly, when an [order instituting proceedings ("OIP")] charges violations of §5, those charges must be framed in terms of particular transactions, not merely in terms of the securities themselves.

(Emphasis in original.) We also noted that res judicata does not apply simply because two proceedings involve "essentially the same course of wrongful conduct" or "the same parties, similar or overlapping facts, and similar legal issues." Rather, it applies "only where the transaction or connected series of transactions is the same, that is, 'where the same evidence is needed to support both claims.'" Because the OIP in the First Proceeding had charged Section 5 violations based solely on sales through the personal account, and different evidence was necessary "to state a claim against Pierce based on unregistered sales from the Corporate Accounts," we concluded that "the § 5 cause of action in the First Proceeding did not embrace the unlawful transactions charged in the Second Proceeding."

The fact that the Division discovered the corporate account trades during the course of the First Proceeding did not alter our conclusion. The Division was diligent in its pursuit of claims against Pierce and the late discovery of the trades was the result of Pierce's fraudulent concealment of the evidence.[4] Thus, even if res judicata could have served as a bar to the Second Proceeding, Pierce's fraudulent concealment of his involvement in the unregistered sales from the corporate accounts would defeat any application of res judicata. We concluded that it was in the public interest to impose a cease-and-desist order and to order disgorgement in the amount of $7,247,635.75, for which Pierce is jointly and severally liable with the corporations through whose accounts the trading was conducted.

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[4] As we noted in the Opinion, Pierce opposed the Division's motion in the First Proceeding to introduce the previously concealed evidence. Pierce argued that admitting the evidence after the hearing had concluded would violate due process. *Pierce*, 2014 SEC LEXIS 839, at *42 n.49. The law judge ruled on the Division's motion and Pierce's opposition by admitting the evidence only for the limited purpose of supporting other charges already at issue in the First Proceeding. The law judge found that she lacked the authority to amend the OIP by adding a Section 5 charge against Pierce based on his sales in the corporate accounts. She accordingly made no findings of Section 5 liability and ordered no disgorgement based on the trading in those accounts. We therefore concluded in the Opinion that the admission of the new evidence for this limited purpose "did not add new charges to the First Proceeding."

II. Analysis

We analyze Pierce's motion for reconsideration under Rule of Practice 470, which requires that a motion for reconsideration "briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought."[5] We have stated that reconsideration is "an extraordinary remedy"[6] that is "designed to correct manifest errors of law or fact, or to permit the presentation of newly discovered evidence."[7] Applicants may not use motions for reconsideration to reiterate arguments previously made or to cite authority previously available, and we will accept additional evidence only if the movant could not have known about or adduced that evidence before entry of the order for which reconsideration is sought.[8] Motions for reconsideration, therefore, are granted only in exceptional cases.[9] Under these standards, Pierce's motion does not establish that reconsideration is merited. Rather, it essentially reiterates claims made during the appeal and addressed in the Opinion. These arguments provide no basis for reconsideration.[10] We nevertheless address certain points below.

The motion posits that the Opinion mistakenly found that the law judge in the First Proceeding ruled against the Division's request to disgorge profits from the sales in the corporate accounts on the grounds that such a request "was beyond the scope of <u>that proceeding</u>" and "<u>was not part of that proceeding</u>" (quotations from Opinion; emphasis provided by Pierce). Pierce argues that, in fact, the law judge "ruled only that the claim 'would be outside the scope <u>of the OIP</u>'" (emphasis provided by Pierce). This is not a substantive distinction because the term "OIP" is the short form for "Order Instituting Proceedings," the charging document in our administrative proceedings that defines the scope of any given proceeding.

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5 17 C.F.R. § 201.470.

6 *See, e.g.*, *Eric J. Brown*, Order Denying Collins's Motion for Reconsideration of Civil Penalties, Exchange Act Rel. No. 66752, 2012 SEC LEXIS 1127, at *3 (Apr. 5, 2012), *aff'd sub nom. Collins v. SEC*, 736 F.3d 521, 524-26 (2013).

7 *Perpetual Sec., Inc.*, Order Denying Motion for Reconsideration, Exchange Act Rel. No. 56962, 2007 SEC LEXIS 2922, at *2 (Dec. 13, 2007).

8 *Eric J. Brown*, 2012 SEC LEXIS 1127, at *3-4; *Perpetual Sec.*, 2007 SEC LEXIS 2922, at*2.

9 *Eric J. Brown*, 2012 SEC LEXIS 1127, at *4.

10 *See id.* at *3.

Pierce argues that the Opinion excessively relied on "the policy that 'special considerations apply in an administrative forum'" and that the Commission "is charged with adjudicating matters as fairly as if it were a court." Although the Opinion recognizes that res judicata can apply more flexibly in the administrative context, the Opinion's application of res judicata in this proceeding is entirely consistent with the application of res judicata in the federal courts.

Finally, Pierce contends that "[t]he Opinion's departure from the established law on res judicata and the fraudulent concealment exception . . . requires reversal of rulings on the remaining affirmative defenses as well." Because Pierce provides no basis for reconsidering our rejection of his arguments based on res judicata and fraudulent concealment, there is no basis for reconsidering his other affirmative defenses.

Accordingly, IT IS ORDERED that the motion for reconsideration filed by Gordon Brent Pierce be, and it hereby is, denied.

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72171 / May 15, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15871

In the Matter of **RAFFERTY CAPITAL MARKETS, LLC,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Rafferty Capital Markets, LLC ("Rafferty" 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 Sections 15(b)(4) and 21C of the Exchange Act, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

[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

1. These proceedings concern the participation of Rafferty in unregistered broker-dealer activity by an unregistered entity ("Company A") and Rafferty's failure to make and keep accurate books and records.

2. Rafferty, a broker-dealer registered with the Commission, entered into a written agreement to facilitate the clearing and execution of securities transactions introduced by Company A. Beginning in 2009, Company A began introducing trades in fixed income securities to Rafferty. Although five employees of Company A became registered representatives of Rafferty and executed trades introduced by Company A, Company A itself never registered with the Commission.

3. Under its arrangement with Rafferty, from May 2009 through February 2010, Company A introduced approximately 100 trades in asset-backed securities that generated over $4 million in compensation. Based on the agreement, Rafferty retained fifteen percent of this compensation, which totaled approximately $640,000; at Company A's direction, paid approximately $550,000 to the registered representatives; and remitted the balance, approximately $3,200,000, to Company A.

4. During the course of this arrangement, Rafferty did not preserve communications to or from the Rafferty registered representatives working on behalf of Company A, and it did not ensure that Company A did so. Due in part to Rafferty's lack of recordkeeping, one of these registered representatives was able to conceal two trades from Rafferty, which caused Rafferty's books and records to be inaccurate.

Respondent

5. Rafferty Capital Markets, LLC, a New York company headquartered in Garden City, NY, is a broker-dealer registered with the Commission.

Other Relevant Entities

6. "Company A," a Delaware company headquartered in New York, NY, has never been registered with the Commission in any capacity.

Rafferty Offers Crucial Assistance to an Unregistered Broker-Dealer

7. In early 2009, Company A entered into a business relationship with Rafferty to allow Company A employees to trade fixed income assets. In an early email, a Rafferty executive proposed: "We can act as B/D of record for your [*i.e.*, Company A's] registered reps. We would hold the licenses and assume those potential liabilities. We would keep a fair percentage of the commissions, I'd cover my own clearing personnel, you would be responsible for the associated clearing costs, and retain the remain[ing] commissions to pay the salesman and cover your overhead. Fails and/or mistakes (hooks) would be on your end. . . . we'd need to be comfortable with your personnel and you'd manage the business yourselves."

8. Consistent with this proposal, in April 2009, Rafferty and Company A signed a "Services and Cost Sharing Agreement," under which Rafferty agreed to "provide clearing and trade processing for trades introduced by [Company A]," and to "provide the necessary compliance and review associated with such trades." Rafferty further agreed to register employees of Company A or its affiliates as "independent representatives" of Rafferty. For these services, Company A agreed to pay Rafferty fifteen percent of the transaction- based compensation from trades processed under this arrangement.

9. Shortly after the execution of this agreement, five employees of Company A registered as representatives of Rafferty and began to execute trades for customers introduced to Rafferty by Company A.

10. Company A exercised control over the five "independent representatives" of Rafferty, all of whom worked out of Company A's offices. Company A had authority over their trading decisions and determined their compensation. Rafferty was not involved in these trading or compensation decisions.

11. Despite the lack of registration, Company A held itself out as a broker-dealer. A Company A executive distributed marketing materials to industry contacts that stated: "The [Company A] Broker/Dealer trades securities, focusing on highly structured consumer and non-consumer ABS, CMBS, and RMBS. It also originates new and existing securitizations."

12. From May 2009 through February 2010, Company A introduced approximately 100 trades in asset-backed securities, *i.e.*, approximately 100 purchases and 100 sales, that generated over $4 million in compensation. Rafferty retained $294,147 in 2009 and $343,468 in 2010.

Rafferty Fails to Keep Accurate Books and Records

13. The five employees of Company A who became registered representatives of Rafferty used Company A's email addresses and Bloomberg messaging addresses. Although they became Rafferty registered representatives in July 2009, Rafferty did not preserve the electronic communications to or from these external addresses related to its business, and it did not ensure that Company A did so.

14. In addition, in March 2010, an employee of Company A registered with Rafferty bought and sold a bond on two occasions but purposefully delayed submitting tickets for the two purchases to Rafferty. As a result, Rafferty failed to make and keep current its books and records by failing to timely reflect these transactions in its trade blotters.

15. As a result of the conduct described above, Rafferty willfully violated Section 17(a) of the Exchange Act and Rules 17a-3(a)(1) and 17a-4(b)(4) thereunder and willfully aided and abetted and caused Company A's violation of Section 15(a) 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's Offer.

Accordingly, pursuant to Sections 15(b)(4) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent cease and desist from committing or causing any violations and any future violations of Sections 15(a) and 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder.

B. Respondent is censured.

C. Respondent shall, within 14 days of the entry of this Order, pay disgorgement of $637,615, prejudgment interest of $82,011, and a civil monetary penalty of $130,000 to the United States Treasury. If timely payment is not made, additional interest on the disgorgement interest and prejudgment interest amounts shall accrue pursuant to SEC Rule of Practice 600, and additional interest on the civil monetary penalty shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(2) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Rafferty Capital Markets, LLC as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Celeste A. Chase, Assistant Regional Director, Securities and Exchange Commission, Brookfield Place, 200 Vesey Street, Suite 400, New York, New York 10281.

By the Commission.

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72175 / May 16, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15872

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

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Tennessee Commerce Bancorp, Inc. ("Bancorp" 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 Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order") , as set forth below.

SECURITIES AND EXCHANGE COMMISSION

Release No. 34-72173; File No. 811-02815

Copley Fund, Inc.; Notice of Application

May 15, 2014

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

Action: Notice of an application for exemptive relief.

Summary of Application: Applicant requests an order exempting it from rule 22c-1 under the Investment Company Act of 1940 ("Company Act") and rule 4-01(a)(1) of Regulation S-X.

Applicant: Copley Fund, Inc. ("Copley" or "Fund").

Filing Date: The application (together with the exhibits, the "Application") was filed on September 4, 2013.

Hearing or Notification of Hearing: Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on June 9, 2014, and should be accompanied by proof of service on the applicant, 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. Absent a request for a hearing that is granted by the Commission, the Commission intends to issue an order under the Company Act denying the Application.

Addresses: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicant, 5348 Vegas Drive, Suite 391, Las Vegas, Nevada 89108.

For Further Information Contact: David Joire, Senior Counsel, or Nadya Roytblat, Assistant Chief Counsel, at (202) 551-6825, Division of Investment Management, Chief Counsel's Office.

Supplementary Information: The following is a summary of the application. The complete application may be obtained via the Commission's website at http://www.sec.gov/rules/other.shtml or by calling (202) 551-8090.

I. Background

A. The Applicant

1. Copley is a Nevada corporation registered under the Company Act as an open-end management investment company ("open-end fund") that issues redeemable securities.[1] Copley has been operating since 1978 and invests primarily in U.S. equity securities. The Application states that Copley's "stated investment objective is the generation and accumulation of dividend income" and "[i]ts secondary objective is 'long-term capital appreciation.'" The Application also states that "[k]ey to the Fund's investment objective is its strategy, contrary to most other [open-end] funds, of not distributing dividends and capital gains to shareholders but rather accumulating them within the Fund."

B. Copley's Status under the Internal Revenue Code ("Code")

2. Virtually all open-end funds take advantage of special provisions in the Code, known as Subchapter M, that enable them to avoid a layer of tax at the corporate, *i.e.*, fund,

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[1] Section 4(3) of the Company Act defines a "management company" as any investment company other than a face-amount certificate company or a unit investment trust. Section 5(a)(1) of the Company Act defines an "open-end company" as a management company which is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Company Act defines "redeemable security" to mean any security, other than short term paper, under the terms of which the holder, upon presentation to the issuer or to a person designated by the issuer, is entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

level.[2] Under Subchapter M, an open-end fund that elects status as a "regulated investment company" ("RIC") and meets certain requirements, one of which is to distribute at least 90% of investment company taxable income, in any taxable year, does not pay federal taxes at the fund level.[3]

3. Copley has never availed itself of RIC status under the Code, so that, according to the Application, its shareholders "are able to defer dividend and capital gains taxes [at the shareholder level] until redemption." Copley instead has elected to be treated as a "C Corporation" under the Code and thus is subject to federal taxation at the fund level.[4] A shareholder of Copley, therefore, is subject to two layers of tax – once (indirectly) at the fund level and again (directly) at the shareholder level.[5] Copley has significant unrealized gains in its portfolio and a federal income tax liability ("federal income tax liability") would arise if those gains were realized by the Fund (*i.e.*, if Copley were to sell any of its portfolio securities that had appreciated in value since the Fund acquired them).

II. The Application

4. The Application concerns the provision that Copley should make for its federal income tax liability for purposes of (i) calculating the current net asset value on which the price of Copley's redeemable securities must be based under rule 22c-1 under the Company Act, and

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2 *See* sections 851-855 and 860 of the Code.

3 *Id.*

4 *See* section 11 of the Code.

5 A shareholder of a RIC and a shareholder of an open-end fund that is a C Corporation pay taxes at the shareholder level on any distributions from the fund and on any capital gains on the fund shares that they redeem. The Application states that Copley does not make any distributions to its shareholders.

(ii) preparing Copley's financial statements filed with the Commission as required by the Company Act. Copley currently makes a provision for federal income taxes for both purposes in the full amount of federal income tax that would be due if the full amount of Copley's existing unrealized gains were realized. Copley's current provision for federal income taxes is consistent with generally accepted accounting principles ("GAAP"). [6]

5. The Application requests an exemption from rule 22c-1 under the Company Act and rule 4-0l(a)(l) of Regulation S-X so that Copley could estimate a provision for federal income tax liability for both purposes using one of two formulas developed by Copley and described in the Application (together, the "Proposed Method").[7] The Proposed Method would result in a provision for Copley's federal income tax liability that is less than the full amount of federal income tax that would be due if the full amount of Copley's existing unrealized gains

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6 Specifically, Financial Accounting Standards Board ("FASB") Accounting Standards Codification Topic 740, *Income Taxes* ("ASC 740") indicates that financial statements should reflect deferred tax liabilities and assets for the future tax consequences of events that have been recognized in an entity's financial statements or tax returns. FASB ASC 740-10-10-1(b). ASC 740 incorporates an assumption that the assets and liabilities of an entity will be recovered and settled at their carrying amounts for financial statement reporting purposes, which may be different from their carrying amounts for income tax purposes. Differences between book and tax carrying amounts that are caused by differences in the timing of recognition of transactions or events for financial reporting versus income tax purposes are referred to as temporary differences. *See* FASB ASC 740-10-25-20. ASC 740 provides examples of such differences. Revenues or gains that are taxable after they are recognized as income for financial reporting purposes are included as an example of a temporary difference. *See* FASB ASC 740-10-25-20(a). Unrealized gains on investments, which are taxable after they are recognized in the financial statements (i.e., they are generally taxable only when the investments are sold), represent a temporary difference on which a deferred tax liability must be recognized; the recognized deferred tax liability is calculated by multiplying the temporary difference *(i .e.,* the unrealized gains) by the expected tax rate at the expected time of reversal. *See generally* FASB ASC 740-10-10-3 (indicating that the objective is to measure a deferred tax liability using the enacted tax rate expected to apply to taxable income in the periods in which the deferred tax liability is expected to be settled).

7 One of the formulas would be based on a quarterly calculation of Copley's historical portfolio turnover rate over the past five or ten years. The alternative formula would be based on the highest daily redemptions of Fund shares during the previous five years.

were realized,[8] and thus is inconsistent with GAAP. In support of its request for exemptions, the Application argues that "the entire [federal income tax liability] would be due only in the unlikely event the entire portfolio were liquidated." The Application further argues that the "use of the full liquidation value method has produced a skewed and unreasonable result -- Copley's per share [net asset value] does not reflect the realistic value of the Fund," and that using the Proposed Method would "fairly and accurately [reflect] a realistic tax liability."

III. Legal Analysis

A. Rules 22c-1 and 2a-4 under the Company Act

6. As an open-end fund, Copley issues redeemable securities under the terms of which all of the holders, upon presentation to Copley or to a person designated by Copley, are entitled to receive approximately their proportionate share of Copley's current net assets or the cash equivalent thereof.[9] Rule 22c-1 under the Company Act states, in relevant part, that no registered investment company issuing any redeemable security shall sell, redeem, or repurchase any such security except at a price based on the "current net asset value" of such security which is next computed after receipt of a tender of such security for redemption or of an order to

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8 The Application includes an extensive discussion of Copley's use, for a period of time prior to 2007, of a methodology similar to the Proposed Method, as well as Copley's subsequent discussions with the staff of the Commission's Division of Enforcement, resulting in Copley changing its methodology to make a provision for federal income tax liability in the full amount of federal income tax that would be due if the full amount of Copley's existing unrealized gains were realized. The Application also discusses a letter from the staff of the Commission's Division of Investment Management to Copley's counsel, dated April 5, 2013, available at http://www.sec.gov/divisions/investment/noaction/2013/copley-fund-040513-22c1.pdf, in which the staff rejected Copley's request for assurance that it would not recommend enforcement action to the Commission if Copley were to make a provision for federal income tax liability according to the Proposed Method.

9 *See supra* note 1 (definition of "redeemable security").

purchase or sell such security. Rule 2a-4 under the Company Act defines the term "current net asset value" for use in computing periodically the price of a fund's shares to mean one determined substantially in accordance with the provisions of the rule. Rule 2a-4(a)(4) provides, in relevant part, that in determining the current net asset value, "[a]ppropriate provision shall be made for Federal income taxes if required [by the open-end fund]." An open-end fund that has elected RIC status under the Code generally would not need to make a "provision . . . for Federal income taxes" under rule 2a-4(a)(4), because it would not be subject to federal taxation at the fund level.[10] In contrast, Copley, which has chosen to be a C Corporation and thus is subject to federal taxation at the fund level, must make an "appropriate provision . . . for Federal income taxes" in computing its current net asset value under rule 2a-4 for purposes of complying with rule 22c-1 under the Company Act. The Commission is aware of several other existing open-end funds that have chosen to be C Corporations and to which this provision of rule 2a-4(a)(4) is relevant; none of these funds has requested an exemption relating to this provision.

7. Under rule 22c-1, an open-end fund may sell and redeem its redeemable securities only at a price based on its current net asset value, which equals the value of the fund's total assets minus the amount of the fund's total liabilities. Under rule 2a-4, an open-end fund generally must value its assets at their market value, in the case of securities for which market quotations are readily available, or at fair value, as determined in good faith by the fund's board of directors, in the case of other securities and assets.[11] When calculating its current net asset

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10 An open-end fund that has elected RIC status under the Code may be subject to a 4% excise tax on undistributed income to the extent that the open-end fund does not satisfy certain distribution requirements for a calendar year. *See* Code Section 4982 "Excise Tax on Undistributed Income of Regulated Investment Companies."

11 *See also* section 2(a)(41) of the Company Act defining the term "value."

value for purposes of rule 22c-1, an open-end fund: (i) adds up the current values of all of its assets (using their market values or fair values, as appropriate), which reflect any unrealized gains; and (ii) subtracts all of its liabilities, which include an appropriate provision for federal income taxes on any unrealized gains. If the open-end fund understates a liability, among other consequences, the calculated current net asset value will be overstated, as will the price at which the fund's redeemable securities are sold and redeemed. As a result, investors purchasing the fund's shares will pay too much for them, redeeming shareholders will receive too much for their shares, and the net asset value of shares held by the remaining shareholders may be reduced correspondingly when the full amount of the liability must be paid. This outcome would be counter to one of the primary principles underlying the Company Act, which is that sales and redemptions of redeemable securities should be effected at prices that are fair, and which do not result in dilution of shareholder interests or other harm to shareholders.[12]

B. Rule 4-01(a)(1) of Regulation S-X

8. Under the Company Act, Copley is required to file with the Commission a registration statement and annual reports, which must contain Copley's financial statements.[13] The form and content of and requirements for the financial statements filed pursuant to the

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12 *See* Investment Trusts and Investment Companies: Hearings on S.3580 Before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. 136-38 (1940) (hearings that preceded the enactment of the Company Act). In addition, all funds must accurately calculate their net asset values to ensure the accuracy of their payment of asset-based fees, such as investment advisory fees, as well as the accuracy of their reported performance. Statement Regarding "Restricted Securities," Investment Company Act Release No. 5847 (Oct. 21, 1969).

13 Sections 8(b) and 30 of the Company Act require the filing of registration statements and annual reports, respectively.

Company Act are set forth in Regulation S-X. Rule 4-0l(a)(l) of Regulation S-X states, in relevant part, that "[f]inancial statements filed with the Commission which are not prepared in accordance with [GAAP] will be presumed to be misleading or inaccurate, despite footnote or other disclosures, unless the Commission has otherwise provided."[14]

C. Section 6(c) of the Company Act

9. Although the Application requests an exemption from rule 22c-1 under the Company Act and rule 4-01(a)(1) of Regulation S-X pursuant to section 36(a) of the Exchange Act, the Commission is considering the requested exemptions under section 6(c) of the Company Act because the provisions of rule 22c-1 under the Company Act and rule 4-01(a)(1) of Regulation S-X are made applicable to Copley by the requirements of the Company Act and the rules thereunder. Section 6(c) of the Company Act provides, in relevant part, that the "Commission, . . . by order upon application, may conditionally or unconditionally exempt any person . . . from any provision or provisions of [the Company Act] . . . or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Company Act]."

IV. The Commission's Preliminary Views

A. Rule 22c-1 under the Company Act

10. Rule 22c-1 under the Company Act, as described above, prohibits Copley from selling or redeeming its redeemable securities at a price other than one based on the "current net

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[14] Rule 4-01 of Regulation S-X is made applicable to investment companies registered under the Company Act by rule 6-03 of Regulation S-X.

asset value," as defined in rule 2a-4 under the Company Act. Copley seeks to sell and redeem its redeemable securities at a price that reflects Copley's provision, in accordance with the Proposed Method, for less than its full federal income tax liability that would arise if the unrealized gains in Copley's portfolio were realized by the Fund. If the Proposed Method results in an "appropriate provision . . . for Federal income taxes" under rule 2a-4(a)(4), then the price of Copley's redeemable securities would be based on the "current net asset value" as defined in rule 2a-4(a)(4) and Copley would not need an exemption from rule 22c-1. On the other hand, if the Proposed Method does not make an "appropriate provision . . . for Federal income taxes" under rule 2a-4(a)(4), the price of Copley's redeemable securities would not be based on the "current net asset value" as defined in rule 2a-4 and would cause Copley to violate rule 22c-1, unless the Commission issues an order exempting Copley from rule 22c-1. Because the Commission, for the reasons discussed below, preliminarily believes that the Proposed Method would not result in an "appropriate provision . . . for Federal income taxes" under rule 2a-4(a)(4), the Commission preliminarily believes that Copley, in order to avoid violating rule 22c-1, would need an exemption from rule 22c-1 to be able to sell and redeem its shares at a price that is not based on the "current net asset value," as defined in rule 2a-4.

11. Copley seeks an exemption from rule 22c-1 to be able to determine the price at which its redeemable securities may be purchased or redeemed based on a net asset value that would reflect less than the full amount of the federal income tax liability that would arise if all of the Fund's existing unrealized gains were realized, calculated based on the Proposed Method ("Proposed Method NAV").[15] The Application's justification for the use of the Proposed

[15] The Application provides an example of the difference in the net asset value per share resulting

Method is that it would "provide its current and future investors with a more fair and accurate presentation of its [net asset value]" because "the entire [federal tax liability] would be due only in the unlikely event the entire portfolio were liquidated."

12. As an open-end fund under the Company Act, Copley must stand ready to redeem its redeemable securities daily. Although Copley has been operating for several decades and the Application states that "the highest daily redemption in the history of the Fund since inception was . . . approximately 1.6% of the total outstanding shares on the date of the redemption," Copley cannot control or fully anticipate the level and amounts of shareholder redemptions and the resulting need to sell its portfolio investments to satisfy the redemption requests. However unlikely it may seem to Copley that it may need to liquidate its entire portfolio to meet redemption requests, that is a possibility that Copley may not rule out under the Company Act.[16] That is because all of the holders of Copley's redeemable securities are entitled, under the terms of their securities, upon presentation to Copley or to a person designated by Copley, to receive approximately their proportionate share of Copley's current net assets or the cash equivalent

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from the use of the Proposed Method, as opposed to making a provision for the full federal income tax liability that would arise if all of the Fund's existing unrealized gains were realized. The Application points out that, following Copley's discussions with the staff of the Commission's Division of Enforcement in 2007, Copley changed its methodology to provide for the full federal income tax liability in the net asset value per share of its redeemable securities. The Application states that, whereas Copley's net asset value per share on February 28, 2007, reflecting the use of a methodology similar to the Proposed Method, was stated in its annual report as being $54.67, "the Restated Annual Report . . . reflect[ed] a per share [net] asset value for that same date (February 28, 2007) of $42.54." The $12.13 reduction in the net asset value per share was a change of 22%.

16 Redemptions necessitating liquidation of a substantial amount of an open-end fund portfolio, while infrequent, have in fact been experienced by several open-end funds. *See, e.g.*, L. Jones, "From Difficult to Disaster: Redemptions' Impact on Funds," Morningstar (Feb. 7, 2008), available at http://news.morningstar.com/articlenet/article.aspx?id=227989

thereof.[17]

13. If Copley were to experience a high level of redemptions necessitating liquidation of a large portion of its portfolio with significant unrealized gains, Copley's pricing of its redeemable securities based on the Proposed Method NAV could result in the redeeming shareholders receiving a price for their shares that reflects more than their pro-rata share of the net asset value of the Fund, while the price of the shares held by the remaining shareholders would reflect less than their pro-rata share of the net asset value of the Fund. Copley's use of the Proposed Method could produce this disparate result because only the net asset value per share of the shares held by the remaining, non-redeeming shareholders would reflect the full actual federal income tax expense incurred as a result of the liquidation of the portfolio, even though the same amount of federal income tax liability existed, but was not provided for, when the other shareholders redeemed at a price based on a higher net asset value per share.

14. For example, consider the following illustrative fact pattern of an open-end fund that is a C Corporation ("Fund A") that records a 2.8% federal income tax liability in accordance with Copley's Proposed Method but is required to pay federal income taxes at a rate of 35%.[18] As of the close of business on March 30, 2014, Fund A has total assets comprised of investments valued at $1,400,000, which reflects $400,000 in unrealized gains,[19] and total liabilities

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17 *See supra* note 1 (definition of "redeemable security").

18 In this example, under the Proposed Method, in lieu of recording the full federal income tax liability of 35% of unrealized gains, Fund A records a federal income tax liability of 2.8% of unrealized gains (which represents 8% times 35%, where 8% is based on highest daily redemptions of Fund A's shares during the previous five years).

19 Valuation of $1,400,000 reflects $1,000,000 cost and $400,000 of unrealized gains.

comprised of a federal income tax liability on unrealized gains of $11,200.[20] Fund A has 100,000 redeemable securities outstanding. As of the close of business on March 30, 2014, Fund A's net asset value and net asset value per share (NAV/share) are $1,388,800[21] and $13.888,[22] respectively. On March 31, 2014, Fund A has no profit or loss for the day[23] and shareholders unexpectedly request redemption of 60,000 shares, which entitles these shareholders to redeem at the March 31, 2014 closing NAV/share of $13.888.[24] On April 1, 2014, in order to raise cash to satisfy the March 31, 2014 shareholder redemption requests of $833,280,[25] Fund A sells investments of $834,000 with a cost basis of $534,000, resulting in realized gains of $300,000.[26] Since Fund A realized $300,000 in gains, Fund A would have a federal income tax liability of $105,000.[27] However, since Fund A's net asset value only reflected a $11,200 federal income

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20 $11,200 federal income tax liability on unrealized gains equals $400,000 unrealized gains times 2.8% recorded federal income tax liability.

21 $1,388,800 net asset value equals $1,400,000 total assets minus $11,200 total liabilities.

22 $13.888 NAV/share equals $1,388,800 net asset value divided by 100,000 shares outstanding.

23 Generally, an open-end fund would have daily profit or loss. However, because this is a simplified example presented solely for illustrative purposes, we assume that Fund A had no profit or loss on March 31, 2014.

24 Because Fund A recorded no profit or loss on March 31, 2014, the NAV/share as of the close of business on March 31, 2014 is the same as the NAV/share as of the close of business on March 30, 2014.

25 $833,280 redemption requests equal 60,000 shares redeemed times 13.888 NAV/share.

26 For purposes of this simplified example, we assume that all transactions are recorded on trade date.

27 $105,000 federal income tax liability equals $300,000 realized gains times 35% federal income tax rate.

tax liability as of March 31, 2014, Fund A has to record an additional $93,800[28] of a federal income tax expense and corresponding federal income tax liability on April 1, 2014. On April 1, 2014, Fund A has no other profit or loss[29] besides recording the federal income tax expense and corresponding current federal income tax liability of $93,800 and an additional federal income tax expense and corresponding federal income tax liability of $2,800.[30] At the close of business on April 1, 2014, Fund A has a net asset value of $458,920[31] and redeemable securities outstanding of 40,000,[32] resulting in an NAV/share of $11.473.[33] Therefore, the redeeming shareholders received an NAV/share of $13.888 on March 31 while the NAV/share of the remaining shareholders was reduced to reflect the federal income tax accrual on gains realized by Fund A from selling portfolio securities with unrealized gains to pay the redeeming shareholders and thus their shares have an NAV/share of $11.473 on April 1, 2014. Although the same

28 $93,800 additional tax expense equals $105,000 federal income tax liability minus $11,200 federal income tax liability on unrealized gains already reflected in the net asset value.

29 *See generally supra* note 23.

30 Subsequent to the sale of investments to meet redemptions, Fund A has investments valued at $566,000 ($1,400,000 value of investments prior to sale minus $834,000 investments sold), with a cost basis of $466,000 ($1,000,000 cost of investments prior to sale minus $534,000 cost of investments sold) and unrealized gains of $100,000 ($566,000 value of investments minus $466,000 cost of investments). Therefore, Fund A, in accordance with the Proposed Method, records an additional federal income tax liability of $2,800 (2.8% times $100,000 unrealized gains).

31 $458,920 net asset value equals $1,388,800 net asset value prior to redemption minus $833,280 redemptions minus $93,800 additional current federal income tax liability recorded minus $2,800 additional federal income tax liability recorded.

32 40,000 redeemable securities outstanding equals 100,000 redeemable securities outstanding prior to redemption minus 60,000 shares redeemed.

33 $11.473 NAV/share equals $458,920 net asset value divided by 40,000 redeemable securities outstanding.

realized gains ($300,000) had been fully reflected in the net asset value on March 31 as unrealized gains, only 2.8% of the full 35% federal income tax liability on those unrealized gains had been reflected in the net asset value on that day, and the remaining shareholders were harmed solely as a result of Fund A's use of the Proposed Method.[34] If Fund A reflected the full 35% federal income tax liability in its net asset value prior to receiving the shareholder redemption requests on March 31, 2014, the redeeming shareholders would have redeemed at an NAV/share of $12.600[35] and the remaining shareholders would have held shares with an NAV/share of $12.600[36] (which is $1.127, or approximately 9.8%, higher than $11.473, their resulting NAV/share when applying the Proposed Method) on April 1, 2014. This result would have been fair and equitable to *all* of Fund A's shareholders.

15. The Commission therefore preliminarily believes that the Proposed Method would not result in an "appropriate provision . . . for Federal income taxes" as required by rule

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34 If there had been any investors who purchased Fund shares on March 31 at the NAV/share of $13.888, they also would have been harmed by Fund A's use of the Proposed Method because they would have overpaid for their shares.

35 $12.600 NAV/share on March 31, 2014 equals $1,260,000 net asset value divided by 100,000 shares outstanding, where $1,260,000 net asset value equals $1,400,000 value of investments (inclusive of an unrealized gain of $400,000) minus federal income tax liability of $140,000 (where $140,000 equals $400,000 unrealized gains times 35%).

36 Shareholders would have redeemed 60,000 shares at the March 31, 2014 NAV/share of $12.600 representing redemptions of $756,000. To satisfy redemptions, assume for illustrative purposes that Fund A would have sold the same $834,000 of investments with a cost basis of $534,000 resulting in a realized gain of $300,000. Fund A would owe $105,000 of federal income taxes ($300,000 realized gain times 35%), however, under this fact pattern, Fund A already recorded a federal income tax liability in excess of $105,000 (*i.e.*, Fund A recorded a federal income tax liability of $140,000), and therefore, Fund A would not need to record an additional federal income tax expense and corresponding federal income tax liability. Fund A's net asset value after sale of investments and redemption of 60,000 shares would be $504,000 ($1,260,000 net asset value before redemption minus $756,000 redemption) and Fund A's resulting NAV/share would be $12.600 ($504,000 net asset value divided by 40,000 shares outstanding).

2a-4(a)(4) under the Company Act. In the Commission's preliminary view, in order to make an "appropriate provision . . . for Federal income taxes" under rule 2a-4(a)(4), Copley must make a provision for the full federal income tax liability that would arise if all of the Fund's existing unrealized gains were realized. Making such a provision would result in purchases and redemptions of Copley's redeemable securities being effected, under rule 22c-1 under the Company Act, at a price based on a net asset value that reflects a fair and equitable treatment of all of Copley's shareholders. In contrast, the exemption from rule 22c-1 requested in the application to provide for less than the full federal income tax liability, could result in, among other things, redemptions of Copley's redeemable securities at prices based on a potentially significantly higher net asset value per share for some shareholders while the net asset value of shares held by the remaining shareholders may be reduced correspondingly when the full federal income tax liability is accrued, producing an unfair and inequitable result among Copley's shareholders.

16. The Application discusses Copley's "willingness to convert to RIC status in the event unforeseen circumstances caused [unrealized] gains to be realized that consumed the entire amount of accumulated deferred income taxes it has recognized" as a way for the Fund to avoid having to pay more in federal income taxes than the amount provided for under the Proposed Method. Copley's suggested potential conversion to RIC status, however, does not change our analysis. In order to successfully convert to a RIC at a point in time, Copley would be required to comply with the Code's RIC requirements at all times during the taxable year, which may not be possible if Copley encountered the "unforeseen circumstances" mid-year or late-year.[37]

[37] *See* section 851 of the Code.

Moreover, despite converting to a RIC, Copley still would be subject to federal income tax on the unrealized gains on securities which existed prior to conversion to the extent the securities are sold within ten years after the conversion.[38] Because Copley, as an open-end fund that has issued redeemable securities, cannot fully predict whether securities may need to be sold to meet redemption requests in the ten years after conversion to a RIC, Copley's contingent intent to convert to a RIC does not eliminate Copley's potential federal income tax liability.[39]

17. Based on the foregoing, the Commission's preliminary view is that an exemption from rule 22c-1 under the Company Act is not necessary or appropriate in the public interest and is not consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Company Act. Accordingly, absent a request for a hearing that is granted by the Commission, the Commission intends to deny Copley's request for an exemption from rule 22c-1 under the Company Act.

B. Rule 4-01(a)(1) of Regulation S-X

18. The Commission's preliminary view that, in order to make an "appropriate provision . . . for Federal income taxes" under rule 2a-4(a)(4) under the Company Act, Copley must make a provision for the full federal income tax liability that would arise if all of the Fund's

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[38] *See* Treas. Reg. section 1.337(d)-7.

[39] The Application discusses certain real estate investment trusts ("REITs"), which under the Code also may avoid a layer of tax at the corporate level if they elect "REIT status" and meet certain requirements, as examples of public companies that have converted from C Corporations and elected REIT status and, by doing so, avoided incurring a federal income tax liability. The Application states that "[Copley is] aware of at least two entities – Weyerhaeuser and American Tower Corp. – that converted from C Corporations into [REITs] and, in doing so, have exercised discretion with respect to accounting for deferred tax liabilities." Among other differences, the REITs discussed in the Application are not open-end funds, do not issue redeemable securities and therefore do not face the associated potential need to sell portfolio assets to satisfy redemption requests.

existing unrealized gains were realized, also is consistent with GAAP. The Application, however, requests an "exemption" from rule 4-01(a)(1) of Regulation S-X for Copley to use a non-GAAP methodology in recording its federal income tax liability in its financial statements.[40] If Copley were to use two different methodologies in calculating its net asset value – a GAAP-consistent methodology for purposes of pricing Copley's redeemable securities for purchases and redemptions under rules 2a-4 and 22c-1 under the Company Act, and a non-GAAP methodology in its financial statements -- in the Commission's preliminary view, the result may be unnecessarily confusing to investors and contrary to the policy behind the Company Act's disclosure requirements. Accordingly, absent a request for a hearing that is granted by the Commission, the Commission intends to deny Copley's request for an exemption from rule 4-01(a)(1) of Regulation S-X as not necessary or appropriate in the public interest and as not consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Company Act.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

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40 The Application does not state how Copley would present the amount of its federal income tax liability in its financial statements if the Commission granted the requested exemption. The Commission assumes that Copley would present the amount according to its Proposed Method in lieu of presenting the amount determined in accordance with GAAP.

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72182 / May 16, 2014

Admin. Proc. File Nos. 3-15350, 3-15351

In the Matter of the Application of

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

For Review of Actions Taken by
Self-Regulatory Organizations

ORDER ESTABLISHING PROCEDURES AND REFERRING APPLICATIONS FOR REVIEW TO ADMINISTRATIVE LAW JUDGE FOR ADDITIONAL PROCEEDINGS

I.

The Securities Industry and Financial Markets Association ("SIFMA"), an industry trade group, has filed several applications for review challenging, pursuant to Section 19(d) of the Securities Exchange Act of 1934,[1] certain self-regulatory organization ("SRO") rule changes affecting fees that a number of SROs charge for non-core market data. On July 3, 2013, we directed the parties to provide briefing on preliminary procedural issues relating to the applications for review filed in Administrative Proceedings 3-15350 (the "'50 Proceeding") and 3-15351 (the "'51 Proceeding") (collectively, the "Proceedings").[2] Among other things, the SROs argued that the fees at issue do not constitute "denials of access" and, therefore, cannot be challenged under Exchange Act Section 19(d). Having now considered the parties' briefs in response to our prior order, we refer the '50 Proceeding, which we consolidate with one rule challenge from the '51 Proceeding, to an administrative law judge for further proceedings consistent with this order.

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1 15 U.S.C. § 78s(d). Exchange Act Section 19(d) requires the Commission, upon timely "application by any person aggrieved," to review, among other things, action by an SRO that "prohibits or limits" "access to services offered by" the SRO to any person. The relevant standard of review is specified in Section 19(f). 15 U.S.C. § 78s(f).

2 SIFMA later filed additional applications related to other fees, which remain pending.

II.

BACKGROUND

Because an understanding of prior proceedings before the Commission and the United States Court of Appeals for the District of Columbia Circuit, along with changes in applicable law, is important to our consideration of the initial issues and to provide context for further development of the record, we set out in detail below the relevant history of prior challenges to SRO fee rules by SIFMA and NetCoalition[3] and the background of the Proceedings.

A. NYSE Arca filed a proposed rule change establishing fees for its ArcaBook "depth-of-book" market data service.

On May 23, 2006, NYSE Arca, Inc. ("NYSE Arca") filed a proposed rule (the "2006 ArcaBook Fee Rule") with the Commission pursuant to which NYSE Arca would begin to charge fees for access to ArcaBook, a proprietary "depth-of-book" data product previously provided to customers free of charge.[4] ArcaBook contains "a compilation of all limit orders resident in the NYSE Arca limit order book, available on a real-time basis."[5]

The Commission requires SROs to provide certain "core data" to central data processors for consolidation and distribution pursuant to joint industry plans.[6] For each NMS security, this core data includes: "(1) [a] national best bid and offer ('NBBO') with prices, sizes, and market center identifications; (2) the best bids and offers from each SRO that include prices, sizes, and market center identifications; and (3) last sale reports from each SRO."[7] In contrast, "[a]n exchange's depth-of-book order data includes displayed trading interest at prices *inferior* to the best-priced quotations that exchanges are required to provide for distribution in the core data

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3 NetCoalition is an advocacy group that represents "leading global Internet and technology companies." http://netcoalition.com (last visited April 8, 2014). It was reported in October 2012 that NetCoalition was winding down operations following the launch of the Internet Association. http://thehill.com/blogs/hillicon-valley/technology/263793-netcoalition-winds-down-operations (last visited April 8, 2014).

4 Form 19b-4, SR-NYSEArca-2006-21, filed May 23, 2006, *available at* http://www.nyse.com/nysenotices/nysearca/rule-filings/pdf?file_no=SR-NYSEArca-2006-21&seqnum=1 (last visited April 8, 2014).

5 Notice of Filing of Proposed Rule Change Relating to Approval of Market Data Fees for NYSE Arca Data, Securities Exchange Act Release No. 53592, File No. SR–NYSEArca–2006–21 (June 6, 2006), 71 Fed. Reg. 33,496, 33,497 (June 9, 2006).

6 *See* Rule 603(b) of Regulation NMS, 17 C.F.R. § 242.603(b).

7 Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, Exchange Act Release No. 59039, File No. SR–NYSEArca–2006–21 (Dec. 2, 2008), 73 Fed. Reg. 74,770, 74,780 (Dec. 9, 2008) ("2008 ArcaBook Approval Order").

feeds."[8] SROs are not required to make "non-core data," like depth-of-book data, available to central data processors for consolidation.[9] Nor are broker-dealers required to purchase depth-of-book or other non-core data to satisfy their duty of best execution.[10]

Under then applicable law, the Commission was required to determine whether the proposed ArcaBook fee rule was consistent with the Exchange Act before it could go into effect.[11] Although the procedural framework has changed (as discussed below), the relevant substantive requirements of the Exchange Act as to market data fees (for both core and non-core data)[12] remain the same today as in 2006. Among other things, Exchange Act Section 6 requires that an exchange's rules provide for the "equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,"[13] not "permit unfair discrimination between customers, issuers, brokers, or dealers,"[14] and "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act.[15] And, when as here, an SRO distributes information with respect to quotations or transactions on an exclusive basis on its own behalf, it acts as an "exclusive processor"[16] and must distribute data on "fair and reasonable" and "not unreasonably discriminatory" terms.[17]

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8 *Id.* (emphasis in original); *see also NetCoalition v. SEC*, 615 F.3d 525, 529–30 (D.C. Cir. 2010) ("*NetCoalition I*").

9 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,779 ("[I]ndividual exchanges and other market participants distribute non-core data voluntarily.").

10 *Id.* ("[T]he Commission does not believe that broker-dealers are required to purchase depth-of-book order data, including the NYSE Arca data, to meet their duty of best execution.").

11 *NetCoalition I*, 615 F.3d at 528 ("As an SRO, an exchange must also file any proposed rule change (including a fee change) with the SEC for approval. . . . The SEC notices a rule change proposal for public comment and either approves it if it is consistent with the requirements of the Exchange Act or disapproves it.").

12 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,779 ("The standards in section 6 of the Exchange Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data.").

13 Exchange Act Section 6(b)(4), 15 U.S.C. § 78f(b)(4).

14 Exchange Act Section 6(b)(5), 15 U.S.C. § 78f(b)(5).

15 Exchange Act Section 6(b)(8), 15 U.S.C. § 78f(b)(8).

16 Exchange Act Section 3(a)(22)(B), 15 U.S.C. § 78c(a)(22)(B).

17 Exchange Act Section 11A(c)(1)(C)–(D), 15 U.S.C. § 78k–1(c)(1)(C)–(D); *see also* Rule 603(a) of Regulation NMS, 17 C.F.R. § 242.603(a) (same).

B. The 2006 ArcaBook Fee Rule was approved.

On December 2, 2008, we approved the 2006 ArcaBook Fee Rule,[18] applying a market-based approach, which focuses on "whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees."[19] We found that (1) "NYSE Arca's compelling need to attract order flow from market participants"; and (2) "the availability to market participants of alternatives to purchasing the ArcaBook data" constituted such competitive forces.[20] Based on this determination and the absence of a "substantial countervailing basis" to find that the 2006 ArcaBook Fee Rule otherwise failed to comply with the Exchange Act or the rules thereunder, we approved the rule change.[21] On January 30, 2009, NetCoalition and SIFMA each petitioned for review of the 2008 ArcaBook Approval Order,[22] asserting that our market-based approach was inconsistent with the Exchange Act and that our decision was not supported by the record.

C. The D.C. Circuit vacated the 2008 ArcaBook Approval Order.

Although the D.C. Circuit vacated the 2008 ArcaBook Approval Order, it held that our market-based approach to evaluating fees charged for non-core data was permissible, upholding it "against the petitioners' cost-based challenges."[23] The court recognized that we had approved the 2006 ArcaBook Fee Rule "based on [our] determination that consideration of costs was unnecessary because of an alternative indicator of competitiveness," *i.e.*, the "two broad types of significant competitive forces" discussed above to which we concluded NYSE Arca was subject.[24] For the reasons explained below, however, the court found that our determination

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18 We reviewed the 2006 ArcaBook Fee Rule following the Division of Market Regulation's approval of it on delegated authority. Order Approving Proposed Rule Change Relating to NYSE Arca Data, Exchange Act Release No. 54597, File No. SR–NYSEArca–2006–21 (Oct. 12, 2006), 71 Fed. Reg. 62,029 (Oct. 20, 2006). When NetCoalition sought review of the order on delegated authority, NYSE Arca argued in a letter that we lacked the authority to review the decision because NetCoalition purportedly was neither "a party to an action made pursuant to delegated authority" nor "a person aggrieved by such action" as required by our Rule of Practice 430(b)(1). 17 C.F.R. § 201.430(b)(1). In accepting the appeal, we necessarily rejected NYSE Arca's jurisdictional argument. *See* Order Granting Petition for Review and Scheduling Filing of Statements (Corrected), *NetCoalition*, Exchange Act Release No. 55011 (Dec. 27, 2006).

19 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,781.

20 *Id.* at 74,782.

21 *Id.* at 74,794.

22 Petitions for Review, Nos. 09-1042 & 09-1045 (D.C. Cir. filed Jan. 30, 2009).

23 *NetCoalition I*, 615 F.3d at 535, 537 (concluding that the Commission's construction of the Exchange Act was permissible and did not "arbitrarily depart from prior practice").

24 *Id.* at 539.

failed to meet the reasoned decision-making standard mandated by the Administrative Procedure Act ("APA").[25]

First, the D.C. Circuit found an inconsistency between what it characterized as the Commission's "repeated statements throughout the Order and in its briefs that depth-of-book data is simply not very important to most traders, even professionals,"[26] and our conclusion that market data was important enough to market participants to drive order flow to trading venues.[27] "More problematic," however, was what the D.C. Circuit found to be a "lack of support in the record for [our] conclusion that order flow competition constrains market data prices."[28] The court did not dispute that the availability of market data could drive order flow, but found that the record did not support the conclusion that it "*necessarily*" did so.[29]

Second, the D.C. Circuit found that the record contained insufficient evidence to conclude that a trader interested in depth-of-book data would substitute any of the alternatives we identified in the 2008 ArcaBook Approval Order or forgo it, "instead of paying a supracompetitive price."[30] The D.C. Circuit found that "the inquiry into whether a market for a product is competitive" focuses on the elasticity of demand for the product, not merely the number of consumers who purchase it.[31] But "without additional evidence of trader behavior,"

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25 *Id.* at 539, 544. Before explaining the particular reasons for which it vacated the 2008 ArcaBook Approval Order, the D.C. Circuit observed that "cost analysis is [not] irrelevant." *Id.* at 537. Because "in a competitive market, the price of a product is supposed to approach its marginal cost," the D.C. Circuit found that "the costs of collecting and distributing market data can indicate whether an exchange is taking 'excessive profits' or subsidizing its service with another source of revenue." *Id.* The D.C. Circuit observed that "[s]upracompetitive pricing may be evidence of 'monopoly,' or 'market,' power." *Id.* It further observed that the "risk that NYSE Arca could exercise market power appears to be elevated in the pricing of its proprietary non-core data," because "[t]here is no dispute that NYSE Arca is the 'exclusive' provider of this data." *Id.* at 538. And although NYSE Arca asserted that the ArcaBook fees "would reflect an equitable allocation of its overall costs," the record contained no evidence of the costs associated with ArcaBook. *Id.*

26 *Id.* at 540.

27 In a footnote, the D.C. Circuit hypothesized that this "apparent contradiction" could be resolved if "evidence of the traders using NYSE Arca's depth-of-book data" and "the percentage of total trading volume those traders may generate" showed that a small but influential group of professional traders were interested in ArcaBook data. *Id.* at 541 n.14.

28 *Id.* at 541. The court specifically rejected as insufficient a variety of supporting evidence cited in the 2008 ArcaBook Approval Order.

29 *Id.* at 540–41 (emphasis in original).

30 *Id.* at 544.

31 *Id.* at 542. The court observed that because market power has been defined as "the ability to raise price profitably by restricting output," "the fact that there are few buyers does not by itself

(continued...)

the court found that we had not adequately supported our determination that alternatives constrain NYSE Arca's depth-of-book fees.[32] The record did not "reveal the number of potential users of the data or how they might react to a change in price," or "how many traders accessed NYSE Arca's depth-of-book data during the period it was offered without charge," which would show "how many traders might be interested in paying for ArcaBook."[33] On the record before it, the D.C. Circuit also specified reasons the alternatives to depth-of-book data we identified might not serve as effective substitutes for ArcaBook data.[34]

D. Congress passed the Dodd-Frank Act providing for, among other things, the immediate effectiveness of SRO rule filings affecting fees.

On July 21, 2010, the Dodd-Frank Act was signed into law.[35] Pursuant to the Act, SRO rule changes "establishing or changing a due, fee, or other charge imposed by the [SRO] on any person" now take effect upon filing with the Commission.[36] We may temporarily suspend such a rule change any time in the sixty-day period commencing on the date the rule was filed with us if it appears that a suspension "is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of" the Exchange Act.[37] If we temporarily suspend an immediately effective rule filing, we must institute proceedings to determine whether the rule should be approved or disapproved.[38] In such a proceeding, approval of an SRO rule change is required if the rule is "consistent with the requirements of" the Exchange Act and the associated rules and regulations applicable to the SRO.[39] Otherwise, we must disapprove the rule.[40]

(...continued)
demonstrate a lack of market power." *Id.* at 543. "Stated differently," evidence that few people purchase depth-of-book data "tells us little about whether the data is 'critically important' to those traders who do" purchase it. *Id.*

32 *Id.*

33 *Id.* at 542, 43.

34 *Id.* at 543–44.

35 *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub. L. 111–203, 124 Stat. 1376 (July 21, 2010).

36 Exchange Act Section 19(b)(3)(A)(ii), 15 U.S.C. § 78s(b)(3)(A)(ii). Before Dodd-Frank, fees assessed on SRO members (but not those on non-members) took effect immediately.

37 Exchange Act Section 19(b)(3)(C), 15 U.S.C. § 78s(b)(3)(C).

38 *Id.* (referencing rule approval procedures of Exchange Act Section 19(b)(2)(B), 15 U.S.C. § 78s(b)(2)(B)).

39 Exchange Act Section 19(b)(2)(C)(i), 15 U.S.C. § 78s(b)(2)(C)(i).

40 Exchange Act Section 19(b)(2)(C)(ii), 15 U.S.C. § 78s(b)(2)(C)(ii).

E. NYSE Arca filed an immediately effective rule change maintaining the fees approved in the 2008 ArcaBook Approval Order.

On November 1, 2010, NYSE Arca filed with the Commission a Form 19b-4 giving notice of an immediately effective rule change enabling NYSE Arca to continue to assess the same market data fees for ArcaBook it had charged since the 2008 ArcaBook Approval Order (the "2010 ArcaBook Fee Rule").[41] On November 9, 2010, the D.C. Circuit's decision vacating the 2008 ArcaBook Approval Order became effective,[42] and we issued a release providing notice of the 2010 ArcaBook Fee Rule and soliciting comments on it.[43]

NYSE Arca asserted that "in conjunction with fees for other services," the ArcaBook data fees "provide for an equitable allocation of NYSE Arca's overall costs among users of its services," and that they are "fair and reasonable because they compare favorably to fees that other markets charge for similar products" and because "competition provides an effective constraint on the market data fees that [NYSE Arca] has the ability and incentive to charge."[44]

On December 8, 2010, NetCoalition and SIFMA submitted a Comment Letter and Petition for Disapproval to the Commission, asserting that NYSE Arca had re-proposed the same fees that the D.C. Circuit had vacated. Among other things, NetCoalition and SIFMA asserted that NYSE Arca (1) had raised the same arguments previously rejected by the D.C. Circuit; (2) did not follow the D.C. Circuit's "teaching" that costs should be considered in assessing the reasonableness of fees; and (3) did not supply any new or substantial evidence to support the conclusion that the ArcaBook fees were "fair and reasonable" and otherwise compliant with the Exchange Act.[45]

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41 Form 19b-4, File No. SR-NYSEArca-2010-97, at 6, *available at* http://www.nyse.com/nysenotices/nysearca/rule-filings/pdf?file_no=SR-NYSEArca-2010-97&seqnum=1 (Nov. 1, 2010) (last visited April 8, 2014) ("2010 ArcaBook Fee Filing").

42 On October 25, 2010, the D.C. Circuit denied NYSE Arca's motion for panel rehearing, and on November 9, 2010, the court issued its mandate.

43 Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Relating to Fees for NYSE Arca Depth-of-Book Data, Exchange Act Release No. 63291 (Nov. 9, 2010), 75 Fed. Reg. 70,311 (Nov. 17, 2010).

44 2010 ArcaBook Fee Filing, at 8.

45 Letter from Ira D. Hammerman and Markham Erickson to Florence E. Harmon, Deputy Secretary, U.S. Securities and Exchange Commission, at 2 (Dec. 8, 2010), *available at* http://www.sec.gov/comments/sr-nysearca-2010-97/nysearca201097-1.pdf (last visited April 8, 2014).

F. The D.C. Circuit held that it lacks statutory jurisdiction to consider challenges to the non-suspension of immediately effective rule filings.

On December 10, 2010, following the expiration of the sixty-day period during which the 2010 ArcaBook Fee Rule could have been temporarily suspended, NetCoalition and SIFMA together petitioned the D.C. Circuit to review the non-suspension of the fee filing.[46]

The D.C. Circuit held that it did not have statutory jurisdiction to consider challenges to the non-suspension of immediately effective rule filings.[47] The court found dispositive that Exchange Act Section 19(b)(3)(C), which governs the suspension of immediately effective SRO rule filings, provides that "action pursuant to this subparagraph . . . shall not be reviewable under [Exchange Act Section 25(a)] nor deemed to be 'final agency action' for purposes of" the APA.[48] Because the D.C. Circuit concluded that "Commission action" under that clause included both suspension and non-suspension of immediately effective rule filings,[49] it determined that it lacked jurisdiction to consider the petitions.

