SECURITIES AND EXCHANGE COMMISSION

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

MARY JO WHITE, CHAIR

LUIS A. AGUILAR, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

KARA M. STEIN, COMMISSIONER

MICHAEL S. PIWOWAR, COMMISSIONER

(54 Documents)

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-73979; File No. SR-OCC-2014-809)

January 2, 2015

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of No Objection to Advance Notice Concerning the Implementation of a Committed Master Repurchase Agreement Program as Part of OCC's Overall Liquidity Plan

On November 6, 2014, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") advance notice SR-OCC-2014-809 ("Advance Notice") pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 ("Clearing Supervision Act" or "Title VIII")[1] and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934 ("Exchange Act").[2] The Advance Notice was published for comment in the Federal Register on December 9, 2014.[3] The Commission did not receive any comments on the Advance Notice publication. This publication serves as a notice of no objection to the Advance Notice.

I. Description of the Advance Notice

a. Background

The purpose of the proposed change is to allow OCC to implement a committed master repurchase agreement program ("MRA Program") in order to access an additional committed source of liquidity to meet its settlement obligations in a manner that does not

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1 12 U.S.C. 5465(e)(1). The Financial Stability Oversight Council designated OCC a systemically important financial market utility on July 18, 2012. See Financial Stability Oversight Council 2012 Annual Report, Appendix A, http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf. Therefore, OCC is required to comply with the Clearing Supervision Act and file advance notices with the Commission. See 12 U.S.C. 5465(e).

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

3 Securities Exchange Act Release No. 73726 (December 3, 2014), 79 FR 73116 (December 9, 2014) (SR-OCC-2014-809).

increase the concentration of OCC's counterparty exposure, given OCC's existing affiliations between a number of commercial banking institutions and OCC's clearing members. According to OCC, the MRA Program will take the form of OCC entering into a committed master repurchase agreement and related confirmations (together, the "Master Repurchase Agreement") with one or more non-bank, non-clearing member institutional investors.[4] The program will be part of OCC's overall liquidity plan that is meant to provide OCC with access to diverse sources of liquidity, which includes committed credit facilities, securities lending and securities repurchase arrangements, and clearing member funding requirements that, under certain conditions, allow OCC to obtain funds from clearing members.[5]

Although the Master Repurchase Agreement would be based on the standard form of master repurchase agreement[6] so that it will be more familiar to potential institutional

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4 OCC states that it will conduct a due diligence review with respect to each counterparty before entering into a master repurchase arrangement with it. Because the appropriate due diligence activities and financial criteria will vary for each type of counterparty, OCC will determine on a case-by-case basis the specific due diligence criteria it would implement. However, as the principal purpose of due diligence will be to obtain assurance that each counterparty has the financial ability to satisfy its obligations under the program, the review will encompass an assessment of the counterparty's financial statements (including external auditor reports thereon) and, as applicable, ratings and/or investment reports. Furthermore, OCC will identify key criteria relative to monitoring the financial stability of the counterparty on a going forward basis.

5 See, e.g., Securities Exchange Act Release No. 72752 (August 4, 2014), 79 FR 46490 (August 8, 2014) (SR-OCC-2014-17), Securities Exchange Act Release No. 71549 (February 12, 2014), 79 FR 03574 (February 19, 2014) (SR-OCC-2014-801) and Securities Exchange Act Release No. 73257 (September 30, 2014), 79 FR 23698 (October 3, 2014) (SR-OCC-2014-806).

6 The standard form master repurchase agreement is published by the Securities Industry and Financial Markets Association and is commonly used in the repurchase market by institutional investors.

investors, OCC would require the Master Repurchase Agreement to contain certain additional provisions tailored to ensure a reduction in concentration risk, certainty of funding, and operational effectiveness.

b. <u>The Proposed MRA Program</u>

i. Standard Repurchase Agreement Terms

According to OCC, the Master Repurchase Agreement generally will be structured like a typical repurchase arrangement, in order to help OCC attract interest from potential institutional investors willing to be counterparties to OCC. Under the Master Repurchase Agreement, the buyer (<u>i.e.</u>, the institutional investor) on occasion would purchase from OCC United States government securities ("Eligible Securities").[7] OCC, as the seller, will transfer Eligible Securities to the buyer in exchange for a payment by the buyer to OCC in immediately available funds ("Purchase Price"). The buyer will simultaneously agree to transfer the purchased securities back to OCC at a specified later date or on OCC's demand ("Repurchase Date") against the transfer of funds by OCC to the buyer in an amount equal to the outstanding Purchase Price plus the accrued and unpaid price differential (together, the "Repurchase Price"), which is the interest component of the Repurchase Price.

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7 OCC would use U.S. government securities that are included in clearing fund contributions by clearing members and margin deposits of any clearing member that has been suspended by OCC for the repurchase arrangements. Article VIII, Section 5(e) of OCC's By-Laws and OCC Rule 1104(b) authorize OCC to obtain funds from third parties through securities repurchases using these sources. The officers who may exercise this authority include the Executive Chairman and the President.

At all times while a transaction is outstanding, OCC will be required to maintain a specified amount of securities or cash margin with the buyer.[8] The market value of the securities supporting each transaction will be determined daily, typically based on a price obtained from a generally recognized pricing source. If the market value of the purchased securities is determined to have fallen below OCC's required margin, OCC will be required to transfer to the buyer sufficient cash or additional securities reasonably acceptable to the buyer so that OCC's margin requirement is satisfied.[9] If the market value of the purchased securities is determined to have risen to above OCC's required margin, OCC will be permitted to require the return of excess purchased securities from the buyer.

As in a typical master repurchase agreement, an event of default will occur with respect to the buyer if the buyer fails to purchase securities on a purchase date, fails to transfer purchased securities on any applicable Repurchase Date, or fails to transfer any interest, dividends or distributions on purchased securities to OCC within a specified period after receiving notice of such failure. An event of default will occur with respect to OCC if OCC fails to transfer purchased securities on a purchase date or fails to repurchase purchased securities on an applicable Repurchase Date. The Master Repurchase Agreement also will provide for standard events of default for either party, including a party's failure to maintain required margin or an insolvency event with respect to one of the parties.

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8 OCC expects that it would be required to maintain margin equal to 102% of the Repurchase Price which, according to OCC, is a standard rate for arrangements involving U.S. government securities.

9 OCC expects that it would use clearing fund securities and securities posted as margin by defaulting clearing members.

Upon the occurrence of an event of default, the non-defaulting party, at its option, will have the right, among others, to accelerate the Repurchase Date of all outstanding transactions between the defaulting party and the non-defaulting party. For example, if OCC were the defaulting party with respect to a transaction and the buyer chose to terminate the transaction, OCC will be required to immediately transfer the Repurchase Price to the buyer. If the buyer were the defaulting party with respect to a transaction and OCC chose to terminate the transaction, the buyer will be required to deliver all purchased securities to OCC. If OCC or the buyer does not perform in a timely manner, the non-defaulting party will be permitted to buy or sell, or deem itself to have bought or sold, securities as needed to be made whole and the defaulting party will be required to pay the costs related to any covering transactions. Additionally, if OCC is required to obtain replacement securities as a result of an event of default, the buyer will be required to pay the excess of the price paid by OCC to obtain replacement securities over the Repurchase Price.

ii. Customized Features

As part of the Master Repurchase Agreement, OCC will enter into an individualized master confirmation with each buyer and its agent which will set forth certain terms and conditions applicable to all transactions entered into under the Master Repurchase Agreement by that buyer. According to OCC, these required terms and conditions will be designed to promote OCC's goals of reduced concentration risk, certainty of funding and operational effectiveness. The terms of the master confirmations under each Master Repurchase Agreement may vary from one another, because a separate master confirmation will be negotiated for a given buyer at the time that buyer becomes a party to the Master Repurchase Agreement. OCC has identified the following as key standards that will need to be incorporated into each repurchase arrangement entered into under the program.[10]

Counterparties

OCC only will enter into repurchase arrangements with non-bank institutional investors, such as pension funds or insurance companies that are not OCC clearing members or banks affiliated with any OCC clearing member. OCC believes this requirement will allow OCC to access stable, reliable sources of funding, without increasing the concentration of its exposure to counterparties that are affiliated banks, broker/dealers and futures commission merchants. OCC believes that this reduction in concentration risk is a key advantage of this proposed program.

Commitment to Fund and Funding Accounts

OCC will seek funding commitments from one or more potential counterparties that will equal \$1 billion in the aggregate,[11] with each commitment extending for 364 days or more. Each counterparty will be obligated to enter into transactions under the Master Repurchase Agreement up to its committed amount so long as no default had occurred and OCC transferred sufficient Eligible Securities. Each counterparty will be obligated to enter into transactions even if OCC had experienced a material adverse change, such as the failure of a clearing member. According to OCC, this commitment to

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10 OCC expects that the Master Repurchase Agreement also will include other, more routine, provisions such as the method for giving notices and basic due authorization representations by the parties.

11 The \$1 billion in commitments could be spread across multiple counterparties, but \$1 billion represents the proposed aggregate size of the program.

provide funding will be a key departure from ordinary repurchase arrangements and a key requirement for OCC. Each commitment will be supported by an agreement by the counterparty to maintain cash and investments acceptable to OCC that must be readily converted into cash in a designated account into which OCC has visibility. OCC believes that the creation of a funding account is important because it will help OCC ensure that the committed funds will be available each day. OCC also believes that it will facilitate prompt funding by counterparties that are not commercial banks and therefore are not in the business of daily funding.

Funding Mechanics

According to OCC, funding mechanics will be targeted so that OCC will receive the Purchase Price in immediately available funds within 60 minutes of its request for funds and delivery of Eligible Securities and, if needed, prior to OCC's regular daily settlement time.[12] OCC believes that these targeted funding mechanics will allow OCC to receive needed liquidity in time to satisfy settlement obligations, even in the event of a default by a clearing member or a market disruption. The funding mechanism may be, for example, delivery versus payment/receive versus payment or another method acceptable to OCC that both satisfies the objectives of the MRA Program and presents limited operational risks.

No Rehypothecation

Under the terms of each master confirmation, the buyer would not be permitted to grant any third party an interest in purchased securities, the custody account at the

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12 According to OCC, this would include OCC's regular daily settlement time and any extended settlement time implemented by OCC in an emergency situation under OCC Rule 505.

custodian where purchased securities are held, or any cash held in OCC's account. As a result, OCC states that the buyer would be prohibited from rehypothecating purchased securities, the purchased securities should never leave the account, and there should be no third-party claims against the purchased securities. OCC believes that the prohibition on rehypothecation also would reduce the risk that a third party could interfere with the buyer's transfer of the purchased securities on the Repurchase Date. Further, according to OCC, the custodian would agree to provide OCC with daily information about each buyer's account. OCC believes that this visibility would allow OCC to act quickly in the event a buyer violates any requirements.

Early Termination Rights

Under the Master Repurchase Agreement, OCC would have the ability to terminate any transaction upon written notice to the buyer, but a buyer only would be able to terminate a transaction upon the occurrence of an event of default with respect to OCC.[13] OCC has stated that this optional early termination right is important because its liquidity needs may change unexpectedly over time and as a result OCC may not want to keep a transaction outstanding as long as originally planned.

Substitution

Under the Master Repurchase Agreement, OCC would have the ability to substitute any Eligible Securities for purchased securities in its discretion by a specified time, so long as the Eligible Securities satisfy any applicable criteria contained in the

13 According to OCC, a notice of termination by OCC would specify a new Repurchase Date prior to the originally agreed upon Repurchase Date. Upon the early termination of a transaction, the buyer would be required to return all purchased securities to OCC, and OCC would be required to pay the Repurchase Price.

Master Repurchase Agreement and the transfer of the Eligible Securities would not create a margin deficit, as described above.[14] OCC believes that this substitution right is important because it must be able to manage clearing member requests to return excess or substitute Eligible Securities in accordance with established operational procedures.

Events of Default

In addition to the standard events of default for a failure to purchase or transfer securities on the applicable Purchase Date or Repurchase Date, OCC would require that the Master Repurchase Agreement not contain any additional events of default that would restrict OCC's access to funding and that it contain an additional default remedy. OCC would require that it would not be an event of default if OCC suffers a "material adverse change."[15] According to OCC, this provision provides it with certainty of funding, even in difficult market conditions.

Upon the occurrence of an event of default, in addition to the non-defaulting party's right to accelerate the Repurchase Date of all outstanding transactions or to buy or sell securities as needed to be made whole, the non-defaulting party may elect to take the actions specified in the "mini close-out" provision of the Master Repurchase Agreement,

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14 In addition to its substitution rights, OCC could cause the return of purchased securities by exercising its optional early termination rights under the Master Repurchase Agreement. If OCC were to terminate part or all of a transaction, the buyer would be required to return purchased securities to OCC against payment of the corresponding Repurchase Price.

15 According to OCC, a "material adverse change" is typically defined as a change that would have a materially adverse effect on the business or financial condition of a company.

rather than declaring an event of default.[16] Therefore, if the buyer fails to deliver purchased securities on any Repurchase Date, OCC believes that it would have remedies that allow it to mitigate risk with respect to a particular transaction, without declaring an event of default with respect to all transactions under the Master Repurchase Agreement.

II. Discussion and Commission Findings

Although Title VIII does not specify a standard of review for an advance notice, the Commission believes that the stated purpose of Title VIII is instructive.[17] The stated purpose of Title VIII is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically-important financial market utilities ("FMUs") and strengthening the liquidity of systemically important FMUs.[18]

Section 805(a)(2) of the Clearing Supervision Act[19] 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. Section

16 For example, if the buyer fails to transfer purchased securities on the applicable Repurchase Date, rather than declaring an event of default, OCC may (1) if OCC has already paid the Repurchase Price, require the buyer to repay the Repurchase Price, (2) if there is a margin excess, require the buyer to pay cash or delivered purchased securities in an amount equal to the margin excess, or (3) declare that the applicable transaction, and only that transaction, will be immediately terminated, and apply default remedies under the Master Repurchase Agreement to only that transaction.

17 See 12 U.S.C. 5461(b).

18 Id.

19 12 U.S.C. 5464(a)(2).

805(b) of the Clearing Supervision Act[20] 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.

The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act ("Clearing Agency Standards").[21] The Clearing Agency Standards became effective on January 2, 2013, and require registered clearing agencies that perform central counterparty ("CCP") services 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.[22] As such, it is appropriate for the Commission to review advance notices against these Clearing Agency Standards, and the objectives and principles of these risk management standards as described in Section 805(b) of the Clearing Supervision Act.[23]

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20 12 U.S.C. 5464(b).

21 17 CFR 240.17Ad-22.

22 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 designated FMUs 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 (August 2, 2012).

23 12 U.S.C. 5464(b).

The Commission believes that the proposal in this Advance Notice is designed to further the objectives and principles of Section 805(b) of the Clearing Supervision Act.[24] As a systemically-important FMU, it is imperative that OCC have adequate resources to be able to satisfy its counterparty settlement obligations. The MRA Program provides OCC with a committed liquidity resource that does not increase the concentration of OCC's counterparty exposure because the counterparties will not include OCC's clearing members nor affiliated commercial banking institutions. Accordingly, the Commission believes that the proposal should promote robust risk management, promote safety and soundness in the marketplace, reduce systemic risks, and support the stability of the broader financial system by giving OCC access to additional committed liquidity that will help OCC meet its settlement obligations in a timely manner, while also limiting the exposure that OCC has to its counterparties.

Exchange Act Rule 17Ad-22(b)(3),[25] adopted as part of the Clearing Agency Standards, requires that a non-security-based swap registered clearing agency that performs CCP services establish, implement, maintain, and enforce written policies and procedures reasonably designed to withstand, at a minimum, a default by the participant family to which it has the largest exposure in extreme but plausible market conditions. As a part of OCC's overall liquidity plan, the Commission believes that the MRA Program will contribute additional liquid financial resources that should enhance OCC's ability to meet any potential settlement demands arising out of a default of a clearing member or clearing member family, including one to which it has the largest exposure.

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24 12 U.S.C 5464(b).

25 17 CFR 240.17Ad-22(b)(3).

III. Conclusion

IT IS THEREFORE NOTICED, pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act,[26] that the Commission DOES NOT OBJECT to advance notice proposal (SR-OCC-2014-809) and that OCC is AUTHORIZED to implement the proposal as of the date of this notice.

By the Commission.

Brent J. Fields
Secretary

26 12 U.S.C. 5465(e)(1)(I).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74005 / January 6, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-14909

In the Matter of OPPENHEIMERFUNDS, INC. and OPPENHEIMERFUNDS DISTRIBUTOR, INC., Respondents.	ORDER APPROVING APPLICATION OF FUND ADMINISTRATOR FOR PAYMENT OF FEES AND EXPENSES

On June 6, 2012, the Securities and Exchange Commission ("Commission") issued an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 15(b)(4) of the Securities Exchange Act of 1934, Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order against Oppenheimerfunds, Inc. ("OFI") and Oppenheimerfunds Distributor, Inc. (collectively, "Respondents") (the "Order").[1] As set forth in the Order, prior to and during the height of the 2008 financial crisis, Respondents made misrepresentations regarding two fixed income mutual funds managed by OFI: Oppenheimer Champion Income Fund and Oppenheimer Core Bond Fund. The Order required OFI to pay disgorgement of $9,879,706, prejudgment interest of $1,487,190, and a civil money

[1] Securities Act Rel. No. 9329 (June 6, 2012).

penalty of $24 million, for a total of approximately $35.4 million. The Order also created a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended.

On March 14, 2013, the Commission issued an order appointing Epiq Class Actions & Claims Solutions, Inc. ("Epiq") as the Fund Administrator and approving the Fund Administrator bond in the amount of $35,500,000.00.[2] On December 18, 2013, the Commission issued a Notice of Proposed Plan of Distribution and Opportunity for Comment.[3] No comments were received, and subsequently, the Plan of Distribution ("Plan") was approved on February 5, 2014.[4]

The Plan provides for the payment of the Fund Administrator for administering the Plan. The Plan states that all payments to the Fund Administrator will be paid from the Fair Fund after review by Commission staff and approval by the Commission. In addition, the Plan states that the cost of the bond premium for the $35.5 million bond will be paid by the Fair Fund. Both payments will first be made from the interest earned on the invested funds, then, if not sufficient, from the corpus of the Fair Fund.

The Fund Administrator has submitted eight invoices totaling $622,066.14 to Commission staff that covers the period from Epiq's appointment on March 14, 2013 to September 30, 2014. The Commission staff has reviewed the Fund Administrator's invoices, confirms that the services have been provided, and finds the fees and expenses of $622,066.14 to be reasonable and in accordance with the Plan. The Commission staff has requested that the Commission authorize the Office of Financial Management ("OFM") to pay the Fund Administrator's invoiced fees and expenses of

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[2] *See* Order Appointing Fund Administrator and Approving Fund Administrator Bond, Exchange Act Rel. No. 69138 (March 14, 2013).
[3] *See* Notice of Proposed Plan of Distribution and Opportunity for Comment, Exchange Act Rel. No. 71119 (December 18, 2013).
[4] *See* Order Approving Distribution Plan, Exchange Act Rel. No. 71493 (February 5, 2014).

$622,066.14 from the Fair Fund, and in addition to authorize OFM to pay, at the direction of the Assistant Director of the Office of Distributions, the Fund Administrator's future fees and expenses up to, but not to exceed, $35,000 per monthly invoice, so long as the total amount paid to the Fund Administrator as of the date of the invoice to be paid does not exceed the total amount of the cost proposal submitted by the Fund Administrator by more than $5,000.

Accordingly, it is hereby ORDERED, pursuant to Rule 1105(d) of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.1105(d), that OFM pay the Fund Administrator's fees and expenses in the amount of $622,066.14. Further, OFM is authorized to pay, at the direction of the Assistant Director of the Office of Distributions, any future fees and expenses up to, but not to exceed, $35,000 per monthly invoice, so long as the total amount paid to the Fund Administrator, as of the date of the invoice to be paid, does not exceed the total amount of the cost proposal submitted by the Fund Administrator by more than $5,000.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74015 / January 8, 2015

Admin. Proc. File No. 3-15056

In the Matter of the Application of JOSEPH S. AMUNDSEN For Review of Disciplinary Action Taken By FINRA

ORDER DENYING REQUEST FOR RECONSIDERATION

On April 18, 2013, we issued an opinion and order in this proceeding (the "April 2013 Order"). In the April 2013 Order, we (1) found that on thirty-six Uniform Applications for Securities Industry Registration or Transfer, known as Forms U4, Joseph S. Amundsen, formerly a registered representative of various FINRA member firms, failed to disclose both an injunction entered against him in connection with investment-related activity and the revocation of his license to act as a certified public accountant and (2) sustained the bar FINRA imposed as a sanction.[1] Amundsen sought review of the April 2013 Order in the United States Court of Appeals for the D.C. Circuit,[2] which denied his petition on August 13, 2014.[3] On August 20, 2014, Amundsen filed petitions for rehearing and rehearing en banc in the D.C. Circuit. On August 25, 2014, while these petitions were pending before the D.C. Circuit, Amundsen asked us to reconsider our April 2013 Order. The D.C. Circuit denied Amundsen's petitions on October 21, 2014 and issued its mandate on November 7, 2014. Amundsen submitted an additional request for reconsideration

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1 *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148 (Apr. 18, 2013). We also found that Amundsen was subject to a statutory disqualification. *Id.* at *35-37.

2 Amundsen originally had sought relief in the U.S. Court of Appeals for the Ninth Circuit; that court found that venue for Amundsen's petition for review was inappropriate and transferred the petition to the D.C. Circuit. *Amundsen v. U.S. Dist. Court*, No. 13-71472 (9th Cir. Sept. 9, 2013) (denying petition to the extent it sought mandamus relief, construing petition in part as petition for review, and transferring petition for review to D.C. Circuit).

3 *Amundsen v. SEC*, 2014 U.S. App. LEXIS 15559 (D.C. Cir. Aug. 13, 2014).

on November 12, 2014.[4] We have determined to deny both the August 25 and the November 12 requests as untimely.[5]

Our Rule of Practice 470 provides, in relevant part:

> A party . . . aggrieved by a determination in a proceeding may file a motion for reconsideration of a final order issued by the Commission. . . . A motion for reconsideration shall be filed within 10 days after service of the order complained of, or within such time as the Commission may prescribe upon motion for extension of time filed by the person seeking reconsideration, if the motion is made within the foregoing 10-day period.[6]

The rule contains no provision for late filings unless an extension is granted based on a request made within the ten-day period.[7] Amundsen was served with a copy of the April 2013 Order on April 22, 2013,[8] well over a year before the filing of his motions. As a result, his requests for reconsideration are untimely.[9]

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[4] Amundsen, who appears pro se, made this request in a letter addressed to Chair Mary Jo White and to Richard G. Ketchum, Chairman and Chief Executive Officer of the Financial Industry Regulatory Authority. On November 14, 2014, Amundsen submitted another letter, supplementing his earlier reconsideration request.

[5] We awaited issuance of the mandate before addressing Amundsen's August 25 request.

[6] 17 C.F.R. § 201.470. We note, in considering the narrow circumstances where reconsideration will be granted, that the comment to Rule 470 states that "reconsideration is intended to be an exceptional remedy." Rules of Practice, 60 Fed. Reg. 32,738, 32,780 (June 23, 1995).

[7] Rule 470, 17 C.F.R. § 201.470.

[8] Our Office of the Secretary served Amundsen with a copy of the April 2013 Order by United States Postal Service certified mail, return receipt requested. *See* Rules of Practice 141(b), 17 C.F.R. § 201.141(b) (service of certain orders or decisions) and 141(a)(2)(i), 17 C.F.R. § 201.141(a)(2)(i) (methods of service on individuals). After service of the April 2013 Order on Amundsen, a corrected opinion and order was issued, listing the names of the participating Commissioners that had been omitted from the original. Amundsen received both decisions, which he attached to pleadings he filed with the D.C. Circuit in 2013.

[9] We also note, with respect to the November 12 request (and the November 14 supplement to that request), that our Rules of Practice do not provide for a second motion to reconsider the same decision. *Johnny Clifton*, Exchange Act Release No. 70942, 2013 SEC LEXIS 3712, at *3 (Nov. 25, 2013) (refusing to consider a second motion for reconsideration, among other reasons, because the Rules of Practice do not provide for a second motion to reconsider the same decision). Because any further filings seeking reconsideration of the April 2013 Order would be untimely and would also be inconsistent with our rules, no further such filings will be accepted. *See*

(continued...)

IT IS therefore ORDERED that the requests for reconsideration of the April 2013 Order, filed by Joseph S. Amundsen, are hereby denied.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

(…continued)
Raghavan Sathianathan, Exchange Act Release No. 54975, 2006 SEC LEXIS 3008 (Dec. 20, 2006) (stating that no further filings would be accepted where litigant repeatedly failed to conform filings to Rules of Practice and where period for filing motions for reconsideration had passed).

Commissioner Aguilar
Not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 74030 / January 9, 2015

Admin. Proc. File No. 3-15811

In the Matter of the Application of

BLAIR ALEXANDER WEST
c/o Stanford R. Solomon, Esq.
The Solomon Group, P.A.
1881 West Kennedy Blvd.
Tampa, FL 33606-1606

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDINGS

Principal of former member firm of registered securities association misused customer funds to pay member firm's operating expenses and his personal debts without customer's authorization in violation of just and equitable principles of trade. *Held*, association's findings of violation and sanction imposed are *sustained*.

APPEARANCES:

Stanford R. Solomon, of The Solomon Group, P.A., and *David E. Robbins*, of Kaufmann Gilden & Robbins LLP, for Blair Alexander West.

Alan Lawhead, *Jennifer Brooks*, and *Celia L. Passaro*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: March 24, 2014
Last brief received: July 16, 2014

Blair Alexander West, sole principal of Crusader Securities LLC ("Crusader" or the "Firm"), a former FINRA member firm, appeals from FINRA disciplinary action barring him from associating with a FINRA member firm. FINRA found that West violated NASD Conduct Rule 2110 by "misu[sing] customer funds that were intended to be held in escrow pending the close of a sale and leaseback transaction."[1] As FINRA found, "[w]ithin moments" of receiving the deposited funds, West transferred the funds to pay his personal debts and fund Crusader's operating expenses, spending the entire amount over a two-month period.

West primarily contends that FINRA lacked jurisdiction to bring this action, that he was authorized to use his customer's funds, and that FINRA failed to consider mitigating factors in barring him. Following our independent review, we reject West's contentions as baseless and find that the record establishes his violation of Rule 2110 through the misuse of his customer's funds. We conclude that a bar is consistent with FINRA Sanction Guidelines and is neither excessive nor oppressive. Accordingly, we sustain FINRA's action.

I. Background

A. West and Crusader

The relevant facts are largely undisputed.[2] West entered the securities industry in 1996 and in 2003 founded Crusader, a registered broker-dealer that provided boutique investment banking services, including capital raising assistance, to small companies. West was at all relevant times Crusader's President, Chief Compliance Officer, and Financial and Operations Principal. West remained associated with Crusader until February 2011, when Crusader withdrew its FINRA membership. West is not currently associated with any FINRA member.

B. West signed an agreement to raise capital for AmeriChip, a new customer.

In the fall of 2008, Drew Mouton, the vice chairman of the board of AmeriChip International, Inc. ("AmeriChip"), asked West to help raise capital for AmeriChip, a Nevada corporation specializing in machine equipment for the automotive industry.[3] At the time,

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[1] NASD Conduct Rule 2110 requires members to "observe high standards of commercial honor and just and equitable principles of trade." Since FINRA initiated this action, FINRA has renamed NASD Rule 2110 as FINRA Rule 2010 without substantive change. *Order Approving FINRA's Adoption of Certain FINRA Rules in the Consolidated Rulebook*, 73 Fed. Reg. 57,174 (Oct. 1, 2008). We apply the rule in effect at the time of the alleged misconduct.

[2] Through his answer, the joint stipulations, and his hearing testimony, West admitted to many facts at issue in this case. *See generally James F. Glaza*, Exchange Act Release No. 50474, 2004 WL 2192392, at *4 (Sept. 30, 2004) ("[S]tipulated facts serve important policy interests . . . [and] should not be set aside without a showing of compelling circumstances.").

[3] We take official notice pursuant to Commission Rule of Practice 323, 17 C.F.R. § 201.323, that Mouton became president and chief executive officer of AmeriChip on December 28, 2008. *See* AmeriChip Form 8-K, dated Dec. 28, 2008, at 1, *available at*

(continued...)

AmeriChip was experiencing financial difficulties. As a result, AmeriChip entered into an agreement with Crusader (the "Advisory Agreement"). On October 22, 2008, Mouton signed the Advisory Agreement on behalf of AmeriChip and West signed on behalf of Crusader.

Under the Advisory Agreement, Crusader would introduce AmeriChip to "certain capital sources, including possible financial and strategic investors and/or lenders," and AmeriChip would pay Crusader a fee for any capital that Crusader helped AmeriChip raise during the engagement.[4] The Advisory Agreement provided that this fee would be "fully earned and paid at each closing" based on a percentage of the financing raised for AmeriChip. If Crusader acted as the "escrow agent" on a capital-raising transaction, the Advisory Agreement authorized it to "retain its [capital raising] fee[] and net fund the balance to the parties in that particular transaction."

C. West facilitated a sale/leaseback transaction and agreed to hold an initial deposit for the transaction with Crusader.

Crusader soon introduced AmeriChip to a potential capital source, Ability Capital Solutions, Inc. ("Ability"), an asset-based finance company specializing in equipment finance and leasing. On December 9, 2008, West forwarded Ability's proposed term sheet (the "Term Sheet") to Mouton. Under the Term Sheet, Ability offered to provide AmeriChip a loan in the form of a sale/leaseback transaction in which Ability would purchase equipment from an AmeriChip subsidiary for $3.5 million and then lease the purchased equipment back to AmeriChip's subsidiary at $56,756.84 a month for seven years. According to this draft of the Term Sheet, AmeriChip would make an initial deposit of $113,513.68 with Ability, representing the first and last payments under the transaction (the "Deposit").

Mouton told West and Crusader that AmeriChip's board of directors would provide the Deposit to Ability only if the funds were held in escrow. Because Ability did not have an escrow account and was reluctant to open one, West proposed that Crusader hold the Deposit in a Crusader account for the transaction. The parties agreed and West revised the Term Sheet (the "Revised Term Sheet") to reflect that "[t]he First and Last Payment in the amount of $113,513.68 [*i.e.*, the Deposit] will be wired to Crusader . . . upon acceptance of this letter and held by Crusader until closing." The Revised Term Sheet also provided that the Deposit would be returned to AmeriChip "promptly" if the transaction terminated.

West sent Mouton the Revised Term Sheet and another document titled "Crusader Securities Escrow Account Bank Wire Instructions." West's wiring instructions directed Mouton to wire the Deposit to the "[Crusader] Escrow Account" at HSBC Bank USA (the "HSBC Account"). Although the wiring instructions referred to the HSBC Account as an escrow

(...continued)
http://www.sec.gov/Archives/edgar/data/1132487/000115752309000157/maindoc.htm (all websites last visited on Dec. 10, 2014).

4 In addition, AmeriChip paid Crusader an advisory fee under the Advisory Agreement, but such other compensation is not relevant here.

account, it is undisputed that there was no escrow agreement or escrow agent and the account was entirely in West's control.

On December 19, 2008, Mouton signed the Revised Term Sheet on behalf of AmeriChip,[5] and Mouton wired the Deposit to the HSBC Account on December 24, 2008. The parties thereafter continued their negotiations toward finalizing the transaction.

D. After negotiations on the sale/leaseback transaction faltered, Mouton demanded that West return the Deposit; West delayed returning the Deposit and failed to disclose his misuse of the money.

By mid-February 2009, negotiations on the proposed sale/leaseback transaction began to falter. In e-mails to West at the time, Mouton expressed his displeasure with the delays in completing the transaction and asked West to terminate negotiations and return the Deposit to AmeriChip. West repeatedly delayed returning the Deposit to Mouton. Instead, West sought more time to complete the deal and suggested to Mouton that Crusader continued to hold the funds. To the contrary, West had withdrawn and spent the entire Deposit on personal and unrelated business expenses by March 2009. At no point did West inform Mouton that he already had spent the Deposit.

1. West spent the Deposit on personal debts and Crusader operating expenses.

West concedes that, shortly after Mouton wired the Deposit to Crusader, he transferred $89,000 of it to a Crusader operating account. Before the transfer, the operating account had a negative balance and recently had incurred service charges for insufficient funds. West then transferred $72,500 of the $89,000 to his personal checking account and transferred an additional $7,500 to the operating account for Crusader Financial Group, Inc. ("Crusader Financial"), the parent company of Crusader. Before West deposited those funds into his personal bank account, the account had maintained a negative balance for at least two weeks and incurred service charges for insufficient funds. West left the remaining $9,000 of the $89,000 in Crusader's operating account.

On December 26, 2008, West began depleting the funds he had transferred to his personal account. He made mortgage payments totaling $27,000, paid $3,500 on his home equity line of credit, made $5,500 in payments to other creditors, and paid other personal expenses, including cable television fees, car payments, clothing purchases, golf- and tennis-club fees, and telephone bills. By January 2009, West had spent the entire $72,500 he had deposited into his personal account and the $16,500 he had transferred to other Crusader business accounts. Over the ensuing months, West transferred the remainder of the Deposit ($24,500) from the HSBC Account to Crusader's accounts and his personal account and spent all of it on personal and Crusader operating expenses.

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5 Mouton accepted the terms of the agreement as the "lead director" and "vice chair" of the board of AmeriChip's affiliate, KSI Machine & Engineering, Inc.

2. West repeatedly delayed returning the Deposit to Mouton.

While West was spending the Deposit, the negotiations between AmeriChip and Ability had stalled, causing Mouton to ask for a return of the funds. On February 16, 2009, Mouton wrote to West, "I'm assuming no word from [Ability]. We're [now] into the 8th week since making that deposit—I need a resolution one way or the other." In an e-mail shortly thereafter, Mouton requested that West return the Deposit: "I need to put that cash to use," Mouton stated, "Time to call it." West responded by asking Mouton to wait for an update from Ability.

Mouton sent West another e-mail on February 23, 2009, asking about the transaction. Mouton asked West, "Have you communicated with [Ability] that 9 weeks is too long, and we need a commitment now or the return of deposits?" adding "[t]oday's the day." West responded, "Yes . . . they need to make a decision this week or return the deposit . . . ." West suggested that, if the deal with Ability was terminated, Crusader should keep "the [D]eposit we hold" and apply it to other potential deals, but Mouton rejected the suggestion and responded that "[t]he funds you hold are mine personally . . . with terms that require short-term payback, so they'll need to come back. This new deal . . . we'd fund from a different source . . . ." Two days later, Mouton e-mailed West wiring instructions for a return of the Deposit.

Although West responded by asking Mouton to "just be patient a few more days," Mouton responded by reemphasizing the importance of returning the Deposit to him. Mouton told West that, if the transaction did not move forward soon, "I *have* to get that cash back to put [it] to use" (asterisks as emphasis in original).

Mouton's frustration increased in March 2009. For example, on March 4, 2009, Mouton e-mailed West:

> It's now been 2 more weeks since we were "close" to getting something closed, and 10 weeks since initiating this deal.
>
> What am I supposed to do here? At this point, my internal credibility with my Board is damaged . . . . I'm sitting around waiting for who knows what, after giving "pass or fail instructions," just in order to get my own personal $130k deposit funds back, *long* after any reasonable deal should have closed.

(Asterisks as emphasis in original). The next day, West responded, "I know it has been many weeks to get to this point but I ask that you please be patient just a little while longer while we push to get this deal closed for you." Again, West did not disclose that he already had spent the funds.

Mouton raised the issue of the funds again in a March 10, 2009, e-mail to West: "[I]nsofar as I gave *explicit instructions* going on 3 weeks ago to get an answer or return deposits, and have repeated it now multiple times without result, how can you expect my Board to have any comfort that those deposit funds are even still there?" (Asterisks as emphasis in original).

In his response, West did not address Mouton's concerns about the Deposit's whereabouts. Instead, he wrote, "I understand. We have been riding [Ability] everyday . . . . All I can tell you is what [Ability] is telling me . . . ." In his hearing testimony, West conceded that at the time of this correspondence he was not about to admit to Mouton that he had already spent the Deposit. West explained that he withheld this information from Mouton because it concerned "my personal business" but admitted that his nondisclosure "was a mistake."

Finally, on April 8, 2009, Mouton sent an e-mail to a representative from Ability (copying West), asking Ability to confirm release of the Deposit. Ability's representative replied that day, "releasing the funds from escrow."

3. After Ability confirmed the release of the funds, West delayed returning the Deposit to AmeriChip.

After Ability confirmed the release of the funds, Mouton provided West with bank wiring instructions and requested that West wire the funds by April 9, 2009. When West failed to return the Deposit by that date, Mouton asked West in an April 11, 2009, e-mail if there was a problem:

> I haven't gotten an email from you in almost a full month . . . . I haven't gotten a comment or response on the 4 messages I've sent since last Friday. Is there some kind of problem I need to be aware of?
>
> More immediately, what else do I have to do in order to get you to return the $113,513.68 I wired to your escrow account in December?
>
> I've already made it clear to you that [this] is causing me a lot of problems, so I need you to address this immediately.