Although the court found that the relevant statutory text was clear, it explained that its decision also was "bolstered by the availability of judicial review down the road."[50] The D.C. Circuit observed that Section 19(b)(3)(C) provides that "[a]ny proposed rule change of a self-regulatory organization which has taken effect [upon filing] may be *enforced* by such organization to the extent it is *not inconsistent* with the provisions of [the Exchange Act], the rules and regulations thereunder, and applicable Federal and State law."[51] This language, the court found, means that "SROs cannot enforce fee rules against their members if those rules are 'inconsistent' with the requirements of the Exchange Act, including sections 6 and 11A," and thus "also suggests that judicial review, if available, is to occur at the enforcement stage."[52]

The court concluded that "if unreasonable fees constitute a denial of 'access to services' under section 19(d)," it had "authority to review such fees."[53] Although the D.C. Circuit did not

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46 Petition for Review, *NetCoalition v. SEC*, 10-1421, Doc. #1285264 (D.C. Cir. filed Dec. 28, 2010). The court consolidated that proceeding with other SRO fee rule challenges brought by the petitioners. Order, *NetCoalition v. SEC*, 10-1421, Doc. #1311399 (D.C. Cir. June 3, 2011) (consolidating Nos. 10-1421, 10-1422, 11-1001, and 11-1065). A number of similar cases were held in abeyance pending resolution of the consolidated appeal.

47 *NetCoalition v. SEC*, 715 F.3d 342, 353 (D.C. Cir. 2013) ("*NetCoalition II*").

48 *Id.* at 348–49 (citing 15 U.S.C. § 78s(b)(3)(C)); *id.* at 351.

49 *Id.* at 351.

50 *Id.* at 352.

51 *Id.* (citing 15 U.S.C. § 78s(b)(3)(C) (emphasis added)).

52 *Id.*

53 *Id.* at 353.

address whether a fee could constitute a denial of access reviewable under Section 19(d), it stated that it took "the Commission at its word, to wit, that it will make the section 19(d) process available to parties seeking review of unreasonable fees charged for market data, thereby opening the gate to [appellate court] review."[54]

The D.C. Circuit also held that its decision vacating the 2006 ArcaBook Fee Rule (*NetCoalition I*) "remains a controlling statement of the law as to what sections 6 and 11A of the Exchange Act require of SRO fees."[55] The court summarized its holding as follows: "[T]here must be evidence that competition will in fact constrain pricing for market data before the Commission approves a fee charged for market data premised on a competitive pricing model."[56]

G. SIFMA filed applications for review under Exchange Act Section 19(d) of immediately effective rule changes governing market data fees.

On May 31, 2013, SIFMA filed an application challenging the 2010 ArcaBook Fee Rule (the "'50 Application"),[57] asserting, among other things, that the 2010 ArcaBook Fee Rule (1) constituted a limitation on access reviewable under Exchange Act Sections 19(d) and (f); and (2) was unenforceable under Exchange Act Section 19(b)(3)(C) because it (a) was not "fair and reasonable," (b) did not "provide for the equitable allocation of reasonable . . . fees . . . among . . . persons using [NYSE Arca's] facilities," and (c) failed to "promote just and equitable principles of trade" and "protect investors and the public interest." In particular, SIFMA asserted that NYSE Arca had offered no evidence that it was subject to significant competitive forces in setting the challenged fees and provided no evidence of the cost of collecting and distributing the data at issue. SIFMA also asserted that the 2010 ArcaBook Fee Rule was "essentially the very same one" that the D.C. Circuit had rejected in *NetCoalition I.*

The same day, SIFMA filed an additional application (the "'51 Application," and collectively with the '50 Application, the "Applications") challenging an additional twenty-two post-Dodd-Frank fee rules from a number of SROs, including a fee rule for NASDAQ's depth-of-book data products,[58] as well as one other fee rule from the participants in the Nasdaq/UTP Plan.[59] SIFMA characterized the fees it challenged as "onerous" and "supracompetitive" and

[54] *Id.* The court was referring to statements in the Commission's brief that a party aggrieved by a fee can challenge it before the Commission under Section 19(d) and thereby ultimately obtain court review of any resulting "final order" of the Commission.

[55] *Id.* at 354.

[56] *Id.*

[57] Application for An Order Setting Aside Rule Change of NYSE Arca, Inc. Limiting Access to Its Services, Admin. Proc. File No. 3-15350.

[58] *Nasdaq Stock Market LLC*, Exchange Act Release No. 62907, File No. NASDAQ–2010–110 (Sept. 14, 2010).

[59] Application for An Order Setting Aside Rule Changes of Certain Self-Regulatory Organizations Limiting Access to Their Services, Admin. Proc. File No. 3-15351.

asserted that they were unenforceable and inconsistent with the Exchange Act for essentially the same reasons it asserted in the '50 Application. SIFMA asked that the '51 Proceeding "be held in abeyance" pending a decision in the '50 Proceeding.

III.

Having considered the parties' responses to the initial briefing orders, we find as follows:

A. We may review SRO fee rules under Exchange Act Section 19(d) so long as the relevant statutory requirements are satisfied.

The SROs contend that we should dismiss the Proceedings for the following reasons: (1) we lack jurisdiction because SIFMA is not a "person aggrieved" under Exchange Act Section 19(d)(2) and there has been no "denial of access" under Section 19(d)(1); (2) the review SIFMA seeks is inconsistent with the statutory scheme for review of SRO actions; and (3) the Applications are untimely because they were filed more than thirty days after we published notice of the rule filings. As discussed below, we hold that we have jurisdiction generally to consider fee rule challenges under Exchange Act Section 19(d) but refer to a law judge the determination of whether SIFMA has established the requisite jurisdictional elements with respect to certain fee challenges.

1. Exchange Act Section 19(d) permits associational standing.

As explained below, we determine that Exchange Act Section 19(d) permits associational standing in challenges to SRO fee rules. To pursue an application for review under Exchange Act Section 19(d)(2), among other things, an applicant must be a "person aggrieved" by SRO action identified in Section 19(d)(1).[60] NYSE argues that SIFMA is not a person aggrieved because it brings its applications in a solely representative capacity, and neither purchases, nor desires to purchase, the market data services for which SROs charge allegedly excessive fees. We reject NYSE's reading of Section 19(d). There is no statutory requirement that a person aggrieved must itself be subject to a prohibition or limitation of access to SRO services. We find that neither the Exchange Act, nor any of our case law, prohibits associational standing under Section 19(d).[61]

Analogous precedent supports recognizing associational standing under Section 19(d)(2) in appropriate circumstances. The Commission, in connection with the 2008 ArcaBook Fee Approval Order, and the D.C. Circuit, in *NetCoalition I*, treated NetCoalition and SIFMA (both representative parties) as "person[s] aggrieved" for purposes of their challenges to the 2006

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60 15 U.S.C. § 78s(d)(1), (2).

61 *Cf. Int'l Power Group, Ltd.*, Exchange Act Release No. 66611, 2012 WL 892229, at *8 & n.12 (Mar. 15, 2012) (finding that issuer was a person aggrieved for purposes of its challenge to clearing agency's suspension of clearing and settlement services with respect to issuer's securities "even [though] those services [wer]e not provided directly to the issuer").

ArcaBook Fee Rule.[62] And in the context of Article III standing to proceed in federal court,[63] the D.C. Circuit held in *NetCoalition II* that its "constitutional jurisdiction [wa]s not in doubt" because "[o]n behalf of their members," SIFMA and NetCoalition "assert[ed] a financial injury allegedly caused by the SEC's inaction which could be remediated if the SEC were to suspend the fee rules."[64]

Nonetheless, the contours of our jurisdiction are not limitless, and we do not mean to suggest that anyone may bring an application for review of SRO action that prohibits or limits any other person's access to SRO services.[65] We find that the following three-part test for associational standing employed by the federal courts is an appropriate standard by which to determine whether SIFMA is a person aggrieved under Section 19(d)(2): "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[66]

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62 Order Granting Petition for Review and Scheduling Filing of Statements (Corrected), *NetCoalition*, Exchange Act Release No. 55011 (Dec. 27, 2006) (implicitly rejecting NYSE Arca argument that NetCoalition was not a "person aggrieved" entitled to challenge delegated authority approval order under Rule of Practice 430); *NetCoalition I*, 615 F.3d at 532 (finding that, in challenge by NetCoalition and SIFMA to Commission approval of 2006 ArcaBook Fee Rule, the court's "jurisdiction ar[ose] under 15 U.S.C. § 78y(a)(1) ('A *person aggrieved* by a final order of the Commission . . . may obtain review of the order in the United States Court of Appeals . . . for the District of Columbia Circuit . . .')" (emphasis added; ellipses in original)).

63 Although this consideration is not directly applicable to us, we find it instructive. *See Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999) ("Agencies, of course, are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts."), *cited in Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27 (D.C. Cir. 2002).

64 *NetCoalition II*, 715 F.3d at 437–48 (citing, among other authority, *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (setting out requirements of associational standing)); *see also Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 486–87 (D.C. Cir. 2007) (finding representative party had standing to challenge Commission rule).

65 *Cf. Fund Democracy*, 278 F.3d at 25 (finding that alleged representative organization lacked associational standing where it could not identify any actual members injured by challenged action); *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) (rejecting claim of associational standing where self-professed "media watchdog," among other things, "serve[d] no discrete, stable group of persons with a definable set of common interests").

66 *Hunt*, 432 U.S. at 343, *cited in WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013).

Respondents' response and reply brief: E&Y, KMPG, DTTC, and PwC shall file a single consolidated brief, not to exceed 16,000 words, by August 27, 2014.

Division's reply brief: The Division may file a reply brief, not to exceed 2,000 words, by September 8, 2014. This brief must be limited to the issues presented by the Division's petition for review.

By separate order, the Commission shall provide for briefing on the Division's petition for review insofar as it seeks to challenge the scope of remedies imposed on Dahua.[27] As provided by Rule of Practice 450(a), no briefs in addition to those specified in this schedule may be filed without leave of the Commission.[28] Pursuant to Rule of Practice 180(c), failure to file a brief in support of the petition may result in dismissal of this review proceeding.[29]

It is further ORDERED that the parties shall confer and prepare an appendix that reproduces without argument or commentary the foreign law materials in the record upon which they rely (including any applicable orders, regulations, directives, or letters), along with translations of any document in a foreign language.[30] The materials shall be set out in chronological order by date of issuance or promulgation and must be consecutively paginated to facilitate citation to the appendix in the parties' briefs. The appendix must contain a table of contents describing each item included, the original location of that item in the record, and the page of the appendix on which it begins. Respondents shall file and serve the appendix at the same time that they file and serve their opening brief.

Finally, it is ORDERED that the Stipulated Protective Order entered by the law judge on May 9, 2013, as modified by the Joint Stipulation and Amendment to Stipulated Protective Order entered July 29, 2013, shall remain in effect. Two versions of each document containing information subject to the protective order must be filed: (1) a complete version of the document marked "CONFIDENTIAL" for filing under seal and (2) a redacted version of the same document for the public file. The Commission reserves the authority to reach a different

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27 *See supra* note 2.

28 Attention also is called to Rules of Practice 150-153, 17 C.F.R. §§ 201.150-153, with respect to form and service, and Rule of Practice 450(b) and (c), 17 C.F.R. §§ 201.450(b), 201.450(c), with respect to content and length limitations (except as modified in this order). Requests for extensions of time to file briefs or for additional words are disfavored.

29 17 C.F.R. § 201.180(c).

30 Where an agreed translation is unavailable, each party shall submit its own preferred version along with any applicable translator's certificate. *See, e.g.*, *Pittway Corp. v. United States*, 88 F.3d 501, 503 n.1 (7th Cir. 1996).

conclusion regarding the confidentiality of the information covered by the May 9 and July 29 orders at any time before it finally determines the issues raised in this proceeding.[31]

By the Commission.

Lynn M. Powalski
Deputy Secretary

31 *See, e.g.*, *Kevin Hall*, Exchange Act Release No. 60346, 2009 WL 2149222, at *2 (July 20, 2009).

There is no question that, by challenging fees that its members pay as excessive under the Exchange Act, SIFMA seeks to protect interests that are germane to its purpose.[67] In addition, neither SIFMA's claim that the fees at issue are inconsistent with the Exchange Act, nor its request that we set those fees aside requires the participation of individual SIFMA members in the Proceedings.[68] SIFMA's arguments do not turn on the identity of the particular member paying the depth-of-book fees; rather, they address the fees with respect to the standards set forth in the Exchange Act and rules thereunder, and SIFMA requests that we set aside those fees for all persons. And to the extent that evidence regarding individual members is necessary to consideration of the first element of associational standing analysis, that evidence bears on standing issues, not the merits of SIFMA's claim itself.

Accordingly, whether SIFMA is a person aggrieved turns on whether it represents identified members who are themselves persons aggrieved within the meaning of Section 19(d)(2).[69] For each challenged fee, Section 19(d) thus requires that an SRO have "prohibit[ed] or limit[ed]" SIFMA members "in respect to access to services" at issue.[70] Focusing on the word "prohibit" and opinions in which we have used the term "denial of access," NASDAQ contends that "SIFMA must demonstrate that an exchange's fee is *prohibitively expensive* for a significant segment of market data consumers," such that, among other things, the fee "actually *prevents* them from accessing" the services at issue.[71] Taking this argument one step further, NYSE Arca argues that there has been no denial of access because it provides ArcaBook to anyone willing to pay the challenged fee for it. In contrast, SIFMA argues that Section 19(d) requires only a showing that a challenged SRO action "limits any person in respect to access to services offered by" the SRO.

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67 *Cf. City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002) (finding lack of associational standing where, among other things, City sought to advance interests of its residents that were not germane to its purpose).

68 *Cf. Telecomm. Research & Action Ctr. v. Allnet Commc'n Servs., Inc.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986) (denying associational standing because plaintiff organization's claims for money damages were of a kind that would ordinarily require individual participation); *O'Hair v. White*, 675 F.2d 680, 692 (5th Cir. 1982) (finding lack of associational standing where "both the claims asserted and relief sought required [member's] individual participation" and challenged conduct "affected [member] alone and d[id] not have any legal or practical significance for the rest of [association's] membership").

69 *Cf. Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) ("When a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically identify members who have suffered the requisite harm." (internal quotation marks omitted)).

70 15 U.S.C. § 78s(d)(1), (2) (requiring the Commission to review a properly challenged SRO action that "prohibits or limits any person in respect to access to services offered by such" SRO).

71 NASDAQ '51 Proceeding Br. at 3 (emphasis added).

The language of the Exchange Act and our precedent show that SIFMA is correct that there is no need to establish a complete prohibition of access.[72] Yet, an applicant must still be subject to an SRO action that actually *limits* its access to SRO services. For example, in *Bloomberg, L.P.*, we concluded that NYSE's "imposition and enforcement of" certain restrictions relating to the dissemination of depth-of-book data "effected a denial of access to Bloomberg" of services because NYSE "would not provide Bloomberg access to [that] data unless it disseminated and continue[d] to disseminate" it in accordance with the restrictions.[73]

Invoking *Bloomberg*, SIFMA asserts that because its members cannot obtain depth-of-book data services without paying the fees it challenges, it is subject to a limitation on access to depth-of-book data. We previously have treated certain fees charged by registered securities information processors as reviewable prohibitions or limitations on access under Exchange Act Section 11A,[74] which uses essentially the same operative language regarding prohibitions and limitations of access as Sections 19(d) and (f).[75] But not every fee charged by an SRO will

72 *See* Exchange Act Section 19(d)(1), 15 U.S.C. § 78s(d)(1) (referencing SRO action that "prohibits *or* limits" access) (emphasis added); *Interactive Brokers LLC*, Exchange Act Release No. 39765, 53 SEC 466, 1998 WL 117627, at *3 n.8 (Mar. 17, 1998) (reviewing challenged SRO action under Section 19(f) where, although the Commission "acknowledge[d] that [applicant] ha[d] not been denied access entirely," its "access undeniably ha[d] been limited"); *see also Matthew Brian Proman*, Exchange Act Release No. 57740, 2008 WL 1902072, at *2 (Apr. 30, 2008) ("A denial of access involves a *denial or limitation* of the applicant's ability to utilize one of the fundamentally important services offered by the SRO." (emphasis added and internal quotation omitted)).

73 Exchange Act Release No. 49076, 57 SEC 265, 2004 WL 67566, at *2 (Jan. 14, 2004).

74 *See* Order Accepting Jurisdiction, Establishing Procedures, and Ordering Briefs, *Cincinnati Stock Exch.*, Exchange Act Release No. 43316, 54 SEC 857, 2000 WL 1363274, at *3 (Sept. 21, 2000) (finding that "charging fees to [CSE] specialists is a limitation on access to the CTA's services"); *Institutional Networks Corp.*, Exchange Act Release No. 20874, 1984 WL 472209, at *6 (Apr. 17, 1984) (finding that "fees for access to NASDAQ services are a limitation on access within the terms of the statute"), *aff'd sub nom.*, *NASD v. SEC*, 801 F.2d 1415, 1419 (D.C. Cir. 1986) (holding that "the Commission quite properly concluded in its April order that NASD's proposal constituted an improper prohibition or limitation of access to services"); *Bunker Ramo Corp.*, Exchange Act Release No. 15372, 1978 WL 171128, at *2 (Nov. 29, 1978) (finding "that the imposition of an access fee can be a limitation upon access to a service offered by an exclusive processor," but determining that, under the circumstances, "imposition of some form of an access fee" was permissible).

75 *Compare* Exchange Act Section 11A(c)(5)(A) (requiring notice "[i]f any registered securities information processor prohibits or limits any person in respect of access to services offered" and authorizing review, on timely application "by any person aggrieved" of such action) *with* Sections 19(d)(1), (2) (requiring notice "[i]f any self-regulatory organization . . . prohibits or limits any person in respect to access to services offered" and authorizing review, on timely application "by any person aggrieved" of such action).

constitute a reviewable limitation on access. Rather, at least three important considerations restrict what fees might constitute reviewable limitations under Section 19(d).

First, SIFMA still must establish that its members are subject to an actual limitation of access. Although SIFMA's general counsel submitted a declaration that identifies certain SIFMA members who purchase ArcaBook, standing alone this is insufficient for us to conclude that there has been a limitation of access. And SIFMA provides no such information with respect to the depth-of-book product at issue in the '51 Proceeding. SIFMA should present, at a minimum, member declarations, or other comparable evidence, establishing that particular SIFMA members purchase the depth-of-book products and explaining that those members are aggrieved because the level of the prices charged for those products is so high as to be outside a reasonable range of fees under the Exchange Act.[76] We find that a law judge should receive this evidence in the first instance.

Second, an applicant cannot object to an SRO fee simply because it believes that it is too high. Rather, an applicant must assert a basis that, if established, would lead the Commission to conclude that the fee violates Exchange Act Section 19(f).[77] This is evident from the text of Section 19(f), which sets out the exclusive bases to set aside a limitation of access to services following an application under Section 19(d),[78] and our Rules of Practice, which mandate that an application for review "identify the determination complained of and set forth in summary form a brief statement of the alleged errors in the determination and supporting reasons therefor."[79] For example, in *Bloomberg*, the applicant asserted (and the Commission ultimately found) that NYSE's enforcement of the restrictions at issue was not in accordance with NYSE's rules because they were not filed with the Commission as proposed exchange rules or approved by the Commission.[80]

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76 Alternatively, SIFMA could present declarations from its members showing that they were unable to purchase depth-of-book products due to alleged supracompetitive pricing violating the Exchange Act. *Cf. Chamber of Commerce v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005) (holding that petitioner suffered injury-in-fact because it could not purchase mutual funds that did not comply with challenged regulations).

77 We note that SIFMA previously submitted extensive comments regarding the rule proposal in the '50 Proceeding explaining in detail its basis for challenging the ArcaBook fees as contrary to the Exchange Act. *See supra* note 45 and accompanying text.

78 15 U.S.C. § 78s (providing that if the Commission "does not make" any of the findings required by the section with respect to a challenged SRO prohibition or limitation of access to services or "finds that such [challenged] prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act, it "shall set aside the [SRO] action").

79 Rule of Practice 420(c), 17 C.F.R. § 201.420(c).

80 2004 WL 67566, at *3, *5.

Although we do not address the merits of SIFMA's legal or factual assertions, SIFMA plainly has alleged a basis in its Applications to conclude that the depth-of-book fees it challenges are contrary to the Exchange Act.[81] SIFMA contends that those fees are "onerous" and "supraçompetitive" and that the rules implementing the charges violate the Exchange Act because they are not "fair and reasonable,"[82] and do not "provide for the equitable allocation of reasonable" fees among the persons using the SROs' facilities,[83] "promote just and equitable principles of trade,"[84] or "protect investors and the public interest."[85] Specifically, SIFMA relies in part on the D.C. Circuit's holdings in *NetCoalition I* and *II*[86] and contends, among other things, that the SROs have failed to provide sufficient evidence that they were subject to significant competitive forces in setting the fees as required by the Commission's market-based approach to the evaluation of fees for non-core market data.[87] Thus, SIFMA has appropriately articulated in its Applications a basis for concluding, if established by the evidence, that the depth-of-book fees should be set aside under Section 19(f).[88]

Third, as we explained in *Morgan Stanley & Co.*, "[i]n those cases in which we have found a denial of access, an SRO had denied or limited the applicant's ability to utilize one of the fundamentally important services offered by the SRO," which "were not merely important to the applicant but were central to the function of the SRO."[89] NASDAQ argues that SIFMA has failed to plead compliance with the *Morgan Stanley* requirement in its Applications. We have

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81 *See supra* notes 57 and 59 and accompanying text.

82 15 U.S.C. § 78k-1(c)(1)(C)-(D); *see also* 17 C.F.R. § 242.603(a).

83 Exchange Act Section 6(b)(4), 15 U.S.C. § 78f(b)(4).

84 Exchange Act Section 6(b)(5), 15 U.S.C. § 78f(b)(5).

85 *Id.*

86 *See supra* text accompanying notes 55 and 56.

87 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,781 (explaining that the "market-based approach" requires consideration, among other things, of "whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees").

88 We do not mean to suggest that, in requiring an applicant to articulate, as a preliminary matter, its theory of why a rule is invalid, the burden of proof has shifted to the applicant. *See supra* text accompanying note 77. Exchange Act Section 19(f) places the burden on an SRO to establish, among other things, that its challenged rule is "consistent with the purposes of" the Exchange Act. 15 U.S.C. § 78s(f). That burden remains with the SRO once a determination has been made that review is appropriate under Section 19(d).

89 Exchange Act Release No. 39459, 53 SEC 379, 1997 WL 802072, at *3 (Dec. 17, 1997), *cited in Sky Capital LLC*, Exchange Act Release No. 55828, 2007 WL 1559228, at *4 (May 30, 2007).

not hesitated to dismiss applications for review that have failed to meet this standard.[90] But we need not look to the evidence submitted by SIFMA to determine its consistency with our governing standard because our precedent resolves this issue. In *Bloomberg*, we found the NYSE depth-of-book data services at issue to be within the scope of Section 19(d).[91] Based on *Bloomberg*, we believe that ArcaBook and NASDAQ's depth-of-book products are also sufficiently important to meet the *Morgan Stanley* standard.[92]

2. Sections 19(d) and (f) can be applied to the Applications.

We reject the SROs' generalized assertions that the Exchange Act Section 19 statutory scheme does not permit review of the Applications under Sections 19(d) and (f). NASDAQ argues that the Dodd-Frank amendments to Section 19 bar the Commission from considering Section 19(d) challenges to immediately effective rule changes because Congress intended the Section 19(b) rule suspension and consideration process to be the exclusive avenue of review for such rules. In the SROs' view, Congress expressly would have provided for our jurisdiction under Section 19(d) if it had intended Section 19(f) review of SRO fee rules to be available after Dodd-Frank.

We reach the opposite conclusion; *i.e.*, we find it compelling that nothing in the Dodd-Frank Act removed jurisdiction under Section 19(d) for challenges to fee rules at the enforcement stage.[93] Congress provided that rule changes involving fees charged to non-

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90 *See, e.g.*, *Proman*, 2008 WL 1902072, at *2 (finding that relevant standard was not satisfied when Proman failed to identify any services "'central to the function of the SRO,' such as access to an exchange trading floor or registration as a market maker" to which he had been denied access); *Sky Capital*, 2007 WL 1559228, at *4 (finding that *Morgan Stanley* test was not met when applicant failed to show that NASD "Office of the Ombudsman provide[d] a 'fundamentally important service' that [wa]s central to the function of NASD"); *Morgan Stanley*, 1997 WL 802072, at *3 (finding that application for review did not allege a denial of access where applicant merely sought "relief from the automatic operation of [an SRO] prohibition, which its employee's actions triggered").

91 We separately have noted the increased value of depth-of-book order data to market participants following the "initiation of decimal trading in 2001." 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,780.

92 If the '50 Proceeding and portion of the '51 Proceeding that we consider herein did not involve depth-of-book data services, SIFMA would have needed to submit at least a member declaration or comparable evidence sufficient to meet the controlling standard. We do not address at this time, nor do we refer to a law judge to consider, whether jurisdiction exists over SIFMA's other fee rule challenges.

93 *Cf. NetCoalition II*, 715 F.3d at 348 ("Although the Congress is authorized to preclude judicial review of agency action, . . . we assume that the Congress has not done so absent clear and convincing evidence of a contrary legislative intent." (internal citation and quotation omitted)).

members would become immediately effective on filing and further mandated a sixty-day period in which such filings could be suspended and rule consideration proceedings initiated under Section 19(b).[94] But the question here is not whether the challenged rule changes should have become effective. Rather, it is whether those rules are enforceable. Nothing in the relevant Dodd-Frank amendments removes our authority under Section 19(f) to find an SRO rule unenforceable because it is inconsistent with the Exchange Act.[95] As the D.C. Circuit recognized, even following Dodd-Frank, an immediately effective rule filing "may be enforced" by an SRO only "to the extent it is not inconsistent with" the Exchange Act and other applicable law.[96] But when we do not suspend an immediately effective SRO rule in the statutory sixty-day period, we have not made a decision to approve the rule or find it enforceable.[97] Indeed, because we have not initiated the statutory process to determine if the rule should be approved or disapproved, a proceeding under Section 19(d) is not the second proceeding to determine the enforceability of the rule, it is the first.[98] On a sufficient application, Section 19(f) still requires us to determine (in the first instance) if a "prohibition or limitation is in accordance with the rules of the [SRO]," and whether such rules are "consistent with the purposes of" the Exchange Act and thus enforceable.[99]

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94 Exchange Act Section 19(b)(3)(A), 15 U.S.C. § 78s(b)(3)(A). Congress also made other changes to the rule approval procedures that were expected to "encourage the SEC to employ a more transparent and rapid process for consideration of rule changes." S. Rep. No. 111-176, at 106 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-111srpt176/pdf/CRPT-111srpt176.pdf (last visited April 8, 2014). These changes do not directly affect the rules challenged here because the Commission never suspended them and initiated approval proceedings.

95 *Cf. id.* (explaining that "[n]othing in" the relevant Dodd-Frank amendments to Exchange Act Section 19 "diminishes the SEC's authority," among other things, to "disapprove a rule that is not consistent with the Exchange Act").

96 Exchange Act Section 19(b)(3)(C), 15 U.S.C. § 78s(b)(3)(C), *cited in NetCoalition II*, 715 F.3d at 352.

97 Exchange Act Section 19(b)(3)(C) provides that we "summarily *may* temporarily suspend" an immediately effective rule change within sixty days of its filing; it does not compel such an action under any circumstances. 15 U.S.C. § 78s(b)(3)(C) (emphasis added). If we suspend a rule change, that suspension initiates a formal process to determine whether the rule should be approved or disproved. And if we do not suspend a rule change, we need not explain why.

98 *Cf. Darr v. Burford,* 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) ("Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner.").

99 Exchange Act Section 19(f), 15 U.S.C. § 78s(f). Congress also left in place our ability to modify SRO rules through notice and comment rulemaking under Exchange Act Section 19(c).

We also reject NASDAQ's argument that review is not appropriate because the Section 19(d) and (f) statutory scheme is ill-suited to address immediately effective rule filings. NASDAQ asserts that when an SRO sets a fee it will not know if the parties paying the fee will view it as excessive. For this reason, NASDAQ asserts, the SRO will be unable to determine whether it needs to provide notice to the Commission pursuant to Exchange Act Section 19(d)(1) that the fee constitutes a prohibition or limitation on access to services. But such uncertainty and potential failure to file do not determine whether an application under Section 19(d) is valid, since we have held that "the failure of an SRO to file the required notice does not prevent Commission review."[100] Moreover, parties and the Commission receive notice of the content and basis of immediately effective fee rules when they are filed with the Commission pursuant to Section 19(b).

NASDAQ also argues that there is no "record before the [SROs]" that can be reviewed under Section 19(f). But this argument essentially ignores that, for each challenged fee, the SROs prepared and submitted to the Commission Form 19b-4 filings providing the basis for the fee. These filings, and the subsequent responses to them, effectively provide a record as contemplated by Section 19(f). Moreover, under the plain language of Section 19(f) and our rules, we have the discretion to expand the record beyond that before the SRO (as we discuss further below).[101]

In addition, NASDAQ's assertion that there is "no mechanism under Section 19(d) or 19(f) for the Commission to alter allegedly unreasonable fees" is inapposite. SIFMA has asked us to vacate the challenged rules as improper limitations on access to services, not to set new fees for those services.[102]

Finally, we reject NASDAQ's assertion that the legislative history of the 1975 amendments to the Exchange Act establishes that Section 19(d)(2) is limited to "quasi-adjudicatory" SRO actions and that review is inappropriate here because there is no such predicate action. The phrase "quasi-adjudicatory action" appears nowhere in the text of Section 19, or, indeed, anywhere else in the Exchange Act. We have never found that Section 19(d) is limited to quasi-adjudicatory actions and decline to do so now. And to the extent that we

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100 *MFS Sec. Corp.*, Exchange Act Release No. 47626, 56 SEC 380, 2003 WL 1751581, at *6 n.13 (Apr. 3, 2003) (citing *William J. Higgins*, Exchange Act Release No. 24429, 48 SEC 713, 1987 WL 757509, at *5 n.29 (May 6, 1987)), *aff'd*, 380 F.3d 611 (2d Cir. 2004).

101 15 U.S.C. § 78s(f) (providing that a hearing "*may* consist solely of consideration of the record before the [SRO] and opportunity for the presentation of supporting reasons" for dismissal or action by the parties (emphasis added)); Rule of Practice 452, 17 C.F.R. § 201.452 ("Upon its own motion . . . , the Commission may allow the submission of additional evidence.").

102 Exchange Act Section 19(f), 15 U.S.C. § 78s(f) (requiring Commission on sufficient showing to "set aside the [challenged SRO] action" and to "require [SRO] to . . . grant . . . access to services" at issue).

previously have cited the legislative history NASDAQ identifies to construe the scope of Section 19(d), we have relied on that history to construe the statute expansively, not to limit its reach.[103]

3. The Proceedings will not be dismissed as untimely.

We also decline the SROs' invitation to dismiss the Proceedings as untimely. Given that SIFMA filed the Applications within 30 days of the decision in *NetCoalition II*, we find there are "extraordinary circumstances" sufficient to extend the application filing deadline under Rule 420(b) of our Rules of Practice.[104]

B. The '50 Proceeding is referred to an administrative law judge.

Given the factors discussed above, we find it appropriate to refer the '50 Proceeding (consolidated with a portion of the '51 Proceeding as discussed below) to an administrative law judge for additional record development and proceedings consistent with this order. On our own motion, we may "refer [a] proceeding to a hearing officer for the taking of additional evidence."[105] Our Rules of Practice also provide us the flexibility to "direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary," based on our determination that "to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding."[106] In similar contexts, we have referred matters to an administrative law judge for development of the record and preparation of an initial decision.[107]

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103 *Tower Trading*, Exchange Act Release No. 47537, 56 SEC 270, 2003 WL 1339179, at *3 (Mar. 19, 2003) ("Congress intended . . . Section 19(d), 'to encompass *all* final quasi-adjudicatory actions[.]'" (internal citation omitted and emphasis added)).

104 17 C.F.R. § 201.420(b); *see also MFS Sec.*, 2003 WL 1751581, at *3 & n.17 (accepting an untimely application for review where the "Court of Appeals . . . asked for the Commission's views as to whether" an SRO's actions comported with relevant law and the application "present[ed] novel facts and legal issues").

105 Rule of Practice 452, 17 C.F.R. § 201.452. As noted above, we have statutory authority to consider an expanded record under Exchange Act Section 19(f). *See supra* note 101 and accompanying text.

106 Rule of Practice 100(c), 17 C.F.R. § 201.100(c).

107 Order Accepting Jurisdiction and Establishing Procedures, *Nasdaq Stock Mkt., LLC*, Exchange Act Release No. 55909, 2007 WL 1725775, at *1 (June 14, 2007) (designating an administrative law judge to preside over Nasdaq's claim that "fee [wa]s excessive and constitute[d] a denial of access"); Order Remanding Case to Administrative Law Judge for Issuance of Initial Decision Pursuant to Rule of Practice 360, *Nasdaq Stock Mkt., LLC*, Exchange Act Release No. 57741, 2008 WL 1902073, at *2 (Apr. 30, 2008) (ordering preparation of initial decision); *Cincinnati Stock Exch.*, 2000 WL 1363274, at *3, *4 (determining "that the record requires development in certain areas" and "to appoint an administrative law judge to preside

(continued...)

A number of factors support our decision to refer the consolidated '50 Proceeding to a law judge. Referral will give the law judge the opportunity to receive and address additional evidence bearing on the existence of jurisdiction and the substantive issues raised by the consolidated '50 Proceeding. Following a determination of jurisdiction, we direct the law judge to hold a hearing addressing whether the challenged rules should be vacated under the statutory standard set forth in Exchange Act Section 19(f) – as informed by the two-part test set out in our 2008 ArcaBook Approval Order,[108] the D.C. Circuit's decision in *NetCoalition I*,[109] and appropriate briefing from the parties – and after such a hearing to issue an initial decision in this matter.[110]

We believe it prudent for the law judge to consider a fully developed record given the focus of the D.C. Circuit on the state of the record in *NetCoalition I*.[111] We perceive no harm to the parties from allowing an expansion of the record. Had we suspended the challenged fee rules for further review under Section 19(b), our rules would have dictated that "all interested persons . . . be given an opportunity to submit written data, views, and arguments" concerning the fee proposal.[112] And an SRO effectively can supplement the record unilaterally by resubmitting an existing rule filing with additional supporting materials, subject to potential rule suspension for behavior inconsistent with the Exchange Act.[113] Finally, because the substantive question concerns the current enforceability of the challenged fees, it is appropriate to consider relevant evidence not available at the time of the initial rule filings.

The administrative law judge shall have all the powers of a Hearing Officer under Rule of Practice 111, including the authority to regulate the scope, schedule, and course of the

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(...continued)
over this proceeding" in proceeding challenging fees as impermissible prohibition or limitation of access).

108 73 Fed. Reg. at 74,781.

109 *See supra* Section II.C.

110 We also invite any interested persons to address any of these issues through amicus briefing in a manner established by the law judge. To the extent that Rule of Practice 201 would appear to prohibit such participation, we waive such restrictions under Rule of Practice 100(c).

111 We recognize that if the law judge were to find jurisdiction lacking under the principles identified in this order, then it would be unnecessary to prepare an initial decision.

112 Rule of Practice 700(c)(1), 17 C.F.R. § 201.700(c)(1); *see also id.* § 201.700(d)(3) (providing that the record would include, among other things, "all written materials received from any interested parties on the proposed rule change, including the [SRO]").

113 Exchange Act Section 19(b)(3)(C) (providing that the Commission may suspend immediately effective rule filings within sixty days of filing if it appears "such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of" the Exchange Act).

proceeding, as well as the conduct of the parties and their counsel.[114] The law judge, in the exercise of his or her discretion, may determine which of our Rules of Practice it is appropriate to apply to this proceeding, including whether and in what form to receive particular additional evidence or documents, and whether and what kind of additional proceedings may be appropriate.

C. The challenge to fees for NASDAQ's depth-of-book data products will be severed from the '51 Proceeding and consolidated with the '50 Proceeding.

We also determine to sever the challenge to the fees for NASDAQ's depth-of-book data products from the '51 Proceeding,[115] and to consolidate it with the '50 Proceeding. Under our Rules of Practice, we may sever proceedings and order "proceedings involving a common question of law or fact" consolidated for hearing.[116] These challenges share common legal and factual issues because they concern fees for similar depth-of-book services offered by competing exchanges. In contrast, we determine that it is not appropriate to consolidate for hearing at this time SIFMA's challenge to the pilot program for the Nasdaq Last Sale data product.[117]

D. Issuance of an order governing further proceedings in the '51 Proceeding will be withheld pending resolution of the '50 Proceeding.

We also determine that it is appropriate to withhold issuance of an order governing further proceedings in the remainder of the '51 Proceeding until after the resolution of the consolidated '50 Proceeding.[118] SIFMA requests that we do this and no SRO objects.[119] We find that there is good cause for our determination for the following reasons. Proceeding first with a limited group of rule challenges will provide an opportunity to address the common substantive legal issues that relate to all filings for the first time following *NetCoalition I*.[120] This will serve

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114 17 C.F.R. § 201.111.

115 *See supra* note 58.

116 Rule of Practice 201(a), (b), 17 C.F.R. § 201.201(a), (b).

117 Exchange Act Release No. 64856, File No. SR–NASDAQ–2011–092 (July 12, 2011). Based on our preliminary review, it appears this pilot program is dissimilar to the NYSE ArcaBook service in a number of material ways and, although NASDAQ requested that we proceed with the last sale challenge, NASDAQ has offered no basis to prefer it to the depth-of-book challenge.

118 We will also do so with respect to the additional applications SIFMA filed after the Proceedings. *See supra* note 2.

119 Although SIFMA requested that we hold the '51 Proceeding "in abeyance," unlike the D.C. Circuit, we have no such specific procedure under our Rules of Practice.

120 *Cf.* Order, *David L. Arnold*, Exchange Act Release No. 37880, 1996 WL 647802, at *9 (Oct. 28, 1996) (postponing scheduled hearing as to one respondent in light of expected Supreme Court decision and noting that "extensive resources may be saved" thereby); *Basardh v. Gates*,

(continued...)

the interests of all parties and conserve resources, by focusing the issues in a single proceeding to those limited to depth-of-book products.[121] Nor is there any prejudice to the parties.[122] SIFMA – the party that challenges the fees on behalf of members who pay them – requests that we first proceed with the '50 Proceeding. We will allow all parties to assert their views in the '50 Proceeding, while reserving the ultimate resolution of the remaining rule challenges in the '51 Proceeding. And consolidating the challenge to NASDAQ depth-of-book data fees with the '50 Proceeding provides NASDAQ with the additional opportunity to directly participate in the resolution of the relevant issues.

IV.

Accordingly, IT IS ORDERED that the challenge to Nasdaq Stock Market LLC, Exchange Act Release No. 62907, File No. NASDAQ–2010–110 (Sept. 14, 2010) of the Securities Industry and Financial Markets Association in Administrative Proceeding File No. 3-15351 be, and hereby is, severed from that proceeding and consolidated with Administrative Proceeding File No. 3-15350; and it is further

ORDERED that Chief Administrative Law Judge Brenda P. Murray shall designate an administrative law judge to preside over the consolidated Administrative Proceeding File No. 3-15350 in accordance with this order.

By the Commission.

Lynn M. Powalski
Deputy Secretary

(…continued)
545 F.3d 1068, 1069 (D.C. Cir. 2008) (stating the court "often" has held petitions in abeyance when "other pending proceedings . . . may affect the outcome of the case"). Indeed, the D.C. Circuit previously held in abeyance several petitions for review pending the result in *NetCoalition II*.

121 *See* Rule of Practice 103(a), 17 C.F.R. § 201.103(a) (requiring that Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding").

122 *See supra* note 106 and accompanying text.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 16, 2014

In the Matter of **Global Stevia Corp.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of complete and accurate information concerning the securities of Global Stevia Corp. ("Global Stevia") because of questions that have been raised about the accuracy and reliability of publicly available information concerning, among other things, possible undisclosed control persons of Global Stevia. Global Stevia was a Nevada corporation based in Hammonds Plains, Nova Scotia, Canada, whose corporate status was revoked in January 2014. Its securities are quoted on OTC Link (previously "Pink Sheets") operated by OTC Markets Group, Inc. under the ticker symbol "GSTV."

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

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on May 16, 2014, through 11:59 p.m. EDT on May 30, 2014.

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 72179 / May 16, 2014

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3836 / May 16, 2014

INVESTMENT COMPANY ACT OF 1940
Rel. No. 31047 / May 16, 2014

Admin. Proc. File No. 3-14355

In the Matter of

DONALD L. KOCH and KOCH ASSET
MANAGEMENT, LLC
c/o Thomas O. Gorman
Dorsey & Whitney LLP
1801 K Street, NW, Suite 750
Washington, DC 20006

OPINION OF THE COMMISSION

EXCHANGE ACT PROCEEDING

INVESTMENT ADVISER PROCEEDING

INVESTMENT COMPANY ACT PROCEEDING

Grounds for Remedial Action

Manipulation

Failure to Implement Policies and Procedures

Investment adviser and its owner and principal engaged in fraudulent and manipulative conduct by "marking the close" in the purchase of securities. *Held*, it is in the public interest to impose a cease-and-desist order on respondents, order disgorgement of $4,169.78, plus prejudgment interest, assess a $75,000 civil penalty, censure investment adviser, and impose a collateral bar on principal.

APPEARANCES:

Thomas O. Gorman and *Cecilie H. MacIntyre*, of Dorsey & Whitney LLP, for Donald L. Koch and Koch Asset Management, LLC.

Suzanne J. Romajas and *Adam S. Aderton*, for the Division of Enforcement.

Appeal filed: July 6, 2012
Last brief received: October 31, 2012

I.

Koch Asset Management LLC ("KAM") and Donald L. Koch, KAM's founder, sole owner, and principal, appeal from an initial decision of an administrative law judge.[1] The law judge found that Respondents violated antifraud provisions of the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 by "marking the close," a form of market manipulation, in the purchase of securities for advisory clients. The law judge also found that Respondents violated Advisers Act Rule 206(4)-7 by failing to implement written policies and procedures designed to prevent violations of the Advisers Act and rules promulgated thereunder. The law judge ordered Respondents to cease and desist from further violations; disgorge $4,169.78 in ill-gotten gains, plus prejudgment interest; and pay a second-tier civil penalty of $75,000.[2] The law judge also censured KAM and barred Koch from association with an investment adviser. Our findings are based on an independent review of the record except for findings that are not challenged on appeal.

II.

A. Respondents' background

Before founding KAM in 1992, Koch had considerable experience in the banking industry. In the 1970s, he was a senior officer of a regional bank and was involved with the bank's acquisitions of many smaller banks. Koch then served as chief economist with the Federal Reserve Bank of Atlanta and thereafter as a professor of finance and banking at the Georgia Institute of Technology. After this, Koch moved to St. Louis, Missouri, and worked as a consultant to banks on regulatory and compliance issues and assisted the Resolution Trust Corporation in the resolution of financial institutions affected by the savings-and-loan crisis. In the late 1980s, Koch began investing his own money in small bank stocks based on the knowledge and insights he had gained in the industry. After experiencing some initial success through his own investing, Koch founded KAM and began managing the investments of close friends and associates.

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1 *Donald L. Koch*, Initial Decision Release No. 458, 2012 SEC LEXIS 1645 (May 24, 2012).

2 The law judge imposed the disgorgement and civil penalty jointly and severally upon Respondents.

KAM's investment strategy was to buy the stock of small community banks as long-term investments. Based on his experience, Koch believed that the shares of many small banks were undervalued. Koch researched small banks and calculated what he termed the "tangible book value" of the bank. KAM sought to purchase stock of promising banks at or below the tangible book value per share. It was Koch's experience that if a small bank was acquired by a larger bank, the larger bank would pay two or more times tangible book value. In the event of such a sale, shares bought at or below tangible book value would yield a considerable return. Given the consolidation occurring in the banking industry, Koch expected many of the undervalued banks he invested in to be purchased, and in the meantime, some of the banks paid regular dividends.

KAM's first clients were Koch's neighbors and long-time friends who had approached him about helping them invest. KAM did not advertise and did not have a website, but KAM's client list grew over time through word of mouth and personal connections, with most clients being individuals and families Koch had known for a long time. Before accepting a new client, Koch made sure that the potential client understood KAM's investment approach and in particular understood that the investment was for the long-term. Koch was not interested in clients who wanted to use their accounts "as a checking account" or were inclined to "watch the paint dry"—instead he only wanted clients who accepted a long time horizon for their investments and were willing to let Koch pursue KAM's investment approach unhindered.[3] Koch was particularly concerned about investment performance because many of KAM's clients were his friends or people he would interact with regularly. Koch testified that when you know your clients well "the last thing you need is to take money from someone and not perform."[4] Although he had an assistant who helped with clerical duties, Koch was the only employee of KAM involved in advising investors.

KAM charged its clients a quarterly fee of 0.25% of the account's value, which was not charged if the account's value declined. Between 1996 and 2010, KAM waived over $234,000 in quarterly client fees. KAM also charged a yearly fee of 20% of realized net gains that exceeded 5% per year. KAM ultimately had about forty fee-paying advisory accounts held by members of about thirty families. KAM also maintained accounts for Koch and members of his family as well as for Koch's assistant, Fay Heidtbrink; these accounts were not charged fees.

KAM used Huntleigh Securities Corporation, a registered broker-dealer in St. Louis, to execute trades and serve as a custodial institution for client accounts. After Huntleigh began offering account holders online access to their accounts, Koch told his registered representative, Catherine Marshall, who was also Huntleigh's compliance officer, that he wanted KAM's clients to get information about their accounts from him.[5] On August 26, 2009, Koch sent an e-mail to Marshall requesting the names of his clients who had online access to their accounts and who checked their accounts regularly so he could "be prepared to anticipate who is going to call" and

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3 Hearing Transcript ("Tr.") at 796.

4 Tr. at 795.

5 *See* Tr. at 48.

to "anticipate their questions."[6] After learning that he could find out which KAM accounts were enabled for online access (most were) but that Huntleigh could not currently determine how often any particular client accessed his or her account, Koch told Marshall that allowing clients to have online access "really only causes confusion."[7] He explained that in the wake of the market downturn in the first half of 2009, "[s]ome of [KAM's] newer and younger clients, especially the women" had become too concerned with the short term performance of their KAM accounts and "want[ed] to watch the paint dry."[8]

When Koch wanted a trade executed on behalf of KAM, he would contact Huntleigh's trading desk directly rather than going through Marshall, his registered representative. In September 2009, the trader who had been Koch's contact at Huntleigh's trading desk left the firm and Huntleigh assigned another trader, Jeffrey Christanell, to execute trades for KAM.

B. Respondents engaged in end-of-day, end-of-month trading in three securities.

The allegations in this appeal concern trading on two days—September 30, 2009, and December 31, 2009—in three bank stocks—High Country Bancorp, Inc., Cheviot Financial Institution, and Carver Bancorp, Inc.[9] Each is a small community bank with thinly traded and illiquid stock. Before the trading involved in the case, KAM had been investing in each for ten or more years.[10]

1. KAM purchased High Country shares at the end of the trading day on September 30, 2009.

At the end of September 2009, according to Christanell's testimony at the hearing, Koch instructed Christanell to buy shares of High Country in order to get a higher closing price for the stock.[11] This testimony is corroborated by a series of e-mail exchanges between Christanell and Koch on September 30, 2009. Christanell sent an e-mail to Koch shortly after 1:00 p.m., Central time, informing him that he had purchased 580 shares of High Country at an average price of

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6 Div. Ex. 96. In a follow-up e-mail to Marshall, Koch explained that he "hate[d] to get blind sided when a client calls and tells [him] what the value of their account is from their on line access to Huntleigh." Div. Ex. 100.

7 Div. Ex. 121.

8 *Id.*

9 The Order Instituting Proceedings also alleged violations related to trading High Country stock on October 31, 2009, and November 30, 2009, but the law judge did not find violations for Respondents' trading on those days and the Division did not file a cross-petition for review. Accordingly, our review is limited to the violations that the law judge found and that are challenged by Respondents on appeal. *See* 17 C.F.R. § 201.411(d).

10 By the time Koch purchased Carver shares on December 31, 2009, he "was worried" about and had lost some confidence in the stock. Tr. at 905. In 2010, because the bank held too many non-performing loans, KAM sold its Carver shares. *Id.* at 850, 852-53.

11 *See* Tr. 459-77.

$16.6897 and that the current bid-ask spread for the stock was $11.71 to $20.[12] In the last line of the e-mail, Christanell told Koch: "Let me know what to do from here."[13]

Koch then asked Christanell, with reference to High Country, how stocks are priced at the end of the day or month—whether the price is based on the last executed trade or the last bid.[14] Christanell responded to Koch in an e-mail at 1:30 p.m.:

> If a stock trades on a day, it's priced at the last trade. If it doesn't trade, say no trading volume for a couple of days, it gets priced on the bid.
>
> In the case of [High Country] today, it will get priced on the last trade.[15]

Koch responded by email at 1:43 p.m.: "good. move last trade right before 3pm up to as near $25 as possible without appearing manipulative."[16] At 1:45 p.m., Christanell replied: "Will do."[17]

Christanell then took steps to implement Koch's instructions. Approximately four minutes before the market closed, Christanell placed three separate orders for 1,000 shares each of High Country stock with a limit of $24.50.[18] Each order received partial fulfillment—one for 480 shares at $20, one for 400 shares at $22, and one for 120 shares at $23.99.[19] With less than a minute before the close of the market, Christanell then placed another three orders for High Country stock, each for 400 shares with a limit of $24.[20] At seventeen seconds before the market closed, one of those orders was filled at a price of $23.50.[21] This trade established the closing price of High Country on September 30, 2009.[22] The 1,980 shares of High Country purchased by KAM on September 30, 2009, represented all of the trading volume reported that day.[23] All

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12 Div. Ex. 144. All times in this opinion are expressed in Central time, the time zone in which Huntleigh was located. E-mail exhibits in the record reflect a variety of different time zones, including GMT and Eastern. For example, Exhibit 144 bears the time "2:11:41 PM," but it is apparent from the e-mail's inclusion in e-mail chains in other exhibits, *see* Div. Exs. 148, 149, that this time refers to Eastern time, which would mean the e-mail was sent at 1:11 p.m., Central time.

13 *Id.*

14 Div. Ex. 145.

15 Div. Ex. 146.

16 Div. Ex. 148.

17 Div. Ex. 149.

18 Div. Ex. 278. We use the term "placed" here and throughout the opinion to mean when Christanell routed the order to the street—*i.e.*, when he electronically sent the order out from Huntleigh to receive executions in the market.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*; Div. Exs. 263, 277.

23 Div. Ex. 263.

of the High Country shares purchased by KAM on September 30, 2009, were allocated to the account of Alice Smith, an elderly widow and one of KAM's oldest clients.

2. KAM purchased High Country, Cheviot, and Carver shares at the end of the trading day on December 31, 2009.

At the end of December 2009, according to Christanell's testimony, Koch again instructed him to try to set the closing price for High Country as well as for Cheviot and Carver.[24] On December 23, 2009, Koch sent an e-mail to Christanell that included the following: "I also want to move up [High Country] the last day of the year before things close down ......so, please be mindful of that if you are there or your backup is around....should be a busy day."[25] Then, on December 28, 2009, Koch sent Christanell the following e-mail:

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[24] *See* Tr. 498-501.

> Q: Do you also recall that in December 2009 Mr. Koch instructed you to get a closing price on HCBC [*i.e.*, High Country], right?
>
> A: Yes.
>
> . . .
>
> Q: Do you recall any conversations that you had with Mr. Koch concerning these trades in HCBC on the last day of December?
>
> A: I remember conversations we had that day, the last day of the year, the 31st, concerning HCBC and other stocks that he was active in.
>
> Q: Okay. What other stocks do you recall discussing with him?
>
> A: CHEV [*i.e.*, Cheviot]; Carver, CARV; and the HCBC.
>
> Q: Any other stock you recall?
>
> A: There may have been others but I don't recall.
>
> Q: Okay. Well, what do you recall discussing with him about those stocks, aside from HCBC?
>
> A: That he wanted to get the price up.
>
> Q: Oh, so he wanted to get the price up on other stocks as well?
>
> A: Or he wanted to get it to a certain—a certain level. I don't know if he used the term get the stock price up, but he wanted to get it to a certain price, particular price.
>
> Q: Okay. And he wanted to get a closing price or he just wanted to increase the price; do you recall?
>
> A: He wanted the closing price to be at a certain level.

[25] Resp. Ex. 33 (ellipses in original).

> Dear Jeff,
>
> Please put on your calendar to buy [High Country] 30 minutes to an hour before the close of market for the year. I would like to get a closing price in the 20-25 range, but certainly above 20. Thanks, DLK[26]

Five minutes later, Christanell replied that he "[j]ust set an alert" and that he would "work on it on Thursday [December 31]."[27]

On December 31, 2009, Christanell and Koch had several telephone conversations about Koch's requested end-of-year trading. These conversations were captured by a recording system at Huntleigh that recorded calls to and from the trading desk, primarily to resolve possible trade discrepancies.[28] Koch called Christanell in the morning to discuss his instructions for the purchase of High Country stock that day, saying that "my parameters are—if you need 5,000 shares, do whatever you have to do—I need to get it above 20, you know, 20 to 25, I'm happy."[29] Koch added with regard to the timing of the trades: "You figure out if you want to do it the last half hour—and just create prints."[30] Christanell testified that he understood Koch's instruction to create prints as a direction to "get the stock price up" for the last trade of the day.[31] Christanell responded that he may "start in the last hour or so" because last time he thought he "waited too

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[26] Div. Ex. 186.

[27] Div. Ex. 187.

[28] Tr. at 94; *see also* Div. Ex. 36 at 69. Respondents objected to the admission of these recordings (Division Exhibits 188 through 193) before the law judge and mention the issue of the recordings' admissibility and reliability in footnotes in their petition for review and briefs. *See* Pet. for Review at 6 n.5; Resp'ts Br. at 5 n.4; Resp'ts Reply Br. at 1 n.2, 16 n.11. We find no basis to overturn the law judge's admission of the audio recordings and conclude that we may properly rely upon them. There is no dispute concerning the authenticity of the recordings and there is no evidence of any alteration or manipulation. While the fact that Huntleigh had recordings only for December 31, 2009, is not fully explained in the record, we reject Respondents' suggestion that this by itself makes the recordings somehow unreliable. The recorded conversations are highly relevant evidence of Koch's state of mind at the time of the alleged violations. Similarly, we reject the suggestion made by Respondents before the law judge that the doctrine of completeness somehow limits the admissibility of these recordings. The doctrine of completeness allows the party against whom a statement or portion of a statement has been introduced in evidence to introduce additional portions of the statement or another statement when necessary to "eliminate the misleading impression created by taking a statement out of context." *United States v.Costner*, 684 F.2d 370, 373 (6th Cir. 1982). The recordings admitted by the law judge are six entire telephone conversations between Koch and Christanell. The law judge thus admitted complete statements, and the fact that Huntleigh's system did not retain other possible statements by Koch does not affect the admissibility or reliability of the admitted statements under the doctrine of completeness. Finally, Respondents are correct that the time of day assigned to the recordings by Huntleigh's system appears to be incorrect in at least one case: Exhibit 192 is a conversation that takes place after the close of the market, but it is time stamped ten minutes before the market closed. There is no dispute, however, that all of the telephone conversations captured in the recordings occurred on December 31, 2009, and the exact time at which the conversations took place on that day is largely irrelevant. Thus, the fact that there is a slightly incorrect time-stamp on at least one of the recordings does not render the recordings unreliable.

[29] Div. Ex. 189. The telephone conversations were admitted as audio files and there is no transcript of the recordings in the record. The quotations from the recordings in this opinion are based upon our own transcription.

[30] *Id.*

[31] Tr. at 505.

long and then the guy just didn't move."[32] Koch replied, "I don't want to tell you your job, but get it up there."[33] Koch then warned that "if you come in too early, there is a seller" and once the seller is aware of the trading "he'll push out the volume."[34] Before ending the conversation, Koch reiterated that he was willing to "go up to 5,000 shares if you need to," and he told Christanell to "talk if you need more than that."[35]

Later in the morning, Koch called Christanell again. After confirming that the market closed at the regular time that day, Koch told Christanell that "we may give you some more orders here."[36] He said that his assistant, Fay Heidtbrink, was looking to "see what else we want to move up toward the end of the year," and he told Christanell to expect "some more orders on a couple of these thin stocks I want to push up a little bit."[37]

Koch called the trading desk again around mid-day. After Christanell told Koch that the bid-ask spread for Cheviot was $7.20 to $7.48, Koch said, "Let's see if by the end of the day you move it to above 8—8, 8 and a quarter," to which he added, "that should be pretty easy."[38] Koch then turned his attention to Carver. After Christanell told him that the bid-ask spread for Carver was $8.10 to $9.05, Koch asked if there had been any trades that day and Christanell responded, "no trades, no volume."[39] Koch replied, "Okay, so what you do at the end of the day—pop that one—to 9.05, if you have to."[40] Christanell affirmed, "Yeah, to make a print."[41]

About an hour before the market closed, Koch made another call to the trading desk to ask Christanell how he was "coming along."[42] Christanell said that he had not "done anything yet."[43] Koch then began to summarize his instructions: "So we got three [stocks]—we got Cheviot, and . . . "[44] At this point, Christanell interrupted to ask a question about Cheviot: "How much should I buy to get it up there?"[45] Koch responded, "I'd start at the 100, 200 share increment and see how far it moves," adding that "since it trades so little, I think you'll be able to

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32 Div. Ex. 189.

33 *Id.*

34 *Id.*

35 *Id.*

36 Div. Ex. 193.

37 *Id.*

38 Div. Ex. 191.

39 *Id.*

40 *Id.*

41 *Id.*

42 Div. Ex. 190.

43 *Id.*

44 *Id.*

45 *Id.*

get it up pretty fast."[46] Then, after a brief discussion of the existing offers for Cheviot in the market, Christanell asked, "Am I alright taking 5,000 [shares] if I have to?"[47] Koch replied, "absolutely," and added, "you know, on both of them," to which Christanell affirmed, "Yeah, with [High Country] also."[48] Christanell then turned the conversation to Carver: "I was thinking about just buying like 300 shares at 9.05. Is that alright?"[49]

Koch: Sure. That's perfect. Just make sure you get a print.

Christanell: Yep, I was going to wait on that until the very end.[50]

Before the market closed, Christanell attempted to carry out Koch's instructions. With regard to High Country, approximately five minutes before 3:00 p.m., Christanell placed an order for 3,000 shares with a limit of $25.[51] In the next three minutes, he received a variety of executions filling this order ranging from 200 to 900 shares with prices between $16.80 and $19.50.[52] Around the same time, another buyer bought 300 shares of High Country at $17.50.[53] With a little over a minute before the market closed, Christanell placed another order for 2,000 shares with a limit of $25.[54] This order received a partial fulfillment of 200 shares at $19.50 thirty-two seconds before the market closed and set the closing price for High Country that day.[55] The 3,200 High Country shares purchased by KAM on December 31, 2009, represented 88.9% of the trading volume reported that day.

Christanell also attempted to carry out Koch's instructions by buying Cheviot stock at the end of the trading day. At 2:40 p.m., Christanell placed an order for 2,000 shares of Cheviot with an $8.25 limit.[56] This order was quickly filled in over fifteen separate executions with share quantities ranging from four to 533 shares.[57] Although Christanell had purchased some shares in the order for $8.00, the final execution for the order was at $7.50.[58] Starting at about two minutes before the close of the market, Christanell placed orders for 5,000 more Cheviot shares

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46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 Div. Ex. 278.

52 *Id.*

53 Div. Ex. 277.

54 Div. Ex. 278.

55 *Id.*; Div. Exs. 263, 277.

56 Div. Ex. 278.

57 *Id.*

58 *Id.*

with an $8.25 limit.[59] Although Christanell received an execution at $7.99 approximately seven seconds before the market closed, another market participant had the final trade before the close at a price of $7.39.[60] Christanell received some executions just seconds after 3:00 p.m., for as high as $8.19, but these did not set the closing price for the stock because they came after the official close of the market.[61] KAM's purchase of Cheviot shares on December 31, 2009, represented approximately 70.7% of the reported volume that day.

With regard to Carver, at 2:58 p.m., Christanell placed an order for 200 shares with a limit of $9.05.[62] This order was filled in two executions—one for 100 shares at $9.045 and another for 100 shares at $9.05.[63] These 200 shares represented the total volume of trading in Carver stock that day, and Carver closed at $9.05.[64]

When the trading day was over, Christanell called Koch to report.[65] Christanell was apologetic that he was not able to get higher closing prices for High Country and Cheviot.[66] Speaking about High Country, Christanell said, "I'm sorry . . . . I know you wanted it higher and I tried."[67] Concerning Cheviot, Christanell explained that he was "busy with that one too," but despite several executions at $8.00, the closing price was not at the target Koch had requested.[68] Christanell told Koch that he "bought some right at the bell" at $8.00 but that the executions had been too late to set the closing price.[69] Koch responded: "Okay, you did the best you can."[70] Christanell reported that "Carver closed about 9.05," to which Koch replied, "Good."[71] All of the High Country, Cheviot, and Carver shares purchased by KAM on December 31, 2009, were allocated to the account of an institutional client, Tampsco, which was managed by a long-time friend and client of Koch's.

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59 *Id.*

60 *Id.*; Div. Exs. 265, 276.

61 *See* Div. Ex. 278.

62 *Id.*

63 *Id.*

64 Div. Exs. 264, 275.

65 *See* Div. Ex. 192. The time-stamp on this recording from Huntleigh's trading desk put the time at 2:48 p.m., Central time, but because the conversation during the call includes a discussion that the market had closed about ten minutes prior to the call, it appears that the time-stamp was off by approximately twenty minutes.

66 Christanell's e-mail to Koch reporting the total shares bought that day and the average prices also included an apology: "Sorry, but it was difficult with a lot going on for the end of the year." Div. Ex. 194.

67 Div. Ex. 192.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

C. Huntleigh investigated KAM's trading and ended its relationship with KAM.

On January 20, 2010, an investigator for NYSE Arca sent a letter to Marshall regarding trading activity in Cheviot on December 31, 2009.[72] Among other things, the letter sought a "detailed description of why the trader(s) entered the trades" and information on Huntleigh's policies and procedures to prevent "marking the close." Marshall showed the letter to Christanell and indicated that she would need his help in preparing a response.[73] According to Marshall, Christanell appeared "upset" after reading the letter.[74] Christanell then told Marshall that his trading for KAM in High Country stock raised similar issues—and, in fact, KAM's purchases of High Country stock involved price moves at the end of the day that "were even more flagrant" than those identified in the NYSE Arca letter.[75] Christanell showed Marshall the December 28, 2009 e-mail in which Koch told Christanell to "buy [High Country] 30 minutes to an hour before the close of market for the year" and Koch said he "would like to get a closing price in the 20-25 range, but certainly above 20."[76] Marshall then launched an internal review of KAM's end-of-month trading.[77]

By letter dated January 20, 2010, Marshall requested information from Koch on the purpose of KAM's High Country trades on the last trading days of September, October, November, and December 2009 and asked Koch "why these transactions should not be considered 'marking the close.'"[78] Koch responded on February 5, 2010, disclaiming any intentional or unintentional effort to mark the close. Koch stated that the High Country purchases allocated to Alice Smith's account were made at her request and that the High Country purchases allocated to Tampsco were made to decrease "excess cash" in the account.[79] Koch emphasized his general practice of trying to buy stock if it becomes available at a price below the tangible book value per share.[80] Based upon its inquiry, Huntleigh terminated Christanell's

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72 Div. Ex. 33. The letter also asked about trading activity in Cheviot on January 4 and 6, 2010.

73 Tr. at 81.

74 *Id.*

75 Tr. at 525; *see also* Tr. at 81-82.

76 Tr. at 81-83; Div. Ex. 187.

77 Tr. at 84-85, 116.

78 Div. Ex. 22.

79 Div. Ex. 24. On February 1, 2010, before responding to Marshall, Koch sent a draft of his response to Christanell, with the request "please do NOT forward." Div. Ex. 221. The draft response is substantially similar to the final response he sent to Marshall, except the draft response did not mention the Tampsco account. *Compare* Div. Ex. 221 *with* Div. Ex. 24.

80 *Id.* On February 5, 2010, Koch also sent two e-mails to Christanell. In the first, Koch tells Christanell that "[y]ou have done nothing WRONG, and do not let any one pressure you to admitting a mistake which you did NOT commit." Div. Ex. 26. Koch speculates that, by going after Christanell and KAM, Huntleigh is trying to divert attention away from other potential misdeeds. *Id.* In the second e-mail, Koch says that "[a]fter things settle down, I would be happy to consider some arrangement of a joint partnership where I provide the trading capital." Div. Ex. 27. Koch again tells Christanell that "you did NO wrong" and suggests that "Huntleigh is trying to cover up something." *Id.*

employment for violating its trading policies on marking the close and also terminated its relationship with KAM.

D. Procedural background

In the spring of 2010, the Commission's Division of Enforcement began its investigation into the matter.[81] On April 25, 2011, the Commission instituted proceedings against Respondents pursuant to Exchange Act Section 21C, Advisers Act Sections 203(e), 203(f), and 203(k), and Investment Company Act Section 9(b).[82] The Order Instituting Proceedings alleged that Respondents engaged in a scheme to mark the close of High Country stock on the last trading days of September, October, November, and December 2009 and of Cheviot and Carver stock on the last trading day of December 2009 in violation of Exchange Act Section 10(b), Rule 10b-5 thereunder, and Advisers Act Sections 206(1) and 206(2). The OIP further alleged that as a result of this conduct Respondents breached their fiduciary duty to seek best execution for their clients. The OIP also alleged that Respondents failed to maintain required books and records in violation of Advisers Act Section 204 and Rule 204-2(a)(7) thereunder. Finally, the OIP alleged that Respondents failed to implement policies and procedures reasonably designed to prevent violations of the Advisers Act in violation of Advisers Act Rule 206(4)-7.

A hearing before the law judge took place over six days in January 2012 and included testimony from Koch, Christanell, Marshall, and Heidtbrink. In addition to fact witnesses, Respondents put forward the testimony of two experts: John Schneider and Gregory Jarrell. Schneider, a partner at KPMG and an accounting expert, testified that KAM consistently followed the investment program agreed to by its clients and that the stock purchases at issue in this case were consistent with that investment program. Jarrell, a professor of business and economics at the University of Rochester, testified as an expert on market economics. He based his opinion on his own expertise and trading data for the stocks at issue in the case, but he did not review any of the communications between Koch and Christanell related to the trades.

Jarrell testified that stocks generally trade in a "U-shaped" pattern, *i.e.*, most trading activity occurs at the start and end of the trading day when market liquidity is the greatest. Given that KAM invested heavily in illiquid stocks, Jarrell posited that it made economic sense for KAM to purchase shares at the end of the trading day. Jarrell further testified that KAM's trading in Cheviot and Carver on December 31, 2009, had minimal impacts on the prices of these stocks and did not set their closing price.[83] Based on these conclusions, Jarrell testified that it was his opinion that Respondents' trading in Cheviot and Carver did not represent marking the close. With regard to High Country, Jarrell testified that KAM's trading affected the price of the

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[81] On May 4, 2010, Koch e-mailed Christanell and asked him to "have your attorney call my attorney." Div. Ex. 28. Koch added that "[w]e both have a strong self-interest in being on the same side of this issue and having the SEC wrap up any issue with you or me quickly." *Id.*

[82] On April 25, 2011, Huntleigh and Christanell entered a settlement with the Commission relating to the events at issue here. *Huntleigh Sec. Corp.*, Securities Exchange Act Release No. 64336, 2011 SEC LEXIS 1439 (Apr. 25, 2011).

[83] As discussed more fully below, the weight of the evidence does not support Jarrell's conclusion that KAM's trading did not set the closing price for Carver.

stock because it was extremely illiquid. Although he could not rule out marking the close for KAM's trading of High Country stock, Jarrell opined that KAM's end-of-month, end-of-day High Country purchases were part of a legitimate attempt to acquire an extremely illiquid and therefore difficult-to-obtain stock.

In an initial decision dated May 24, 2012, the law judge found that Respondents violated the antifraud provisions of the Exchange Act and the Advisers Act through marking-the-close transactions in High Country stock on September 30, 2009, and December 31, 2009, and in Cheviot and Carver stock on December 31, 2009. The law judge also found that Respondents violated Adviser Act Rule 206(4)-7 by failing to implement KAM's anti-manipulation policy.[84] The law judge ordered Respondents to cease and desist from violations of Exchange Act Section 10(b), Rule 10b-5 thereunder, Advisers Act Sections 206(1), 206(2), and 206(4), and Rule 206(4)-7 thereunder, to disgorge $4,169.78 plus prejudgment interest, and to pay a second-tier penalty of $75,000. In addition, the law judge censured KAM and barred Koch from association with an investment adviser. Respondents appeal from the law judge's initial decision.

III.

A.

Exchange Act Section 10(b) makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[85] Rule 10b-5 thereunder makes it unlawful "for any person, directly or indirectly . . . [t]o employ any device, scheme, or artifice to defraud" or "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[86] Advisers Act Section 206 contains similar proscriptions specifically applicable to investment advisers. Advisers Act Section 206(1) makes it unlawful for any investment adviser "to employ any device, scheme, or artifice to defraud any client or prospective client,"[87] and Section 206(2) makes it unlawful for any investment adviser "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."[88]

Manipulation of the market for a security violates Exchange Act Section 10(b) and Rule 10b-5,[89] and an investment adviser engaged in market manipulation also violates Advisers Act

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84 The law judge found that the Division did not prove marking the close violations for KAM's trading in High Country stock at the end of October and November 2009. The law judge also found that the Division did not prove Respondents violated Advisers Act Rule 204-2(a)(7) regarding the maintenance of books and records.

85 15 U.S.C. § 78j(b).

86 17 C.F.R. § 240.10b-5(a) & (c).

87 15 U.S.C. § 80b-6(1).

88 15 U.S.C. § 80b-6(2).

89 *Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 SEC LEXIS 948, at *15 (Apr. 26, 2006).

Section 206.[90] Manipulation has been defined as the "'intentional interference with the free forces of supply and demand.'"[91] "Manipulation of the market for securities is at the core of conduct that the securities laws were designed to prevent."[92] We have noted that "[d]etermining whether a person has engaged in a manipulative scheme depends on inferences from a variety of factual detail, patterns of behavior, and, among other things, trading data."[93]

"'Marking the close' is the practice of attempting to influence the closing price of a stock by executing purchase or sale orders at or near the close of the market."[94] We have previously held that "the practice of placing orders at the end of the day to cause a stock to close higher constitutes a manipulative practice."[95] The purchase of a security at the end of the trading day with the purpose of raising its reported price manipulates the market for the security because it "convey[s] false information to the market as to the stock's price level and therefore as to the demand for the stock free of manipulative influences."[96] In order to prove a marking-the-close violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and Advisers Act Section 206(1), the Division must show that Respondents (i) engaged in conduct evidencing a scheme to mark the close—*i.e.*, trading at or near the close of the market so as to influence the price of a security—and (ii) acted with scienter, defined as "a mental state embracing intent to deceive, manipulate, or defraud."[97] To find a violation of Advisers Act Section 206(2) requires only a finding of negligence.[98]

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90 *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 SEC LEXIS 3015, at *33 (Dec. 21, 2007), *petition denied*, 33 F. App'x 334 (D.C. Cir. 2008) (per curiam) ("'Facts showing a violation of . . . [Exchange Act Section] 10(b) by an investment advisor will also support a showing of a Section 206 violation.'" (alteration in original) (quoting *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007))).

91 *Yoshikawa*, 2006 SEC LEXIS 948, at *16 (quoting *Pagel, Inc.*, Exchange Act Release No. 22280, 48 SEC 223, 1985 SEC LEXIS 988, at *7 (Aug. 1, 1985)).

92 *Kirlin Sec. Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *42 (Dec. 10, 2009).

93 *Amr Elgindy*, Exchange Act Release No. 49389, 57 SEC 431, 2004 SEC LEXIS 555, at *13 (Mar. 10, 2004).

94 *Thomas C. Kocherhans*, Exchange Act Release No. 36556, 52 SEC 528, 1995 SEC LEXIS 3308, at *6 (Dec. 6, 1995).

95 *Id.* at *7.

96 *Id.* at *7; *see also Richard D. Chema*, Exchange Act Release No. 40719, 53 SEC 1049, 1998 SEC LEXIS 2592, at *14 (Nov. 30, 1998) (Marking the close "artificially influence[es]" a stock's "price level at the end of the day" and thereby "intentionally distort[s] the stock's market price, conveying false information to investors and the market.").

97 *See Kirlin*, 2009 SEC LEXIS 4168, at *44-46 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) and recognizing that manipulation in violation of Rule 10b-5 depends upon "whether the trading and surrounding circumstances suggest an effort to 'interfer[e] with the free forces of supply and demand'"); *Kocherhans*, 1995 SEC LEXIS 3308, at *6-8 (finding marking-the-close violation where registered representative (1) engaged in trading within the last fifteen minutes of the trading day that raised the price of the security and (2) acted with scienter); *Disraeli*, 2007 SEC LEXIS 3015, at *33 (a violation of Advisers Act Section 206(1) requires a finding of scienter).

We do not adopt the standard for market manipulation advanced by the court in *SEC v. Masri*, 523 F. Supp. 2d 361 (S.D.N.Y. 2007). *Masri*'s holding that a marking-the-close violation requires proof "that *but for* the manipulative intent, the defendant would not have conducted the transaction," *id.* at 372, is inconsistent with our

(continued...)

1. Respondents' trading in High Country constituted marking-the-close violations.

We find that Respondents unlawfully manipulated the market for High Country stock through marking-the-close transactions on September 30, 2009, and December 31, 2009. Respondents' trading activity is consistent with a scheme to mark the close of High Country stock on those days. On September 30, 2009, KAM purchased 1,980 shares of High Country, the vast majority in the last four minutes of trading. KAM's purchases represented 100% of the trading volume in High Country that day[99] and set the closing price for the stock at $23.50. The day before (September 29, 2009) High Country had closed at $18 and for the remainder of 2009 the stock never traded above $20.[100] We find, therefore, that KAM's last minute trading in High Country on September 30, 2009, had the effect of raising the price of the stock.[101]

On December 31, 2009, KAM purchased 3,200 shares of High Country, all within the last five minutes of trading. These purchases represented 88.9% of the trading volume in High Country that day and set the closing price of the stock at $19.50. The highest price for a non-KAM transaction in High Country on December 31, 2009, was $17.50, and for over a year, High Country would never trade as high as its closing price on December 31, 2009.[102] We find that

(...continued)

precedent, *see Kirlin*, 2009 SEC LEXIS 4168, at *58 (rejecting applicants' reliance on *Masri*'s "but for" test), and, to our knowledge, has not been adopted by any other court, *cf., e.g., In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 391-92 (S.D.N.Y. 2003) (rejecting a "sole intent" standard for manipulation in the context of open market transactions as having no basis in case law). The law judge appears to have applied a version of *Masri*'s holding in finding marking-the-close violations here, concluding that Koch "would not have bought [High Country, Cheviot, and Carver] on September 30 and December 31 at the prices at which they were executed but for his purpose of manipulating their closing prices." *Koch*, 2012 SEC LEXIS 1645, at * 37-38. But the Initial Decision applied *Masri*'s "but for" test in a limited way: it found manipulation when "Koch's manipulative intent altered the timing and prices of his trades." *Id.* at *38. The law judge thus appears to have incorporated into her decision criticism of *Masri* by the court in *SEC v. Kwak*, No. 3:04-cv-1331, 2008 U.S. Dist. LEXIS 10201 (D. Conn. Feb. 12, 2008). *See Koch*, 2012 SEC LEXIS 1645, at *30 (citing *Kwak*, 2008 U.S. Dist. LEXIS 10201, at *16 n.10). *Kwak* noted that *Masri*'s "but for" test "may make some sense . . . under the theory that there is nothing deceptive about a transaction if the exact same transaction would have been entered into absent the manipulative intent" but "that theory loses its applicability if the prohibited intent alters the trade in any material respect (*e.g.*, by changing the time at which the trade would have otherwise been executed)." 2008 U.S. Dist. LEXIS 10201, at *15 n.10. Although we do not adopt the test applied by the law judge, we agree that the evidence in the record shows that Respondents' manipulative intent caused them to alter their trading in some material respect.

98 *Disraeli*, 2007 SEC LEXIS 3015, at *33; *see also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

99 Domination of the market for a security by a market participant is a recognized characteristic of manipulation and here further supports the proposition that Respondents' trading was consistent with a scheme to mark the close. *See Kirlin*, 2009 SEC LEXIS 4168, at *45; *Pagel, Inc.*, Exchange Act Release No. 22280, 48 SEC 223, 1985 SEC LEXIS 988, at *13.

100 *See* Div. Ex. 263. High Country's closing price would not again go above $20 until February 2012.

101 A finding that Respondents succeeded in raising the price of the stock is not required to prove a marking-the-close violation. *See infra* note 118 and accompanying text.

102 *See* Div. Ex. 263.

KAM's High Country purchases on December 31, 2009, had the effect of raising the stock's price.[103]

The evidence in the record also shows that Respondents purchased High Country shares on September 30, 2009, and December 31, 2009, with the express purpose of setting a higher closing price and thus acted with scienter. On September 30, 2009, Koch learned that, pursuant to Huntleigh's pricing policy, the last trade would establish the closing price. Koch then sent an e-mail to Christanell telling him to "move last trade right before 3pm up to as near $25 as possible without appearing manipulative."[104] We agree with the law judge[105] that Koch's attempt to explain this e-mail as an instruction to Christanell to avoid driving up the price of the stock by trading in "as small of an increment as you can" is "unconvincing."[106] As the Division points out, "Koch's instruction contains no information at all about the size of incremental purchases that Christanell should make."[107] Instead, the e-mail contains an instruction for Christanell to attempt to raise the price of the stock "right before" the close of the market. As such, it is compelling direct evidence of Respondents' intent to mark the close of High Country stock on September 30, 2009. Indeed, Koch's instruction to Christanell to avoid "appearing manipulative" is evidence that Respondents understood that they were engaging in manipulative trading.[108] In addition to this e-mail, Christanell testified convincingly that Koch instructed him on September 30, 2009, to "get the [High Country stock] price between 20 and 25 at the end of the day" and

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[103] Even Respondents' expert, Jarrell, conceded that KAM's end-of-day purchases of High Country on these dates had the effect of raising the price of the stock. *See* Resp'ts Ex. 39 at 61 ("KAM's trading in HCBC's stock would have impacted the price.").

[104] Div. Ex. 148.

[105] *Koch*, 2012 SEC LEXIS 1645, at *15. The law judge's credibility determinations are "entitled to considerable weight and deference. We reject such determinations only where there is substantial evidence in the record for doing so." *Martin R. Kaiden*, Exchange Act Release No. 41629, 54 SEC 194, 1999 SEC LEXIS 1396, at *22-23 (July 20, 1999). Here, we find no basis to reject the law judge's appraisal of Koch's self-serving testimony. We also do not disturb the law judge's finding that Koch's explanation for why he was asking about Huntleigh's pricing policy—*i.e.*, that he was merely taking a survey of various custodians—was also "not altogether convincing." *Koch*, 2012 SEC LEXIS 1645, at *14 n.9.

[106] Tr. at 879. When asked what he meant by the e-mail, Koch gave the following explanation:

> Well, you know, . . . I had not worked with this gentleman that long, . . . and I [knew] he was an institutional trader. He was hired, and most of his activities were large block transactions. The last thing in the world you want is to be the elephant in the room, is to go there and . . . say, I'm an institutional player, get 5,000 shares. If he gives that signal to the market, the bid/ask goes—and I'm guessing here—30, 35. You destroy the entire market. So I am asking him to be as invisible as you can, to be as low keyed as you can, to do this at as small of an increment as you can without jumping up and down in the room, showing who you are, showing that you're an institutional trader.

Id. Koch's explanation may provide insight on how he thought Christanell should trade so as not to appear manipulative—*i.e.*, attempt to move the stock price up through incrementally higher purchases—but it completely fails to address why he wanted to "move the last trade . . . up to as near $25 as possible."

[107] Div. Br. at 17.

[108] *See, e.g.*, *Phillip J. Milligan*, Exchange Act Release No. 61790, 2010 SEC LEXIS 1163, at *19 (Mar. 26, 2010) ("[A]ttempts to conceal misconduct indicate scienter.").

that he executed trades near the close of the market "to get the price up to where [Koch] asked [him] to get it."[109]

The evidence of Respondents' intent to mark the close of High Country stock on December 31, 2009, is likewise compelling. Over a week before the end of the year, Koch told Christanell in an e-mail that he "want[ed] to move up [High Country] the last day of the year."[110] In another e-mail on December 28, 2009, he told Christanell "to buy [High Country] 30 minutes to an hour before the close of market for the year," explaining that he "would like to get a closing price [for High Country] in the 20-25 range, but certainly above 20."[111] These e-mails offer strong support for Respondents' intent to mark the close of High Country stock on December 31, 2009. In particular, in the December 28, 2009 e-mail Koch states unambiguously the reason for his instruction to buy High Country near the close of the market on December 31—"to get a closing price in the 20-25 range, but certainly above 20."

The recorded telephone conversations between Koch and Christanell on December 31, 2009, bolster the already strong evidence of intent. In one conversation, Koch told Christanell that "my parameters [for High Country] are—if you need 5,000 shares, do whatever you have to do—I need to get it above 20, you know, 20 to 25, I'm happy."[112] Later in the conversation, Koch made clear that the goal of the end-of-day High Country trading was to "just create prints,"[113] which Christanell testified meant to "get the stock price up" for the last trade of the day.[114] In their conversation after the market closed, Christanell apologized that High Country's closing price was not in the range requested by Koch, saying "I know you wanted it higher and I tried."[115] As Christanell explained in his hearing testimony, he understood that Respondents' purpose for trading High Country on December 31, 2009, was to try "to get a particular price," specifically to "get the price between 20 and 25."[116] When Christanell was unable to achieve this goal, he "remember[ed] that [he] was nervous about it because [he] didn't get the price that [Koch] wanted to get."[117] We find that the record establishes that Respondents acted with scienter when they marked the close of High Country stock on December 31, 2009.

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109 Tr. at 474, 477.

110 Resp. Ex. 33.

111 Div. Ex. 186.

112 Div. Ex. 189.

113 *Id.*

114 Tr. at 505.

115 Div. Ex. 192.

116 Tr. at 504, 506.

117 Tr. at 513.

2. Respondents' trading in Cheviot and Carver constituted marking-the-close violations.

The evidence also establishes marking-the-close violations by Respondents on December 31, 2009, with respect to Cheviot and Carver stock. With regard to Cheviot, the record shows that KAM, whose trades represented 70.7% of the reported volume for Cheviot on December 31, 2009, made multiple purchases of the stock in the last twenty minutes of trading. Specifically, Christanell placed orders for several thousand shares of Cheviot in the final three minutes of trading. KAM's last execution from these orders was a purchase of 200 shares at a price of $7.99 just seven seconds before 3 p.m., Central time, but a later non-KAM trade for Cheviot set the closing price for the stock at $7.39. At nine seconds after 3 p.m., Christanell placed another KAM order for additional Cheviot shares, which almost immediately resulted in three executions—two at $8.00 and one at $8.19. These final three trades, however, came after the official close of the market and therefore none of them set the closing price.

Respondents' trading activity is consistent with a scheme to mark the close. Although KAM's Cheviot purchases did not set the closing price for the stock that day, it was not for lack of trying. As we have held, "[s]ucess is not a prerequisite for a finding of manipulation."[118] KAM purchased Cheviot stock near the close of the market for prices significantly higher than other market participants that day. And KAM's final order, placed within seconds of the close of the market, is consistent with an attempt to raise the stock's closing price, even if it proved unsuccessful because it came too late.

Other evidence shows that it was Respondents' goal to set a closing price above $8.00 for Cheviot on December 31, 2009. Early that day, Koch told Christanell that his assistant was looking to "see what else we want to move up toward the end of the year," and that Christanell should expect "some more orders on a couple of these thin stocks [Koch] want[ed] to push up a little bit."[119] On a call later in the day, after hearing from Christanell that the bid-ask spread for Cheviot was $7.20 to $7.48, Koch asked Christanell to "move it to above 8—8, 8 and a quarter" "by the end of the day."[120] Koch thought that getting a closing price above $8.00 "should be pretty easy,"[121] explaining that "since it trades so little, I think you'll be able to get it up pretty fast."[122] On his call reporting the day's trading, Christanell apologized that he was unable to get the closing price that Koch had sought. Christanell told Koch that, although he had "bought some right at the bell" for $8.00, the trade had been too late to set the closing price.[123] Koch expressed disappointment but told Christanell, "Okay, you did the best you can."[124] These

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118 *Elgindy*, 2004 SEC LEXIS 555, at *15; *see also SEC v. Martino*, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003) ("[A]n attempted manipulation is as actionable as a successful one.").

119 Div. Ex. 193.

120 Div. Ex. 191.

121 Div. Ex. 191.

122 Div. Ex. 190.

123 Div. Ex. 192.

124 *Id.*

telephone conversations are persuasive direct evidence of Respondents' intent to mark the close of Cheviot stock on December 31, 2009.[125]

Respondents' trading in Carver on December 31, 2009, also evidences a scheme to mark the close. With less than two minutes before the market closed, Christanell placed a KAM order for 200 shares of Carver stock, which was filled in two executions—the first for 100 shares at $9.045 and the second for another 100 shares at $9.05.[126] These executions, at the high end of the bid-ask spread, represented an uptick in the price of the stock. Respondents point to the testimony of their expert, Jarrell, who concluded that KAM's trading did not set the closing price for Carver on December 31, 2009.[127] But Jarrell's position is inconsistent with the weight of the evidence in the record. The evidence shows that the total reported trading volume for Carver on December 31, 2009 was 200 shares[128] and that KAM purchased 200 shares of Carver on that day before the market closed.[129] In addition, KAM's final purchase of Carver stock on December 31, 2009, at approximately one-and-a-half minutes before the market closed was at a price of $9.05,[130] the same as the reported closing price for the stock.[131] Accordingly, we find a preponderance of the evidence establishes that KAM's final Carver trade set the closing price for the stock.[132] But even if KAM's final Carver purchase did not represent the final trade of the day, Respondents' end-of-day trading is still consistent with a scheme to mark the close. As

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125 In addition, Christanell's hearing testimony confirms that on December 31, 2009, Koch's "instructions were to get the last trade in the 8 to 8.25 range" for Cheviot. Tr. at 512

126 Div. Ex. 278.

127 *See* Resp'ts Br. at 25 (citing Resp'ts Ex. 39 (Jarrell's presentation)); Resp'ts Reply Br. at 19-20 (citing Tr. 1098-1102). Jarrell's testimony that KAM's final trade did not set the closing price may come from a misreading of the trading data. Jarrell apparently relied upon the New York Stock Exchange Trade and Quote ("TAQ") database in reaching his conclusion that a trade by someone other than KAM for 100 shares of Carver at $9.05 at three seconds after 3 p.m., Central time, set the closing price on December 31, 2009. *See* Resp. Ex. 39 at 36. The underlying data from the TAQ database upon which Jarrell relied for his opinion is not in the record, but the Division argued before the law judge, pointing to evidence admitted after the hearing, that the line entry in the TAQ database relied upon by Jarrell was "informational only" and did not represent an actual trade in the market. *See* Div. Mot. to Admit Div. Ex. 340 at 3-5; Div. Ex. 340 at 21. Respondents disputed before the law judge the relevance and foundation of the 2008 TAQ manual for countering Jarrell's testimony. *See* Resp'ts Surreply at 1-4. The law judge did not resolve this factual dispute, and because the law judge also declined to admit the underlying data upon which Jarrell relied in reaching his conclusion, it is difficult for us to do so. Nevertheless, we believe that a preponderance of the evidence in the record supports the conclusion that KAM's trading set the closing price for Carver on December 31, 2009. Jarrell's understanding of the TAQ data—that an additional non-KAM trade for 100 shares set the closing price—contradicts the fact that the total reported volume for Carver on that day was 200 shares, the same amount purchased by KAM. Respondents offer no explanation for this conflict between Jarrell's testimony and other evidence in the record.

128 Div. Ex. 264 (Bloomberg reports); Div. Ex. 275 (FINRA Audit Trail).

129 Div. Ex. 278.

130 *Id.*

131 Div. Ex. 264.

132 The law judge did not make an explicit finding in this regard.

previously noted, a marking-the-close violation is not predicated upon Respondents' succeeding in their attempted manipulation.[133]

We find further that Respondents acted with scienter in their purchase of Carver stock in the final minutes of the trading day on December 31, 2009. Telephone conversations between Koch and Christanell show that Koch's purpose in purchasing Carver was to set a higher closing price for the stock. Upon learning that the bid-ask spread for Carver was $8.10 to $9.05 and that there had not yet been any trading activity that day in the stock, Koch told Christanell to "at the end of the day ... pop that one [*i.e.*, Carver]—to 9.05, if you have to."[134] Later that day, Christanell told Koch that he intended to carry out Koch's instructions by buying around 300 shares of Carver at $9.05, to which Koch responded: "That's perfect. Just make sure you get a print."[135] Koch's direction to "pop that one" and his insistence on getting a print—*i.e.*, on executing the trade that will set the closing price for the stock—show that his goal in purchasing Carver stock was to mark the close.[136] And the record shows that this is exactly how Christanell understood Koch's direction. In a telephone conversation with Koch, Christanell affirmed that purpose of KAM's purchase of Carver was "to make a print,"[137] and Christanell testified during the hearing that Koch's reason for purchasing Carver stock on December 31, 2009, was that "he wanted it to close at [$]9[.]05."[138]

* * *

Based on the proceeding analysis, we find that Respondents willfully[139] violated Exchange Act Section 10(b) and Rule 10b-5 thereunder, as well as Advisers Act Section 206(1),[140] through a scheme to mark the close of High Country, Cheviot, and Carver stock.

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133 *Supra* note 118.

134 Div. Ex. 191.

135 Div. Ex. 190.

136 When asked during the hearing what he meant by "pop that one," Koch responded, "I don't recall having meaning to that. I mean, I don't know. Was that—I don't know." Tr. at 906.

137 Div. Ex. 191

138 Tr. at 511.

139 Respondents argue that the law judge did not find that their violations were willful, contending that "there is no finding of willfulness other than the finding that Respondents intended to trade as they did." Resp'ts Br. at 13. As the Division rightly points out, however, such a finding is all that is required to show willfulness here. Div. Br. at 36 (citing *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000) (interpreting Exchange Act Section 15(b), which directly mirrors the relevant provisions of Advisers Act Section 203)). "'[I]t has been uniformly held that "willfully" in this context means intentionally committing the act which constitutes the violation'" and does not mean that "'the actor [must] also be aware that he is violating one of the Rules or Acts.'" *Wonsover*, 205 F.3d at 414 (alteration in original) (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)). Our finding of scienter, amply supported by evidence in the record, demonstrates that Respondents' violations were willful.

140 These findings also support of a violation of Advisers Act Section 206(2), which unlike Section 206(1), requires only a showing of negligence. *Supra* note 98. Because we have found that Respondents acted with scienter, the lesser negligence standard of Section 206(2) is also satisfied. Respondents' suggestion that the law

(continued...)

B.

Respondents raise several challenges to the law judge's findings of marking-the-close violations. We find none of them convincing. Respondents argue that the law judge did not find that Respondents were engaged in deception, which they argue is essential to a finding of manipulation.[141] Respondents are correct that deception must be part of any manipulative scheme,[142] but they misconstrue the meaning of this requirement. The Division is not required to show that particular investors were misled by Respondents' conduct, but only that Respondents were "engaged in fraud or deceit as to the nature of the market for the security."[143] As shown above, Respondents entered the market with the intent of raising the price of the securities they were purchasing, which is directly contrary to the intent of a purchaser who is *not* trying to manipulate the market, namely, acquiring the securities at the best available price. By attempting to raise the price of the stocks they were purchasing, Respondents "intentionally interfered with the factors upon which market value depends"[144] and "distorted the stock[s'] market price[s], conveying false information to investors and market participants."[145] Respondents conduct was deceptive because it "conveyed false information to the market as to the stock[s'] price level[s] and therefore as to the demand for the stock[s] free of manipulative influence."[146] By engaging in transactions with the market-distorting intent of pushing up the

(...continued)
judge failed to make a finding that they violated Advisers Act Section 206(2), *see* Resp'ts Reply Br. at 6 n.7, is specious. *See Koch*, 2012 SEC LEXIS 1645, at *27, *35 ("The record shows that Respondents violated . . . Advisers Act Sections 206(1), 206(2) . . . .").

141 Resp'ts Br. at 9-10, 15. Related to this argument, Respondents insist that the Initial Decision failed to properly articulate the standards upon which it found violations and this failure is inconsistent with *Rapoport v. SEC*, 682 F.3d 98 (D.C. Cir. 2012). Respondents' reliance on *Rapoport* is misplaced. *Rapoport* remanded to the Commission a case in which the court held the Commission did not adequately articulate a rationale for departing from its own precedent involving the interpretation of a Commission rule of practice. *Rapoport* is inapplicable because any failure to articulate the proper standard by the law judge is cured by our *de novo* review. *See Gary M Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *35 n.44 (Feb. 13, 2009).

142 *See Ernst & Ernst*, 425 U.S. at 199 (Exchange Act Section 10(b)'s use of "manipulative" "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities"); *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 130 (2d Cir. 2011) ("'The gravamen of manipulation is deception of investors into believing that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators.'" (quoting *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999))).

143 *Yoshikawa*, 2006 SEC LEXIS 948, at *16.

144 *Kocherhans*, 1995 SEC LEXIS 3308, at *7.

145 *Adrian C. Havill*, Exchange Act Release No. 40726, 53 SEC 1060, 1998 SEC LEXIS 2599, at *12 (Nov. 30, 1998).

146 *Kocherhans*, 1995 SEC LEXIS 3308, at *7; *see also Swartwood, Hesse, Inc.*, Exchange Act Release No. 31212, 50 SEC 1301, 1992 SEC LEXIS 2412, at *18 (Sept. 22, 1992) ("Basically, the manipulated price of [the stock], which was perceived by investors as the best information on how others valued the security, deceived the marketplace since it was contrary to the value that would otherwise have been dictated by supply and demand."); *Pagel, Inc.*, 1985 SEC LEXIS 988, at *13 ("When individuals occupying a dominant market position engage in a scheme to distort the price of a security for their own benefit, they violate the securities laws by perpetuating a fraud on all public investors.").

price of the stocks that they were purchasing, Respondents deceived other market participants who were "'entitled to assume that the prices they pay and receive are determined by the unimpeded interaction of real supply and real demand so that those prices are the collective marketplace judgments that they purport to be.'"[147]

Respondents argue that manipulation involves "actions such as wash sales and matched orders which are designed to deceive investors by feigning actual market activity,"[148] suggesting that manipulation must involve fictitious trades. Although wash sales, cross trades, and matched orders are often part of manipulative trading,[149] we have consistently held that "[a] finding of manipulation does not hinge on the presence or absence of any particular device usually associated with a manipulative scheme."[150] And while "fictitious trades frequently form the basis of manipulative activity[,] . . . it is not necessary that the transactions in question be fictitious."[151] For this reason, we have recognized that market manipulation can occur in the context of open market transactions.[152] Although the trades Respondents engaged in were real, they artificially distorted the price of the stocks involved because Respondents were not participating in the market to find the best available prices but with the intent to raise the price of the stocks.

Respondents further contend that the law judge erred by basing her finding of manipulation on Respondents' intent, arguing that "[i]ntent standing alone cannot create an artificial price and deception in the market place" and that "intent, thought, thinking or even wishing is not a crime."[153] Respondents' argument misses the mark. The finding of manipulation here is not based solely on their intent to manipulate but also on their conduct (*i.e.*, end-of-day trades designed to raise the stocks' prices) that furthered that manipulative intent. In this context, we have recognized that a market participant's "scienter renders his interference with the market illegal."[154] In other words, although it is Respondents' intent that transforms what might otherwise have been legal trades into illegal manipulation, the violation is not based on intent alone; there must also be trading activity that is consistent with the intent to manipulate.

147 *Pagel, Inc.*, 1985 SEC LEXIS 988, at *9 (quoting *Edward J. Mawod & Co.*, Exchange Act Release No. 13512, 46 SEC 865, 1977 SEC LEXIS 1811, at *12-13 (May 6, 1977)).

148 Resp'ts Br. at 15.

149 A wash sale is a fictitious sale where there is no change in beneficial ownership. A matched order is when identical orders to buy and sell are entered at the same time. Often related to a matched order, a cross trade occurs when a security of one client is bought by another client. *See* Thomas Lee Hazen, *Law of Securities Regulation* § 14.3[6][B] (1995).

150 *Swartwood, Hesse, Inc.*, 1992 SEC LEXIS 2412, at *17.

151 Hazen, *supra* note 149, § 14.3[6][A] (citing *Markowski v. SEC*, 274 F.3d 525, 529 (D.C. Cir. 2001)).

152 *See Kirlin*, 2009 SEC LEXIS 4168, at *57-58; *see also In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d at 391 (rejecting a "distinction between open-market manipulation and any other market manipulation").

153 Resp'ts Br. at 10.

154 *Kirlin*, 2009 SEC LEXIS 4168, at *57; *see also Markowski*, 274 F.3d at 528-29 (rejecting the argument that manipulation required fictitious transactions and concluding that the Commission's interpretation of Exchange Act Section 10(b) was reasonable in light of "Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose").

If someone intends to manipulate the market for a security *and* engages in trading that furthers that intent (even if such trading might otherwise be lawful or if the manipulation ultimately is unsuccessful), that person has engaged in illegal market manipulation.

Respondents further argue that they had no motive to manipulate and that "[t]he absence of motive . . . undercuts a claim of manipulation."[155] But proof of motive is not required where there is direct evidence of manipulative intent; it is only where direct evidence of scienter is lacking that circumstantial evidence of intent, such as motive, becomes critical.[156] In this case, there is substantial direct evidence of scienter, including multiple statements by Koch unambiguously showing his intent to mark the close of the stocks in question. Accordingly, the Division is not required to prove Respondents' motive for perpetuating the manipulative scheme.

That said, the evidence in the record shows that Respondents had motive to mark the close. Respondents profited financially from the marking-the-close scheme by increasing the advisory fees paid by clients, even if the increase in fees related to these violations was relatively modest. And contrary to Respondents' suggestion,[157] the fact that Respondents waived fees in the past does not mean that they had no motive to inflate client fees in the second half of 2009. In addition, the evidence suggests that Koch was motivated to artificially raise the prices of the stocks held by KAM's clients to maintain his reputation as a skilled investment adviser. Koch testified that he was particularly concerned about KAM's performance because most of his clients were his friends and associates,[158] and the record shows that Koch was frustrated with the attention that certain clients were paying to their account balances in the wake of the 2009 market downturn.[159] This suggests that Koch, in order to maintain his reputation and avoid losing clients' investments, had a motive to try to boost the performance of his clients' accounts through market manipulation, even if the financial benefit to him through increased fees was modest.[160]

Faced with the substantial direct evidence of scienter in the record, Respondents counter that portions of e-mails and telephone conversations have been taken out of context by the law

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155 Resp'ts Br. at 16, 26-27; *see also* Resp'ts Reply Br. at 4.

156 *See, e.g.*, *Renovitch v. Kaufman*, 905 F.2d 1040, 1046 (7th Cir. 1990) (noting that where there is no "direct evidence of scienter, the court should examine whether there is indirect evidence of scienter" including examining whether there was motive to commit fraud); *Stumpf v. Garvey*, No. 03-CV-1352-PB, 02-MDL-1335-PB, 2005 U.S. Dist. LEXIS 19154, at *35 (D.N.H. Sept. 2, 2005) ("[S]cienter can be established through direct evidence" or by "'combin[ing] various facts and circumstances indicating fraudulent intent—including those demonstrating motive and opportunity.'" (quoting *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir. 2002))); *Kas v. Caterpillar, Inc.*, 815 F. Supp. 1158, 1163 (C.D. Ill. 1992) ("If the plaintiff fails to produce direct evidence, the court should examine whether there is indirect evidence of scienter by considering whether the fraud was in the interest of the defendants or whether the defendants had a motive to defraud.").

157 Resp'ts Br. at 27.

158 Tr. at 795.

159 *See, e.g.*, Div. Ex. 121.

160 *Cf. Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *56 (Feb. 1, 2010) (noting that a registered representative "derived a personal benefit by keeping [her] clients . . . happy and retaining their business").

judge and the Division.[161] We find no merit in this contention. Upon our *de novo* review, we find that, in the context of the entire record, the e-mails and telephone conversations are convincing evidence of Respondents' intent to mark the close. We are unpersuaded by Respondents' attempts to cast these e-mails and telephone conversations in a more benign light by obscuring the context out of which they arose. For example, Respondents consistently suggest that the evidence in the record—including the interactions between Koch and Christanell—supports their contention that the relevant trading by KAM was for the purpose of acquiring difficult-to-obtain shares of stock.[162] But contrary to Respondents' suggestion, the evidence shows that Koch's overriding motivation for the trading at issue was to obtain a particular closing price and not to acquire shares. Not only did Christanell repeatedly testify to this during the hearing,[163] but Koch's statements in e-mails and telephone conversations show the same:

- "I would like to get a closing price in the 20-25 range, but certainly above 20."[164]
- "[I]f you need 5,000 shares, do whatever you have to do—I need to get it above 20, you know, 20 to 25, I'm happy."[165]
- "I can go up to 5,000 shares if you need to. . . . Talk if you need more than that."[166]
- Regarding Cheviot, Christanell asked, "How much should I buy to get it up there?" Koch responded, "You know, I'd start at the 100, 200 share increment and see how far it moves. . . . I think, since it trades so little, I think you'll be able to get it up pretty fast."[167]

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161 *See* Resp'ts Br. at 2, 14; Resp'ts Reply Br. at 1-2.

162 *See* Resp'ts Br. at 1-2, 14-15, 25; Resp'ts Reply Br. at 2. In one particularly brazen attempt at spin, Respondents unjustifiably added the following bracketed material to Christanell's apology to Koch at the end of the trading day on December 31, 2009: "I know you wanted it higher [which would get more shares], and I tried." *Id.* at 16; *see also* Resp'ts Br. at 25 (suggesting that Christanell apologized because "KAM failed to acquire the 5,000 share block of High Country it sought").

163 Tr. at 498 ("Q: Okay. For all the trades that we've discussed so far, was Mr. Koch's focus on acquiring a certain number of shares or on getting a particular closing price? A: It was getting—more based on getting the closing price."); Tr. at 504-05 ("Q: So was he trying to acquire 5,000 shares or was he trying to get a particular price? A: He was trying to get a particular price."); Tr. at 511 ("Q: So was the principal focus on acquiring CARV for Mr. Koch, or was the focus on getting a closing price? A: The focus was the closing price, the last trade of the day.").

164 Div. Ex. 186.

165 Div. Ex. 189.

166 *Id.*

167 Div. Ex. 190.

- Christanell then asked, "Am I alright taking 5,000 [shares] if I have to?", to which Koch replied, "Sure, absolutely . . . you know, on both of them." Christanell affirmed, "Yeah, with [High Country] also."[168]

- On Carver, Christanell asked, "I was thinking about just buying like 300 shares at 9.05. Is that alright?", to which Koch replied, "Sure. That's perfect. Just make sure you get a print."[169]

Considering all the evidence in its proper context, it is apparent that Koch was focused on getting a particular closing price for these securities and not on acquiring shares. It makes no sense for Koch to say "if you need 5,000 shares, do whatever you have to do" and "I can go up to 5,000 shares if you need to" if his goal was to acquire 5,000 shares. His repeated use of such phrases shows that he was authorizing Christanell to purchase up to 5,000 shares only in order to increase the price of the securities at the close of the market—*not* because he wanted that number (or any particular number) of additional shares.[170]

In support of their contention that their trading was for a legitimate investment purpose, Respondents rely heavily upon the testimony of their expert witnesses, particularly Jarrell.[171] But this reliance is misplaced. The thrust of Jarrell's testimony was that KAM's trading can be viewed as part of a legitimate strategy to acquire difficult-to-obtain and illiquid stocks. But Jarrell's testimony has serious limitations. Most significantly, Jarrell did not review any of the communications between Koch and Christanell in forming his opinions about whether the trading at issue was manipulative.[172] Although it might be possible to view some of the trading at issue here, standing alone, as consistent with legitimate attempts to obtain illiquid stocks, such an explanation is not convincing if it fails to take into account the strong evidence of Respondents' intent to manipulate. In addition, although Jarrell uses the illiquid nature of the relevant stocks as part of his explanation for why KAM's trading could be legitimate, his opinion fails to take into account that the market for thinly traded stocks is more easily manipulated and thus more often the target of manipulative schemes.[173]

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168 *Id.*

169 *Id.*

170 Moreover, as the law judge recognized, Koch fails to provide a credible explanation for why he purchased only a few hundred shares of Carver on December 31, 2009, if his goal was to acquire the stock. *Koch*, 2012 SEC LEXIS 1645, at *22.

171 The thrust of the testimony of Respondents' other expert, Schneider, was that the trades in question were consistent with KAM's overall investment program. *See* Resp'ts Br. at 7. That the trades were consistent with KAM's investment program, however, does not mean they were not manipulative. Thus, Schneider's opinion in this regard ultimately is not relevant to the question of Respondents' liability.

172 Tr. at 1151.

173 *See, e.g.*, Steve Thel, *$850,000 in Six Minutes—The Mechanics of Securities Manipulation*, 79 Cornell L. Rev. 219, 231 (1994) ("[M]anipulation by taking advantage of inelastic supply is likely to be easier with thinly traded securities. In fact, such securities are the subject of many allegedly manipulative schemes.").

Many of the details of Jarrell's testimony are also problematic. With regard to High Country, Jarrell could not rule out marking the close and he conceded that KAM's trades had the effect of raising the price of the stock. Jarrell insisted that it made economic sense to purchase illiquid stocks at the end of the day because of a U-shaped trading curve that applies to stocks in general, which means liquidity is the highest at the start and end of the day. But as Jarrell admitted during the hearing, High Country itself did not have a U-shaped trading curve.[174]

Moreover, as the Division points out, Jarrell's explanation does not account for the manner in which KAM acquired High Country stock the vast majority of the time. If it made economic sense for KAM to purchase High Country at the end of the day and end of the month, one would expect to see KAM using such a strategy when acquiring shares. However, as Respondents' expert Schneider testified, between January 7, 1998, and December 28, 2010, KAM purchased High Country on twenty-six separate days but did so on the last trading day of the month only six times—four of which were in 2009 (at issue in this case) and the other two were in 1998.[175] Additionally, trading data from mid-2008 through the end of 2009 show that KAM often purchased High Country shares in the middle of the trading day.[176] Thus, despite Jarrell's opinions about the rationality of KAM's theoretical trading strategy, the evidence shows that KAM did not actually use such a strategy generally for obtaining High Country stock, and Jarrell failed to offer an explanation for this inconsistency.

Furthermore, Jarrell's opinion that KAM's December 31, 2009 trading in Cheviot and Carver did not reflect marking the close is premised on both factual and legal errors. First, Jarrell's opinion relies on his conclusion that KAM's trading did not set the closing price for these stocks on the day in question. But as discussed above, the evidence shows that KAM's trading did set Carver's closing price.[177] More importantly, Respondents can engage in a manipulative scheme to mark the close even if they were ultimately unsuccessful in setting the closing price.[178] And although Jarrell is correct that the price movements with regard to KAM's trading in Cheviot and Carver are smaller than those of High Country, the evidence shows that KAM's trading in these stocks was designed to and did have an impact on the stocks' prices.[179]

Respondents further argue that their trading was not manipulative because they used limit orders and "ladder[ed] up" the price of the shares by making small executions to attract potential sellers of a difficult-to-obtain security.[180] Although Respondents may have had a more immediate impact on price by entering a large market order, the evidence shows that they were

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174 Tr. at 1157-59; Resp'ts Ex. 39 at 17.

175 Resp'ts Ex. 36; Tr. at 1226-27.

176 *See* Div. Exs. 321-39.

177 *See supra* notes 127-131 and accompanying text.

178 *See supra* note 118. Jarrell testified during the hearing that his opinion was not based on any knowledge of the *legal* requirements to find a marking-the-close violation. Tr. at 1153.

179 *See supra* at 18 &19.

180 *See* Resp'ts Br. at 6, 18. Although Respondents write in their brief that Jarrell called this a "laddering" effect, *id.* at 18, Jarrell's testimony does not include this term.

trying to avoid "appearing manipulative."[181] And contrary to Respondents' suggestion, the use of limit orders is not inconsistent with a manipulative scheme to mark the close.[182] Respondents also suggest that because neither KAM nor its clients sold the shares at issue their trading cannot be manipulative.[183] Selling a manipulated stock in order to reap a short term gain based on an elevated price, however, is not the only reason for manipulating a stock's price. We have recognized that investment advisers can use marking-the-close transactions to manipulate the closing value of a managed account at the end of a reporting period—which is exactly the type of manipulative scheme alleged here.[184] Whether the shares are retained thereafter is not relevant to whether the original purchases were part of such a manipulative scheme. And a client's decision not to sell the stock or complain about the manipulated price at which it was purchased does not mean that there was no manipulation to begin with.[185]

Respondents argue that the Initial Decision's failure to specifically address the allegation that Respondents did not seek best execution for the trades at issue "can only be read as a failure of proof" for the marking-the-close violations.[186] We disagree. Although the Initial Decision does not use the words "best execution," it did find that "Koch's seeking to mark the close by purchases for the accounts of others at higher prices than would have resulted from legitimate market forces violated his fiduciary duty as an investment adviser,"[187] which is another way of saying the same thing.[188] As Respondents recognize, marking the close and failure to seek best execution are closely related. When an investment adviser attempts to raise the price of the securities he is purchasing for the accounts of his clients, *a fortiori*, he is not seeking to obtain for those clients "the most favorable terms reasonably available under the circumstances."[189]

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181 Div. Ex. 148.

182 *See Havill*, 1998 SEC LEXIS 2599, at *16-17 (noting that limit orders can be consistent with marking-the-close manipulation when they cause the price of the stock to rise).