On April 14, West replied, "I will try to get you a wire back before the end of this week or at worst early next."[6]

When Mouton did not receive the Deposit by April 22, he demanded an explanation: "Please tell me where my money is . . . ." West responded by apologizing without explanation, assuring Mouton, "You will have the wire this week." Frustrated, Mouton replied, "What exactly does that mean? I need to know specifics that I can rely on, and why this continues to drag on?" West did not respond to this e-mail.

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6 West did not respond for three days, later claiming he was out of the office and unavailable.

4. While West sought to replace the missing funds, Mouton complained to regulatory authorities about West's failure to return the Deposit.

On April 23, 2009, Mouton e-mailed West that he had waited long enough and that it was "evident that rather than remain in a segregated escrow account, my funds have been converted to some other use, which is a crime." Mouton further stated that, if he did not receive the funds by day's end, he would contact FINRA and the New York Attorney General the next morning.

West responded to Mouton's e-mail immediately, assuring Mouton that he expected to send the wire the following day and noting for the first time in their discussions that "Crusader has no escrow agreement with you or [AmeriChip]." West further claimed that "the funds [were] in a time sensitive deposit that did not make them readily available."

West did not return the Deposit the next day as he had promised. Instead, West wrote to Mouton, "We are hoping to get your wire instructions to the bank this afternoon but it may slip [until] Monday. We assure you that you ARE getting the money back . . . and ask for your patience just a little while longer" (emphasis in original).

In the meantime, West had been trying to replace the missing Deposit funds by renting his home for the summer. By "late February or early March," West testified, he and a renter had agreed on a price of $160,000, although no lease had been signed. West explained that the potential renter took weeks to review the lease because West had structured the rental agreement to avoid having to pay taxes on the lease proceeds, which complicated the transaction. West testified that, if the lease had fallen through, he would have "borrowed money from [his] family" to repay the Deposit.

On April 27, 2009, West and the renter signed the lease, although West had yet to receive funds from the renter. West e-mailed Mouton promising that the Deposit would be sent "this afternoon," but later in the day West informed Mouton that he would not return the Deposit that day. West claimed, "I just checked with the bank and it does not appear as though the wire went out this afternoon. Not sure why but I was assured it would be going out tomorrow." Although West blamed the bank, West did not have the funds to repay the Deposit.

On April 28, 2009, when the Deposit did not appear in his bank account, Mouton filed a formal complaint with FINRA. Mouton also told West that the "New York [Attorney General's Office] is waiting confirmation of funds transfer, since you said it would be today, and as I informed them . . . . I have no problem pulling my complaints when the transfer occurs."[7] West responded with a series of heated e-mails, telling Mouton that he had hired an attorney to handle Mouton's "threats of criminal activity to resolve a civil matter," emphasizing that AmeriChip had "no written agreement" with Crusader, and threatening Mouton by stating, "You will get the wire but this is far from over." But West still did not inform Mouton that he lacked the funds to repay the Deposit.

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7 Mouton testified that he filed complaints with FINRA, the New York's Attorney General, and the Federal Bureau of Investigation on April 28, 2009.

On April 29, 2009, West received the rental payment and, after over two months of delays, wired the funds to Mouton to replace the Deposit.

E. FINRA barred West from associating with any FINRA member.

Based on Mouton's complaint, FINRA opened an investigation and then filed a disciplinary action against West for misuse of customer funds. In his answer to FINRA Department of Enforcement's complaint, West admitted that, "[w]hen Crusader accepted AmeriChip's funds pending the closing of [the proposed sale/leaseback transaction] . . . , those funds should have been kept *untouched* in a separate Crusader account until the closing" (italics in original). He also conceded in his answer that before the closing of the transaction he used the "entirety of the . . . Deposit to pay business expenses of Crusader and to pay his own personal expenses." After a two-day hearing, a Hearing Panel found that West misused AmeriChip's funds and barred West for his misconduct.[8] West appealed the decision to the National Adjudicatory Council (the "NAC") but only challenged the bar imposed.[9]

On February 20, 2014, the NAC affirmed the Hearing Panel's decision, noting West's failure to contest liability. The NAC concluded that "West's misconduct in this case represents an egregious breach of trust on the part of an experienced securities industry professional, and . . . [that] a bar is abundantly supported." This appeal followed.

II. Analysis

We base our findings on an independent review of the record and apply a preponderance of the evidence standard for self-regulatory organization disciplinary actions.[10] Pursuant to Exchange Act Section 19(e)(1), in reviewing an SRO disciplinary action, we determine whether the aggrieved person engaged in the conduct found by the SRO, whether such conduct violated the securities laws or SRO rules, and whether those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[11]

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8 The Hearing Panel further found, as FINRA had alleged, that West caused Crusader to violate Exchange Act Rule 15c-4 with respect to another customer by releasing funds required to be held in escrow before the minimum contingency of the securities offering was met. But given its decision to bar West for misuse of AmeriChip's funds, the Hearing Panel declined to impose any sanction for this violation. West did not appeal these findings to the NAC or the Commission.

9 West's brief on appeal to the NAC conceded that "[West] did misuse [customer funds]" but requested "fairness and mercy" in overturning the bar imposed.

10 *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *9 (May 27, 2011) (citing *Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982) (upholding preponderance of evidence standard in FINRA disciplinary proceeding)), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

11 15 U.S.C. § 78s(e); *see, e.g.*, *Joseph Abbondante*, Exchange Act Release No. 53066, 2006 WL 42393, at *6 (Jan. 6, 2006), *petition denied*, 209 F. App'x 6 (2d Cir. 2006). West does

(continued...)

A. West misused his customer's funds in violation of NASD Conduct Rule 2110 when he used the Deposit to pay for his personal and business expenses.

NASD Conduct Rule 2110 requires the observance of "high standards of commercial honor and just and equitable principles of trade."[12] Rule 2110 is "designed to enable [FINRA] to regulate the ethical standards of its members."[13] The Rule "serves as an industry backstop for the representation, inherent in the relationship between a securities professional and a customer, that the customer will be dealt with fairly and in accordance with the standards of the profession."[14] To this end, Rule 2110 sets forth a standard intended to encompass "a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace."[15] "[W]e have long applied a disjunctive 'bad faith or unethical conduct' standard to disciplinary action under [Rule 2110]."[16] Proof of scienter is not required.[17]

We find that West violated NASD Rule 2110. "[M]isuse of customer funds is 'patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote.'"[18] The record establishes West's misuse of his customer's funds. On December 24, 2008, his customer AmeriChip deposited $113,513.68 with Crusader to hold until the closing of a sale/leaseback transaction. On the same day that Crusader received the funds, West transferred $89,000 out of the HSBC Account to pay his personal and business expenses, spending the entire $113,513.68 over a two-month period. West admitted in his answer that he should have "kept [the funds] *untouched* in a separate Crusader account until the closing," a belief shared by his customer, who testified that he thought the funds were being held in escrow.

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not argue, and the record does not support a finding, that Rule 2110 is, or FINRA's application of it was, inconsistent with the Exchange Act.

12 Rule 2110 applies to West through NASD Rule 115 (now FINRA Rule 140), providing that persons associated with a member have the same duties and obligations as a member.

13 *Heath v. SEC*, 586 F.3d 122, 132 (2d Cir. 2009) (discussing NYSE Rule 476, counterpart to NASD Rule 2110), *aff'g Thomas W. Heath*, Exchange Act Release No. 59223, 2009 WL 56755 (Jan. 9, 2009). We interpret and apply all SRO just-and-equitable rules under the same analysis and precedent. *See, e.g., Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 WL 32128, at *5 & n.19 (Jan. 6, 2012) (applying *Heath*, 2009 WL 56755, at *4).

14 *DiFrancesco*, 2012 WL 32128, at *5 & n.21 (citing *Heath*, 2009 WL 56755, at *4).

15 *Id.* at *5 & n.22 (citing *Heath*, 2009 WL 56755, at *5 & n.13).

16 *Id.* at *5 & n.19 (citing *Heath,* 2009 WL 56755, at *4).

17 *Heath*, 586 F.3d at 132-34 (discussing Commission precedent).

18 *Henry E. Vail*, Exchange Act Release No. 35872, 1995 WL 380152, at *2 n.12 (June 20, 1995) (quoting *Wheaton D. Blanchard*, Exchange Act Release No. 12484, 1976 WL 160367, at *1 (May 27, 1976)), *aff'd*, 101 F.3d 37 (5th Cir. 1996); *see also Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 WL 358737, at *16 & n.21 (Feb. 1, 2010) (same), *petition denied*, 647 F.3d 1156 (D.C. Cir. 2011).

The underlying agreements support this conclusion. The Revised Term Sheet specified that the Deposit be "held until closing" and returned to AmeriChip "promptly" if the transaction terminated. West and Crusader were not parties to the Revised Term Sheet, but West drafted the document and knew of its requirements and the expectations of his customer, who was a party. And, while the parties' Advisory Agreement allowed Crusader to "retain its fees" from any escrow account it managed, the Agreement also specified that Crusader's fee was "fully earned and paid *at each closing*" (emphasis added).[19]

Although we need not find scienter to establish a violation of Rule 2110, we believe the record amply supports finding that West acted intentionally and in bad faith.[20] Notwithstanding the clear limitations on the use of the Deposit until the transaction closed, West admits that he began using the funds almost immediately to pay his overdue personal debts and fund Crusader's operating expenses. West's concealment of his actions from his customer and his deceit further demonstrate deliberate intent and bad faith.[21] Numerous e-mails show that West concealed his misuse of the funds from Mouton and delayed returning the Deposit until he replaced the funds. Mouton, frustrated with West's delay, directly asked West where his money was, but West did not disclose that he had spent it. He implied that Crusader still held the funds and affirmatively misrepresented to Mouton that the funds were "not readily available" because they were "in a time sensitive deposit." West faulted his bank for failing to wire the funds, when he knew there were no funds in the HSBC Account for the bank to wire.

B. West's arguments on appeal are without merit.

West makes a variety of arguments on appeal challenging the NAC's findings of liability. He claims that FINRA lacks jurisdiction to bring this action because the underlying transaction did not involve a security, that he was orally authorized by Mouton to use the deposited funds as

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19 Because West lacked authority to pay himself Crusader's fee before closing, we find irrelevant his argument that his "[expected] fee would have easily been well in excess of $89,000."

20 *See Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *10 (Nov. 15, 2013) (defining "bad faith" as "[d]ishonesty of belief or purpose"). It is well established that "[i]ntent may be proved through circumstantial evidence and inferences drawn from surrounding circumstances." *Thomas C. Kocherans*, Exchange Act Release 36556, 1995 WL 723989, at *2 (Dec. 6, 1995) (collecting cases).

21 *See Peter W. Schellenbach*, Exchange Act Release No. 30030, 1991 WL 288493, at *3 (Dec. 4, 1991) (finding applicant's deliberate intent to conceal his firm's net capital position from regulators established bad faith and thus violated the just and equitable principles of trade), *aff'd*, 989 F.2d 907 (7th Cir. 1993); *cf. Jonathan Feins*, Exchange Act Release No. 41943, 1999 WL 770236, at *4 (Sept. 29, 1999) (finding "evidence that [applicant] deliberately concealed his conduct from the Exchange established that he knew his conduct was wrongful"); *Long v. Bd. of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1152-54 (10th Cir. 1997) (finding bank executive's pecuniary gain in transferring bank shares and concealment of the transfer from his board, among other things, established his bad faith).

he did, and that his delay in returning the Deposit was caused by his concerns about Mouton's loyalty to AmeriChip. As explained below, we reject those arguments.[22]

1. Actions brought under NASD Rule 2110 need not involve a security.

We reject West's claim that FINRA lacked jurisdiction to bring this action because "[t]he underlying transaction was not a securities transaction." It is well established that FINRA's "disciplinary authority [under NASD Rule 2110] is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade even if that activity does not involve a security."[23] West's misconduct here occurred in connection with his Firm's business dealings with AmeriChip. Although his deliberate misuse of this customer's funds did not involve securities, we find that such wrongdoing reflects negatively both on his ability to comply with regulatory requirements and ability to fulfill his responsibilities in handling customer funds.[24] We accordingly find a sufficient basis for FINRA's jurisdiction under Rule 2110.[25]

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22 FINRA asserts in its opposition brief that West's challenges to the NAC's findings of liability are waived because he effectively conceded liability before the NAC. *See supra* note 9. We nonetheless consider West's arguments in our discretion as part of our review of FINRA's action.

23 *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996); *see also Ialeggio v. SEC*, 185 F.3d 867, 1999 WL 362896, at *2 (9th Cir. 1999) (Table) (same); *Daniel D. Manoff*, Exchange Act Release No. 46708, 2002 WL 31769236, at *4 (Oct. 23, 2002) (noting that application of Rule 2110 to business-related conduct not involving a security "is well established"); *Thomas E. Jackson*, Exchange Act Release No. 11476, 1975 WL 162936, at *2 (June 16, 1975) (stating that, although "[applicant's] wrongdoing in this instance did not involve securities, [FINRA] could justifiably conclude that on another occasion it might").

24 *See, e.g., Manoff*, 2002 WL 31769236, at *4 (finding that registered representative's misconduct, which did not include a security but unauthorized use of a co-worker's credit card, calls into question his ability to fulfill his responsibilities of handling other people's money); *James A. Goetz*, Exchange Act Release No. 39796, 1998 WL 130849, at *3 (Mar. 25, 1998) (finding registered representative's misconduct, which did not include a security but disregarded the rules of his firm's charitable organization and misled the organization, "reflects directly on [his] ability both to comply with regulatory requirements fundamental to the securities business" and fulfill responsibilities "in handling other people's money").

25 The NAC did not, as West asserts, find that the transaction with Ability was a "best efforts" securities offering. That finding was made by the Hearing Panel and related to another customer's transaction, not the subject of this appeal. *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *22 n.89 (May 27, 2011) ("[I]t is the decision of the NAC, not . . . the Hearing Panel, that is . . . subject to Commission review" (citation and quotation omitted)), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

2. West did not establish that Mouton gave West verbal authorization to use the funds before the closing of the sale/leaseback transaction.

Despite the express limitations on the use of funds in the Revised Term Sheet and Advisory Agreement, West contends he had a "prior oral agreement" with Mouton to use the funds as he did. West cites a May 2009 letter that Mouton submitted to FINRA after West had repaid the Deposit, in which Mouton stated "there was no written agreement" restricting "how the . . . deposit was to be held" and that Crusader could use the deposit "at Crusader's discretion . . . until the expected closing of the [transaction]." But West admits that he drafted the letter for Mouton in connection with his May 2009 request that Mouton retract his complaint to FINRA. Moreover, during the resulting FINRA investigation, Mouton stated in a sworn September 2009 declaration that he had no discussions with West about his use of the Deposit and believed that the "funds would be held in an escrow account until the closing." Mouton also testified under oath that he never authorized West to prepay himself fees from the Deposit.

The May 2009 letter is also contradicted by other, contemporaneous evidence in the record. The Revised Term Sheet itself clearly states that the Deposit was to be held "until closing" and the Advisory Agreement states that any fees owing to Crusader would be earned at the closing. And in contemporaneous e-mail communications, when Mouton demanded a return of the Deposit, West delayed, deflected blame to others, and falsely claimed that the funds were in a "time sensitive deposit." West never disclosed his use of the funds. This concealment is inconsistent with West's claim that Mouton authorized him to use the funds.[26]

3. There is no support for West's claim that he delayed repayment because of his concerns about Mouton.

Equally unavailing is West's assertion that his delay in returning the Deposit was justified by his "valid concerns . . . [about] Mouton's loyalty and commitment to" West's customer AmeriChip. When Mouton signed the Advisory Agreement and the Revised Term Sheet on behalf of AmeriChip, he was the vice chairman of the board of AmeriChip and shortly thereafter became AmeriChip's president and CEO.[27] He had authority to act on AmeriChip's behalf, and whether Mouton had another motive for requesting a return of the Deposit is irrelevant. The relevant inquiry is whether West misused his customer's funds, which the record fully establishes.[28]

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26 *See Cathy Jean Krause Kirkpatrick*, Exchange Act Release No. 40630, 1998 WL 764457, at *5 (Nov. 3, 1998) (finding registered representative violated just and equitable principles of trade by, among other things, misappropriating customer funds and rejecting claim that customer had orally authorized the use the funds because representative's "acts of concealment [were] inconsistent" with such authority).

27 See *supra* note 3.

28 Accordingly, we also reject West's related claim that FINRA conducted an unfair or improper investigation because it did not consider Mouton's motive for requesting the Deposit be returned. In conducting our *de novo* review, we found no evidence of unfair treatment. *See*

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Moreover, the record does not substantiate that West had any concerns about Mouton at the time. West never suggested in his contemporaneous e-mails to Mouton that he had concerns about Mouton's loyalty. Nor did West adduce any evidence showing that he had expressed his concerns to AmeriChip or any other person. Rather, the record establishes that he spent the entire Deposit to pay personal and Crusader business expenses and delayed returning the Deposit because he lacked the funds to repay it.

Accordingly, based on the reasons stated above, we find that West engaged in the conduct found by FINRA, that such conduct violates Rule 2110, and that Rule 2110 is, and was applied in a manner, consistent with the purposes of the Exchange Act.

III. Sanction

Pursuant to Exchange Act Section 19(e)(2), we will sustain a FINRA sanction unless we find, "having due regard for the public interest and the protection of investors," that the sanctions are "excessive or oppressive" or impose an "unnecessary or inappropriate burden on competition."[29] As part of this review, we consider any aggravating or mitigating factors presented[30] and whether the sanctions imposed by FINRA are remedial and not punitive.[31] Though not bound by FINRA's Sanction Guidelines, we use them as a benchmark for our review under Exchange Act Section 19(e)(2).[32]

For the improper use of customer funds, the Sanction Guidelines recommend imposing a bar as the standard sanction, unless "the improper use resulted from respondent's misunderstanding of his or her customer's intended use of the funds or securities, or other mitigation exists."[33] The Sanction Guideline for improper use of customer funds does not specify any additional factors but directs adjudicators to the Sanction Guidelines' Principal

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(...continued)
Cody, 2011 WL 2098202, at *19 (rejecting claim that FINRA was biased and applicant was unfairly treated and noting our *de novo* review cures such error).

29 15 U.S.C. § 78s(e)(2). West does not claim, nor does the record show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

30 *See Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007).

31 *See PAZ*, 494 F.3d at 1065.

32 *Capwest Sec., Inc.*, Exchange Act Release No. 71340, 2014 WL 198188, at *9 (Jan. 17, 2014) (citation omitted). FINRA adopted the Sanction Guidelines to ensure "greater consistency, uniformity, and fairness in the sanctions that are imposed for violations." *Richard A. Neaton*, Exchange Act Release 65598, 2011 WL 5001956, at *12 n.38 (Oct. 20, 2011).

33 FINRA Sanction Guidelines, http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf, at 36 ("Sanction Guidelines").

Considerations for a non-exhaustive list of aggravating and mitigating factors. The relevance of these factors depends on the facts and circumstances of each case.[34]

A. FINRA's imposition of a bar was neither excessive nor oppressive.

We find that a bar is consistent with the Sanction Guidelines and sustain the sanction imposed by the NAC because it is neither excessive nor oppressive. Misappropriation or misuse of customer funds constitutes a serious violation of the securities laws, involving a betrayal of the most basic and fundamental trust owed to a customer.[35] The obligation to protect customer assets is paramount to operating in the securities industry.[36]

AmeriChip entrusted West with holding its funds in escrow until the closing of the transaction with Ability. West violated his customer's trust when, upon receipt of these funds, he transferred the funds out of the HSBC Account to pay his personal debts and fund Crusader's operations without authorization. The securities industry "presents many opportunities for abuse and overreaching and depends very heavily upon the integrity of its participants."[37] West's misuse of his customer's funds demonstrates his disregard for fundamental ethical principles and unfitness to practice in the securities industry.[38]

The NAC referenced four aggravating factors that provide further support for imposition of a bar here. First, West's misconduct was intentional,[39] as evidenced by, among other things, his use of the funds just after drafting the Revised Term Sheet that required the Deposit be held by Crusader "until the closing." Second, West engaged in numerous deceptive acts to conceal his actions from his customer.[40] Despite Mouton's persistent inquiries, West failed to disclose

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34 *Id.* at 6.

35 *Katz*, 2010 WL 358737, at *25 (stating that "[m]isappropriating client funds and making misstatements [to the client] are serious misconduct"); *Kevin Lee Otto*, Exchange Act Release No. 43296, 2000 WL 1335346, at *4 (Sept. 15, 2000) (observing that a registered representative's misuse of customer funds "demonstrate[s] a serious misunderstanding of the obligations" owed to customers), *aff'd*, 253 F.3d 960 (7th Cir. 2001).

36 *See, e.g., Broker-Dealer Reports*, Exchange Act Release 70073, 2013 WL 4456076, at *135 (July 30, 2013) (stating that "safeguarding of customer securities and cash held by broker-dealers is of paramount importance as demonstrated by recent cases where the broker-dealers failed to protect customer securities and cash").

37 *Robert Conway*, Exchange Act Release No. 70833, 2013 WL 5960703, at *11 (Nov. 7, 2013) (finding violations of NASD Conduct Rule 2110).

38 *See supra* note 35.

39 *See* Sanction Guidelines, *supra* note 33, at 7 (Principal Consideration No. 13: "[w]hether respondent's misconduct was the result of an intentional act, recklessness, or negligence").

40 *See id.* at 6 (Principal Consideration No. 8: "[w]hether the respondent engaged in numerous acts and/or a pattern of misconduct"; Principal Consideration No. 10: "[w]hether the

(continued...)

that he had spent the Deposit and he misrepresented the whereabouts of the funds.[41] Third, he benefitted from his misconduct.[42] His use of customer funds enabled him to fund Crusader's continued operations, make payments on his overdue mortgage, and pay various other debts. Fourth, his misconduct occurred over "an extended period of time," four months, from December 26, 2008, through April 29, 2009, and did not end until after Mouton contacted regulatory authorities about West's failure to return the Deposit.[43]

B. The NAC properly considered and rejected West's arguments concerning mitigating factors.

West claims that the NAC "declined to consider any mitigating factors." Before the NAC, he cited as mitigating factors a misunderstanding over AmeriChip's intended use of the funds, his lack of disciplinary history, his substantial assistance during FINRA's investigation, and Mouton's withdrawal of his FINRA complaint. We find that the NAC properly considered and rejected West's claims of mitigation.[44]

We agree with the NAC that there was no misunderstanding over the customer's intended use of the funds. The terms of the underlying agreements were unambiguous: West was not entitled to Crusader's fees "until the closing" and was obligated to return the Deposit "promptly" if the transaction terminated. West signed the Advisory Agreement and personally drafted the

(...continued)
respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer").

41 For example, West suggested that the Deposit was in a "time-sensitive deposit" and that Mouton apply the "the Deposit we hold" to another transaction, when West had already spent the Deposit. He also failed to deliver on promises that repayment was imminent, when he still had not replaced the funds he had spent.

42 Sanction Guidelines, *supra* note 33, at 7 (Principal Consideration No. 17: "[w]hether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain").

43 Sanction Guidelines, *supra* note 33, at 6 (Principal Consideration No. 9: "[w]hether the respondent engaged in the misconduct over an extended period of time"); *see also Otto*, 2000 WL 1335346, at *4 (finding aggravating that applicant "delayed returning [customer's] funds for at least four months"). West contends his misconduct occurred over a shorter period, beginning on April 8, when Ability released the Deposit, until April 29, 2009, when he returned the funds to Mouton. But his contention ignores both that he had no authority to use the Deposit in December 2008, when his violative conduct commenced, and that Mouton began asking for the return of the Deposit in February.

44 Because we conclude that the NAC properly rejected West's claims of mitigation, we reject West's contention that its failure to consider mitigating factors shows it had an "unjustified prejudice[] against . . . [him]." We found no evidence of such bias in our review of the record. Moreover, "our *de novo* review of this matter cures whatever bias . . . , if any, that may have existed below." *Robert Bruce Orkin*, Exchange Act Release No. 32035, 1993 WL 89023, at *5 (1993), *aff'd*, 31 F.3d 1056 (11th Cir. 1994).

Revised Term Sheet restricting his use of the Deposit. West's concealment of his use of the Deposit from Mouton further demonstrates that he knew that the deposited funds were to be held in the HSBC Account until the closing of the transaction.

Contrary to West's assertions, "lack of disciplinary history is not a mitigating factor" under FINRA's Sanction Guidelines because, as we have stated, securities professionals "'should not be rewarded for acting in accordance with [their] duties.'"[45] In any event, West's misconduct here is not "aberrant," as he urges.[46] Pursuant to findings under Count 2 of FINRA's underlying complaint not appealed by West, he admittedly misused another customer's funds that were required to be held in escrow for another transaction.[47]

We also find that West did not substantially assist FINRA's investigation so as to justify reducing the sanction.[48] Although West states that he supplied "extremely sensitive and unduly personal information, including entirely irrelevant information about [his] wife and . . . young children," he does not substantiate his claim. This information was provided in response to FINRA's request pursuant to FINRA Rule 8210. Rule 8210 required that he produce the information requested or be subject to FINRA disciplinary action for failure to cooperate.[49] Associated persons do not provide substantial assistance by simply fulfilling their obligations to provide FINRA information pursuant to an investigation.[50]

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[45] *Busacca v. SEC*, 449 F. App'x 886, 893 (11th Cir. 2011) (quoting *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at *6 (Nov. 8, 2006)); *see also Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006).

[46] In support, West cites to Principal Consideration No. 16, but that factor applies to FINRA "member firm[s]," not associated persons. *See* Sanction Guidelines, *supra* note 33, at 7 (Principal Consideration No. 16: "[w]hether the respondent member firm can demonstrate that the misconduct at issue was aberrant or not otherwise reflective of the firm's historical compliance record").

[47] *See supra* note 8 (discussing findings with respect to Count 2 of FINRA's complaint).

[48] Sanction Guidelines, *supra* note 33, at 7 (Principal Consideration No. 12: "[w]hether the respondent provided substantial assistance to FINRA in its examination and/or investigation").

[49] FINRA Rule 8210 (requiring member firms and their associated persons to provide information to FINRA during an investigation); *see also Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 WL 2482466, at *5 (Aug. 25, 2006) (stating that the obligation to supply information under Rule 8210 "stems from the contractual relationship entered into voluntarily by [FINRA] members and associated persons with [FINRA]").

[50] *Kent M. Houston*, Exchange Act Release No. 71589A, 2014 WL 936398, at *7 & n.56 (Feb. 20, 2014) (citing *Keyes*, 2006 WL 3313843, at*6 n.22 (holding that applicant's "cooperation in the [FINRA] investigation was consistent with the responsibilities he agreed to when he became an associated person and does not constitute substantial assistance")); *see also Brokaw*, 2013 WL 6044123, at *18 & n.139 (same).

Nor does Mouton's withdrawal of his complaint mitigate West's misconduct. FINRA's "power to enforce its rules is independent of a customer's decision not to complain," which may be influenced by many factors.[51] This applies equally to a customer's decision to withdraw a complaint, which occurred here only after West repaid Mouton. And Mouton nonetheless testified that West did not have any right to prepay himself fees from the Deposit that was to be held in escrow.[52]

C. We reject West's new claims concerning mitigation.

On appeal, West lists additional factors that we find not mitigating.[53] He argues that the absence of several aggravating factors specified in the Principal Considerations should be considered mitigating, an argument that we have repeatedly rejected in a variety of circumstances.[54] Accordingly, we reject West's arguments that, because he did not attempt to delay FINRA's investigation, conceal information from FINRA, or provide inaccurate or misleading information to FINRA, his misconduct is mitigated. It is similarly not mitigating that he was not previously sanctioned for the same misconduct, that he was not previously warned about the misconduct, and that his misconduct involved a non-securities transaction.[55]

West also asserts for the first time in this appeal that his repayment of the Deposit constitutes mitigation under Principal Consideration No. 4, which recommends consideration of "whether respondent voluntarily and reasonably attempted prior to detection and intervention to pay restitution."[56] We disagree with West's description of his attempts to return his customer's

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51 *Maximo Justo Guevara*, Exchange Act Rel. No. 42793, 2000 WL 679607, at *6 (May 18, 2000) (collecting cases), *petition denied*, 47 F. App'x 198 (3d Cir. 2000); *see also Raymond M. Ramos*, Exchange Act Release No. 26007, 1988 WL 902244, at *4 (Aug. 18, 1988) (barring broker for misuse of customer funds despite customer having sought leniency for the broker).

52 As discussed, *supra* notes 27-28 and accompanying text, West's assertion that Mouton lacked authority to act on behalf of AmeriChip is unsupported.

53 *See supra* note 22.

54 *See, e.g., China Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *11 n.72 (Nov. 4, 2013) ("While the presence of any . . . aggravating circumstances justify[] an increase in sanctions, their absence is not mitigating." (collecting cases)); *see also Harry Friedman*, Exchange Act Release No. 64486, 2011 WL 1825025, at *9 (May 13, 2011) ("[Applicant's] violations may be aggravated by a registered representative taking affirmative actions to mislead the member firm, but this does not mean that the absence of misleading conduct is mitigating." (citing *Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 WL 4528192, at *12 (Oct. 06, 2008), *petition denied in part and remanded in part,* 592 F.3d 147 (D.C. Cir. 2010)); Sanction Guidelines, *supra* note 33, at 6 ("[T]he presence of certain factors [in a given case] may be aggravating, but their absence does not draw an inference of mitigation.").

55 *See* Sanction Guidelines, *supra* note 33, at 6-7 (Principal Considerations Nos. 1, 10, 14, 15, and 18).

56 *Id.* at 6.

funds, which were not reasonable. West delayed returning his customer's funds for over two months and lied to Mouton about the reasons for the delay. Even after West found a new source of funds (a renter for his house), he again put his own financial interests ahead of his customer's. He delayed finalizing the renter's lease, which in turn delayed his repayment of the Deposit, so that he could negotiate a tax benefit for himself. Nor did West repay Mouton before detection or intervention. Mouton suspected that West had improperly used the Deposit and complained to regulatory authorities before West returned the Deposit. We accordingly find that West's repayment does not warrant a reduction of the sanction.[57]

We also reject West's related claim that there was no customer harm. As we have stated, "[t]he absence of . . . customer harm is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally."[58] Moreover, West's misconduct harmed his customer. By spending the Deposit without authorization, West put his customer's funds at risk for over four months. His delay in returning the Deposit deprived his customer of the ability to make other use of that money.[59]

We also reject West's assertion that the sanction should be reduced because his customer was sophisticated. As we have repeatedly held, both sophisticated and unsophisticated investors are entitled to protections against abuse under the securities laws.[60] And we consistently have upheld the imposition of a bar for misusing customer assets in other cases in which no mitigating factors were present.[61]

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57 *See e.g.*, *Otto v. SEC*, 253 F.3d 960, 967 (7th Cir. 2001) (sustaining bar and $35,000 fine despite repayment of the misused funds); *Joel Eugene Shaw*, Exchange Act Release No. 34509, 1994 WL 440927, at *2 (Aug. 10, 1994) ("Nor does the fact that [broker] ultimately repaid [customer] the money warrant permitting him to remain in the securities business."); *Ernest A. Cipriani*, Exchange Act Release No. 33675, 1994 WL 62106, at *3 (Feb. 24, 1994) (same); *Ramos*, 1988 WL 902244, at *4 (same).

58 *E.g.*, *Brokaw*, 2013 WL 6044123, at *18; *Howard Braff*, Exchange Act Release No. 66467, 2012 WL 601003, at *7 (Feb. 24, 2012).

59 *Cf., e.g.*, *Otto*, 2000 WL 1335346, at *4 (finding that registered representative, by using his customer's funds, "deprived [his customer] of the opportunity to invest those funds in a legitimate investment").

60 *Cf., e.g.*, *Dolphin & Bradbury, Inc.* Exchange Act Release No. 54143, 2006 WL 1976000, at *9 (July 13, 2006) ("[T]he protection of the antifraud provisions of the securities laws extends to sophisticated investors as well as those less sophisticated."), *aff'd*, 512 F.3d 634 (D.C. Cir. 2008); *CMG Institutional Trading LLC*, Exchange Act Release No. 59325, 2009 WL 223617, at *10 (Jan. 30, 2009) ("NASD Rule 8210 does not lessen one's obligation to cooperate with an investigation based on the type of client served, nor are sophisticated or institutional investors without the need for protection against potential financial instability.").

61 *See supra* note 57; *see also Katz*, 2010 WL 358737, at *16 (affirming bar for, among other things, "causing funds to be transferred, without authorization"); *Bernard D. Gorniak*, Exchange Act Release No. 35996, 1995 WL 442063, at *2 (July 20, 1995) (sustaining bar where applicant delayed making trades and returning customer funds).

D. FINRA's sanction is remedial and not punitive.

In addition to being consistent with the Sanction Guidelines, we find the imposition of a bar remedial and not punitive. West's deliberate misuse of customer funds placed his own interests ahead of his customer's. His misconduct, together with his other deceptive acts, further shows an inability to adhere to the high standards of business ethics required to participate in the securities industry.[62] Although West is not currently associated with a FINRA member, he has not ruled out the possibility of future association. While not denying that he spent his customer's funds, he fails to accept responsibility for his misconduct and continues to suggest that his actions are excusable, suggesting a risk of future violations.[63] The imposition of a bar will therefore prevent West from harming additional customers and will serve as a deterrent to other securities professionals tempted to misuse their customers' assets.[64]

* * *

62 *Cf. Bateman, Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 315 (1985) (stating that the primary objective of the securities laws is the "protection of the investing public and the national economy through the promotion of 'a high standard of business ethics . . . in every facet of the securities industry'" (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186-87 (1963)).

63 *See Otto*, 253 F.3d at 967 (sustaining bar "[g]iven the ongoing deception in the face of a request for the return of her funds and [applicant's] refusal to accept responsibility for his misuse of [customer] funds"); *Conway*, 2013 WL 5960703, at *11 (finding applicants' failure to "accept[] responsibility for their conduct" and deflection of blame to others supported conclusion they posed a risk of future violations).

64 Although "'general deterrence is not, by itself, sufficient justification for expulsion[,] . . . it may be considered as part of the overall remedial inquiry.'" *PAZ*, 494 F.3d at 1066 (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)).

IV. Conclusion

For all the above reasons, we sustain FINRA's findings that West violated NASD Conduct Rule 2110 and the sanction imposed.

An appropriate order will issue.[65]

By the Commission (Chair WHITE and Commissioners GALLAGHER, STEIN, and PIWOWAR; Commissioner AGUILAR not participating).

Brent J. Fields
Secretary

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

65 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. Because the issues have been thoroughly briefed and can be adequately determined on the basis of the record filed by the parties, Applicants' request for oral argument is denied. Rule of Practice 451, 17 C.F.R. § 201.451.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

Admin. Proc. File No. 3-15811

In the Matter of the Application of

BLAIR ALEXANDER WEST
c/o Stanford R. Solomon, Esq.
The Solomon Group, P.A.
1881 West Kennedy Blvd.
Tampa, FL 33606-1606

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

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

ORDERED that the disciplinary action taken by FINRA against Blair Alexander West is hereby sustained.

By the Commission.

Brent J. Fields
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74032 / January 12, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16332

In the Matter of **EDGA EXCHANGE, INC., and EDGX EXCHANGE, INC.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 19(h) 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 (the "Commission") deems it necessary and appropriate in the public interest and for the protection of investors 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 EDGA Exchange, Inc. ("EDGA") and EDGX Exchange, Inc. ("EDGX") (collectively, "the Exchanges" or "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h) 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:

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

ADMINISTRATIVE PROCEEDING
File No.

In the Matter of **EDGA EXCHANGE, INC., and** **EDGX EXCHANGE, INC.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 19(h) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

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III.

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

A. Introduction

1. Congress has subjected national securities exchanges to significant regulatory compliance obligations because of their critical role in the national market system. In addition to requiring compliance with the federal securities laws and their own rules, the Exchange Act also requires exchanges and other self-regulatory organizations to file proposals for new rules and rule changes with the Commission for public comment and, in many cases, Commission approval. Pursuant to Section 19(b)(1) of the Exchange Act, an exchange's proposed new rule or rule change shall not take effect unless approved by the Commission or otherwise permitted by Section 19(b).

2. The Exchange Act also requires the Commission to make certain findings about an exchange's rules before the Commission grants its registration as a national securities exchange. The Exchange Act requires that the Commission determine that, among other things, the rules of an 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, or impose any burden on competition not necessary or appropriate.[2]

3. An important category of exchange rules are those that govern the exchange's order types. Order types are the primary means by which market participants communicate their instructions for the handling of their orders to the exchange. Complete and accurate disclosure of an exchange's order types and order handling procedures is necessary to promote a fair, orderly, and free and open market. It is essential that an exchange operate in compliance with its own rules regarding order types so that the exchange's members and all other participants in trading that occurs on an exchange can understand on what terms and conditions their trading will be conducted. When an exchange fails to completely and accurately describe its order types in its rules, it creates a significant risk that the manner in which those order types operate will not be understood by all market participants, thereby compromising the integrity and fairness of trading on that exchange. This risk is compounded when the exchange discloses information regarding the operation of those order types to some but not all of its members.