183 *See* Resp'ts Br. at 26; Tr. at 893 (Koch testifying that the allegation of market manipulation was incorrect "because I didn't sell").

184 *See, e.g., ABN AMRO Inc.*, Exchange Act Release No. 44677, 2001 SEC LEXIS 1621 (Aug. 10, 2001) (settlement of marking-the-close charges); *Parlin*, Exchange Act Release No. 44679, Investment Advisers Act Release No. 1967, 2001 SEC LEXIS 1622 (Aug. 10, 2001) (same).

185 *Cf. Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *27 (Nov. 4, 2009) ("The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate Glodek's misconduct."), *pet. for review denied*, 416 F. App'x 95 (2d Cir. 2011).

186 Resp'ts Br. at 11.

187 *Koch*, 2012 SEC LEXIS 1645, at *38.

188 *See, e.g., Fleet Inv. Advisors, Inc.*, Advisers Act Release No. 1821, 1999 SEC LEXIS 1805, at *24 (Sept. 9, 1999) ("[A]n investment adviser's fiduciary duty includes the requirement to seek the best execution of client securities transactions where the adviser is in a position to direct brokerage transactions.").

189 *Newton v. Merrill, Lynch, Pierce, Fenner & Smith*, 135 F.3d 266, 270 (3d Cir. 1998). Christanell's affirmative answer to the question of whether the trades in question represented "best execution," Tr. at 591, cannot be squared fully with his testimony that these trades were different from typical trading because they did not involve "try[ing] to purchase them at the best price we can," Tr. at 517. It is possible that Christanell understood the concept of "best execution" differently than obtaining the best available price. In any event, Christanell's opinion about the abstract concept of "best execution" does not carry the weight of the extensive evidence in the record—including

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Thus, marking the close, which here involved attempts to raise the price of a security through end-of-day purchases, is plainly inconsistent with an investment adviser's duty to seek best execution. As the law judge found, the evidence in the record shows that, to the extent they were present, other market participants were obtaining the relevant securities at lower prices than KAM.[190] Koch even instructed Christanell to try to avoid a seller of High Country on December 31, 2009, in order to get a higher closing price.[191] We have recognized such conduct as evidence of a failure to seek best execution.[192] Accordingly, we find that the allegations of failure to seek best execution are supported by the evidence in the record and that the law judge's failure to use the words "best execution" in the Initial Decision in no way undermines the marking-the-close violations.[193]

Respondents further argue that only KAM (and not Koch) could be a primary violator because "KAM, not Mr. Koch[,] is the investment adviser."[194] We find, however, that Koch, whose activities as KAM's principal and sole owner extended to "advising others . . . as to the value of securities or as to the advisability of investing in, purchasing or selling securities," falls under the broad definition of "investment adviser" in the Act.[195] As such, he can be liable as a primary violator under Advisers Act Sections 206(1) and 206(2).[196] Similarly, Respondents'

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Christanell's own testimony—that Respondents were not trying to obtain the relevant securities for the best available price but were seeking to raise the price of the securities through their purchases.

190 *See Koch*, 2012 SEC LEXIS 1645, at *13, *21-22. The record also shows that on September 8, 2009, Koch purchased 10,000 shares of High Country for his personal and family accounts out of the account of one of his other clients for an average of $11.71 per share. *See* Div. Ex. 53 at SEC-HUNTLEIGH 3327-28; *see also* Resp'ts Ex. 39 at 41. Just three weeks later, on September 30, 2009, KAM purchased 2,000 shares of High Country for the account of Alice Smith for an average of $20.3794 per share. *See* Div. Ex. 53 at SEC-HUNTLEIGH 3336. Although Smith paid nearly double the price per share for the stock that Koch had paid earlier in the month, Koch insisted that Smith got a "terrific deal." Tr. at 883.

191 Div. Ex. 189. Koch specifically warned Christanell that "if you come in too early, there is a seller" and once the seller is aware of the trading "he'll push out the volume." *Id.*

192 *See Kirlin*, 2009 SEC LEXIS 4168, at *71-73 (finding a failure to seek best execution where broker, as part of a manipulative scheme, ignored a pending order in the market to prevent a large market transaction from depressing a stock's bid price).

193 We reject Respondents' argument that the issue of best execution was somehow forfeited by the Division under the Commission's Rules of Practice, *see* Resp'ts Reply Br. at 5-6, particularly because it was Respondents who first raised the issue by arguing that the Initial Decision's treatment of the topic constituted a failure of proof for the marking-the-close violations.

194 Resp'ts Br. at 12 n.5.

195 15 U.S.C. § 80b-2(a)(11).

196 *Warwick Capital Mgmt.*, Advisers Act Release No. 2694, 2008 SEC LEXIS 96, at *31 n. 37 (Jan. 16, 2008) ("We have held that an associated person may be charged as a primary violator under Section 206 where his activities cause him to meet the 'broad' definition of 'investment adviser.'" (quoting *John J. Kenny*, Exchange Act Release No. 47847, 56 SEC 448, 2003 SEC LEXIS 1170, at *63 n. 54 (May 14, 2003))); *see also SEC v. Gotchy*, No. 91-1855, 1992 U.S. App. LEXIS 33647, at *6 (4th Cir. Dec. 28, 1992) (per curiam) (holding that president and fifty percent owner of registered investment adviser qualified as an investment adviser "within the meaning of the Act"); *Abrahamson v. Fleschner*, 568 F.2d 862, 870 (2d Cir. 1977) ("[P]ersons who managed the funds of others for compensation are 'investment advisers' within the meaning of the statute."); *SEC v. Juno Mother Earth Asset Mgmt.*,
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reliance on *Janus Capital Group, Inc. v. First Derivative Traders*,[197] for the proposition that Koch cannot be liable as a primary violator is also misplaced.[198] *Janus* limited the scope of primary liability under Rule 10b-5(b) to the entity that was responsible for making the statements alleged to be fraudulent, and focused specifically on the meaning of the word "make" in Rule 10b-5(b).[199] Respondents, however, are not charged with making statements but with engaging in manipulative and deceptive conduct, and thus *Janus*'s holding does not apply.[200] For the same reason, *Janus* does not apply to violations of Advisers Act Sections 206(1) and 206(2), which lack any reference to making statements.[201]

C.

The law judge found that Respondents violated Advisers Act Rule 206(4)-7(a), which requires that investment advisers "[a]dopt and implement written policies and procedures reasonably designed to prevent violations by [the adviser] of the Act and the rules that the Commission has adopted under the Act."[202] In reaching this conclusion, the law judge found, after finding a violation of the Advisers Act, that "[i]nasmuch as KAM was a one-man firm and Koch was its alter ego as well as its Chief Compliance Officer, it is concluded that KAM and Koch did not implement the anti-manipulation policy and thus violated the rule."[203]

We agree that Respondents violated Rule 206(4)-7(a), but on slightly different grounds. Although a violation of the Advisers Act may be evidence that there was a failure to implement a policy against violating the Act, to determine whether there was a Rule 206(4)-7(a) violation, we consider evidence about the steps the adviser took or failed to take to adopt and implement policies and procedures reasonably designed to prevent violations. Upon our *de novo* review of the record, we find that Respondents violated Rule 206(4)-7(a) by failing to implement KAM's policy against manipulative trading.

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LLC, No. 11 Civ. 1778, 2012 U.S. Dist. LEXIS 28114, at *13-15 (S.D.N.Y. Mar. 2, 2012) (holding that individual defendants who were twenty-five percent owners and served as the portfolio manager, CEO and Chief Compliance Officer of a registered investment adviser were "investment advisers" under the Act); *SEC v. Berger*, 244 F. Supp. 2d 180, 192-93 (S.D.N.Y. 2001) (concluding that individual who controlled an investment adviser firm "is also properly labeled an investment adviser within the meaning of the Advisers Act").

197 131 S. Ct. 2296 (2011).

198 *See* Pet. for Review at 20-21; Resp'ts Br. at 12 n.5.

199 131 S. Ct. at 2302.

200 *See, e.g., SEC v. Monterosso*, Nos. 13-10341, 13-10342, 13-10464, 2014 WL 815403, at *5 (11th Cir. Mar. 3, 2014) (declining to extend *Janus* to claims that hinge on deceptive conduct); *SEC v. Pentagon Capital Mgmt., PLC*, 844 F. Supp. 2d 377, 421-22 (S.D.N.Y. 2012) (same), *aff'd in part, vacated in part on other grounds*, 725 F.3d 279 (2d Cir. 2013).

201 We are unaware of any ruling extending *Janus* to Advisers Act Section 206 violations.

202 17 C.F.R. § 275.206(4)-7(a).

203 *Koch*, 2012 SEC LEXIS 1645, at *39.

KAM's policies and procedures manual expressly prohibited "[e]ngag[ing] in any transaction intended to raise, lower or maintain the price of any Security."[204] When asked by his counsel what he did to implement the manual's trading policies, Koch responded, "I made sure that I followed my highest sense of right," and he added that he kept records of "every trade we did."[205] But the evidence in the record, as outlined above, shows that Koch—the only KAM employee responsible for implementing the anti-manipulation policy— engaged in multiple transactions specifically intended to raise the price of the securities KAM was purchasing. The multiple instances of intentionally manipulative trading by Respondents belie Koch's claim that he implemented the policy through ethical behavior and, in fact, demonstrate a complete failure to meaningfully implement KAM's policy against manipulative trading. Moreover, merely keeping records of KAM's trading is insufficient to implement an anti-manipulation policy. For these reasons, we find that Respondents violated Rule 206(4)-7(a).

IV.

A. Censure and collateral bar

The Division requests that we censure KAM and impose a collateral bar upon Koch. Advisers Act Section 203(e), among other things, authorizes us to censure an investment adviser for willfully violating the securities laws.[206] Advisers Act Section 203(f) authorizes us to bar a person associated with an investment adviser from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization if the person has willfully violated the securities laws.[207]

In determining the need for sanctions in the public interest, we consider, among other things, (i) the egregiousness of the respondent's actions; (ii) the degree of scienter involved; (iii) the isolated or recurrent nature of the infraction; (iv) the respondent's recognition of the wrongful nature of his or her conduct; (v) the sincerity of any assurances against future violations; and (vi) the likelihood that the respondent's occupation will present opportunities for future violations.[208] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[209]

Respondents' insistence to the contrary notwithstanding,[210] their conduct was egregious. Market manipulation is one of the most egregious securities law violations.[211] We have held that

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204 Div. Ex. 279.

205 Tr. at 822.

206 15 U.S.C. § 80b-3(e).

207 15 U.S.C. § 80b-3(f).

208 *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

209 *Disraeli*, 2007 SEC LEXIS 3015, at *61.

210 Resp'ts Br. at 28.

211 *See Robert J. Prager*, Exchange Act Release No. 51974, 2005 SEC LEXIS 1558, at *55 (July 6, 2005) (noting that manipulation is a "very grave violation," and that its elimination is "one of the central goals of the federal securities

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"[c]onduct that violates the antifraud provisions 'is especially serious and subject to the severest of sanctions.'"[212] Respondents also acted with scienter. As detailed above, the evidence shows that Respondents engaged in end-of-month, end-of-day trading with the specific intent to manipulate the market by marking the close of the securities they purchased. This conduct was recurrent, with Respondents attempting to mark the close of one or more securities at least twice in the second half of 2009. Respondents' marking-the-close scheme ended after regulators began investigating suspicious end-of-day trades, but we have repeatedly declined to credit a respondent whose misconduct stopped only after it was detected by regulators.[213]

Respondents point to their "unblemished record of years of service to firm clients" and "deep respect for the rule of law" to show that they will not commit future violations.[214] We have concerns, however, about the sincerity of their assurances given the degree of scienter involved. We also find troubling their continued insistence that they have done nothing wrong and that their trading activity was completely legitimate, despite substantial evidence that they intentionally sought to raise the price of the securities they were purchasing to obtain a particular closing price. Respondents also insist there is "little likelihood of reoccurrence" because they "currently have no advisory clients" and Koch is "retired."[215] We note, however, that Koch apparently still manages at least some client accounts,[216] and as the Division argues,[217] absent a bar there is nothing to prevent Koch from coming out of retirement and participating in the industry.

The law judge declined to impose a collateral bar solely on the ground that, in her view, a collateral bar amounted to imposing a "new sanction retroactively."[218] At the time of her decision, the law judge did not have the benefit of our decision in *John W. Lawton*.[219] For the reasons we explained in *Lawton,* the imposition of a collateral bar in this case is not impermissibly retroactive.[220] The Dodd-Frank Act amended Advisers Act Section 203(f) to

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laws" (citing *R.B. Webster Inv., Inc.*, Exchange Act Release No. 34659, 51 SEC 1269, 1994 SEC LEXIS 2868, at *22(Sept. 13, 1994))).

212 *Disraeli*, 2007 SEC LEXIS 3015, at *66 (quoting *Marshall E. Melton*, Exchange Act Release No. 48228, 56 SEC 695, 2003 SEC LEXIS 1767, at *29-30 (July 25, 2003)).

213 *See Gregory O. Trautman*, Exchange Act Release No. 61167, 2009 SEC LEXIS 4173, at *78 (Dec. 15, 2009) (considering the nature of the misconduct and finding bar appropriate where, among other things, misconduct stopped only after it was detected by regulators); *Joseph John VanCook*, Exchange Act Release No. 61039A, 2009 SEC LEXIS 3872, at *61-62 (Nov. 20, 2009) (same), *petition denied*, 653 F.3d 130 (2d Cir. 2011); *Ofirfan Mohammed Amanat*, Exchange Act Release No. 54708, 2006 SEC LEXIS 2545, at *45 (Nov. 3, 2006) (same).

214 Resp'ts Br. at 28-29.

215 Resp'ts Br. at 28.

216 Tr. at 806-08.

217 Div. Br. at 39.

218 *Koch*, 2012 SEC LEXIS 1645, at *48 n.29. The law judge made no determination that a collateral bar would not be in the public interest.

219 Advisers Act Release No. 3513, 2012 SEC LEXIS 3855 (Dec. 13, 2012).

220 *Id.* at *20-38.

authorize us to bar persons associated with an investment adviser from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, whereas Section 203(f) previously provided only for an investment adviser associational bar.[221] Although Congress enacted the Dodd-Frank amendment after Koch committed his misconduct, we held in *Lawton* that such collateral bars are not impermissibly retroactive because the decision to impose such a bar is based on a present assessment of "whether such a remedy is necessary or appropriate to protect investors and markets from the risk of future misconduct."[222]

Based upon such an assessment, we conclude that it is in the public interest to censure KAM and impose a collateral bar on Koch from associating with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. Koch's intentional manipulation of the securities market raises significant doubts about his fitness to remain in the securities industry in any capacity. As we have recognized previously, market manipulation "'attacks the very foundation and integrity of the free market system' and 'runs counter to the basic objectives of the securities laws.'"[223] Because "[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence,"[224] it is essential that the "highest ethical standards prevail in every facet of the securities industry."[225] The antifraud provisions that Koch violated apply broadly to the conduct of all participants in the securities industry. In addition, Koch's violations were neither technical in nature nor based solely on his status as an investment adviser. For all of these reasons, we believe that a collateral bar is in the public interest.

B. Cease-and-desist order

Exchange Act Section 21C and Advisers Act Section 203(k) authorize us to issue a cease-and-desist order against any person who "is violating, has violated, or is about to violate" the

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[221] Prior to Dodd-Frank, the Division could seek—under the Exchange Act—to bar a person with an existing investment adviser suspension or bar from associating with a broker, dealer, municipal securities dealer, or transfer agent (but not from associating with a municipal advisor or a nationally recognized statistical rating organization) in a separate proceeding if the person was seeking such an association. *See Lawton*, 2012 SEC LEXIS 3855, at *17. The Division submitted in its brief that that it was not authorized to seek an order barring Koch from association with a municipal advisor or a nationally recognized statistical rating organization, Div. Br. at 41, presumably because such bars were completely unavailable prior to Dodd-Frank. In light of *Lawton*, however, a full collateral bar is an available sanction.

[222] *Lawton*, 2012 SEC LEXIS 3855, at *32.

[223] *Yoshikawa*, 2006 SEC LEXIS 948, at *32 (quoting *Pagel, Inc.*, 1985 SEC LEXIS 988, at *21).

[224] *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 SEC LEXIS 2238, at *28 (Sept. 26, 2007); *see also Paul K. Grassi, Jr.*, Exchange Act Release No. 52858, 2005 SEC LEXIS 3072, at *9 (Nov. 30, 2005); *Frank Kufrovich*, Exchange Act Release No. 45437, 55 SEC 616, 2002 SEC LEXIS 3399, at *17 (Feb. 13, 2002); *William F. Lincoln*, Exchange Act Release No. 39629, 53 SEC 452, 1998 SEC LEXIS 193, at *29 (Feb. 9, 1998); *Philip S. Wilson*, Exchange Act Release No. 23348, 48 SEC 511, 1986 SEC LEXIS 1332, at *14 (June 19, 1986); *Walter H. T. Seager*, Exchange Act Release No. 20831, 47 SEC 1040, 1984 SEC LEXIS 1836, at *8 (Apr. 6, 1984).

[225] *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186-87 (1963) (internal citation omitted).

Acts or the rules promulgated thereunder.[226] In determining whether a cease-and-desist order is appropriate, we consider the *Steadman* factors identified above as well as "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings."[227] In this context, we also consider the risk of future violations.[228] Although "'some' risk is necessary, it need not be very great to warrant issuing a cease-and-desist order. Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation."[229]

Based on our consideration of the relevant factors, we conclude that a cease-and-desist order is appropriate. As discussed above, Respondents' conduct involved egregious violations of the securities laws, Respondents acted with scienter, the violations were recurrent, and Respondents continue to insist—despite strong evidence to the contrary—that they were not attempting to mark the close and that their trading was completely lawful. The violations occurred in 2009 and the direct harm to Respondents' clients from the manipulative scheme was relatively small, but we believe Respondents' manipulation represented a serious threat to the integrity of the markets for these thinly traded stocks. And although Koch insists that he would "respect and abide by the ruling" of the Commission,[230] we find reasons to question these assurances, particularly in light of Respondents' continued and strenuous insistence that their trading was wholly legitimate. Accordingly, we find there is sufficient risk of future violations to order Respondents to cease-and-desist from committing or causing any violations or future violations of the antifraud provisions.

C. Disgorgement

Exchange Act Section 21C(e) and Advisers Act Section 203(j) authorize the Commission to order the disgorgement of ill-gotten gains.[231] An order for disgorgement "is intended primarily to prevent unjust enrichment."[232] Thus, "the amount of disgorgement should include all gains flowing from the illegal activities," but calculating the amount of disgorgement

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[226] 15 U.S.C. §§ 78u-3, 80b-3(k).

[227] *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 SEC LEXIS 98, at *116 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002); *see also Herbert Moskowitz*, Exchange Act Release No. 45609, 55 SEC 658, 2002 SEC LEXIS 693, at *35-36 (Mar. 21, 2002).

[228] *KPMG Peat Marwick LLP*, 2001 SEC LEXIS 98, at *102-03.

[229] *Id.* ("To put it another way, evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist.").

[230] Resp'ts Br. at 29.

[231] 15 U.S.C. §§ 78u-3(e), 80b-3(j).

[232] *Zacharias v. SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) (quoting *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)); *see Michael David Sweeney*, Exchange Act Release No. 29884, 50 SEC 761, 1991 SEC LEXIS 2455, at *17 (Oct. 30, 1991) ("[D]isgorgement is intended to force wrongdoers to give up the amount by which they were unjustly enriched.").

"requires only a reasonable approximation of profits causally connected to the violation."[233] We have held that "[o]nce the Division shows that its disgorgement figure is a reasonable approximation of the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation."[234] The law judge ordered Respondents to disgorge $4,169.78. We agree that this is a reasonable approximation of Respondents' ill-gotten gains.

To calculate the disgorgement amount, the Division undertook to quantify the difference between the quarterly fees KAM charged its clients in the third and fourth quarter of 2009 and the amount those fees would have been had Respondents not engaged in manipulation. In making its calculation, the Division relied upon evidence regarding how Huntleigh priced securities at month-end for account holders. If there was no trading on the last trading day of the month, Huntleigh priced the security at the last bid of the day. If there was trading on the last day of the month, Huntleigh valued the holding at the publicly-reported closing price. Thus, when Respondents' trading constituted all of the trading volume on the last day of the month, the Division used the last bid before Respondents began trading, and when Respondents' trading constituted less than all of the trading volume, the Division used the last reported non-KAM trade before the close. Once the Division calculated the difference between the closing price that was established by Respondents' manipulative trades in High Country on September 30 and December 31 and in Carver on December 31 and an estimate of the closing price that would have been reported to Respondents' clients on those days if Respondents had not traded, the Division multiplied that amount by the number of High Country shares held by KAM clients on September 30 and the number of High Country and Carver shares held by KAM clients on December 31.[235] This amount represented the total dollar increase in KAM client holdings caused by Respondents' manipulative trading on September 30 and December 31, 2009. The Division then multiplied this amount by KAM's quarterly advisory fee of 0.25% to determine the increase in advisory fees charged to KAM clients for the two relevant quarters. The Division initially calculated this amount to be $5,819.93. After hearing testimony established that certain accounts (principally Koch personal and family accounts) were not charged an advisory fee, the Division revised its disgorgement calculation to $4,288.08, excluding the non-fee-paying

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[233] *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006) (quotation omitted); *Laurie Jones Canady*, Exchange Act Release No. 41250, 54 SEC 65, 1999 SEC LEXIS 669, at *38 n.35 (Apr. 5, 1999) (noting that "courts have held that '[t]he amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation [and that] any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty'" (quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) (alterations in original and internal quotation marks omitted)); *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) (noting that, when calculating disgorgement, "separating legal from illegal profits exactly may at times be a near-impossible task").

[234] *Eric J. Brown*, Exchange Act Release No. 66469, 2012 SEC LEXIS 636, at *50 (Feb. 27, 2012) (citing *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 2006)); *see also Zacharias*, 569 F.3d at 473 (noting that, where disgorgement cannot be exact, the "well-established principle is that the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create that uncertainty"); *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004) ("Exactitude is not a requirement; '[s]o long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.'" (quoting *SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998))).

[235] Div. Br. at 43-44.

accounts that had been identified during the hearing. In their post-hearing brief, Respondents argued that, based on the Division's methodology, the excessive fees should only be $4,169.78. The Division accepted Respondents' lower number, "[r]ecognizing that disgorgement need only reflect a reasonable approximation of the ill-gotten gains."[236] This amount was then adopted by the law judge in the Initial Decision.

Respondents argue that the disgorgement amount ordered by the law judge is incorrect because it "ignores the manner in which KAM actually calculates advisory fees."[237] According to Respondents, when an illiquid stock did not trade on the last day of a quarter, KAM, unlike Huntleigh, did not use the bid price to value the stock for its quarterly fee calculation. Instead, KAM "estimate[d] the value of the security to calculate the fees and disclose[d] that fact to the clients."[238] Neither before the law judge nor before us, however, have Respondents put forward any evidence concerning their methodology for estimating the value of the securities in question, nor have they provided an explanation of how their methodology would differ from the one used by the Division.[239] We believe that the Division's methodology—based on an estimate of values that would have been reported to KAM's clients by Huntleigh—represents a reasonable approximation of Respondents' ill-gotten gains. And Respondents have not met their burden of showing that the Division's estimate is not a reasonable approximation—particularly because it is Respondents' manipulative trading that is the basis for the underlying uncertainty in estimating the value of the securities absent manipulation.[240] Accordingly, we order Respondents, jointly and severally, to disgorge $4,169.78, plus prejudgment interest.[241]

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[236] Div. Br. at 44.

[237] Resp'ts Br. at 14. In their petition for review—but not in their brief—Respondents also argued that the disgorgement amount was incorrect because it included fees for October and November 2009, for which the law judge failed to find violations. Pet. for Review at 10. We agree with Division, however, that his argument is baseless because KAM charged its clients fees only quarterly, not monthly. KAM based its fees on the value of its clients' accounts at the end of the quarter. Thus, the relevant days for determining client fees for the last two quarters of 2009 were the last trading days of September and December.

[238] Resp'ts Br. at 14.

[239] Respondents' brief insists that KAM "does not use [Huntleigh's] methodology to calculate value," but it contains no explanation of how KAM did estimate the price of securities that were not traded on the final day of a quarter. *Id.* at 14 n.6.

[240] *See supra* note 234.

[241] *David R. Lehl*, Securities Act Release No. 8102, 55 SEC 843, 2002 SEC LEXIS 1796, at *52 (May 17, 2002) ("Numerous courts recognize that 'where two or more individuals or entities collaborate or have a close relationship in engaging in the violations of securities laws, they have been jointly and severally liable for the disgorgement of illegally obtained proceeds." (quoting *SEC v. First Pacific Bancorp.*, 142 F.3d 1186, 1191 (9th Cir. 1998)); *Terence Michael Coxon*, Exchange Act Release No. 48385, 56 SEC 934, 2003 SEC LEXIS 2013, at *64 (Aug. 21, 2003) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005); 17 C.F.R. § 201.600(b) (stating that "[i]nterest on the sum to be disgorged shall be computed at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), and shall be compounded quarterly").

D. Civil monetary penalty

Advisers Act Section 203(i) authorizes the Commission to impose civil monetary penalties for willful violations of the securities laws.[242] In considering whether a civil penalty is in the public interest, the Commission may consider (i) whether the act or omission involved fraud; (ii) whether the act or omission resulted in harm to others; (iii) the extent to which any person was unjustly enriched, taking into account restitution made to injured persons; (iv) whether the individual has committed previous violations; (v) the need to deter such person and others from committing violations; and (vi) such other matters as justice may require.[243] Second-tier penalties are appropriate if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and third-tier penalties are appropriate if, in addition to "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed" the violation.[244]

We find that the $75,000 second-tier penalty ordered against Respondents by the law judge is appropriate in this case. As elaborated above, Respondents' marking-the-close scheme involved fraud, deceit, and manipulation under the securities laws. Their conduct harmed both their advisory clients (who received higher fees and overvalued securities) as well as other participants in the markets they were manipulating (who received false information about the value of the relevant securities). As the disgorgement analysis demonstrates, Respondents were also unjustly enriched through their misconduct. Given the serious nature of the violations of the antifraud provisions of the Exchange Act and Advisers Act, a second-tier civil penalty is appropriate to deter future misconduct by Respondents and others.

The Division argues that a third-tier penalty is called for because Respondents' "conduct led to the risk of substantial losses to other persons."[245] We disagree. Although Respondents' marking-the-close scheme may have resulted in losses to KAM's advisory clients who purchased shares at inflated prices, the Division has not shown that, to the extent there were such losses, they were substantial. Moreover, the Division has not adequately demonstrated that the risk of substantial losses to these clients or to other market participants is significant enough to warrant third-tier penalties. Accordingly, we order Respondents to pay a $75,000 second-tier penalty, for which they are jointly and severally liable.[246]

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[242] 15 U.S.C. § 80b-3(i). As we have explained, Respondents' violations were willful in this context. *See supra* note 139.

[243] *Id.* § 80b-3(i)(3).

[244] *Id.* § 80b-3(i)(2).

[245] Div. Br. at 46.

[246] Because Koch is the sole owner and principal of KAM, and it is through Koch's conduct that KAM's violations occurred, joint and several liability is appropriate. *See Zion Capital Mgmt. LLC*, Exchange Act Release No. 48904A, 57 SEC 99, 2003 SEC LEXIS 2939, at *35-36 (Dec. 11, 2003) (imposing a joint-and-several civil penalty on an advisory firm and its president and sole owner).

An appropriate order will issue.[247]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN; Commissioners GALLAGHER and PIWOWAR concurring in part and dissenting with respect to the bars from association with municipal advisors and nationally recognized statistical rating organizations).

Lynn M. Powalski
Deputy Secretary

[247] 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. 72179 / May 16, 2014

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3836 / May 16, 2014

INVESTMENT COMPANY ACT OF 1940
Rel. No. 31047 / May 16, 2014

Admin. Proc. File No. 3-14355

In the Matter of

DONALD L. KOCH and KOCH ASSET
MANAGEMENT, LLC
c/o Thomas O. Gorman
Dorsey & Whitney LLP
1801 K Street, NW, Suite 750
Washington, DC 20006

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Koch Asset Management, LLC ("KAM") is censured for violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-7 thereunder; and it is further

ORDERED that Donald L. Koch be barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and it is further

ORDERED that KAM and Koch cease and desist from committing or causing any violations or future violations of Exchange Act Section 10(b) and Rule 10b-5 thereunder, and Advisers Act Sections 206(1), 206(2), and 206(4) and Rule 206(4)-7 thereunder; and it is further

ORDERED that KAM and Koch, jointly and severally, disgorge $4,169.78, plus prejudgment interest of $695.89, such prejudgment interested calculated beginning from October 1, 2009, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that KAM and Koch pay a civil money penalty of $75,000, for which they are jointly and severally liable.

Payment of the amounts to be disgorged and the civil money penalty shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

By the Commission.

Lynn M. Powalski
Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72178 / May 16, 2014

WHISTLEBLOWER AWARD PROCEEDING

File No. 2014-4

In the Matter of the Claim for Awards

in connection with

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

Claimant Redacted failed to submit – claim for an award for Notice of Covered Action Redacted to the Office of the Whistleblower ("OWB)" within ninety (90) calendar days of the date of the Notice of Covered Action ("NoCA"), which Rule 21F-10(b) of the Securities Exchange Act ("Exchange Act") requires to be considered for an award.[1] As a result, the Claims Review Staff ("CRS") issued a Preliminary Determination recommending that Redacted untimely claim be denied.

For the reasons set forth below, Redacted award claim is denied.

[1] Rule 21F-10(b) provides:

> To file a claim for a whistleblower award, you must file Form WB-APP, Application for Award for Original Information Provided Pursuant to Section 21F of the Securities Exchange Act of 1934 (referenced in § 249.1801 of this chapter). You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax. All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award. 17 C.F.R. § 240.21F-10(b).

I. Commission Enforcement Action and Notice of Covered Action

On Redacted the Securities and Exchange Commission ("Commission" or "SEC") filed a complaint in the U.S. District Court Redacted against Redacted for engaging in Redacted On Redacted the district court entered a default judgment against Redacted and Redacted. Among other relief, the court ordered Redacted to pay disgorgement in the amount of Redacted prejudgment interest in the amount of Redacted and a civil penalty of Redacted

On Redacted the OWB posted NoCA Redacted for the Redacted Matter.

II. Redacted Claim is Denied

A. Background

On Redacted the 90-day period established by Rule 21F-10(b) to submit an award claim expired without Redacted having made a submission. Instead, Redacted submitted — award claim dated Redacted – more than Redacted late.

B. The Preliminary Determination

On Redacted the CRS issued a Preliminary Determination recommending that Redacted claim be denied because it was untimely.

C. Redacted Response to the Preliminary Determination

On Redacted submitted a response pursuant to Rule 21F-10(e)(2), 17 C.F.R. § 240.21F-10(e)(2), contesting the Preliminary Determination. Redacted conceding that — claim was late, argued that the Commission should nonetheless excuse — untimely filing due to certain purported "extraordinary circumstances." Redacted identified two considerations that — argues rise to the level of an extraordinary circumstance that should excuse — untimely filing: (i) Redacted purportedly provided information to SEC and other federal investigators relating to the Redacted fraud that — claims "led directly to the Redacted Redacted and (ii) — lacked knowledge about the whistleblower program until "[s]hortly after Redacted the date charges were filed against the Defendants in the Redacted matter.

D. Analysis

Under Rule 21F-8(a), "the Commission may, in its sole discretion, waive" the 90-day filing requirement "upon a showing of extraordinary circumstances." 17 C.F.R. § 240.21F-8(a). We find, however, that Redacted has not made the necessary showing to trigger our discretionary authority to waive that requirement.

In determining whether a claimant has demonstrated extraordinary circumstances to excuse an untimely submission under Rule 21F-8(a), we look to our analogous decision in *In the Matter of the Application of PennMont Securities et al.*, SEC Rel. No. 34-61967, 2010 WL 1638720 (April 23, 2010) (hereinafter "*PennMont*"), *aff'd* 414 Fed. Appx. 465 (3d. Cir. 2011). There, in determining whether extraordinary circumstances were shown to permit an untimely filing under Commission Rule of Practice 420(b), 17 C.F.R. § 201.420(b), we explained that "the 'extraordinary circumstances' exception is to be narrowly construed and applied only in limited circumstances." *PennMont*, 2010 WL 1638720 at *4. Accordingly, after examining analogous areas of federal law, we determined that demonstration of an extraordinary circumstance in the context of a late filing requires a person seeking relief to show that "the reason for the failure to timely file was beyond [his or her] control [.]"*Id.* Further, we identified attorney misconduct or serious illness that presented the applicant from making a timely filing as two examples of the types of showing an applicant must make for us to consider exercising our discretionary authority to excuse an untimely filing. *Id.*

In *PennMont*, we also concluded that "[e]ven when circumstances beyond the applicant's control give rise to the delay, however, an applicant must also demonstrate that he or she promptly arranged for the filing … as soon as reasonably practicable thereafter." *Id.* Indeed, we admonished that "[a]n applicant whose application is delayed as a result of extraordinary circumstances remains under an obligation to proceed promptly" thereafter in making his submission. *Id.*

Applying the *PennMont* standard here, we think it apparent that neither of the considerations that Redacted has identified rises to the level of an extraordinary circumstance under Rule 21F-8(a). Redacted has not demonstrated how, if at all, -- purported role in leading to the Redacted behind the Redacted and the impact that this may in turn have had on the recovery of significant funds, constitutes an extraordinary circumstance such that we may excuse -- untimely award claim.

We understand Redacted to claim that, at the time the Notice of Covered Action was posted, -- was unaware that the information that -- had shared would lead to Redacted Redacted Redacted This, however, does not constitute an extraordinary circumstance beyond Redacted control that excuses -- failure to timely file an award application with respect to the *Commission's successful enforcement action.*[2] The 90-day deadline set forth in Rule 21F-10(b) was intended both to ensure fairness to

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[2] We note that, in order to qualify for an award based upon information provided to criminal authorities in connection with a related criminal action, Redacted would first have to qualify for an award in the Commission's enforcement action. *See* Rule 21F-3(b), 17 C.F.R. § 240.21F-3(b). Even if -- application were timely, -- would likely not be eligible for an award because nothing in the record (including the information that the claimant has submitted) indicates that -- information led to the successful enforcement of the Redacted by the Commission.

potential claimants by giving all an equal opportunity to have their competing claims evaluated at the same time, and to bring finality to the claims process so that we can make timely awards to meritorious whistleblowers.[3] To reopen the process to consider claims based on purported assistance provided to investigators in collecting money long after the deadline has passed for claims to be filed in response to a NoCA would undercut these important goals and make the whistleblower claims process unworkable. For this reason, and consistent with our analysis in *PennMont*, we do not view Redacted claim as justifying a waiver of the filing deadline based upon "extraordinary circumstances."[4]

Turning to Redacted second claim for relief, we find that -- lack of awareness about the whistleblower program until "[s]hortly after Redacted does not constitute an extraordinary circumstance justifying a waiver of the timing requirement. As an initial matter, we have serious doubts that such lack of awareness by a claimant could ever rise to the caliber of circumstances beyond a party's control for which we would exercise our Rule 21F-8(a) authority. That said, we need not conclusively decide the issue today. Even if we were persuaded to see that issue in Redacted favor, -- would still not be eligible for discretionary relief because -- has offered no explanation for why it took -- until Redacted -- approximately Redacted after supposedly first learning about the whistleblower program – to "prepare the paperwork" to file -- award claim. Redacted failure to proceed promptly upon supposedly learning of the whistleblower program is, under the *PennMont* standard, fatal to -- already weak request that we exercise our discretionary authority here.[5]

III. Conclusion

Accordingly, upon due consideration under Rule 21F-10(h), 17 C.F.R. § 240.21F-10(h), it is hereby ORDERED that Redacted whistleblower award claim be, and hereby is, denied.

By the Commission

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

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[3] *See Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 172 (May 25, 2011).

[4] We see nothing about subsequent developments in the Redacted that excuses under the *PennMont* standard Redacted untimely application. We fail to see how subsequent developments in the Redacted have any relevance to alerting Redacted that -- was a potential claimant in the Commission's action, as those developments would have no bearing on whether -- had provided the Commission information that "led to" the earlier success of the Commission's action.

[5] If the Commission believes that an award is merited notwithstanding that the untimely filing was within the claimant's control, the Commission could still have recourse to its general exemptive authority under Section 36(a) of the Exchange Act. However, we do not find any evidence that would support the Commission exercising its authority to exempt Redacted from --- obligation to have timely filed.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72185 / May 19, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31048 / May 19, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15873

In the Matter of

Thomas R. Delaney II and
Charles W. Yancey

Respondents.

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 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to 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") against Thomas R. Delaney II ("Delaney") and Charles W. Yancey ("Yancey").

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. Penson Financial Services, Inc. ("Penson") was one of the largest independent clearing firms in the United States. As a participant of a registered clearing agency, Penson had strict obligations under Rules 204T and 204 of Regulation SHO, 17 C.F.R. 242.204 ("Rule 204T/204") to purchase or borrow sufficient shares to close out failures to deliver to a registered clearing agency for all sales of equity securities that it cleared. Generally, this required Penson to close out fails to deliver in the Continuous Net Settlement ("CNS") System resulting from long or short sales within certain timeframes.

For short sales, Penson was required to close out the CNS failure to deliver no later than the beginning of regular trading hours, i.e., market open, on the fourth day after the transaction (T+4). For long sales, Penson was required to close out the CNS failure to deliver no later than the beginning of regular trading hours on the sixth day after the transaction (T+6).

2. When Penson's customers caused a CNS failure to deliver, Penson purchased or borrowed shares to fulfill its close-out obligations and passed along the costs of those transactions to its customers. In some circumstances, Penson profited from those transactions.

3. In thousands of occasions, however, Penson was not able to pass along the cost of compliance with Rule 204T/204 because the CNS failure to deliver was not caused by a customer, but rather by Penson itself. Penson's Stock Loan ("Stock Loan") generated revenue and financed Penson's operations by loaning out shares held in customer margin accounts. When the customers sold those shares, Penson had a CNS delivery obligation arising from the sale but, due to the open stock loan, did not have shares on hand with which to fulfill that obligation. Such transactions are hereinafter referred to as "long sales of loaned securities." As a result of its stock lending activities, Penson frequently failed to deliver to CNS on long sales of loaned securities.

4. Two departments within Penson had primary responsibility for complying with Penson's Rule 204T/204 obligations for long sales: Stock Loan and Buy Ins ("Buy Ins"). The two departments worked together closely to fulfill those obligations. Buy Ins reviewed a report of all long sale CNS level fails and determined whether the failure to deliver resulted from the customer failing to provide the security to Penson, or from Penson's securities lending activities. Buy Ins retained responsibility for closing out CNS failures to deliver caused by the customer's account-level failure to deliver. For the CNS failures to deliver resulting from long sales of loaned securities, Buy Ins informed Stock Loan of the CNS failure to deliver and passed the Rule 204T/204 close-out obligation on to Stock Loan.

5. Senior officers in Stock Loan knew Rule 204T(a)/204(a) required Penson to close out those CNS failures to deliver resulting from long sales no later than market-open on T+6. Instead of directing that Stock Loan be bought in to fulfill Penson's delivery obligations, or take some other action to comply with the rule, those senior officers willfully ignored the rule's requirements. They did so because they did not want the costs of compliance with Rule 204T/204(a) to negatively affect Stock Loan's net revenues. As a result, they caused Penson to violate the rule thousands of times from October 2008 until November 2011.

6. Penson's Written Supervisory Policies and Procedures ("WSPs") delegated responsibility for supervision at Penson, including responsibility for designating supervisors and allocation of supervisory responsibilities, to Penson's Chief Compliance Officer ("CCO"), Delaney. Delaney knew Rule 204T(a)/204(a) required market-open, T+6 close-outs for CNS fails resulting from long sales, including long sales of loaned securities. Delaney also knew, from 2008 through 2011, that Stock Loan's procedures did not comply with that rule.

7. Motivated by financial considerations, Delaney affirmatively assisted the violations resulting from the Stock Loan procedures. Delaney agreed with Stock Loan officers that Stock Loan would continue implementing the non-compliant procedures and he agreed to reject certain procedures that would have brought Penson into Rule 204T/204(a) compliance because he did not want Penson to incur the associated costs. This financial motivation pervaded Delaney's approach to Rule 204T(a)/204(a) compliance. Where Penson was able to pass along costs or even profit from Rule 204(a) compliance – such as with Buy Ins's Rule 204T(a)/204(a) responsibilities – Delaney worked to bring Penson into compliance. But, where Penson was required to absorb the costs of compliance – as was the case with closing out CNS fails resulting from long sales of loaned securities – Delaney supported Stock Loan in implementing the intentionally non-compliant procedures.

8. Delaney further aided and abetted and caused Penson's violations by intentionally concealing the violations from regulators; authorizing WSPs that he knew concealed the actual, non-compliant procedures; establishing and maintaining a Supervisory System that he knew allowed the Senior Vice President of Stock Loan to remain effectively unsupervised; and attempting to conceal the violations from Penson's President / CEO, Yancey.

9. Penson's WSPs designated Yancey, Penson's President / Chief Executive Officer, as the direct supervisor of the Senior Vice President of Stock Loan and Delaney. Yancey exercised no supervision over the Senior Vice President of Stock Loan and, operating in that supervisory vacuum, the Senior Vice President of Stock Loan willfully aided and abetted Penson's Rule 204T/204(a) violations relating to long sales of loaned securities. Yancey also failed to supervise Delaney with a view towards preventing and detecting Delaney's aiding and abetting of Penson's Rule 204T/204(a) violations relating to long sales of loaned securities. Yancey failed to supervise Delaney by turning a blind eye to red flags indicating that Delaney was aware of and substantially assisted Stock Loan's Rule 204T/204(a) violations relating to long sales of loaned securities.

10. As a result of Delaney's misconduct, Penson systematically violated Rule 204T(a)/204(a)'s market-open CNS close-out requirement for long sales of loaned securities from October 2008 until November 2011. Additionally, because Yancey did not fulfill his supervisory responsibilities, Yancey failed to prevent and detect the aiding and abetting violations by the Senior Vice President of Stock Loan and Delaney.

B. RESPONDENTS

11. Delaney, 42, of Colleyville, Texas, was the CCO at Penson from at least October 2008 through April 2011. Delaney currently works in compliance at a registered broker-dealer. He holds Series 4, 7, 24, 27, 53, and 63 licenses.

12. Yancey, 56, of Colleyville, Texas, was the President/CEO of Penson from at least October 2008 through February 2012. Yancey is currently the Managing Director of clearing and execution services at a registered broker-dealer. Yancey holds Series 7, 24, 55, and 63 licenses.

C. OTHER RELEVANT ENTITY

13. Penson was a North Carolina corporation with a principal place of business in Dallas, Texas. It was a broker-dealer registered with the Commission, which, from at least 2010 to 2012, was one of the largest clearing firms in the United States as measured by the number of correspondent brokers for which it cleared. Penson was a wholly-owned subsidiary of SAI Holdings, Inc., which in turn was a wholly-owned subsidiary of Penson Worldwide, Inc. ("PWI"). Penson filed a Form BDW, which was effective in October 2012, and then declared bankruptcy in January 2013. A bankruptcy plan implementing Penson's liquidation was approved in July 2013.

D. ALLEGATIONS

Background

14. Rule 204T/204 was adopted to, among other things, address prolonged failures to deliver. Rule 204T became effective on September 18, 2008 and Rule 204 became effective on July 31, 2009.

15. Rule 204T/204 requires participants of a registered clearing agency to deliver equity securities to a registered clearing agency when delivery is due; that is, by settlement date. As relevant here, settlement date is generally three days after the trade date ("T+3"). For short sales, if the participant does not deliver securities by T+3 and has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver), it must take affirmative action to close-out the failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on the settlement day following the settlement date ("T+4"). For long sales, if the participant has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver), it must take affirmative action to close-out the failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on the third day following the settlement date ("T+6").

16. The Depository Trust and Clearing Corporation ("DTCC") operates the National Securities Clearing Corporation ("NSCC"), a clearing agency registered with the Commission that clears and settles the majority of United States transactions in equities. When NSCC members purchase or sell securities on the exchanges, the exchanges send the trade information to the NSCC. NSCC operates the Continuous Net Settlement ("CNS") system. NSCC member clearing firms receive reports that, as of at least close of business T+1, notify the firms of transactions scheduled to clear and settle by close of business T+3. CNS also sends reports to the firms listing net fails to deliver in each security as of T+3.

Penson Violates Rule 204 of Regulation SHO

17. At all relevant times, Penson was a clearing firm, i.e., a participant of a registered clearing agency and a member of NSCC. As a clearing firm, Penson had

obligations under Rule 204(a) to close out CNS failures to deliver resulting from long sales no later than market open T+6.

18. From October 2008 until November 2011, Penson systematically failed to close out CNS failures to deliver resulting from long sales of loaned securities by market open T+6. The relevant long sales originated with securities held in customer margin accounts. Under the Commission's customer protection rule, Penson is permitted, subject to certain conditions and limitations, to re-hypothecate margin securities to third parties. Penson re-hypothecated margin securities according to the terms of the Master Securities Lending Agreement ("MSLA") developed by the Securities Industry and Financial Markets Association ("SIFMA").

19. When a margin customer sold the hypothecated securities that were out on loan, Penson issued account-level recalls to the borrowers on T+3, i.e., three business days after execution of the margin customer's sale order. When the borrowers did not return the shares by the close of business T+3, and Penson did not otherwise have enough shares of the relevant security to meet its CNS delivery obligations, Penson incurred a CNS failure to deliver. When the open stock loan continued to cause a CNS failure to deliver as of market open T+6, Penson did not purchase or borrow shares sufficient to close out its CNS failure to deliver position. Instead, Penson allowed its CNS failure to deliver position to persist beyond market open T+6.

Stock Loan Adopts Procedures That Cause Penson to Violate Rule 204T/204 For Long Sales of Loaned Securities

20. Stock Loan was included on the organizational charts of PWI, the parent company, rather than within Penson, which was then a registered broker-dealer. However, the policies and procedures of Penson treated Stock Loan as part of the broker-dealer and the employees of Stock Loan as associated persons of the broker-dealer. Stock Loan personnel had direct access to Penson's account with NSCC and conducted all securities lending activity on behalf of Penson. Stock Loan had primary responsibility at Penson for effecting Rule 204(a) close-outs of Penson's CNS failures to deliver resulting from long sales of loaned securities.

21. Stock Loan initially attempted to comply with Rule 204T for long sales of loaned securities by recalling loans at the account level on T+3 and buying in the borrowers at market open T+6. However, because the MSLA gave the borrowers three full days (until close-of-business T+6) to return the shares, the borrowing counterparties pushed back against Penson's attempted market-open T+6 buy ins.

22. In response to this push back, Stock Loan stopped trying to buy in the borrowing counterparties by market open T+6. Instead, Stock Loan allowed CNS failures to deliver resulting from long sales of loaned securities to persist beyond market open T+6. In certain circumstances, Stock Loan allowed the CNS fail to persist for days beyond T+6. Stock Loan personnel did not take any affirmative steps, such as purchasing or borrowing securities, in order to close out Penson's CNS failure to deliver position. Additionally,

Stock Loan personnel did not recall securities earlier than T+3 so that Penson would be able to buy in the borrowing counterparties before market-open T+6.

23. These actions resulted in direct financial benefit to Stock Loan and, by extension, Penson. Stock Loan avoided the costs and market risks associated with buy ins and/or borrows. It also profited by keeping stock out on loan rather than recalling it so that it could be delivered in a timely fashion.

24. Stock Loan's non-compliant Rule 204T(a)/204(a) procedures relating to long sales of loaned securities were in place from at least October 2008 until November 2011.

Delaney's Misconduct

25. Delaney was Penson's CCO when Rule 204T was implemented in September 2008. He continued in that position at Penson until April 2011.

26. As Penson's CCO, if Delaney learned that associated personnel were not following the securities laws, he was required to investigate and report his findings to members of senior management where those persons reported.

27. Delaney participated in Penson's efforts to implement procedures in response to Rule 204T in October 2008 and to Rule 204 in July 2009. Delaney knew at all relevant times that Rule 204T/204 required Penson to close out CNS failures to deliver resulting from long sales by market open T+6.

28. Delaney also knew at all relevant times that Stock Loan was not complying with the T+6 market-open close-out requirement for CNS fails resulting from long sales, including long sales of loaned securities. In or around October 2008, in the context of Penson's efforts to respond to Rule 204T, Delaney met with Stock Loan supervisors and discussed the fact that Stock Loan was not complying with that requirement. Stock Loan supervisors informed Delaney that they were not closing out CNS failures to deliver on long sales of loaned securities until approximately close of business T+6, when they were able to effect buy ins against borrowers under the MSLA.

29. Delaney next discussed Stock Loan's non-compliant procedures for CNS failures to deliver resulting from long sales of loaned securities with Stock Loan supervisors in or around July 2009, when Rule 204T became permanent Rule 204. In this context, he had several discussions with Stock Loan supervisors about the intentionally non-compliant Rule 204(a) procedures for long sales of loaned securities. Based on these discussions, Stock Loan understood that Delaney supported their non-compliant approach.

30. In December 2009, Penson's Compliance Department conducted an NASD Rule 3012 internal audit of the Rule 204T/204 close-out procedures for Buy Ins, which had been in place at Penson from October 2008 forward. The audit uncovered severe compliance deficiencies – Penson's compliance personnel sampled 113 CNS failures to deliver resulting from both long sales and short sales and found that Buy Ins' procedures resulted in Rule 204(a) violations for 112 out of the 113 securities sampled (99% failure

rate). Delaney understood this NASD Rule 3012 audit had revealed massive and profound failures relating to Buy Ins's Rule 204T(a)/204(a) procedures that were anomalous during his tenure as CCO.

31. The relevant Buy Ins Rule 204T(a)/204(a) procedures were intertwined with Stock Loan's Rule 204T(a)/204(a) procedures for long sales of loaned securities. Due to this nexus between the Buy Ins and Stock Loans' Rule 204T(a)/204(a) procedures, when one of the supervisors in Buy Ins reviewed Buy Ins Rule 204T(a)/204(a) procedures in response to the audit he learned that Stock Loan was not complying with Rule 204(a) for long sales of loaned securities. The Buy Ins supervisor then met with Stock Loan supervisors and Delaney. At this meeting, which occurred in late 2009 or early 2010, Stock Loan Supervisors explained that Penson was not complying with Rule 204(a) for long sales of loaned securities, and erroneously claimed Penson was following contrary industry practice. At this meeting, Delaney agreed with Stock Loan Supervisors that Penson would not implement options such as T+2 account level recalls or purchases into inventory that would have brought Penson into compliance because those options imposed costs on Penson.

32. In July 2010, Delaney reviewed e-mail discussions between compliance and operational personnel about Stock Loan's non-compliant procedures for close outs of CNS failures to deliver resulting from long sales of loaned securities.

33. In late 2010 to early 2011, Delaney again discussed the violations with compliance and operational personnel.

34. As a result, Delaney knew Penson was violating Rule 204T(a)/204(a) in connection with long sales of loaned securities. And, when Stock Loan erroneously claimed in discussions with Delaney that it was industry practice not to follow Rule 204T(a)/204(a), Delaney understood that industry practice was no excuse for failing to follow the securities laws.

35. But, even though he knew about the violations relating to long sales of loaned securities for nearly two-and-one-half years, Delaney took no steps to ensure that Stock Loan changed its procedures to comply with Rule 204T(a)/204(a). Additionally, Delaney did not investigate the violations or report his findings to members of senior management where Stock Loan supervisors reported. Indeed, Delaney never escalated his knowledge about Stock Loan's Rule 204T(a)/204(a) violations to Yancey, even though Delaney participated in numerous meetings with Yancey in 2010 to discuss the closely-related Rule 204(a) procedures for Buy Ins.

36. Delaney's conduct relating to Penson's Rule 204T(a)/204(a) violations in connection with Stock Loan's procedures is in stark contrast to his actions relating to Buy Ins. After reviewing all long sale CNS fails to determine the reason for the fail, Penson's Buy Ins handled close outs of CNS failures to deliver resulting from transactions initiated by customers who sold short or customers who sold long but failed to provide the shares to Penson by settlement date. In those circumstances, Penson could pass along the cost of Rule 204T/204 compliance (i.e., borrowing or buying before market open) to the customer.

In many circumstances, Penson was able to pass along the cost of compliance at a mark-up. Upon learning of systematic Rule 204T/204 deficiencies in Buy Ins through the December 2009 audit, Delaney oversaw extensive remediation efforts.

37. However, Buy Ins informed Stock Loan of long sales resulting in CNS fails due to open stock loans, and Stock Loan was responsible for closing out those CNS fails. Because those CNS failures to deliver were not caused by the action of any customers, there was no one other than Penson to absorb the cost of the close outs. When Penson would have been forced to pay for its Rule 204T(a)/204(a) compliance, Delaney affirmatively caused Penson to violate the rule. Indeed, in 2009 or early 2010 – about the same time Delaney began overseeing Rule 204 remedial efforts for Buy Ins's procedures – Delaney and Stock Loan rejected procedures that would have brought Penson into compliance because they did not want Penson to incur the costs of those procedures.

38. Instead of taking steps to bring the Stock Loan Rule 204T(a)/204(a) procedures into compliance at any point during his tenure as CCO of Penson, Delaney agreed with Stock Loan Supervisors that Penson would continue implementing non-compliant Rule 204T(a)/204(a) procedures.

39. Thus, Delaney consciously chose profits over compliance. This was only the starting point for Delaney's misconduct. Delaney also repeatedly, and knowingly, concealed the violations from regulators.

40. In January 2010, at about the same time he agreed with Stock Loan to continue implementing non-compliant Rule 204(a) procedures, Delaney compiled Penson's WSPs for delivery to FINRA as part of a FINRA Rule 1017 application. FINRA had been very clear with Delaney that they were going to be "poring over the WSPs with a fine-tooth comb." On January 25, 2010, Delaney forwarded a set of Stock Loan WSPs to one of his junior Compliance Specialists for comment before delivering the WSPs to FINRA. The junior Compliance Specialist responded that the Stock Loan WSPs Delaney sent him did not include Stock Loan's Rule 204 procedures. The officer attached the missing section of the Stock Loan WSPs, noted several deficiencies in them, and specifically recommended that Penson "include close-out requirement procedures in the WSPs." Not surprisingly, the Stock Loan WSPs were silent on that front, as Stock Loan and Delaney had not detailed the willfully non-compliant procedures in Stock Loan's WSPs.

41. Delaney was then copied on two emails from Penson's Compliance Department delivering the Stock Loan WSPs to FINRA as part of Penson's Rule 1017 application. Those WSPs omitted all discussion of Stock Loan's actual, non-compliant close-out procedures relating to long sales of loaned securities. Instead, those WSPs were intentionally designed to conceal the relevant procedures. The relevant WSP section had two parts: one titled "Close-Out Requirements for Fail [sic] to Deliver (SEC Rule 10b-21; Regulation SHO Rule 204)," and a subsequent part titled "Procedures Adopted in Accordance With Rule 204." The first part correctly articulated the regulatory requirement that CNS failures to deliver resulting from long sales had to be closed out by market open T+6. But the subsequent part contained no discussion of any procedures Penson had adopted in accordance with that Rule 204(a) requirement. Instead, the section detailed

Stock Loan's procedures for maintaining an easy-to-borrow list and providing locates – procedures that were relevant to Penson's compliance with Rule 203, not Rule 204. The second part finished with a brief description of procedures designed to ensure close outs of CNS failures to deliver resulting from short sales by T+4. Thus, the WSPs for Stock Loan's compliance with Rule 204 relating to long sales of loaned securities went beyond silence about the actual practices and procedures to an affirmative effort to mislead by including a confusing discussion about locate and easy-to-borrow procedures instead of discussing Rule 204 close-out procedures.