4. From the time that EDGA and EDGX began operating as registered securities exchanges in July 2010 until late 2014, they failed to submit and obtain Commission approval of proposed rules that accurately reflected the operation of "price sliding" on the Exchanges, and therefore failed to operate in compliance with their own rules.

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1 *See* Exchange Act Sections 6(b)(5) and 6(b)(8).

2 *Id.*

5. From July 2010 until late 2014, the Exchanges' rules provided for a single "displayed price sliding process" that was identified as the default for a non-routable order unless the member had entered instructions not to use that process. The rules of both Exchanges stated:

> An [Exchange] Only Order that, at the time of entry, would cross a Protected Quotation will be repriced to the locking price and ranked at such price in the [Exchange] Book. An [Exchange] Only Order that, if at the time of entry, would create a violation of Rule 610(d) of Regulation NMS by locking or crossing a Protected Quotation will be displayed by the System at one minimum price variation ("MPV") below the current [National Best Offer] (for bids) or to one MPV above the current [National Best Bid] (for offers) (collectively, the "displayed price sliding process"). In the event the [National Best Bid and Offer] changes such that the [Exchange] Only Order at the original locking price would not lock or cross a Protected Quotation, the order will receive a new timestamp, and will be displayed at the original locking price.[3]

6. The displayed pricing sliding process described in the rules did not accurately describe how this functionality of the Exchanges operated. Instead of a single price sliding process as described in their rules, the Exchanges accepted three different price sliding order types, called "Single Re-Price," "Price Adjust," and "Hide Not Slide" ("HNS"). These three variations of price sliding were not accurately reflected in the rules filed with, or filed with and approved by, as applicable, the Commission under Section 19(b) of the Exchange Act.

7. The Exchanges' rules did not use the term "Hide Not Slide" and did not completely and accurately describe how HNS operated.

8. As described herein, although the Exchanges provided some information about priority and other characteristics of HNS in technical specifications made available to members, the technical specifications did not contain complete and accurate information regarding the operation of HNS.[4] The Exchanges did, however, provide complete and accurate information about HNS to some (but not all) members. As a result, the Exchanges created a significant risk that the manner in which HNS operated would not be understood by all of their members.

9. The "Single Re-Price" and "Price Adjust" order types were not accurately described in the Exchanges' rules and, at various times, the Exchanges employed Price Adjust as the default functionality on the Exchanges. This further increased the risk that the manner in which price sliding order types operated would not be understood by all members.

10. As a result of such conduct, EDGA and EDGX each violated Sections 19(b) and 19(g) of the Exchange Act. EDGA and EDGX also violated a previous Commission order issued

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3 *See* EDGX Rule 11.5(c); EDGA Rule 11.5(c).

4 Technical specifications are not a substitute for exchange rules and do not satisfy an exchange's obligation to submit proposed rules and proposed rule changes under Section 19(b) of the Exchange Act.

against them on October 13, 2011, that required Respondents to cease and desist from committing or causing any violations and any future violations of Sections 19(b) and 19(g) of the Exchange Act.[5]

B. Respondents

11. **EDGA Exchange, Inc.** is registered with the Commission as a national securities exchange pursuant to Section 6(a) of the Exchange Act and is a self-regulatory organization ("SRO"). Since July 2010, EDGA has operated as an all-electronic exchange. EDGA offers trading in all U.S. listed equity securities and generally executes approximately 2-3% of the U.S. national average daily trading volume in NMS stocks.[6] From July 2010 until July 2011 and from September 2012 to the present, EDGA has maintained a taker-maker model where members receive rebates for removing liquidity and pay a fee for adding liquidity. From August 2011 until August 2012, EDGA maintained a maker-taker model where members paid a fee for removing liquidity and received a rebate for adding liquidity.

12. **EDGX Exchange, Inc.** is registered with the Commission as a national securities exchange pursuant to Section 6(a) of the Exchange Act and is an SRO. Since July 2010, EDGX has operated as an all-electronic exchange. EDGX offers trading in all U.S. listed equity securities and generally executes approximately 8-9% of the U.S. national average daily trading volume in NMS stocks. Since July 2010, EDGX has maintained a maker-taker model where members pay a fee for removing liquidity and receive a rebate for adding liquidity.

13. On May 7, 2009, EDGA and EDGX submitted to the Commission Form 1 applications seeking registration as national securities exchanges under Section 6 of the Exchange Act. When EDGA and EDGX applied for registration as national securities exchanges, each was operating as a separate trading platform of Direct Edge ECN, LLC.[7] In an order dated March 12, 2010 (the "Order Granting Registration"), the Commission granted the applications of EDGA and EDGX for registration as national securities exchanges.[8]

14. From 2009 through January 2014, EDGA and EDGX were owned and operated by Direct Edge Holdings, LLC ("Direct Edge"). In August 2013, Direct Edge and BATS Global Markets, Inc. ("BATS"), the operator of certain other all-electronic exchanges, announced that

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5 *In the Matter of EDGX Exchange, Inc.*, Exchange Act Release No. 65556 (Oct. 13, 2011).

6 *See* 17 C.F.R. § 242.600(b)(46) and (47) (definition of "NMS stock" and "NMS security").

7 An ECN, or electronic communication network, is a trading center that displays quotations in the consolidated quotation data that is widely distributed to the public. *See Concept Release on Equity Market Structure*, 75 Fed. Reg. 3594, 3599 (Jan. 21, 2010); *see also* Rules 300–303 under the Exchange Act, 17 C.F.R. §§ 242.300–303. An ECN is regulated by the Commission as an alternative trading system ("ATS").

8 *In the Matter of the Applications of EDGX Exchange, Inc., and EDGA Exchange, Inc. for Registration as National Securities Exchanges: Findings, Opinion, and Order of the Commission*, Exchange Act Release No. 34-61698 (Mar. 12, 2010), 75 Fed. Reg. 13151 (Mar. 18, 2010) (File Nos. 10-194 and 10-196).

they would merge. The two firms completed their merger in January 2014. EDGA and EDGX currently are owned and operated by BATS.

15. On October 13, 2011, the Commission issued an administrative order against EDGA, EDGX and Direct Edge ECN LLC, doing business as DE Route. The order found that EDGA, EDGX, and DE Route violated the federal securities laws in connection with two systems incidents occurring in November 2010 and April 2011. Among other violations, the order found that in responding to the November 2010 incident, EDGA, EDGX and DE Route improperly assumed and traded out of member positions through DE Route's error account in violation of the Exchanges' rules. The order found that EDGA and EDGX violated Sections 19(b) and 19(g) of the Exchange Act and other provisions. Without admitting or denying the Commission's findings, EDGA and EDGX consented to the Commission order that, among other things, required them to cease and desist from further violations of these provisions.

C. Facts

Background

16. Exchanges and ECNs typically offer different categories of order types, including both displayed and undisplayed, or "hidden," order types for trading. Displayed orders are included in market data feeds. "Hidden" orders are not displayed in the market data feeds or visible to market participants. However, hidden orders may execute against incoming orders. Displayed orders are given execution priority over undisplayed orders at the same price.

17. In 2005, the Commission adopted Regulation NMS, a series of regulatory changes designed to modernize and strengthen the national market system ("NMS") for equity securities. Rule 610 of Regulation NMS, known as the Access Rule, enacted new requirements for accessing quotations in NMS securities.[9] In particular, Rule 610(d) requires national securities exchanges to establish, maintain, and enforce written rules that require their members to reasonably avoid displaying quotations that lock or cross any protected quotation[10] in an NMS stock. For the purposes of this rule, a crossed market exists when a protected bid price of a security exceeds the protected offer price, and a locked market exists when a protected bid price is identical to a protected offer price.

18. After the adoption of Rule 610(d), Direct Edge, which at that time was operating EDGA and EDGX as ECNs, developed an order handling procedure, known generally as price sliding, for non-routable orders[11] that would otherwise lock or cross a protected quotation.[12]

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9 *See* 17 C.F.R. § 610.

10 *See* 17 C.F.R. §§ 600(b)(57), (58) (defining "protected bid," "protected offer," and "protected quote"). Protected quotations generally are the best bids and offers displayed by a national securities exchange or a national securities association.

11 A "non-routable" order is an order that must be executed, posted or cancelled by the exchange to which it is sent; the exchange may not route it to another market center.

Under Direct Edge's price-sliding functionality, an order that would lock or cross a protected quotation was to be displayed and "ranked" (*i.e.*, be executable at) one minimum price variation away from the locking price. The ECNs would subsequently unslide and re-price the orders to their original locking prices when market conditions permitted them to be displayed at the original locking prices. When unslid, the order would receive a new time stamp and be treated as having been newly received by the ECNs. For example, if the national market system's best protected bid was $7.99 and best protected offer was $8.00 for a security, a bid at $8.00 would lock the $8.00 protected offer. As a result, the $8.00 bid would be displayed and ranked at $7.99, at which point it would only be able to execute at a price up to $7.99. Similarly, an offer at $7.99 would lock the $7.99 protected bid and thus would be instead displayed and ranked at $8.00, at which point it would only be able to execute at a price of $8.00 or higher. Once the National Best Bid and Offer ("NBBO") changed so that the original price would no longer lock or cross a protected quotation, the displayed price of the order would "unslide" back to its original locking price, at which time the order would receive a new time stamp and would now be able to execute at that higher (lower) bid (offer) price. At the time that EDGA and EDGX operated as ECNs (before becoming exchanges), this price sliding functionality was the default on both ECNs for any non-routable order that would lock or cross a protected quotation. Around the same time, other trading centers also developed price sliding functionalities in order to display incoming non-routable orders that upon entry would lock or cross a protected quotation without violating Rule 610(d) of Regulation NMS.

19. The "ranking" and "time stamping" of orders are terms used by market centers with "price-time" priority to describe how they determine execution priority for orders for the same security. The "ranking" of an order reflects the price at which the market participant that sent the order is willing to trade. More aggressively priced orders are "ranked" higher, meaning that they may be executed at more aggressive prices. For example, an order to buy securities that can execute at a price as high as $8.00 is more aggressive, and ranked higher, than an order to buy securities that can execute up to a price of only $7.99. The market participant that sent the $8.00 order is willing to buy securities for a higher price than the market participant who sent the $7.99 order. Generally, between two orders, the order that is more aggressively priced will receive execution priority and a higher "ranking." In this example, if the exchange were to receive a new order to sell securities for $7.99, the buy order that was priced up to $8.00 would receive the execution before the buy order that was priced only up to $7.99.

20. For two displayed orders that have equally aggressive pricing (are willing to execute at the same prices), equity exchanges generally give priority to the order that was first received. Exchanges apply time stamps to orders to identify when they were received. For multiple displayed orders ranked at the same price, the earlier time-stamped order will typically have execution priority over orders with later time-stamps. If an existing order receives a new time stamp, for example, under circumstances where certain parameters of an order are modified,

[12] Not all non-routable orders lock or cross a protected quotation at the time of entry. Price sliding functionality operates to handle those orders that lock or cross a protected quotation at the time of entry and therefore cannot be displayed at the price at which they were entered.

the order is treated as having been newly submitted and will be re-prioritized relative to other existing orders at that same execution price.

Direct Edge Developed and Introduced Hide Not Slide Following the Request of a Significant Market Participant

21. Beginning in late 2008, a high frequency trading firm ("Trading Firm A"), a subscriber of the Direct Edge ECNs, encouraged Direct Edge to develop an alternative to its existing price sliding functionality that would enable an order that would lock or cross a protected quotation upon entry to retain its priority (or queue position) in Direct Edge's order book. Trading Firm A informed Direct Edge that it sought this alternative because Direct Edge's existing price sliding functionality, which re-priced and ranked the orders to one minimum price variation away from the locking price and assigned new time stamps to price slid orders when they were unslid back to the original locking price, caused those orders to lose their order book priority to later arriving orders at the locking price. Trading Firm A reported that this alternative would be similar to functionalities developed and offered at certain other trading centers.

22. Trading Firm A explained to Direct Edge that in order to generate profits from its trading strategy, which was designed to capture spreads and/or collect rebates offered by trading centers for providing liquidity, it required a high degree of certainty that it could enter and exit individual trades at its intended prices. Trading Firm A informed Direct Edge that one of the ways it sought to achieve such certainty was through its queue position. Trading Firm A further informed Direct Edge that under the then-existing price sliding functionality, it lost its intended place in the order book queue because its orders were price slid and ranked upon entry to a less aggressive price than it was willing to pay. Then, when the orders were unslid and re-priced/re-ranked back to the locking price, it at times lost its queue position to later arriving orders at the locking price because its orders received new time stamps. Moreover, in certain circumstances, Trading Firm A's unslid orders, after receiving a new time stamp and thus losing their order book priority, would execute as takers of liquidity and thereby be charged a fee, as opposed to collecting a rebate (as intended by Trading Firm A).

23. Trading Firm A requested that Direct Edge develop an alternative price-sliding functionality that would permit a displayed order that would otherwise lock or cross a protected quotation to "hide" and be ranked and available to execute on Direct Edge's order book at its original locking price, as opposed to being price-slid and ranked at a new price. Trading Firm A also requested that the order be permitted to "light up" and become displayed at the original locking price if market conditions permitted, while retaining its original ranking and time stamp, and thus its queue position in the order book. Trading Firm A further advised Direct Edge that implementation of such an order type would likely cause it to increase the order flow that it sent to Direct Edge from 4-5 million orders per day to 12-15 million orders per day. Additional order flow would be beneficial to Direct Edge because it would increase its market volume and its revenue.

24. Following Trading Firm A's request, and also because of the possible benefits the change would provide to other market participants similar to Trading Firm A, Direct Edge adopted this order type functionality and referred to it as HNS. Under HNS, an order that would

lock or cross a protected quotation upon entry would be displayed one minimum price variation away from the original locking price but would be ranked and "hidden" on the order book at the original locking price and be able to execute at that price. This was unlike Direct Edge's then-existing default price-sliding functionality, which re-ranked and re-priced orders one minimum price variation away from the locking price and the orders could execute only at that lower (higher) bid (offer) price. If market conditions changed such that the HNS order could be displayed at that original price without locking or crossing a protected quotation, Direct Edge would subsequently display (*i.e.*, "unhide") the HNS order at its ranked and executable price without appending a new time stamp and without affecting the order's prioritization compared to other orders at that same ranked price.

25. Because it was ranked and available to execute at the more aggressive locking price, a HNS order would have execution priority over orders that were originally submitted at the same price but subjected to Direct Edge's then-existing default price sliding functionality. Those orders were price slid to and ranked/re-priced to potentially be executed at a less aggressive price—one minimum price variation away from the locking price. If market conditions changed such that the orders could be displayed at the original locking price, and the price slid orders were unslid and re-ranked back to the original locking price, they received a new time stamp and were treated as newly received. Having the same price as the HNS order but a later time stamp, they would be ranked after the HNS order that retained its original time stamp and was always ranked at the more aggressive locking price.

26. Direct Edge, in May 2009, began a phased roll-out of HNS. Direct Edge published amended technical specifications to enable subscribers to place HNS orders and issued a trade desk notification e-mail announcing the introduction of HNS to its then-existing ECN subscribers.[13] The notification, dated May 27, 2009, stated, among other things, that the new HNS order type, which was ranked and hidden at the locking price, and did not receive a new time stamp when unslid, allows "orders originally submitted as display-eligible to be hidden and price-adjusted, rather than price-adjusted, in order to maintain their book priority." The notification further stated that without using HNS, the order would "lose priority because it receives a new time stamp," whereas using HNS would allow an order to "maintain[] its priority."

27. The trade desk notification, in addition to being distributed via e-mail, was also posted on and remained on Direct Edge's website. However, the information contained in the trade desk notification about the operation of HNS became outdated shortly thereafter, as Direct

[13] On or about April 22, 2009, approximately two weeks prior to the release of HNS, Direct Edge made publicly available, on its website, a revised version of its FIX specifications to reflect the planned release of HNS. FIX, an acronym for Financial Information eXchange, is an electronic communications protocol initiated in 1992 for international real-time exchange of information related to the securities transactions and markets. The revised FIX specifications did not include all of the information contained in the announcement email. The FIX specifications, in the "Execution Instruction" field, under the heading "New Order Single-From Client" stated: "h=Hide Not Slide eligible; if locking or crossing the NBBO, order will be adjusted to post as follows: Hidden orders will be booked at the locking price. Displayed orders will be displayed at a compliant price (1 tick worse than the NBBO) and also be booked as hidden at the locking price."

Edge made modifications (as discussed further below) to the operation of HNS. Direct Edge did not issue any further communication (such as a trade desk notification) to all members notifying them about how HNS operated or how HNS had been modified.

While its Exchange Registration Applications were Pending, Direct Edge Modified Hide Not Slide without Amending its Proposed Rules

28. On May 7, 2009, several days after the phased implementation of HNS began, Direct Edge filed Form 1 applications with the Commission to register EDGA and EDGX as national securities exchanges. As part of the Form 1 applications, Direct Edge submitted to the Commission proposed rules that described, in pertinent part, EDGA and EDGX's available order types and order handling routines. During the period when the applications were pending, Direct Edge modified how HNS functioned on EDGX but did not update the Form 1 application to reflect such changes.

29. In early 2009, Direct Edge began planning for a new technology platform, referred to internally as the "Next Gen Platform," to replace the platform in use on EDGA and EDGX when they operated as ECNs. Development work on this platform's functionalities began in or around May 2009, around the same time that HNS was released. The new platform included a Midpoint Match, or "MPM," order on EDGX. An MPM order is an undisplayed order that can only be executed at the mid-point of the NBBO.

30. As a result of its addition of the MPM order, Direct Edge also made changes to the behavior of HNS orders on EDGX. Pursuant to these changes, HNS orders that locked or crossed a protected quotation would no longer be ranked and "hidden" at the original locking price, but would instead be re-priced, ranked, and "hidden" at the mid-point of the NBBO and could execute at the NBBO mid-point. Direct Edge also originally intended that MPM orders would have execution priority over HNS orders when those orders were executed at the midpoint of the NBBO.

31. In May 2009, Direct Edge began contacting certain users of HNS orders and potential users of the proposed MPM order, including Trading Firm A and another high frequency trading firm ("Trading Firm B"), to solicit their feedback on the proposed MPM order logic. Trading Firm A and Trading Firm B both expressed concerns about the possible implications of the proposed MPM order logic on their trading strategies. In particular, Trading Firm A and Trading Firm B reacted negatively to Direct Edge's plan to re-price and rank HNS orders at the NBBO mid-point on EDGX, informing Direct Edge that they preferred to know the prices at which their orders were ranked on the order book and not have the prices automatically adjusted by the platform. Trading Firm A and Trading Firm B also reacted negatively upon learning that Direct Edge proposed to give MPM orders order book priority over HNS orders. Trading Firm A and Trading Firm B took the position that HNS orders should have execution priority over MPM orders (which were not displayed) because the HNS orders were displayed orders that were entered with more aggressive limit prices.

32. Direct Edge ultimately agreed that HNS orders should have execution priority over MPM orders for the reasons stated by Trading Firm A and Trading Firm B. Direct Edge

revised the EDGX trading system so that HNS orders ranked at the midpoint of the NBBO would have execution priority over MPM orders. As discussed below, neither HNS nor these changes made to how HNS operated were accurately described in EDGX's proposed rules.

33. Trading Firm B also expressed a preference regarding the handling of HNS orders designated as "post only," which were to be executed only if they would add liquidity and thus receive a rebate.[14] Trading Firm B preferred that "post only" orders be permitted to execute and take liquidity, and thus be charged a taker fee (instead of earning a rebate), in circumstances under which Trading Firm B's order received price improvement (by virtue of executing at the less aggressive NBBO mid-point as opposed to the more aggressive locking price) in an amount sufficient to offset the loss of the rebate that Trading Firm B would have earned had the order created liquidity.

34. Following Trading Firm B's reaction, Direct Edge, prior to EDGX commencing operations as an exchange, modified the handling of HNS orders designated as "post only." Pursuant to this modification, a "post only" HNS order could execute and take liquidity (and thus be charged a fee), but only in circumstances under which the execution would be at a less aggressive price and would result in the HNS order receiving price improvement in an amount that exceeded the loss of the rebate that it would have earned had it been posted before being executed. This was not explained in the proposed rules that EDGX filed with the Commission, which defined a "post only" order as "[a]n order that is to be ranked and executed on the Exchange . . . without routing away to another trading center except that the order will not remove liquidity from the EDGX Book absent an order instruction to the contrary."

35. Direct Edge viewed these changes as beneficial to users of HNS and to Direct Edge. For users of HNS, HNS orders would have execution priority over MPM orders, as well as over other price slid orders when the other price slid orders were unslid, re-priced and ranked at the original locking price. For Direct Edge, the revised logic would allow more executions to occur on EDGX and would also increase Direct Edge's revenue on EDGX by virtue of both the increase in executions and by charging taker fees to both the HNS and MPM orders on transactions executing at the NBBO mid-point, as opposed to charging one order a taker fee but having to pay a rebate to the other order.

Direct Edge Began Operating EDGA and EDGX with a Hide Not Slide Order Type that was not Completely and Accurately Described in the Exchanges' Rules

36. EDGA and EDGX's Form 1 applications, which included the proposed order type rules for EDGA and EDGX, were published for public comment on September 17, 2009. The

14 A post only order is an order that only will execute if it first is added, or "posted," to the exchange's order book and then, after being posted, is matched with another order. A post only order will not be matched with an order that already is present on the exchange's order book. "Post only" orders are often defined as orders that will not remove liquidity. One reason for sending a post only order is to earn the rebate that many exchanges pay for orders that are added to the order book before executing, which is known as "adding liquidity."

Commission issued the Order Granting Registration on March 12, 2010. EDGA and EDGX began operating as exchanges in July 2010.

37. The proposed rules that EDGA and EDGX filed and that the Commission found consistent with Section 6 of the Exchange Act did not completely and accurately describe the HNS order type or its underlying functionality. As described below, EDGA and EDGX's rules did not accurately describe their operations at the time of their launch.

38. EDGA's and EDGX's rules included a "displayed price sliding process." Displayed price sliding was the only price sliding functionality provided for in EDGA and EDGX's rules.[15] Pursuant to the displayed price sliding rule, which was identical, as written, for both Exchanges, an order that would cross a protected quotation at the time of entry would "be repriced to the locking price and ranked at such price in the [order book]." In addition, on both Exchanges, an order that, at the time of entry, would lock or cross a protected quotation would "be displayed . . . at one minimum price variation below the current [National Best Offer] (for bids) or at one [minimum price variation] above the current [National Best Bid] (for offers) . . . ." In the event the NBBO changed such that "the . . . Order at the original locking price would not lock or cross a Protected Quotation, the order will receive a new timestamp and will be displayed at the original locking price."[16]

39. The "displayed price sliding process" set forth in the rules did not accurately describe the manner in which HNS operated on EDGX. For example, since July 2010, a HNS order on EDGX that would lock or cross a protected quotation was displayed at a price that was one minimum price variation away from the locking price but was executable, ranked and hidden at the mid-point of the NBBO and, hence, could receive price improvement over what was described in the rules in certain situations. The HNS order could execute at the NBBO mid-point, and it also had discretion to execute to the locking price. EDGX's "displayed price sliding process" did not completely and accurately describe how a HNS order on EDGX operates because an HNS order on EDGX is ranked and hidden at the mid-point of the NBBO and can execute at the midpoint with discretion to execute to the locking price. The proposed rules also did not describe the situation in which a "post only" HNS order on EDGX could take liquidity in circumstances where it would be economically advantageous for the HNS order to do so.

40. The rules, which did not state that HNS orders would be re-ranked and re-priced to the NBBO mid-point, also did not explain that the HNS order on EDGX had execution priority over all non-displayed orders that were eligible for mid-point execution when the HNS order was positioned at the NBBO mid-point. Nor did the proposed rules explain that, although a HNS order received a new time stamp if the NBBO changed such that the original locking

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15 The proposed rules also did not accurately describe how the types of price sliding that had been available on the Direct Edge ECNs operated.

16 The above definition was contained in the proposed rules submitted with Direct Edge's September 2009 amendments to the Form 1 applications. The Form 1 applications and proposed rules were further amended in February 2010, but the amendments were immaterial in this respect and did not result in any changes to the language discussing "displayed price sliding."

price would no longer lock or cross a protected quote and the HNS order could be displayed at that price, the EDGX system re-ranked, re-priced and displayed the HNS order at the original locking price ahead of all other orders, including other types of earlier price slid orders, at that price, except for an arriving day intermarket sweep order ("ISO") that enabled the original locking price to be displayed on EDGX.[17]

41. The "displayed price sliding process" set forth in the rules also did not completely and accurately describe the manner in which HNS operated on EDGA. From at least July 2010 to the present, a HNS order on EDGA that would lock or cross a protected quotation is displayed one minimum price variation away from the original locking price but is executable, ranked and hidden at that locking price. If the NBBO changed as a result of an incoming ISO, such that the original locking price would no longer lock or cross a protected quote, the HNS order on EDGA that was already ranked/priced at the original locking price will be displayed/"unhid" and will receive a new time stamp. However, if the NBBO changed other than as a result of an incoming ISO order, the HNS order on EDGA, when displayed, will retain its original time stamp and thus its priority in the EDGA order book. The "displayed price sliding process" did not completely and accurately describe how an HNS order on EDGA operated because an HNS order that would lock or cross a protected quotation does not receive a new time stamp under circumstances other than when an incoming ISO order permits its display.

Direct Edge Provided Detailed Information about Mid-Point Re-pricing and HNS Order Execution to Certain Members at Exchange Launch

42. Direct Edge provided complete and accurate information about the operation of HNS and the benefits offered by that order type to some, but not all, of its members. For example, Trading Firm A and Trading Firm B were informed about the mid-point re-pricing, that HNS orders would have execution priority over MPM orders, and that a post-only order could execute as a taker of liquidity (and pay a taker fee) but receive price improvement in an amount that exceeded the loss of the rebate that it would have earned had it been posted before being executed.

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17 An ISO is defined by Rule 600(b)(30) of Regulation NMS as a limit order for an NMS stock that is identified as an ISO and, simultaneously with its routing, one or more additional ISOs, as necessary, are routed to execute against the full displayed size of any protected bid (in the case of an initial ISO to sell) or offer (in the case of an initial ISO to buy). 17 C.F.R. § 242.600(b)(30). ISOs also are an exception to Rule 611 of Regulation NMS (the "Order Protection Rule"). Rule 611 generally requires trading centers to have policies and procedures reasonably designed to prevent "trade-throughs." 17 C.F.R. § 242.611(a). A trade-through is defined in Rule 600(b)(77) of Regulation NMS as an execution at a price that is lower than a protected bid or higher than a protected offer. 17 C.F.R. § 242.600(b)(77). Pursuant to Rule 611(b)(5), a trading center's policies and procedures to prevent trade-throughs need not seek to prevent trade-throughs that result from the execution of an ISO. The principal supporting this exception is that the ISO is accompanied by other ISOs meant to execute against the full size of any existing protected quotations; accordingly, the concern that an execution traded through a better available protected quotation should not be present. A day ISO is an ISO order that, if not executed in full upon receipt, will rest on the order book—unless executed or cancelled—until the end of the day.

43. Similarly, in or about June 2010, another high frequency trading firm was provided with information about how a HNS order would be ranked, displayed and executed on EDGX, including that an incoming HNS order that was marked post only could execute at the mid-point of the NBBO and be charged a taker fee, even though it was marked post only. Direct Edge also provided information about these issues to some other market participants, who raised questions about the operation of the Exchanges.

44. The additional information that Direct Edge provided to these firms about the operation of HNS on EDGA and EDGX was not contained in the Exchanges' rules. Nor was it contained in any other document or communication made available to all members. For instance, Direct Edge's then-available technical specifications for both EDGA and EDGX stated that, if a HNS order locked or crossed an away market quotation at the time of entry, "the order will be hidden and ranked at the locking price, but will be displayed one [minimum price variation] away from the locking price. The displayed price will be adjusted to the ranked price as soon as market conditions permit." As noted above, with respect to EDGX, the specifications incorrectly stated that HNS orders were ranked at the locking price when, in fact, they were ranked at the midpoint of the NBBO and had discretion to execute to the locking price in certain circumstances. The specifications also failed to explain that a HNS post-only order could execute as a taker of liquidity if price improved on EDGX.[18] With respect to EDGA, the specifications failed to explain that in the absence of an incoming ISO order, a HNS order did not receive a new time stamp when displayed.

45. As a result of disclosing this information to some but not all members, Direct Edge caused some members to have information about Exchange order types and order handling procedures that other members did not have, including that HNS orders on EDGX were ranked at the midpoint of the NBBO and had priority over other orders ranked at the midpoint and that a HNS post-only order could execute as a taker of liquidity if price improved on EDGX.

After Beginning to Operate as an Exchange, EDGX Made Other Changes to HNS that were Inconsistent with its Commission-Approved Rules

46. For a short time period after EDGX began operating as an exchange, under certain circumstances, a later arriving limit order contra to a HNS order (on the other side of the market—for example, if the HNS order was to buy, the contra order was to sell) obtained execution priority over a previously entered limit order that was also contra to the HNS order. This resulted in the subsequently received sell order executing before a previously received sell order with the same limit price, contrary to the price/time priority principle. This situation arose when EDGX received a post-only HNS order at a price that would lock a protected quotation displayed on EDGX itself (as opposed to locking a protected quotation that appeared on another

[18] On June 28, 2011, more than one year after the Commission approved the Exchanges' Form 1 registration applications, Direct Edge amended its FIX specifications to reflect that a HNS post-only order could execute as a taker of liquidity if price improved on EDGX, but the specification still did not describe the circumstances under which this could occur. Direct Edge did not again modify the description of HNS in its FIX specifications until July 24, 2014.

exchange, other than EDGX). The post-only attribute of the HNS order prevented an immediate execution against a resting contra-side order, but EDGX permitted the HNS order to post to the order book and execute against a subsequently received contra-side order at the same price as the protected quotation.[19]

47. On September 2, 2010, to address a complaint from certain members that some orders that were eligible to execute as takers of liquidity appeared to jump over orders that already had been received at EDGX and had the same price, Direct Edge modified the operation of HNS on EDGX.

48. EDGX altered its order handling logic such that if the locking price is displayed on EDGX (as opposed to another trading center), a HNS order's discretion to execute up to the locking price will be suspended unless and until there is no contra-side displayed order on the EDGX book that equals the locking price.

49. EDGX did not submit a proposed rule change to amend its rules to include the HNS order type or to reflect this modification to the operation of HNS.

EDGX and EDGA Did Not Include "Price Adjust" and "Single Re-Price" Price Sliding Order Types in their Rules

50. According to EDGA's and EDGX's rules, the "displayed price sliding process" was the default process on both Exchanges, and a member had to affirmatively enter instructions not to use it. However, as discussed in more detail below, a price-sliding functionality called Price Adjust has been the default price sliding functionality on EDGX since October 2010. Price Adjust is comparable to the default price sliding that existed on the Direct Edge ECNs, but it was not included in the Exchanges' rules filed with the Commission.

51. Since at least July 2010, both EDGX and EDGA have had a price-sliding functionality described as Price Adjust. With Price Adjust, an order that locks or crosses the NBBO will be displayed and ranked/re-priced one minimum price variation away from the locking price and then, if the NBBO changes such that the original locking price would no longer lock or cross a protected quotation, it will be re-priced, re-ranked, and displayed to the original locking price with a new time stamp.

52. The proposed rules for EDGA and EDGX submitted to the Commission with Direct Edge's Form 1 applications did not provide for Price Adjust-type price sliding.

53. The Price Adjust order functionality operates differently than the "displayed price sliding process" set forth in the Exchanges' rules because a Price Adjust order is ranked/re-

[19] For example, if a HNS post-only order to buy, with an $8.00 limit price, arrived after a displayed limit order to sell with an $8.00 limit price was already on EDGX's order book, the HNS post-only order to buy would not execute against the sell order because that would result in the HNS post-only order removing liquidity, which post-only orders generally cannot do. The HNS post-only order then would rest on EDGX's book. If a second order to sell arrived, also with an $8.00 limit price, it would execute against the HNS post-only buy order, and the HNS post-only order would receive a rebate.

priced to one minimum price variation *away from the locking price*, thus having a lower order book priority than an order subjected to the "displayed price sliding process." In contrast, under the Exchanges' rules, an order that would cross a protected quotation at the time of entry would "be repriced *to the locking price* and ranked at such price" (emphasis added). The Exchanges' rules do not state that an order subject to the "displayed price sliding process" will be repriced/ranked *to one minimum price variation away from the locking price.*

54. From at least July 2010 through late 2014, EDGA and EDGX had another price-sliding functionality, known as Single Re-Price, that Direct Edge also did not include in the Exchanges' rules.[20] If at the time of entry, a Single Re-Price order locked or crossed a protected quotation, it was displayed and ranked one minimum price variation away from the locking price in a one-time re-pricing of the order, and would not be unslid. As discussed above, the Exchanges' rules did not state that an order subject to the "displayed price sliding process" would be repriced/ranked to one minimum price variation away from the locking price. The Exchanges' rules also provided that, in the event the NBBO changed, "the order will receive a new timestamp and will be displayed at the original locking price." However, a Single Re-Price order was not unslid and displayed at the original locking price.

<u>EDGA and EDGX Changed the Price Sliding Default Settings without Filing Proposed Rule Changes with the Commission</u>

55. As discussed above, the rules that EDGA and EDGX filed and that the Commission found consistent with Section 6 of the Exchange Act provided that the "displayed price sliding process" is the default on the Exchanges.

56. After EDGA and EDGX began operating as registered exchanges, Direct Edge modified the default settings for price sliding on both Exchanges without filing proposed rule changes with the Commission.

57. During the period when EDGA and EDGX operated as ECNs, the Price Adjust order functionality was the default setting. Accordingly, from May 2009 until they began operating as exchanges, a member had to affirmatively designate its order as HNS in order to bypass the default price sliding procedure on the EDGA and EDGX ECNs.

58. At the time they started operating as Exchanges in July 2010, the default functionality on EDGA and EDGX was changed from Price Adjust to HNS. Accordingly, a

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20 The Exchanges included a description of the Price Adjust and Single Re-Price functionalities in their publicly-available FIX specifications. The technical specifications described the "Price Adjust" functionality as follows: "If at the time of entry an order locks or crosses an away market quotation, the order will be displayed and ranked one penny away from the locking price. If market conditions allow the order to be displayed at the original locking price, it will be moved to that price." The technical specifications described Single Re-Price functionality as follows: "If at the time of entry, an order locks or crosses an away market quotation, it will be displayed and ranked one penny away from the locking price. This is a one-time re-pricing of the order."

member did not have to affirmatively designate its order as HNS in order to maintain the order's priority position in the Exchanges' order book.

59. In October 2010, Direct Edge switched the default on EDGA and EDGX back to Price Adjust. The next month, in November 2010, Direct Edge again changed the default on EDGA only, this time reverting to HNS. Since October 2010, the default on EDGX has been and remains Price Adjust, and since November 2010, the default on EDGA has been and remains HNS.

60. By changing the default price-sliding functionality on EDGX to Price Adjust, Direct Edge subjected members on EDGX who were unfamiliar with HNS to a price sliding functionality that resulted in their orders not being eligible for mid-point execution or the book priority that resulted when the orders were subsequently displayed at the original locking price.

61. Direct Edge's rules included statements about default settings that were inaccurate. In addition, Direct Edge did not file proposed rule changes to reflect the changes to the default settings that it had described in its rules.

62. Direct Edge updated its publicly-available FIX specifications to reflect the changes to the default price-sliding functionality. However, Direct Edge also took steps to inform certain members about the significance of the changes to the default price sliding functionalities. In October 2010, before it made the default change on EDGX, Direct Edge informed some members that it would be changing the default on EDGX from HNS to Price Adjust. Direct Edge noted internally that significant order flow that was defaulting to HNS was coming from key high frequency trading firms, and that if those firms did not make a change to explicitly mark their orders HNS before EDGX changed the default, Direct Edge could unnecessarily lose substantial revenue. Direct Edge reached out to the affected firms, including Trading Firm A and Trading Firm B, to remind them that, with the change in the default back to Price Adjust, they would have to affirmatively tag their orders as HNS once again.

The Exchanges Did Not Operate Consistently with their Rules

63. From the time they began operating as registered exchanges in July 2010, EDGA and EDGX operated in a manner that was inconsistent with their rules, which, among other things, did not completely and accurately describe the HNS, Price Adjust or Single Re-price order types or their underlying functionalities.

64. Beginning in July 2011, Direct Edge submitted to the Division of Trading and Markets several draft proposed rule changes that were in various stages of completion that included proposed changes to the "displayed price sliding process" reflected in its rules. The Exchanges could have filed proposed rule changes with the Commission, pursuant to Section 19(b) of the Exchange Act, at any time.

65. On July 11, 2014, Direct Edge submitted an EDGX rule filing for public comment and Commission approval that included the HNS, Price Adjust and Single Re-Price order types and that included a description of how they operate.[21] On August 1, 2014, Direct Edge submitted an EDGA rule filing for public comment and Commission approval that included the HNS, Price Adjust, and Single Re-price order types and that included a description of how they operate.[22] The Commission approved the EDGX rule filing on October 29, 2014 and the EDGA rule filing on November 13, 2014.[23]

D. Violations

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

66. Section 19(b) of the Exchange Act requires an exchange to file with the Commission "any proposed rule or any proposed changes in, addition to, or deletion from" the rules of the SRO accompanied by a concise general statement of the basis and purpose of such proposed rule change. "Rules of an exchange" is defined in Section 3(a)(27) of the Exchange Act and "means the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing, of an exchange..., and such of the stated policies, practices, and interpretations of such exchange...as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange . . . ."

67. Rule 19b-4 thereunder provides, in relevant part, that any "stated policy, practice, or interpretation" of an exchange shall be deemed a "proposed rule change" unless: (1) "it is reasonably and fairly implied by an existing rule" of the exchange; or (2) it 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." As defined in Rule 19b-4, the term "stated policy, practice, or interpretation" means: (1) any material aspect of the operation of the facilities of the SRO; or (2) any statement made generally available to the membership of, to all participants in, or to persons having or seeking access to the facilities of the SRO, or to a group or category of specified persons "that establishes or changes any standard, limit or guideline" with respect to: (a) the "rights, obligations, or privileges" of specified persons

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21 Notice of Filing of Proposed Rule Change, Release No. 34-72676, File No. SR-EDGX-2014-18 (July 25, 2014) (available at http://www.sec.gov/rules/sro/edgx/2014/34-72676.pdf).

22 Notice of Filing of Proposed Rule Change, Release No. 34-72812, File No. SR-EDGA-2014-20 (Aug. 11, 2014) (available at http://www.sec.gov/rules/sro/edga/2014/34-72812.pdf).

23 Notice of Filing of Amendment Nos. 1 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, Release No. 34-73468, File No. SR-EDGX-2014-18 (Oct. 29, 2014) (available at http://www.sec.gov/rules/sro/edgx/2014/34-73468.pdf); Notice of Filing of Amendment Nos. 1 and 2 and Order Granting Accelerated Approval of a Proposed Rule Change, Release No. 34-73592, File No. SR-EDGA-2014-20 (available at http://www.sec.gov/rules/sro/edga/2014/34-73592.pdf). Prior to Commission approval, the Exchanges filed amendments to their rule filings to eliminate the Single Re-price order type.

or persons associated with specified persons; or (b) the "meaning, administration or enforcement" of an existing rule.

68. An exchange must file a proposed rule change with the Commission on Form 19b-4. Following receipt of the proposed rule change, the Commission publishes it in the Federal Register to enable all interested parties to review and provide comment upon it. Section 19(b) 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."

69. EDGA and EDGX violated Section 19(b)(1) of the Exchange Act by failing to file proposed rules and proposed rule changes that completely and accurately described how the HNS, Price Adjust, and Single Re-price order types operated and impacted order handling and trading on the Exchanges.

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

70. 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 the exchange's own rules.

71. EDGA and EDGX violated Section 19(g)(1) of the Exchange Act by not complying with their own rules when they offered and executed HNS, Price Adjust, and Single Re-price order types, which were not completely and accurately described in the rules approved by the Commission.

<u>October 13, 2011 Commission Order</u>

72. On October 13, 2011, the Commission issued a settled Order Instituting Administrative and Cease-and-Desist Proceedings against EDGA and EDGX finding that they violated Sections 19(b) and 19(g) of the Exchange Act and that EDGX also violated Rule 602(a)(3) thereunder. The Commission ordered EDGA and EDGX to cease and desist from committing or causing any violations and any future violations of Sections 19(b) and 19(g) of the Exchange Act.

73. EDGA and EDGX violated the October 13, 2011 Commission Order by violating Sections 19(b) and 19(g) of the Exchange Act, as described above.

E. Findings

74. Based on the foregoing, the Commission finds that Respondents violated Sections 19(b) and 19(g) of the Exchange Act.

F. Undertakings

75. The Respondent Exchanges each have undertaken to do the following:

A. Each Respondent Exchange shall take all necessary steps to ensure that its regulatory functions are independent from the commercial interests of the Respondent Exchange, including by providing sufficient resources and employing sufficient regulatory staff so that the Respondent Exchange can reasonably discharge its responsibilities as an SRO and ensure that the Respondent Exchange and its members comply with the federal securities laws and the Respondent Exchange's rules.

B. Each Respondent Exchange shall, no later than thirty (30) days from the issuance of this Order, create and implement written policies and procedures relating to the development of order types, the rule filing process for order types, and the communication of information regarding order types to members. The policies and procedures shall require that each Respondent Exchange:

   i. Evaluate new order type proposals to ensure fairness in the Respondent Exchange's dealings with members and to ensure appropriate consideration of a proposed order type's potential impact, including the following:

      a. document the source of and reason for a proposed order type;

      b. designate the point person or group responsible for identifying and evaluating a proposed order type;

      c. determine a proposed order type's projected usage, regulatory impact, market impact, system impact, and resource commitment; and

      d. evaluate whether the proposed order type is consistent with the Respondent Exchange's obligations as an SRO as well as the requirements of Section 19(b) of the Exchange Act.

   ii. Ensure appropriate oversight in the order type rule filing process, including the following:

      a. document the process for filing order type rules with the Commission; and

      b. document the degree of the Board of Director's or a committee's involvement in the approval of order type rule filings and the circumstances under which certain Exchange staff have delegated authority to approve the filing of order type rules or rule changes.

   iii. Supervise and monitor communications with members and the public about order types to ensure that the Respondent Exchange staff provide the same information regarding the functionality of order types to all members and the public, including the following:

a. document how, what, and when information about order types is communicated to members and the public, including how the Respondent Exchange targets certain types of communication to specific members; and

b. provide presentations or informational guides regarding the Respondent Exchange's order types on their public websites to describe how the order types function.

C. Beginning one (1) year after the date of this Order, and continuing each year thereafter for two (2) years (for a total of three (3) years), each Respondent Exchange shall require its principal executive officer to certify, in writing, that the Respondent Exchange's rules identify and describe all order types, order handling procedures, and order type modifiers available on the Respondent Exchange as required under Section 19(b) of the Exchange Act as of the date of the certification.

i. The initial certification required one year after the date of this Order shall provide written evidence of compliance with this Undertaking in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance.

ii. With respect to the additional certifications required two years and three years after the date of this Order, the certifications shall provide written evidence of compliance with this Undertaking by identifying, with reference to the prior year's certification, (i) any enhancements or alterations to the Respondent Exchange's order type management policies and procedures, (ii) any new order types or modifications to existing order types, order handling procedures, or order type modifiers available on the Respondent Exchange, and all rule filings associated therewith, and (iii) any operational changes that impacted the handling of order types on the Respondent Exchange.

iii. The certifications and supporting material required above shall be submitted to the Director of the Division of Enforcement, with copies to the Director of the Office of Compliance Inspections and Examinations ("OCIE") and to the Director of the Division of Trading and Markets. Commission staff may make reasonable requests for further evidence of compliance, and each Respondent Exchange agrees to provide such evidence.

D. In the event that the Commission determines that a Respondent Exchange's rules do not identify and describe all order types, order handling procedures, and order type modifiers available on the Respondent Exchange as required under Section 19(b) of the Exchange Act, the Commission may, at any time within three (3) years of the date of this Order, in the Commission's sole discretion and not subject to judicial review, require the Respondent Exchange to retain at its expense a qualified independent consultant (the "Order Type Consultant") not unacceptable to the staff of the Commission to conduct a comprehensive review of the Respondent Exchange's rules to determine whether they accurately identify and describe all existing order types, order handling procedures, and order type modifiers available on the Respondent Exchange in operation since the date of this Order (the "Order Type Compliance Review").

i. The Order Type Compliance Review should assure that each Exchange's rulebook fully describes the characteristics of the order type (*e.g.*, price, display, routable, provide liquidity only); the functionality of the order type (*e.g.*, how and when it interacts or does not interact with other order types, in the full range of potential order book and execution scenarios); the relative priority of the order type vis-à-vis other order types, in the full range of potential order book and execution scenarios; and the way in which an execution of the order type will be priced, in the full range of potential execution scenarios. To the extent the order type behaves differently under certain scenarios, the rulebook must describe each of these variations;

ii. The Respondent Exchange shall provide a copy of the engagement letter detailing the Order Type Consultant's responsibilities to the staff of the Division of Enforcement. The Respondent Exchange may in the course of the Order Type Consultant's engagement provide the Order Type Consultant with the views of the Respondent Exchange, and the management and Board of Directors of the Respondent Exchange;

iii. The Respondent Exchange shall require the Order Type Consultant, within six (6) months of the Order Type Consultant's engagement, to submit a report of his/her findings and recommendations (the "Order Type Consultant's Report") simultaneously to the Board of Directors of the Respondent Exchange and to the Director of the Division of Enforcement, with copies to the Director of OCIE and to the Director of the Division of Trading and Markets, that sets forth the Order Type Consultant's findings in connection with the Order Type Compliance Review;

iv. Within 60 days of the Order Type Consultant's Report, the Respondent Exchange shall submit proposed rule changes to the Commission, in accordance with Section 19(b) of the Exchange Act, with respect to any order type, order handling procedure, and/or order type modifier that the

Order Type Consultant determined was not accurately identified or described in the Respondent Exchange's existing rules;

v. If the Respondent Exchange determines that it is not necessary to file a proposed rule change with the Commission with respect to any order type, order handling procedure, or order type modifier as required by paragraph 75.D.iv, the Respondent Exchange shall provide written notice, within 60 days of the issuance of the Order Type Consultant's Report, to the Director of the Division of Enforcement, with copies to the Director of OCIE and to the Director of the Division of Trading and Markets, setting forth an explanation of the reasons for the Respondent Exchange's determination;

vi. The Respondent Exchange shall cooperate fully with the Order Type Consultant, including providing the Order Type Consultant with access to the files, books, records, and personnel of the Respondent Exchange (and the Respondent Exchange's relevant affiliated entities) as reasonably requested for the Order Type Compliance Review, and obtaining the cooperation of employees or other persons under the Respondent Exchange's control. Nothing in the foregoing shall be deemed to require the Respondent Exchange to waive their attorney-client privileges or other privileges with respect to privileged documents;

vii. The Respondent Exchange shall require the Order Type Consultant to report to Commission staff in the Divisions of Enforcement and Trading and Markets and OCIE on his/her activities as the staff may reasonably request;

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

ix. The Respondent Exchange shall expend sufficient funds to permit the Order Type Consultant to discharge all of his/her duties. The Respondent Exchange shall permit the Order Type 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 Exchange;

x. The Respondent Exchange shall bear the full expense of carrying out these undertakings, including the costs of retaining the Order Type Consultant and implementing the Order Type Consultant's recommendations;

xi. The Respondent Exchange shall require the Order Type 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 Order Type Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with the Exchanges, BATS, or any of their present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Order Type 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 Order Type 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 the Exchanges, BATS, or any of their 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 Order Type Consultant shall maintain the confidentiality of any confidential information of the Respondent Exchange and/or its affiliates; and

xii. The Respondent Exchange may apply to the staff of 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 Exchange, the staff of the Division of Enforcement may, in its sole discretion, grant such extensions for whatever time period it deems appropriate.

IV.

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

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

A. EDGA and EDGX shall cease and desist from committing or causing any violations and future violations of Sections 19(b) and 19(g) of the Exchange Act.

B. EDGA and EDGX are censured.

C. EDGA and EDGX shall pay, jointly and severally, within ten (10) days of the entry of this Order, a civil money penalty in the amount of $14 million to the United States Treasury. 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 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 EDGA and EDGX 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 Daniel M. Hawke, Chief, Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, One Penn Center, 1617 John F. Kennedy Blvd., Suite 520, Philadelphia, PA, 19103-1844.

D. Respondents shall comply with the undertakings enumerated above.

By the Commission.

Brent J. Fields
Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3994 / January 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16335

In the Matter of

DUANE HAMBLIN SLADE,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("the 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 Duane Hamblin Slade ("Respondent" or "Slade").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From at least 2002 to 2005, Respondent was an employee for Mathon Management Company, LLC, a company that was registered with the Commission as an investment adviser from March 2, 2004 to February 2011. Respondent's title was "Salesperson." Respondent is 42 years old and is currently incarcerated at the Federal Correctional Institution at Texarkana in Texarkana, Texas.

B. ENTRY OF RESPONDENT'S CRIMINAL CONVICTION

2. On June 5, 2013, Respondent pleaded guilty to conspiracy to commit mail and wire fraud, in violation of Title 18 United States Code, Section 1349 before the United States District Court for the District of Arizona. *United States v. Duane Hamblin Slade*, Case No. CR 09-01492-001-PHX-ROS. On September 30, 2013, he was sentenced to a prison term of one hundred eighty (180) months, followed by three years of supervised release.

3. The counts of the criminal indictment to which Respondent pleaded guilty alleged, *inter alia*, that from 2002 to 2005, Respondent and others operating through Mathon-related entities, falsely promised investors that Mathon could earn high-yield rates of return for investors by making short-term, high-interest hard money loans to borrowers, and using repayment of principal and interest on those loans to pay investor returns, when the Respondent knew that the loans were in default or non-performing. The Respondent concealed from the investors that the loans were in default, non-performing and/or otherwise incapable of generating high rates of returns on the purported "investments" as the Respondent represented. The Respondent also repaid earlier investors with funds from later investors and unlawfully enriched himself through excessive origination fees, management fees, and other means. Specifically, the Respondent took $5,442,840 from victim investors as purported compensation and other financial remuneration.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act.

IV

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

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

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

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

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

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

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3993 / January 13, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74044 / January 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16334

In the Matter of **SHELTON FINANCIAL GROUP, INC. and JEFFREY SHELTON,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f), AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTION 15(b)(6) 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 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act") against Shelton Financial Group, Inc. ("SFG") and Jeffrey Shelton ("Shelton") (collectively "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 and Section 15(b)(6) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

SUMMARY

1. This matter involves an investment adviser's failure to disclose compensation it received through an arrangement with a registered broker-dealer ("Broker") and conflicts arising from that compensation. The Broker agreed to pay SFG for all client assets that were invested in certain mutual funds. In exchange, SFG agreed to provide certain custodial support services to the Broker. The agreement created incentives for SFG to favor particular mutual funds over other investments and to favor the Broker over other brokers when giving investment advice to its clients. SFG initially did not disclose this arrangement and the resulting conflict of interest to its clients. When SFG first disclosed the arrangement, its description was inadequate. While SFG later corrected the disclosure, by failing to properly disclose the arrangement and its attendant conflict of interest, SFG and Shelton violated Sections 206(2) and 207 of the Advisers Act. In addition by not adopting policies and procedures reasonably designed to address – among other things – conflicts of interest, SFG violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder and Shelton caused these violations.

RESPONDENTS

2. SFG is an Indiana corporation with its principal place of business in Fort Wayne, Indiana. SFG registered with the Commission as an investment adviser in May 2009. As of March 31, 2014, SFG reported $259.2 million of assets under management.

3. Shelton, age 48, is a resident of Markle, Indiana. He is the founder, sole owner, and president of SFG. He was also SFG's Chief Compliance Officer from 2004 until June 2010. He holds Series 6, 63, and 65 licenses. Since July 2009, he has been a registered representative of Comprehensive Asset Management and Servicing, Inc., a broker-dealer registered with the Commission.

FACTS

4. After working for several years as a registered representative for a broker-dealer, Shelton started SFG in 1995. SFG was initially a one-man shop and Shelton was responsible for finding and developing client relationships, preparing marketing materials, and selecting and implementing investment strategies. He was also SFG's Chief Compliance Officer. As SFG's business grew, Shelton hired new employees. This included a Chief Operating Officer in June 2007 who later became Chief Compliance Officer in June 2010 (the "CCO").

5. Shelton and later the CCO were responsible for preparing, reviewing, and updating SFG's compliance policies, regulatory filings (including, but not limited to, Form ADV, Form ADV Part II and Schedule F, and Form ADV Part 2A ("Brochure"), and client advisory

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

agreements. During an on-site exam in 2012, Commission staff discovered that SFG had inadequate policies and procedures regarding, among other things, conflicts of interest and its compliance policies were not tailored to its business.

6. The Broker became a custodian for SFG clients in September 2008. As part of fee negotiations, the Broker proposed an addendum to the contract in which the Broker agreed to pay SFG a certain percentage of every dollar that its clients invested in No Transaction Fee ("NTF") mutual funds other than proprietary funds advised by affiliates of the Broker. In exchange, SFG agreed to perform certain "custodial support services" such as facilitating asset transfers, updating client information for the Broker, handling client inquiries, and assisting clients with paperwork.

7. The addendum was memorialized in a "Custodial Support Services Agreement" ("CSSA"). However, due to an administrative oversight, the CSSA was not formally signed until November 2013. Despite this clerical mistake, SFG provided administrative and custodial support services on behalf of the Broker since October 2008. SFG received its first custodial support payment from the Broker in May 2009 and continues to receive such payments through the present.

8. From May 2009 through March 2010, SFG did not disclose the existence of the CSSA in its Forms ADV – a disclosure form filed with the Commission and made available to clients – or in its advisory agreements with clients. Item 13.A of former Form ADV Part II specifically requires investment advisers to disclose any arrangement where they receive direct or indirect compensation in connection with giving advice to clients. SFG's Item 13.A disclosures during this period did not disclose the CSSA or custodial support arrangement with the Broker.

9. In March 2010, SFG revised its Form ADV Part II to disclose that it "receiv[ed] an administrative reimbursement from [the Broker] for assisting in the paperwork process of opening new accounts with [the Broker]." This same language was used in SFG's Form ADV Part II dated June 22, 2010.

10. Item 14.A of Form ADV Part 2A, in effect for SFG as of March 2011, requires advisers to disclose compensation received from third-parties for providing investment advisory services to clients, as well as the resulting conflicts and how the adviser addresses them.[2] SFG prepared and distributed its first Brochure in March 2011. When drafting the Brochure, the CCO relied on language from prior Forms ADV Part 2 and Schedules F that were reviewed and signed by Shelton. SFG's Item 14.A disclosures did not mention the CSSA and also omitted a reference to an "administrative reimbursement" that had been included in prior Forms ADV. Advisory clients were thus unaware that because of the CSSA, SFG might have a bias in favor of non-broker NTF funds over other investments that would not generate revenue for SFG, leading to potentially conflicted investment advice. Clients were also unaware of SFG's conflict of interest in selecting the Broker as custodian over other brokers that did not offer compensation to SFG.

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[2] Form ADV was amended in 2010, requiring most Commission-registered advisers to file and start using client disclosure brochures that met the requirements of new Part 2A early in 2011. *See* IA-3060 (July 28, 2010), http://www.sec.gov/rules/final/2010/ia-3060.pdf.

11. SFG disclosed the CSSA in a December 28, 2011 Brochure. This Brochure informs clients that SFG "entered into a [CSSA] with [the Broker] by which SFG agreed to provide … certain back-office … and clerical services. …. [I]n consideration for these services, [the Broker] has agreed to pay SFG a fee on specified assets – namely NTF mutual fund assets (other than [the Broker's] mutual funds) …." However, SFG still did not disclose a conflict of interest attendant to this arrangement or how the firm addressed such a conflict. A month after receiving a deficiency letter from the staff, SFG disclosed the conflict of interest in an October 10, 2013 Brochure.

VIOLATIONS OF LAW

12. Section 206(2) of the Advisers Act makes it unlawful for an adviser to use instruments of interstate commerce to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Scienter is not required to establish a violation of Section 206(2), but rather may rest on a finding of negligence. *SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194-95 (1963)). Section 207 of the Advisers Act, among other things, makes it unlawful for a person to "willfully to omit to state … material fact[s]" in registration applications and reports filed with the Commission. As a result of the negligent conduct described above, SFG and Shelton willfully[3] violated Sections 206(2) and 207 of the Advisers Act.

13. Section 206(4) of the Advisers Act makes it "unlawful for any investment adviser … to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." Rule 206(4)-7 under the Advisers Act requires registered investment advisers to, among other things, "[a]dopt and implement written policies and procedures, reasonably designed to prevent violation" of the Advisers Act and its rules. As a result of the negligent conduct described above, SFG willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder and Shelton caused these violations by SFG.

RESPONDENTS' REMEDIAL EFFORTS

14. In determining to accept the Offers, the Commission considered remedial acts promptly undertaken by Respondents and cooperation afforded the Commission staff.

UNDERTAKINGS

Respondents have undertaken to:

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

15. Independent Compliance Consultant. With respect to the retention of an independent compliance consultant, SFG has agreed to the following undertakings:

a. SFG shall retain, within ninety (90) days of the entry of this Order, the services of an independent compliance consultant (the "Independent Consultant") that is not unacceptable to the Commission staff. The Independent Consultant's compensation and expenses shall be borne exclusively by SFG.

b. SFG shall provide to the Commission staff, within ninety (90) days of the entry of this Order, a copy of the engagement letter detailing the Independent Consultant's responsibilities, which shall include comprehensive compliance reviews as described below in this Order. SFG shall require that the Independent Consultant conduct by the end of the first quarter of 2015 and again at the end of the first quarter of 2016 a comprehensive review of SFG's supervisory, compliance, and other policies and procedures reasonably designed to detect and prevent breaches of the federal securities laws by SFG and its employees.

c. SFG shall require that, within forty-five (45) days from the end of the applicable quarterly period, the Independent Consultant shall submit a written and detailed report of its findings to SFG and to the Commission staff (the "Report"). SFG shall require that each Report include a description of the review performed, the names of the individuals who performed the review, the conclusions reached, the Independent Consultant's recommendations for changes in or improvements to SFG's policies and procedures and/or disclosures to clients, and a procedure for implementing the recommended changes in or improvements to SFG's policies and procedures and/or disclosures.

d. SFG shall adopt all recommendations contained in each Report within sixty (60) days of the applicable Report; provided, however, that within forty-five (45) days after the date of the applicable Report, SFG shall in writing advise the Independent Consultant and the Commission staff of any recommendations that SFG considers to be unduly burdensome, impractical, or inappropriate. With respect to any recommendation that SFG considers unduly burdensome, impractical or inappropriate, SFG need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose.

e. As to any recommendation with respect to SFG's policies and procedures on which SFG and the Independent Consultant do not agree, SFG and the Independent Consultant shall attempt in good faith to reach an agreement within sixty (60) days after the date of the applicable Report. Within fifteen (15) days after the conclusion of the discussion and evaluation by SFG and the Independent Consultant, SFG shall require that the Independent Consultant inform SFG and the Commission staff in writing of the Independent Consultant's final determination concerning any recommendation that SFG considers to be unduly burdensome, impractical, or inappropriate. SFG shall abide by the determinations of the Independent Consultant and, within sixty (60) days after final agreement between SFG and the Independent Consultant or final determination by the

Independent Consultant, whichever occurs first, SFG shall adopt and implement all of the recommendations that the Independent Consultant deems appropriate.

f. Within ninety (90) days of SFG's adoption of all of the recommendations in a Report that the Independent Consultant deems appropriate, as determined pursuant to the procedures set forth herein, SFG shall certify in writing to the Independent Consultant and the Commission staff that SFG has adopted and implemented all of the Independent Consultant's recommendations in the applicable Report. Unless otherwise directed by the Commission staff, all Reports, certifications, and other documents required to be provided to the Commission staff shall be sent to Paul Montoya, Assistant Regional Director, Asset Management Unit, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, IL, 60604, or such other address as the Commission staff may provide.

g. SFG shall cooperate fully with the Independent Consultant and shall provide the Independent Consultant with access to such of its files, books, records, and personnel as are reasonably requested by the Independent Consultant for review.

h. To ensure the independence of the Independent Consultant, SFG:

(1) Shall not have the authority to terminate the Independent Consultant or substitute another independent compliance consultant for the initial Independent Consultant, without the prior written approval of the Commission staff; and

(2) Shall compensate the Independent Consultant and persons engaged to assist the Independent Consultant for services rendered pursuant to this Order at their reasonable and customary rates.

i. SFG shall require the Independent 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 Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with SFG, 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 Independent Consultant will require that any firm with which the Independent Consultant is affiliated or of which the Independent Consultant is a member, and any person engaged to assist the Independent Consultant in the performance of the Independent Consultant's duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with SFG, 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.

16. <u>Recordkeeping</u>. SFG shall preserve for a period of not less than six (6) years from the end of the fiscal year last used, the first two (2) years in an easily accessible place, any record of SFG's compliance with the undertakings set forth in this Order.

17. Separation of Chief Compliance Officer From Other Officer Positions. For a period of five (5) years from the entry of this Order, SFG shall employ a Chief Compliance Officer whose sole responsibility will be serving in that position. During this period, the person SFG designates as Chief Compliance Officer shall not simultaneously hold any other officer or employee position at SFG while serving as Chief Compliance Officer. Shelton shall not serve or act as SFG's Chief Compliance Officer for a period of five (5) years from the entry of this Order.

18. Compliance Training. Within one year of entry of this Order, SFG shall require its Chief Compliance Officer to complete thirty (30) hours of compliance training relating to the Advisers Act.

19. Notice to Advisory Clients. Within thirty (30) days of the entry of this Order, SFG shall provide a copy of the Order to each of SFG's existing advisory clients as of the entry of this Order via mail, e-mail, or such other method as may be acceptable to the Commission staff, together with a cover letter in a form not unacceptable to the Commission staff. For a period of one (1) year, SFG shall provide a copy of the Order to all of its prospective clients.

20. Deadlines. For good cause shown, the Commission staff may extend any of the procedural dates relating to the undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.

21. Certifications of Compliance by Respondents. SFG shall certify, in writing, compliance with its undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and SFG agrees to provide such evidence. The certification and supporting material shall be submitted to Paul Montoya, Assistant Regional Director, Asset Management Unit, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, IL, 60604, or such other address as the Commission staff may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, 100 F Street, NE Washington, DC 20549, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

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

Accordingly, pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act and Section 15(b)(6) of the Exchange Act, it is hereby ORDERED that:

A. Respondents SFG and Shelton shall cease and desist from committing or causing any violations and any future violations of Sections 206(2), 206(4), and 207 of the Advisers Act and Rule 206(4)-7 thereunder.

B. Respondents SFG and Shelton are censured.

C. Respondents SFG and Shelton on a joint and several basis shall, within fourteen (14) days of the entry of this Order, pay total disgorgement of $99,114.19 and prejudgment interest of $20,952.91 to the Commission. 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) 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) 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
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 SFG and Shelton 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 Paul Montoya, Assistant Regional Director, Asset Management Unit, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, IL, 60604.

D. Respondents SFG and Shelton on a joint and several basis shall, within fourteen (14) days of the entry of this Order, pay a civil penalty in the total amount of $70,000 to the 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) 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) 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
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 SFG and Shelton 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 Paul Montoya, Assistant Regional Director, Asset Management Unit, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Blvd., Suite 900, Chicago, IL, 60604.

E. Respondents SFG and Shelton shall comply with the undertakings enumerated in Section III, paragraphs 15 to 21 above.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent Shelton, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent Shelton under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent Shelton 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.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74039 / January 13, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3619 / January 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16333

In the Matter of **JAMES T. CRANE, CPA,** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against James T. Crane ("Respondent" or "Crane") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

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

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

II.

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

III.

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

1. Crane, age 38, was a certified public accountant licensed to practice in the Commonwealth of Massachusetts, until his license expired on June 30, 2010. He served as Chief Financial Officer of Subaye, Inc. ("Subaye") from October 29, 2007 until March 10, 2011.

2. Subaye was, at all relevant times, a Delaware corporation that purported to have its 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, but presently it is inactive. Subaye's common stock was registered with the Commission pursuant to Section 12(b) of Securities Exchange Act of 1934 ("Exchange Act") and was listed on the NASDAQ Stock Market under the ticker "SBAY" from March 15, 2010 until November 21, 2011. The NASDAQ Stock Market filed a Form 25 (Notification of Removal from Listing and/or Registration under Section 12(b) of the Exchange Act) on November 10, 2011, and Subaye no longer has a class of stock registered pursuant to the Exchange Act.

3. On October 20, 2014, a final judgment was entered by consent, against Crane, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rules 10b-5, 13a-14, 13b2-1 and 13b2-2 thereunder, and Section 105(c)(7)(B) of the Sarbanes-Oxley Act of 2002, and from aiding and abetting any violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, thereunder, in the civil action entitled Securities and Exchange Commission v. Subaye, Inc. and James T. Crane, Civil Action Number 1:13-cv-03114-PKC, in the United States District Court for the Southern District of New York. Crane also was ordered to pay a civil penalty of $150,000 and was barred from serving as an officer or director of a public company for a period of ten years.

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the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

4. The Commission's complaint contained allegations, which Crane neither admitted nor denied, that, among other things, Crane engaged in a fraudulent scheme that resulted in Subaye's filing materially false and misleading financial statements in the company's annual report on Form 10-K for the fiscal year ended September 30, 2010, and a report on Form 8-K/A filed on January 26, 2011. The Complaint alleged that Crane, as Subaye's Chief Financial Officer, engaged in a number of improper accounting practices, which included circumventing or failing to implement a system of internal accounting controls, falsifying the books, records and accounts of Subaye, providing false documents to Subaye's independent auditors, signing false management representation letters that were provided to the auditors, making materially false or misleading statements to Subaye's accountants, and signing a false certification of Subaye's Form 10-K for 2010. In addition, the complaint alleged that, after being barred from doing so by the Public Company Accounting Oversight Board (PCAOB) in January 2011, Crane remained associated with Subaye, an issuer of U.S. registered stock, in a financial management or accounting capacity.

IV.

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

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

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

B. After ten 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/she works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

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

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

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

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

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

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

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3995 / January 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16336

In the Matter of **GUY ANDREW WILLIAMS,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("the 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 Guy Andrew Williams ("Respondent" or "Guy Williams").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From at least 2002 to 2005, Respondent was an employee for Mathon Management Company, LLC, a company that was registered with the Commission as an investment adviser from March 2, 2004 to February 2011. Respondent's title was "Salesperson." Respondent is 42 years old and is currently incarcerated at the Federal Correctional Institution at Safford in Safford, Arizona.

B. ENTRY OF RESPONDENT'S CRIMINAL CONVICTION

2. On June 28, 2013, Respondent was found guilty, after a jury trial, of conspiracy to commit mail and wire fraud, mail fraud, wire fraud, and transactional money laundering, all in violation of Title 18 United States Code, Sections 1349, 1341, 1343, and 1957(a) before the United States District Court for the District of Arizona. *United States v. Guy Andrew. Williams*, Case No. CR 09-01492-002-PHX-ROS. On September 30, 2013, he was sentenced to a prison term of one hundred fifty (150) months, followed by three years of supervised release.

3. The counts of the criminal indictment to which Respondent was found guilty alleged, *inter alia*, that from 2002 to 2005, Respondent and others operating through Mathon-related entities, falsely promised investors that Mathon could earn high-yield rates of return for investors by making short-term, high-interest hard money loans to borrowers, and using repayment of principal and interest on those loans to pay investor returns, when the Respondent knew that the loans were in default or non-performing. The Respondent concealed from the investors that the loans were in default, non-performing and/or otherwise incapable of generating high rates of returns on the purported "investments" as the Respondent represented. The Respondent also repaid earlier investors with funds from later investors and unlawfully enriched himself through excessive origination fees, management fees, and other means. Specifically, the Respondent took $5,862,064 from victim investors as purported compensation and other financial remuneration.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act.

IV

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

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

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

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

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

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

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3996 / January 13, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16337

In the Matter of

BRENT F. WILLIAMS,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("the 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 Brent F. Williams ("Respondent" or "Brent F. Williams").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From at least 2003 to 2005, Respondent was the Chief Operating Officer of Mathon Management Company, LLC, a company that was registered with the Commission as an investment adviser from March 2, 2004 to February 2011. Respondent is 66 years old and is currently incarcerated at the Federal Correctional Institution at La Tuna in Anthony, Texas.

B. ENTRY OF RESPONDENT'S CRIMINAL CONVICTION

2. On June 28, 2013, Respondent was found guilty, after a jury trial, of conspiracy to commit mail and wire fraud, mail fraud, wire fraud, and transactional money laundering, all in violation of Title 18 United States Code, Sections 1349, 1341, 1343, and 1957(a) before the United States District Court for the District of Arizona. *United States v. Brent F. Williams*, Case No. CR 09-01492-003-PHX-ROS. On September 30, 2013, he was sentenced to a prison term of ninety (90) months, followed by three years of supervised release.

3. The counts of the criminal indictment to which Respondent was found guilty alleged, *inter alia,* that from 2002 to 2005, Respondent and others operating through Mathon-related entities, falsely promised investors that Mathon could earn high-yield rates of return for investors by making short-term, high-interest hard money loans to borrowers, and using repayment of principal and interest on those loans to pay investor returns, when the Respondent knew that the loans were in default or non-performing. The Respondent concealed from the investors that the loans were in default, non-performing and/or otherwise incapable of generating high rates of returns on the purported "investments" as the Respondent represented. The Respondent also repaid earlier investors with funds from later investors and unlawfully enriched himself through excessive origination fees, management fees, and other means. Specifically, the Respondent took $623,888 from victim investors as purported compensation and other financial remuneration.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act.

IV

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

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

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

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

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

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

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-74057/January 15, 2015]

Order Making Fiscal Year 2015 Annual Adjustments to Transaction Fee Rates

I. Background

Section 31 of the Securities Exchange Act of 1934 ("Exchange Act") requires each national securities exchange and national securities association to pay transaction fees to the Commission.[1] Specifically, Section 31(b) requires each national securities exchange to pay to the Commission fees based on the aggregate dollar amount of sales of certain securities ("covered sales") transacted on the exchange.[2] Section 31(c) requires each national securities association to pay to the Commission fees based on the aggregate dollar amount of covered sales transacted by or through any member of the association other than on an exchange.[3]

Section 31 of the Exchange Act requires the Commission to annually adjust the fee rates applicable under Sections 31(b) and (c) to a uniform adjusted rate.[4] Specifically, the Commission must adjust the fee rates to a uniform adjusted rate that is reasonably likely to produce aggregate fee collections (including assessments on security futures transactions) equal to the regular appropriation to the Commission for the applicable fiscal year.[5]

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1 15 U.S.C. 78ee.

2 15 U.S.C. 78ee(b).

3 15 U.S.C. 78ee(c).

4 In some circumstances, the SEC also must make a mid-year adjustment to the fee rates applicable under Sections 31(b) and (c).

5 15 U.S.C. § 78ee(j)(1) (the Commission must adjust the rates under Sections 31(b) and (c) to a "uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales for such fiscal year, is

The Commission is required to publish notice of the new fee rates under Section 31 not later than 30 days after the date on which an Act making a regular appropriation for the applicable fiscal year is enacted.[6] On December 16, 2014, the President signed the Consolidated and Further Continuing Appropriations Act, 2015, providing $1,500,000,000 in funds to the SEC for fiscal year 2015.

II. Fiscal Year 2015 Annual Adjustment to the Fee Rate

The new fee rate is determined by (1) subtracting the sum of fees estimated to be collected prior to the effective date of the new fee rate[7] and estimated assessments on security futures transactions to be collected under Section 31(d) of the Exchange Act for all of fiscal year 2015[8] from an amount equal to the regular appropriation to the Commission for fiscal year 2015, and (2) dividing the difference by the estimated aggregate dollar amount of sales for the remainder of the fiscal year following the effective date of the new fee rate.

reasonably likely to produce aggregate fee collections under [Section 31] (including assessments collected under [Section 31(d)]) that are equal to the regular appropriation to the Commission by Congress for such fiscal year.").

6 15 U.S.C. § 78ee(g).

7 The sum of fees to be collected prior to the effective date of the new fee rate is determined by applying the current fee rate to the dollar amount of covered sales prior to the effective date of the new fee rate. The exchanges and FINRA have provided data on the dollar amount of covered sales through November 30, 2014. To calculate the dollar amount of covered sales from that date to the effective date of the new fee rate, the Division is using the same methodology it developed in consultation with the Congressional Budget Office ("CBO") and the Office of Management and Budget ("OMB") to estimate the dollar amount of covered sales in prior fiscal years. An explanation of the methodology appears in Appendix A.

8 The Division is using the same methodology it has used previously to estimate assessments on security futures transactions to be collected in fiscal year 2015. An explanation of the methodology appears in Appendix A.