42. Delaney knew that, due to the significant nexus between the Buy Ins and Stock Loans' Rule 204(a) procedures, any significant inquiry into the December 2009 NASD Rule 3012 audit showing the 99% Rule 204(a) violation rate for Buy Ins risked leading to Stock Loan's Rule 204(a) violations and his own related misconduct. Indeed, Delaney knew that an inquiry by the Buy Ins supervisor in response to the December 2009 audit had led directly to that supervisor's discovery of the intentional Stock Loan Rule 204(a) violations and Delaney's role in them. Therefore, Delaney intentionally, and repeatedly, concealed both the Buy Ins Rule 204(a) deficiencies and intentional Stock Loan Rule 204(a) violations from regulators.

43. On March 31, 2010, Delaney met with Yancey to discuss Yancey's annual certification of Penson's compliance testing procedures. As part of that certification, Delaney prepared an Annual Report that, per Penson's WSPs, was to discuss Penson's "key compliance problems" for the period April 1, 2009 through March 31, 2010. Delaney understood the report was also supposed to detail the significant results of Penson's NASD Rule 3012 testing for that same period. At the March 31, 2010 meeting, the principal item of discussion was the results of the December 2009 audit showing the 99% Rule 204(a) violation rate resulting from Buy Ins' procedures – a compliance failure that Delaney characterized as "massive," "profound" and "anomalous."

44. Delaney's March 31, 2010 Annual Report appended to Yancey's certification omitted two critical facts relating to Penson's Rule 204 compliance: (1) the results of the December 2009 NASD Rule 3012 audit revealing Buy Ins's Rule 204T(a)/204(a) compliance failures; and (2) the ongoing, willful Rule 204(a) violations relating to long sales of loaned securities by Stock Loan.

45. On March 31, 2010, Delaney personally emailed the certification and Annual Report to FINRA in response to its specific request for the documents. That same day, Penson's compliance personnel uploaded the documents to Penson's FINRA gateway and separately emailed the Annual Report to other FINRA personnel. On April 1, 2010, compliance personnel sent the Annual Report to the Chicago Board Options Exchange ("CBOE"). In September 2010, compliance personnel sent the Annual Report to the National Stock Exchange, Inc. ("NSX") in response to an information request.

46. On April 8, 2010, the Commission's Office of Compliance, Inspections and Examinations ("OCIE") informed Penson it had learned Penson was having problems executing close outs at market open and asked for an explanation. On April 14, 2010, a junior Penson compliance officer asked OCIE to clarify how it had learned about the

potential close-out problems. That same day, OCIE sent the junior compliance officer, and Delaney the following clarification and request for information: "During staff's review of fails to deliver and conversations with the firm regarding 204T compliance, Penson represented and in documents produced evidenced that the firm did not always buy-in to close-out a fail to deliver position at the market open. The reason the firm provided for not buying-in at the open was because of manual processes and system limitations. Q. What is the system limitations that prevent the firm from executing buy-ins at the market open? Has the firm fixed the system limitations and manual processes to now execute buy-ins at the market open? If so, please provide the date the firm corrected this issue."

47. Delaney knew the information OCIE had received as of April 14, 2010 – that the reason "for not buying-in at the open was because of manual processes and system limitations" – was false and misleading. Delaney knew that, for long sales of loaned securities, the reason for "not buying-in at the open" was a conscious decision to systematically violate Rule 204T/204.

48. On April 22, 2010, the junior compliance officer sent Penson's response to OCIE. The response stated: "[Penson] I would like to note that the majority of any Regulation SHO buy-ins are and have been covered by stock borrow or executing closing trades prior to the market open." This response was false in light of information known to Delaney. Delaney knew the December 2009 audit showed that 99% of Buy Ins' Rule 204(a) close outs in fact occurred after market open. The statement was also directly contrary to Delaney's agreement with Stock Loan, affirmed just months earlier, that Penson would not close out CNS failures to deliver resulting from long sales of loaned securities at market open.

49. Penson's April 22, 2010 response continued: "For instances where we were unable to complete buy-ins prior to market open, buy ins were typically executed within 15 minutes of market open." This also was directly contrary to the findings of the December 2009 audit. The December 2009 audit memorandum reported that Buy Ins' Rule 204(a) close outs of short sales occurred "anywhere from 30 minutes to a 1 hour and 15 minutes after the market open" and that Buy Ins' Rule 204(a) close outs of long sales occurred "anywhere from 4 hours from the market open to up until 11 minutes of the market close." Additionally, Delaney knew the representation to OCIE was directly contrary to the intentionally non-compliant Stock Loan's Rule 204T(a)/204(a) procedures, under which Stock Loan did not close out the CNS fails resulting from long sales of loaned securities – if at all – until it bought in the borrowing counterparties at close-of-business on T+6.

50. On May 10, 2010, a compliance officer forwarded the April 22, 2010 response to Delaney, stating "Tom, Attached is a copy of the most recent response, as well as a link to the examination folder." In October 2010, the junior compliance officer who signed the April 22, 2010 response forwarded the response to Delaney as part of Delaney's efforts to respond to the OCIE exam deficiency finding.

51. Delaney took no steps to correct the numerous misrepresentations to OCIE in those April 2010 communications from the Compliance Department.

52. In June and July 2010, Delaney coordinated with his staff to formally approve an updated version of Penson's WSPs. In so doing, Delaney reviewed certain updates to the WSPs that were provided to FINRA in January 2010 as part of the Rule 1017 application discussed above. Delaney knew that Penson's WSPs, which included the Stock Loan WSPs, did not reflect Stock Loan's actual business practices. In fact, as discussed above, Penson's WSPs went beyond silence about the actual, intentionally non-compliant practices and procedures to an affirmative effort to mislead by focusing primarily on confusing references to procedures relating to Rule 203 requirements. Delaney knew, or absent recklessness must have known, that the Stock Loan WSPs update he approved would have the effect of concealing the ongoing violations from regulators. The misleading Stock Loan WSP provisions relating to Rule 204 close-outs for long sales remained in Penson's WSPs through the remainder of Delaney's tenure at Penson, and, with Delaney's knowledge, were sent to regulators on numerous occasions.

53. Delaney's final act of concealing Buy Ins's Rule 204(a) deficiencies and the closely-related Stock Loan misconduct from regulators was his most significant. Beginning in 2009, OCIE conducted a review of Penson's Rule 204T procedures. In October 2010, OCIE issued Penson a deficiency letter reporting that OCIE had found Rule 204T(a) violations. The findings reported to Penson in the deficiency letter included findings that Penson had violated Rule 204T in connection with short sales along with specific instances of Stock Loan's intentional Rule 204T(a) violations relating to long sales of loaned securities.

54. In its November 24, 2010 response to OCIE's deficiency findings, Penson stated the following: "Penson feels that the reasonable processes employed to close out positions that were allegedly in violation of rule [sic] 204T were effective and performed as designed."

55. This statement was false and misleading in light of facts known to Delaney in November 2010, specifically: (1) the results of the December 2009 internal compliance audit showing fundamental deficiencies in Penson's Rule 204T/204 processes for Buy Ins; and (2) Stock Loan's willfully non-compliant Rule 204T/204 processes for closing out CNS failures to deliver resulting from long sales of loaned securities.

56. Delaney was directly responsible for this misrepresentation to OCIE. As CCO of Penson, Delaney had final responsibility for the contents of the letter to OCIE. Furthermore, Delaney directly participated in drafting the misrepresentation. On November 8, 2010, a supervisor in Buy Ins emailed Delaney a short, 1.5 page draft of selected responses to OCIE's findings. That draft contained the first version of the misrepresentation: "Penson feels that the processes and procedures employed to close out positions that were in violation of rule 204T were effective and performed as designed."

57. On November 15, 2010, a junior compliance officer shepherding the drafting process emailed Delaney a full draft of Penson's responses to OCIE. That draft contained the language from the November 8, 2010 draft collection of selected responses regarding Penson's Rule 204T processes and procedures.

58. On November 19, 2010, Delaney emailed the junior compliance officer stating "Attached is my re-draft with a couple of additional notes." Delaney's November 19, 2010 re-draft edited the key language from the November 15, 2010 draft as follows: "Penson feels that the reasonable processes ~~and procedures~~ employed to close out positions that were allegedly in violation of rule 204T were effective and performed as designed."

59. On November 24, 2010, Delaney was copied on an email seeking final review of the letter before delivery to OCIE. That draft, and the final draft delivered to OCIE on November 24, 2010, contained the exact language from Delaney's November 19, 2010 draft.

60. In addition to concealing the intentional violations relating to long sales of loaned securities from regulators, Delaney substantially assisted those violations by exploiting a fundamental flaw in Penson's Supervisory System that allowed Stock Loan to operate without supervision. Delaney also substantially assisted the intentional Rule 204(a) violations relating to long sales of loaned securities by attempting to conceal them from Yancey.

61. Penson's WSPs assigned Delaney specific responsibility for "establishing and maintaining Penson's Supervisory System." This included responsibility for designating supervisors, allocating responsibilities, and assigning personnel to appropriate supervisors. Per this responsibility, Delaney was personally involved in preparing a Supervisory Matrix, incorporated into Penson's WSPs, which established the chain of regulatory supervision at Penson. From 2009 to 2011, the Supervisory Matrix designated Yancey as supervisor for the Senior Vice President of Stock Loan, the individual with primary responsibility within Stock Loan for the non-compliant Rule 204(a) procedures.

62. But Delaney knew that Yancey in fact was not supervising the Senior Vice President of Stock Loan because the Senior Vice President of Stock Loan and Yancey informed him of that fact. Additionally, in early-to-mid 2010, Yancey expressed serious concerns to Delaney about Yancey's lack of supervision over the Senior Vice President of Stock Loan. Yancey told Delaney that Yancey did not trust the Senior Vice President of Stock Loan, that Yancey lacked adequate visibility into and control over the Senior Vice President of Stock Loan's actions, and that Yancey was concerned the Senior Vice President of Stock Loan was exposing Penson and Yancey to liability.

63. Delaney knew these concerns were well-founded. He knew that, from 2008 forward, the Senior Vice President of Stock Loan had been intentionally causing Penson to violate Rule 204T(a)/204(a) relating to long sales of loaned securities. He also knew that, just months earlier, he and the Senior Vice President of Stock Loan had considered and rejected procedures that would have brought Penson into compliance with Rule 204(a). But, even after Yancey expressed his concerns, Delaney withheld this critical information from Yancey.

64. Delaney withheld this critical information about the Rule 204T(a)/204(a) violations relating to long sales of loaned securities, along with his and the Senior Vice President of Stock Loan's misconduct, in other key interactions with Yancey. As

discussed, Delaney met with Yancey on March 31, 2010 to discuss Yancey's CEO Certification and Delaney's Annual Report. The meeting focused primarily on Penson's Rule 204T(a)/204(a) deficiencies in Buy Ins, but Delaney did not inform Yancey of the closely-related Rule 204T(a)/204(a) violations relating to Stock Loan and long sales of loaned securities. Nor did Delaney inform Yancey of his agreement just months earlier with the Senior Vice President of Stock Loan not to implement compliant procedures and to reject procedures that would have brought Penson into compliance with Rule 204(a) for long sales of loaned securities. Instead, Delaney focused solely on remediation efforts relating to Buy Ins.

65. A few months later, in July 2010, Delaney was copied on a series of emails between Buy Ins, Stock Loan and compliance personnel confirming Stock Loan was continuing to cause Rule 204(a) violations relating to long sales of loaned securities. In the final email of the chain, one of Penson's junior Compliance Specialists stated the failure to deliver positions "should be flat by the end of the day" and "[p]referably this should be completed prior to or at market open."

66. Delaney reviewed the July 2010 email chain and knew, or absent recklessness should have known, the advice in the July 2010 email was incorrect because Rule 204(a) requires close-out of CNS fails no later than market open; this is not an option. Yet Delaney took no steps to address the ongoing violations, and took no steps to address the improper advice.

67. To the contrary, one week later, on August 2, 2010, Delaney met with Yancey to discuss the status of the efforts to remediate Buy Ins's Rule 204(a) deficiencies. Consistent with his actions during the March 31, 2010 meeting and the discussions in which Yancey expressed significant concerns about the Senior Vice President of Stock Loan, Delaney did not inform Yancey of the closely-related, ongoing Rule 204(a) violations relating to long sales of loaned securities.

68. By directing Yancey away from Stock Loan's Rule 204T(a)/204(a) compliance and repeatedly withholding the critical information about the Senior Vice President of Stock Loan's and Delaney's own misconduct from Yancey, Delaney subverted Penson's Supervisory System instead of establishing and maintaining it. And even though he knew Yancey was not in fact supervising the Senior Vice President of Stock Loan, Delaney continued to designate Yancey as the Senior Vice President of Stock Loan's supervisor in the Supervisory Matrix up until Delaney left Penson in April 2011. These actions allowed Stock Loan to avoid supervision and continue violating Rule 204T(a)/204(a) relating to long sales of loaned securities.

Yancey Fails to Supervise the Senior Vice President of Stock Loan

69. The Senior Vice President of Stock Loan was controlled by Penson and was an associated person of Penson. He had primary authority and responsibility within Stock Loan for its operational practices and for the Department's WSPs, which WSPs were incorporated into Penson's WSPs. The Senior Vice President of Stock Loan knew that Rule 204T(a)/204(a) required Penson to close out CNS failures to deliver for long sales,

including long sales of loaned securities, by market open T+6. From October 2008 through November 2011, the Senior Vice President of Stock Loan willfully implemented and enforced procedures that he knew were systematically causing Penson to violate Rule 204T(a)/204(a) in connection with long sales of loaned securities.

70. Penson's WSPs designated Yancey as the direct supervisor for the Senior Vice President of Stock Loan. Yancey was aware of that fact. However, from at least October 2008 through November 2011, Yancey did not exercise any supervision over the Senior Vice President of Stock Loan.

71. Yancey knew he lacked adequate insight into, and control over, the Senior Vice President of Stock Loan's securities lending activities. Yancey also knew there was a substantial risk that the Senior Vice President of Stock Loan was exposing Penson to potential liability. However, Yancey took no steps to acquire the requisite insight into, and control over, the Senior Vice President of Stock Loan's securities lending activities.

72. Yancey thus failed to detect and prevent the intentional misconduct by the Senior Vice President of Stock Loan.

Yancey Fails to Supervise Delaney

73. Penson's WSPs designated Yancey as Delaney's supervisor.

74. Yancey failed to fulfill his supervisory obligations by failing to follow up on red flags of Delaney's misconduct relating to his aiding and abetting Penson's violations of Rule 204T(a)/204(a). The 99% violation rate for Buy Ins' Rule 204T(a)/204(a) procedures uncovered by the December 2009 audit was a significant red flag to Yancey that Penson had systemic Rule 204 deficiencies and that Delaney, whom he supervised, might bear responsibility for those deficiencies. Paramount among these deficiencies was the willful violations originating with Stock Loan. As discussed, there was a direct nexus between the Buy Ins and Stock Loans' Rule 204T(a)/204(a) procedures such that a meaningful inquiry into the December 2009 audit results would have led directly to knowledge of the intentional Stock Loan violations. If Yancey had been at least as diligent as the Buy Ins supervisor in response to the December 2009 audit, he too would have discovered the intentional Stock Loan violations and Delaney's role in them.

75. The Senior Vice President of Stock Loan's conspicuous absence from the March 2010 meeting regarding the December 2009 audit was another fact that should have prompted vigorous follow up from Yancey. Yancey's initial instinct in response to the December 2009 audit was correct – Yancey's immediate response to the audit results was serious concerns about Stock Loan's Rule 204T(a)/204(a) procedures. Yancey requested that the Senior Vice President of Stock Loan attend the March 31, 2010 meeting to discuss the audit. But the Senior Vice President of Stock Loan refused to attend. At about the same time, Yancey informed Delaney he was concerned the Senior Vice President of Stock Loan was not trustworthy, that he presented significant risks to Penson's liability as well as Yancey's individual liability, and that Yancey lacked the insight he needed as CEO of Penson into Stock Loan's actions. Notwithstanding his understanding of the December

2009 audit's potential implications regarding Stock Loan procedures, the Senior Vice President of Stock Loan's refusal to meet with him regarding that audit, and Yancey's significant concerns about the Senior Vice President of Stock Loan and Stock Loan, Yancey took no steps to follow up regarding how Stock Loan's Rule 204 procedures may have been contributing to Penson's Rule 204 deficiencies.

76. Penson's WSPs, effective as of March 31, 2010, contained a section titled "Annual CEO Certification (RULE 3130): CEO and CCO Mandated Meeting." Those procedures identified Yancey, as CEO/President, and Delaney, as CCO, to be the relevant Designated Supervisory Principals. The procedures required as follows: "The CCO will prepare and provide the CEO (or equivalent officer) with an Annual Report that includes a review of [Penson]'s Supervisory System and Procedures and <u>key compliance issues</u>. The CCO will meet with the CEO to discuss and <u>review the report</u> and will meet at other times, as needed, to discuss other compliance matters." [Emphasis added.] The procedures further required Yancey to certify, among other things, that "<u>[c]ompliance processes are evidenced in a written report</u> reviewed by the CEO, CCO, and other appropriate officers and submitted to the Board of Directors and Audit Committee, if any." [Emphasis added.]

77. Per those procedures, on March 31, 2010, Yancey met with Delaney to review Delaney's Annual Report of Penson's key compliance issues. The primary topic at the meeting was the results of the December 2009 NASD Rule 3012 audit showing Penson's 99% failure rate for Buy Ins' Rule 204(a) procedures and Penson's efforts to amend its processes to remediate these compliance deficiencies.

78. At the conclusion of that meeting, Yancey signed CEO Certifications per FINRA Rule 3130 and NYSE Rule 342.30. Those certifications included copies of Delaney's Annual Report. Consistent with the WSPs' requirement that the report discuss "key compliance issues," the March 31, 2010 Annual Report contained a section titled "identification of significant compliance problems." But that section of the report was silent about Penson's Rule 204 deficiencies as identified in the December 2009 audit or any of the compliance processes that Penson enacted to correct the deficiencies. In fact, there was not one word anywhere in the Annual Report about these issues.

79. Thus, in violation of Penson's WSPs, Yancey falsely certified that Penson's "[c]ompliance processes [were] evidenced in a written report reviewed by the CEO, CCO and other appropriate officers." Contrary to the WSPs, Yancey also failed to ensure that the report discussed Penson's "key compliance issues."

80. Delaney's role in Yancey's March 31, 2010 CEO Certification and attendant Annual Report discussed above elevated the red flag presented by the December 2009 audit to an emergency flare. The Annual Report's omission of any discussion relating to the December 2009 audit was glaring in light of the facts known to Yancey about the audit and Penson's response. As of March 31, 2010, therefore, Yancey was aware that his CCO was omitting significant information about Penson's Rule 204T/204 deficiencies in a critical report prepared in accordance with Penson's WSPs and regulatory requirements.

81. This was a significant red flag of Delaney's misconduct relating to Rule 204T/204, and, if Yancey had followed up on that red flag he would have discovered the intentional Rule 204T(a)/204(a) violations relating to long sales of loaned securities and Delaney's role in them. But Yancey took no steps to follow up. Instead, Yancey failed to prevent and detect Delaney's misconduct by failing to address the red flags reflected in the materially misleading Annual Report.

82. Yancey was aware of another significant red flag regarding Delaney's misconduct, specifically the misrepresentations to OCIE in November 2010. As discussed above, Delaney participated in drafting and delivering a response to a Rule 204T exam by OCIE that materially misrepresented Penson's Rule 204T processes. Yancey knew the statement in the November 24, 2010 letter to OCIE that Penson's Rule 204T processes were "reasonable" "effective" and "performed as designed" was false in light of the December 2009 audit results. He also knew Delaney was responsible for the misrepresentation, because Yancey participated with him in the drafting process from start to finish – Yancey and Delaney were recipients on the email distributing the initial draft of the misrepresentation on November 8, 2010, and then, on November 24, 2010, Delaney and Yancey received the draft for their final review before delivery to OCIE.

83. Coming on the heels of the red flags presented by the December 2009 audit and Delaney's omissions in the March 31, 2010 Annual Report, these overt misrepresentations to OCIE were an emergency beacon. Yet Yancey did nothing. Instead, he allowed the November 24, 2010 letter to be delivered to OCIE without any comment or correction to the misrepresentation, and without taking any steps to follow up on Delaney's misconduct.

E. VIOLATIONS

84. As stated above, Penson violated Rule 204T(a)/204(a) of Regulation SHO.

85. As a result of the conduct described above, Delaney willfully aided and abetted and caused Penson's violations of Exchange Act Rule 204T(a)/204(a), which requires registered participants of a clearing agency to close out CNS failures to deliver resulting from short sales no later than market open T+4 and CNS failures to deliver resulting from long sales no later than market open T+6.

86. The Senior Vice President of Securities Lending willfully aided and abetted and caused Penson's violations of Rule 204T(a)/204(a) of Regulation SHO, which requires registered participants in a clearing agency to close out CNS failures to deliver resulting from short sales no later than market open T+4 and CNS failures to deliver resulting from long sales no later than market open T+6.

87. As a result of the conduct described above, Yancey failed reasonably to supervise the Senior Vice President of Stock Loan and Delaney within the meaning of Section 15(b)(4)(E) of the Exchange Act with a view to preventing and detecting their willful aiding and abetting Penson's violations of Rule 204T(a)/204(a) of Regulation SHO.

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 Delaney and Yancey ("Respondents") an opportunity to establish any defenses to such allegations;

B. What, if any, remedial actions are appropriate in the public interest against Respondents pursuant to Section 15(b)(6) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

D. What, if any, remedial actions are appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act; and

E. Whether, pursuant to Section 21C of the Exchange Act, Delaney should be ordered to cease and desist from committing or causing violations of and any future violations of Rule 204T(a)/204(a) of Regulation SHO, whether Respondents should be ordered to pay civil penalties pursuant to Section 21B(a) of the Exchange Act, and whether Respondents should be ordered to pay disgorgement pursuant to Sections 21B(e) and 21C(e) of the Exchange Act.

IV.

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

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

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

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

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

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

By the Commission.

Lynn M. Powalski

Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72186 / May 19, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31049 / May 19, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15874

In the Matter of Michael H. Johnson 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 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to 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") against Michael H. Johnson ("Johnson" or "Respondent").

II.

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

This proceeding arises out securities lending practices at Penson Financial Services, Inc. ("Penson") that resulted in systematic violations of Rule 204 of Regulation SHO. From October 2008 through November 2011, Johnson and his subordinates in the Securities Lending Department implemented procedures that they knew, or were reckless in not knowing, did not comply with Rule 204 of Regulation SHO. In so doing, Johnson willfully aided and abetted and caused Penson's violations, and failed reasonably to supervise his subordinates with a view to preventing and detecting their misconduct.

Respondent

1. Johnson, of Dallas, Texas, was the Senior Vice President of Penson Worldwide, Inc.'s ("PWI") Securities Lending Department from at least October 2008 until June 2012. In that position, Johnson oversaw securities lending activities at Penson. Johnson was associated with Penson between 2004 and 2012. Johnson is not currently associated with any registered broker-dealer. Johnson held Series 7, 24, 27, and 63 licenses.

Other Relevant Entity

2. Penson was a registered broker-dealer incorporated in North Carolina with a principal place of business in Dallas, Texas. From at least 2010 to 2012, Penson was the second-largest clearing firm in the United States as measured by the number of correspondent broker-dealers for which it cleared. Penson was a wholly-owned subsidiary of SAI Holdings, Inc., which in turn was a wholly-owned subsidiary of PWI. Penson filed a Form BDW, which became effective in October 2012, and then declared bankruptcy in January 2013. A bankruptcy plan implementing Penson's liquidation was approved in July 2013.

Background

3. In September 2008, the Commission implemented Rule 204T of Regulation SHO, which required, among other things, clearing firms to close out Continuous Net Settlement ("CNS") failures to deliver in all sales of equity securities that they cleared. In July 2009, the Commission made those requirements permanent in adopting Rule 204 of Regulation SHO. The Commission adopted Rule 204 of Regulation SHO to address, among other things, abusive "naked" short selling and failures to deliver.[2]

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

[2] Rule 204T and Rule 204 will be collectively referred to as Rule 204.

4. Rule 204(a) requires participants of a registered clearing agency (generally, clearing firms) to deliver equity securities to a registered clearing agency when delivery is due, i.e, by settlement date, or close out fails to deliver resulting from long or short sales within certain timeframes. Settlement date is generally three days after the trade date ("T+3"). For short sales, if the clearing firm has a failure-to-deliver position at the clearing agency, it must close out the CNS failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours (i.e., market open) on the settlement day following the settlement date ("T+4"). For long sales, if the clearing firm has a failure-to-deliver position at the clearing agency, it must close out the CNS failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on the third day following the settlement date ("T+6").

5. If Penson failed to close out a CNS failure to deliver within the timeframes required by Rule 204(a), it was required to follow the "pre-borrow" requirements of Rule 204(b). Rule 204(b) provides that if a CNS failure to deliver position is not closed out pursuant to Rule 204(a), Penson may not accept a short sale order in the equity security from another person, or effect a short sale in the equity security for its own account, without first borrowing the security, or entering into a bona fide arrangement to borrow the security, until Penson closes out the fail to deliver position by purchasing securities of like kind and quantity and that purchase has cleared and settled. The requirements of Rule 204(b) are also referred to as the "penalty box."

Penson Violates Rule 204 of Regulation SHO

6. At all relevant times, Penson was a clearing firm and a member of the National Securities Clearing Corporation ("NSCC"), a clearing agency registered with the Commission that clears and settles the majority of United States transactions in equities. From October 2008 through November 2011, Penson systematically failed to close out CNS failures to deliver resulting from certain long sales by market open T+6. The relevant long sales originated with securities held in customer margin accounts. Under the Commission's customer protection rule, Penson was permitted, subject to certain conditions and limitations, to re-hypothecate margin securities to third parties. Penson re-hypothecated margin securities according to the terms of the Master Securities Lending Agreement ("MSLA") developed by the Securities Industry and Financial Markets Association ("SIFMA"). Penson's Securities Lending Department generated revenue and helped to finance Penson's operations by loaning out shares held in customer margin accounts.[3]

7. When a margin customer sold the hypothecated securities that were out on loan, Penson issued account-level recalls to the borrowers on T+3, i.e., three business days after execution of the margin customer's sale order. If the borrowers did not return the shares by the close of business T+3 and Penson did not otherwise have enough shares of the relevant security to meet its CNS delivery obligations, Penson incurred a CNS failure to deliver in the relevant security. When the open stock loan continued to cause a CNS failure to deliver as of market open

[3] The circumstances in which margin customers sold securities that were on loan will be referred to as "long sales of loaned securities."

T+6, it was Penson's procedure not to purchase or borrow shares by market open sufficient to close out its failure to deliver position. Instead, Penson systematically violated Rule 204(a) by allowing its CNS failure to deliver position to persist beyond market open T+6.

8. Penson also violated Rule 204(b) of Regulation SHO by not pre-borrowing prior to effecting further short sales in the security until it had purchased shares sufficient to close out the CNS fail to deliver and the purchase cleared and settled.

9. When closing out CNS fails to deliver resulting from short sales, Penson frequently located sources that could provide borrowable securities, or made arrangements to borrow, instead of actually borrowing (or purchasing) securities sufficient to close out the CNS fail position.

Penson's Securities Lending Department Adopts Procedures for Long Sales of Loaned Securities that Violate Rule 204(a)

10. At all relevant times, Johnson was the senior officer in the Securities Lending Department. The Securities Lending Department was included on the organizational charts of PWI, the parent company, rather than within Penson, which was then a registered broker-dealer. However, the policies and procedures of Penson treated the Securities Lending Department as part of the broker-dealer and the employees of the Securities Lending Department as associated persons of the broker-dealer. Securities Lending Department personnel had direct access to Penson's account with NSCC and conducted all securities lending activity on behalf of Penson. The Securities Lending Department had primary responsibility at Penson for effecting Rule 204(a) close-outs of Penson's CNS failures to deliver resulting from long sales of loaned securities.

11. Johnson had primary authority and responsibility within the Securities Lending Department for its operational practices and for the Department's Written Supervisory Policies and Procedures ("WSPs"), which were incorporated into Penson's WSPs.

12. In September 2008, the Securities Lending Department initially attempted to comply with Rule 204 for long sales of loaned securities by recalling loans at the account level on T+3 and buying in borrowing counterparties at market open T+6. However, under the MSLA applicable to the loans, the borrowing counterparties had three full business days from the T+3, account-level recall – i.e., until close of business T+6 – to return the shares. Because the MSLA provided for three full business days for the borrowing counterparties to return the shares, those counterparties often pushed back against Penson's attempted market open T+6 buy ins.

13. In response to this push back, Johnson and the Securities Lending Department supervisors met to discuss Penson's compliance with Rule 204. Johnson and the Securities Lending Department supervisors agreed that, due to their view of industry practices, they would not close out Penson's CNS failures to deliver resulting from long sales of loaned securities by market open of T+6. They further agreed that, in certain circumstances, they would allow the CNS failures to deliver to persist beyond close-of-business T+6.

14. Johnson knew the procedures the Securities Lending Department implemented as a result of these discussions did not comply with Rule 204.

15. Johnson and other Securities Lending Department supervisors discussed the non-compliant procedures with Penson's senior compliance officers. Johnson and the Securities Lending Department supervisors explained that, based on their view of securities lending industry practices, they were not complying with Rule 204. Johnson and Penson's senior compliance officers agreed that Penson would continue implementing the non-compliant procedures.

16. The non-compliant Rule 204 procedures were in effect at Penson from at least October 2008 through November 2011.

Penson's Securities Lending Department Adopts Procedures for Long Sales of Loaned Securities That Violate Rule 204(b)

17. Rule 204(b) required Penson to "penalty box" all securities for which it had a Rule 204(a) violation. However, Penson's Securities Lending Department implemented procedures under which it did not "penalty box" securities for CNS failures to deliver that persisted beyond market open T+6. Instead, it only took certain, incomplete steps to "penalty box" securities when it allowed failures to deliver to persist beyond close-of-business T+6. This caused Penson to violate Rule 204(b) from October 2008 through November 2011.

18. Penson's Securities Lending Department caused Penson to violate Rule 204(b)'s penalty box requirements in the following ways:

- When Rule 204(a) violations relating to long sales of loaned securities occurred, the Securities Lending Department typically did not purchase securities as required by Rule 204(b). Instead, it simply waited for the shares recalled at the account level to return during the business day on T+6 and placed no pre-borrow restrictions on short sales if the shares were returned during that day.

- If the recalled shares were not returned on T+6, the Securities Lending Department sometimes purchased shares by effecting a buy-in at close of business T+6 against the borrowing counterparty. After effecting this buy in, the Securities Lending Department immediately cleared the relevant security for short selling without pre-borrow requirements instead of waiting for the purchase to clear and settle.

- The Securities Lending Department only placed pre-borrow restrictions on securities if it deferred, at the borrowing counterparty's request, a buy-in at close of business T+6. However, the Securities Lending Department did not then purchase shares as required by Rule 204(b). Instead, it again waited for the recalled shares to be returned, and then allowed short selling without pre-borrows in the securities once the shares were returned.

19. Johnson knew or was reckless in not knowing that these procedures did not comply with Rule 204(b).

Penson's Securities Lending Department Implements Procedures for Short Sales That Violate Rule 204(a)

20. Rule 204(a) required Penson to close out CNS failures to deliver resulting from short sales by borrowing or purchasing securities by market open T+4. Merely obtaining a "locate" or arranging to borrow shares was not sufficient to meet the close-out requirement of Rule 204(a).

21. Penson's Securities Lending Department implemented Rule 204(a) procedures for close-outs of CNS failures to deliver resulting from short sales under which Securities Lending personnel contacted other broker-dealers prior to market open T+4 to determine whether they had shares available for lending. The Securities Lending personnel deemed the close-out completed, and instructed Penson's Buy Ins Department personnel to take no further close-out action, if the other broker-dealers stated they had shares available. This may have resulted in Penson obtaining a "locate," but did not constitute borrowing of shares.

22. In other cases, Securities Lending personnel "booked" the "locates" in Penson's electronic lending platform prior to market open – a more definitive, but not final, stage in the borrow process. But the personnel did not confirm whether the potential lender booked a reciprocal transaction or actually delivered securities by market open. In so doing, Penson did not borrow the shares.

23. In many cases, these "locates" and/or arranged borrows ultimately "dropped," i.e., were never completed, because the potential lender never delivered the shares. This caused failures to deliver to persist beyond T+4.

24. Johnson knew or should have known these procedures amounted to arranged borrows and/or "locates" for Rule 204(a) close-out purposes, and that, as a result, Johnson aided and abetted and caused Penson to violate Rule 204(a) from October 2008 through November 2011.

Johnson's Supervisory Responsibilities

25. Johnson was the direct supervisor of two Vice Presidents in the Securities Lending Department, both of whom were associated with Penson. The two Vice Presidents aided and abetted Penson's Rules 204(a) violations by implementing procedures they knew or were reckless in not knowing would result in violations of Rule 204(a) in connection with long sales of loaned securities.

26. Johnson failed reasonably to supervise his subordinates with the view to preventing and detecting their violations. Instead, Johnson fostered and encouraged their misconduct by participating in it with them.

Violations

27. As a result of the conduct described above, Johnson willfully aided and abetted and caused Penson's violations of Rules 204(a) and 204(b) of Regulation SHO, which require registered participants of clearing agencies to close out CNS failures to deliver resulting from long

sales by market open T+6, to close out CNS failures to deliver resulting from short sales by market open T+4, and impose pre-borrowing restrictions on securities for which the close-out requirements are violated.

28. As a result of the conduct described above, Johnson failed reasonably to supervise the two Vice Presidents of Securities Lending within the meaning of Section 15(b)(4)(E) of the Exchange Act with a view to detect and prevent them from willfully aiding and abetting Penson's violations of Rule 204(a).

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent'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. Pursuant to Section 21C of the Exchange Act, Respondent Johnson cease and desist from committing or causing any violations and any future violations of Rule 204 of Regulation SHO.

B. Pursuant to Section 15(b)(6) of the Exchange Act and Section 9(b) of the Investment Company Act, Respondent be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization 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 10 days of the entry of this Order, pay a civil money penalty in the amount of $125,000.00 to the United States Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment must be made in one of the following ways:

(1) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(2) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Johnson as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Julie K. Lutz, Regional Director, Denver Regional Office, Securities and Exchange Commission, 1801 California Street, Suite 1500, Denver, Colorado 80202.

E. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72188 / May 19, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15751

In the Matter of **Matthew Scott Menies,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to accept the Offer of Settlement submitted by Matthew Scott Menies ("Menies" 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 February 12, 2014, pursuant to Section 15(b)(6) 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, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

1. From April 2001 to March 2008, Menies was a registered representative associated with Joseph Stevens & Co., Inc., which at the time of his association was a broker-dealer registered with the Commission. Joseph Stevens & Co. ceased to be registered with the Commission as of August 2008. Menies, age 41, is a resident of New York.

2. On August 2, 2011, before the New York Supreme Court in People v. Matthew Menies, Case No. 02394-2009, Menies pleaded guilty to three felony counts of securities fraud in violation of New York General Business Law § 352-c(5), one felony count of grand larceny in the third degree in violation of New York Penal Law § 155.35, and two felony counts of criminal possession of stolen property in the third degree in violation of New York Penal Law § 165.50. On November 4, 2011, Menies was sentenced in that proceeding to five years of probation and ordered to pay $115,718 in restitution.

3. The counts of securities fraud to which Menies pleaded guilty alleged, among other things, that between January 2003 and June 2005, Menies engaged in a scheme at Joseph Stevens & Co. with the intent to defraud at least ten persons by false and fraudulent pretenses, representations, and promises and so obtained property from at least one such person while engaged in inducing and promoting the issuance, distribution, exchange, sale, negotiation, and purchase of securities. The count of grand larceny to which Menies pleaded guilty alleged, among other things, that between March 2003 and May 2005, Menies stole money in excess of $3,000 from an individual.

IV.

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

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

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72187 / May 19, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15875

In the Matter of

Lindsey Alan Wetzig

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

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

II.

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

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that: This proceeding arises out of securities lending practices at Penson Financial Services, Inc. ("Penson") that resulted in systematic violations of Rules 204T and 204 of Regulation SHO (respectively "Rule 204T" and "Rule 204"). Wetzig, acting under the direction of more senior officers in the Securities Lending Department, implemented procedures that he knew or should have known did not comply with Rule 204. In so doing, Wetzig caused Penson to violate Rules 204T(a) and 204(a) from October 2008 through November 2011.

Respondent

1. Wetzig, of Keller, Texas, was one of the managers in Global Equity Finance, Penson Worldwide, Inc. ("PWI") from October 2008 through November 2011. Wetzig currently works in the securities lending department of Apex Clearing Corporation. He holds Series 7, 24, 55, and 63 licenses.

Other Relevant Entity

2. Penson was a North Carolina corporation with a principal place of business in Dallas, Texas. It was a registered broker-dealer that, from at least 2010 to 2012, was the second-largest clearing firm in the United States as measured by the number of correspondent broker-dealers for which it cleared. Penson was a wholly-owned subsidiary of SAI Holdings, Inc., which in turn was a wholly-owned subsidiary of PWI. Penson filed a Form BDW, which became effective in October 2012, and then declared bankruptcy in January 2013. A bankruptcy plan implementing Penson's liquidation was approved in July 2013.

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

Background

3. In September 2008, the Commission implemented Rule 204T of Regulation SHO, which required, among other things, clearing firms to close out Continuous Net Settlement ("CNS") failures to deliver in all sales of equity securities that they cleared. In July 2009, the Commission made those requirements permanent in adopting Rule 204 of Regulation SHO. The Commission adopted Rule 204 of Regulation SHO to address, among other things, abusive "naked" short selling and failures to deliver.

4. Rule 204(a) requires participants of a registered clearing agency (generally, clearing firms) to deliver equity securities to a registered clearing agency when delivery is due, i.e, by settlement date, or close out fails to deliver resulting from long or short sales within certain timeframes. Settlement date is generally three days after the trade date ("T+3"). For short sales, if the clearing firm has a failure-to-deliver position at the clearing agency, it must close out the CNS failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours (i.e., market open) on the settlement day following the settlement date ("T+4"). For long sales, if the clearing firm has a failure-to-deliver position at the clearing agency, it must close out the CNS failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on the third day following the settlement date ("T+6").

Penson Violates Rule 204(a) of Exchange Act Regulation SHO

5. At all relevant times, Penson was a clearing firm and a member of the National Securities Clearing Corporation ("NSCC"), a clearing agency registered with the Commission that clears and settles the majority of United States transactions in equities. From October 2008 through November 2011, Penson systematically failed to close out CNS failures to deliver resulting from certain long sales by market open T+6. The relevant long sales originated with securities held in customer margin accounts. Under the Commission's customer protection rule, Penson was permitted, subject to certain conditions and limitations, to re-hypothecate margin securities to third parties. Penson re-hypothecated margin securities according to the terms of the Master Securities Lending Agreement ("MSLA") developed by the Securities Industry and Financial Markets Association ("SIFMA"). Penson's Securities Lending Department generated revenue and helped to finance Penson's operations by loaning out shares held in customer margin accounts.[2]

6. When a margin customer sold the hypothecated securities that were out on loan, Penson issued account-level recalls to the borrowers on T+3, i.e., three business days after execution of the margin customer's sale order. If the borrowers did not return the shares by the close of business T+3 and Penson did not otherwise have enough shares of the relevant security to meet its CNS delivery obligations, Penson incurred a CNS failure to deliver in the relevant

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[2] The circumstances in which margin customers sold securities that were on loan will be referred to as "long sales of loaned securities."

security. When the open stock loan continued to cause a CNS failure to deliver as of market open T+6, it was Penson's procedure not to purchase or borrow shares by market open sufficient to close out its failure to deliver position. Instead, Penson systematically violated Rule 204(a) by allowing its CNS failure to deliver position to persist beyond market open T+6.

7. When closing out CNS fails to deliver resulting from short sales, Penson frequently located sources that could provide borrowable securities, or made arrangements to borrow, instead of actually borrowing (or purchasing) securities sufficient to close out the CNS fail position.

<u>Penson's Securities Lending Department Adopts Procedures for Long Sales of Loaned Securities that Violate Rule 204(a)</u>

8. At all relevant times, Wetzig was a manager in the Securities Lending Department. The Securities Lending Department was included on the organizational charts of PWI, the parent company, rather than within Penson, which was then a registered broker-dealer. However, the policies and procedures of Penson treated the Securities Lending Department as part of the broker-dealer and the employees of the Securities Lending Department as associated persons of the broker-dealer. Securities Lending Department personnel had direct access to Penson's account with NSCC and conducted all securities lending activity on behalf of Penson. The Securities Lending Department had primary responsibility at Penson for effecting Rule 204(a) close outs of Penson's CNS failures to deliver resulting from long sales of loaned securities.

9. In September 2008, the Securities Lending Department initially attempted to comply with Rule 204 for long sales of loaned securities by recalling loans at the account level on T+3 and buying in borrowing counterparties at market open T+6. However, under the MSLA applicable to the loans, the borrowing counterparties had three full business days from the T+3, account-level recall – i.e., until close of business T+6 – to return the shares. Because the MSLA provided for three full business days for the borrowing counterparties to return the shares, those counterparties often pushed back against Penson's attempted market-open T+6 buy ins.

10. In response to this push back, Wetzig met with more senior Securities Lending Department supervisors to discuss Penson's compliance with Rule 204. The Securities Lending Department supervisors agreed that, due to their view of industry practices, they would not close out Penson's CNS failures to deliver resulting from long sales of loaned securities by market open of T+6. They further agreed that, in certain circumstances, they would allow the CNS failures to deliver to persist beyond close-of-business T+6.

11. Wetzig knew or should have known that the procedures the Securities Lending Department implemented as a result of these discussions did not comply with Rule 204.

12. The non-compliant Rule 204 procedures were in effect at Penson from at least October 2008 through November 2011.

Penson's Securities Lending Department Implements Procedures for Short Sales That Violate Rule 204(a)

13. Rule 204(a) required Penson to close out CNS failures to deliver resulting from short sales by borrowing or purchasing securities by market open T+4. Merely obtaining a "locate" or arranging to borrow shares was not sufficient to meet the close-out requirement of Rule 204(a).

14. Penson's Securities Lending Department implemented Rule 204(a) procedures for close outs of CNS failures to deliver resulting from short sales under which Wetzig or other Securities Lending personnel contacted other broker-dealers prior to market open T+4 to determine whether they had shares available for lending. The Securities Lending personnel, including Wetzig, deemed the close out completed, and instructed Penson's Buy Ins Department personnel to take no further close-out action, if the other broker-dealers stated they had shares available. This may have resulted in Penson obtaining a "locate," but did not constitute borrowing of shares.

15. In other cases, Wetzig or other Securities Lending personnel "booked" the "locates" in Penson's electronic lending platform prior to market open – a more definitive, but not final, stage in the borrow process. But Wetzig and the other personnel did not confirm whether the potential lender booked a reciprocal transaction or actually delivered securities by market open. In so doing, Penson did not borrow the shares.

16. In many cases, these "locates" and/or arranged borrows ultimately "dropped," i.e., were never completed, because the potential lender never delivered the shares. This caused failures to deliver to persist beyond T+4.

17. Wetzig knew or should have known these procedures amounted to arranged borrows and/or "locates" for Rule 204(a) close-out purposes, and that, as a result, Wetzig caused Penson to violate Rule 204(a) from October 2008 through November 2011.

Violations

18. As a result of the conduct described above, Wetzig caused Penson's violations of Rules 204T(a) and 204(a). Wetzig knew or should have known his acts or omissions as described above would contribute to these violations.

Undertakings

19. Wetzig shall cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in the Order.

20. In connection with such cooperation, Wetzig shall (a) produce, without service of a notice or subpoena, any and all non-privileged documents and other information requested by the Commission's staff; (b) be interviewed by the Commission's staff at such times as the staff reasonably may request and to appear and testify without service of a notice or subpoena in such investigations, litigations, hearings or trials as may be requested by the Commission's staff; and (c) in connection with any testimony of Wetzig to be conducted at deposition, hearing or trial pursuant

to a notice or subpoena, agree that any such notice or subpoena for Wetzig's appearance and testimony may be served by regular mail on his counsel.

21. In determining whether to accept Wetzig's Offer, the Commission has considered these undertakings.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Wetzig cease and desist from committing or causing any violations and any future violations of Rule 204(a) of Regulation SHO.

B. Respondent Wetzig is censured.

By the Commission.

Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9589 \ May 19, 2014

In the Matter of **Certain Current Funds, Third Party Issuers and Portfolio Companies affiliated with Credit Suisse AG** **Respondent.**	**ORDER UNDER RULE 506(d) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 506(d)(1)(i) DISQUALIFICATION PROVISION**

I.

Certain current funds (comprised of any fund or other investment vehicle which, as of the date of the letter requesting relief, relies on a Regulation D private placement exemption and which is managed, advised, or sub-advised by Credit Suisse Asset Management, LLC ("CSAM") Credit Suisse Securities (USA) LLC ("CSSU"), Credit Suisse Asset Management Limited, Credit Suisse Hedging-Griffo Servicos Internacionais S.A., or Aventicum Capital Management Holding AG and its subsidiaries), certain third party issuers (comprised of any issuer as to which CSAG is, as of the date of the letter requesting relief, directly or indirectly, the beneficial owner of 20% or more but less than 50% of the issuer's outstanding voting equity securities, calculated on the basis of voting power), and certain portfolio companies (comprised of any portfolio company of any fund or investment vehicle managed, advised, or sub-advised by CSAM, CSSU or any other subsidiary of CSAG as to which CSAG thereby is, as of the date of the letter requesting relief, directly or indirectly, the beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power) (collectively, the "Applicants") have submitted a letter, dated May 19, 2014, requesting a waiver of the Rule 506(d)(1)(i) disqualification from relying on the exemption under Regulation D from the registration requirements under the Securities Act of 1933 (the "Securities Act") arising out of a guilty plea entered on May 19, 2014 by Credit Suisse AG ("CSAG") in the U.S. District Court for the Eastern District of Virginia ("District Court") in connection with a plea agreement between CSAG and the U.S. Department of Justice ("DOJ").

II.

On May 19, 2014, the DOJ filed a one-count criminal information (the "Information") in the District Court charging CSAG with conspiracy to commit tax fraud related to accounts CSAG established for cross-border clients in violation of Title 18, United States Code, Section 371. CSAG has agreed to resolve the action brought by DOJ through a plea agreement dated May 19, 2014 (the "Plea Agreement"). Under the Plea Agreement, CSAG pleaded guilty to the charge set out in the Information (the "Guilty Plea"). The Applicants expect that the

District Court will enter a judgment against CSAG that will require remedies that are materially the same as set forth in the Plea Agreement. Pursuant to the Plea Agreement, CSAG agreed to comply with the undertakings described in the application and to pay substantial criminal penalties and restitution.

III.

The exemption under Rule 506 of Regulation D under the Securities Act is unavailable for the securities of an issuer if any of a number of specified persons "has been convicted, within ten years before such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor: . . . arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities." 17 CFR § 230.506(d)(1)(i). Rule 506(d)(2) of Regulation D under the Securities Act provides, however, that the disqualification "shall not apply . . . upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied." 17 CFR § 230.506(d)(2).

IV.

Based upon the representations set forth in the Applicants' request, the Commission has determined that pursuant to Rule 506(d) under the Securities Act a showing of good cause has been made that it is not necessary under the circumstances that the exemption be denied as a result of the Guilty Plea.

Accordingly, **IT IS ORDERED**, pursuant to Rule 506(d) under the Securities Act, that a limited waiver, as described above, from the application of the disqualification provision of Rule 506(d)(1)(i) under the Securities Act resulting from the Guilty Plea is hereby granted to the Applicants.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-31051; 812-14313]

Credit Suisse Asset Management, LLC, et al.; Notice of Application and Temporary Order

May 19, 2014

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: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to a guilty plea entered on May 19, 2014, by Credit Suisse AG ("CSAG") in the U.S. District Court for the Eastern District of Virginia ("District Court") in connection with a plea agreement between CSAG and the U.S. Department of Justice ("DOJ"), until the Commission takes final action on an application for a permanent order. Applicants have also applied for a permanent order.

Applicants: Credit Suisse Asset Management, LLC ("CSAM"), Credit Suisse Asset Management Limited ("CSAML"), Credit Suisse Hedging-Griffo Servicos Internacionais S.A. ("CSHG"), Credit Suisse Securities (USA) LLC ("CSSU"), and CSAG (each an "Applicant" and collectively, the "Applicants"),[1] and Credit Suisse Group AG ("CS Group").[2]

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1 Applicants request that any relief granted pursuant to the application also apply to any existing or future company of which CSAG 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") with respect to any activity contemplated by section 9(a) of the Act.

2 CS Group is a party to the application solely for purposes of agreeing to the portion of condition 4 that applies to it.

Filing Date: The application was accepted on EDGAR on May 19, 2014, with a filing date of May 20, 2014.

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 June 13, 2014, 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: c/o Credit Suisse Asset Management, LLC, Eleven Madison Avenue, New York, NY 10010.

For Further Information Contact: Courtney S. Thornton, Senior Counsel, at (202) 551-6812 or Mary Kay Frech, Branch Chief, at (202) 551-6821 (Division of Investment Management, Chief Counsel's Office).

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

Applicants' Representations:

1. Each of the Applicants is a direct or indirect wholly owned subsidiary of CS Group, the parent company of CSAG. CSAM, a limited liability company formed under

Delaware law, is registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"). CSAML, a corporation formed under the laws of the United Kingdom, is registered as an investment adviser under the Advisers Act. CSHG, a corporation formed under the laws of Brazil, is registered as an investment adviser under the Advisers Act. CSSU, a limited liability company formed under Delaware law, is registered as a broker-dealer under the Securities Exchange Act of 1934 and as an investment adviser under the Advisers Act, and is registered as a member of the Financial Industry Regulatory Authority. CSAM, CSAML, CSHG, and CSSU serve either as investment adviser (as defined in section 2(a)(20) of the Act) to investment companies (or series thereof) registered under the Act ("Funds") and employees' securities companies ("ESCs"), or as principal underwriter (as defined in section 2(a)(29) of the Act) to open-end management investment companies registered under the Act ("Open-End Funds") (such activities, collectively, "Fund Service Activities"). CSAG is the principal operating subsidiary of CS Group, which operates as a holding company. Both CSAG and CS Group are corporations organized under the laws of Switzerland; both are engaged in the private banking, investment banking, and asset management businesses.

2. On May 19, 2014, the DOJ filed a one-count criminal information (the "Information") in the District Court charging CSAG with conspiracy to commit tax fraud related to accounts CSAG established for cross-border clients in violation of Title 18, United States Code, Section 371. CASG has agreed to resolve the action brought by DOJ through a plea agreement dated May 19, 2014 (the "Plea Agreement"). Under the Plea Agreement, CSAG pleaded guilty to the charge set out in the Information (the "Guilty Plea"). Applicants expect that the District Court will enter a judgment against CSAG that will require remedies that are materially the same as set forth in the Plea Agreement. Pursuant to the Plea Agreement, CSAG

agreed to comply with the undertakings described in the application and to pay substantial criminal penalties and restitution.

3. In addition to the Plea Agreement with DOJ, on February 21, 2014, CS Group reached a settlement with the Commission that resolved its investigation into the provision of unregistered broker-dealer and investment adviser services to U.S. clients during the time period between 2002-2008 (the "Commission Settlement"). The conduct that was the subject of the Commission investigation related to the conduct charged in the Information. As part of the Commission Settlement, CS Group agreed to pay $196,511,014, which includes $82,170,990 in disgorgement, $64,340,024 in interest and a $50,000,000 penalty. CS Group also retained an independent consultant in connection with the Commission Settlement.

4. CSAG will enter a settlement with the Board of Governors of the Federal Reserve System (the "Federal Reserve") to resolve certain findings by the Federal Reserve, including that the activities of CSAG regarding opening of foreign accounts for U.S. taxpayers, provision of investment services to U.S. clients, and operation of CSAG's New York representative office prior to 2009 lacked adequate enterprise-wide risk management and compliance policies and procedures sufficient to ensure that all of its activities comply with U.S. laws and regulations (the "Federal Reserve Order").

5. CSAG also will enter into a consent order with the New York State Department of Financial Services ("DFS") to resolve DFS's investigation into the Conduct, as defined below (the "DFS Order").

6. Ten individuals who have been identified as having been responsible for the conduct underlying the Plea Agreement (including the conduct described in any of the exhibits to the Plea Agreement) (the "Conduct") are current employees of CSAG or a Covered Person. All

other employees of CSAG and any Covered Person who were identified as having been responsible for the Conduct have either resigned or been terminated. Of the individuals identified as having been responsible for the Conduct that remain employees of CSAG or a Covered Person, all but one (the "December Employee") will be notified no later than May 31, 2014 that their employment with CSAG or a Covered Person will be terminated no later than August 31, 2014.[3]

7. Additionally, beginning in 2008, CSAG commenced a remediation program to ensure that only U.S. clients who established compliance with U.S. tax laws could remain clients of CSAG. U.S. clients that could not demonstrate tax compliance had to terminate their relationship with CSAG. As part of that program, CSAG moved the securities business with U.S. residents into U.S.-regulated subsidiaries or terminated those relationships.

Applicants' Legal Analysis:

1. Section 9(a)(1) of the Act provides, in pertinent part, that a person may not serve or act as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company or registered unit investment trust, if such person within ten years has been convicted of any felony or misdemeanor arising out of such person's conduct, as, among other things, an investment adviser, a broker or dealer, or a bank. Section 2(a)(10) of the Act defines the term "convicted" to include a plea of guilty. Section 9(a)(3) of the Act extends the prohibitions of section 9(a)(1) to a company any affiliated person of which has been disqualified under the provisions of section 9(a)(1). Section 2(a)(3) of

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[3] The employment of the December Employee will be terminated at the earlier of December 31, 2014 or the date that the December Employee's services are no longer needed by CSAG. The sole activity of the December Employee as an employee will be to perform compliance-related services in a specific area. The activity of the December Employee will be subject to direct supervision by senior legal personnel.

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 CSAG is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3). Applicants state that the Guilty Plea would result in a disqualification of each Applicant for ten years under section 9(a) of the Act because CSAG would become the subject of a conviction described in 9(a)(1).

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

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants assert that the Conduct did not involve any of Applicants acting as an investment adviser or depositor of any Fund, ESC or business development company or principal underwriter for any Open-End Fund, unit investment trust registered under the Act, or face amount certificate company registered under the Act. The Conduct similarly did not involve any Fund, ESC or business development company with respect to which Applicants engaged in Fund

Service Activities.[4] Applicants further assert that (i) none of the current or former directors, officers or employees of the Applicants (other than certain personnel of CSAG who were not involved in any of the Applicants' Fund Service Activities) had involvement in the Conduct; (ii) except as noted above, no current or former employee of CSAG or any Covered Person who previously has been or who subsequently may be identified by CSAG or any U.S. or non-U.S. regulatory or enforcement agencies as having been responsible for the Conduct will be an officer, director, or employee of CSAM, CSAML, CSHG, CSSU, or of any other Covered Person; (iii) those identified employees have had no, and will not have any future, involvement in the Covered Persons' activities in any capacity described in section 9(a) of the Act; and (iv) because the personnel of the Applicants (other than certain personnel of CSAG who were not involved in any of the Applicants' Fund Service Activities) did not have any involvement in the Conduct, shareholders of the Funds and ESCs were not affected any differently than if those Funds and ESCs had received services from any other non-affiliated investment adviser or principal underwriter.