The regular appropriation to the Commission for fiscal year 2015 is $1,500,000,000. The Commission estimates that it will collect $614,005,586 in fees for the period prior to the effective date of the new fee rate and $58,863 in assessments on round turn transactions in security futures products during all of fiscal year 2015.[9] Using a methodology for estimating the aggregate dollar amount of sales for the remainder of fiscal year 2015 (developed after consultation with the CBO and OMB), the Commission estimates that the aggregate dollar amount of covered sales for the remainder of fiscal year 2015 to be $48,121,838,283,138.

As described above, the uniform adjusted rate is computed by dividing the residual fees to be collected of $885,935,551 by the estimate of the aggregate dollar amount of covered sales for the remainder of fiscal year 2015 of $48,121,838,283,138. This results in a uniform adjusted rate for fiscal year 2015 of $18.40 per million.[10]

III. Effective Date of the Uniform Adjusted Rate

Under Section 31(j)(4)(A) of the Exchange Act, the fiscal year 2015 annual adjustments to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall take effect on the later of October 1, 2014, or 60 days after the date on which a regular appropriation to the Commission for fiscal year 2015 is enacted.[11] The regular appropriation to the Commission for fiscal year 2015 was

9 The estimate of fees to be collected prior to the effective date of the new fee rate is determined by applying the current fee rate to the dollar amount of covered sales prior to the effective date of the new fee rate.

10 Appendix A shows the purely arithmetic process of calculating the fiscal year 2015 annual adjustment. The appendix also includes the data used by the Commission in making this adjustment.

11 15 U.S.C. § 78ee(j)(4)(A).

nacted on December 16, 2014, and accordingly, the new fee rates applicable under Sections 31(b) and (c) of the Exchange Act will take effect on February 14, 2015.

IV. Conclusion

Accordingly, pursuant to Section 31 of the Exchange Act,

IT IS HEREBY ORDERED that the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall be $18.40 per $1,000,000 effective on February 14, 2015.

By the Commission.

Brent J. Fields
Secretary

APPENDIX A

This appendix provides the formula for determining the annual adjustment to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act for fiscal year 2015. Section 31 of the Exchange Act requires the fee rates to be adjusted so that it is reasonably likely that the Commission will collect aggregate fees equal to its regular appropriation for fiscal year 2015.

To make the adjustment, the Commission must project the aggregate dollar amount of covered sales of securities on the securities exchanges and certain over-the-counter markets over the course of the year. The fee rate equals the ratio of the Commission's regular appropriation for fiscal year 2015 (less the sum of fees to be collected during fiscal year 2015 prior to the effective date of the new fee rate and aggregate assessments on security futures transactions during all of fiscal year 2015) to the estimated aggregate dollar amount of covered sales for the remainder of the fiscal year following the effective date of the new fee rate.

For 2015, the Commission has estimated the aggregate dollar amount of covered sales by projecting forward the trend established in the previous decade. More specifically, the dollar amount of covered sales was forecasted for months subsequent to November 2014, the last month for which the Commission has data on the dollar volume of covered sales.[12]

The following sections describe this process in detail.

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12 To determine the availability of data, the Commission compares the date of the appropriation with the date the transaction data are due from the exchanges (10 business days after the end of the month). If the business day following the date of the appropriation is equal to or subsequent to the date the data are due from the exchanges, the Commission uses these data. The appropriation was signed on December 16, 2014. The first business day after this date was December 17, 2014. Data for November were due from the exchanges on December 12. So the Commission used November 2014 and earlier data to forecast volume for December 2014 and later months.

A. Baseline estimate of the aggregate dollar amount of covered sales for fiscal year 2015.

First, calculate the average daily dollar amount of covered sales (ADS) for each month in the sample (November 2004 – November 2014). The monthly total dollar amount of covered sales (exchange plus certain over-the-counter markets) is presented in column C of Table A.

Next, calculate the change in the natural logarithm of ADS from month to month. The average monthly percentage growth of ADS over the entire sample is 0.0068 and the standard deviation is 0.123. Assuming the monthly percentage change in ADS follows a random walk, calculating the expected monthly percentage growth rate for the full sample is straightforward. The expected monthly percentage growth rate of ADS is 1.44%.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for November 2014 ($276,290,217,978) to forecast ADS for December 2014 ($280,278,562,848 = $276,290,217,978 x 1.0144).[13] Multiply by the number of trading days in December 2014 (22) to obtain a forecast of the total dollar volume for the month ($6,166,128,382,663). Repeat the method to generate forecasts for subsequent months.

The forecasts for total dollar volume of covered sales are in column G of Table A. The following is a more formal (mathematical) description of the procedure:

1. Divide each month's total dollar volume (column C) by the number of trading days in that month (column B) to obtain the average daily dollar volume (ADS, column D).

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[13] The value 1.0144 has been rounded. All computations are done with the unrounded value.

For each month t, calculate the change in ADS from the previous month as

$\Delta_t = \log(ADS_t / ADS_{t-1})$, where log (x) denotes the natural logarithm of x.

3. Calculate the mean and standard deviation of the series $\{\Delta_1, \Delta_2, \ldots, \Delta_{120}\}$. These are given by μ = 0.0068 and σ = 0.123, respectively.

4. Assume that the natural logarithm of ADS follows a random walk, so that Δ_s and Δ_t are statistically independent for any two months s and t.

5. Under the assumption that Δ_t is normally distributed, the expected value of ADS_t / ADS_{t-1} is given by $\exp(\mu + \sigma^2/2)$, or on average $ADS_t = 1.0144 \times ADS_{t-1}$.

6. For December 2014, this gives a forecast ADS of 1.0144 × \$276,290,217,978 = \$280,278,562,848. Multiply this figure by the 22 trading days in December 2014 to obtain a total dollar volume forecast of \$6,166,128,382,663.

7. For January 2015, multiply the December 2014 ADS forecast by 1.0144 to obtain a forecast ADS of \$284,324,480,857. Multiply this figure by the 20 trading days in January 2015 to obtain a total dollar volume forecast of \$5,686,489,617,137.

8. Repeat this procedure for subsequent months.

B. Using the forecasts from A to calculate the new fee rate.

1. Use Table A to estimate fees collected for the period 10/1/14 through 2/13/15. The projected aggregate dollar amount of covered sales for this period is $27,783,058,208,169. Actual and projected fee collections at the current fee rate of 0.0000221 are $614,005,586.

2. Estimate the amount of assessments on security futures products collected from 10/1/14 through 9/30/15 to be $58,863 by projecting a 1.44% monthly increase from a base of $4,707 in November 2014.

3. Subtract the amounts $614,005,586 and $58,863 from the target offsetting collection amount set by Congress of $1,500,000,000 leaving $885,935,551 to be collected on dollar volume for the period 2/14/15 through 9/30/15.

4. Use Table A to estimate dollar volume for the period 2/14/15 through 9/30/15. The estimate is $48,121,838,283,138. Finally, compute the fee rate required to produce the additional $885,935,551 in revenue. This rate is $885,935,551 divided by $48,121,838,283,138 or 0.00001841026.

5. Round the result to the seventh decimal point, yielding a rate of .0000184 (or $18.40 per million).

Table A. Baseline estimate of the aggregate dollar amount of sales. Fee rate calculation.	
a. Baseline estimate of the aggregate dollar amount of sales, 10/01/2014 to 01/31/2015 ($Millions)	24,898,770
b. Baseline estimate of the aggregate dollar amount of sales, 02/01/2015 to 02/13/2015 ($Millions)	2,884,288
c. Baseline estimate of the aggregate dollar amount of sales, 02/14/2015 to 02/28/2015 ($Millions)	2,595,859
d. Baseline estimate of the aggregate dollar amount of sales, 03/01/2015 to 09/30/2015 ($Millions)	45,525,979
e. Estimated collections in assessments on security futures products in fiscal year 2015 ($Millions)	0.059
f. Implied fee rate (($1,500,000,000 - $22.10*(a+b) - e) / (c+d)	$18.40

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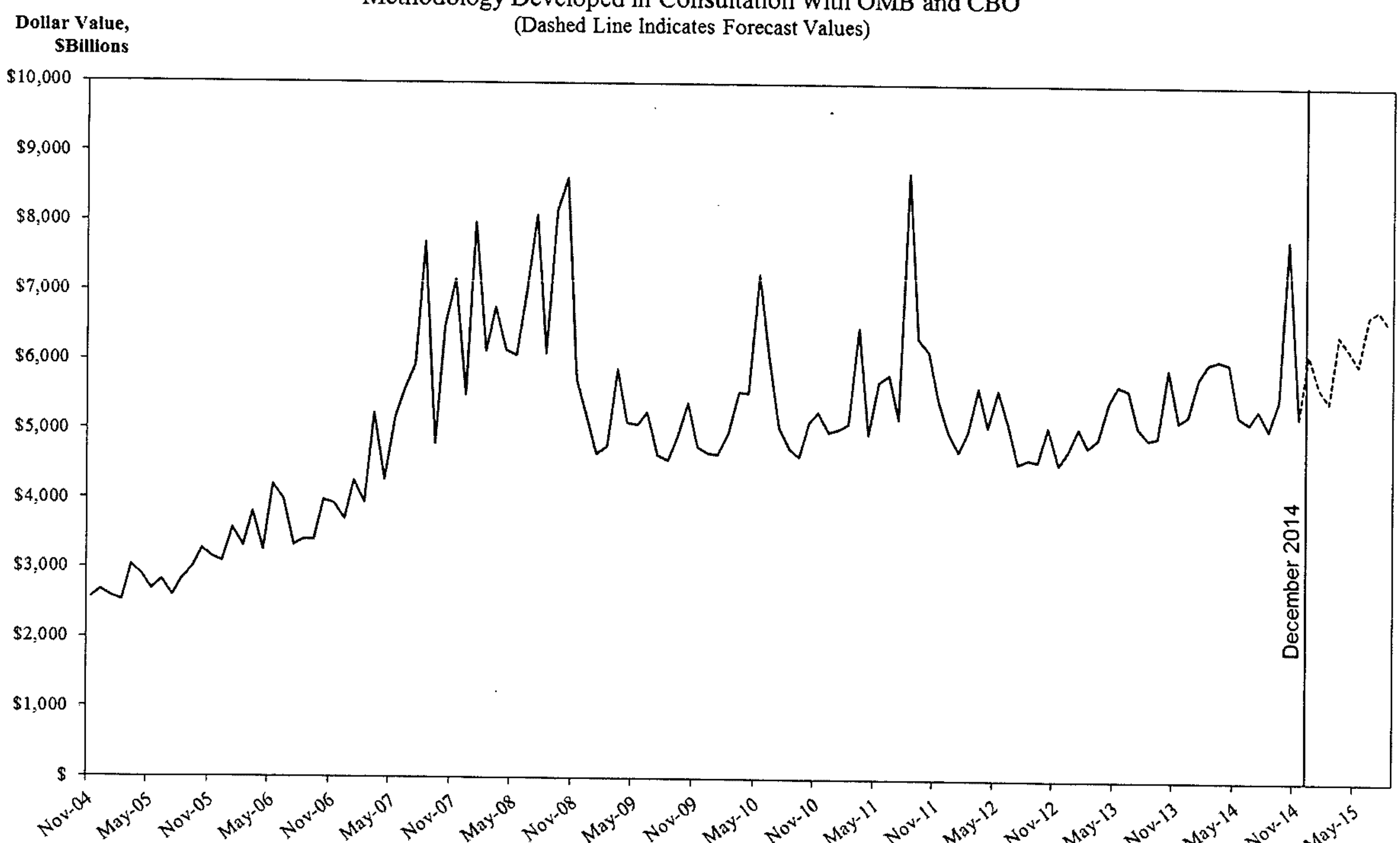
(A) Month	(B) # of Trading Days in Month	(C) Total Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in Natural Logarithm of ADS	(F) Forecast ADS	(G) Forecast Total Dollar Amount of Sales
Nov-04	21	2,577,513,374,160	122,738,732,103	-		
Dec-04	22	2,673,532,981,863	121,524,226,448	-0.010		
Jan-05	20	2,581,847,200,448	129,092,360,022	0.060		
Feb-05	19	2,532,202,408,589	133,273,810,978	0.032		
Mar-05	22	3,030,474,897,226	137,748,858,965	0.033		
Apr-05	21	2,906,386,944,434	138,399,378,306	0.005		
May-05	21	2,697,414,503,460	128,448,309,689	-0.075		
Jun-05	22	2,825,962,273,624	128,452,830,619	0.000		
Jul-05	20	2,604,021,263,875	130,201,063,194	0.014		
Aug-05	23	2,846,115,585,965	123,744,155,912	-0.051		
Sep-05	21	3,009,640,645,370	143,316,221,208	0.147		
Oct-05	21	3,279,847,331,057	156,183,206,241	0.086		
Nov-05	21	3,163,453,821,548	150,640,658,169	-0.036		
Dec-05	21	3,090,212,715,561	147,152,986,455	-0.023		
Jan-06	20	3,573,372,724,766	178,668,636,238	0.194		
Feb-06	19	3,314,259,849,456	174,434,728,919	-0.024		
Mar-06	23	3,807,974,821,564	165,564,122,677	-0.052		
Apr-06	19	3,257,478,138,851	171,446,217,834	0.035		
May-06	22	4,206,447,844,451	191,202,174,748	0.109		
Jun-06	22	3,995,113,357,316	181,596,061,696	-0.052		
Jul-06	20	3,339,658,009,357	166,982,900,468	-0.084		
Aug-06	23	3,410,187,280,845	148,269,012,211	-0.119		
Sep-06	20	3,407,409,863,673	170,370,493,184	0.139		
Oct-06	22	3,980,070,216,912	180,912,282,587	0.060		
Nov-06	21	3,933,474,986,969	187,308,332,713	0.035		
Dec-06	20	3,715,146,848,695	185,757,342,435	-0.008		
Jan-07	20	4,263,986,570,973	213,199,328,549	0.138		
Feb-07	19	3,946,799,860,532	207,726,308,449	-0.026		
Mar-07	22	5,245,051,744,090	238,411,442,913	0.138		
Apr-07	20	4,274,665,072,437	213,733,253,622	-0.109		
May-07	22	5,172,568,357,522	235,116,743,524	0.095		
Jun-07	21	5,586,337,010,802	266,016,048,133	0.123		
Jul-07	21	5,938,330,480,139	282,777,641,911	0.061		
Aug-07	23	7,713,644,229,032	335,375,836,045	0.171		
Sep-07	19	4,805,676,596,099	252,930,347,163	-0.282		
Oct-07	23	6,499,651,716,225	282,593,552,879	0.111		
Nov-07	21	7,176,290,763,989	341,728,131,619	0.190		
Dec-07	20	5,512,903,594,564	275,645,179,728	-0.215		
Jan-08	21	7,997,242,071,529	380,821,051,025	0.323		
Feb-08	20	6,139,080,448,887	306,954,022,444	-0.216		
Mar-08	20	6,767,852,332,381	338,392,616,619	0.098		
Apr-08	22	6,150,017,772,735	279,546,262,397	-0.191		

(A) Month	(B) # of Trading Days in Month	(C) Total Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in Natural Logarithm of ADS	(F) Forecast ADS	(G) Forecast Total Dollar Amount of Sales
May-08	21	6,080,169,766,807	289,531,893,657	0.035		
Jun-08	21	6,962,199,302,412	331,533,300,115	0.135		
Jul-08	22	8,104,256,787,805	368,375,308,537	0.105		
Aug-08	21	6,106,057,711,009	290,764,652,905	-0.237		
Sep-08	21	8,156,991,919,103	388,428,186,624	0.290		
Oct-08	23	8,644,538,213,244	375,849,487,532	-0.033		
Nov-08	19	5,727,998,341,833	301,473,596,939	-0.221		
Dec-08	22	5,176,041,317,640	235,274,605,347	-0.248		
Jan-09	20	4,670,249,433,806	233,512,471,690	-0.008		
Feb-09	19	4,771,470,184,048	251,130,009,687	0.073		
Mar-09	22	5,885,594,284,780	267,527,012,945	0.063		
Apr-09	21	5,123,665,205,517	243,984,057,406	-0.092		
May-09	20	5,086,717,129,965	254,335,856,498	0.042		
Jun-09	22	5,271,742,782,609	239,624,671,937	-0.060		
Jul-09	22	4,659,599,245,583	211,799,965,708	-0.123		
Aug-09	21	4,582,102,295,783	218,195,347,418	0.030		
Sep-09	21	4,929,155,364,888	234,721,684,042	0.073		
Oct-09	22	5,410,025,301,030	245,910,240,956	0.047		
Nov-09	20	4,770,928,103,032	238,546,405,152	-0.030		
Dec-09	22	4,688,555,303,171	213,116,150,144	-0.113		
Jan-10	19	4,661,793,708,648	245,357,563,613	0.141		
Feb-10	19	4,969,848,578,023	261,570,977,791	0.064		
Mar-10	23	5,563,529,823,621	241,892,601,027	-0.078		
Apr-10	21	5,546,445,874,917	264,116,470,234	0.088		
May-10	20	7,260,430,376,294	363,021,518,815	0.318		
Jun-10	22	6,124,776,349,285	278,398,924,967	-0.265		
Jul-10	21	5,058,242,097,334	240,868,671,302	-0.145		
Aug-10	22	4,765,828,263,463	216,628,557,430	-0.106		
Sep-10	21	4,640,722,344,586	220,986,778,314	0.020		
Oct-10	21	5,138,411,712,272	244,686,272,013	0.102		
Nov-10	21	5,279,700,881,901	251,414,327,710	0.027		
Dec-10	22	4,998,574,681,208	227,207,940,055	-0.101		
Jan-11	20	5,043,391,121,345	252,169,556,067	0.104		
Feb-11	19	5,114,631,590,581	269,191,136,346	0.065		
Mar-11	23	6,499,355,385,307	282,580,668,926	0.049		
Apr-11	20	4,975,954,868,765	248,797,743,438	-0.127		
May-11	21	5,717,905,621,053	272,281,220,050	0.090		
Jun-11	22	5,820,079,494,414	264,549,067,928	-0.029		
Jul-11	20	5,189,681,899,635	259,484,094,982	-0.019		
Aug-11	23	8,720,566,877,109	379,155,081,613	0.379		
Sep-11	21	6,343,578,147,811	302,075,149,896	-0.227		
Oct-11	21	6,163,272,963,688	293,489,188,747	-0.029		
Nov-11	21	5,493,906,473,584	261,614,593,980	-0.115		
Dec-11	21	5,017,867,255,600	238,946,059,790	-0.091		
Jan-12	20	4,726,522,206,487	236,326,110,324	-0.011		

(A) Month	(B) # of Trading Days in Month	(C) Total Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in Natural Logarithm of ADS	(F) Forecast ADS	(G) Forecast Total Dollar Amount of Sales
Feb-12	20	5,011,862,514,132	250,593,125,707	0.059		
Mar-12	22	5,638,847,967,025	256,311,271,228	0.023		
Apr-12	20	5,084,239,396,560	254,211,969,828	-0.008		
May-12	22	5,611,638,053,374	255,074,456,972	0.003		
Jun-12	21	5,121,896,896,362	243,899,852,208	-0.045		
Jul-12	21	4,567,519,314,374	217,500,919,732	-0.115		
Aug-12	23	4,621,597,884,730	200,939,038,467	-0.079		
Sep-12	19	4,598,499,962,682	242,026,313,825	0.186		
Oct-12	21	5,095,175,588,310	242,627,408,967	0.002		
Nov-12	21	4,547,882,974,292	216,565,855,919	-0.114		
Dec-12	20	4,744,922,754,360	237,246,137,718	0.091		
Jan-13	21	5,079,603,817,496	241,885,896,071	0.019		
Feb-13	19	4,800,663,527,089	252,666,501,426	0.044		
Mar-13	20	4,917,701,839,870	245,885,091,993	-0.027		
Apr-13	22	5,451,358,637,079	247,789,028,958	0.008		
May-13	22	5,681,788,831,869	258,263,128,721	0.041		
Jun-13	20	5,623,545,462,226	281,177,273,111	0.085		
Jul-13	22	5,083,861,509,754	231,084,614,080	-0.196		
Aug-13	22	4,925,611,193,095	223,891,417,868	-0.032		
Sep-13	20	4,959,197,626,713	247,959,881,336	0.102		
Oct-13	23	5,928,804,028,970	257,774,088,216	0.039		
Nov-13	20	5,182,024,612,049	259,101,230,602	0.005		
Dec-13	21	5,265,282,994,173	250,727,761,627	-0.033		
Jan-14	21	5,808,700,114,288	276,604,767,347	0.098		
Feb-14	19	6,018,926,931,054	316,785,627,950	0.136		
Mar-14	21	6,068,617,342,988	288,981,778,238	-0.092		
Apr-14	21	6,013,948,953,528	286,378,521,597	-0.009		
May-14	21	5,265,594,447,318	250,742,592,729	-0.133		
Jun-14	21	5,159,506,989,669	245,690,809,032	-0.020		
Jul-14	22	5,364,099,567,460	243,822,707,612	-0.008		
Aug-14	21	5,075,332,147,677	241,682,483,223	-0.009		
Sep-14	21	5,507,943,363,243	262,283,017,297	0.082		
Oct-14	23	7,796,638,035,879	338,984,262,430	0.257		
Nov-14	19	5,249,514,141,576	276,290,217,978	-0.205		
Dec-14	22				280,278,562,848	6,166,128,382,663
Jan-15	20				284,324,480,857	5,686,489,617,137
Feb-15	19				288,428,803,091	5,480,147,258,736
Mar-15	22				292,592,372,637	6,437,032,198,017
Apr-15	21				296,816,044,750	6,233,136,939,740
May-15	20				301,100,687,030	6,022,013,740,599
Jun-15	22				305,447,179,604	6,719,837,951,283
Jul-15	22				309,856,415,301	6,816,841,136,632
Aug-15	21				314,329,299,842	6,600,915,296,676
Sep-15	21				318,866,752,018	6,696,201,792,368

Figure A.

Aggregate Dollar Amount of Sales Subject to Exchange Act Sections 31(b) and 31(c)[1]
Methodology Developed in Consultation With OMB and CBO
(Dashed Line Indicates Forecast Values)



[1]Forecasted line is not smooth because the number of trading days varies by month.

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74073; File No. SR-OCC-2014-812)

January 15, 2015

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Advance Notice Concerning Extended and Overnight Trading Sessions

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[1] ("Payment, Clearing and Settlement Supervision Act") and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934[2] notice is hereby given that on December 12, 2014, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the advance notice as 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 to its operations concerning the clearance of confirmed trades executed in extended and overnight trading sessions (hereinafter, "overnight trading sessions") offered by exchanges for which OCC provides clearance and settlement services.

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

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

3 OCC initially filed a similar advance notice on September 17, 2014. Securities Exchange Act Release No. 73343 (October 14, 2014), 79 FR 62684 (October 20, 2014), (SR-OCC-2014-805). OCC withdrew that advance notice on October 28, 2104. Securities Exchange Act Release No. 73710 (December 1, 2014), 79 FR 72225 (December 5, 2014), (SR-OCC-2014-805).

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 these statements.

(A) 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.

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

Description of Change

This advance notice is being filed in connection with a proposed change to OCC's operations concerning the clearance of confirmed trades executed in overnight trading sessions offered by exchanges for which OCC provides clearance and settlement services. OCC currently clears overnight trading activity for CBOE Futures Exchange, LLC ("CFE").[4] The total number of trades submitted to OCC from overnight trading sessions is nominal, typically less than 3,000 contracts per session. However, OCC has recently observed an industry trend whereby exchanges are offering overnight trading sessions beyond traditional hours. Exchanges offering overnight trading sessions have indicated

4 ELX Futures LP ("ELX") previously submitted overnight trading activity to OCC, but currently does not submit trades from overnight trading sessions to OCC. OCC will re-evaluate ELX's risk controls in the event ELX re-institutes its overnight trading sessions.

that such sessions benefit market participants by providing additional price transparency and hedging opportunities for products traded in such sessions, which, in turn, promotes market stability.[5] In light of this trend, OCC proposes to implement a framework for clearing trades executed in such sessions that includes: 1) qualification criteria used to approve clearing members for overnight trading sessions, 2) systemic controls to identify trades executed during overnight trading sessions by clearing members not approved for such sessions, 3) enhancements to OCC's overnight monitoring of trades submitted by exchanges during overnight trading sessions, 4) enhancements to OCC's credit controls with respect to monitoring clearing members' credit risk during overnight trading sessions, including procedures for contacting an exchange offering overnight trading sessions in order to invoke use of the exchange's kill switch, and 5) taking appropriate disciplinary action against clearing members who attempt to clear during overnight trading session without first obtaining requisite approvals. These changes (described in greater detail below) are designed to reduce and mitigate the risks associated with clearing trades executed in overnight trading sessions. In addition, the only products that will be eligible for overnight trading sessions are index options and index futures products.

OCC's standards for determining whether to provide clearing services for overnight trading sessions offered by an exchange and the implementation of a framework are designed to work in conjunction with the risk controls of the exchanges that offer overnight trading sessions. OCC would confirm an exchange's risk controls as well as its staffing levels as they relate to overnight trading sessions to determine if OCC

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5 *See* CFE-2014-010 at http://cfe.cboe.com/publish/CFErulefilings/SR-CFE-2014-010.pdf.

may reasonably rely on such risk controls to reduce risk presented to OCC by the exchange's overnight trading sessions. Such exchange risk controls will consist of: 1) price reasonability checks, 2) controls to prevent orders from being executed beyond a certain percentage (determined by the exchange) from the initial execution price, 3) activity based protections which focus on risk beyond price, such as a high number of trades occurring in a set period of time, and 4) kill switch capabilities, which may be initiated by the exchange and can cancel all open quotes or all orders of a particular participant. OCC believes that confirming the existence of applicable pre-trade risk controls as well as overnight staffing at the relevant exchanges is essential to mitigating risks presented to OCC from overnight trading sessions.[6] Providing clearing services to exchanges offering such sessions is consistent with OCC's mission to provide market participants with clearing and risk management solutions that respond to changes in the marketplace and may result in increased cleared contract volume.

Qualification Criteria

In order to mitigate risks associated with clearing for overnight trading sessions, clearing members that participate in such trading sessions would be required to provide contact information to OCC for operational and risk personnel available to be contacted by OCC during such sessions. In addition, OCC would require that clearing members

6 Comparable controls are applied to futures and future option trades executed in overnight trading sessions currently cleared by OCC, although such controls have been implemented by clearing futures commission merchants ("clearing FCMs") pursuant to Commodity Futures Trading Commission ("CFTC") Regulation 1.73, which also requires such clearing FCMs to monitor for adherence to such controls during regular and overnight trading sessions. OCC believes that it may reasonably rely on such regulation to reduce risk presented to OCC during futures markets overnight trading sessions. *See* 17 CFR 1.73. OCC also confirmed CFE maintains kill switch capabilities.

participating in an overnight trading session to post additional margin in a designated account in order to mitigate against the risk that OCC cannot draft a clearing member's bank account during an overnight trading session.[7] OCC would also adopt a procedure whereby, on a quarterly basis, it confirms its record of clearing members eligible for overnight trading sessions with a similar record maintained by exchanges offering such overnight trading sessions.

With respect to providing operational and risk contacts, under OCC Rule 201, each clearing member is required to maintain facilities for conducting business with OCC, and a representative of the clearing member authorized in the name of the clearing member to take all action necessary for conducting business with OCC is required to be available at the facility during such hours as may be specified from time-to-time by OCC. Similarly, OCC Rules 214(c) and (d) require clearing members to ensure that they have the appropriate number of qualified personnel and to maintain the ability to process anticipated volumes and values of transactions. OCC would use this existing authority to require clearing members trading during overnight trading sessions to maintain operational and risk staff that may be contacted by OCC during such sessions.

OCC would impose upon clearing members qualified to participate in overnight trading sessions additional margin requirement in an amount of the lesser of $10 million or 10% of the clearing member's net capital ("Additional Margin"), which would be equal to the first monitoring risk threshold (described below) and which would be collected the morning before each overnight trading sessions. Clearing members must

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7 Clearing members will be required to designate a firm account to ensure that OCC has a general lien on the assets in the account and can use them to satisfy any obligation of the clearing member to OCC.

identify the proprietary account that would be charged the Additional Margin amount. The Additional Margin requirement is intended to provide OCC with additional margin assets should a clearing member's credit risk increase during overnight trading sessions.[8] OCC proposes to adopt a process whereby each morning OCC Financial Risk Management staff would assess the Additional Margin requirement against clearing members eligible to participate in overnight trading sessions. Clearing members that do not have sufficient excess margin on deposit with OCC to meet the Additional Margin amount would be required to deposit additional funds with OCC to satisfy the Additional Margin requirement.[9] This process would be adopted under existing rule authority.

Moreover, OCC also would confirm that an exchange offering overnight trading sessions has adopted a procedure whereby such exchange would contact OCC when a trader requests trading privileges during overnight trading sessions. The purpose of this contact is to verify that the trader's clearing firm (*i.e.,* the OCC clearing member) is approved for overnight trading sessions. If the applicable OCC clearing member is not approved for overnight trading sessions, then the clearing member must receive OCC's approval for overnight trading sessions, or the exchange would not provide the trader trading privileges during overnight trading sessions. Moreover, OCC would confirm that an exchange offering overnight trading sessions has implemented a procedure to periodically (i.e., quarterly) validate its record of approved clearing firms against OCC's

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8 Clearing members approved for overnight trading sessions who do not meet the Additional Margin requirement for a given overnight trading session would be treated like a clearing member not approved overnight trading sessions, as described below.

9 Under OCC Rule 601, OCC has the discretion to fix the margin requirement for any account at an amount that it deems necessary or appropriate under the circumstances to protect the interests of clearing members, OCC and the public.

record of clearing members approved for overnight trading sessions. Any discrepancies between the two records would be promptly resolved by either the clearing member obtaining approval at OCC for overnight trading sessions, or by the exchange revoking the clearing firm's trading privileges for overnight trading sessions.

Systemic Controls

OCC plans to implement system changes so that trades submitted to OCC during overnight trading sessions that have been executed by clearing members not approved for such trading sessions would be reviewed by OCC staff after acceptance but before being processed (each such trade a [sic] being a "Reviewed Trade"). OCC would contact the submitting exchange regarding each Reviewed Trade in order to determine if the trade is a valid trade. If the exchange determines that the Reviewed Trade was in error such that, as provided in Article VI, Section 7(c), new or revised trade information is required to properly clear the transaction, OCC expects the exchange would instruct OCC to disregard or "bust" the trade. If the exchange determines that the Reviewed Trade was not in error, then OCC would clear the Reviewed Trade and take appropriate disciplinary action against the non-approved clearing member, as described below. OCC believes that clearing the Reviewed Trade is appropriate in order to avoid potentially harming the clearing member approved for overnight trading sessions that is on the opposite side of the transaction.

Overnight Monitoring

OCC plans to implement additional overnight monitoring in order to better monitor clearing members' credit risk during overnight trading sessions. Such monitoring of credit risk is similar to existing OCC practices concerning futures cleared during overnight trading hours and includes automated processes within ENCORE to measure, by clearing member: (i) the aggregate mark-to-market amounts of a clearing member's positions, including positions created during overnight trading, based on current prices using OCC's Portfolio Revaluation system, (ii) the aggregate incremental margin produced by all positions resulting from transactions executed during overnight trading, and (iii) with respect to options cleared during overnight trading hours, the aggregate net trade premium positions resulting from trades executed during overnight trading (each of these measures being a "Credit Risk Number"). Hourly credit reports would be generated by ENCORE containing the Credit Risk Numbers expressed in terms of both dollars and, except for the mark-to-market position values, as a percentage of net capital for each clearing member trading during overnight trading sessions. The Credit Risk Numbers are the same information used by OCC staff to evaluate clearing member exposure during regular trading hours and, in addition to OCC's knowledge of its clearing members' businesses, are effective measures of the risk presented to OCC by each clearing member. OCC's Operations staff would review such reports as they are generated and, in the event that any of the Credit Risk Numbers for positions established by a clearing member during an overnight trading session exceeds established thresholds, staff would alert OCC's Market Risk staff[10] of the exceedance in accordance with established procedures, as described below. Market Risk staff would follow a standardized process concerning such exceedances, including escalation to OCC's management, if required by such process. Given the nominal volume of trades executed

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10 OCC's Member Services staff will also receive alerts in order to contact clearing members as may be necessary.

in overnight trading sessions that are presently submitted for clearance, no changes in current staffing levels that support overnight clearing activities is contemplated at this time, however, such staffing levels will be periodically assessed and adjusted, as appropriate. As part of the overnight clearing activities, OCC has, however, designated an on-call Market Risk duty officer who would be responsible for reviewing issues that arise when clearing for overnight trading session and determining what measures to be taken as well as additional escalation, if necessary.

With respect to OCC's escalation thresholds, if any Credit Risk Number of a clearing member approved for overnight trading sessions is $10 million or more, or any Credit Risk Number equals 10% or more of the clearing member's net capital, OCC's Operations staff would be required to provide e-mail notification to Market Risk and Member Services staff. If any Credit Risk Number of a clearing member not approved for overnight trading sessions is $10 million or more, or any Credit Risk Number equals 10% or more of the clearing member's net capital, OCC's Operations would also notify Market Risk and Member Services staff as well as its senior management. Such departments would take action to prevent additional trading by the non-approved clearing member, including contacting the exchange to invoke use of the exchange's kill switch.

If any Credit Risk Number of a clearing member approved for overnight trading sessions is $50 million or more, or equals 25% or more of the clearing member's net capital, Operations staff would be required to contact, by telephone: (i) Market Risk and Member Services, (ii) the applicable exchange for secondary review, and (iii) the clearing member's designated contacts. The on-call Market Risk duty officer would also consider if additional action is necessary, which may include contacting a designated executive officer in order to issue an intra-day margin call, increase the clearing member's margin requirement in order to prevent the withdrawal of a specified amount of excess margin collateral, if any, the clearing member has on deposit with OCC or contacting the exchange in order to invoke use of its kill switch. If any Credit Risk Number is $75 million or more, or equals 50% or more of the clearing member's net capital, Operations staff would be required to contact, by telephone, Market Risk staff, the on-call Market Risk duty officer and a designated executive officer. Such officer would be responsible for reviewing the situation and determining whether to implement credit controls, which are described in greater detail below and include: issuing an intra-day margin call, increasing a clearing member's margin requirement in order to prevent the withdrawal of a specified amount of excess margin collateral, if any, the clearing member has on deposit with OCC, whether further escalation is warranted in order for OCC to take protective measures pursuant to OCC Rule 305, or contact the exchange in order to invoke use of its kill switch. OCC chose the above described escalation thresholds based on its analysis of historical overnight trading activity across the futures industry. OCC believes that these thresholds strike an appropriate balance between effective risk monitoring and operational efficiency.

Credit Controls

In order to address credit risk associated with trading during overnight trading sessions, and as described above, OCC would collect Additional Margin from clearing members as well as monitor and analyze the impact that positions established during such sessions have on a clearing member's overall exposure. Should the need arise based on threshold breaches described above, and pursuant to OCC Rule 609, OCC may require the deposit of additional margin ("intra-day margin") by any clearing member that increases its incremental risk as a result of trading activity during overnight trading sessions. Accordingly, a clearing member's positions established during such sessions will be incorporated into OCC's intra-day margin process. Should a clearing member's exposure significantly increase while settlement banks are not open to process an intra-day margin call, OCC has the authority under OCC Rule 601 to increase a clearing member's margin requirement which would restrict its ability to withdraw excess margin collateral. The implementation of these measures is discussed more fully below.

In the event that a clearing member's exposure during overnight trading sessions causes a clearing member to exceed OCC's intra-day margin call threshold for overnight night trading sessions, OCC would require the clearing member to deposit intra-day margin equal to the increased incremental risk presented by the clearing member. Specifically, if a clearing member has a total risk charge[11] exceeding 25% (a reduction of the usual figure of 50%), as computed overnight by OCC's STANS system, and a loss of greater than $50,000 from an overnight trading session(s), as computed by Portfolio Revaluation, OCC would initiate an intra-day margin call. OCC would know at approximately 8:30 a.m. (Central Time) if an intra-day margin call on a clearing member would be initiated based on breaches of these thresholds. This "start of business" margin call is in addition to daily margin OCC collects from clearing members pursuant to OCC Rule 605, any intra-day margin call that OCC may initiate as a result of regular trading sessions or special margin call that OCC may initiate.

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11 Total risk charge is a number derived from STANS outputs and is the sum of expected shortfall, stress test charges and any add-on charges computed by STANS. STANS is OCC's proprietary margin methodology.

In addition to, or instead of, requiring additional intra-day margin, OCC Rule 601[12] and OCC's Clearing Member Margin Call Policy work together to authorize Market Risk staff to increase a clearing member's margin requirement which may be in an amount equal to an intra-day margin call.[13] (Any increased margin requirement will remain in effect until the next business day.) This action would immediately prevent clearing members from withdrawing any excess margin collateral (in the amount of the increased margin requirement) the clearing member has deposited with OCC. With respect to clearing trades executed in overnight trading sessions, and in the event OCC requires additional margin from a clearing member, Market Risk staff may use increased margin requirements as a means of collateralizing the increase in incremental risk a clearing member incurred during such sessions without having to wait for banks to open to process an intra-day margin call.[14] Such action may be taken by OCC instead of or in addition to issuing an intra-day margin call depending on the amount of excess margin a clearing member has on deposit with OCC and the amount of the incremental risk presented by such clearing member. The expansion of OCC's intra-day margin call process as described in the preceding paragraph, including OCC's ability to manually increase clearing members' margin requirements, would mitigate the risk that OCC is under-collateralized as a result of overnight trading hours.

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12 In addition, OCC Rule 601 provides OCC with the authority to fix the margin requirement for any account or any class of cleared contracts at such amount as it deems necessary or appropriate under the circumstances to protect the respective interests of clearing members, OCC and the public.

13 Clearing members frequently deposit margin at OCC in excess of requirements.

14 Clearing members would be able to substitute the locked-up collateral during normal time frames (i.e., 6:00 a.m. to 5:00 p.m. (Central Time) for equity securities).

Moreover, a designated executive officer may call an exchange offering overnight trading sessions to invoke use of its kill switch. The kill switch would prevent a clearing member (or the market participant clearing through a clearing member) from executing trades on the exchange during a given overnight trading session or, if needed, stop all trading during a given overnight trading session. Finally, pursuant to OCC Rule 305, the Executive Chairman or the President of OCC, in certain situations, has the authority to impose limitations and restrictions on the transactions, positions and activities of a clearing member. This authority would be used, as needed, in the event a clearing member accumulates significant credit risk during overnight trading sessions, or a clearing member's activities during such trading sessions otherwise warrant OCC taking protective action.

Rule Enforcement Actions

In order to deter clearing members from attempting to participate in overnight trading sessions without authorization as well as appropriately enforce the above described processes, OCC would ensure that any attempt by a clearing member to participate in overnight trading sessions without first obtaining the necessary approval would result in the initiation of a rule enforcement action against such clearing member. As described above, clearing members not approved for overnight trading sessions who trade during such overnight sessions would have their trades reviewed by OCC staff. Clearing members who attempted to participate in overnight trading sessions that did not obtain the necessary approval to do so would be subject to a minor rule violation fine.[15] In addition, if a clearing member's operational or risk contacts for overnight trading

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15 *See* OCC Rule 1201(b).

sessions were unavailable had OCC attempted to contact such individuals, the clearing member would be subject to a minor rule violation fine. OCC has existing processes in place to monitor for clearing member violations of OCC's rules and such processes would also apply to clearing member activity during overnight trading sessions.

Anticipated Effect on and Management of Risk

Clearing transactions executed in overnight trading sessions may increase risk presented to OCC due to the period of time between trade acceptance and settlement, the staffing levels at clearing members during such trading sessions and the deferment of executing intra-day margin calls until banking settlement services are operational. However, OCC would expand its risk management practices in order to mitigate these risks by implementing, and expanding, the various tools discussed above. For example, OCC would enhance its monitoring practices in order to closely monitor clearing members' credit risk from trades placed during overnight trading sessions as well as implement processes so that OCC takes appropriate action when such credit risk exceeds certain limits. OCC would also use its existing authority to require adequate clearing member staffing during such trading sessions, in order to mitigate the operational risk associated with clearing members trading while they are not fully staffed. These risk management functions would work in tandem with risk controls, including the implementation of kill switch capabilities, adopted by the exchanges operating overnight trading sessions or by clearing FCMs, as applicable.

In addition to the above, OCC would adapt existing processes so that such processes can be used to mitigate risk associated with overnight trading sessions. Specifically, OCC would exercise its authority to issue margin calls, and prevent the withdrawal of excess margin on deposit at OCC, as a result of activity during such trading sessions as a means of reducing risk. OCC also would implement a systemic function to identify trades executed during overnight trading sessions by clearing members not approved for such trading sessions for further review prior to allowing such trades to proceed further through OCC's clearance processing, and therefore mitigate the risk of losses from erroneous trades. Finally, OCC would be able to assess the need to take protective action pursuant to OCC Rule 305 as a result of clearing member activity during such sessions.

Consistency with the Payment, Clearing and Settlement Supervision Act

OCC believes that the proposed change is consistent with Section 805(b)(1) of the Payment, Clearing and Settlement Supervision Act[16] because the proposed change would promote robust risk management.[17] OCC believes that the proposed changes described above would provide OCC with the tools necessary to mitigate risks that may occur as a result of overnight trading sessions. Specifically, OCC would implement risk monitoring processes designed to identify increases in credit risk presented to OCC as a result of such sessions as well as implement changes designed to mitigate operational risk associated with overnight trading sessions. In addition, OCC would adapt certain existing practices to accommodate these overnight trading sessions including its margin call process and its authority to take protective action pursuant to OCC Rule 305. These practices are designed to identify and mitigate risks that may be presented to OCC as a result of overnight trading sessions and thereby promote robust risk management.

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

17 12 U.S.C. 5464(b)(1).

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 Commission receives the notice of proposed change, or (ii) the date the Commission receives any further information it requests for consideration of the notice. The clearing agency 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 the clearing agency 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 the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency 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 proposed change, is consistent with the Payment, Clearing and Settlement 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 Number SR-OCC-2014-812 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 Number SR-OCC-2014-812. 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 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of OCC and on OCC's website http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_14_812.pdf

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-2014-812 and should be submitted on or before [insert date 15 days from publication in the Federal Register].

By the Commission.

Brent Fields
Secretary

Chair White
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9697 / January 15, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74060 / January 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16338

In the Matter of UBS SECURITIES LLC Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against UBS Securities LLC ("UBS").

II.

In anticipation of the institution of these proceedings, UBS has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, UBS consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

1. UBS is the owner and operator of UBS ATS, an alternative trading system ("ATS")[2] commonly referred to as a "dark pool." UBS ATS is a private execution venue that accepts, matches, and executes orders to buy and sell securities that it receives from UBS clients and UBS ATS subscribers. Those clients and subscribers include many of the world's largest asset managers, broker-dealers, and institutional investors, who may place trades on behalf of all kinds of investors, including pension funds and individuals with retail brokerage accounts. Between May 2008 and August 2012, UBS ATS was among the largest ATSs. As measured by dollar volume, it was the nation's largest equity ATS during the second quarter of 2014, having executed over $416 billion in equity securities transactions in that period. During the same quarter, UBS executed trades for nearly 10.7 billion shares on UBS ATS.

2. Between 2008 and 2012, UBS's operation of and disclosures regarding UBS ATS violated federal securities laws and regulations at different times and in numerous ways.

3. Between May 2008 and March 2011, UBS violated Rule 612 of Regulation NMS promulgated under the Exchange Act by accepting and ranking hundreds of millions of orders priced in increments smaller than one cent ("sub-penny orders"). That rule was designed to prevent orders from executing before others based upon economically insignificant sub-penny differences in their prices. While many of the sub-penny orders

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

2 Rule 300(a) of Regulation ATS promulgated under the Exchange Act provides that an ATS is "any organization, association, person, group of persons, or system: (1) [t]hat constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of [Exchange Act Rule 3b-16]; and (2) [t]hat does not: (i) [s]et rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such [ATS]; or (ii) [d]iscipline subscribers other than by exclusion from trading." Rule 301(a) of Regulation ATS provides that an ATS must comply with Rule 301(b) of Regulation ATS, unless the ATS is registered as a national securities exchange or qualifies for another enumerated exclusion. During the relevant period, UBS ATS was not registered as a national securities exchange and did not qualify for an enumerated exclusion. Therefore, it was required to comply with Regulation ATS, including Rule 301(b) thereunder, in order to benefit from the exemption from the definition of "exchange" provided by Rule 3a1-1(a)(2) under the Exchange Act.

accepted by UBS resulted from technical problems, many also were the product of two order types created for UBS ATS: PrimaryPegPlus ("PPP") and Whole Penny Offset. Because they permitted a subscriber to enter an order that was priced in and ranked based upon an increment of less than one penny, those order types gave execution priority to subscribers who were willing to pay just a fraction of a penny more (or receive just a fraction of a penny less) for a share of stock than subscribers who had entered orders at lawful, whole-penny prices. In addition, because exchanges and ATSs that complied with Rule 612 of Regulation ATS rejected sub-penny priced orders submitted by their subscribers or did not provide those subscribers with access to functionalities that permitted them to enter sub-penny orders, those order types provided UBS ATS with an unfair competitive advantage over those trading venues.

4. During the period June 2010 through March 2011, UBS violated Section 17(a)(2) of the Securities Act by failing to disclose PPP to all UBS ATS subscribers. Although it was eventually disclosed to most subscribers, PPP was pitched almost exclusively to market makers and/or high-frequency trading ("HFT") firms[3], which UBS expected to be the primary users of the order type.

5. During the period March 2010 through July 2012, UBS violated Section 17(a)(2) of the Securities Act by failing to provide all UBS ATS subscribers with notice of a feature that could prevent an order from executing in the ATS against orders from subscribers whose flow was designated as "non-natural," typically market makers and/or HFT firms. This feature – called the "natural-only crossing restriction" – was neither disclosed to nor made available to all UBS ATS subscribers. Instead, it could only be used to benefit orders generated on behalf of users of UBS's trading algorithms or "algos," *i.e.*, UBS clients that paid to have their trades executed systematically through a UBS trading tool that automated order placement, scheduling, and routing consistent with a specified strategy developed by UBS. Prior to July 2012, UBS had no internal policy or procedure requiring the disclosure of such features or new order types to all subscribers.

6. UBS violated Rule 301(b)(2) of Regulation ATS promulgated under the Exchange Act by (a) filing with the Commission and failing to amend a Form ATS[4] that included inconsistent and incomplete statements concerning UBS ATS's acceptance of sub-penny orders, (b) failing to file, at least 20 days before it implemented the change, an amendment on Form ATS that disclosed a modification to the PPP order type; (c) failing to file, at least 20 days before it implemented the natural-only crossing restriction, an amendment on Form ATS that disclosed the existence of the natural-only crossing restriction and the fact that it was not available to all users of the ATS, and (d) failing to attach to the

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3 A market maker is a firm that stands ready to buy and sell a particular stock on a regular and continuous basis at a publicly quoted price. All subscribers to the UBS ATS, including market makers and HFT firms, are registered broker-dealers.

4 Filed with the Commission pursuant to Rule 301(b)(2) of Regulation ATS, a Form ATS is confidential document that an ATS uses to notify the Commission of its operations.

Form ATS a copy of UBS ATS's subscriber manual or other materials that were provided to UBS ATS subscribers.

7. During five months in 2011 and with respect to securities for which UBS ATS accounted for five percent or more of the average daily volume in four of the six preceding months as a result of a lapse in monitoring, UBS violated Rule 301(b)(5) of Regulation ATS by (a) failing to establish written standards for granting subscribers access to the natural-only crossing restriction, (b) unreasonably prohibiting subscribers from utilizing that crossing restriction, and (c) failing to disclose information about its grants, denials, and limitations of access in Forms ATS-R that it filed with the Commission.

8. Prior to August 2012, UBS violated Rule 301(b)(10) of Regulation ATS by failing to limit access to the confidential trading information of UBS ATS subscribers, including by granting access to the UBS ATS order book to 103 of its employees – primarily information technology ("IT") personnel – who neither operated UBS ATS nor had responsibility for its compliance functions.

9. Prior to December 2010, UBS violated Section 17(a) of the Exchange Act, Exchange Act Rule 17a-4(b)(1), and Rules 301(b)(8) and 303 of Regulation ATS by failing to keep for prescribed periods and preserve certain order data for UBS ATS.

Respondent

10. UBS is a Delaware entity with principal executive offices in New York, New York. It is a broker-dealer registered with the Commission. Since 2008, it has operated UBS ATS, which operates pursuant to Regulation ATS.

Facts

Sub-Penny Orders

11. Rule 612 of Regulation NMS provides that "[n]o … alternative trading system … or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or any indication of interest in any NMS stock[5] priced in an increment smaller than \$0.01," unless the price of the quotation is less than \$1.00, in which case the minimum increment is \$0.0001. In adopting Rule 612, the Commission noted that "Rule 612 will deter the practice of stepping ahead of exposed trading interest by an economically insignificant amount." *See* Exchange Act Release No. 51808, at 219 (June 9, 2005), 70 Fed. Reg. 37496 (June 29, 2005).

[5] Rules 600(b)(46) and 600(b)(47) of Regulation NMS provide that an NMS stock is a non-option security "for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan …."

12. During the relevant period, UBS ATS's Form ATS indicated that UBS ATS complied with Rule 612. UBS ATS's Form ATS reported that "[o]nly orders priced in penny increments will be accepted by the UBS ATS." In the same document, UBS indicated that "[t]he UBS ATS will screen for orders priced in increments other than pennies ...."

13. Despite those representations and from at least May 2008 through March 2011, UBS accepted and ranked hundreds of millions of orders priced in sub-penny increments. Those sub-penny orders were generated in the following ways: (a) as a result of the PPP order type, (b) as a result of the Whole Penny Offset order type, and (c) as a result of various technical or coding problems, at least one of which UBS did not remedy in a timely fashion.

PrimaryPegPlus Orders

14. Following the order type's internal approval at UBS, UBS ATS accepted and ranked PPP orders for execution from June 2010 through March 2011. Throughout that period, a large number of PPP orders were accepted and ranked by UBS ATS, resulting in executions on a daily basis.

15. The price of a PPP order was fixed to – or "pegged to" – the national best bid or the national best offer (prices that are referred to collectively as the "NBBO"[6]) *plus or minus* a subscriber-entered percentage of the "spread."[7] Therefore, PPP allowed a UBS ATS subscriber to place an order at numerous price points greater than the national best bid and less than the national best offer.

16. Because the second component of the formula determining the price of a PPP order – a subscriber-determined percentage of the spread – nearly always yielded a sub-penny amount, PPP orders were nearly always priced in illegal, sub-penny increments. (Even the UBS ATS user manual described PPP by using an example in which – when the national best bid ("NBB") was $50.00 and the national best offer ("NBO") was $50.02 – PPP yielded an illegal, sub-penny price: "Example: NBBO 50.00 x 50.02 – Primary peg BUY order, plus 10% - order is resident in the ATS at effective price 50.002.") UBS ATS accepted and ranked such sub-penny PPP orders, even though Rule 612 of Regulation NMS barred it from doing so and UBS ATS's Form ATS indicated it would not do so.

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6 Rule 600(b)(42) of Regulation ATS provides that, with respect to quotations for an NMS stock, the NBBO is typically the best (*i.e.*, highest) bid price and the best (*i.e.*, lowest) offer price for that stock "that are calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan...."

7 For the purpose of calculating the price of a PPP order, the "spread" was the difference between the national best bid for a stock and the national best offer for that stock. For example, if the national best bid for a stock was $50.00 and the national best offer was $50.02, the spread was $0.02.

17. Generally, UBS ATS operated based upon principles of price-time priority. The best-priced marketable order for a security – *i.e.*, the highest bid or lowest offer – had priority in the dark pool's order queue and was executed before all others and if two bids or two offers shared the same price the first one received by the ATS had priority in the queue. Thus, UBS ATS would execute a marketable PPP order to buy at $50.002 per share before an order to buy the same security at $50.00 per share. As a result, the PPP order type facilitated the very result that Rule 612 was designed to prevent: it allowed one subscriber to gain execution priority over another in the order queue by offering to pay an economically insignificant sub-penny more per share. Further, because UBS ATS allowed its subscribers to place orders at prices that were unavailable at ATSs and exchanges that complied with Rule 612 of Regulation ATS, UBS ATS obtained an unfair competitive advantage over those venues in its efforts to attract and execute orders from market participants.

18. When a resting PPP order executed in UBS ATS, the order that executed against it – such as one from a retail broker-dealer – received a slightly better execution price than if the trade had occurred at the bid or offer. Referred to as "price improvement," the magnitude of that improvement was dictated by the percent of spread component of the PPP order. (In the example above, a sell order pegged to the bid – $50.00 per share – could execute against the resting PPP buy order at $50.002, receiving price improvement of 10 percent of the spread or $0.002.) UBS employees understood that certain UBS ATS subscribers would want to use PPP to gain execution priority over orders in the queue that were simply pegged to the bid or the offer, in return for providing some price improvement.

19. When PPP was launched in June 2010, PPP orders could move ahead of orders pegged to the bid or the offer in the queue by providing only a minimal amount of price improvement, *i.e.*, one percent of the spread. Concerned that this increment was too small, UBS raised the minimum percent of spread for PPP orders to 10 percent on August 3, 2010, but did not amend UBS ATS's Form ATS to reflect that change. As a result of that change, a firm that engaged in high-frequency trading and market making ("Subscriber A") stopped using PPP.

20. UBS did not disclose the existence of PPP to all UBS ATS subscribers. Instead, more than three months before PPP's launch in June 2010, UBS employees began pitching PPP to some potential subscribers and to a subset of the ATS's existing subscribers. Recipients of that pitch received an updated version of the UBS ATS user manual – the "Rules of Engagement" – that provided the coding instructions a subscriber needed to place a PPP order.[8]

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8 The instructions to Form ATS provide that an ATS must attach to its Form ATS "[a] copy of the alternative trading system's subscriber manual and any other materials provided to subscribers." The Rules of Engagement, a document provided to a number of UBS ATS subscribers, included information that subscribers needed to use the ATS and that was of the sort one would reasonably expect to find in a subscriber manual. Nevertheless, prior to December 2011, UBS ATS's Form ATS and amendments thereto

21. UBS employees believed the PPP order type would be particularly well-suited to the trading strategies of market makers and HFT firms, which typically traded at or near the best bid or offer. Accordingly, nearly all of the subscribers who received the pre-launch notice of PPP were market makers and/or HFT firms.

22. On at least one occasion, UBS employees discussed the possibility of disclosing PPP broadly or to all of the ATS's subscribers. In May 2010, approximately one month before PPP's June 2010 launch, a UBS employee responsible for communicating with potential and existing subscribers to UBS ATS emailed the principal for UBS ATS. Mentioning a firm that engaged in high-frequency trading and market making and that had recently been pitched PPP (an order type that UBS employees referred to as "percent of spread"), the employee wrote, "[l]everaging the % of spread may be a way to help get [Subscriber A] in the black and generate some added flow from other subscribers. We should explore the impact and make sure all of our ATS client[s] are aware of the new % of spread functionality as well. If we haven't already we should consider creating an ATS client distribution list for these types of announcements." The ATS principal responded, "I would like to not push % of spread to[o] hard to the full subscriber base, until we see the results with [Subscriber B and Subscriber A]," two firms that engaged in high-frequency trading and market making. The other employee responded, "yep..makes sense."

23. At the time the order type was launched, UBS did not disseminate a notice to all of the ATS's subscribers advising them of the PPP order type. Prior to July 2012, UBS had no policy or procedure requiring the Rules of Engagement to be sent to all subscribers every time it was amended. Typically, UBS sent an up-to-date version of the Rules of Engagement to new subscribers and to any existing subscriber that asked for them. (At that time, PPP was described on page 10 of the 17-page Rules of Engagement.) Even though they were UBS ATS subscribers in June 2010, several entities were emailed a PPP-referencing version of the Rules of Engagement months later, and well after the order type was launched.

24. In July 2010, a UBS employee emailed an employee of a potential subscriber to the UBS ATS, cutting-and-pasting into his email the lengthy coding instructions that a subscriber needed to place orders on UBS ATS. Before sending the email and for reasons that included a prior business dispute between UBS and the potential subscriber, the UBS employee intentionally removed the portion of those instructions that described PPP and that provided the instructions needed to enter PPP orders. While the entity subsequently traded on the ATS, UBS never provided it with notice of PPP.

25. In October 2010, the same employee was asked to review a draft PowerPoint marketing presentation that mentioned PPP ("New Order Types & Functionality: % of Spread") and the natural-only crossing restriction ("Intelligently leverage UBS ATS → Non natural vs. Natural designation"). The employee removed both of those references from the presentation. In an email attaching his edits to the PowerPoint deck, the employee wrote to

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reported that "UBS ATS does not have a subscriber manual" and did not attach a copy of the Rules of Engagement.

another UBS employee, "I took out references to our % of spread and non-natural vs natural as well because that stuff is very proprietary and changes.. It's something we should talk to rather than put in the slide…."

26. In March 2011, UBS sent a spreadsheet containing certain trading information to a firm that engaged in high-frequency trading and market making ("Subscriber C") in an effort to encourage its expanded usage of PPP. For each of the thousands of orders Subscriber C had executed in UBS ATS on two prior trading days, the spreadsheet showed, without providing any customer-identifying information, whether the firm's order had executed against a retail order or a non-retail order. (Such information was not data that UBS typically disclosed to other UBS ATS subscribers and was not information that subscribers could readily ascertain through other means.) The UBS employee that proposed sending the spreadsheet to Subscriber C understood that Subscriber C wanted to use the spreadsheet's data to adjust its algorithmic trading strategies in ways that would increase the likelihood of its PPP orders executing against orders from retail broker-dealers.

27. On March 11, 2011, and after a Commission examination team had identified PPP and raised concerns that it might violate Rule 612 of Regulation NMS, UBS decommissioned the PPP order type. At that time, a number of the ATS's subscribers still had not received notice of PPP's existence: UBS never provided a PPP-referencing version of the Rules of Engagement to at least one entity that became a subscriber of UBS ATS after PPP's June 2010 launch and UBS never provided such notice to about eight of the approximately 35 entities that were already ATS subscribers in June 2010. Notice of the existence and selective disclosure of the PPP order type would have been important to subscribers.

Whole Penny Offset Orders

28. From 2008 until it was decommissioned in June 2010, a second order type – referred to in this Order as the Whole Penny Offset order type – permitted subscribers in certain instances to place orders priced in sub-penny increments that were accepted and ranked by UBS ATS.

29. The Whole Penny Offset order type allowed subscribers to enter orders priced at the NBB, the NBO, or the midpoint of the NBBO (*i.e.*, the average of the national best bid and national best offer), *plus or minus* \$0.01. The order type yielded orders priced in impermissible sub-penny increments whenever the price of the order was pegged to the midpoint and the spread between the national best bid and national best offer was an odd number of cents, *e.g.*, if the national best bid and offer were \$30.00 and \$30.03, the midpoint would be \$30.015 and orders plus and minus the one-cent offset would be illegally priced at \$30.005 and \$30.025 per share. Between January 2009 and June 2010, Whole Penny Offset orders resulted in executions for approximately 1.5 million shares of stock on UBS ATS.

Additional Orders Priced in Sub-Penny Increments

30. In addition to the violative orders placed as a result of the PPP and Whole Penny Offset order types, UBS accepted and ranked tens of millions of other orders priced above $1.00 in sub-penny increments. Those sub-penny orders resulted from at least two technical problems.

31. The first technical problem, which caused the overwhelming majority of the additional sub-penny orders, involved a coding error in UBS's smart order router, an application that utilized pre-programmed logic to route or direct orders to UBS ATS and to other venues for execution. When seeking to place an order in UBS ATS at the NBBO midpoint, UBS's smart order router would send an immediate-or-cancel limit order that was explicitly denominated at the price the router had calculated to be the midpoint of the NBBO, rather than sending an order with a price that was *pegged* to the midpoint of the NBBO.[9] To the extent those orders sent by the router to UBS ATS were sub-penny-priced, UBS ATS failed to identify and reject them and, instead, accepted them in violation of Rule 612 of Regulation NMS. After discovering this coding error in May 2010, UBS fixed it within a few weeks.

32. The second technical problem arose from defects in UBS's algorithmic trading platform – called PTSS – that generated sub-penny orders which, in some instances, were routed to third-party venues for execution and, in others, were routed to UBS ATS, which accepted and ranked them. PTSS's problems persisted as a result of numerous delays in the rollout of a replacement algo platform called Rainier.

33. In March 2010, after receiving an automated report indicating that UBS had routed over a thousand PTSS-generated sub-penny orders to third-party venues on the prior trading day, a UBS compliance officer wrote, "[w]e need to have some system control in place to prevent sub penny pricing violations caused by bad market data feeds. … Please let me know what can be done to prevent recurrence of this issue going forward."

34. Aware that PTSS was the cause of the sub-penny orders, another UBS employee proposed awaiting the rollout of the replacement algo platform rather than immediately remedying the issue with PTSS. "We plan to decommission PTSS in two months," he wrote in an internal email. "Our new algo system Rainier doesn't have the issue. Since it happened rarely, we would like to make no change to PTSS, and let the migration take care of the issue."

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9 While an ATS does not violate Rule 612 by accepting and ranking an order *pegged* to the midpoint of the NBBO (even if the midpoint is a sub-penny price), this limited exception does not permit an ATS to accept and rank an order that is explicitly denominated in a sub-penny price (even if that sub-penny price is equal to the midpoint of the NBBO). *See* Exchange Act Release No. 51808, at 231 ("Rule 612 will not prohibit a sub-penny execution resulting from a midpoint or volume-weighted algorithm or from price improvement, so long as the execution did not result from an impermissible sub-penny order or quotation.").

35. Nearly four months later, on July 13, 2010, a UBS employee again reported in an internal email that UBS was routing PTSS-generated sub-penny orders to third-party venues for execution. The UBS ATS principal responded by explaining that the problem would be resolved by the upcoming migration from PTSS to Rainier. "If we confirm this pricing decision came from PTSS classic," he wrote, "can we not spend to[o] much time on research – we know classic has this issue, its being phased out, and we have dug through examples – to[o] many times already." On July 14, 2010, the UBS ATS principal and other UBS employees received a message reporting that UBS had routed over 17,000 additional PTSS-generated sub-penny orders to third-party venues on the prior trading day.

36. On August 6, 2010, after receiving an additional report of seventy-one PTSS-generated orders being routed to third-party venues and being assured by another UBS employee that the PTSS order flow would be migrated to Rainier "in the next few weeks," the UBS compliance officer responded: "Can we get a hard date [for the decommissioning of PTSS classic]? This has been going on for months – and we have been saying a few weeks for quite some time – I need a hard cut-off date." Nevertheless, sub-penny orders continued to be generated by PTSS and accepted by UBS until at least September 2010.

<u>Natural-Only Crossing Restriction</u>

37. Since March 2010, certain orders – those entered on behalf of UBS clients that pay to utilize UBS-developed algorithms – have had the ability to avoid executing in UBS ATS against orders entered by subscribers that UBS has deemed "non-natural." This feature protects those algorithmic orders – and only those orders – from executing against orders from market makers/HFT firms. No other user of or subscriber to the UBS ATS has had the ability to utilize this natural-only crossing restriction.

38. Prior to July 2012, a significant number of UBS ATS subscribers had received no notice of the natural-only crossing restriction's existence and some non-natural subscribers – who had not been told of their "non-natural" designation – remained unaware that they had been effectively barred from executing against millions of the orders placed in UBS ATS by UBS algorithms. Beginning no later than March 2010, a large number of algorithmic orders invoking the natural-only crossing restriction were accepted and ranked by UBS ATS, resulting in executions on a daily basis.

39. By early 2010 and in anticipation of the natural-only crossing restriction's launch, UBS used subjective criteria to identify UBS ATS subscribers and accounts that utilized "non-natural" trading strategies and those that did not. Subsequently, UBS made that determination by using a UBS-created quantitative metric that assessed the correlation between a subscriber's executions and movements in market prices in the second after the execution.

40. Historically, the list of firms that UBS has deemed "non-natural" has been comprised largely or entirely of market makers and HFTs. In a disclosure provided to all ATS subscribers in July 2012, UBS described non-natural order flow as orders placed by "a category of subscribers whose order flow is determined by the UBS ATS to be more short

term and opportunistic in nature and where the position would likely be immediately reversed, such as market making, liquidity provision and arbitrage."

41. Clients utilizing UBS's algorithms typically paid more to trade a share of stock in UBS ATS than direct subscribers to the ATS did and UBS employees sought to shield certain order flow of UBS's algorithmic clients from any negative impacts of interacting with non-natural order flow. In a January 2010 email, a UBS employee responsible for its algorithmic trading products wrote that the firms to be "tagged as 'non-natural'" were mainly "high freq firms and market makers" and that "[i]nitially we do not want to expose our discretionary dark liquidity to this flow."

42. As early as 2010, UBS employees understood that non-natural subscribers would want to know about the crossing restriction's existence and those employees debated disclosing it to subscribers. For example, in September 2010, two UBS employees with responsibility for the ATS had the following instant message exchange concerning whether to make such a disclosure to Subscriber C, a firm that had been deemed "non-natural":

> *Employee 1*: hey – do you want to tell [Subscriber C] that you labelled them as aweful [*sic*] bad liquidity? [...] opps ... I mean ... non-natural [...] I think we should
>
> *Employee 2*: negative [...] raises too many questions for something that in the end [...] will be almost not noticeable [...] our clients do not need to understand how and when our algos trade against them ... thats to our discretion

43. As was noted in paragraph 25, in one instance in October 2010, mention of the natural-only crossing restriction was removed from a draft UBS ATS marketing presentation. When removing it, a UBS employee noted that the restriction was "proprietary [and] . . . something [they] should talk to rather than put in the slide."

44. Pre-November 2011 versions of the Rules of Engagement did not disclose the natural-only crossing restriction and included two statements that were rendered false or misleading by the crossing restriction's existence.

a. *First*, the Rules represented that "[o]rders sent to the UBS ATS will be given priority based on price first and receipt time second." That statement was false because it failed to disclose that the natural-only crossing restriction – and not simply an order's price and receipt time – could determine whether or not an order would be executed.

b. *Second*, the Rules represented that "[s]ubscriber orders that are placed in the UBS ATS will have an opportunity to interact with UBS BD's US equity order flow – liquidity that includes ... algorithmic trading orders." In fact, orders received from non-natural subscribers were ineligible to execute in UBS ATS against the significant portion of UBS algorithmic trading orders that made use of the crossing restriction.

45. UBS ATS's Rules of Engagement was amended in November 2011 to include a disclosure of the natural-only crossing restriction. However, the revised rules were not distributed to all subscribers until July 2012, when UBS revised its internal policies and procedures to require prompt distribution to all subscribers of changes to the Rules of Engagement.

46. Prior to December 2011, UBS ATS's Form ATS and amendments thereto failed to report the natural-only crossing restriction's existence or the fact that it was available only to orders placed via UBS algorithms.

47. Knowledge of UBS ATS's implementation of its non-natural designation and trading restriction would have been important to natural and non-natural subscribers. However, while some non-natural subscribers were told about the crossing restriction and their non-natural status prior to July 2012, at least some subscribers received no written or oral notice of the crossing restriction's existence until that time.

48. In July 2012, the Rules of Engagement was distributed simultaneously to all subscribers for the first time and that version of the document included a description of the natural-only crossing restriction. Although UBS gave at least some non-natural subscribers oral and/or written notice of their non-natural status prior to August 2012, it did not provide all non-natural subscribers with written notice of their status until then.

Fair Access

49. Rule 301(b)(5) of Regulation ATS requires an ATS with at least five percent of the average daily volume for any covered security (the "fair access threshold") during four of the preceding six months to comply with "fair access" requirements. Under Rules 301(b)(5)(ii)(A), (B), and (D) of Regulation ATS, those requirements include: (a) establishing written standards for granting access to trading on its system, (b) not unreasonably prohibiting or limiting any person in respect to access to services offered by the ATS, and (c) reporting all grants, denials, and limitations of access (and the reasons for granting, denying, or limiting access) with respect to such security on its quarterly Form ATS-R. Exchange Act Release No. 40760 (December 8, 1998), 68 SEC Docket 2188, 2217-2218. For equity securities, the fair access requirements apply on a security-by-security basis. Exchange Act Release No. 40760, 68 SEC Docket at 2217. A denial of access is reasonable if it is based on objective standards that are applied in a fair and non-discriminatory manner. *In the Matter of INET ATS, Inc.*, Exchange Act Rel. 53631 (April 12, 2006).

50. In June 2011 and from August 2011 through November 2011, as a result of a lapse in monitoring, UBS ATS crossed the fair access threshold during four of the preceding six months with respect to as many as four covered securities. Therefore, with respect to those securities during that time period, UBS ATS was subject to the fair access requirements of Regulation ATS and was required, among other things, to report all of its grants, denials, and limitations of access (and, for each applicant, its reasons for granting, denying, or limiting access) on its quarterly Form ATS-R.

51. During that time period, UBS ATS did not have written standards for granting access to trading on its system, in particular, with respect to granting access to the natural-only crossing restriction, which was available only to orders generated by certain UBS algorithms.

52. Under Rule 301(b)(5)(ii)(B) of Regulation ATS and with respect to covered securities for which UBS ATS had crossed the fair access threshold for the requisite time period, the natural-only crossing restriction was an ATS function to which UBS could not unreasonably prohibit or limit access in an unfair or discriminatory manner. UBS's failure to permit UBS ATS subscribers access to this function was not based upon a fair and non-discriminatory application of objective standards and, therefore, did not comply with Rule 301(b)(5)(ii)(B).

53. UBS ATS filed three Forms ATS-R with the Commission concerning the periods in which it exceeded the fair access threshold for one or more covered securities in four of the six preceding months. With respect to those securities, in each of those Forms ATS-R, UBS ATS was required to disclose, but did not disclose, all required grants, denials, and limitations of access, including with respect to the natural-only crossing restriction.

Order Book Access

54. Rule 301(b)(10) of Regulation ATS provides that an ATS "shall establish adequate safeguards and procedures to protect subscribers' confidential trading information," including "[l]imiting access to the confidential trading information of subscribers to those employees of the alternative trading system who are operating the system or responsible for its compliance with these or any other applicable rules."

55. Prior to August 2012, 103 UBS employees (primarily IT personnel) who neither operated UBS ATS nor had responsibility for its compliance functions had full, live access to data concerning orders pending in UBS ATS, *i.e.*, the ATS's order book.

Record Preservation

56. Section 17(a) of the Exchange Act and Rule and 17a-4(b)(1) thereunder require broker-dealers to keep for prescribed periods and preserve a "memorandum of each brokerage order, and of any other instruction ... show[ing] the terms and conditions of the order ...." Rules 301(b)(8) and 303 of Regulation ATS impose record preservation obligations on ATSs and require them to preserve records of "[t]he designation of [an] order as a market order, limit order, stop order, stop limit order, or other type of order."

57. For at least the periods August 2008 through March 2009 and August 2010 through November 2010, UBS failed to keep for prescribed periods and preserve records of certain order information for UBS ATS, including data indicating whether orders had utilized the natural-only crossing restriction.

Violations

58. As a result of the conduct described above, UBS willfully[10] violated:

a. Section 17(a)(2) of the Securities Act, which prohibits, directly or indirectly, in the offer or sale of securities, obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

b. Section 17(a) of the Exchange Act and Rule 17a-4(b)(1) thereunder, which require brokers and dealers to keep for prescribed periods and preserve certain records;

c. Rule 301(b)(2) of Regulation ATS, which requires an ATS to file an initial operation report on Form ATS at least 20 days prior to commencing operation as an alternative trading system and to file an amendment on Form ATS at least 20 days prior to implementing a material change to the operation of the ATS, within 30 days after the end of a quarter when information contained in an initial operation report filed on Form ATS becomes inaccurate, and promptly upon discovering that an initial operation report filed on Form ATS or an amendment on Form ATS was inaccurate when filed;

d. Rule 301(b)(5)(ii)(A) of Regulation ATS, which requires an ATS that crosses the fair access threshold during four of the preceding six months in a covered security to establish written standards for granting access to trading on its system;

e. Rule 301(b)(5)(ii)(B) of Regulation ATS, which requires an ATS that crosses the fair access threshold during four of the preceding six months in a covered security to not unreasonably prohibit or limit any person in respect to access to services offered by the ATS with respect to such security by applying standards required by Rule 301(b)(5)(ii)(A) in an unfair or discriminatory manner;

f. Rule 301(b)(5)(ii)(D) of Regulation ATS, which requires an ATS that crosses the fair access threshold during four of the preceding six months in a covered security to report all grants, denials, and limitations of access (and

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

the reasons, for each applicant, for granting, denying, or limiting access) with respect to such security on its quarterly Form ATS-R;

g. Rules 301(b)(8) and 303 of Regulation ATS, which require an ATS to preserve certain records;

h. Rule 301(b)(10) of Regulation ATS, which requires an ATS to establish adequate safeguards and procedures to protect subscribers' confidential trading information and to adopt and implement adequate oversight procedures to ensure that the safeguards and procedures for protecting subscribers' confidential trading information are followed; and

i. Rule 612 of Regulation NMS, which provides that "[n]o ... alternative trading system ... or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than $0.01," unless the bid or offer, order, or indication of interest is priced less than $1.00 per share, in which case the minimum increment is $0.0001.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act and Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. UBS cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act, Section 17(a) of the Exchange Act and Rule 17a-4(b)(1) thereunder, Rules 301(b)(2), 301(b)(5)(ii)(A), 301(b)(5)(ii)(B), 301(b)(5)(ii)(D), 301(b)(8), 301(b)(10) and 303 of Regulation ATS, and Rule 612 of Regulation NMS.