5. Except as discussed above, Applicants have agreed that neither they nor any of the other Covered Persons will employ any of the current or former employees of CSAG or any Covered Person who previously have been or who subsequently may be identified by CSAG or any U.S. or non-U.S. regulatory or enforcement agencies as having been responsible for the Conduct in any capacity without first making a further application to the Commission pursuant to section 9(c). Applicants also have agreed that each Applicant (and any Covered Person that acts in any capacity described in section 9(a) of the Act) will adopt and implement policies and procedures reasonably designed to ensure compliance with the terms and conditions of the order

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4 CSAG does not engage, has not engaged, and will not engage in Fund Service Activities.

granted under section 9(c). In addition, CSAG has agreed to comply in all material respects with the material terms and conditions of the Plea Agreement and the material terms of the Federal Reserve Order and the DFS Order, and CS Group has agreed to comply in all material respects with the material terms and undertakings of the Commission Settlement.

6. Applicants further represent that the inability of CSAM, CSAML, CSHG, and CSSU to continue providing Fund Service Activities would result in potential hardships for both the Funds and the ESCs and their shareholders. Applicants state that they will distribute written materials, including an offer to meet in person to discuss the materials, to the board of trustees of the Funds, 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, regarding the Plea Agreement, any impact on the Funds, and the application. The Applicants will provide the Funds with all information concerning the Plea Agreement and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

7. Applicants also state that, if CSAM, CSAML, CSHG, and CSSU were barred from providing Fund Service Activities to the Funds and the ESCs, the effect on their business and employees would be severe.

8. Applicants state that certain of the Applicants and their affiliates have received exemptive orders under section 9(c), as described in greater detail in the application.

<u>Applicants' Conditions</u>:

Applicants agree that any order granted by the Commission pursuant to the application will be subject to the following conditions:

1. Any temporary exemption granted pursuant to the application will 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.

2. Except as set out in the second paragraph of Section IV.E of the application, neither the Applicants nor any of the other Covered Persons will employ any of the current or former employees of CSAG or any Covered Person who previously have been or who subsequently may be identified by CSAG or any U.S. or non-U.S. regulatory or enforcement agencies as having been responsible for the Conduct in any capacity without first making a further application to the Commission pursuant to section 9(c).

3. Each Applicant and Covered Person will adopt and implement policies and procedures reasonably designed to ensure that they will comply with the terms and conditions of the requested orders within 60 days of the date on which any permanent order is granted or, with respect to condition 4, such later date as may be contemplated by the Federal Reserve Order, the DFS Order, or the Commission Settlement, as applicable.

4. CSAG will comply in all material respects with the material terms and conditions of the Plea Agreement and with the material terms of the Federal Reserve Order and the DFS Order, and CS Group will comply in all material respects with the material terms and undertakings of the Commission Settlement.

5. Applicants will provide written notification to the Chief Counsel of the Commission's Division of Investment Management, with a copy to the Chief Counsel of the Commission's Division of Enforcement, of a material violation of the terms and conditions of the requested orders within 30 days of discovery of the material violation.

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 the Applicants and the other Covered Persons are granted a temporary exemption from the provisions of section 9(a), effective forthwith, solely with respect to the Guilty Plea, subject to the representations and conditions in the application, until the date the Commission takes final action on their application for a permanent order.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72198 / May 20, 2014

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3554 / May 20, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15876

In the Matter of JAMES T. ADAMS, CPA, Respondent.	ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against James T. Adams, CPA ("Respondent" or "Adams"), pursuant to Sections 4C(a)(2)[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii)[2] of the Commission's Rules of Practice.

[1] Section 4C(a)(2) 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 . . . to have engaged in unethical or improper professional conduct.

[2] Rule 102(e)(1)(ii) provides, in relevant 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.

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 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

A. SUMMARY

This matter involves issues of auditor independence and improper professional conduct arising from the repeated acceptance of tens of thousands of dollars in casino markers by James T. Adams, CPA in 2009 from a casino gaming issuer ("Casino Gaming Issuer"). At the time, Adams was the Chief Risk Officer of Deloitte LLP and a partner of Deloitte & Touche LLP ("D&T"). The Casino Gaming Issuer was an attest client of D&T, and from January 20, 2009 until January 13, 2010, Adams served as the advisory partner on D&T's audit engagements for that issuer. During the audit and professional engagement period for D&T's audit of the Casino Gaming Issuer's financial statements for its fiscal year ended December 31, 2009, Adams sought and received casino markers from a casino of the Casino Gaming Issuer. The transactions by which Adams received the casino markers were prohibited "loans" under Rule 2-01(c)(1)(ii) of Regulation S-X. These loans impaired D&T's independence with regard to its audit client. Through his actions, Adams caused D&T to violate Rule 2-02(b)(1) of Regulation S-X and caused the Casino Gaming Issuer to violate Section 13(a) of the Exchange Act and Rule 13a-1 promulgated thereunder.

B. RESPONDENT

Adams was the Chief Risk Officer of Deloitte LLP ("Deloitte") from September 2005 through May 29, 2010. Additionally, Adams was a partner of D&T, a Deloitte subsidiary, from June 1985 through May 29, 2010. Adams worked for Deloitte and/or D&T and their predecessor entities from June 1974 until he retired in May 2010. Adams,

[3] 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.

age 62, resides in California. He obtained a license as a Certified Public Accountant ("CPA") in Georgia in November 1974 and in California in September 2002. At the time of his actions discussed herein, Adams was a licensed CPA in the States of Georgia and California. His licenses are currently inactive.

C. RELEVANT ENTITIES

1. Deloitte is a Delaware limited liability partnership. It is the U.S. member firm of Deloitte Touche Tohmatsu Limited, a U.K. private company limited by guarantee. Deloitte has four main subsidiaries – D&T, Deloitte Tax LLP, Deloitte Consulting LLP, and Deloitte Financial Advisory Services LLP – that provide audit and enterprise risk services, tax, consulting, and financial advisory services, respectively. Deloitte does not provide client services; services are performed by the subsidiaries.

2. D&T is a Delaware limited liability partnership. It is a subsidiary of Deloitte that provides audit and other attest services and enterprise risk services to clients. D&T is registered with the Public Company Accounting Oversight Board ("PCAOB"). At all relevant times, D&T provided auditing and other services to a variety of casino entertainment and hospitality companies, including companies whose securities are registered with the Commission and trade on the U.S. markets.

3. Casino Gaming Issuer is incorporated in Delaware and is a casino entertainment and hospitality provider. At all times relevant to these proceedings, Casino Gaming Issuer was an attest client of D&T. At the time of Adams' conduct described herein, the common stock of the Casino Gaming Issuer was registered with the Commission pursuant to Section 12(g) of the Exchange Act, and the issuer filed periodic reports with the Commission pursuant to Section 13 of the Exchange Act.

D. FACTS

1. From January 20, 2009 until January 13, 2010, Adams served as the advisory partner on D&T's attest engagements of Casino Gaming Issuer. He worked on the firm's audits of the issuer's financial statements for its fiscal years ended December 31, 2008 and December 31, 2009. An advisory partner is a senior partner who is part of the audit engagement team. As the advisory partner on the Casino Gaming Issuer audit engagements, Adams primarily served as a liaison between D&T and the issuer's management and audit committee.

2. Adams had regular contact with Casino Gaming Issuer's management and the audit committee of its board of directors. Adams was invited to, and attended, certain of the issuer's audit committee meetings and participated in audit committee conference calls and the review of audit committee materials.

3. While Adams was serving as the advisory partner on D&T's 2009 Casino Gaming Issuer audit, he sought and received casino markers from a casino operated by the issuer. He visited the casino at least five times during this period and signed a number of

casino "markers." A casino marker is an instrument utilized by a casino customer to receive gaming chips drawn against the customer's line of credit at the casino. Adams had opened a line of credit with the casino on June 9, 2004 and increased that line of credit from $100,000 to $110,000 on December 16, 2009.

4. Adams drew down his line of credit by using markers at the Casino Gaming Issuer's casino while he was the advisory partner for D&T's Casino Gaming Issuer 2009 audit engagement. Specifically, on July 29, 2009, Adams drew markers, $85,000 of which remained outstanding for a period of 43 days. On September 15, 2009, he drew markers, $3,000 of which remained outstanding for a period of 13 days and $70,000 of which remained outstanding for a period of 27 days. On October 13, 2009, Adams drew markers, $110,000 of which remained outstanding for a period of 38 days. On December 8, 2009, he drew markers, $100,000 of which remained outstanding for seven days. On December 16, 2009, Adams drew markers, $110,000 of which remained outstanding.

5. On January 13, 2010, D&T removed Adams from the Casino Gaming Issuer 2009 audit engagement, for reasons that were not based on his use of casino markers. Adams subsequently defaulted on the $110,000 of outstanding markers that he drew on December 16, 2009.

6. Adams concealed from D&T the fact that he had drawn casino markers from Casino Gaming Issuer and in fact lied to a D&T partner when he was asked generally if he had casino markers from attest clients of the firm. Accordingly, at the time that Adams retired, D&T was not aware of his casino markers from Casino Gaming Issuer.

7. On March 9, 2010, Casino Gaming Issuer filed its annual Report on Form 10-K for its fiscal year ended December 31, 2009. The annual report included a D&T audit report that stated that its audit of the financial statements of Casino Gaming Issuer had been conducted in accordance with the standards of the PCAOB. Because of Adams' conduct described above, that statement was incorrect.

8. Adams retired from D&T on May 29, 2010.

E. LEGAL ANALYSIS

Basic Principles

1. "Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an independent professional." SEC v. Arthur Young, 465 U.S. 805, 819 n.15 (1984).

2. The Commission has stated that it "will not recognize an accountant as independent, with respect to an audit client, if the accountant is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the

accountant is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement." Rule 2-01(b) of Regulation S-X.

3. "In considering this standard, the Commission looks in the first instance to whether a relationship or the provision of a service: creates a mutual or conflicting interest between the accountant and the audit client . . . ." Preliminary Note to Rule 2-01 of Regulation S-X, ¶ 2.

4. Rule 2-01(c) of Regulation S-X sets forth a "non-exclusive specification of circumstances inconsistent with" the general standard. Among the listed circumstances is "[a]ny loan . . . to or from an audit client." Rule 2-01(c)(1)(ii)(A) of Regulation S-X.

Violations

5. As a result of the conduct described above, Adams caused D&T to violate Rule 2-02(b)(1) of Regulation S-X, which requires that an accountant's report state whether the audit was conducted in accordance with generally accepted auditing standards. Exchange Act Release No. 49708 provides that, for financial statements dated after May 24, 2004, the Rule's reference to "generally accepted auditing standards" means the standards of the PCAOB and the applicable Commission regulations, both of which require an auditor to be independent of its client. Adams knew or should have known that his conduct would cause the firm to violate the Rule.

6. As a result of the conduct described above, Adams caused Casino Gaming Issuer to violate Section 13(a) of the Exchange Act and Rule 13a-1 promulgated thereunder, which require that financial statements included in annual reports filed with the Commission be audited by an independent accountant. Adams knew or should have known that his conduct would cause the issuer to violate those provisions.

7. As a result of the conduct described above, Adams engaged in improper professional conduct, as defined by Exchange Act 4C(a)(2) and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

F. FINDINGS

Based on the conduct described above, Adams caused a violation of Rule 2-02(b)(1) of Regulation S-X by D&T, caused violations of Exchange Act Section 13(a) and Exchange Act Rule 13a-1 by Casino Gaming Issuer, and engaged in improper professional conduct within the meaning of Exchange Act Section 4C(a)(2) and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

IV.

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

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

A. Adams shall cease and desist from committing or causing any violations and any future violations of Rule 2-02(b)(1) of Regulation S-X and Section 13(a) of the Exchange Act and Rule 13a-1 promulgated thereunder.

B. Adams is denied the privilege of appearing or practicing before the Commission as an accountant.

C. After two 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 PCAOB 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 PCAOB 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 PCAOB, and has complied with all terms and conditions of any sanctions imposed by the PCAOB (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 PCAOB, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews, and quality control standards.

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

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72199 / May 20, 2014

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3555 / May 20, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15877

In the Matter of **BRYCE WALKER, CA and** **SPENCE WALKER, CA, CPA** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Bryce Walker and Spence Walker, CPA (collectively "Respondents") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.[2]

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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 . . . (1) not to possess the requisite qualifications to represent others . . . (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:

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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. SUMMARY

1. From 2007 until December 2010, DNTW Chartered Accountants, LLP ("DNTW"), an accounting firm based in Canada, and Bryce Walker and Spence Walker, two of its partners, served as the independent auditors of Subaye, Inc. ("Subaye"), a company whose stock is registered with the Commission and trades in the U.S. These proceedings arise out of the Respondents' failure to comply with Public Company Accounting Oversight Board ("PCAOB") Auditing Standards ("PCAOB Standards") in their 2010 audit of Subaye. Among other failures, Bryce Walker failed to: (a) properly supervise assistants; (b) obtain sufficient competent evidence; (c) properly perform the confirmation process; and (d) act with due professional care. In his role as filing quality review partner, Spence Walker failed to act with due professional care because he should have been aware of audit deficiencies but did not address those deficiencies. Had Respondents properly conducted the audit, they might have uncovered that Subaye was a fraudulent company that lacked credible books and records.

B. RESPONDENTS

2. Bryce Walker, age 36, is a Chartered Accountant ("CA") licensed through the Institute of Chartered Accountants of Ontario ("ICAO"). Bryce Walker served as the engagement partner on the 2010 audit of Subaye. He was a partner of DNTW Chartered Accountants operating out of the Markham office. He is a resident of Markham, Ontario and a Canadian citizen.

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.

[3] 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. Spence Walker, age 38, is a CA licensed through the ICAO and a CPA licensed to practice in Illinois. Spence Walker served as the engagement partner on DNTW's audits and reviews of Subaye from 2007 through the third quarter of 2010 and the file quality review partner for DNTW's 2010 audit of Subaye. He was a partner of DNTW Chartered Accountants operating out of the Markham office. He is a resident of Markham, Ontario and a Canadian citizen.

C. RELEVANT ENTITIES[4]

4. Subaye, Inc., is a Delaware incorporated company that purported to have primary operations in the People's Republic of China. Subaye claimed to be a leading online services provider for small-to-medium sized businesses in China. Its stock was registered with the Commission, and DNTW served as its independent auditor between 2007 and 2010. Subaye's fiscal year ends on September 30.

5. DNTW Chartered Accountants, LLP (alternatively, "DNTW") was a Canadian partnership of Chartered Accounting firm that was registered with the PCAOB and operated in seven major Canadian cities, including Markham, Ontario. From 2008 until February 28, 2013, the Markham office of DNTW performed public company audits and was registered with the PCAOB.[5] DNTW served as the independent auditor for Subaye from 2007 through December 31, 2010. On February 28, 2013, the DNTW partnership was dissolved.

D. FACTS

Background

6. During at least 2010, Subaye promoted itself as "a leading online business services provider in China." These online services were initially said to include video advertising and entertainment media services, and subsequently a cloud computing business. Customers purportedly paid monthly for the service. Sales agents supposedly interacted with the customers and collected the monthly fees in cash.

7. In its public filings for fiscal year 2010 ending September 30, 2010, Subaye claimed approximately $39 million in revenues and over 1,500 employees. In addition, the company claimed that, as of the end of calendar year 2010, it had more than 14,600 customers.

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[4] On May 8, 2013, the Commission filed a civil injunctive action against Subaye and its former Chief Financial Officer, James T. Crane ("Crane") alleging that Subaye and Crane violated the antifraud, books and records, internal controls and reporting provisions of the Exchange Act, and that Crane violated Section 105(c)(7)(B) of the Sarbanes-Oxley Act of 2002 ("SOX").

[5] A public company audit is defined as an engagement to audit the financial statements of an "issuer" as that term is defined in Section 3(a)(8) of the Securities Exchange Act of 1934.

8. On December 23, 2010, the same day Subaye filed its 2010 Form 10-K, Subaye dismissed DNTW as its independent auditor and hired PricewaterhouseCoopers Hong Kong ("PwC HK") as Subaye's new independent auditor. This set in motion a chain of events that, by mid-2011 had exposed Subaye to be a fraud, without the infrastructure to support its claimed cloud computing and other online business, few paying customers, few, if any, employees, no real revenues and no cash in bank accounts.

Accounting for Subaye's Fraud

9. In its Form 10-K and corresponding earnings press release for the period ended September 30, 2010, Subaye reported that $22.1 million of revenues collected by its sales agents had been reinvested into "growth orientated marketing expenses to help us penetrate attractive new markets." In reality, Subaye had almost no paying customers for its online membership business and claimed to have reinvested in marketing expenses so as to conceal the fact that the money did not exist. During the fourth quarter of 2010, Subaye had recorded an $18.8 million asset called "Cash Held in Trust" on its balance sheet. In discussions with Respondents, Subaye's management claimed that the cash was being held by Subaye's third-party sales agents to be used for marketing and promotional expenses, as directed by the company. During the 2010 audit, Subaye provided DNTW with general ledger and journal entries showing funds recorded as "development" in various provinces, with an offset to accounts receivable from third party sales agents. But when DNTW asked for documents to support the existence of this cash, said to be held by sales agents for development, Subaye's management could not produce any bank account statements, receipts, or other direct proof. In reality, Subaye's offset of the accounts receivable balances purportedly in exchange for marketing by its sales agents was a device used to hide the fact that those receivables would never be converted to cash, because the sales had never occurred.

10. Similarly, Subaye's financial statements reported "Deposits for Purchases of Inventoriable Assets" as an asset on its balance sheet beginning in 2009. In its Form 10-K for the period ended September 30, 2009, Subaye reported $8.1 million in Deposits for Purchases of Inventoriable Assets. Subaye's management told the Respondents that the deposits were related to Subaye's future launch of its online 3D mall. Like the reinvestment in "marketing promotions" scheme, the general ledger and journal entries provided to DNTW during the 2009 audit showed amounts being recorded as "deposits" for various types of purchases with an offset to accounts receivable due from third-party sales agents.

11. By the fourth quarter of fiscal year 2010, the $8.1 million in deposits had been reduced to $2.8 million on Subaye's books after a series of write-offs and a purported refund. At the insistence of DNTW, Subaye expensed the remaining $2.8 million in the 2010 Form 10-K for the period ended September 30, 2010. This write-off was another device used by Subaye to cover the fact that it had collected no cash for its outstanding receivables.

12. In its 2010 financial statements, Subaye should not have recognized over $21 million in revenues or the corresponding expenses related to the reinvestment of those revenues into "marketing" or "deposits" because the company never had cash or a claim to cash for the

purported revenues. In fact, Subaye had almost no customers and its representations of earning more than $39 million in revenues for fiscal year 2010 were false and misleading.

13. Subaye made numerous false and misleading statements in its Form 10-K for fiscal year 2010. Among other things, the Form 10-K overstated Subaye's revenues, falsified marketing expenses, overstated the number of employees, and failed to disclose material related party transactions. For fiscal year 2010, Subaye's income statement was overstated by at least $21.6 million for the period ended September 30, 2010. In addition, Subaye's 2009 balance sheet, as reported in the Form 10-K for the period ended September 30, 2010, overstated the Deposits for Purchases of Inventoriable Assets by $8.1 million. The effects of Subaye's false and misleading statements were material to Subaye's reported results.

Respondents Failed to Conduct the 2010 Audit in Accordance with PCAOB Standards

14. Respondents performed the fiscal year 2010 audit of Subaye's financial statements and issued an unqualified audit report. The Respondents failed to ensure that the fiscal year 2010 Subaye audit was conducted in accordance with PCAOB standards. As set forth below, Bryce Walker failed to: (a) properly supervise assistants; (b) obtain sufficient competent evidence; (c) properly perform the confirmation process; and (d) act with due professional care. Further, in his role as file quality review partner, Spence Walker failed to act with due professional care because he should have been aware of audit deficiencies but did not address those deficiencies.

a. Failure to properly supervise assistants

15. Supervision involves directing the efforts of assistants who are involved in accomplishing the objectives of the audit and determining whether those objectives were accomplished. [AU§311, *Planning and Supervision*, at .11][6] DNTW, under Bryce Walker's direction, failed to appropriately supervise China-based assistants engaged to perform the audit fieldwork for the 2010 audit of Subaye.

16. No employee of DNTW ever traveled to Subaye's offices in China. Instead, DNTW contracted with a China-based firm to employ assistants to conduct the audit fieldwork. During the 2010 audit, Bryce Walker did not know the scope of the procedures being performed by the China-based assistants. Furthermore, DNTW's work papers are unclear as to chain of custody of the accounts receivable confirmations or what, if any, role the China-based assistants had in the process. By failing to understand what procedures the China-based assistants performed during the audit, and how they performed them, Bryce Walker failed to properly supervise assistants as required under PCAOB Standards.

b. Failure to obtain sufficient competent evidence

17. Under PCAOB Standards, auditors are required to obtain sufficient competent evidential matter by performing audit procedures to afford a reasonable basis for an opinion

[6] References in this Order are to the PCAOB standards in effect at the time of the relevant conduct.

regarding the financial statements under audit. [AU§326, *Evidential Matter*, at .01] DNTW failed to obtain sufficient competent evidence regarding Subaye's claims about cash, marketing expenses, and deposits for purchases of Inventoriable Assets.

i. Cash

18. Despite the materiality of the cash balance, DNTW, under Bryce Walker's direction, failed to gather sufficient competent evidence of its existence by relying solely on bank statements obtained from Subaye's management. As of September 30, 2010, Subaye's financial statements showed a balance of $7.1 million. Beginning with the 2009 audit, DNTW stopped testing cash through confirmations to banks because in prior year audits there had not been any exceptions with bank confirmations.

19. Instead, DNTW relied solely on bank statements provided to DNTW's China-based audit assistants by Subaye's management. Under PCAOB Standards, audit evidence is more reliable when it is obtained from independent sources outside the entity than from solely within the entity. [AU§326, *Evidential Matter*, at .21] During the 2010 audit, DNTW, under Bryce Walker's direction, failed to obtain sufficient competent evidence in its testing of Subaye's cash balances because it relied solely on information provided by Subaye's management despite the materiality of the balance and the lack of evidence gathered from an independent source.

ii. Marketing expenses

20. DNTW failed to obtain sufficient competent evidence regarding the purported marketing and promotional expenses Subaye reported in its 2010 financial statements.

21. During the fourth quarter of fiscal year 2010 Subaye had recorded an $18.8 million asset called "Cash Held in Trust" on its balance sheet. Subaye's management informed both Bryce and Spence Walker that the cash was held by Subaye's various third-party sales agents to be used at the company's direction for development costs related to marketing and promotional expenses. When DNTW requested documentation to support the existence of the cash and marketing expenses, Subaye's management was unable to produce any reliable evidence. Instead, Subaye's management suggested the amount remain an asset but instead be labeled, "advances to third party agents for business development."

22. Bryce Walker and Spence Walker ultimately determined that there was not sufficient evidence to account for the $18.8 million as an asset and insisted that it instead be booked as a marketing expense. However, DNTW did not obtain sufficient competent evidence to verify that the cash had ever existed or that the purported cash provided to sales agents for marketing was, or would be, used for marketing expenses.

iii. Deposits for purchase of Inventoriable Assets

23. DNTW failed to obtain sufficient competent evidence regarding the purported deposits for Inventoriable Assets. As stated in DNTW's own work papers, no "third party

evidence of the existence of this cash, either by examining bank accounts or similar documents" was provided to the auditors. DNTW failed to obtain sufficient competent evidence that the cash purportedly provided to vendors for future inventory had ever existed. In 2010, Subaye wrote off the remaining $2.8 million balance for Deposits for Purchase of Inventoriable Assets despite Subaye's inability to produce sufficient competent evidence to support the amounts recorded.

24. In addition, DNTW failed to recognize that, if sufficient competent evidence was not available in 2010 to support the deposits, then sufficient competent evidence of the 2009 balance of $8.1 million in deposits may not have been obtained in the prior year. PCAOB Standards require an auditor who subsequently becomes aware of facts that may have existed as of the date of a previously issued audit report to, among other things, take action to determine the effect of the information on previously issued audit reports. [AU§561, *Subsequent Discovery of Facts Existing at the Date of the Auditor's Report*] After learning that there was not sufficient competent evidence to support the Deposits for Purchases of Inventoriable Assets, DNTW failed to take any action to determine the effect of that information on Subaye's 2009 financial statements and DNTW's corresponding audit report.

c. Failure to properly perform the confirmation process

25. During the performance of confirmation procedures for items like accounts receivable, the auditor should maintain control over the confirmation requests and responses. Maintaining control means that the auditor establishes direct communications between the intended recipient and the auditor so as to minimize the possibility that the results will be biased because of interception and alteration of the confirmation requests or responses. [AU§330, *The Confirmation Process*, at .28] There is no evidence that DNTW established direct contact with the independent parties. Therefore, DNTW failed to maintain control over the accounts receivable confirmation process.

26. DNTW's work papers contain copies of the returned accounts receivable confirmations. However, there is insufficient documentation or evidence of how those confirmations were sent and received by the auditors. Bryce Walker and his junior associate on the engagement testified that DNTW's China-based audit assistants had handled the sending and receipt of the confirmations. However, an employee of the China-based audit assistants said that they had no role in the accounts receivable confirmation process. In addition, one of the returned confirmations in DNTW's work papers includes a handwritten note at the top that indicates four of the confirmations were faxed from Subaye's bookkeeper to the DNTW offices. By allowing Subaye to gain control over the confirmations, DNTW failed to maintain control of the process and increased the likelihood that the results were biased based on interception and alteration.

d. Failure to act with due professional care

27. The auditor must exercise due professional care in the performance of the audit and the preparation of the audit report. [AU§230, *Due Professional Care in the Performance of Work*, at .01] Due professional care requires the auditor to exercise professional skepticism. Professional skepticism is an attitude that includes a questioning mind and a critical assessment

of audit evidence. [AU§230, *Due Professional Care in the Performance of Work*, at .07] It also requires that the auditor not be satisfied with less than persuasive evidence because of a belief that management is honest. [AU§230, *Due Professional Care in the Performance of Work*, at .09] During the 2010 audit of Subaye, there were multiple instances where DNTW failed to exercise professional skepticism.

28. Respondents did not probe Subaye's management about the company's inability to produce any evidence to support the over $18 million in purported cash that was later reclassified as a marketing expense. Additionally, a Subaye officer emailed both Bryce and Spence Walker regarding the marketing expenses - "There is no control over the bank accounts. That was something I suggested they [Subaye] do but confirmed yesterday that it was not agreed to by the agents." Despite receiving an email from the Subaye officer stating that there were no controls over the cash, Respondents made no further inquiries and conducted no additional procedures.

29. In another example, Subaye's initial position had been that the deposit contracts for "inventoriable assets" were fully refundable, and yet by the end of fiscal 2010, two of the contracts had been canceled and Subaye reported that it had only been refunded for $1.9 million of the $5.9 million in outstanding deposits. Despite being aware of this disparity, Respondents failed to probe the inconsistencies in a Subaye officer's representations that the deposits were fully refundable. Respondents should have been attentive to evidence about the Subaye officer's credibility because he was their sole point of contact at Subaye. As such, any questions about the Subaye officer's credibility required Respondents to exercise professional skepticism and to seek additional evidence.

30. Additionally, even though bank statements were the only evidence obtained to verify Subaye's cash balances, Respondents failed to question suspicious transfers on those statements. For example, $6.7 million of Subaye's $7.1 million cash balance as of September 30, 2010 resulted from deposits into Subaye's accounts during the last seven days of September. Despite this suspicious timing, Respondents performed no testing to ascertain the basis for the cash infusion during the final week of fiscal year 2010

31. In addition to Respondents' failing to maintain control over the accounts receivable confirmation process, they also failed to address questions raised by the return of those confirmations to the audit team. DNTW's work papers indicate that 10 confirmations for accounts receivable were purportedly sent out to independent parties on November 19, 2010 and all were returned without exception by November 30, 2010. Despite the fact that DNTW personnel, including Bryce Walker, recognized that it was very unusual for all audit confirmations to be returned so quickly, Respondents never performed additional procedures to address the unusual timing, once again failing to exercise the adequate level of professional skepticism that was required based on the circumstances.

32. Finally, in accordance with DNTW's audit quality control process, Spence Walker was designated as the file quality review partner who had responsibility for reviewing the audit work of DNTW for the 2010 year-end audit of Subaye. Spence Walker failed in this role because

he should have been aware of the shortcomings of the audit in obtaining sufficient competent evidence regarding cash, the marketing expenses, and deposits for Inventoriable Assets, yet did not assure that these deficiencies were appropriately addressed before completion of the audit. He also failed to exercise due professional care in evaluating numerous significant risks during the 2010 audit, including that Subaye was unable to produce sufficient competent evidence to support a purported $21 million asset during the 2010 audit.

E. VIOLATIONS

Improper Professional Conduct Under Rule 102(e)(1)(ii)

33. Rule 102(e)(1)(ii) of the Commission's Rules of Practice provides that the Commission may deny to any person the privilege of practicing before it, if that person is found to have engaged in improper professional conduct. Section 4C(a)(2) of the Exchange Act provides for the same authority. Improper professional conduct may be intentional or reckless; it can also be one of two types of negligent conduct: a single instance of highly unreasonable conduct in circumstances for which heightened scrutiny is warranted; or repeated instances of unreasonable conduct that indicate a lack of competence.

34. Bryce Walker, the engagement partner, was responsible for ensuring that DNTW's audit of Subaye's 2010 financial statements met applicable professional standards. He failed in this regard, as DNTW's audit of Subaye was not conducted in accordance with PCAOB Standards. DNTW's audit failures demonstrate that Bryce Walker's conduct was unreasonable and support an action against him under Rule 102(e)(1)(ii).

35. Spence Walker, in his role as file quality review partner, took on certain responsibilities to ensure DNTW's audits were conducted in accordance with PCAOB Standards. As discussed herein, upon assuming this responsibility, Spence Walker should have become aware of audit deficiencies in multiple areas but did not address those deficiencies. These failures demonstrate that Spence Walker's conduct was unreasonable and support an action against him under Rule 102(e)(1)(ii).

Respondents Caused Subaye's Violation of Exchange Act Section 13(a) and Rule 13a-1 Thereunder

36. Section 13(a) of the Exchange Act and Rule 13a-1 thereunder, require that every issuer of a security registered pursuant to Section 12 of the Exchange Act file with the Commission annual reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading. The obligation to file such reports embodies the requirement that they be true and correct.

37. Included in Subaye's annual report for the fiscal year ended 2010 was an audit report from DNTW that stated DNTW's audit was conducted "in accordance with the standards of the Public Company Accounting Oversight Board (United States)." The statement in

DNTW's audit report was false, because Respondents failed to conduct their audit of Subaye in accordance with PCAOB Standards. Accordingly, Respondents were a cause of Subaye's violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder.

Spence Walker and Bryce Walker caused DNTW's direct violation of Rule 2-02 of Regulation S-X

38. Rule 2-02(b)(1) of Regulation S-X requires an accountant's report to state "whether the audit was made in accordance with generally accepted auditing standards." "[R]eferences in Commission rules and staff guidance and in the federal securities laws to GAAS ("Generally Accepted Auditing Standards") or to specific standards under GAAS, as they relate to issuers, should be understood to mean the standards of the PCAOB plus any applicable rules of the Commission." (See SEC Release No. 34-49708 (May 14, 2004)). Thus, an auditor violates Regulation S-X Rule 2-02(b)(1) if it issues a report stating that it had conducted its audit in accordance with PCAOB Standards when it had not. See In re Andrew Sims, CPA, Rel. No.34-59584, AAER No. 2950 (Mar. 17, 2009).

39. DNTW issued an audit report on Subaye's 2010 financial statements stating that it had conducted its audit in accordance with PCAOB Standards. DNTW's audit, however, was not conducted in accordance with PCAOB Standards. As such, DNTW directly violated Rule 2-02(b)(1) of Regulation S-X. Bryce Walker, as engagement partner, and Spence Walker, as file quality review partner, should have known that DNTW had not conducted its audit in accordance with PCAOB Standards. Accordingly, Bryce Walker and Spence Walker caused DNTW's violation of Rule 2-02(b)(1).

F. FINDINGS

Based on the foregoing, the Commission finds that the Respondents 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.

Based on the foregoing, the Commission finds that Respondents caused Subaye's violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder. Additionally, the Commission finds that DNTW directly violated Regulation S-X Rule 2-02(b)(1) and that Spence Walker and Bryce Walker caused DNTW's violation of Regulation S-X Rule 2-02(b)(1).

G. UNDERTAKINGS

Respondents Bryce Walker and Spence Walker undertake the following:

Cooperation

A. Respondents Bryce Walker and Spence Walker agree that each shall cooperate fully with the Commission with respect to any matter relating to the Commission's investigation of Subaye or its current or former officers, directors or employees, including but not limited to any litigation or other proceeding related to or resulting from that investigation, including litigation in *SEC v. Subaye, Inc. and James T. Crane*, Civil Action No. 13 CIV 3114 (S.D.N.Y.).

a. Producing any document, record, or other tangible evidence reasonably requested by Commission staff in connection with the Commission's investigation, litigation or other proceedings;

b. Providing all information reasonably requested by Commission staff in connection with the Commission's investigation; and

c. Attending and providing truthful statements or testimony at any meeting, interview, testimony, deposition, trial, or other legal proceeding reasonably requested by the Commission staff.

In determining whether to accept the Offer, the Commission has considered these undertakings.

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 Bryce Walker and Spence Walker shall cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Rule 13a-1 promulgated thereunder and Regulation S-X Rule 2-02(b)(1).

B. Respondent Bryce Walker is denied the privilege of appearing or practicing before the Commission as an accountant.

C. After three (3) years from the date of this order, Respondent Bryce Walker 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 Bryce Walker'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 Bryce Walker, 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 Bryce Walker, 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 Respondent Bryce Walker's or the firm's quality control system that would indicate that Respondent Bryce Walker will not receive appropriate supervision;

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

D. The Commission will consider an application by Respondent Bryce Walker 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 Bryce Walker's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

E. Respondent Spence Walker is denied the privilege of appearing or practicing before the Commission as an accountant.

F. After one (1) year from the date of this order, Respondent Spence Walker 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 Spence Walker'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 Spence Walker, 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 Spence Walker, 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 Spence Walker's or the firm's quality control system that would indicate that Spence Walker will not receive appropriate supervision;

(c) Respondent Spence Walker 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 Spence Walker acknowledges his responsibility, as long as Respondent Spence Walker 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.

G. The Commission will consider an application by Respondent Spence Walker 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 Spence Walker's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

H. Respondents Bryce Walker and Spence Walker, jointly and severally, shall, within ten (10) days of the entry of this Order, pay disgorgement of $128,000 and prejudgment interest of $10,954 to the Securities and Exchange Commission. Payment shall be made in the following installments: $38,954 to be paid with the entry of this Order and $100,000 to be paid within one-year from the date of the Order. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Spence Walker or Bryce Walker as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to John T. Dugan, Division of Enforcement, Securities and Exchange Commission, 33 Arch Street, 23rd Floor, Boston, MA 02110.

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72212 / May 21, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3839 / May 21, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15881

In the Matter of **GENESIS ADVISORY SERVICES CORP., ABJ SOCIETE ANONYME CORP., and BRUCE J. FIXELLE** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTIONS 203(e) AND 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, 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 Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Genesis Advisory Services Corp. ("Genesis"), ABJ Societe Anonyme Corp. ("ABJ"), and Bruce J. Fixelle ("Fixelle") (collectively, "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 Section 21C 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 and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Securities Exchange Act of 1934 ("Rule 105") by Fixelle, Genesis, ABJ, and Ironbird Capital LLC ("Ironbird"). Rule 105 prohibits buying an equity security in a secondary or follow-on firm commitment public offering (hereinafter collectively referred to as "covered offering") from an underwriter, broker, or dealer participating in the offering after having sold short the same security during a defined restricted period (typically five business days before the pricing of the offering).

2. On 35 occasions, from June 2008 through November 2012, Fixelle, through trading in the accounts of Genesis, ABJ, Ironbird, and other entities, bought offering 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 of Rule 105 collectively resulted in profits and losses avoided of $1,230,985.16, of which $951,060.13 is attributed to Genesis, ABJ, and Fixelle.

Respondents

3. Genesis is incorporated in Delaware with a principal place of business in New Jersey. Genesis is solely owned and operated by Fixelle and has one administrative employee. Genesis is the investment adviser to the fund Genesis Group LP ("Genesis Fund"). Fixelle directed all trading decisions for Genesis.

4. ABJ is organized under the laws of the British Virgin Islands and has a principal place of business in New Jersey. ABJ is solely owned and operated by Fixelle, and it shares an administrative employee with Genesis. ABJ is an unregistered investment adviser to the fund ABJ Societe Anonyme L.P. ("ABJ Fund"). Fixelle directed all trading decisions for ABJ.

5. Fixelle, age 54, a resident of New Jersey, is the owner, principal, and an associated person, of Genesis and ABJ. Fixelle, through Genesis and ABJ, provides investment advice to the Genesis Fund and the ABJ Fund. Fixelle also directed trading by Ironbird for the period January 2008 through July 2010. Fixelle directed all the trading associated with the Rule 105 violations discussed herein.

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

Other Relevant Entities

6. Ironbird, a trading entity, is incorporated in and maintains a principal place of business in Maryland. For the period January 2008 through July 2010, Fixelle had trading authority for Ironbird and directed trading by Ironbird. Fixelle was never an owner, officer, partner, or employee of Ironbird.

7. Genesis Fund is a fund incorporated in Delaware and advised by Genesis. Genesis is the investment adviser to Genesis Fund. Genesis Fund and ABJ Fund had $650,000 in combined assets as of March 2014.

8. ABJ Fund is a fund organized under the laws of the British Virgin Islands and advised by ABJ. ABJ is the investment adviser to ABJ Fund. ABJ Fund and Genesis Fund had $650,000 in combined assets as of March 2014.

Background

9. From the early 1990s to about 2012, Fixelle managed between $2 and $6 million in both the Genesis Fund and ABJ Fund, which was comprised of Fixelle's personal funds and funds raised from family and friends. Fixelle traded these funds through Genesis, ABJ, and from January 2008 through July 2010, Ironbird.

10. By mid-2008, Fixelle had devised a strategy of seeking allocations in numerous covered offerings, including offerings that Fixelle believed might not be profitable. Fixelle believed that his entities were more likely to receive desirable allocations of initial public offerings and covered offerings from brokers if the entities also participated in less desirable covered offerings. If Fixelle believed that a covered offering would not be profitable, he sometimes shorted those same securities both during the restricted period and after the allocation as a hedge against any securities from the covered offering allocated to his entities.

11. At all relevant times, Fixelle had full responsibility for this trading strategy, and he directed trades executing this strategy. From June 2008 through June 2009, profits, losses, and expenses associated with this strategy were split two-thirds to Fixelle/Genesis/ABJ and one-third to Ironbird. From July 2009 through July 2010, Fixelle/Genesis/ABJ and Ironbird split profits, losses, and expenses 50-50.

Legal Framework

12. Rule 105 makes it unlawful for a person to purchase equity securities in a covered public offering from an underwriter, broker, or dealer participating in the offering if that person sold short the security that is the subject of the offering during the restricted period as defined in the rule, absent an exception. 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.

13. Rule 105 applies irrespective of the short seller's intent in effecting the short sale. "The prohibition on purchasing offered securities . . . provides a bright line demarcation of prohibited conduct consistent with the prophylactic nature of Regulation M." Short Selling in Connection with a Public Offering, 72 Fed. Reg. at 45096. The Commission adopted Rule 105 in an effort to prevent manipulative short selling prior to a public offering and, therefore, "to foster secondary and follow-on offering prices that are determined by independent market dynamics and not by potentially manipulative activity." Id. at 45094.

Respondents' Violations of Rule 105 of Regulation M

14. From June 2008 through November 2012, Fixelle directed trading that violated Rule 105 in connection with 35 separate secondary and follow-on offerings, in each case by selling short shares of the issuers' stock during the restricted period, and then purchasing offering shares. These violations resulted in profits and losses avoided of $1,230,985.16, of which $951,060.13 is attributed to Genesis, ABJ, and Fixelle.[2]

15. The profits and losses avoided consisted of the following:

A. First, the Respondents profited from the difference between the proceeds from their improper restricted period short sales, and the amounts they paid on an equivalent number of shares received in the offerings of the same issuer's shares. These unlawful profits totaled approximately $438,310.35.

B. Second, in those offerings where the number of shares they received in the offerings exceeded the number of shares they sold short during the restricted period ("overage"), the Respondents improperly obtained an additional benefit in that they obtained the offering shares at a discount to the market price of the issuer's shares. Unlawful profits in the form of market discounts totaled approximately $504,256.36.

C. Third, the Respondents improperly benefitted in certain offerings where the offering price exceeded the price at which they had sold the stock short during the restricted period. Because they purchased their offering shares at a discount to the market price, they avoided losses in connection with these offerings in an amount that totaled $8,493.42.

16. For example, on July 9, 2008, ABJ sold short 26,200 shares of Chesapeake Energy Corp. (ticker: CHK) common stock at an average price of $59.18. After the close of the market on July 9, 2008, a secondary offering of CHK common stock was priced at $57.25. Genesis, ABJ, and Ironbird purchased 86,100 shares in the offering. The difference between the proceeds from the restricted period short sales of CHK shares and amount paid for the equivalent number of shares purchased in the offering was $50,566. These entities obtained an additional improper

2 Disgorgement and pre-judgment interest was allocated approximately in the same manner in which Fixelle/Genesis/ABJ and Ironbird split profits and losses during the course of their business venture, as described above.

benefit of $135,703.45 by purchasing the remaining 59,900 offering shares at a discount to the market price of $59.5155.

17. As another example, on October 25, 2011, ABJ sold short 78,000 shares of GNC Holdings Inc. (ticker: GNC) common stock, at an average price of $24.73. Later that day, after the close of the market, a follow-on offering of GNC common stock was priced at $24.75. Genesis and ABJ purchased a total of 35,125 shares in the offering. Although the offering price exceeded the price at which it had sold short the stock during the restricted period, there was an improper benefit in the amount of $2,458.75 by obtaining a number of shares equal to the number it had sold short at a discount from the market price, which was $24.8198.

18. The 35 offerings in which Fixelle, Genesis, and ABJ violated Rule 105 are listed on Exhibit A to this Order.

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

A. Respondents Genesis, ABJ, and Fixelle cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Genesis, ABJ, and Fixelle are censured;

C. Within 30 days of entry of this order, Genesis, ABJ, and Fixelle shall together, on a joint and several basis, pay disgorgement of $951,060.13 , prejudgment interest of $140,488.48, and a civil monetary penalty in the amount of $492,394 (for a total of $1,583,942.61) to the Securities and Exchange Commission, for transmission to the United States Treasury. If timely payment is not made, additional interest shall accrue 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 must be made in one of the following ways:

(1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;[3]

(2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

[3] The minimum threshold for transmission of payment electronically is $1,000,000. For amounts below the threshold, Respondents must make payments pursuant to options (2) or (3) above.

(3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Genesis, ABJ, and Fixelle as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Andrew M. Calamari, Regional Director, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, NY 10281.

By the Commission.

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

Exhibit A

	ISSUER (TICKER)	PRICING DATE
1	Boardwalk Pipeline Partners, LP (BWP)	6/10/2008
2	KeyCorp (KEY)	6/12/2008
3	Atlas Pipeline Partners, LP (APL)	6/18/2008
4	Capital Source, Inc. (CSE)	6/23/2008
5	Sequenom, Inc. (SQNM)	6/26/2008
6	Chesapeake Energy Corp. (CHK)	7/9/2008
7	Energy Transfer Partners LP (ETP)	7/15/2008
8	Energy Solutions (ES)	7/24/2008
9	Incyte Corp. (INCY)	7/31/2008
10	Waste Connections, Inc. (WCN)	9/24/2008
11	Chimera Investment Corp. (CIM)	10/24/2008
12	Pepco Holdings, Inc. (POM)	11/5/2008
13	Ecolab Inc. (ECL)	11/12/2008
14	Kinder Morgan Energy Partners LP (KMP)	12/17/2008
15	DHT Holdings Inc. (DHT)	3/27/2009
16	Empresas ICA SA (ICA)	7/9/2009
17	STEC, Inc. (STEC)	8/5/2009
18	TRW Automotive Holdings Corp. (TRW)	8/11/2009
19	Ocwen Financial Corp. (OCN)	8/12/2009
20	Apollo Investment Corp. (AINV)	8/12/2009
21	Plains All American Pipeline, L.P. (PAA)	9/9/2009
22	Ramco-Gershenson Properties Trust (RPT)	9/10/2009
23	ReneSola Ltd. (SOL)	9/29/2009
24	Louisiana-Pacific Corp. (LPX)	9/23/2009
25	Hercules Offshore, Inc. (HERO)	9/24/2009
26	Xcel Energy Inc. (XEL)	8/3/2010
27	Citigroup Inc. (C)	12/6/2010
28	GNC Holdings, Inc. (GNC)	10/25/2011
29	Cheniere Energy, Inc. (LNG)	7/17/2012
30	American International Group Inc. (AIG)	8/2/2012
31	Associated Estates Realty Corp. (AEC)	6/22/2012
32	American Capital Agency Corp. (AGNC)	7/18/2012
33	Splunk Inc. (SPLK)	7/19/2012
34	WisdomTree Investments, Inc. (WETF)	11/14/2012
35	Equity Residential (EQR)	11/28/2012

The Office of the Chief Accountant Working Files (SEC-28) contain records related to Accountants; persons associated with accountants and accounting firms; persons associated with SEC registrants, including individuals that submit requests for consultation with the Office of the Chief Accountant and individuals involved with or subjects of SEC investigations; and SEC personnel assigned to work on relevant matters. The Office of the Chief Accountant uses the records in formulating and applying accounting or auditing policies for documents to be filed with the Commission; in determining appropriate recommendations to the Commission relating to the disqualification of accountants to appear and practice before the Commission; to respond to inquiries concerning accounting and auditing matters; and to assist in investigations of possible violations of the federal securities laws. Substantive changes to SEC-28 have been made to the following sections: (1) Categories of Individuals, to clarify specific individuals covered in the records; (2) Categories of Records, modifying to include specific data elements collected on individuals, to include name, mailing address, telephone number and email address; (3) Purpose, stating the purposes of the system; (4) Routine Uses, expanding to include seven new routine uses located at numbers 1, 12, 18-22; and (5) Exemption Claimed for the System, updating to include notice that certain records from this system of records are exempt from the certain provisions of the Privacy Act. This exemption was originally adopted in 40 FR 44068 (September 24, 1975).

The Office of Inspector General Investigative Files (SEC-43) records are compiled by the Office of the Inspector General with respect to individuals, including subjects, complainants, and witnesses, involved in investigations or inquiries relating to SEC programs and operations. The Office of Inspector General uses the records to effectively and efficiently conduct investigations relating to the programs and operations of the SEC, as authorized by the Inspector General Act of 1978, as amended. Substantive changes to SEC-43 have been made to the following sections: (1) System Location, modifying to reflect the addition of an off-site location for closed investigatory files; (2) Categories of Individuals, clarifying the types of files contained in the system; (3) Categories of Records, providing additional details about the management system and adding additional types of individually identifiable documents; (4) Purpose, clarifying the purpose; and (5) Routine Uses, deleting routine uses previously numbered 5, 13 and 14, revising routine use previously numbered 17, and expanding to include seven new routine uses located at numbers 1, 6, 7, 8, 10, 12, and 13.

The Commission has submitted a report of the new system of records and the amended existing systems of records to the appropriate Congressional Committees and to the Director of the Office of Management and Budget ("OMB") as required by 5 U.S.C. § 552a(r) (Privacy Act of 1974) and guidelines issued by OMB on December 12, 2000 (65 FR 77677).

Accordingly, the Commission is proposing to establish one new system of records and revise two existing systems of records to read as follows:

SEC-28

SYSTEM NAME:

Office of the Chief Accountant Working Files.

SYSTEM LOCATION:

Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Accountants and persons associated with accountants and accounting firms and persons associated with SEC registrants, including individuals that submit requests for consultation with the Office of the Chief Accountant and individuals involved with or subjects of SEC investigations; and SEC personnel assigned to work on relevant matters.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records contain names, mailing addresses, telephone numbers, email addresses, and/or information pertaining to accounting and auditing practices, problems, issues, and opinions and information concerning the activities of individuals in connection with Commission enforcement actions or in proceedings pursuant to the Commission's rules of practice.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

15 U.S.C. 77a et seq., 78a et seq., 7201 et seq., and 17 CFR 200.22.

PURPOSE(S):

1. To assist the Office of the Chief Accountant in performing the functions assigned to it by the Commission including the formulation and application of accounting or auditing policies in the case of documents required to be filed with the Commission and the determination of appropriate recommendations to the Commission relating to the disqualification of accountants to appear and practice before the Commission.
2. To respond to inquiries from Members of Congress, the press, and the public concerning accounting and auditing matters.
3. To assist investigations of possible violations of the Federal securities laws.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the Commission as a routine use pursuant to 5 U.S.C. 552 a(b)(3) as follows:

1. To appropriate agencies, entities, and persons when (a) it is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the SEC has determined that, as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the SEC or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the SEC's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.
2. To other federal, state, local, or foreign law enforcement agencies; securities self-regulatory organizations; and foreign financial regulatory authorities to assist in or coordinate regulatory or law enforcement activities with the SEC.
3. To national securities exchanges and national securities associations that are registered with the SEC, the Municipal Securities Rulemaking Board; the Securities Investor Protection Corporation; the Public Company Accounting Oversight Board; the federal banking authorities, including, but not limited to, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation; state securities regulatory agencies or organizations; or regulatory authorities of a foreign government in connection with their regulatory or enforcement responsibilities.
4. By SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities laws.
5. In any proceeding where the federal securities laws are in issue or in which the Commission, or past or present members of its staff, is a party or otherwise involved in an official capacity.

6. In connection with proceedings by the Commission pursuant to Rule 102(e) of its Rules of Practice, 17 CFR 201.102(e).
7. To a bar association, state accountancy board, or other federal, state, local, or foreign licensing or oversight authority; or professional association or self-regulatory authority to the extent that it performs similar functions (including the Public Company Accounting Oversight Board) for investigations or possible disciplinary action.
8. To a federal, state, local, tribal, foreign, or international agency, if necessary to obtain information relevant to the SEC's decision concerning the hiring or retention of an employee; the issuance of a security clearance; the letting of a contract; or the issuance of a license, grant, or other benefit.
9. To a federal, state, local, tribal, foreign, or international agency in response to its request for information concerning the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation of an employee; the letting of a contract; or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.
10. To produce summary descriptive statistics and analytical studies, as a data source for management information, in support of the function for which the records are collected and maintained or for related personnel management functions or manpower studies; may also be used to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act.
11. To any trustee, receiver, master, special counsel, or other individual or entity that is appointed by a court of competent jurisdiction, or as a result of an agreement between the parties in connection with litigation or administrative proceedings involving allegations of

violations of the federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)) or pursuant to the Commission's Rules of Practice, 17 CFR 201.100 – 900 or the Commission's Rules of Fair Fund and Disgorgement Plans, 17 CFR 201.1100-1106, or otherwise, where such trustee, receiver, master, special counsel, or other individual or entity is specifically designated to perform particular functions with respect to, or as a result of, the pending action or proceeding or in connection with the administration and enforcement by the Commission of the federal securities laws or the Commission's Rules of Practice or the Rules of Fair Fund and Disgorgement Plans.

12. To any persons during the course of any inquiry, examination, or investigation conducted by the SEC's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.

13. To interns, grantees, experts, contractors, and others who have been engaged by the Commission to assist in the performance of a service related to this system of records and who need access to the records for the purpose of assisting the Commission in the efficient administration of its programs, including by performing clerical, stenographic, or data analysis functions, or by reproduction of records by electronic or other means. Recipients of these records shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a.

14. In reports published by the Commission pursuant to authority granted in the federal securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15

U.S.C. 78c(a)(47)), which authority shall include, but not be limited to, section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a).

15. To members of advisory committees that are created by the Commission or by Congress to render advice and recommendations to the Commission or to Congress, to be used solely in connection with their official designated functions.

16. To any person who is or has agreed to be subject to the Commission's Rules of Conduct, 17 CFR 200.735-1 to 200.735-18, and who assists in the investigation by the Commission of possible violations of the federal securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47), in the preparation or conduct of enforcement actions brought by the Commission for such violations, or otherwise in connection with the Commission's enforcement or regulatory functions under the federal securities laws.

17. To a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.

18. To members of Congress, the press, and the public in response to inquiries relating to particular Registrants and their activities, and other matters under the Commission's jurisdiction.

19. To prepare and publish information relating to violations of the federal securities laws as provided in 15 U.S.C. 78c(a)(47), as amended.

20. To respond to subpoenas in any litigation or other proceeding.

21. To a trustee in bankruptcy.

22. To members of Congress, the Government Accountability Office, or others charged with monitoring the work of the Commission or conducting records management inspections.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in electronic and paper format. Electronic records are stored in computerized databases, magnetic disc, tape and/or digital media. Paper records and records on computer disc are stored in locked file rooms and/or file cabinets.

RETRIEVABILITY:

Paper records are searchable by name, subject, firm, date, and/or internal file number. Electronic records are searchable through routine word searches to include searches by name, subject, firm and /or keyword.

SAFEGUARDS:

Access to SEC facilities, data centers, and information or information systems is limited to authorized personnel with official duties requiring access. SEC facilities are equipped with security cameras and 24-hour security guard service. The records are kept in limited access areas during duty hours and in locked file cabinets and/or locked offices or file rooms at all other times. Computerized records are safeguarded in a secured environment. Security protocols meet the promulgating guidance as established by the National Institute of Standards and Technology (NIST) Security Standards from Access Control to Data Encryption and Security Assessment & Authorization (SA&A). Records are maintained in a secure, password-protected electronic system that will utilize commensurate safeguards that may include: firewalls, intrusion detection and prevention systems, and role-based access controls. Additional safeguards will vary by program. All records are protected from unauthorized access through appropriate administrative, operational, and technical safeguards. These safeguards include: restricting access to authorized personnel who have a "need to know"; using locks; and password protection identification features. Contractors and other recipients providing services to the Commission shall be required to maintain equivalent safeguards.

RETENTION AND DISPOSAL:

These records will be maintained until they become inactive, at which time they will be retired or destroyed in accordance with records schedules of the United States Securities and Exchange Commission and as approved by the National Archives and Records Administration.

SYSTEM MANAGER(S) AND ADDRESS:

Chief Accountant, Office of the Chief Accountant, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

NOTIFICATION PROCEDURE:

All requests to determine whether this system of records contains a record pertaining to the requesting individual may be directed to the FOIA/PA Officer, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5100.

RECORD ACCESS PROCEDURES:

Persons wishing to obtain information on the procedures for gaining access to or contesting the contents of these records may contact the FOIA/PA Officer, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5100.

CONTESTING RECORD PROCEDURES:

See Record access procedures above.