B. UBS is censured.

C. UBS shall, within ten days of the entry of this Order, pay a civil money penalty in the amount of $12,000,000.00, disgorgement of $2,240,702.50 and prejudgment interest of $235,686.14 to the Securities and Exchange Commission for transfer to the U.S. Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717 and SEC Rule of Practice 600. Payment must be made in one of the following ways:

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

2) UBS 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) UBS 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 UBS 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 Amelia Cottrell, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Brookfield Place, 200 Vesey Street, Suite 400, New York, NY 10281.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chair White
Not participating
Commissioner Stein
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9698 / January 15, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74061 / January 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16338

In the Matter of **UBS AG**	**ORDER UNDER RULE 405 OF THE SECURITIES ACT OF 1933, GRANTING A WAIVER FROM BEING AN INELIGIBLE ISSUER**

UBS AG ("Company")has submitted a letter, dated January 14, 2015, constituting an application for relief from the Company being considered an "ineligible issuer" under Clause (1)(vi) of the definition of ineligible issuer in Rule 405 of the Securities Act of 1933 ("Securities Act"). The Company requests relief from being considered an "ineligible issuer" under Rule 405, due to the entry on January 15, 2015, of an order instituting administrative and cease-and-desist proceedings against UBS Securities, LLC. ("UBSS") (the "Cease-and-Desist Order"). The Cease-and-Desist Order requires, among other things, UBSS to cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

Under Clause (1)(vi) of the definition of ineligible issuer in Rule 405 of the Securities Act, an issuer becomes an ineligible issuer and thus unable to avail itself of well-known seasoned issuer status, if "Within the past three years (but in the case of a decree or order agreed to in a settlement, not before December 1, 2005), the issuer or any entity that at the time was a subsidiary of the issuer was made the subject of any judicial or administrative decree or order arising out of a governmental action that: (A) Prohibits certain conduct or activities regarding, including future violations of, the anti-fraud provisions of the federal securities laws..."

Under Paragraph two of the definition of ineligible issuer in Rule 405 of the Securities Act, an issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.

Based on the representations set forth in the Company's January 14, 2015 request, and on other considerations, the Commission has determined that the Company has made a showing of good cause under Paragraph two of the definition of ineligible issuer in Rule 405 of the Securities Act and that the Company should not be considered an ineligible issuer by reason of the entry of the Cease-and-Desist Order.

Accordingly, IT IS ORDERED, pursuant to Paragraph two of the definition of ineligible issuer in Rule 405 of the Securities Act, that a waiver from the Company being an ineligible issuer under Rule 405 of the Securities Act is hereby granted.

By the Commission.

Brent Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9699 / January 15, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74065 / January 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16339

In the Matter of **JOHN BRINER, ESQ.,** **DIANE DALMY, ESQ.,** **DE JOYA GRIFFITH, LLC,** **ARTHUR DE JOYA, CPA,** **JASON GRIFFITH, CPA,** **CHRIS WHETMAN, CPA,** **PHILIP ZHANG, CPA,** **M&K CPAS, PLLC,** **MATT MANIS, CPA,** **JON RIDENOUR, CPA, and** **BEN ORTEGO, CPA,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 4C, 15(b)(6), AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act") against John Briner ("Briner"); that public cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act against Diane Dalmy ("Dalmy"); and that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act, Sections 4C, and 21C of the Securities Exchange Act, and Rule 102(e) of the Commission's Rules of Practice against De Joya Griffith, LLC ("De Joya"), Arthur De Joya, Jason Griffith ("Griffith"), Chris Whetman ("Whetman"), Philip Zhang ("Zhang"), M&K CPAS, PLLC ("M&K"), Matt

Manis ("Manis"), Jon Ridenour ("Ridenour"), and Ben Ortego ("Ortego") (collectively, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

1. This proceeding concerns a scheme to create sham public shell companies by Briner, a Canadian attorney and recidivist, and various legal and accounting professionals who provided opinion letters or audit reports in furtherance of the scheme. This scheme resulted in the filing of Form S-1 registration statements by twenty issuers, with each registration statement containing material misrepresentations and omissions in violation of Section 17(a) of the Securities Act.

2. According to their registration statements, each issuer purported to be an exploration stage mining company that had not begun any mining activity, had no revenue, was solely controlled and governed by a single officer, was capitalized by its officer's purchase of issuer stock for $30,000, and had purchased mineral claims from an entity named Jervis Explorations Inc. ("Jervis").

3. These statements were false. Briner—not the named officers—controlled the issuers. Briner also controlled Jervis, which was not identified as a related party in the Form S-1s. None of the officers provided any funds to purchase issuer stock. And Jervis never transferred any of the allegedly purchased mineral claims to the issuers.

4. In late 2011 and 2012, Dalmy, an attorney, provided opinion letters for eighteen of the twenty issuers at Briner's request. Each letter stated that Dalmy "investigated" and "examined" the issuer, including reviewing relevant documents. But Dalmy did no investigations. Instead, Dalmy simply supplied electronically signed opinion letters to Briner, who then filed them along with the issuers' registration statements.

5. In late 2011, Briner also contacted De Joya and M&K, registered public accounting firms, to audit the issuers' financial statements. The audits that these firms conducted were so deficient that they amounted to no audits at all. The De Joya and M&K partners also ignored red flags with respect to the issuers.

6. For these reasons, Respondents violated Section 17(a) of the Securities Act and respondents De Joya, Arthur De Joya, Griffith, Whetman, Zhang, M&K, Manis, Ridenour, and Ortego engaged in improper professional conduct within the meaning of Rule 102(e) of the Commission's Rules of Practice.

<u>RESPONDENTS</u>

7. **<u>Briner</u>**, 35, is an attorney and a Canadian citizen who resides in Vancouver, British Columbia. Briner's law firm was MetroWest Law Corporation ("MetroWest"). Briner also controlled Jervis, a British Columbia corporation. In 2010, to resolve a Commission action against him alleging a pump-and-dump and market manipulation scheme, Briner consented to the entry of a

federal court judgment that enjoined him from violating the antifraud and securities registration provisions of the federal securities laws; barred him for five years from participating in penny stock offerings; and ordered him to disgorge ill-gotten gains of $52,488.32 plus prejudgment interest and pay a civil penalty of $25,000. SEC v. Golden Apple Oil and Gas, Inc., et al., 09-Civ-7580 (S.D.N.Y.) (HB). The Commission subsequently suspended Briner from appearing or practicing before it as an attorney, with a right to apply for reinstatement after five years. John Briner, Exchange Act Release No. 63371, 2010 WL 4783445 (Nov. 24, 2010).

8. **Dalmy**, 58, is an attorney who resides in Denver, Colorado and is admitted to practice law in Colorado. Dalmy issued opinion letters for eighteen of the issuers.

9. **De Joya** is a registered public accounting firm based in Henderson, Nevada. De Joya issued audit reports for nine of the issuers.

10. **Arthur De Joya**, 48, of Las Vegas, Nevada, is a CPA licensed in the state of Nevada, a partner at De Joya, and has served as a managing partner of De Joya.

11. **Griffith**, 37, of Las Vegas, Nevada, is a CPA licensed in the state of Nevada, a partner of De Joya, and was a managing partner of De Joya.

12. **Whetman**, 46, of Las Vegas, Nevada, is a CPA licensed in the state of Nevada and a partner at De Joya.

13. **Zhang**, 40, of Las Vegas, Nevada, is a CPA licensed in the state of Nevada and a partner at De Joya.

14. **M&K** is a registered public accounting firm based in Houston, Texas. M&K issued audit reports for eleven of the issuers.

15. **Manis**, 52, of Houston, Texas, is a CPA licensed in the state of Texas and a partner of M&K.

16. **Ridenour**, 36, of Houston, Texas, is a CPA licensed in the state of Texas and a partner of M&K.

17. **Ortego**, 34, of Houston, Texas, is a CPA licensed in the state of Texas and a partner of M&K.

OTHER RELEVANT ENTITIES

Issuers Audited By De Joya

18. **La Paz Mining Corp.** ("La Paz") is a Nevada corporation organized in November 2011. Its Form S-1 states that it has its principal offices in Peoria, Arizona.

19. **Tuba City Gold Corp.** ("Tuba City") is a Nevada corporation organized in June 2012. Its Form S-1 states that it has its principal offices in Dundas, Ontario, Canada.

20. **Braxton Resources Inc.** ("Braxton") is a Nevada corporation organized in May 2012. Its Form S-1 states that it has its principal offices in Peoria, Arizona.

21. **Clearpoint Resources Inc.** ("Clearpoint") is a Nevada corporation organized in May 2012. Its Form S-1 states that it has its principal offices in Peoria, Arizona.

22. **Gold Camp Explorations Inc.** ("Goldcamp") is a Nevada corporation organized in June 2012. Its Form S-1 states that it has its principal offices in St. Alberta, Alberta, Canada.

23. **Gaspard Mining Inc.** ("Gaspard") is a Nevada corporation organized in May 2012. Its Form S-1 states that it has its principal offices in Ocala, Florida.

24. **Coronation Mining Corp.** ("Coronation") is a Nevada corporation organized in May 2012. Its Form S-1 states that it has its principal offices in Ocala, Florida.

25. **Jewel Explorations Inc.** ("Jewel") is a Nevada corporation organized in May 2012. Its Form S-1 states that it has its principal offices in Winnipeg, Manitoba, Canada.

26. **Canyon Minerals Inc.** ("Canyon") is a Nevada corporation organized in May 2012. Its Form S-1 states that it has its principal offices in Salt Lake City, Utah.

Issuers Audited By M&K

27. **Stone Boat Mining Corp.** ("Stone Boat") is a Nevada corporation organized in September 2011. Its Form S-1 states that it has its principal offices in Chihuahua, Mexico.

28. **Goldstream Mining Inc.** ("Goldstream") is a Nevada corporation organized in November 2011. Its Form S-1 states that it has its principal offices in Ocala, Florida.

29. **Chum Mining Group Inc.** ("Chum") is a Nevada corporation organized in June 2012. Its Form S-1 states that it has its principal offices in Edmonton, Alberta, Canada.

30. **Eclipse Resources Inc.** ("Eclipse") is a Nevada corporation organized in May 2012. Its Form S-1 states that it has its principal offices in Winnipeg, Manitoba, Canada.

31. **PRWC Energy Inc.** ("PRWC") is a Nevada corporation organized in May 2012. Its Form S-1 states that it has its principal offices in Salt Lake City, Utah.

32. **Kingman River Resources** ("Kingman") is a Nevada corporation organized in June 2012. Its Form S-1 states that it has its principal offices in Dundas, Ontario, Canada.

33. **Bonanza Resources Corp.** ("Bonanza") is a Nevada corporation organized in June 2012. Its Form S-1 states that it has its principal offices in Edmonton, Alberta, Canada.

34. **CBL Resources Inc.** ("CBL") is a Nevada corporation organized in June 2012. Its Form S-1 states that it has its principal offices in Panama City, Panama.

35. **Lost Hills Mining Inc.** ("Lost Hills") is a Nevada corporation organized in June 2012. Its Form S-1 states that it has its principal offices in Panama City, Panama.

36. **Yuma Resources Inc.** ("Yuma") is a Nevada corporation organized in June 2012. Its Form S-1 states that it has its principal offices in St. Albert, Alberta, Canada.

37. **Seaview Resources Inc.** ("Seaview") is a Nevada corporation organized in June 2012. Its Form S-1 states that it has its principal offices in Sterrett, Alabama.

38. The issuers identified in paragraphs 18 through 37 (collectively, the "Issuers") filed Form S-1 registration statements, and in some instances amendments to those registration statements, for intended public offerings on the dates, and in the amounts, listed in the chart under Appendix A. In June and July 2013, after receiving investigative subpoenas, eighteen of the Issuers sought to withdraw their Forms S-1 on the grounds that the Issuer had "determined not to pursue" the proposed initial public offering. The withdrawals were not granted, although the registration statements never became effective. On March 20, 2014, an Administrative Law Judge issued stop orders suspending the effectiveness of these registration statements. La Paz Mining Inc., et al., Init. Dec. Rel. No. 580, 2014 WL 1116694 (Mar. 20, 2014). The stop orders became final on May 2, 2014. La Paz Mining Inc., et al., Sec. Act Rel. 9582, 2014 WL 1802275 (May 2, 2014).

BRINER'S SHELL FACTORY

Briner Acquired Mineral Claims Through Jervis

39. In 2011, Briner became the sole director of a British Columbia shelf company and changed its name from 0827796 BC Ltd. to Jervis. Between September 2011 and May 2013, Jervis acquired 68 mineral claims (which are rights to extract resources from identified land tracts) located in British Columbia. These mineral claims, as with all British Columbia mineral claim transactions, were acquired online through the British Columbia Ministry of Energy and Mines (the "Ministry").

Briner Recruited Clients and Acquaintances to Serve as Officers

40. Around the time Briner caused Jervis to acquire the mineral claims, he recruited current and former law clients and acquaintances to serve as officers for the Issuers. The individuals recruited had little to no actual mining experience. Briner explained to his recruits that he needed people to serve as officers and directors for companies that he planned to take public. For those who agreed, Briner presented an agreement stating, among other things, that the "term of [the] engagement shall be until the Company receives a trading symbol from FINRA for quotation on the [over the counter bulletin board], at which time the [officer] and the Company shall be free to re-negotiate the terms of the engagement." Briner explained that when the companies obtained ticker symbols, he planned to bring in new management, and the officer would have the option of staying on as a director.

41. Briner offered to pay the officers an initial "consulting" fee between $2,000 and $3,000 for each Issuer with the promise of another $7,000 to $8,000 per company when the Issuer

obtained an OTCBB ticker symbol. Briner then sought the officers' signatures on the documents necessary to create the Issuers. These documents included, among other things, forms for incorporating the Issuers, articles of incorporation, bylaws, the officers' engagement agreements, and board minutes.

42. Briner recruited ten individuals to serve as officers. For each Issuer, Briner presented the relevant individual with decisions he had already made on behalf of the Issuer and a pre-packaged set of documents. Briner had already determined, among other things, the mineral claims the Issuer would purchase, the stock that would be purchased, and the accounting and legal professionals the Issuers would hire. The officers simply signed the documents Briner provided and sent them back to Briner. Briner (through a check drawn on a MetroWest bank account or a wire) then paid the officers the promised initial consulting fee.

Briner Created Two Sham Transactions for Each Issuer

43. For each Issuer, Briner fabricated two material transactions—the officer's purchase of Issuer stock and the Issuer's purchase of mineral claims from Jervis.

44. The Stock Purchase Transactions: The terms of the stock purchase transactions described in the Forms S-1 were the same for each Issuer. Each officer allegedly paid $30,000 in cash for Issuer stock. Briner supplied and the officers executed a stock purchase agreement and a "Treasury and Reservation Order" reflecting the issuance and purchase of the stock.

45. The stock purchase agreements, which are nearly identical for each Issuer, state, among other things, that the officer (identified by name) "is purchasing the Shares as principal for investment purposes only" and that "$30,000 [is] due and payable upon signing of this subscription . . . and shares shall be issued on a pro rata basis as payment is received."

46. In fact, none of the officers purchased any Issuer stock. None of the officers paid $30,000—or any funds—to the Issuers for any reason. The officers also did not borrow funds to pay for the stock.

47. The Mineral Claim Purchases: Briner used the Issuers' purported mineral claim purchases to justify the Issuers' business purpose to avoid them being deemed "blank check" companies and, therefore, subject to the requirements of Rule 419 of the Securities Act, 17 C.F.R. § 230.419.

48. Briner caused Jervis and each of the Issuers to enter into an asset purchase agreement. The asset purchase agreements show the Issuers' purchases of British Columbia mineral claims for between $7,500 and $8,500 from Jervis, and state that Jervis "delivers to the Purchaser, on execution hereof, all of the Claims unconditionally and free and clear of all liens, charges, or encumbrances."

49. None of the Issuers ever acquired any mineral claims from Jervis or any other entity or individual. According to the Ministry, each of the mineral claims purportedly purchased either continued to remain in Jervis's name or were otherwise forfeited to the state under British Columbia law for failure to make required payments.

Briner Caused the Issuers to Engage Professionals to Support
the Filing of the Issuers' Form S-1 Registration Statements

50. Briner caused the Issuers to engage M&K and De Joya to audit the financial statements used in the registration statements. De Joya provided reports for nine of the Issuers (identified in ¶¶ 18-26, above) and M&K provided audit reports for the other eleven (identified in ¶¶ 27-37, above).

51. Briner told De Joya and M&K that the Issuers intended to file Form S-1 registration statements and that the accounting for each of the Issuers had been outsourced to him. Briner also informed De Joya and M&K that he maintained all of the Issuers' purported funds "in trust" in an account he controlled (the "Master Trust Account"). Briner and his assistant were the exclusive contacts between De Joya and M&K and the Issuers. They created the Issuers' financial statements, provided De Joya and M&K with all of the supporting evidence for the audits, and responded to nearly all of De Joya's and M&K's questions about the Issuers.

52. Additionally, Briner caused the Issuers to hire Dalmy to provide opinion letters in support of the Issuers' registration statements. Dalmy provided these opinion letters for eighteen of the twenty Issuers (all except La Paz and Goldstream).

The Issuers Filed Form S-1 Registration Statements
Containing Material Misrepresentations and Omissions

53. Between July 19, 2012 and January 31, 2013, the Issuers filed with the Commission nearly identical Form S-1 registration statements for their officers' public sale of stock. The registration statements were publicly available and each indicated that the Issuers were engaged in the exploration for gold and other minerals, but were currently in an exploration stage, were without known reserves, and had not yet begun actual mining. They each stated that the Issuers' mineral claims and business plans were obtained from Jervis. None of the registration statements disclosed any related party transactions or Briner's control over the Issuers.

54. First, the registration statements state that management for each Issuer consists of a single officer who "control[s]" and "solely govern[s]" the Issuer. All of the registration statements also state that other than management agreements between the Issuers and their officers, "there are no, and have not been since inception, any other material agreements or proposed transactions, whether direct or indirect, with . . . any promoters." None of the officers controlled the Issuers—Briner did. Nor do any of the registration statements disclose in any way, directly or indirectly, Briner's role as a promoter and de facto control person of the Issuers.

55. Second, the registration statements state that the Issuers purchased their mineral claims from Jervis and that the Issuers "own[] 100% of the rights to the property." In fact, the mineral claims at issue were never transferred from Jervis to any of the Issuers.

56. Third, the registration statements each state that the Issuer's sole officer capitalized the Issuer via a purchase of Issuer stock for $30,000 in cash. None of the officers, however, paid the Issuers for stock.

57. Fourth, the opinion letters by Dalmy, filed with the registration statements for

eighteen of the Issuers, each stated that Dalmy "made such investigation and examined such records" of the Issuers to support her opinion that the Issuers' shares were validly issued. Dalmy, however, conducted no investigations, as detailed below.

58. Fifth,, the registration statements contain an audit report by M&K or De Joya stating that "[w]e conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States)" and that the financial statements present the Issuers' financial position "in conformity with U.S. generally accepted accounting principles." As described below, the audits were so deficient that they amounted to no audits at all, and the audit partners of M&K and De Joya ignored red flags.

59. Finally, each of the Issuers states that, as defined in the securities laws, it "[is] not a 'blank check company,' as [it] do[es] not intend to participate in a reverse acquisition or merger transaction." The Issuers were "blank check" companies as Briner intended to cause the Issuers to engage in a business combination, such as a reverse merger.

THE ISSUERS' FALSE OPINION LETTERS

60. In or about September 2011, Briner contacted Dalmy and engaged her to provide an opinion letter in support of a Form S-1 registration statement he intended to file on behalf of Stone Boat. Dalmy provided the letter for Stone Boat and Briner paid her $1,500 for her services.

61. In or about late November 2012, Briner again asked Dalmy to provide opinion letters in support of registration statements he intended to file on behalf of PRWC, Eclipse, Kingman, Chum, Bonanza, CBL, Lost Hills, Yuma, Seaview, Tuba City, Braxton, Clearpoint, Goldcamp, Gaspard, Coronation, Jewel, and Canyon.

62. Dalmy provided the letters, each with her electronic signature, to Briner or his assistant.

63. Between December 2012 and January 2013, these Issuers filed registration statements that included the opinion letters signed by Dalmy as attorney for each Issuer.

64. Dalmy's letters, including the letter in support of the Stone Boat registration statement, each state that Dalmy has "made such investigation and examined such records," including the registration statement, the company's articles of incorporation, certain records of corporate proceedings, records with respect to the authorization and issuance of common stock, and other records Dalmy deemed necessary to support her opinion, which was in each case that "the shares of Common Stock held by the Selling Shareholder are validly issued, fully paid and non-assessable." Dalmy did not conduct the investigations she described in the opinion letters.

THE ISSUERS' DEFICIENT AUDITS

Violations of PCAOB Standards Common to Both De Joya and M&K

65. In or about November 2011, Briner contacted De Joya and M&K for the purpose of engaging them to conduct audits of the financial statements that were to be included in the Form S-1 registration statements he intended to file for the Issuers. Briner referred La Paz to De Joya, and

referred Stone Boat and, shortly thereafter, Goldstream to M&K.

66. In or about July 2012 and again in August 2012, Briner contacted De Joya and M&K to engage them for additional audits. He referred the following additional eight Issuers to De Joya: Braxton, Coronation, Jewel, Canyon, Clearpoint, Gaspard, Tuba City and Gold Camp (together with La Paz, the "De Joya Issuers"). He referred the following additional nine Issuers to M&K: Kingman, CBL, Yuma, Seaview, Bonanza, Eclipse, PRWC, Chum, and Lost Hills (together with Stone Boat and Goldstream, the "M&K Issuers").

67. Whetman and Zhang, as engagement partners, and Arthur De Joya and Griffith, as engagement quality review partners (collectively, the "De Joya Partners"), conducted the audits of the De Joya Issuers.

68. Manis, Ridenour, and Ortego (collectively, the "M&K Partners," and together with the De Joya Partners, the "Audit Partners"), as engagement partners (together with Whetman and Zhang, the "Engagement Partners") and alternating as engagement quality review partners (together with Arthur De Joya and Griffith, the "Engagement Quality Review Partners"), conducted the audits of the M&K Issuers.

69. Between July 2012 and January 2013, De Joya and M&K issued audit reports containing unqualified opinions for each Issuer. The Audit Partners also consented to the inclusion of their firm's reports in each of the Issuers' registration statements. In connection with these reports, De Joya received a total of $37,500 in fees and M&K received a total of $49,500 in fees.

70. The staffing for the Issuers' audits is listed in Appendix A.

De Joya's and M&K's Client Acceptance and Continuance
Policies and Procedures Failed to Detect Red Flags

71. Under PCAOB standard QC Section 20 (System of Quality Control for a CPA Firm's Accounting and Auditing Practice) ("QC 20"), "[p]olicies and procedures should be established for deciding whether to accept or continue a client relationship" and "[s]uch policies and procedures should provide the firm with reasonable assurance that the likelihood of association with a client whose management lacks integrity is minimized" (at .14).[1]

72. Under PCAOB Auditing Standard No. 12 (Identifying and Assessing Risks of Material Misstatement) ("AS 12"), auditors should "evaluate whether information obtained from the client acceptance and retention evaluation process or audit planning activities is relevant to identifying risks of material misstatement" (¶ 41).

73. Additionally, under PCAOB Auditing Standard No. 7 (Engagement Quality Review) ("AS 7"), among other things, engagement quality review partners, should "evaluate the significant judgments made by the engagement team," (¶ 9) including "consideration of the firm's recent engagement experience with the company and risks identified in connection with the firm's client acceptance and retention process" (¶ 10 a.).

[1] The PCAOB standards referenced herein are the standards that were in effect during the time of relevant conduct.

74. Finally, auditors must meet PCAOB standard AU Section 230 (Due Professional Care in the Performance of Work) ("AU 230"), which requires that auditors "exercise professional skepticism" (at .07), "consider the competency and sufficiency of the evidence" (at .08), and "neither assume[] that management is dishonest nor assume[] unquestioned honesty" (at .09).

75. De Joya's and M&K's client acceptance policies and procedures in effect at the time they accepted the Issuers as clients required very little. In substance, each firm required only a background check of the officers of the prospective client. Such check consisted of a simple Internet search.

76. Specifically, De Joya's policy instructed its staff to "confirm individuals" and, if there was something to report, to "summarize findings, site [sic] sources, and email Partner." M&K's policy called for "background checks on all significant owners and chief executives."

77. De Joya, M&K, and the Audit Partners failed to sufficiently question or otherwise investigate the Issuers' management, which would have revealed Briner's undisclosed role as a control person. Neither firm conducted a background check of Briner or Dalmy, which at minimum would have turned up, among other things, the Commission's complaint alleging fraud and suspension order against Briner, and that Briner had been on the OTC Market's Prohibited Attorney List since March 15, 2006, and that Dalmy had also been on the list since September 25, 2009.

78. Additionally, De Joya's and M&K's client acceptance policies and procedures failed to detect clues that should have raised concerns. Upon referring the Issuers, Briner's assistant provided De Joya and M&K with the names of the officers, the inception dates, and the year-end dates for each of the Issuers. From this, De Joya was on notice that two of the officers purportedly controlled five of the Issuers. Further, De Joya was on notice that the De Joya Issuers were incorporated the same day or within one day of each other (May 31, 2012 or June 1, 2012).

79. Similarly, M&K was on notice that two of the officers controlled four Issuers. M&K was also on notice that nine of the eleven Issuers were incorporated on the same day or within one day of each other (May 31, 2012 or June 1, 2012).

80. This information should have at least caused De Joya and M&K to question why the same individuals appear to control multiple Issuers and why the Issuers' dates of incorporation appeared to be coordinated. De Joya and M&K failed to ask any questions with respect to this information.

81. For the above reasons, De Joya's and M&K's client acceptance policies and procedures failed to meet QC 20 and, in the course of utilizing these procedures during the engagements at issue, the Engagement Partners failed to meet AS 12 and AU 230 and the Engagement Quality Review Partners failed to meet their obligations under AS 7.

The Audit Partners Failed to Obtain an Understanding of the Issuers

82. Under AS 12, auditors should "obtain an understanding of the company and its environment . . . to understand the events, conditions, and company activities that might reasonably be expected to have a significant effect on the risks of material misstatement," including "[t]he

nature of the company" (¶ 7.b.) and "[t]he company's objectives and strategies and those related business risks that might reasonably be expected to result in risks of material misstatement" (¶ 7.d.). Further, obtaining an understanding of the nature of the company includes understanding "[t]he company's organizational structure and management personnel; [t]he sources of funding of the company's operations and investment activities, including the company's capital structure[, t]he company's operating characteristics, including its size and complexity" (¶ 10), and "an understanding of internal control includes evaluating the design of controls that are relevant to the audit and determining whether the controls have been implemented" (¶ 20).

83. Additionally, under AU 230, engagement partners "should be knowledgeable about the client" and are responsible for the "supervision of[] members of the engagement team" (.06).

84. The Audit Partners failed to obtain a sufficient understanding of the Issuers. What little understanding of the Issuers the Audit Partners obtained came almost entirely from draft Form S-1 registration statements provided by Briner. None of the Audit Partners obtained an understanding of the Issuers through communication with the Issuers' officers.

85. In obtaining an understanding of the Issuers, the Audit Partners did not question the substantial similarities among the Issuers. The Issuers filed twenty nearly identical Form S-1 registration statements. Using almost exactly the same language, each stated the following: (1) the Issuers are not blank check companies; (2) the Issuers' officers purchased Issuer stock for $30,000; (2) the Issuers purchased British Columbia mineral claims from Jervis; (3) Jervis supplied the Issuers' with their business plans; (4) the officers "solely" control the company; (5) the officers planned to devote only 4 to 5 hours each week to the business; and (6) the officers have not inspected the land comprising the mineral claims.

86. For De Joya, within about a four week period, Zhang read eight of these registration statements; Griffith read seven; and Arthur De Joya read two. For M&K, within about a six week period, Manis read ten registration statements; Ridenour read nine; and Ortego read three. Yet none of the Audit Partners raised any concern about the similarities among the registration statements, or performed any enhanced procedures to respond to the level of risk presented.

87. For the above reasons, the Audit Partners failed to meet AS 12 and AU 230.

<u>The Engagement Partners Failed to Audit Issuer Cash</u>

88. Under PCAOB standard AU Section 330 (The Confirmation Process) ("AU 330"), when "information about the respondent's [i.e., the person or entity from which a confirmation is requested] competence, knowledge, motivation, ability, or willingness to respond, or about the respondent's objectivity and freedom from bias with respect to the audited entity comes to the auditor's attention, the auditor should consider the effects of such information on designing the confirmation request and evaluating the results" and, in circumstances where "the respondent is the custodian of a material amount of the audited entity's assets," the auditor should exercise "a heightened degree of professional skepticism" and "should consider whether there is sufficient basis for concluding that the confirmation request is being sent to a respondent from whom the auditor can expect the response will provide meaningful and appropriate audit evidence" (at .27).

89. Additionally, under PCAOB Auditing Standard No. 15 (Audit Evidence) ("AS

15"), "[t]he auditor must plan and perform audit procedures to obtain sufficient appropriate audit evidence to provide a reasonable basis for his or her opinion" (¶ 4). To be appropriate, audit evidence must be both relevant and reliable in providing support for the conclusions on which the auditor's opinion is based. "The reliability of evidence depends on the nature and source of the evidence and the circumstances under which it is obtained" (¶ 8). Under PCAOB Auditing Standard No. 13 (The Auditor's Responses to the Risks of Material Misstatement) ("AS 13"), "[t]he auditor's responses to the assessed risks of material misstatement, particularly fraud risks, should involve the application of professional skepticism in gathering and evaluating audit evidence" (¶ 7).

90. The Engagement Partners exhibited no concern about Briner's handling of the Issuers' alleged cash. Each partner knew that Briner held all of the Issuers' purported funds in the Master Trust Account and that none of the Issuers had their own bank account. The Engagement Partners also knew that Briner was a "consultant" to the Issuers and that MetroWest was a law firm. None of the Engagement Partners sought any appropriate audit evidence about what, if any, limitations governed Briner's use of the cash in his Master Trust Account. Nor did any of the Engagement Partners ask for a reconciliation between Briner's Master Trust Account and the schedules Briner provided purportedly showing how much cash in his account was attributable to each Issuer.

91. In addition, the Engagement Partners violated the above standards by failing to apply professional skepticism in gathering and evaluating the evidence obtained, such as Briner's confirmation of Issuer cash, and consider Briner's "objectivity and freedom from bias with respect to the audited entity" in relation to the Issuers' cash confirmation Briner provided.

The Engagement Partners Disregarded Red Flags that Briner's
<u>Services to the Issuers Were Not Given Accounting Recognition</u>

92. Under PCAOB standard AU Section 334 (Related Parties) ("AU 334"), transactions that are indicative of the existence of related parties include, among other things, "transactions [that] are occurring, but are not being given accounting recognition, such as receiving or providing accounting, management or other services at no charge" (at .08(f)). Further, under AS 15, "[i]f audit evidence obtained from one source is inconsistent with that obtained from another, or if the auditor has doubts about the reliability of information to be used as audit evidence, the auditor should perform the audit procedures necessary to resolve the matter and should determine the effect, if any, on other aspects of the audit" (¶ 29). Finally, auditors must exercise professional skepticism throughout the course of the engagement consistent with standard AU 230.

93. Except for Whetman, none of the Engagement Partners questioned Briner's fee arrangement with the Issuers. Instead, they relied on legal confirmation letters from Briner that conflicted on their face with what they knew to be true about the services he provided.

94. These letters each stated that "[a]s of the date of inception and up to the present date, the [Issuers were] not indebted to us for services and expenses (billed or unbilled) of which we are aware." The Engagement Partners knew Briner provided substantial services to the Issuers, such as, among other things, performing accounting functions (paying expenses and recording transactions), drafting the Issuers' registration statements, and preparing the Issuers' financial

statements for their registration statements. The Engagement Partners also knew that the Issuers' financial statements and general ledgers did not reflect payment for Briner's services. Despite this, no Engagement Partner (except Whetman) asked Briner for any invoices, agreements, engagement letters, or any details about his fee arrangements with the Issuers. Nor did they conduct any related party analysis.

95. With respect to Whetman, the La Paz audit team requested details concerning Briner's fee arrangement with La Paz. In a November 29, 2012 email response, Briner indicated that he would charge between $10,000 and $25,000 for his services, but was not "comfortable" estimating his bill because he told his "client" he "would work out a fair bill at the end of the project and [his client] would find interim billing in the financials without their prior approval to be offensive." Whetman failed to investigate further and allowed this material liability to remain undisclosed.

96. For the above reasons, the Engagement Partners failed to meet AU 334, AS 15, and AU 230.

Certain Engagement Partners Did Not Investigate
<u>the Issuers' Failures to Account For Audit Fees</u>

97. Under AS 15, "[t]he auditor must plan and perform audit procedures to obtain sufficient appropriate audit evidence to provide a reasonable basis for his or her opinion" (¶ 4). In doing so, the auditor must exercise professional skepticism throughout the course of the engagement consistent with AU 230.

98. Additionally, under PCAOB Auditing Standard No. 14 (Evaluating Audit Results) ("AS 14"), the "auditor should take into account all relevant audit evidence, regardless of whether it appears to corroborate or to contradict the assertions in the financial statements" (¶ 3) and should take into account "[t]ransactions that are not recorded in a complete or timely manner or are improperly recorded as to amount, accounting period, classification, or company policy" (Appendix C, C1.a.(1)).

99. Zhang, Manis and Ortego did not question the Issuers' failures to account for audit fees paid during the audit period, or failures to account for audit fees paid during the subsequent events period.

100. Specifically, M&K and De Joya each requested retainers from Stone Boat, Goldstream, Braxton, Clearpoint, Gaspard, Coronation, Jewel, and Canyon, which were paid via wire transfers from Briner's Master Trust Account. But the retainers M&K and De Joya received from these Issuers were not reflected in the corresponding schedules that Briner prepared from his Master Trust Account and provided to M&K and De Joya.

101. Further, M&K failed to investigate conflicting evidence regarding the audit fees it received for three Issuers: Chum, Eclipse, and PRWC. Even though M&K knew that it received $9,900 on August 14, 2012 from Briner to cover its audit fees for these Issuers ($3,300 each), it did not question why Briner accounted only for the payment he made for Chum in the schedules he provided and not the payments he made for Eclipse and PRWC. Ortego was the engagement partner for all three Issuers. Yet he did not investigate this discrepancy.

102. For the above reasons, Zhang, Manis, and Ortego failed to meet AS 14, AS 15, and AU 230.

The Audit Partners Failed to Detect Basic Accounting Errors and Inconsistencies Between the Financial Statements and the <u>Registration Statements</u>

103. Under AU 230, "[a]n auditor should possess 'the degree of skill commonly possessed' by other auditors and should exercise it with 'reasonable care and diligence' (that is, with due professional care)" (at .05). Further, under AS 7, an engagement quality review partner should "review the financial statements" and "read other information in documents containing the financial statements to be filed with the Securities and Exchange Commission . . . and evaluate whether the engagement team has taken appropriate action with respect to any material inconsistencies with the financial statements or material misstatements of fact of which the engagement quality reviewer is aware" (¶ 10 f. and g.).

104. During the audits and engagement quality reviews, the Engagement Partners and Engagement Quality Review Partners (except for Arthur De Joya), respectively, failed to detect basic mistakes in the Issuers' financial statements and inconsistencies between the financial statements and information contained in other parts of the registration statements (see charts under Appendices B and C).

105. Mistakes in the financial statements include, among other things, balance sheets that do not foot and conflicts between balance sheets and the notes to the financial statements. Inconsistences between the financial statements and other information in the registration statements include, among other things, the disclosure of a net loss in the registration statement that conflicts with what should be the same disclosure in the Statement of Operations in the financial statements. These errors may constitute material misstatements and reflect the Engagement Partners and Engagement Quality Review Partners (except for Arthur De Joya) apparent lack of due care in conducting their audits and engagement quality reviews, respectively.

106. For the reasons contained in the charts under Appendices B and C, the Engagement Partners failed to meet AU 230 and the Engagement Quality Review Partners (except for Arthur De Joya) failed to meet AS 7.

<u>Additional De Joya Violations of PCAOB Standards</u>

The De Joya Partners Failed to Adequately Respond to Concerns <u>that Briner and Dalmy May Have Been Engaging in Fraud</u>

107. In early November 2012, while Whetman was reviewing La Paz's interim financial statements and Zhang was conducting the initial audit for the other eight Issuers, a De Joya staff member raised concerns to the De Joya Partners, including Griffith and Arthur De Joya, that Briner and Dalmy may be engaging in fraud with respect to the Issuers.

108. Under QC 20, "policies and procedures should provide the firm with reasonable assurance that the likelihood of association with a client whose management lacks integrity is minimized" (at .14) and that the firm "[a]ppropriately considers the risks associated with providing

professional services in the particular circumstances" (at .15 b.).

109. Under AS 12, "[t]he auditor's assessment of the risks of material misstatement, including fraud risks, should continue throughout the audit. When the auditor obtains audit evidence during the course of the audit that contradicts the audit evidence on which the auditor originally based his or her risk assessment, the auditor should revise the risk assessment and modify planned audit procedures or perform additional procedures in response to the revised risk assessments" (¶ 74).