RECORD SOURCE CATEGORIES:

The information contained in the system is derived from official SEC records, letters and inquiries from the public, SEC staff memoranda, which may include information derived from investigations, litigation, and other submissions, and professional auditing and accounting literature and information received from individuals including where practicable those to whom the records relate.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Under 5 U.S.C. 552a(k)(2), this system of records is exempted from the following provisions of the Privacy Act, 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) and 17 CFR 200.303, 200.304, and 200.306, insofar as it contains investigatory materials compiled for law enforcement purposes. This exemption is contained in 17 CFR 200.312(a)(3).

SEC-43

SYSTEM NAME:

Office of Inspector General Investigative Files.

SYSTEM LOCATION:

Office of the Inspector General, Securities and Exchange Commission (SEC), 100 F Street, NE, Washington, DC 20549. Closed investigatory files may be stored at a federal records center in accordance with the SEC's records retention schedule.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system of records contains records on individuals, including subjects, complainants, and witnesses, in connection with the Office of Inspector General's investigations or inquiries relating to programs and operations of the SEC.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records include: a case management system that contains a unique control number, descriptive information, and supporting documents for each investigation or preliminary inquiry; incoming complaints and complaint logs; preliminary inquiry files and indexes; correspondence relating to investigations; internal staff memoranda concerning investigations; copies of all subpoenas issued during investigations; subpoena logs; affidavits, declarations and statements from witnesses; transcripts of interviews conducted or testimony taken in the investigation and accompanying exhibits; documents and records obtained during investigations; working papers of the staff and other documents and records relating to the investigation; investigative plans, operation plans, status reports, reports of investigation, and closing memoranda; information and documents relating to grand jury proceedings; arrest and search warrant affidavits; information and documents relating to criminal, civil, and administrative actions; information and documents received from other law enforcement entities; personnel information for witnesses and subjects; and investigative peer review files.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Inspector General Act of 1978, as amended, Pub. L. 95-452, 5 U.S.C. App.

PURPOSE(S):

The purpose of this system of records is to enable the Office of Inspector General to effectively and efficiently conduct investigations relating to the programs and operations of the SEC, as authorized by the Inspector General Act of 1978, as amended.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the Commission as a routine use pursuant to 5 U.S.C. 552 a(b)(3) as follows:

1. To appropriate agencies, entities, and persons when (a) it is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; (b)

the SEC has determined that, as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the SEC or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the SEC's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

2. Where there is an indication of a violation or a potential violation of law, whether civil, criminal or regulatory in nature, to the appropriate agency, whether Federal, foreign, state, or local, or to a securities self-regulatory organization, charged with enforcing or implementing the statute, or rule, regulation or order.
3. To Federal, foreign, state, or local authorities in order to obtain information or records relevant to an Office of Inspector General investigation or inquiry.
4. To non-governmental parties where those parties may have information the Office of Inspector General seeks to obtain in connection with an investigation or inquiry.
5. To respond to subpoenas in any litigation or other proceeding.
6. In connection with proceedings by the Commission pursuant to Rule 102(e) of its Rules of Practice, 17 CFR 201.102(e).
7. To a bar association, state accountancy board, or other federal, state, local, or foreign licensing or oversight authority; or professional association or self-regulatory authority to the extent that it performs similar functions (including the Public Company Accounting Oversight Board) for investigations or possible disciplinary action.

8. To a federal, state, local, tribal, foreign, or international agency, if necessary to obtain information relevant to the SEC's decision concerning the hiring or retention of an employee; the issuance of a security clearance; the letting of a contract; or the issuance of a license, grant, or other benefit.
9. To a federal, state, local, tribal, foreign, or international agency in response to its request for information concerning the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation of an employee; the letting of a contract; or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.
10. To produce summary descriptive statistics and analytical studies, as a data source for management information, in support of the function for which the records are collected and maintained or for related personnel management functions or manpower studies; may also be used to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act.
11. To inform complainants, victims, and witnesses of the results of an investigation or inquiry.
12. To any persons during the course of any inquiry, audit, or investigation conducted by the SEC's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.
13. To interns, grantees, experts, contractors, and others who have been engaged by the Commission to assist in the performance of a service related to this system of records and who need access to the records for the purpose of assisting the Commission in the efficient

administration of its programs, including by performing clerical, stenographic, or data analysis functions, or by reproduction of records by electronic or other means. Recipients of these records shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a.

14. To qualified individuals or organizations in connection with the performance of a peer review or other study of the Office of Inspector General's audit or investigative functions.
15. To a Federal agency responsible for considering debarment or suspension action if the record would be relevant to such action.
16. To the Department of Justice for the purpose of obtaining its advice on Freedom of Information Act matters.
17. To a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.
18. To the Office of Government Ethics (OGE) to comply with agency reporting requirements established by OGE in 5 CFR 2638, subpart F.
19. To the Department of Justice and/or the Office of General Counsel of the SEC when the defendant in litigation is: (a) Any component of the SEC or any employee of the SEC or any employee of the SEC in his or her official capacity; (b) the United States where the SEC determines that the claim, if successful, is likely to directly affect the operations of the SEC; or (c) any SEC employee in his or her individual capacity where the Department of Justice and/or the Office of General Counsel of the SEC agree to represent such employee.
20. To the news media and the public when there exists a legitimate public interest (*e.g.*, to provide information on events in the criminal process, such as an indictment).

21. To the Council of the Inspectors General on Integrity and Efficiency, another Federal Office of Inspector General, or other Federal law enforcement office in connection with an allegation of wrongdoing by the Inspector General or staff members of the Office of Inspector General.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in electronic and paper format. Electronic records are stored in computerized databases, magnetic disc, tape and/or digital media. Paper records and records on computer disc are stored in locked file rooms and/or file cabinets.

RETRIEVABILITY:

The records may be retrieved by the name of the complainant, subject, witness, or victim; the investigative staff name for the investigation or inquiry; or other indexed information.

SAFEGUARDS:

Access to SEC facilities, data centers, and information or information systems is limited to authorized personnel with official duties requiring access. SEC facilities are equipped with security cameras and 24-hour security guard service. The records are kept in limited access areas during duty hours and in locked file cabinets and/or locked offices or file rooms at all other times. Computerized records are safeguarded in a secured environment. Security protocols meet the promulgating guidance as established by the National Institute of Standards and Technology (NIST) Security Standards from Access Control to Data Encryption and Security Assessment & Authorization (SA&A). Records are maintained in a secure, password-protected electronic system that will utilize commensurate safeguards that may include: firewalls, intrusion detection and prevention systems, and role-based access controls. Additional safeguards will vary by program. All records are protected from unauthorized access through appropriate administrative, operational, and technical safeguards. These safeguards include: restricting access to authorized personnel who have a "need to know"; using locks; and password protection identification features. Contractors and other recipients providing services to the Commission shall be required to maintain equivalent safeguards.

RETENTION AND DISPOSAL:

These records will be maintained until they become inactive, at which time they will be retired or destroyed in accordance with the SEC's records retention schedule, as approved by the National Archives and Records Administration.

SYSTEM MANAGER(S) AND ADDRESS:

Inspector General, Office of Inspector General, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

NOTIFICATION PROCEDURE:

All requests to determine whether this system of records contains a record pertaining to the requesting individual may be directed to the FOIA/PA Officer, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-2736.

RECORD ACCESS PROCEDURES:

Persons wishing to obtain information on the procedures for gaining access to or contesting the contents of these records may contact the FOIA/PA Officer, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-2736.

CONTESTING RECORD PROCEDURES:

See record access procedures above.

RECORD SOURCE CATEGORIES:

Information in these records is supplied by: Individuals including, where practicable, those to whom the information relates; witnesses, corporations and other entities; records of individuals and of the SEC; records of other entities; Federal, foreign, state or local bodies and law enforcement agencies; documents and correspondence relating to litigation; transcripts of testimony; and miscellaneous other sources.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Pursuant to 5 U.S.C. 552a(j)(2) and 17 CFR 200.313(a), this system of records, is exempt from the provisions of the Privacy Act of 1974, 5 U.S.C. 552a, except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i), and 17 CFR 200.303, 200.403, 200.306, 200.307, 200.308, 200.309, and 200.310, insofar as the system contains information pertaining to criminal law enforcement investigations.

Pursuant to 5 U.S.C. 552a(k)(2) and 17 CFR 200.313(b), this system of records is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f), and 17 CFR 200.303, 200.304, and 200.306, insofar as the system contains investigatory materials compiled for law enforcement purposes.

SEC-67

SYSTEM NAME:

General Information Technology Records

SYSTEM LOCATION:

Securities and Exchange Commission, Headquarters, 100 F Street, NE, Washington, DC 20549 and the SEC's Regional Offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Records are maintained on all individuals who are authorized to access SEC information or information systems; including: employees, contractors, students, interns, volunteers, affiliates, others working on behalf of the SEC, and individuals formerly in any of these positions. Records may also include individuals who voluntarily join an SEC-owned and operated web portal for collaboration purposes; individuals who request access but are denied, and/or who have had access revoked.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system of records may include: users' names; social security numbers; business telephone numbers; cellular phone numbers; pager numbers; levels of access; physical and email addresses; titles; departments; division; contractor/employee status; computer logon addresses; password hashes; user identification codes; dates and times of access; IP addresses; logs of internet activity; types of access/permissions required; failed access data; archived transaction data; historical data; and justifications for access to SEC computers, networks, or systems. For individuals who telecommute from home or a telework center, the records may contain the Internet Protocol (IP) address and telephone number at that location. For contractors, the system may contain the company name, contract number, and contract expiration date. The system may also contain details regarding: programs; databases; functions; and sites accessed and/or used, dates and times of use, information products created, received, or altered during use, and access or functionality problems reported for technical support and resolution.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. §302, Delegation of Authority; 44 U.S.C. §3534; Federal Information Security Act (Pub. L. 104-106, section 5113); Electronic Government Act (Pub. L. 104-347, section 203); and E.O. 9397 (SSN), as amended by E.O. 13487.

PURPOSE(S):

The purpose of this system is to (1) provide authentication and authorization to individuals with access to SEC-controlled information and information system networks; (2) collect, review, and maintain any logs, audit trails, or other such security data regarding the use of SEC information or information systems; and (3) to enable the Commission to detect, report, and take appropriate action against improper or unauthorized access to SEC-controlled information and information systems networks. The records will also enable the SEC to provide individuals access to certain programs and meeting attendance and, where appropriate, allow for sharing of information between individuals in the same operational program to facilitate collaboration. SEC management personnel may use statistical data, with all personal identifiers removed or masked, for system efficiency, workload calculation, or reporting purposes.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the Commission as a routine use pursuant to 5 U.S.C. 552 a(b)(3) as follows:

1. To appropriate agencies, entities, and persons when (a) it is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the SEC has determined that, as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the SEC or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection

with the SEC's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

2. To other federal, state, local, or foreign law enforcement agencies; securities self-regulatory organizations; and foreign financial regulatory authorities to assist in or coordinate regulatory or law enforcement activities with the SEC.
3. In any proceeding where the federal securities laws are in issue or in which the Commission, or past or present members of its staff, is a party or otherwise involved in an official capacity.
4. To a federal, state, local, tribal, foreign, or international agency, if necessary to obtain information relevant to the SEC's decision concerning the hiring or retention of an employee; the issuance of a security clearance; the letting of a contract; or the issuance of a license, grant, or other benefit
5. To a federal, state, local, tribal, foreign, or international agency in response to its request for information concerning the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation of an employee; the letting of a contract; or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.
6. To produce summary descriptive statistics and analytical studies, as a data source for management information, in support of the function for which the records are collected and maintained or for related personnel management functions or manpower studies; may also be used to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act
7. To any persons during the course of any inquiry, examination, or investigation conducted by the SEC's staff, or in connection with civil litigation, if the staff has reason to believe that the

person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.

8. To interns, grantees, experts, contractors, and others who have been engaged by the Commission to assist in the performance of a service related to this system of records and who need access to the records for the purpose of assisting the Commission in the efficient administration of its programs, including by performing clerical, stenographic, or data analysis functions, or by reproduction of records by electronic or other means. Recipients of these records shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. § 552a.
9. To respond to subpoenas in any litigation or other proceeding.
10. To a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.
11. To members of Congress, the Government Accountability Office, or others charged with monitoring the work of the Commission or conducting records management inspections.
12. To a commercial contractor in connection with benefit programs administered by the contractor on the Commission's behalf, including, but not limited to, supplemental health, dental, disability, life and other benefit programs.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in electronic and paper format. Electronic records are stored in computerized databases, magnetic disc, tape and/or digital media. Paper records and records on computer disc are stored in locked file rooms and/or file cabinets.

RETRIEVABILITY:

Information may be retrieved, sorted, and/or searched by an identification number assigned by the computer, the last 2 digits of a social security number, email address, or by the name of the individual, or other employee data fields previously identified in this SORN.

SAFEGUARDS:

Access to SEC facilities, data centers, and information or information systems is limited to authorized personnel with official duties requiring access. SEC facilities are equipped with security cameras and 24-hour security guard service. The records are kept in limited access areas during duty hours and in locked file cabinets and/or locked offices or file rooms at all other times. Computerized records are safeguarded in a secured environment. Security protocols meet the promulgating guidance as established by the National Institute of Standards and Technology (NIST) Security Standards from Access Control to Data Encryption and Security Assessment & Authorization (SA&A). Records are maintained in a secure, password-protected electronic system that will utilize commensurate safeguards that may include: firewalls, intrusion detection and prevention systems, and role-based access controls. Additional safeguards will vary by program. All records are protected from unauthorized access through appropriate administrative, operational, and technical safeguards. These safeguards include: restricting access to authorized personnel who have a "need to know"; using locks; and password protection identification features. Contractors and other recipients providing services to the Commission shall be required to maintain equivalent safeguards.

RETENTION AND DISPOSAL:

These records will be maintained until they become inactive, at which time they will be retired or destroyed in accordance with the SEC's records retention schedule, as approved by the National Archives and Records Administration.

SYSTEM MANAGER(S) AND ADDRESS:

Chief Information Officer, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-2736.

NOTIFICATION PROCEDURE:

All requests to determine whether this system of records contains a record pertaining to the requesting individual may be directed to the FOIA/PA Officer, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-2736.

RECORD ACCESS PROCEDURES:

Persons wishing to obtain information on the procedures for gaining access to or contesting the contents of these records may contact the FOIA/PA Officer, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-2736.

CONTESTING RECORD PROCEDURES:

See Record access procedures above.

RECORD SOURCE CATEGORIES:

Information is supplied by the record subject, their supervisors, and the personnel security staff. Logs and details about access times and functions used are provided by the system.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

Date: May 21, 2014

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72201 / May 21, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15878

In the Matter of

China Green Lighting Limited,
China Kangtai Cactus Bio-Tech, Inc.,
Gemco Minerals, Inc.,
Perfectenergy International Limited, and
Rodobo International, Inc.,

Respondents.

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

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents China Green Lighting Limited, China Kangtai Cactus Bio-Tech, Inc., Gemco Minerals, Inc., Perfectenergy International Limited, and Rodobo International, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. China Green Lighting Limited (CIK No. 1421378) is a delinquent Colorado corporation located in Jiangshan City, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). China Green Lighting Limited 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, 2011, which reported a net loss of $1,252,940 for the prior nine months. As of May 8, 2014, the company's stock (symbol "CHGL") was quoted on OTC Link (previously, "Pink

Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. China Kangtai Cactus Bio-Tech, Inc. (CIK No. 1017699) is a revoked Nevada corporation located in Harbin, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). China Kangtai Cactus Bio-Tech, Inc. 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, 2011. As of May 8, 2014, the company's stock (symbol "CKGT") 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. Gemco Minerals, Inc. (CIK No. 1338118) is a Florida corporation located in Langley, British Columbia, Canada, with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Gemco Minerals, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended November 30, 2009, which reported a net loss of $3,394,046 since the company's August 21, 1997 inception. As of May 8, 2014, the company's stock (symbol "GMML") was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Perfectenergy International Limited (CIK No. 1345432) is a revoked Nevada corporation located in Shanghai, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Perfectenergy International Limited is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the fiscal year ended September 30, 2011, which reported a net loss of $7,627,177 for the prior eleven months. As of May 8, 2014, the company's stock (symbol "PFGY") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Rodobo International, Inc. (CIK No. 1177274) is a revoked Nevada corporation located in Harbin, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Rodobo International, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2011, which reported a net loss of $6,892,633 for the prior three months. As of May 8, 2014, the company's stock (symbol "RDBO") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72209 / May 21, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3837 / May 21, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15879

In the Matter of **STEVEN B. HEINZ,** **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 Steven B. Heinz ("Heinz" 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, Respondent admits the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, and 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. Heinz is the owner, President and CEO of S.B. Heinz & Associates, Inc. ("S.B. Heinz"). From 1986 through March 2004, Heinz was associated as a representative with Northwestern Mutual Investment Services, LLC, a registered broker dealer. From April 2004 until October 2012, Heinz was a registered representative associated with Ogilvie Security Advisors Corp., a registered broker dealer and investment adviser until October 29, 2012. From approximately January 2012 and continuing through August 8, 2013, Heinz provided investment advice to and solicited investments from individuals. Heinz received compensation for providing investment advice and acted as an investment adviser.

2. On April 28, 2014, a judgment was entered by consent against Heinz, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Steven B. Heinz, et al., Civil Action Number 2:13-CV-00753, in the United States District Court for the District of Utah. The order also required Heinz to pay disgorgement and prejudgment interest of $3,656,675.84.

3. The Commission's complaint alleged that Heinz provided investment advice and offered and sold investment contracts to more than fifteen advisory clients, family members, and friends raising approximately $4 million, through his company S.B. Heinz, representing that he would invest in securities and execute rapid buy and sell orders of futures contracts. The complaint further alleged that investor funds were used to falsely create the appearance of a successful investment business although S.B. Heinz has actually lost approximately $1.5 million executing Heinz's high risk futures contract trading activities. In addition, the complaint alleged that Heinz paid "returns" to earlier investors using new investor funds, used investor funds for his own personal purposes and that S.B. Heinz used investor funds to pay business expenses, including the salary for its secretary and its office rent.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Heinz 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.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

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/or 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 them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72211 / May 21, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15880

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

I.

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

II.

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

III.

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

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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.

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Securities Exchange Act of 1934 ("Rule 105") as a result of trading by Ironbird and other entities. Rule 105 prohibits buying an equity security in a secondary or follow-on firm commitment public offering (hereinafter collectively referred to as "covered offering") from an underwriter, broker, or dealer participating in the offering after having sold short the same security during a defined restricted period (typically five business days before the pricing of the offering).

2. On 25 occasions, from June 2008 through July 2010, Ironbird and other entities, as part of a trading strategy, bought offering 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. Ironbird's participation in these violations resulted in profits and losses avoided of $279,925.03.

Respondent

3. Ironbird, a trading entity, is incorporated in and maintains a principal place of business in Maryland. For the period January 2008 through July 2010, Bruce J. Fixelle had trading authority for Ironbird and directed trading by Ironbird. Fixelle was never an owner, officer, partner, or employee of Ironbird.

Other Relevant Entities

4. Genesis is incorporated in Delaware with a principal place of business in New Jersey. Genesis is solely owned and operated by Fixelle and has one administrative employee. Genesis is the investment adviser to the fund Genesis Group LP ("Genesis Fund"). Fixelle directed all trading decisions for Genesis.

5. ABJ is organized under the laws of the British Virgin Islands and has a principal place of business in New Jersey. ABJ is solely owned and operated by Fixelle, and it shares an administrative employee with Genesis. ABJ is an unregistered investment adviser to the fund ABJ Societe Anonyme L.P. ("ABJ Fund"). Fixelle directed all trading decisions for ABJ.

6. Fixelle, age 54, a resident of New Jersey, is the owner, principal, and an associated person, of Genesis and ABJ. Fixelle, through Genesis and ABJ, provides investment advice to the Genesis Fund and the ABJ Fund. Fixelle also directed trading in Ironbird for the period January 2008 through July 2010. Fixelle directed all the trading associated with the Rule 105 violations discussed herein.

Background

7. From the early 1990s to about 2012, Fixelle managed between $2 and $6 million in the Genesis Fund and ABJ Fund, which was comprised of Fixelle's personal funds and funds raised from family and friends. Fixelle traded these funds primarily through trading in the accounts of Genesis, ABJ, and from January 2008 through July 2010, Ironbird.

8. By mid-2008, Fixelle had devised a strategy of seeking allocations in numerous covered offerings, including offerings that Fixelle believed might not be profitable. Fixelle believed that his entities were more likely to receive desirable allocations of initial public offerings and covered offerings from brokers if the entities also participated in less desirable covered offerings. If Fixelle believed that a covered offering would not be profitable, he sometimes shorted those same securities both during the restricted period and after the allocation as a hedge against any securities from the covered offering allocated to his entities.

9. At all relevant times, Fixelle had full responsibility for this trading strategy, and he directed trades executing this strategy. From June 2008 through June 2009, profits, losses, and expenses associated with this strategy were split two-thirds to Fixelle/Genesis/ABJ and one-third to Ironbird. From July 2009 through July 2010, Fixelle/Genesis/ABJ and Ironbird split profits, losses, and expenses 50-50.

Legal Framework

10. Rule 105 makes it unlawful for a person to purchase equity securities in a covered public offering from an underwriter, broker, or dealer participating in the offering if that person sold short the security that is the subject of the offering during the restricted period as defined in the rule, absent an exception. 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.

11. Rule 105 applies irrespective of the short seller's intent in effecting the short sale. "The prohibition on purchasing offered securities . . . provides a bright line demarcation of prohibited conduct consistent with the prophylactic nature of Regulation M." Short Selling in Connection with a Public Offering, 72 Fed. Reg. at 45096. The Commission adopted Rule 105 in an effort to prevent manipulative short selling prior to a public offering and, therefore, "to foster secondary and follow-on offering prices that are determined by independent market dynamics and not by potentially manipulative activity." Id. at 45094.

Respondent's Violation of Rule 105 of Regulation M

12. From June 2008 through July 2010, Ironbird and other entities engaged in trading that violated Rule 105 in connection with 25 separate secondary and follow-on offerings, in each case by selling short shares of the issuers' stock during the restricted period, and then purchasing offering shares. These violations resulted in profits and losses avoided attributable to Ironbird of $279,925.03.

13. The profits and losses avoided consisted of the following:

A. First, the Respondent profited from the difference between the proceeds from the improper restricted period short sales, and the amounts paid on an equivalent number of shares received in the offerings of the same issuer's shares. These unlawful profits totaled approximately $227,550.61.

B. Second, in those offerings where the number of shares received in the offerings exceeded the number of shares sold short during the restricted period ("overage"), the Respondent improperly obtained an additional benefit in that it obtained the offering shares at a discount to the market price of the issuer's shares. Unlawful profits in the form of market discounts totaled approximately $51,915.42.

C. Third, the Respondent improperly benefitted in certain offerings where the offering price exceeded the price at which the stock was sold short during the restricted period. Because offering shares were purchased at a discount to the market price, Respondent avoided losses in connection with these offerings in an amount that totaled $459.00.

14. For example, on July 9, 2008, ABJ sold short 26,200 shares of Chesapeake Energy Corp. (ticker: CHK) common stock at an average price of $59.18. After the close of the market on July 9, 2008, a secondary offering of CHK common stock was priced at $57.25. Genesis, ABJ, and Ironbird purchased 86,100 shares in the offering. The difference between the proceeds from the restricted period short sales of CHK shares and amount paid for the equivalent number of shares purchased in the offering was $50,566. These entities obtained an additional improper benefit of $135,703 by purchasing the remaining 59,900 offering shares at a discount to the market price of $59.5155.

15. As another example, on June 26, 2008, ABJ sold short 21,000 shares of Sequenom, Inc. (ticker: SQNM) common stock, at an average price of $14.56. Later that day, after the close of the market, a follow-on offering of SQNM common stock was priced at $15.50. Genesis and Ironbird purchased a total of 15,300 shares in the offering. Although the offering price exceeded the price at which it had sold short the stock during the restricted period, there was an improper benefit in the amount of $1,377 by obtaining a number of shares equal to the number it had sold short at a discount from the market price, which was $15.586.

16. The 25 offerings in which Ironbird contributed to violations of Rule 105 are listed on Exhibit A to this 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's Offer.

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

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

B. Within 30 days of this order, Ironbird shall pay disgorgement of $279,925.03, and prejudgment interest of $55,510.84 (for a total of $335,435.87) to the Securities and Exchange Commission, for transmission to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;[2]

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Ironbird as Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Andrew M. Calamari, Regional Director, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, NY 10281.

By the Commission.

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

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2 The minimum threshold for transmission of payment electronically is $1,000,000. For amounts below the threshold, Respondent must make payments pursuant to options (2) or (3) above.

Exhibit A

	ISSUER (TICKER)	PRICING DATE
1	Boardwalk Pipeline Partners, LP (BWP)	6/10/2008
2	KeyCorp (KEY)	6/12/2008
3	Atlas Pipeline Partners, LP (APL)	6/18/2008
4	Capital Source, Inc. (CSE)	6/23/2008
5	Sequenom, Inc. (SQNM)	6/26/2008
6	Chesapeake Energy Corp. (CHK)	7/9/2008
7	Energy Transfer Partners LP (ETP)	7/15/2008
8	Energy Solutions (ES)	7/24/2008
9	Incyte Corp. (INCY)	7/31/2008
10	Waste Connections, Inc. (WCN)	9/24/2008
11	Chimera Investment Corp. (CIM)	10/24/2008
12	Pepco Holdings, Inc. (POM)	11/5/2008
13	Ecolab Inc. (ECL)	11/12/2008
14	Kinder Morgan Energy Partners LP (KMP)	12/17/2008
15	DHT Holdings Inc. (DHT)	3/27/2009
16	Empresas ICA SA (ICA)	7/9/2009
17	STEC, Inc. (STEC)	8/5/2009
18	TRW Automotive Holdings Corp. (TRW)	8/11/2009
19	Ocwen Financial Corp. (OCN)	8/12/2009
20	Apollo Investment Corp. (AINV)	8/12/2009
21	Plains All American Pipeline, L.P. (PAA)	9/9/2009
22	Ramco-Gershenson Properties Trust (RPT)	9/10/2009
23	ReneSola Ltd. (SOL)	9/29/2009
24	Louisiana-Pacific Corp. (LPX)	9/23/2009
25	Hercules Offshore, Inc. (HERO)	9/24/2009

美利坚合众国
证券交易委员会

1934 年证券交易法
发行编号 72201 / May 21, 2014

行政程序
文档编号 3-15878

关于

中国绿能照明有限公司 (China Green Lighting Limited)，
中国康太仙人掌生物科技公司 (China Kangtai Cactus Bio-Tech, Inc.)，
Gemco Minerals, Inc.，
展丰能源技术（上海）有限公司 (Perfectenergy International Limited) 和
Rodobo International, Inc.，

答辩人

依据《1934 年证券交易法》第 12 条 (j) 款启动行政程序的指令和听证通知书

第一部分

证券交易委员会（“委员会”）认为，为保护投资者而依据《1934 年证券交易法》（“交易法”）第 12 条 (j)款在此向答辩人中国绿能照明有限公司 (China Green Lighting Limited)、中国康太仙人掌生物科技公司 (China Kangtai Cactus Bio-Tech, Inc.)、Gemco Minerals, Inc.、展丰能源技术（上海）有限公司(Perfectenergy International Limited) 和 Rodobo International, Inc. 启动公共行政程序是必要且适当的。

第二部分

经过调查，执法司指控如下：

A. 答辩人

1. 中国绿能照明有限公司 (China Green Lighting Limited)（CIK 编号 1421378）是一家位于中国江山市的且存在违法行为的科罗拉多州公司，依据交易法第 12 条 (g) 款在委员会登记了一类证券。中国绿能照明有限公司 (China Green

Lighting Limited) 怠于向委员会提交定期申报，自提交了截至 2011 年 9 月 30 日的表 10-Q，报告前九个月净亏损为 1,252,940 美元后，其未再提交任何定期申报。截至 2014 年 5 月 8 日，该公司股票（代码为“CHGL”）在美国场外交易集团 (OTC Markets Group, Inc.) 操作的场外交易市场链接 (OTC Link)（原名“粉单市场”）（以下简称“OTC 链接”）仍有报价，有 3 个做市商，符合交易法 15c2-11(f)(3) 规则中“捎带” (piggyback) 例外的资格。

2. 中国康太仙人掌生物科技公司 (China Kangtai Cactus Bio-Tech, Inc.)（CIK 编号 1017699）是一家位于中国哈尔滨的已被吊销的内达华州公司，依据交易法第 12 条 (g) 款在委员会登记了一类证券。中国康太仙人掌生物科技公司 (China Kangtai Cactus Bio-Tech, Inc.) 怠于向委员会提交定期申报，自提交了截至 2011 年 9 月 30 日的表 10-Q，其未再提交任何定期申报。截至 2014 年 5 月 8 日，该公司股票（代码为“CKGT”） 在 OTC 链接仍有报价，有 8 个做市商，符合交易法 15c2-11(f)(3) 规则中“捎带” (piggyback) 例外的资格。

3. Gemco Minerals, Inc.（CIK 编号 1338118）是一家位于加拿大不列颠哥伦比亚省兰利的佛罗里达州公司，依据交易法第 12 条 (g) 款在委员会登记了一类证券。Gemco Minerals, Inc. 怠于向委员会提交定期申报，自提交了截至 2009 年 11 月 30 日的表 10-Q，报告该公司自 1997 年 8 月 21 日开始的净亏损为 3,394,046 美元后，其未再提交任何定期申报。截至 2014 年 5 月 8 日，该公司股票（代码为“GMML”） 在 OTC 链接仍有报价，有 3 个做市商，符合交易法 15c2-11(f)(3) 规则中“捎带” (piggyback) 例外的资格。

4. 展丰能源技术（上海）有限公司 (Perfectenergy International Limited)（CIK 编号 1345432）是一家位于中国上海的已被吊销的内达华州公司，依据交易法第 12 条 (g) 款在委员会登记了一类证券。展丰能源技术（上海）有限公司 (Perfectenergy International Limited) 怠于向委员会提交定期申报，自提交了截至 2011 年 9 月 30 日的财政年表 10-Q，报告前 11 个月的净亏损为 7,627,177 美元后，其未再提交任何定期申报。截至 2014 年 5 月 8 日，该公司股票（代码为“PFGY”） 在 OTC 链接仍有报价，有 6 个做市商，符合交易法 15c2-11(f)(3) 规则中“捎带” (piggyback) 例外的资格。

5. Rodobo International, Inc.（CIK 编号 1177274）是一家位于中国哈尔滨的已被吊销的内达华州公司，依据交易法第 12 条 (g) 款在委员会登记了一类证券。Rodobo International, Inc. 怠于向委员会提交定期申报，自提交了截至 2011 年 6 月 30 日的表 10-Q，报告前 3 个月的净亏损为 6,892,633 美元后，其未再提交任何定期申报。截至 2014 年 5 月 8 日，该公司股票（代码为“RDBO”） 在 OTC 链接仍有报价，有 4 个做市商，符合交易法 15c2-11(f)(3) 规则中“捎带” (piggyback) 例外的资格。

B. 怠于提交定期申报

6. 如上文详述， 所有答辩人均怠于向委员会定期申报，已经多次不履行其按时提交定期申报的义务，且对委员会公司财务部门发出的违规告知函未能给予应有的注意，或者由于其未按照委员会规则保持一个有效的文件收发地址，而没有收到上述函件。

7. 交易法第 13 条 (a) 款及据此颁布的规则要求，依交易法第 12 条登记的证券发行人，应向委员会定期申报当前准确信息，即使该登记是在第 12 条 (g) 款下自动形成的。具体来说，规则 13a-1 要求发行人提交年度报告，规则 13a-13 要求国内发行人提交季度报告。

8. 基于以上原因，答辩人违反了交易法第 13 条 (a) 款及规则 13a-1 和/或 13a-13。

第三部分

鉴于执法司提出的指控，委员会认为，为保护投资者而提请裁决公共行政程序是必要且适当的：

A. 本文第二部分的指控是否属实以及，与此相关的，给答辩人就上述指控提出任何抗辩的机会；和，

B. 为保护投资者而对本文第二部分认定的答辩人、交易法规则 12b-2 或 12g-3 项下的任何继承者、以及任何答辩人的任何新的公司，依交易法第 12 条所登记的每一类证券，予以不超过十二个月的暂停或者撤销登记，是否必要且适当。

第四部分

兹指令，在依委员会《行为规范》第 110 条 [17 C.F.R. § 201.110] 下达进一步指令来任命行政法法官之前，将在指定的时间和地点举行公开听证，对本文第三部分所述问题进行取证。

兹进一步指令，根据委员会《行为规范》第 220 条 (b) 款 [17 C.F.R. §201.220(b)]，答辩人应在本指令送达后十 (10) 日内提交对于本指令所述指控的答辩。

依据委员会《行为规范》第 155 条 (a) 款、第 220 条 (f) 款、第 221 条 (f)款、以及第 310 条 [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), 201.310]，如果答辩人在被正式通知后未能提交该等答辩或者未能出席听证，那么答辩人、交易法规则 12b-2 或 12g-3 项下的任何继承者、以及任何答辩人的任何新的公司，会被视为缺席听证，且在审议本指令时结果会对他们不利，本指令所述指控可能会被裁决属实。

本指令须当面，或通过证实、登记，或经特快专递，或通过委员会《行为规范》允许的其他方式，立即送达答辩人。

进一步指令，依据委员会《行为规范》第 360 条 (a) 款 (2) 项 [17 C.F.R. §201.360(a)(2)]，行政法法官应在不迟于本指令送达之日起第 120 天作出初步裁决。

在无适当豁免的情况下，任何参与行使本次或事实上与之相关的任何调查或控诉职能的委员会高级职员或雇员，不得被允许参加或建言对本次事件的裁决，除非是经通知作为本次程序的证人或律师。本次程序不属于《行政程序法》第 551 条所指的"规则制定"，本程序不受第 553 条所限制，任何最终的委员会行动生效日期不得予以延迟。

委员会发布。

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Jill M. Peterson
助理秘书

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 21, 2014

In the Matter of **China Green Lighting Limited,** **China Kangtai Cactus Bio-Tech, Inc.,** **Gemco Minerals, Inc.,** **Perfectenergy International Limited, and** **Rodobo International, Inc.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

China Green Lighting Limited (CIK No. 1421378) is a delinquent Colorado corporation located in Jiangshan City, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). China Green Lighting Limited 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, 2011, which reported a net loss of $1,252,940 for the prior nine months. As of May 8, 2014, the company's stock (symbol "CHGL") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Green Lighting Limited because it has not filed any periodic reports since the period ended September 30, 2011.

China Kangtai Cactus Bio-Tech, Inc. (CIK No. 1017699) is a revoked Nevada corporation located in Harbin, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). China Kangtai Cactus Biotech, Inc. 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, 2011. As of May 8, 2014, the company's stock (symbol "CKGT") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Kangtai Cactus Biotech, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

Gemco Minerals, Inc. (CIK No. 1338118) is a Florida corporation located in Langley, British Columbia, Canada, with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Gemco Minerals, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended November 30, 2009, which reported a net loss of $3,394,046 since the company's August 21, 1997 inception. As of May 8, 2014, the company's stock (symbol "GMML") was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Gemco Minerals, Inc. because it has not filed any periodic reports since the period ended November 30, 2009.

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9590 / May 21, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 72210 / May 21, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3838 / May 21, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31056 / May 21, 2014

Admin. Proc. File No. 3-15518

In the Matter of

DIEGO F. HERNANDEZ,
THE WEALTH MANAGEMENT PARTNERS, LLC,
WEALTH FINANCIAL, LIMITED LIABILITY COMPANY,
DFHR INVESTMENTS, INC., and
HD MILE HIGH MARKETING, INC.

ORDER DISMISSING PROCEEDINGS

On September 24, 2013, the Commission instituted administrative and cease-and-desist proceedings against Diego F. Hernandez ("Hernandez"); The Wealth Management Partners, LLC ("Wealth Management"); Wealth Financial, Limited Liability Company ("Wealth Financial"); DFHR Investments, Inc. ("DFHR"); and HD Mile High Marketing, Inc. ("HD Mile High"; collectively, the "Respondents"), 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.[1] The Order Instituting Proceedings ("OIP") alleged, among other things, that Respondents violated antifraud provisions of the Securities Act and Exchange Act from July 2011 to April 2013 by raising and misappropriating approximately $921,000 from investors through a fraudulent securities offering and using those funds to pay personal and business expenses and to repay other investors, instead of investing in the promised securities. The OIP further alleged that, at the time of the

[1] 15 U.S.C. §§ 77h-1, 78*o*(b), 78u-3, 80b-3(f), 80a-9(b).

misconduct, Hernandez, Wealth Management, Wealth Financial, and DFHR acted as unregistered brokers-dealers in violation of Exchange Act requirements.

After institution of the proceedings, the Commission entered into a settlement with Hernandez and HD Mile High.[2] The Commission's settlement order stated that Hernandez and HD Mile High consented to findings that they willfully violated Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5 thereunder and that Hernandez willfully violated Exchange Act Section 15(a).[3] Pursuant to that order, the Commission ordered that Hernandez and HD Mile High cease and desist from committing or causing any violations and future violations of the above provisions; barred Hernandez from the securities industry; ordered Hernandez and HD Mile High to pay disgorgement plus prejudgment interest, and assessed civil penalties of $710,000 and $120,000 against Hernandez and HD Mile High, respectively.

The Division of Enforcement has moved to dismiss the proceedings against Respondents Wealth Management, Wealth Financial, and DFHR, none of which are registered with the Commission. The Division states that the administrative proceedings are no longer appropriate against these remaining Respondents because they are "defunct entities, non-operational, not in good standing, and have no assets." Wealth Management, Wealth Financial, and DFHR have not responded to the Division's motion.

We conclude that, under the circumstances, it is appropriate to grant the Division's motion to dismiss the proceedings against Wealth Management, Wealth Financial, and DFHR.[4]

Accordingly, IT IS ORDERED that the proceedings against The Wealth Management Partners, LLC; Wealth Financial, Limited Liability Company; and DFHR Investments, Inc., are dismissed.

By the Commission.

Lynn M. Powalski
Deputy Secretary

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2 *Diego F. Hernandez*, Securities Act Release No. 3828, 2014 WL 1712095, at *6–7 (May 1, 2014).

3 15 U.S.C. §§ 78j(b), 78*o*(a), and 78q(a).

4 *See LPB Capital d/b/a Family Office Grp., LLC*, Securities Act Release No. 3468, 2013 WL 3271085 (June 18, 2013) (granting motion to dismiss charges against defunct, insolvent entities following death of principal respondent).

SECURITIES AND EXCHANGE COMMISSION

[Release No. PA-51; File No. S7-06-14]

Privacy Act of 1974: Systems of Records.

AGENCY: Securities and Exchange Commission.

ACTION: Notice to establish a new system of records and to revise two existing systems of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. § 552a, the Securities and Exchange Commission ("Commission" or "SEC") proposes to establish a new system of records, "General Information Technology Records (SEC-67)." Additionally, two existing systems of records are being revised: "Office of the Chief Accountant Working File (SEC-28)" last published in the Federal Register Volume 62, Number 176 on September 11, 1997; and "Office of Inspector General Investigative Files (SEC-43)", last published in the Federal Register Volume 71, Number 105 on Thursday, June 1, 2006.

DATES: The proposed systems will become effective [insert date that is 40 days after publication in the Federal Register] unless further notice is given. The Commission will publish a new notice if the effective date is delayed to review comments or if changes are made based on comments received. To be assured of consideration, comments should be received on or before [insert date that is 30 days after publication in the Federal Register].

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/other.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-06-14 on the subject line.

Perfectenergy International Limited (CIK No. 1345432) is a revoked Nevada corporation located in Shanghai, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Perfectenergy International Limited is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the fiscal year ended September 30, 2011, which reported a net loss of $7,627,177 for the prior eleven months. As of May 8, 2014, the company's stock (symbol "PFGY") was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Perfectenergy International Limited because it has not filed any periodic reports since the period ended September 30, 2011.

Rodobo International, Inc. (CIK No. 1177274) is a revoked Nevada corporation located in Harbin, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Rodobo International, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2011, which reported a net loss of $6,892,633 for the prior three months. As of May 8, 2014, the company's stock (symbol "RDBO") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Rodobo International, Inc. because it has not filed any periodic reports since the period ended June 30, 2011.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 21, 2014, through 11:59 p.m. EDT on June 4, 2014.

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72231 / May 22, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15495

In the Matter of **G-2 TRADING LLC** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

On September 16, 2013, the Securities and Exchange Commission ("Commission") issued a Corrected Order Instituting Administrative Proceedings and a Cease-and-Desist Order pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Notice of Hearing against G-2 Trading LLC ("G-2" or "Respondent").

II.

In response to 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 Making Findings and Imposing Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

Summary

1. These proceedings arise out of violations of Rule 105 of Regulation M of the Exchange Act by G-2, a New York-based registered broker-dealer. Rule 105 prohibits selling short an equity security that is the subject of a public offering, conducted on a firm commitment basis, and purchasing the offered security from an underwriter or broker or dealer participating in the offering if such short sale was effected during the restricted period as defined herein.

2. On two occasions, from February 2010 through August 2012, G-2 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 $841.

Respondent

3. G-2 is a Delaware limited liability company and a registered broker-dealer based in New York.

Legal Framework

4. Rule 105 makes it unlawful for a person to purchase equity securities in a public offering from an underwriter, broker, or dealer participating in the offering if that person sold short the security that is the subject of the offering during the restricted period as defined in the rule, absent an exception. 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 Form 1-A or Form 1-E and ending with the pricing. 17 C.F.R. § 242.105(a)(1) and (a)(2).

5. The Commission adopted Rule 105 "to foster secondary and follow-on offering prices that are determined by independent market dynamics and not by potentially manipulative activity." 72 Fed. Reg. 45094. Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale. Id.

[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.

G-2's Violations of Rule 105 of Regulation M

6. On August 3, 2012, G-2 sold short 7,500 shares of American International Group, Inc. ("AIG") during the restricted period. On August 3, 2012, AIG announced the pricing of a follow-on offering of its common stock at $30.50 per share. G-2 received an allocation of 600 shares in that offering. G-2's participation in the AIG offering resulted in total profits of $708.

7. On February 24 and February 25, 2010, G-2 sold short a total of 6,000 shares of Seabridge Gold, Inc. ("SA") during the restricted period. On February 25, 2010, SA announced the pricing of a follow-on offering of its common stock at $22.90 per share. G-2 received an allocation of 10,000 shares in that offering. G-2's participation in the SA offering resulted in total profits of $133.

8. In total, G-2's violations of Rule 105 resulted in profits of $841.

Violations

9. As a result of the conduct described above, G-2 violated Rule 105 of Regulation M under the Exchange Act.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent G-2's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent G-2 cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. G-2 shall within fourteen (14) days of the entry of this Order, pay disgorgement of $841, prejudgment interest of $36.45, and a civil money penalty in the amount of $75,000 (for a total of $75,877.45) to the United States Treasury. If timely payment is not made on the disgorgement amount, additional interest shall accrue pursuant to SEC Rule of Practice 600. If timely payment is not made on the civil money penalty, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payments must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;[2]
(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

[2] The minimum threshold for transmission of payment electronically is $1,000,000. For amounts below the threshold, respondents must make payments pursuant to options (2) or (3) above.

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying G-2 as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 22, 2014

In the Matter of **ANGEL ACQUISITION CORP. n/k/a BIOGERON, INC.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Angel Acquisition, Corp. n/k/a BioGeron, Inc. ("BioGeron") because it has not filed a periodic report since it filed its Form 10-Q for the period ending September 30, 2011, filed on November 14, 2011.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of BioGeron. Therefore, it is ordered, pursuant to Section 12(k) of the Exchange Act, that trading in the securities of BioGeron is suspended for the period from 9:30 a.m. EDT on May 22, 2014, through 11:59 p.m. EDT on June 5, 2014.

By the Commission.

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72219 / May 22, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15882

In the Matter of **ANGEL ACQUISITION CORP. n/k/a BIOGERON, INC.** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate and for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondent Angel Acquisition Corp. n/k/a BioGeron, Inc. ("Respondent" or "BioGeron").

II.

After an investigation, the Division of Enforcement alleges that:

RESPONDENT

1. BioGeron is a Nevada corporation with principal offices in Carson City, Nevada and Carlsbad, California. Respondent has a class of equity securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. As of March 17, 2014, the Respondent's common stock (ticker "AGEL") was quoted on the OTC Link (previously "Pink Sheets") operated by OTC Markets Group, Inc., had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

DELINQUENT FILINGS

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

3. The Respondent filed its last Form 10-K for the year ended December 31, 2010 on April 11, 2011, and its last Form 10-Q for the quarter ended September 30, 2011 on November 14, 2011. Since then, the Respondent has not filed its required periodic reports.

4. The Respondent is delinquent in the following periodic filings:

Form	Period Ended	Due on or about
10-K	December 31, 2011	March 31, 2012
10-Q	March 31, 2012	May 15, 2012
10-Q	June 30, 2012	August 14, 2012
10-Q	September 30, 2012	November 14, 2012
10-K	December 31, 2012	March 31, 2013
10-Q	March 31, 2013	May 15, 2013
10-Q	June 30, 2013	August 14, 2013
10-Q	September 30, 2013	November 14, 2013

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

III.

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

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

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

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed, and before an

Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice [17 C.F.R. § 201.110].

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

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

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

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

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

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 22, 2014

In The Matter Of	:	
	:	
First Power & Light, Inc.	:	
n/k/a Volt Solar Systems, Inc.	:	**ORDER OF SUSPENSION**
	:	**OF TRADING**
File No. 500-1	:	

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of First Power & Light, Inc. n/k/a Volt Solar Systems, Inc. ("VOLT") because of questions concerning the adequacy and accuracy of publicly available information about VOLT, including, among other things, its corporate transactions, the control of the company, and trading in its securities.

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

THEREFORE, IT IS ORDERED, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on May 22, 2014, through 11:59 p.m. EDT on June 5, 2014.

By the Commission.

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9591 / May 22, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15812

In the Matter of **the Registration Statement of** **Creative Vision Alliance Corporation,** **210 White Wing Dr. #B** **Columbia, South Carolina 29229** **Respondent.**	**ORDER MAKING FINDINGS AND ISSUING STOP ORDER PURSUANT TO SECTION 8(d) OF THE SECURITIES ACT OF 1933**

I.

On March 25, 2014, the Securities and Exchange Commission ("Commission") issued an Order Fixing Time and Place of Public Hearing and Instituting Proceedings Pursuant to Section 8(d) of the Securities Act of 1933 ("Securities Act") in the administrative proceedings entitled In the Matter of the Registration Statement of Creative Vision Alliance Corporation ("Respondent").

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Issuing Stop Order Pursuant to Section 8(d) of the Securities Act of 1933 ("Order"), as set forth below.

III.

On the basis of this Order and Offer submitted by the Respondent, the Commission finds that:

A. On March 12, 2014, Respondent, a South Carolina corporation headquartered in Columbia, South Carolina, filed a Form S-1 registration statement (the "Registration Statement") with the Commission. Respondent's Registration Statement was labeled as a "prospectus" and stated that Respondent planned to issue 7,000,000 shares of common stock at an offering price of $.25 per share.

B. The Registration Statement was materially deficient for the following reasons:

1. The Registration Statement did not include audited financial statements, as required by Form S-1, Part 1—Information Required in Prospectus, Item 11(e), and Regulation S-X of the Securities Act.

2. The Registration Statement failed to provide management's discussion and analysis of Creative Vision's historical and interim financial information as required by Form S-1, Part 1---Information Required in Prospectus, Item 11(h), and Regulation S-K, Item 303.

3. The Registration Statement failed to provide signatures as required by Form S-1, Part II.

IV.

On the basis of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction specified in the Offer submitted by the Respondent.

ACCORDINGLY, IT IS ORDERED that pursuant to Section 8(d) of the Securities Act, the effectiveness of the Registration Statement filed by Respondent and all amendments thereto, be, and it hereby is, suspended.

By the Commission.

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72249 / May 23, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15886

In the Matter of **MARCUS A. LUNA, ESQ.** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3)(i)(B) OF THE COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Marcus A. Luna ("Respondent" or "Luna") pursuant to Rule 102(e)(3)(i)(B)[1] of the Commission's Rules of Practice [17 C.F.R. 200.102(e)(3)(i)(B)].

II.

The Commission finds that:

1. Luna is a resident of Henderson, Nevada and is an attorney.

2. On December 14, 2010, the Commission filed civil fraud charges against Luna and others in the United States District Court for the District of Nevada, charging him with violating Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R.

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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, temporarily suspend from appearing or practicing before it any attorney . . . who has been by name: (B) found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

240.10b-5. In addition, the Commission charged Luna and the other defendants with violating Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. 77e(a) and (c). *Securities and Exchange Commission v. Marcus A. Luna, et al.*, 10-CV-2166-PMP (D. Nev.).

3. On February 26, 2014, the court granted summary judgment against all of the defendants. In relevant part, the court held that Luna had violated Sections 5, 17(a)(1), (2), and (3) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Rule 10b-5. The court made no finding that the violations were not willful.

4. The court found that from 2005-2006, the President and CEO of the privately-held corporation Axis Technologies, Inc., sought financing to expand the company's operations. They were referred to Luna, an attorney, to help raise capital. Luna identified Riverside Entertainment as a publicly-traded company whose shares were quoted on the Pink Sheets and advised the President and CEO that Axis Technologies, Inc. should engage in a reverse merger with Riverside Entertainment and issue and sell shares in the newly-named public company to accredited investors. Luna coordinated the reverse merger and arranged for a reverse stock split, changing the name of the company to Axis Technologies Group, Inc. ("Axis Group").

5. The court found that during that same time period, Luna incorporated several corporate entities in the state of Minnesota. He set himself up as the principal of St. Paul Venture Fund ("St. Paul VF") and named others as the principals of Minnesota Venture Capital, Inc. ("Minnesota VC"), Real Estate of Minnesota, Inc. ("Real Estate MN"), and Matrix Venture Capital, Inc. ("Matrix VC"). Luna created these entities merely to act as conduits to allow him and the others to sell their stock into the public market.

6. The court found that Luna then authored and issued a false legal opinion letter to Axis Group's transfer agent claiming that the shares of common stock issued by the newly-formed public company were not restricted and were freely tradable. One of his bases for this claim was that St. Paul VF, Minnesota VC, Real Estate MN, and Matrix VC were accredited investors under Minnesota and federal law. The Commission had alleged that this was false and Luna knew that they did not meet the definition of accredited investors. The court found that soon after these alleged accredited investors received their shares, they transferred shares to promoters and sold the remaining shares through a broker-dealer to the public. By use of these entities, Luna gained approximately $2 million from unregistered stock sales. The principals of Minnesota VC, Real Estate MN, and Matrix VC collected approximately $6 million from unregistered stock sales. From their profits, these principals paid Luna approximately $1.8 million in kickbacks.

III.

Based upon the foregoing, the Commission finds a court of competent jurisdiction in an action brought by the Commission has found that Luna violated provisions of the securities laws and rules thereunder. In view of this finding, the Commission deems it appropriate and in the public interest that Luna be temporarily suspended from appearing or practicing before the Commission.

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

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

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

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

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 34-72233 / May 23, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15884

In the Matter of **OCTuS, Inc.,** **Pacific Coast National Bancorp,** **Travelstar, Inc.,** **We Save Homes, Inc., and** **ZVUE Corp.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS[1]

1. OCTuS, Inc. ("OCTI") (CIK No. 891462) is a revoked Nevada corporation located in Davis, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). OCTI 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, 2011, which reported a net loss of $320,545 for the prior three months. As of May 20, 2014, the common stock of OCTI was quoted on OTC Link operated by OTC Markets Group Inc. (formerly "Pink Sheets") ("OTC Link"), had eight 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.

2. Pacific Coast National Bancorp ("PCSTQ") (CIK No. 1302502) is a suspended California corporation located in San Clemente, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PCSTQ 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 $8,771,355 for the prior year. As of May 20, 2014, the common stock of PCSTQ was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Travelstar, Inc. ("TVLS") (CIK No. 1085661) is a suspended California corporation located in Viejo, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TVLS is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2008, which reported a net loss of $494,215 for the prior three months. As of May 20, 2014, the common stock of TVLS was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. We Save Homes, Inc. ("WESA") (CIK No. 1410307) is a revoked Nevada corporation located in Anaheim, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WESA 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, 2010, which reported a net loss of $2,668,999 for the prior nine months. As of May 20, 2014, the common stock of WESA was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. ZVUE Corporation ("ZVUE") (CIK No. 1309710) is a void Delaware corporation located in San Francisco, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ZVUE is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2008, which reported a net loss of $24,439,000 for the prior nine months. As of May 20, 2014, the common stock of ZVUE was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

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

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

III.

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

A. Whether the allegations contained in Section II 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.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 23, 2014

In the Matter of **OCTuS, Inc.,** **Pacific Coast National Bancorp,** **Travelstar, Inc.,** **We Save Homes, Inc., and** **ZVUE Corp.,** **File No. 500-1**

ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of OCTuS, Inc. because it has not filed any periodic reports since the period ended March 31, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Pacific Coast National Bancorp because it has not filed any periodic reports since the period ended December 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Travelstar, 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 We Save Homes, Inc. because it has not filed any periodic reports since the period ended September 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of ZVUE Corporation because it has not filed any periodic reports since the period ended September 30, 2008.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 23, 2014, through 11:59 p.m. EDT on June 6, 2014.

By the Commission.

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72237 / May 23, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15885

In the Matter of **Pro-Tech Industries, Inc.,** **Vida Life International Ltd.,** **Vitavea, Inc.,** **Western Power & Equipment Corp., and** **Westmont Resources, 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 the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS[1]

1. Pro-Tech Industries, Inc. ("PTCK") (CIK No. 1402186) is a revoked Nevada corporation located in Sacramento, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PTCK is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2011. As of May 20, 2014, the common stock of PTCK was quoted on OTC Link operated by OTC Markets Group Inc. (formerly "Pink Sheets") ("OTC Link"), had six 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.

2. Vida Life International Ltd. ("VILF") (CIK No. 1435055) is a revoked Nevada corporation located in Cameron Park, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). VILF 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, 2009, which reported a net loss of $379,818 for the prior nine months. As of May 20, 2014, the common stock of VILF was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Vitavea, Inc. ("VVEA") (CIK No. 1324207) is a permanently revoked Nevada corporation located in Bellingham, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). VVEA 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 April 30, 2007, which reported a net loss of $2,496,039 for the prior six months. As of May 20, 2014, the common stock of VVEA was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Western Power & Equipment Corp. ("WPEC") (CIK No. 939729) is a void Delaware corporation located in Vancouver, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WPEC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended April 30, 3008, which reported a net loss of $6,726,000 for the prior nine months. As of May 20, 2014, the common stock of WPEC was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Westmont Resources Inc. ("WMNS") (CIK No. 1377963) is a revoked Nevada corporation located in Bellevue, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WMNS 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, 2011, which reported a net loss of $1,436,544 for the prior nine months. As of May 20, 2014, the common stock of WMNS was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

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

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

III.

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

A. Whether the allegations contained in Section II 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.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Piwowar
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72256 / May 27, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15887

In the Matter of **BLAYNE S. DAVIS,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From 2005 through at least October 2006, Davis acted as a broker with respect to the offer and sale of securities. Although Davis was a registered representative associated with two registered broker-dealers from January 2001 to October 2002, Davis was not registered as a broker-dealer or associated with a registered broker-dealer during the relevant time. Davis, 32 years old, was a resident of Orlando and Naples, Florida and is currently in custody in the Middle District of Florida.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On March 9, 2011, a federal jury in the Middle District of Florida convicted Davis of three counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 2. U.S. v. Blayne Davis, Case No. 6:10-CR-190-ORL-22GJK (M.D. Fla. Jun. 22, 2010). On November 1, 2011, Davis was sentenced to three years in prison and three years of supervised release, and was ordered to make restitution totaling $41,865. Davis has since been serving his prison sentence in Bastrop, Texas.

3. As detailed in the indictment and trial transcript, from 2005 through at least October 2006, Davis solicited 15 investors into a purported investment program that raised over $300,000 by telling them that their money would be invested in the foreign currency exchange, stocks, and hedge funds. Davis represented to investors that the investments were safe, risk-free, and guaranteed. He promised investors that they would earn returns on their investments ranging between 15% and 40% over 45-day intervals. Davis also told investors he himself was an investor in the program. He paid dividends to some investors to make them believe that their investments were making money. Davis provided investors with documents after they invested that reflected rates of return of over 20% on a monthly basis, and he told some investors that their investments were generating the promised returns. Davis, through an associate, directed at least two investors to transfer their money to a bank account in his own name, where Davis pooled investor funds for purported investment. Davis misappropriated the investors' funds to pay for his gambling, travel, personal mortgage payments, and personal expenditures.

4. Through the conduct in paragraph 3, Davis acted as an unregistered broker-dealer by selling securities in the form of investment contracts. He regularly and routinely engaged in securities transactions by, among other conduct, soliciting at least fifteen investors for his investment program. Moreover, Davis used investor funds for personal expenditures.

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72259 / May 27, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15890

In the Matter of RANDI A. BOCHINSKI, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From at least November 30, 2004 through at least January 2010, Bochinski acted as a broker with respect to the offer and sale of securities. Bochinski was not registered as a broker-dealer or associated with a registered broker-dealer during the relevant time. Bochinski, 49 years old, is a Canadian citizen and was a resident of Kelowna, British Columbia and is currently imprisoned in Taft, California.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On May 13, 2013, Bochinski pleaded guilty to three counts of wire fraud (18 U.S.C. §§ 1343 and 2), three counts of mail fraud (18 U.S.C. §§ 1341 and 2), and one count of money laundering (18 U.S.C. §§ 1957 and 2) in the United States District Court for the District of Massachusetts in Boston U.S. v. Bochinksi, et. al., Case No.: 1:10-cr-10199-DPW-1 (D. Mass. June 23, 2010). Bochinski was sentenced on October 18, 2013 to 72 months in prison and three years of supervised release. He was ordered to make restitution totaling $5.2 million, to be paid jointly and severally with another individual. Bochinski is serving his sentence at a correctional institution in Taft, California.

3. As detailed in the plea agreement and indictment, Bochinski and another individual collectively induced at least 12 individuals nationwide to invest more than $3.5 million in a series of purported high yield investment programs under various names, including Carlant Holdings, Ltd., from at least November 30, 2004 through at least January 2010. Bochinski falsely told investors that their funds would be held collectively in an escrow account as collateral for offshore foreign currency exchange trading or used to invest in communications-related business, timber, and gold, and to secure loans. The proceeds of the loans would purportedly be used for purposes such as trading in the stock of European and Asian banks and making loans to third world countries which purportedly would be guaranteed by the World Bank. Bochinksi promised investors returns of at least three to four percent per month, and assured them that their principal would be returned to them within a short amount of time. In reality, there were no such investment programs. Instead, Bochinski misappropriated investor funds for personal use.

4. Bochinksi acted as an unregistered broker by selling securities in the form of investment contracts. Bochinski solicited investors in the Carlant Holdings high yield investment program via telephone, e-mail, and in person. Bochinski contacted by telephone prospective investors referred to him by the other or met with them in person in order to sell the investments. He also solicited investors directly for the Carlant Holdings investment program through telephone calls. Bochinski represented himself as a fellow investor and told some investors that he was involved in other investment programs as well. Bochinski sometimes offered investors opportunities in other, purportedly higher yielding investment opportunities.

5. Bochinski provided investors with documents related to the purported investment programs. Bochinski sent some investors fictitious account statements, confirmations, updates, and investment agreements he personally signed. Bochinski collected investor funds directly from investors he solicited, sending them wire and bank instructions for investment. He set up an escrow account where he received investor funds. Bochinski made some payments to investors but the money came from other investors' funds.

6. Bochinski used investor funds for personal expenditures.

III.

In view of the foregoing, the Commission deems it appropriate and in the public interest that public administrative proceedings be instituted to determine:

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

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

IV.

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

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

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

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

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

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

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72258 / May 27, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15889

In the Matter of **ALBERT E. GILNER,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From at least November 30, 2004 through at least January 2010, Gilner, though not registered with the Commission, acted as a broker with respect to the offer and sale of securities. Gilner was not registered as a broker-dealer or associated with a registered broker-dealer during the relevant time. Gilner, 77 years old, was a resident of New Smyrna Beach, Florida and is currently imprisoned in South Carolina.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On June 19, 2013, a federal jury in the District of Massachusetts in Boston convicted Gilner of one count of conspiracy (18 U.S.C. § 371), three counts of wire fraud (18 U.S.C. § 1343), three counts of mail fraud (18 U.S.C. § 1341), and one count of money laundering (18 U.S.C. § 1957). U.S. v. Bochinski, et. al., Case No.: 1:10-cr-10199-DPW-2 (D. Mass. Jun. 23, 2010). Gilner was sentenced on October 18, 2013 to 84 months in prison with three years of supervised release and was ordered to make restitution in the amount of $5.2 million, to be paid jointly and severally with another individual. Gilner is serving his sentence at a federal correctional institution in South Carolina.

3. As detailed in the trial transcript and indictment, from at least November 30, 2004 through at least January 2010, Gilner and another individual collectively induced at least 30 individuals nationwide to invest more than $6 million in a series of purported high yield investment programs under various names, including the Old Navajo Foundation. Gilner falsely told investors that their funds would be held collectively in an escrow account as collateral for offshore foreign currency exchange trading or used to invest in communications-related business, timber, and gold, and to secure loans. The proceeds of the loans would purportedly be used for purposes such as trading in the stock of European and Asian banks and making loans to third world countries which would be guaranteed by the World Bank. Gilner promised investors returns of at least three to four percent per month, and assured them that their principal would be returned to them within a short amount of time. In reality, there were no such investment programs. Instead, Gilner misappropriated investor funds for personal use.

4. Gilner acted as an unregistered broker during the relevant period by selling securities in the form of investment contracts. Gilner solicited investors and recruited friends and acquaintances in the Old Navajo Foundation high yield investment program via telephone, e-mail, and in person. Gilner placed an advertisement containing information about the investment opportunity in an investment newsletter of nationwide distribution. Gilner labeled himself as a "facilitator" of the Old Navajo Foundation investment program, sometimes referring investors to the other individual for more information on the program. Gilner represented himself as a fellow investor in the investment program and told several investors that he was involved in other investment programs as well. Gilner made investment recommendations to at least one investor, telling that investor he would decide which of the programs he was involved with was the best fit for that investor. Gilner sometimes offered investors opportunities in other, purportedly higher yielding investment opportunities.

5. Gilner provided investors with forms to complete at the initiation of an investment, and collected completed forms from investors. He gave investors wire and bank deposit instructions so they could send funds to one of his two accounts. Gilner sent some investors fictitious account statements, confirmations, updates, and investment agreements he personally signed. Investors provided their funds to Gilner, with which he and the other individual purportedly purchased interests in the investments. Gilner collected investor checks personally. Gilner made some payments to investors, but the money came from other investors' funds.

6. Gilner used investor funds to purchase two automobiles, fund his personal investment account, and for other personal expenditures.

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72257 / May 27, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15888

In the Matter of **DONALD R. FRENCH, JR.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From March 26, 2008 to November 30, 2011, French was the owner and principal of D3 Funds, L.P., a now-defunct Delaware limited partnership located in Boca Raton, Florida. French was not registered as a broker-dealer or associated with a registered broker-dealer during the relevant time. French, 26 years old, is currently imprisoned in Oakdale, Louisiana.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On March 7, 2013, French pled guilty to one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 1349 before the U.S. District Court for the Southern District of Florida. U.S. v. Donald French, Case No. 12-80212-cr-RYSKAMP/HOPKINS (S.D. Fla.). On June 27, 2013, a judgment in the criminal case was entered against French. French was sentenced to 121 months in prison and 5 years of supervised release. French was ordered to pay restitution in the amount of $9.1 million.

3. The count of the criminal information to which French pled guilty alleged, inter alia, that between March 26, 2008 and November 30, 2011, French induced at least 50 individuals into an investment scheme in the name of D3 Funds that raised over $10 million for purported investment in foreign currency, emeralds, and a solar energy project in Italy. As alleged in French's negotiated plea agreement, French solicited investors by telling them they would earn annual returns ranging from 15% to 50% in the D3 investment program and that their investments would be guaranteed against loss. As further alleged in the negotiated plea agreement, French caused the creation of a prospectus for D3 Funds, which was given to potential investors. The prospectus falsely stated that that French had extensive experience and expertise in financial consulting and that D3 Funds' investment management fee would not exceed 2% of the total investment. French opened a single bank account in the name of D3 Funds, into which he directed investor funds. He generated fraudulent web-based monthly account statements falsely reflecting large investment profits. French only used a small percentage of investor funds for actual investment in a foreign currency exchange. Instead, he misappropriated investor funds from the purported investment account to pay his personal living expenses and casino gambling debts. Investors who requested a return of their investment principal unknowingly received Ponzi payments from the D3 Funds bank account.

4. French acted as an unregistered broker in connection with the D3 Funds investment program. He regularly and routinely engaged in securities transactions by, among other conduct, soliciting at least 50 investors nationwide to invest in the D3 Funds program. Finally, French used investor funds for the personal expenditures.

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-72260; File No. SR-NSCC-2014-802)

May 27, 2014

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing Amendment No. 1 and No Objection to Advance Notice, as Modified by Amendment No. 1, to Enhance NSCC's Existing Parametric Value-at-Risk Margining Model

I. Introduction

On March 28, 2014, National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") advance notice SR-NSCC-2014-802 ("Advance Notice") pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act")[1] and Rule 19b-4(n)(1)(i) of the Securities Exchange Act of 1934 ("Exchange Act").[2] The Advance Notice was published in the Federal Register on April 21, 2014.[3] The Commission did not receive any comment letters to the Advance Notice. On May 6, 2014, NSCC filed Amendment No. 1 to the Advance Notice ("Amendment"). This publication serves as notice of filing of Amendment No. 1 and no objection to the Advance Notice, as amended ("Amended Advance Notice").

II. Description of the Amended Advance Notice

A. Background

NSCC maintains a Clearing Fund to have on deposit assets sufficient to satisfy losses that may otherwise be incurred by NSCC as the result of the default of an NSCC member ("Member") and the resulting closeout of that Member's unsettled positions under NSCC's trade

1 12 U.S.C. 5465(e)(1).

2 17 CFR 240.19b-4(n)(1)(i).

3 Release No. 34-71945 (Apr. 15, 2014), 79 FR 22174 (Apr. 21, 2014).

guaranty. Each Member is required to contribute to the Clearing Fund pursuant to a formula calculated daily. The Clearing Fund formula accounts for a variety of risk factors through the application of a number of components, including value-at-risk ("VaR"). The VaR component of the Clearing Fund calculation is a core component of the formula and is designed to calculate the amount of money that may be lost on a portfolio over a given period of time that is assumed necessary to liquidate the portfolio (e.g., three days), within a given level of confidence (e.g., 99%).

NSCC performs back testing to measure the performance of Members' portfolios against the calculated VaR margin requirements for those portfolios. Over the past few years, the results of those tests have shown that while the NSCC's VaR margin component has remained mostly above its 99 percent coverage target when tested over a longer time horizon (e.g., a 12-month rolling window), coverage fell below the 99 percent target in a few instances where the tests were conducted over a shorter time horizon (e.g., a 1-month window).

Historically, parametric VaR models have computed risk on the assumption that the distributional return of an equity portfolio is normal. However, the increased frequency of market volatility in recent years has stressed the performance of parametric VaR models and has called into question that assumption. In other words, certain risks, such as "fat-tail risk," may not be properly addressed by parametric VaR models that are based solely on the assumption of a normal return distribution, as demonstrated by NSCC's back testing results. As such, industry participants have begun to move away from the use of assuming normal distributions for asset returns in parametric VaR models and, instead, have begun to use other distributions, such as Student's t-distributions, that better account for fat-tail risk events. Therefore, with this

Amended Advance Notice, NSCC will adjust its current VaR model to incorporate Student's t-distributions into the model in a manner specific to NSCC's needs, as described below.

B. Proposed Change

The proposed change contained in the Amended Advance Notice will enhance NSCC's existing parametric VaR model by supplementing the current assumption of a normal return distribution for equity portfolios with a factor that utilizes the degrees of freedom ("DOF") derived from a family of Student's t-distributions, which are more representative of the historically observed return distributions in the equities markets. NSCC will estimate periodically the DOF factor of the empirical t-distribution in the model by using daily return data from the S&P 500 over a historical window no shorter than 12-months. NSCC will then compute a multiplication factor that represents the magnitude of increase of t-distribution-based parametric VaR from the normal-based parametric VaR. This multiplication factor will be applied to Members' VaR margin requirement.

NSCC initially proposed in the Advance Notice to use its existing VaR model, with the normal distribution assumption, as a floor to the proposed model. However, under the Amendment, NSCC proposes not to use its current model as a floor but, instead, to set a floor on the DOF (i.e., set a lower bound on the DOF) in the proposed model that will serve the same function. By doing so, the Amended Advance Notice mimics the intent of the original proposal while ensuring that the amount of margin collected by NSCC during volatile market conditions is greater than the amount of margin computed under the existing and originally proposed methodologies.

The proposed change contained in the Amended Advance Notice is expected to improve NSCC's back-testing performance over shorter time horizons, particularly during more volatile market environments, and it should enable NSCC's VaR model to better account for the higher degree of fat-tail risk observed in equities markets.

III. Commission Findings and Notice of No Objection

Although the Clearing Supervision Act does not specify a standard of review for advance notices, the Commission believes that the stated purpose of the Clearing Supervision Act is instructive.[4] The stated purpose of the Clearing Supervision Act is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for designated systemically important financial market utilities ("SIFMU").[5]

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities and financial institutions engaged in designated activities for which it is the supervisory agency or the appropriate financial regulator.[6] Section 805(b) of the Clearing Supervision Act states that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to:

- promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.[7]

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4 12 U.S.C. 5461(b).

5 Id.

6 12 U.S.C. 5464(a)(2).

7 12 U.S.C. 5464(b).

The Commission adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act[8] ("Clearing Agency Standards"),[9] which the Commission recently proposed to amend, in part, to establish additional standards.[10] The Clearing Agency Standards became effective on January 2, 2013 and require registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for their operations and risk management practices on an ongoing basis.[11] As such, it is appropriate for the Commission to review advance notices against the objectives and principles for risk management standards as described in Section 805(b) of the Clearing Supervision Act,[12] as well as the applicable Clearing Agency Standards promulgated under Section 805(a) of the Clearing Supervision Act.[13]

The Amended Advance Notice's proposed change, as described above, is designed to enhance the VaR model that NSCC uses to calculate Clearing Fund requirements for its

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8 12 U.S.C. 5464(a)(2).

9 Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

10 See Release No. 34-71699 (Mar. 12, 2014), 79 FR 16865 (Mar. 26, 2014) proposing to amend Rule 17Ad-22 for covered clearing agencies.

11 The Clearing Agency Standards are substantially similar to the risk management standards established by the Board of Governors of the Federal Reserve System ("Board of Governors") governing the operations of SIFMUs that are not clearing entities and financial institutions engaged in designated activities for which the Commission or the Commodity Futures Trading Commission is the Supervisory Agency. See Financial Market Utilities, 77 FR 45907 (Aug. 2, 2012).

12 12 U.S.C. 5464(b).

13 12 U.S.C. 5464(a).

Members. Consistent with Section 805(b) of the Clearing Supervision Act,[14] the Commission believes that the Amended Advance Notice will help promote robust risk management and mitigate systemic risk by aligning more closely the assumptions utilized by NSCC's VaR model regarding distribution returns on equity portfolios with observed returns, which, in turn, will enable the calculation for Members' Clearing Fund margin requirements to better account for fat-tail risk events. This change should increase the financial resources available to NSCC at appropriate times and constitutes an improvement to its risk management practices.

Commission Rule 17Ad-22(b)(2), adopted as part of the Clearing Agency Standards,[15] requires a registered clearing agency that is also a central counterparty ("CCP") to "establish, implement, maintain and enforce written policies and procedures reasonably designed to … [u]se margin requirements to limit its credit exposures to participants under normal market conditions and use risk-based models and parameters to set margin requirements and review such margin requirements and the related risk-based models and parameters at least monthly."[16] Furthermore, Commission Rule 17Ad-22(b)(3), also adopted as part of the Clearing Agency Standards,[17] requires, a registered CCP to "establish, implement, maintain, and enforce written policies and procedures reasonably designed to … [m]aintain sufficient financial resources to withstand, at a minimum, a default by the participant family to which it has the largest exposure in extreme but plausible market conditions…."[18]

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14 See 12 U.S.C. 5464(b).

15 Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

16 17 CFR 240.17Ad-22(b)(2).

17 Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

18 17 CFR 240.17Ad-22(b)(3).

The proposed change contained in the Amended Advance Notice, as discussed above, furthers NSCC's compliance with Rules 17Ad-22(b)(2) and (b)(3) because the change will enable the assumptions used in NSCC's risk-based VaR model to better reflect fat-tailed event risk, thus leading to calculations of Members' Clearing Fund margin requirements that better reflect historically observed returns, increased deposits to NSCC's Clearing Fund at appropriate times, and increased resources available to NSCC in the event of a defaulting Member to which NSCC has the largest exposure in extreme market conditions.

For the reasons stated above, the Commission does not object to the Amended Advance Notice.

IV. Solicitation of Comments to Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Amendment No. 1 to the Advance Notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-NSCC-2014-802 on the subject line.

Paper Comments:

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

All submissions should refer to File No. SR-NSCC-2014-802. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the Advance Notice that are filed with the Commission, and all written communications relating to the Advance Notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on NSCC's website (http://dtcc.com/legal/sec-rule-filings.aspx). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NSCC-2014-802 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

IT IS THEREFORE NOTICED, pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act,[19] that the Commission DOES NOT OBJECT to the proposed change described in advance notice SR-NSCC-2014-802, as modified by Amendment No. 1, and that NSCC be and hereby is AUTHORIZED to implement the proposed change as of the date of this notice.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

[19] 12 U.S.C. 5465(e)(1)(I).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-72268; File No. SR-OCC-2014-802)

May 28, 2014

Self-Regulatory Organizations; The Options Clearing Corporation; Advance Notice Concerning the Consolidation of the Governance Committee and Nominating Committee into a Single Committee, Changes to the Nominating Process for Directors, and Increasing the Number of Public Directors on The Options Clearing Corporation's Board of Directors

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4(n)(1)(i),[2] notice is hereby given that on May 8, 2014, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the advance notice described in Items I and II below, which Items have been prepared by OCC.[3] The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This advance notice is filed by OCC in connection with a proposed change that would amend OCC's By-Laws regarding its Nominating Committee ("NC") and the Charter for OCC's Governance Committee ("GC") to consolidate the two Committees into a single Governance and Nominating Committee ("GNC"), make changes to OCC's nomination process for Directors and increase the number of Public Directors on OCC's Board of Directors.

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

2 17 CFR 240.19b-4(n)(1)(i).

3 OCC also filed the proposal in this advance notice as a proposed rule change under Section 19(b)(1) of the Exchange Act and Rule 19b-4 thereunder. 15 U.S.C. 78s(b)(1); 17 CFR 240.19b-4. See SR-OCC-2014-802.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the advance notice and discussed any comments it received on the advance notice. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A) and (B) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

1. Purpose

OCC is proposing to amend its By-Laws and Governance Committee Charter to combine the current NC and GC to establish a single GNC, make changes concerning OCC's nomination process for Directors and to increase the number of Public Directors on OCC's Board of Directors ("Board"). The proposed modifications are based on recommendations from the GC in the course of carrying out its mandate of reviewing the overall corporate governance of OCC and recommending improvements to the structure of OCC's Board. In part, the GC's recommendations stem from suggestions of an outside consultant that was retained to review and report on OCC's governance structure in relationship to industry governance practices. To conform to these proposed changes OCC is also proposing to make certain edits to its Stockholders Agreement, Board of Directors Charter and Fitness Standards for Directors.

Currently, the GC operates pursuant to its own Charter.[4] The NC is not a Board level Committee and does not operate pursuant to a charter, however, provisions in Article III of OCC's By-Laws prescribe certain aspects of the NC's structure and operation. OCC is proposing to apply to the GNC many of the existing provisions of the relevant By-Laws and GC Charter that apply to the NC and GC. Where OCC is proposing amendments to the existing By-Laws and GC Charter, they are discussed below.

Certain provisions of Article III govern the role the NC plays in nominating persons as Member Directors[5] on OCC's Board as well as the composition and structure of the NC itself. The NC is required to endeavor to achieve balanced representation in its Member Director and Non-Director Member nominees, giving due consideration to business activities and geographic distribution.

Presently, the NC is composed of seven total members: one Public Director and six Non-Director Members.[6] The Public Director member, who is nominated by the Executive Chairman with the approval of a majority of the Board, generally serves a three year term, unless he or she ceases to be a Public Director. The six Non-Director Members nominated by the NC and selected by OCC's stockholders are divided into two equal classes of three members, and the

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4 Securities Exchange Act Release Nos. 71030 (Dec. 11, 2013), 78 FR 7612 (Dec. 16, 2013) (SR-OCC-2013-18); 71083 (Dec. 16, 2013), 78 FR 77182 (Dec. 20, 2013) (SR-OCC-2013-807).

5 Under Article III, Section 2 every Member Director must be either a Clearing Member or a representative of a Clearing Member Organization.

6 Under Sections 4 and 5 of Article III, a Non-Director Member of the NC must be a representative of a Clearing Member and no person associated with the same Clearing Member Organization as a member of the NC may be nominated by the NC for a position as a Member Director on the Board of Directors or a Non-Director Member of the NC for the ensuing year.

classes serve staggered two year terms.[7] By comparison, the GC Charter requires the current GC to have not fewer than five directors and to include at least one Public Director, at least one Exchange Director, and at least one Member Director. It also provides that no Management Directors may serve on the Committee.

OCC's Board currently has 19 members consisting of nine Member Directors, five Exchange Directors, three Public Directors, who under Article III, Section 6A of OCC's By-Laws, may not be affiliated with any national securities exchange or national securities association or any broker or dealer in securities, and OCC's Executive Chairman and President, who are Management Directors. Based on recommendations from the GC in the course of review of OCC's overall corporate governance, OCC is proposing certain amendments detailed below to merge OCC's NC, GC and their related responsibilities into a single GNC and increase the number of Public Directors from three to five.

a. Proposed Amendments Common to the By-Laws and Other OCC Governance Documents

Certain of the proposed changes would amend the existing By-Laws as well as other governance documents of OCC. For example, conforming edits would be made throughout the By-Laws and GC Charter to delete NC and GC references and in many cases those references would be replaced with references to the GNC.

(1) GNC Composition

The new GNC would be composed of a minimum of three total members: at least one Public Director, at least one Exchange Director and at least one Member Director. To reflect this

7 This tiered structure eliminated the complete turnover of the members of the NC each year and fostered greater continuity among its elected members. Securities Exchange Act Release No. 29437 (July 12, 1991), 56 FR 33319 (July 19, 1991) (SR-OCC-91-11).

change, OCC would eliminate in Section 4 of Article III the requirement for six Non-Director Members, add requirements for at least one Member Director and one Exchange Director, and modify the current requirement for one Public Director to instead require that there must be *at least* one Public Director. The proposed composition for the GNC already mirrors the existing composition specified in the GC Charter. Therefore, no changes are proposed to the current GC Charter in that respect, other than the elimination of the requirements that the GNC have no fewer than five directors. That limitation would be eliminated with the goal of providing the Board with greater flexibility to determine the optimal size and composition of the GNC, so long as the composition also facilitates diverse representation by satisfying the proposed requirement for at least one GNC representative from each of the Member Director, Exchange Director and Public Director categories.

(2) GNC Member Appointment Process and Term Limits

The members of the GNC would be appointed annually by the Board from among certain Board members recommended by the GNC after consultation with OCC's Executive Chairman, and GNC Members would serve at the pleasure of the Board. The GNC's Chairman ("GNC Chair"), would be designated from among the GNC's Public Directors. Provisions implementing these changes would be added to Section 4 of Article III to entirely supplant the class and term limit structure and nominations process that currently applies to the NC and its Non-Director Members and Public Director, and references to Non-Director Members would be removed from the By-Laws. Section II.A. of the GC Charter would also be amended to reflect this structure for GNC nominations and appointments.

(3) Number of Public Directors and Member Directors

OCC is proposing to amend its By-Laws to increase the number of Public Directors on its Board from three to five and to make certain other changes related to the overall composition of the Board and the classification and term of office of Public Directors. The proposed change in the number of Public Directors from three to five would reconstitute OCC's Board with a total of 21 directors. OCC continues to believe that, as indicated in OCC's initial 1992 proposal to add Public Directors to its Board,[8] Public Directors broaden the mix of viewpoints and business expertise that is represented on the Board. Accordingly, OCC believes that the input and expertise of two more Public Directors will further benefit OCC in the administration of its affairs in respect of the markets that it serves, and in the discharge of its obligations as a systemically important financial market utility. In addition, the decision to add two more Public Directors is consistent with the principles discussed in the Commission's recent release on standards for covered clearing agencies.[9] In particular, the additional Public Directors would facilitate OCC's compliance with the public interest requirements of Section 17A of the Act and allow OCC to balance potentially competing viewpoints of various stakeholders in its decision making.

The proposed changes would remove a provision that currently is designed under certain conditions to automatically adjust the number of Member Directors serving on the Board. Article III, Section 1 requires that if the aggregate number of Exchange Directors and Public

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8 Securities Exchange Act Release No. 30328 (January 31, 1992), 57 FR 4784 (February 7, 1992) (SR-OCC-1992-02).

9 Securities Exchange Act Release No. 71699 (March 12, 2014), 79 FR 16866 (March 26, 2014).

Directors equals at least nine, the total number of Member Directors must be automatically increased to always exceed that number by one. This provision would be removed to provide the Board with greater flexibility to be able to determine its optimal composition. OCC also proposes to make corresponding changes to Article III, Section 3 under which it would remove provisions that provide for the classification and term of office of Member Directors where the number of Member Directors increases based on the provision in Article III, Section 1 that OCC proposes to delete. The proposed changes also remove a provision that reduces the number of Member Directors if the number is above nine and exceeds the sum of the number of Exchange Directors and the number of Public Directors by more than one, because as a result of the deletion of the above provision in Article III, Section 1, the number of Member Directors would be fixed at nine.

OCC is also proposing certain amendments to its Stockholders Agreement, Board of Directors Charter and Fitness Standards for Directors, Clearing Members and Others. In each case, conforming changes would be made to recognize the merger of the Nominating Committee and Governance Committee into the GNC as a standing Committee of the Board and reflect the role it would play in OCC's director nomination process. The proposed modifications to the Board Charter and Fitness Standards would reflect the increase in the number of Public Directors serving on the Board from three to five and the removal of the provision that currently is designed under certain conditions to automatically adjust the number of Member Directors serving on the Board. The criteria specified in the Fitness Standards for Directors, Clearing Members and Others for use in considering Member Director nominees would also be revised for consistency with the criteria proposed to be added to Article III, Section 5 designed to achieve balanced Board representation.

The Stockholders Agreement also contains proposed amendments to replace the term Chairman with Executive Chairman. This parallels a separate proposed amendment by OCC to implement this change in its By-Laws and Rules, but a consolidated amendment to the Stockholders Agreement is proposed for ease of administration.

b. Proposed Amendments to By-Laws Only

As explained in more detail below, certain of the proposed changes would require amendments only to OCC's existing By-Laws. One such example is that Sections 2 and 5 of Article III would be amended to remove prohibitions against representation of the same Clearing Member Organization on the Board and the NC.[10] This barrier would be eliminated since GNC members will be selected from among the members of the Board under the new approach.

(1) Balanced Representation

The NC's responsibility to endeavor to achieve balanced representation among Clearing Members on the Board would be carried over to the GNC. The proposed amendments would also add more detailed guidance for the GNC concerning how to achieve balanced Board representation. Specifically, the GNC would be required to assure that not all of the Member Directors represent the Clearing Member Organizations having the largest volume of business with OCC during the prior year and that the mix of Member Directors includes Clearing Member Organizations primarily engaged in agency trading on behalf of retail customers or individual investors.

(2) Nomination and Election Process

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10 A Clearing Member Organization is a Clearing Member that is a legal entity rather than a natural person.

In place of the existing structure under which the NC nominates candidates to be Non-Director Members, who are not also required to be Board members, the Board would appoint members to the GNC from among the Board's members who are recommended by the GNC. This change requires certain proposed modifications to the nomination and election process currently reflected in Article III, Section 5. Changes are also proposed that would change the deadlines for nominations of Member Directors by both the GNC and Clearing Members, and OCC would preserve the petition process by which Clearing Members may nominate additional candidates for Member Director positions on the Board. In recognition of the elimination of the concept of Non-Director Members, several provisions in Section 5 of Article III addressing the ability of stockholders to elect or nominate Non-Director Members of the NC would be deleted. In relevant part, however, these provisions would be retained to the extent they apply to the ability of stockholders under certain conditions to nominate and elect Member Directors of the Board.

(3) Public Directors

Proposed changes to Section 6A of Article III would require the GNC to nominate Public Directors for election by OCC's stockholders and to use OCC's fitness standards in making such nominations. Presently, OCC's Executive Chairman makes Public Director nominations with Board approval. Changes are also proposed to help clarify the class structure and term limits of Public Directors that are independent of changes proposed to facilitate the formation of the GNC. These changes would specify that, aside from the Class II Public Director who was elected to the Board at the 2011 annual meeting, two other Public Directors were appointed to the Board prior to its 2013 annual meeting, one designated as a Class I Public Director and the other designated as a Class III Public Director. Generally, the three year terms for Public Directors with staggered expiration for each class would be preserved, however, an exception would be added for the initial Class I and III Public Directors.

The proposed changes to Article III, Section 6A would also provide for the classification of the two new Public Directors, who will be first appointed or elected after the 2014 annual meeting. One of the new Public Directors will be designated as a Class I Public Director, and the other will be designated as a Class III Public Director. The proposed changes also establish the times at which the successors of the two new Public Directors will be elected. The successor of the new Public Director that is a Class III Public Director will be elected at the 2015 annual meeting of stockholders, and the successor of the new Public Director that is a Class I Public Director will be elected at the 2016 annual meeting.

(4) Disqualifications and Filling Vacancies and Newly Created Directorships

The disqualification provisions in Article III, Section 11 would be revised to reflect that any determination to disqualify a director would be effective and result in a vacancy only if the GNC makes a recommendation for disqualification in addition to an affirmative vote for disqualification by a majority of the whole Board. The By-Laws currently provide that if a Member Director vacancy is filled by the Board, the person filling the vacancy will serve until the next scheduled election for the relevant class of Member Director and a successor is elected. However, if the term for that class of Member Director extends beyond the Board's next annual meeting the vacancy must be filled by a person who is recommended by the Nominating Committee. Proposed changes to these terms in respect of the GNC would require the Board in all cases to appoint a person who is recommended by the GNC. Similarly, Public Director vacancies would be required to be filled by the Board as generally provided for in Section 6A of Article III, including with regard to candidates being nominated by the GNC using OCC's fitness standards for directors. Provisions concerning filling vacancies with respect to the NC would be deleted, consistent with its elimination in favor of the GNC.

(5) Ministerial Changes

The proposed changes to Article III also include certain ministerial changes. A reference to stockholder exchanges in the interpretation and policy to Section 6 would be replaced by the defined term Equity Exchanges, and a reference in Section 14 to notice by telegram would be changed to facsimile to reflect current means of communication.

c. Proposed Amendments to the GC Charter Only

Certain of the proposed amendments relating to the creation of the GNC would apply only to OCC's existing GC Charter. These amendments are discussed below.

(1) GNC Purpose

The statement of purpose in the GC Charter would be revised to reflect the GNC's larger scope of responsibilities. The existing GC purpose of reviewing the overall corporate governance of OCC would be maintained, along with language clarifying that this review would be performed on a regular basis and that recommendations concerning Board improvements should be made when necessary. The GNC Charter would also provide that the GNC assists the Board in identifying, screening and reviewing individuals qualified to serve as directors and by recommending candidates to the Board for nomination for election at the annual meeting of stockholders or to fill vacancies. The GNC Charter would also specify that the GNC would develop and recommend to the Board, and oversee the implementation of, a Board Code of Conduct.

(2) GNC Membership and Organization

The requirement in the GC Charter that the GC hold four meetings annually would be modified to also permit the GNC to call additional meetings as it deems appropriate.[11] The GC Charter requirement for regular reporting to the Board on Committee activities by the GC chair or a designee would be revised in favor of placing the reporting responsibility solely on the GNC Chair and requiring the GNC Chair to make timely reports to the Board on important issues discussed at GNC meetings. Taking into consideration certain pre-established guidelines in the GNC Charter, the GNC Chair would also be given responsibility for determining whether minutes should be recorded at any executive session. Aside from this exception for executive sessions, GNC meeting minutes would be required to be recorded. The GNC Charter would also create a position to be filled by an OCC officer who would assist the GNC and liaise between it and OCC's staff.

(3) GNC Authority

As in the case of the existing GC, the GNC would have authority to inquire into any matter relevant to its purpose and responsibilities in the course of carrying out its duties. The GNC Charter would further specify that in connection with any such inquiry the GNC would have access to all books, records, facilities and personnel of OCC. Unlike the existing GC Charter, the GNC Charter would not provide express authority for the GNC to rely on members of OCC's management for assistance. Instead, this relationship between the GNC and OCC's management would be more specifically addressed through the role of the newly created staff liaison position. Additional revisions to the GC Charter would also establish that the GNC Chair

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11 This would bring the Governance and Nominating Committee Charter in line with the Charters of OCC's other Board Committees.

would not have discretion to take unilateral action on behalf of the Committee, even in special circumstances.

(4) Board Composition

Without limiting the GNC to particular activities, the GNC Charter would specify certain responsibilities meant to guide the GNC in achieving its purposes, including with respect to its role in the development of the Board's composition. As an overarching goal, the GNC's Charter would require it to pursue development of a Board comprised of individuals who have a reputation for integrity and represent diverse professional backgrounds as well as a broad spectrum of experience and expertise. The GNC Charter would also prescribe more detailed responsibilities designed to further this goal. For example, the GNC would be required to conduct periodic reviews of the composition of the Board against the goal, including whether the Board reflects the appropriate balance of types of directors, business specialization, technical skills, diversity and other qualities.[12] The GNC would be required to recommend policies and procedures to the Board for identifying and reviewing Board nominee candidates, and it would implement and oversee the effectiveness of those policies, including with regard to criteria for Board nominees. Using criteria approved by the Board, the GNC would identify, screen and review persons who it determines are qualified to serve as directors. This process would also extend to incumbent directors concerning any potential re-nomination. In all cases, the GNC would only recommend candidates to the Board for nomination for election after consulting with OCC's Executive Chairman. In the event that a sitting director offers to resign because of a change in occupation or business association, the GNC would be responsible for reviewing

12 The GNC would also review director conflicts of interest and the manner in which any such conflicts are to be monitored and resolved.

whether continued service is appropriate and making a recommendation of any action, consistent with OCC's By-Laws and Rules, that should be taken by the Board. The GNC would also undertake periodic reviews of term limits for certain directors and recommend changes to these limits where appropriate.

(5) Governance Practices

The GNC would have responsibility for reviewing the Board's Charter for consistency with regulatory requirements, transparency of the governance process and other sound governance practices. Currently, this is a GC function, and certain GC Charter amendments are proposed to help further detail the GNC's review responsibilities. These include a general responsibility to recommend changes, as the GNC deems appropriate, to the Board concerning Committee Charters. This would include the GNC Charter, which the GNC would be required to review annually.[13] In connection with a periodic review of Board Committee structure, the GNC would advise the Board regarding related matters of structure, operations and charters. Furthermore, and in each case after consultation with OCC's Executive Chairman, the GNC would recommend to the Board for its approval certain directors for Committee service as well as for assignment as Committee chair persons.

The GNC would develop and recommend to the Board the annual process used by the Board and Board Committees for self-evaluation of their role and performance in the governance of OCC. The GNC would also be responsible for coordinating and providing oversight of that

13 As part of the annual review, the GNC would also submit the GNC Charter to the Board for re-approval, including any changes the GNC deems advisable.

process. Corporate governance principles applicable to OCC would be developed by the GNC for recommendation to the Board, and the GNC would review them at least once a year.

(6) Other Proposed GC Charter Amendments

The GNC Charter would require the Committee to regularly evaluate its performance and the performance of its individual members and provide results of such assessments to the Board. It would also require an annual report to be prepared by the GNC and delivered to the Board regarding the GNC's activities for the preceding year, and the GNC would be required to include a statement that it carried out all of its GNC Charter responsibilities. In addition to such responsibilities, the GNC would generally be empowered to perform any other duties that it deems necessary or appropriate and consistent with the GNC Charter or as may otherwise be further delegated to it by the Board.

d. Fair Representation Requirement for Clearing Agencies

Section 17A(b)(3)(C) of the Act requires the rules of a clearing agency to assure fair representation of its shareholders (or members) and participants[14] in the selection of its directors and administration of its affairs.[15] The Act does not define fair representation but instead reserves to the Commission the authority to determine whether a clearing agency's rules give fair voice to participants and shareholders or members in the selection of directors and administration of affairs. On this subject, the Division of Market Regulation's Announcement of Standards for

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[14] In relevant part, a clearing agency participant is defined in Section 3(a)(24) of the Act as "any person who uses a clearing agency to clear or settle securities transactions or to transfer, pledge, lend, or hypothecate securities…"

[15] 15 U.S.C. 78q-1(b)(3)(C). The statute further provides that one way of establishing that the representation of participants is fair is by affording them a reasonable opportunity to acquire voting stock of the clearing agency in reasonable proportion to their use.

the Registration of Clearing Agencies provides that a clearing agency's procedures concerning fair representation are evaluated on a case-by-case basis but that a clearing agency could comply with the standard, including with respect to board nominations, through the use of a nominating committee composed of and selected by participants or their representatives.[16] Subsequent Commission guidance in this area also provides that the entity responsible for nominating individuals for membership on the board of directors should be obligated by by-law or rule to make nominations with a view toward assuring fair representation of the interests of shareholders and a cross-section of the community of participants.[17]

OCC believes for several reasons that the proposed amendments to the By-Laws and GC Charter would continue to assure fair representation of OCC's shareholders and participants in the selection of its directors and the administration of its affairs. First, as the body responsible for nominating Member Director and Public Director candidates to OCC's Board, the GNC would be composed of and selected by OCC's participants and shareholders or their representatives because, along with at least one Public Director, the GNC would be composed of Board members who represent OCC's Clearing Members and equity exchanges. Furthermore, the GNC would be obligated by OCC's By-Laws and the GNC Charter to make nominations that serve the interests of shareholders and a cross-section of participants because it would be required to nominate candidates with a view toward: assuring that the Board consists of, among

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16 Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41 (June 23, 1980) (citing in relevant part Securities Exchange Act Release 14531 (March 6, 1978), 43 FR 10288, 10291 (March 10, 1978) regarding proposed Commission-level standards for clearing agency registration). The Division of Market Regulation is now known as the Division of Trading and Markets.

17 Securities Exchange Act Release No. 20221 (September 23, 1983), 48 FR 45167, 45172 (October 3, 1983) (Depository Trust Co., et. al.; Order).

other things, individuals who have a reputation for integrity and represent diverse professional backgrounds and a broad spectrum of experience and expertise; that not all Member Directors of the Board would represent the largest Clearing Member Organizations; and that the mix of Member Directors on the Board should include representatives of Clearing Member Organizations primarily engaged in agency trading on behalf of retail customers or individual investors. Finally, rather than prescribing pre-set term limits, OCC believes that having GNC members serve at the pleasure of the Board would help foster continuity on the GNC and thereby strengthen the quality of the representation of OCC's participants and shareholders in the administration of its affairs.

2. Statutory Basis

OCC believes that the proposed change to OCC's By-Laws are consistent with Section 805(b) of the Clearing Supervision Act[18] because the changes are designed to improve the structure and effectiveness of the Board, thereby promoting robust risk management,[19] as well as safety and soundness.[20] The proposed change achieve this purpose by, among other things, creating a framework that requires the GNC to be composed of representatives of at least one Member Director, Exchange Director and Public Director, requiring the GNC to endeavor to develop a Board that represents a broad range of skills and experience and increasing the number of Public Directors the proposed changes would help ensure that OCC continues to have clear and transparent governance arrangements that are in the public interest. The proposed change is

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18 12 U.S.C. 5464(b).

19 12 U.S.C. 5464(b)(1).

20 12 U.S.C. 5464(b)(2).

not inconsistent with the existing rules of OCC, including any other rules proposed to be amended or any advance notice filings pending with the Commission.

3. Clearing Agency's Statement on Comments on the Advance Notice Received from Members, Participants, or Others

Written comments on the advance notice were not and are not intended to be solicited with respect to the advance notice and none have been received.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed changes contained in the advance notice may be implemented pursuant to Section 806(e)(1)(G) of Clearing Supervision Act[21] if the Commission does not object to the proposed changes within 60 days of the later of (i) the date that the advance notice was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed changes contained in the advance notice if the Commission objects to the proposed changes.

The Commission may extend the period for review by an additional 60 days if the proposed changes raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. Proposed changes may be implemented in fewer than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed changes and authorizes the clearing agency to implement the proposed changes on an earlier date, subject to any conditions imposed by the Commission.

OCC has also filed the advance notice as a proposed rule change pursuant to Section

21 12 U.S.C. 5465(e)(1)(G).

19(b)(1) of the Act[22] and Rule 19b-4 thereunder.[23] Pursuant to those provisions, within 45 days of the date of publication of the notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed. The clearing agency shall post notice on its web site of proposed changes that are implemented.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-OCC-2014-802 on the subject line.

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22 15 U.S.C. 78s(b)(1).

23 17 CFR 240.19b-4. See supra note 3.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549-1090.

All submissions should refer to File Number SR-OCC-2014-802. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, N.E., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of OCC and on OCC's website at http://www.theocc.com/about/publications/bylaws.jsp.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-OCC-2014-802 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.

Kevin M. O'Neill

Kevin O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72264 / May 28, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15891

In the Matter of Asia Global Holdings Corp., China Electric Motor, Inc., Ikona Gear International, Inc., Imagin Molecular Corp. (n/k/a The Planet Bottle Corporation), Sungold International Holdings Corp., and Westergaard.com, 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 the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS[1]

1. Asia Global Holdings Corp. ("AAGH") (CIK No. 1171689) is a revoked Nevada corporation located in Hong Kong with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AAGH is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2011, which reported a net loss of $85,623 for the prior nine months. As of May 23, 2014, the common stock of AAGH was quoted on OTC Link (formerly "Pink Sheets")

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

operated by OTC Markets Group Inc. ("OTC Link"), had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. China Electric Motor, Inc. ("CELM") (CIK No. 1421526) is a void Delaware corporation located in Shenzen, Guangdong, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CELM 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, 2010. As of May 23, 2014, the common stock of CELM was traded on the over-the-counter markets.

3. Ikona Gear International, Inc. ("IKGI") (CIK No. 1130809) is a void Delaware corporation located in Coquitlam, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IKGI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended May 31, 2008, which reported a net loss of $2,252,474 for the prior nine months. As of May 23, 2014, the common stock of IKGI 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. Imagin Molecular Corp. (n/k/a The Planet Bottle Corporation) ("IMGM") (CIK No. 1047540) is a void Delaware corporation located in Calgary, Alberta, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). IMGM 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, 2010, which reported a net loss of $550,672 for the prior nine months. As of May 23, 2014, the common stock of IMGM 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. Sungold International Holdings Corp. ("SGIH") (CIK No. 1073674) is an Ontario corporation located in Toronto, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). SGIH 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 August 31, 2008, which reported a net and comprehensive loss of $ 1,775,386 Canadian for the prior year. As of May 23, 2014, the common shares of SGIH were quoted on OTC Link, had eight market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Westergaard.com, Inc. ("WSYS") (CIK No. 1106974) is a void Delaware corporation located in Quanzhou, Fujian, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WSYS is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2011. On February 15, 2006, the Commission revoked the registration of WSYS based on its failure to file periodic reports. *Westergaard.com, Inc.*, Exchange Act Rel. No. 53313, Admin Proc. File No. 3-12205 (February 15, 2006). On June 26, 2007, WSYS re-registered its common stock by filing a Form 10SB-12G. As of May 23, 2014, the common stock of WSYS was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 28, 2014

In the Matter of **Asia Global Holdings Corp.,** **Ikona Gear International, Inc.,** **Imagin Molecular Corp.** **(n/k/a The Planet Bottle Corporation),** **Sungold International Holdings Corp., and** **Westergaard.com, Inc.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Asia Global Holdings Corp. because it has not filed any periodic reports since the period ended June 30, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Ikona Gear International, Inc. because it has not filed any periodic reports since the period ended May 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Imagin Molecular Corp. (n/k/a The Planet Bottle Corporation) because it has not filed any periodic reports since the period ended September 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Sungold International Holdings Corp. because it has not filed any periodic reports since the period ended August 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Westergaard.com, Inc. because it has not filed any periodic reports since the period ended June 30, 2011.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 28, 2014, through 11:59 p.m. EDT on June 10, 2014.

By the Commission.

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72270 / May 29, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15892

In the Matter of Carbon 612 Corporation, EcoGlobal Holdings Corporation, Euramerica Holdings Corp., and Wilder Filing, 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 Carbon 612 Corporation, EcoGlobal Holdings Corporation, Euramerica Holdings Corp., and Wilder Filing, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Carbon 612 Corporation (CIK No. 1476470) is a void Delaware corporation located in Farmingdale, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Carbon 612 Corporation 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, 2011, which reported a net loss of $549,674 since the company's September 10, 2008 inception.

2. EcoGlobal Holdings Corporation (CIK No. 1497843) is a Wisconsin corporation located in Chicago, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). EcoGlobal Holdings Corporation

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, 2011, which reported a net loss of $36,213 since its July 23, 2009 inception.

3. Euramerica Holdings Corp. (CIK No. 1491826) is a void Delaware corporation located in Bonita Springs, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Euramerica Holdings Corp. 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, 2011, which reported a net loss of $3,139 since the company's August 12, 2010 inception.

4. Wilder Filing, Inc. (CIK No. 1480797) is a New York corporation located in Island Park, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Wilder Filing, Inc. 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, 2011, which reported a net loss of $6,869 for the prior nine months.

B. DELINQUENT PERIODIC FILINGS

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

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

7. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and/or 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 them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72274 / May 29, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15893

In the Matter of **SUSAN OLIVE,** **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 Susan Olive ("Respondent").

II.

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

III.

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

1. From March 2008 through April 2012, Olive was the chief of finance and administration for We the People, Inc. of the United States ("WTP"). WTP, a Massachusetts corporation located in Tallahassee, Florida, is a purported charitable organization registered under Section 501(c)(3) of the Internal Revenue Code. WTP was in the business of offering and selling a product called a "tax-deductible gift annuity" or "charitable gift annuity" ("CGA").

2. On May 23, 2014, a final judgment was entered by consent against Olive, permanently enjoining her from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 15(a) of the Exchange Act, and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Richard Olive, et al., Civil Action Number 2:13-cv-14047, in the United States District Court for the Southern District of Florida.

3. The Commission's complaint alleged that from June 2008 through April 2012, WTP, through Susan Olive and others, raised over $75 million in assets from approximately 400 mostly elderly investors in over 30 states through an offering of CGAs. The complaint further alleged that the marketing and promotional materials for the CGA offering contained several misrepresentations and omissions of material fact about the products' value and security, Susan Olive's previous regulatory sanctions and criminal indictment, and the sizeable commission payments made in connection with the sale of CGAs. The complaint also alleged that Susan Olive offered and sold unregistered securities, and acted as an unregistered broker-dealer.

IV.

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

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

Jill M. Peterson
Jill M. Peterson
Assistant Secretary

Commissioner Piwowar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72275 / May 29, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15894

In the Matter of **RICHARD OLIVE,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Richard Olive ("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 March 2008 through April 2012, Olive was the chief of program services for We the People, Inc. of the United States ("WTP"). WTP, a Massachusetts corporation located in Tallahassee, Florida, is a purported charitable organization registered under Section 501(c)(3) of the Internal Revenue Code. WTP was in the business of offering and selling a product called a "tax-deductible gift annuity" or "charitable gift annuity" ("CGA").

2. On May 23, 2014, a final judgment was entered by consent against Olive, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 15(a) of the Exchange Act, and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Richard Olive, et al., Civil Action Number 2:13-cv-14047, in the United States District Court for the Southern District of Florida.

3. The Commission's complaint alleged that from June 2008 through April 2012, WTP, through Richard Olive and others, raised over $75 million in assets from approximately 400 mostly elderly investors in over 30 states through an offering of CGAs. The complaint further alleged that the marketing and promotional materials for the CGA offering contained several misrepresentations and omissions of material fact about the products' value and security, Richard Olive's previous regulatory sanctions and criminal indictments, and the sizeable commission payments made in connection with the sale of CGAs. The complaint also alleged that Richard Olive offered and sold unregistered securities, and acted as an unregistered broker-dealer.

IV.

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

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

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72282 / May 30, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15895

In the Matter of BEHROOZ SARAFRAZ 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 Behrooz Sarafraz ("Sarafraz" 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. Respondent acted as the principal securities salesman on behalf of TVC Opus I Drilling Program, LP ("Opus") and Tri-Valley Corporation ("Tri-Valley"). Respondent has never held any securities licenses or been registered with the Commission in any capacity. Respondent, age 53, is a resident of Tiburon, California.

2. On May 27, 2014, a final judgment was entered by consent against Sarafraz, permanently enjoining him from future violations of Section 15(a) of the Exchange Act, in the civil action entitled Securities and Exchange Commission v. Behrooz Sarafraz, Civil Action Number 3:14-CV-02252-EDL, in the United States District Court for the Northern District of California.

3. The Commission's complaint alleged that Respondent participated in the offer and sale of securities by Opus and its managing general partner, Tri-Valley. The complaint alleged that between February 2002 and April 2010 (the "relevant period"), Opus raised approximately $97 million from nearly 300 investors in a private placement of securities in the form of general and limited partnership interests. The complaint further alleged that during the relevant period, Tri-Valley and two subsidiaries raised nearly $43 million in other securities offerings to many of the same investors. The complaint alleged that Sarafraz helped Opus, Tri-Valley and its subsidiaries raise these funds. The complaint also alleged that Opus and Tri-Valley paid Sarafraz approximately $18.3 million in sales commissions as a result of his efforts in connection with these securities offerings, of which he paid approximately $1.9 million to others for their referrals. Finally, the complaint alleged that during the relevant period, Sarafraz was not registered with the Commission as a broker-dealer or associated with a registered broker-dealer, and that by engaging in the business of effecting transactions in securities for the account of others, he acted as an unregistered broker in violation of Section 15(a) 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 Sarafraz's Offer.

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

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

Commissioner Piwowar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3840 / May 30, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15896

In the Matter of EVERETT C. MILLER, 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 Everett C. Miller ("Miller" 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, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Miller, age 44, is a resident of Marlton, New Jersey. From approximately February 1, 2008, through October 22, 2009, Miller was associated with Carr Miller Capital Investments, LLC (later known as Capital Markets Advisory, LLC), an investment adviser that was registered with New Jersey from February 2008 through December 20, 2010. From approximately June 2006 through December 2010, Miller was chief executive officer, president, principal, and sole owner of Carr Miller Capital, LLC ("CMC"). In addition, from approximately May 2000 through August 2002, Miller was associated with Synergy Investment Group, LLC, a broker-dealer registered with the Commission. Also, from approximately June 2002 through January 2005, Miller was associated with Millenium Brokerage, L.L.C., a broker-dealer registered with the Commission, and from March 2005 through December 2005, Miller was associated with Nationwide Planning Associates, Inc., a broker-dealer registered with the Commission. From approximately March 2005 through June 5, 2006, Miller was also associated with NPA Asset Management, LLC, an investment adviser registered with New Jersey. Miller previously held Series 7, 24, 55, 63, and 65 securities licenses from approximately 2001 until 2006.

2. On July 9, 2013, Miller pled guilty to one count of securities fraud in violation of 15 U.S.C. Sections 78j(b) and 78ff, 17 C.F.R. Section 240.10b-5, and 18 U.S.C. Section 2, and one count of tax evasion in violation of 26 U.S.C. Section 7201 before the United States District Court for the District of New Jersey, in United States v. Everett C. Miller, Crim. Information No. 1:13cr451 (RMB).

3. The criminal information to which Miller pled guilty charged, inter alia, that from in or about August 2009 to in or about December 2010, Miller defrauded members of the investing public in conjunction with the offer and sale of securities in the form of CMC promissory notes (the "Notes") to approximately 40 investors in New Jersey, Pennsylvania, Texas, and elsewhere. Miller falsely represented to investors how their monies would be invested, by either failing to provide material information about the investments, or misleading them about the risks of the investments. The offering of the Notes was not registered with any federal or state agency and the Notes were not exempt from registration requirements. Miller and CMC received more than $4.99 million from these investors and, without informing investors, Miller commingled and pooled investor monies into CMC bank accounts and used some of those monies to repay other investors, for CMC and its related entities' payrolls and operating expenses, and to support Miller's lifestyle.

IV.

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

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

Jill M. Peterson

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72285 / May 30, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15696

In the Matter of **SHAWN C. HEGEDUS,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

On January 28, 2014, the Securities and Exchange Commission ("Commission") instituted proceedings against Respondent Shawn C. Hegedus ("Hegedus" or "Respondent") pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act").

II.

Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934, as set forth below.

III.

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

1. Hegedus, age 33, is a resident of New York and is currently incarcerated in the Mecklenburg County Jail in Charlotte, North Carolina. From January 2012 to April 2012, which constitutes a portion of the time in which Respondent engaged in the conduct underlying the bill of indictment described below, Respondent was a registered representative associated with Gradient Securities LLC, a broker-dealer registered with the Commission. During this period, Respondent held a Series 7 securities license.

2. On September 23, 2013, Hegedus was criminally convicted upon the entry of his guilty plea to one count of conspiracy to commit money laundering in violation of Title 18 United States Code, Section 1956(h), and one count of violating Title 18 United States Code, Section 371 by conspiring to commit insider trading, including conspiracy to violate Title 15 United States Code, Sections 78j(b) and 78ff, and Title 17 Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2 in the United States District Court for the Western District of North Carolina in United States v. Shawn C. Hegedus, No. 3:12cr386.

3. The counts of the bill of indictment to which Hegedus pled guilty alleged, inter alia, that from approximately March 2010 through approximately December 2012, Hegedus engaged in an insider trading conspiracy by knowingly receiving material, nonpublic information about upcoming corporate acquisitions that was stolen from Wells Fargo Securities and its clients, trading profitably in the securities of the companies to be acquired based on the information, and tipping the information to other conspirators who also traded profitably in the securities of the companies to be acquired.

IV.

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

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

Jill M. Peterson

Jill M. Peterson
Assistant Secretary