110. Further, under AS 13, "[t]he auditor's responses to the assessed risks of material misstatement, particularly fraud risks, should involve the application of professional skepticism in gathering and evaluating audit evidence [including] . . . modifying the planned audit procedures to obtain more reliable evidence regarding relevant assertions and (b) obtaining sufficient appropriate evidence to corroborate management's explanations or representations concerning important matters, such as through third-party confirmation, use of a specialist engaged or employed by the auditor, or examination of documentation from independent sources" (¶ 7).

111. Finally, under AS 7, the engagement quality review partner should "evaluate the significant judgments made by the engagement team and the related conclusions reached in forming the overall conclusion on the engagement," (¶ 9) including "significant risks identified by the engagement team, including fraud risks" (¶ 10.b.).

112. De Joya and the De Joya Partners failed to (a) properly consider the risks associated with the Issuers' audits, (b) apply professional skepticism in evaluating audit evidence indicating Briner and Dalmy may be engaging in fraud, (c) re-evaluate their risk assessments for the Issuers' audits in light of such evidence, and (d) regarding Arthur De Joya's and Griffith's roles as engagement quality review partners, appropriately evaluate the engagement teams' judgments to continue with the audits without appropriately re-assessing and responding to the risk of fraud in violation of QC 20, AS 12, AS 13, and AS 7.

113. On or about November 5, 2012, a De Joya staff member became concerned that Briner might be engaging in fraud in connection with the De Joya Issuers. Her concern stemmed from conversations she had with certain Issuers' officers in which nearly all her questions about the Issuers were deferred to Briner. These conversations caused her to conduct an internet search on Briner. She found, among other things, the Commission's complaint against him. Additional searches yielded news articles describing Briner and Dalmy as repeat securities fraud offenders.

114. As a result, the De Joya staff member sent four emails over three days sharing the negative information she found concerning Briner and Dalmy. First, on November 5, 2012, she sent Zhang and Whetman an email containing links to the Commission's complaint against Briner (SEC v. Golden Apple Oil and Gas, Inc., et al., 09-Civ-7580 (S.D.N.Y.) (HB)) and a Canadian news article stating, among other things, that the British Columbia Securities Commission issued an order (reciprocal to the Commission's order suspending Briner) banning Briner from trading shares in British Columbia or "acting in a management or consultative capacity in any securities related matter."[2] In the email, she asked Zhang and Whetman to "review the links" and stated that

[2] http://www.canadianjusticereviewboard.ca/article-securities%20lawyer.htm

she "will call [Zhang] tonight."

115. Second, that same day, the De Joya staff member sent another email to Zhang and Whetman with a link to an article posted on Pumpsanddumps.com stating that Briner and Dalmy "together and apart, the pair has been involved in dozens of schemes on the Vancouver market as well as the Pink sheets and OTC Bulletin Board, writing many a dubious legal opinion resulting in millions of dollars lost by thousands of investors."[3]

116. Third, on November 7, 2012, the De Joya staff member sent yet another email to Zhang and Whetman attaching an article about a De Joya client, MoneyMinding International Corp., and its counsel, Dalmy, who was described as having "a reputation for helping scoundrel promoters take dubious companies public on the U.S. over-the-counter markets." The article also specifically mentions De Joya as having "similarly helped many dubious companies go public on the bulletin board."[4]

117. Finally, the same day, the De Joya staff member forwarded the email and article to Griffith stating, "I thought I should forward this to you as well. I was doing research on Diane Dalmy and John Briner as we are working on some of their jobs and that's how I can [sic] across this article." Griffith then forwarded her email with the attached article to Arthur De Joya without comment.

118. In light of the negative background the De Joya staff member found and the officers' apparent inability to answer questions about the Issuers, the staff member found it suspicious that Briner and Dalmy were working together on eight of the nine De Joya Issuers. The staff member discussed her concerns with Zhang. Whetman and Zhang then discussed the staff member's concerns and resolved that Zhang would raise them with Griffith and Arthur De Joya, which Zhang did.

119. Zhang opened the links in the emails the De Joya staff member sent, printed the documents, highlighted relevant portions, and brought them to separate face-to-face meetings with Arthur De Joya and Griffith. At these meetings it was collectively decided that De Joya could continue with the engagements because Briner was not appearing before the Commission in violation of his suspension.

120. Zhang and Arthur De Joya each informed the De Joya staff member of this decision and then continued with the audits without adjusting any audit procedures or taking any additional precautions in light of the facts they learned about Briner and Dalmy. Zhang ultimately signed audit reports containing unqualified opinions for the eight Issuers and Arthur De Joya and Griffith signed off on the nine Issuers' audits as Engagement Quality Review partners without taking any further action.

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[3] http://www.pumpsanddumps.com/2011/06/all-that-glitters-is-not-greenwood-gold.html

[4] http://blogs.vancouversun.com/2011/03/17/david-baines-two-victoria-startups-wade-into-bulletin-board-swamp/

121. For his part, Whetman did not follow-up with Zhang on the matter, nor did he do anything further regarding the La Paz audit, such as considering whether to withdraw the audit reports on La Paz's financial statements that had been filed. Nor did Whetman do anything further with respect to La Paz's interim financial statements, which he was reviewing at the time. Whetman, therefore failed to meet PCAOB standard AU Section 561 (Subsequent Discovery of Facts Existing at the Date of the Auditor's Report) ("AU 561"), which provides that "[w]hen the auditor becomes aware of information which relates to financial statements previously reported on by him, but which was not known to him at the date of his report, and which is of such a nature and from such a source that he would have investigated it had it come to his attention during the course of his audit, he should, as soon as practicable, undertake to determine whether the information is reliable and whether the facts existed at the date of his report" (at .04).

122. None of the above purported discussions were documented in any workpaper, or otherwise, in violation of PCAOB Auditing Standard No. 3 (Audit Documentation) ("AS 3"), which provides that auditors "must document significant findings or issues, actions taken to address them (including additional evidence obtained), and the basis for the conclusions reached in connection with each engagement" (¶ 12).

Whetman Disregarded Red Flags that La Paz's
<u>Stock Sale to Its Officer Was a Sham</u>

123. La Paz was the first Issuer audited by De Joya. From about November 2011 through June 2013 (when De Joya resigned from the engagement), Whetman served as the engagement partner in charge of auditing La Paz's financial statements. On or about July 17, 2012, Whetman consented to De Joya's audit report being included in La Paz's Form S-1 registration statement.

124. Under AS 15, "[i]f audit evidence obtained from one source is inconsistent with that obtained from another, or if the auditor has doubts about the reliability of information to be used as audit evidence, the auditor should perform the audit procedures necessary to resolve the matter and should determine the effect, if any, on other aspects of the audit" (¶ 29). Under AS 12, the auditor should obtain "an understanding of the nature of the company include[ing]…the sources of funding of the company's operations" (¶ 10) and "[w]hen the auditor obtains audit evidence during the course of the audit that contradicts the audit evidence on which the auditor originally based his or her risk assessment, the auditor should revise the risk assessment and modify planned audit procedures or perform additional procedures in response to the revised risk assessments" (¶ 74). Further, under AS 14, auditors should consider "[t]he sufficiency and appropriateness of the audit evidence obtained" (¶ 4.f.). In meeting these standards, auditors must apply professional skepticism and due care consistent with AU 230.

125. Whetman failed to resolve significant contradictions and inconsistencies in the audit evidence supporting La Paz's stock sale to its officer in violation of these standards.

126. Specifically, Whetman received contradicting accounting support as to who paid $30,000 for La Paz's stock. On or about May 29, 2012, Briner sent a purported schedule for La Paz (prepared by Briner purportedly reflecting cash attributable to La Paz in the Master Trust Account) that conflicted with the stock purchase agreement for La Paz stock. The schedule

showed that the $30,000 for the purchase of La Paz stock was paid for by an entity called "Hyperion [Management]." The stock purchase agreement (and La Paz's registration statement), by contrast, described the stock purchase as a transaction between La Paz and La Paz's officer. Despite this red flag, Whetman never resolved the issue of who paid for the La Paz stock.

127. In fact, the back-up documentation Briner provided to support the stock purchase further confused the issue. It showed that another entity apparently provided the funds for the stock purchase. On July 4, 2012, in response to De Joya staff requests for support for the stock purchase, Briner sent an email with information reflecting an alleged deposit into the Master Trust Account on December 29, 2011 for $39,280.60 from an entity referred to as Ft-Green Omega, Inc. In the email, Briner stated that "$30,000 was earmarked for the project [i.e., La Paz]."

128. The La Paz audit team then requested the corresponding bank statements. In response, on July 11, 2012, Briner sent an email containing what appear to be computer screen shots reflecting transactions in the Master Trust Account. Briner indicated these screen shots were "bank statements." No actual bank statements were received by De Joya in connection with the La Paz audit. The computer screen shot Briner provided appeared to show a deposit by Ft-Green Omega, Inc. on December 29, 2011 for $39,280.60. In this same email, Briner also sent a revised schedule for La Paz changing the date of the stock purchase from November 23, 2011 to December 29, 2011, apparently to make it consistent with the computer screen shots. Briner left the name "Hyperion [Management]" in this later version of the La Paz schedule. Despite the contradicting evidence regarding who paid for (and owned) La Paz's stock, Whetman took no further action with respect to the stock purchase.

129. For these reasons, Whetman failed to meet AS 14, AS 15, AS 12, and AU 230.

Whetman Disregarded Red Flags that La Paz's
<u>Mineral Claim Purchase Was a Sham</u>

130. Like the evidence supporting the stock purchase, the La Paz schedule and the computer screen shots Briner provided to Whetman in support of the mineral claim purchase (the same documents used to support the stock purchase) conflicted with one another. As described below, Whetman failed to resolve these conflicts and therefore violated AS 15, AS 12, and AU 230.

131. First, the La Paz schedule Briner provided to De Joya described the mineral claim purchase as a $20,000 wire transfer occurring on December 12, 2011. The transaction in the computer screen shots was a $20,000 debit (not a wire) occurring on December 30, 2011. Further, in the computer screen shot also provided by Briner, this transaction is characterized in the description as "Business Investment Savings." No mention in the description was made to Jervis or how the cash was transferred. From this, it is impossible to determine whether La Paz actually paid Jervis for the mineral claim. Moreover, if the funds were in fact transferred via a wire, there is no sufficient explanation for the discrepancy between December 12 (the date listed in the La Paz schedule that funds were sent) and December 30 (the date listed in the computer screen shots that funds were sent). Later, in an apparent attempt to cover up the date discrepancies, Briner changed the dates of the mineral claim purchase from December 12 to December 30, 2011 when he sent De Joya a revised schedule for La Paz (like he did for the dates of the alleged stock purchase).

132. Second, on July 17, 2012, Whetman requested additional support for La Paz's mineral claim purchase. In response, on July 18, 2012, Briner provided a check, numbered 350, that was from MetroWest to Jervis for $20,000 and was dated December 30, 2011. "La Paz Mining" was written in the memo line. Briner included copies of both the front and back of the check, but the back of the check was obscured such that it was impossible to tell whether the check had been cashed. The $20,000 transaction listed in the computer screen shots that Briner indicated was for the mineral claim purchase, however, did not reference a check number 350, or any check for $20,000. The check numbers on the computer screen shots ranged from 1 to 253. Whetman failed to question this discrepancy, despite the fact that the computer screen shots reference approximately thirty other transactions that each appear to identify the check numbers associated with cashed checks.

133. Finally, Briner provided evidence to Whetman indicating that La Paz's mineral claim purchase may not have been the result of arms-length negotiation because Briner appeared to have been behind the sale. Specifically, the purchase agreement Whetman relied on to support La Paz's mineral claim purchase contained an invoice for the claim listing Briner's name (in typeface) as the signatory on behalf of Jervis. Whetman did not do any additional investigation into whether the purchase was a related party transaction.

134. In this regard, Whetman also violated AU 334 (because Briner appeared to control Jervis and Whetman failed to, among other things, "review the extent and nature of business transacted with [Jervis] for indications of previously undisclosed relationships" (.08(e))), and AS 13, which states that "[t]he auditor's responses to the assessed risks of material misstatement, particularly fraud risks, should involve the application of professional skepticism in gathering and evaluating audit evidence" (¶ 7).

Whetman Failed to Resolve Discrepancies in the Audit Evidence Supporting the Officer's Fee

135. Whetman accepted evidence that purported to support fees paid to La Paz's officer that did not in fact provide support. On or about October 28, 2012, a De Joya staff accountant asked for documents reflecting the payment of fees to, among others, La Paz's officer. The next day, Briner's assistant sent documents appearing to reflect wire transfers from MetroWest to, among others, Crown Capital Partners for $6,000. The La Paz schedule indicated that its officer was paid $2,000 and does not mention Crown Capital Partners. Although Briner's assistant indicated in an email that the wire to Crown Capital Partners was for La Paz's officer (for services to three companies), she did not provide any other evidence of this or how the $6,000 was allocated. And Whetman did not ask La Paz's officer whether he was paid his fee or how the $6,000 was allocated among the Issuers he served as the officer. Nonetheless, Whetman accepted these documents as support for La Paz's officer's fees.

136. Whetman failed to resolve these conflicts or obtain sufficient appropriate audit evidence to support De Joya's opinion and therefore violated AS 15, AS 12, and AU 230.

Zhang Disregarded Red Flags that the Issuers' Stock
<u>Sales to Their Officers Were Shams</u>

137. From about July 2012 through June 2013 (when De Joya resigned from the engagements), Zhang served as the engagement partner in charge of auditing the financial statements for the following eight Issuers: Braxton, Coronation, Jewel, Canyon, Clearpoint, Gaspard, Tuba City and Gold Camp. Between about December 2012 and January 2013, Zhang consented to the inclusion of De Joya's audit reports in the Form S-1 registration statements for these eight Issuers.

138. Similar to the evidence Briner provided in connection with the La Paz audit, Briner provided De Joya with schedules for each of these other Issuers purportedly listing all transactions (prepared by Briner allegedly reflecting cash attributable to each Issuer from his Master Trust Account). Each appeared to indicate that individuals or entities named "Hyperion" management, "Luke Pretty," or "Dhaliwal" supplied the funds to pay for the officers' stock purchases. As such, these schedules contradicted the Stock Purchase Agreements, which all indicated that the officer purchased the Issuer's stock.

139. For some Issuers, the date listed for the stock purchase was prior to the Issuers' incorporation.

140. For others, the date listed for the stock purchase was after the Issuers purchased their mineral claims, which, if true, raises questions as to how the Issuers were able to finance a mineral claim purchase before having received the funds necessary to make the mineral claim purchase.

141. Despite the contradicting evidence regarding who paid for (and owned) the Issuers' stock, and when the transactions took place, Zhang took no further action with respect to these alleged stock purchases.

142. Although Zhang and De Joya staff questioned Briner about who paid for the stock purchase, they failed to obtain adequate supporting evidence that resolved this issue. In or about October 2012, De Joya staff requested supporting documentation and a breakdown by Issuer identifying who paid for the stock. Briner replied that the officers borrowed the funds, not only for the stock purchase, but also for the Issuers' mineral claim purchase from Jervis as well. As support, Briner sent copies of three checks: (1) $300,000 from Jagjit Dhaliwal to MetroWest, (2) $42,500 from MetroWest to Jervis, and (3) $41,543.75 from an unidentified individual or entity to Jervis. Briner also stated that the $300,000 was really from an entity called Global Investments (not Dhaliwal), which purportedly loaned the funds to the officers to incorporate and pay for company stock.

143. As Briner's response did not make clear who paid for the stock, the De Joya staff continued to request a breakdown by Issuer of who paid for the stock purchases (and also for the mineral claims). The breakdown Briner provided stated that an individual referred to as Luke Pretty paid $15,000 for the mineral claims allegedly purchased by Goldcamp and Tuba City. And that Luke Pretty paid $60,000 for Goldcamp's and Tuba City's officers' purchase of company stock. Global Investments paid the remaining funds to the Issuers.

144. Not satisfied with Briner's response, on November 27, 2012, Zhang emailed Briner asking who paid Jervis for the mineral claims stating "we have received contradicting information for this" and that if it was Global Investments "why [is it] not shown in [the] books." He also asked about Luke Pretty. But Briner did not provide any additional supporting documentation. Nor did Zhang seek clarification from the Issuers' officers.

145. As a result, Zhang failed to resolve these conflicts or obtain sufficient appropriate audit evidence to support De Joya's opinions and therefore violated PCAOB standards AS 15, AS 12, and AU 230.

Zhang Disregarded Red Flags that the Issuers' Mineral Claim Purchases Were Shams

146. Zhang failed to investigate evidence from Briner that should have caused him to question the Issuers' alleged mineral claim purchases from Jervis.

147. During the audits, Zhang sought information about Briner's relationship with Jervis, in part because all of the Issuers purchased their mineral claims from Jervis. On or about October 25, 2012, Zhang participated in a conference call with Briner to discuss the issue. Following the call, Briner provided a letter dated October 26, 2012 stating that he "is only a director of Jervis Explorations Inc. [and a]s such he neither holds any ownership interests in that company nor is he involved in any decision making process of Jervis Explorations Inc." Learning that Briner was a director of Jervis and knowing that Briner played a substantial role in the Issuers' affairs should have caused Zhang to obtain evidence to corroborate Briner's assertions regarding the Issuers' mineral claim purchases from Jervis.

148. Zhang, therefore, violated AU 334 (because Briner appeared to control Jervis and Zhang failed to, among other things, "review the extent and nature of business transacted with [Jervis] for indications of previously undisclosed relationships" (.08(e))) and AS 13, which states that "[t]he auditor's responses to the assessed risks of material misstatement, particularly fraud risks, should involve the application of professional skepticism in gathering and evaluating audit evidence." (¶ 7) Zhang also violated AS 15, AS 12, and AU 230 for failing to resolve the conflict between Briner's role as a director of Jervis and his statement that he is not involved in Jervis's decision making.

Zhang Failed to Resolve Discrepancies in the Audit Evidence Supporting the Officers' Fees

149. Like Whetman, Zhang accepted evidence that purported to support the officers' fees that did not in fact provide support. In some instances the evidence also was inconsistent with the schedules for the Issuers prepared by Briner purportedly reflecting cash attributable to the Issuers in the Master Trust Account.

150. On or about October 28, 2012, a De Joya staff accountant asked for documents reflecting the payment of fees to the officers (in the same communication discussed in ¶ 137, above). The next day, Briner's assistant sent documents reflecting wire transfers from MetroWest to, among others, Crown Capital Partners for $6,000 and Strategic Air Consultants for $4,000. Although Briner's assistant indicated that the wire to Crown Capital Partners was for La Paz's

officer (for services to three companies), no other documents made this connection and La Paz's officer was not asked whether he was paid his fee. Briner's assistant did not state which officer was associated with Strategic Air Consultants, and Zhang did not try to find out. Nonetheless, Zhang accepted these documents as support for the officers' fees.

151. Further, the documents reflecting wire transfers from MetroWest to the officers for Canyon and Clearpoint were not consistent with these Issuers' schedules. The wire transfers were as follows: USD $4,000 to Canyon's officer and C $4,000 to Jewel's officer. But the schedule Briner provided for Canyon indicates that its officer was paid USD $3,000, and the schedule for Jewel indicates that its officer was paid USD $3,000 in U.S. currency. Moreover, the wire transfer documents Briner provided do not indicate when the wire transfers purportedly occurred. The dates of the transactions listed in the schedules, therefore, cannot be compared with the wire transfer documents provided.

152. Zhang failed to resolve these conflicts or obtain sufficient appropriate audit evidence to support De Joya's opinions and therefore violated AS 15, AS 12, and AU 230.

Additional M&K Violations of PCAOB Standards

Manis Accepted Accounting that Violated GAAP

153. From November 2011 through June 2013, Manis served as the engagement partner in charge of auditing Stone Boat's financial statements, the first of the eleven Issuers that M&K would audit. On or about July 27, 2012, Manis consented to the inclusion of M&K's audit report in Stone Boat's Form S-1 registration statement.

154. Manis accepted without question Briner's improper accounting of certain material transactions. Specifically, Briner deleted Stone Boat transactions that purportedly occurred during the audit period on grounds that Stone Boat had purportedly "rescind[ed]" the transactions after the audit period.

155. On June 11, 2012, Briner's assistant sent to M&K, among other things, a schedule purportedly reflecting cash attributable to Stone Boat in the Master Trust Account and financial statements for Stone Boat reflecting all transactions as of May 31, 2012 (Stone Boat's period end). These documents reflected, among other things, (1) a $250,000 private placement for the sale of Stone Boat stock, (2) payments of $75,000 and $67,500 for property, and (3) a $10,000 legal retainer. Briner's assistant also sent a cash confirmation, dated June 11, 2012, signed by Briner confirming that as of May 31, 2012, Briner held $106,105 in cash attributable to Stone Boat in the Master Trust Account.

156. On June 27, 2012, approximately one month after the period's end, Briner sent an email to an M&K employee working on the Stone Boat audit stating the following:

> There have been some dramatic changes with the company over the past two weeks. The Company was forced to rescind the private placement it received for $250,000. As such, it has reversed the two property payments it made as well as the legal retainer for $10,000.

> Accordingly, I have reversed all of the transactions required by these changes and am sending you the updated financials and [general ledger].

157. According to Briner's email, the purported rescission apparently occurred after Briner sent the first set of Stone Boat financial statements on June 11, 2012 and therefore, after the period ending May 31, 2012. These subsequent events, therefore, should be treated as non-recognized subsequent events and should not result in adjustment of the financial statements. See ASC 855-10-25-3 (Evidence about Conditions That Did Not Exist at the Date of the Balance Sheet). Briner's accounting on behalf of Stone Boat, therefore, violated GAAP. Manis did not question the business rationale or motive behind the rescission or Stone Boat's ability to back-out of the transactions such as by conducting an "examination of data to assure that proper cutoffs have been made and . . . information to aid the auditor in his evaluation of the assets and liabilities as of the balance-sheet date," as required under PCAOB standard AU Section 560 (Subsequent Events) ("AU 560") (.11).

158. Yet Manis, as the engagement partner, and Ridenour, as the engagement quality review partner, accepted this accounting without question. Further, Manis raised no concern with the new documents Briner provided that excluded the above transactions as well as a second cash confirmation dated July 20, 2012 and signed by Briner confirming that, as of May 31, 2012, Briner held $9,570.00 of cash attributable to Stone Boat in his Master Trust Account. Neither Manis, nor Ridenour, resolved the material difference between the June 11, 2012 cash confirmation of $106,105 and the July 20, 2012 cash confirmation of $9,570.

159. In addition to consenting to the filing of his firm's audit report where the Issuers' underlying accounting violated GAAP, Manis failed to meet AS 15, AS 12, AS 3, AU 560, and AU 230 for failing to obtain sufficient appropriate evidence, exercise professional skepticism, and document the consideration of Briner's accounting with respect to the alleged rescission. Manis also failed to meet PCAOB standard AU Section 316 (Consideration of Fraud in a Financial Statement Audit) ("AU 316") for not gaining "an understanding of the business rationale for [a significant transaction that is outside of the normal course of business for the entity] and whether that rationale (or the lack thereof) suggests that the transactions may have been entered into to engage in fraudulent financial reporting or conceal misappropriation of assets" (at .66).

160. Further, Ridenour violated AS 7, which provides that an engagement quality review partner should "evaluate the significant judgments made by the engagement team and the related conclusions reached in forming the overall conclusion on the engagement" (¶ 9). Manis's decision not to evaluate the manner in which Briner, on behalf of Stone Boat, accounted for the purported rescission was a significant judgment Ridenour should have, but failed, to evaluate.

Manis Ignored Red Flags Indicating that Briner May Have Engaged in a Related Party Transaction With Stone Boat

161. Under AU 334, transactions that because of their nature may be indicative of the existence of related parties include, among other things, "[b]orrowing or lending on an interest-free basis" and "[m]aking loans with no scheduled terms for when or how the funds will be repaid" (at .03(a) and (d)). Further, under AS 15, "[i]f audit evidence obtained from one source is inconsistent

with that obtained from another, or if the auditor has doubts about the reliability of information to be used as audit evidence, the auditor should perform the audit procedures necessary to resolve the matter and should determine the effect, if any, on other aspects of the audit" (¶ 29). Finally, auditors must exercise professional skepticism throughout the course of the engagement consistent with AU 230.

162. Manis ignored evidence indicating that Stone Boat may have engaged in a related party transaction with Briner and therefore failed to meet the above standards.

163. On June 13, 2012, Briner's assistant sent an email with two documents: (1) a related party worksheet listing no related parties for the period ending May 31, 2012 that was signed by Stone Boat's officer, and (2) a confirmation that as of May 31, 2012, MetroWest issued a $100,000 "non-interest bearing demand loan" to Stone Boat.

164. Despite the apparent contradiction between the MetroWest loan to Stone Boat and Stone Boat's officer's assertion that that there were no related party transactions during the audit period, Manis did not investigate the nature of the alleged noninterest bearing loan from MetroWest, including whether it constituted a related party transaction. Manis therefore violated AU 334, AS 15, and AU 230.

The M&K Partners Disregarded Red Flags that the Issuers' Stock Sales to Their Officers Were Shams

165. Under PCAOB Auditing Standard No. 10 (Supervision of the Audit Engagement) ("AS 10"), the engagement partner "is responsible for proper supervision of the work of engagement team members and for compliance with PCAOB standards" (¶ 3) and should "[d]irect engagement team members to bring significant accounting and auditing issues arising during the audit to the attention of the engagement partner or other engagement team members performing supervisory activities so they can evaluate those issues and determine that appropriate actions are taken in accordance with PCAOB standards" (¶ 5 b.).

166. Like the De Joya audits, Briner provided M&K with schedules for each of the Issuers purportedly listing all transactions (prepared by Briner) that were reviewed by an M&K staff member (the same person reviewed the audit evidence for all of the M&K Issuers' audits).

167. Each of the schedules appeared to indicate that individuals or entities named "Hyperion" management, "Luke Pretty," or "Dhaliwal" supplied the funds to pay for the officers' stock purchases and characterized these transactions as "investments." The Issuers' registration statements and stock purchase agreements (also reviewed by the same M&K staff member referred to above), by contrast, indicated that the Issuers' respective officers paid for and purchased the Issuers' stock.

168. Additionally, these schedules contained the same contradictions as those Briner provided on behalf of the De Joya Issuers, such as dates listed for stock purchases that in some instances (1) occurred before the Issuers were incorporated, or (2) occurred after the Issuers purchased their mineral claims.

169. The M&K Partners disregarded these inconsistencies and contradictions in the audit

evidence in violation of AS 15, AS 12, and AU 230. The M&K Partners also failed to meet AS 10 by failing to direct the M&K staff member reviewing the audit evidence to bring significant accounting and auditing issues to their attention and by otherwise failing to supervise the M&K Issuers' audits.

BRINER VIOLATED SECTION 17(a) OF THE SECURITIES ACT

170. Briner violated Section 17(a) of the Securities Act as the architect and primary proponent of the fraudulent shell-factory scheme that resulted in the filing of the twenty Form S-1 registration statements with the materially false statements and omissions of fact discussed herein. Briner handled, oversaw, directed, and controlled each step of the scheme including:

- arranging the incorporation of the Issuers;
- selecting the officers for the Issuers;
- paying fees to the officers;
- providing the Issuers with a business plan and purpose;
- fabricating mineral claim purchases for the Issuers;
- providing the funds, if any, to purchase Issuer stock;
- holding Issuer funds, if any, in a bank account under his control;
- engaging auditors and counsel for the Issuers;
- creating the Issuers' financial statements;
- performing the Issuers' accounting;
- drafting the Issuers' Form S-1 registration statements; and
- handling and coordinating all administrative tasks for the Issuers, including the filing of Issuers' Form S-1 registration statements.

171. Briner was able to maintain total control over the Issuers by recruiting current and former law clients and acquaintances to serve as officers for the Issuers and paying them a fee as a "consultant." Briner paid the recruits an initial "consulting" fee between $2,000 and $3,000 for each company for which they served as an officer with the promise of another $7,000 to $8,000 (per company) when the company obtained an OTCBB ticker symbol.

172. The officers then signed all the documents Briner provided and held the Issuer stock in their name with the understanding that Briner truly controlled the stock and, therefore, the Issuers. No information concerning Briner's role in financing the Issuers, the purported mineral claim purchases (i.e., that Briner controlled Jervis, the entity that allegedly sold the mineral claims to the Issuers), or otherwise was disclosed in any public filings.

173. Further, the fact that none of the mineral claims the Issuers supposedly purchased from Jervis were transferred from Jervis to the Issuers shows that the mining businesses were simply created to avoid the "blank check" provisions of Rule 419 of the Securities Act.

174. Briner obtained money or property by means of the scheme, including through the Issuers' mineral claim purchases from Jervis and through his work on behalf of the Issuers.

175. Accordingly, Briner knew, or was reckless in not knowing, that each of the Issuers was a device, scheme, or artifice to defraud in violation of Section 17(a)(1) of the Securities Act, and that by actually controlling the Issuers he aided and abetted the Issuers' violations of Sections 17(a)(1), (2), and (3) of the Securities Act. Further, Briner violated Sections 17(a)(2) and (3) of the Securities Act because he engaged in a course of conduct relating to the Issuers that operated as a fraud and a reasonable attorney would have known that his control over the Issuers was required to be publicly disclosed.

DALMY VIOLATED SECTION 17(a) OF THE SECURITES ACT

176. Dalmy violated Section 17(a) of the Securities Act by preparing and consenting to the filing of eighteen opinion letters that she knew or was reckless in not knowing falsely stated that she had conducted an investigation in support of her opinion. She consented to the inclusion of these letters with the Form S-1 registration statements to be filed with the Commission (and that were filed) and knew that Briner intended to include these letters with the registration statements once filed. Her preparation of the opinion letters that included false statements and her consent to the inclusion of such letters with the Issuers' registration statements constitutes a failure to conform to the standard of care of a reasonable person in a similar position under like circumstances.

177. In the opinion letters, Dalmy claimed to have "made such investigation and examined such records," including the registration statement, the company's articles of incorporation, certain records of corporate proceedings, records with respect to the authorization and issuance of common stock, and other records Dalmy deemed necessary to support her opinion, which was in each case that "the shares of Common Stock held by the Selling Shareholder are validly issued, fully paid and non-assessable."

178. But the evidence indicates that she did not conduct any investigation. She simply provided the attorney opinion letters for the Issuers to Briner to be filed with the Issuers' registration statements. Dalmy was paid $1,500 for at least one of these letters, and expected to be paid for the others.

179. Accordingly, Dalmy knew, or was reckless in not knowing, that by providing her attorney opinion letters she was engaging in a device, scheme, or artifice to defraud in violation of Section 17(a)(1) of the Securities Act. Further, by providing such letters, Dalmy knew or was reckless in not knowing that the use of her letters caused or would be a cause the Issuers' violations of Sections 17(a)(1) of the Securities Act. Dalmy also acted unreasonably in providing her attorney opinion letters and violated Sections 17(a)(2) and (3) of the Securities Act because a reasonable attorney would have conducted an investigation into the underlying facts represented in such opinions. By acting unreasonably in this manner, Dalmy knew or should have known that her

letters caused or would be a cause of the Issuers' violations of Sections 17(a)(2) and (3).

DE JOYA, M&K, AND THE AUDIT PARTNERS VIOLATED SECTION 17(a) OF THE SECURITES ACT, RULE 2-02 OF REGULATION S-X, AND ENGAGED <u>IN IMPROPER PROFESSIONAL CONDUCT</u>

180. De Joya and M&K falsely stated in their audit reports filed with each of the Issuers' twenty registration statements that they "conducted [their] audit in accordance with the standards of the Public Company Accounting Oversight Board (United States)" and that the financial statements present the Issuers' financial positions "in conformity with U.S. generally accepted accounting principles." Each of De Joya, M&K and the Audit Partners signed or consented to the filings of these audit reports.

181. Additionally, De Joya, M&K, and the Audit Partners failed to meet the PCAOB standards discussed herein.

182. For these false reports, De Joya and the De Joya Partners collected a total of $37,500 in fees and M&K and the M&K Partners collected a total of $49,500 in fees.

183. De Joya, M&K, and the Audit Partners knew, or were reckless in not knowing, that each of the Issuers for which they provided audit reports was a device, scheme, or artifice to defraud in violation of Section 17(a)(1) of the Securities Act. Further, by providing such reports, De Joya, M&K, and the Audit Partners acted unreasonably and caused the Issuers' violations of Sections 17(a)(1), (2), and (3) of the Securities Act. De Joya, M&K, and the Audit Partners also violated Sections 17(a)(2) and (3) of the Securities Act by falsely claiming that their audits complied with PCAOB standards.

184. Additionally, for failing to meet the PCAOB audit standards identified above in auditing the Issuers, De Joya, M&K, and the Audit Partners engaged in improper professional conduct pursuant to the Commission's Rules of Practice Rule 102(e)(1)(ii) by each engaging in at least one instance of highly unreasonable conduct or at least two instances of unreasonable conduct under Rule 102(e)(1)(iv). De Joya, M&K, and the Audit Partners also violated Rule 2-02(b)(1) of Regulation S-X by providing audit reports included in the Issuers' Form S-1 Registration statements that falsely state that the Issuers' audits were made in accordance with PCAOB standards.

185. Further, as described above, De Joya, M&K, and the Audit Partners willfully violated Sections 17(a)(1), (2), and (3) of the Securities Act thereby engaging in conduct subject to the Commission's Rules of Practice Rule 102(e)(1)(iii).

III.

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

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

B. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Briner should be ordered to cease and desist from committing or causing violations of and any future violations of Section 17(a) of the Securities Act, whether Briner should be ordered to pay civil penalties pursuant to Section 8A(g) of the Securities Act and Section 21B(a) of the Exchange Act, whether Briner should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act, whether Briner should be prohibited from serving as an officer or director under Section 8A(f) of the Securities Act and Section 21C(f) of the Exchange Act, and whether Briner should be barred from participating in an offering of penny stock under Section 15(b)(6)(A) of the Exchange Act;

C. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Dalmy should be ordered to cease and desist from committing or causing violations of and any future violations of Section 17(a) of the Securities Act, whether Dalmy should be ordered to pay civil penalties pursuant to Section 8A(g) of the Securities Act and Section 21B(a) of the Exchange Act, and whether Dalmy should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act;

D. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, De Joya, M&K, Arthur De Joya, Griffith, Whetman, Zhang, Manis, Ridenour, and Ortego should be ordered to cease and desist from committing or causing violations and any future violations of Section 17(a) of the Securities Act and Rule 2-02 of Regulation S-X, whether De Joya, M&K, Arthur De Joya, Griffith, Whetman, Zhang, Manis, Ridenour, and Ortego should be ordered to pay civil penalties pursuant to Section 8A(g) of the Securities Act and Section 21B(a) of the Exchange Act, and whether De Joya, M&K, Arthur De Joya, Griffith, Whetman, Zhang, Manis, Ridenour, and Ortego should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act; and

E. What, if any, remedial action is necessary and appropriate and in the public interest against De Joya, M&K, Arthur De Joya, Griffith, Whetman, Zhang, Manis, Ridenour, and Ortego pursuant to Section 4C of the Exchange Act and Rule 102(e) of the Commission's Rules of Practice.

IV.

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

IT IS FURTHER ORDERED that Respondents shall file Answers 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 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 as provided for in the Commission's Rules of Practice.

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.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Appendix A

Issuer	Engagement Partner	EQR Partner	Form S-1 Filing Date	Form S-1 Amendment Date	Amount of Intended Public Offering
De Joya Issuers					
La Paz	Whetman	Griffith	7/19/2012	9/25/2012	$20,000
Tuba City	Zhang	Griffith	1/2/2013	-	$12,000
Braxton	Zhang	Griffith	1/2/2013	-	$24,000
Clearpoint	Zhang	Arthur De Joya	1/2/2013	-	$16,000
Goldcamp	Zhang	Griffith	1/2/2013	-	$10,000
Gaspard	Zhang	Arthur De Joya	1/25/2013	-	$20,000
Coronation	Zhang	Griffith	1/25/2013	-	$30,000
Jewel	Zhang	Griffith	1/25/2013	-	$20,000
Canyon	Zhang	Griffith	1/25/2013	-	$24,000
M&K Issuers					
Stone Boat	Manis	Ridenour	1/27/2012	9/24/2012 and 10/17/2012	$20,000
Goldstream	Manis	Ridenour	8/6/2012	9/24/2012 and 10/17/2012	$15,000
Chum	Ortego	Manis	11/30/2012	-	$20,000
Eclipse	Ortego	Manis	12/3/2012	-	$18,000
PRWC	Ortego	Ridenour	12/6/2012	-	$20,000
Kingman	Ridenour	Manis	1/31/2013	-	$14,000
Bonanza	Ridenour	Manis	1/31/2013	-	$18,000
CBL	Ridenour	Manis	1/31/2013	-	$10,000
Lost Hills	Ridenour	Manis	1/31/2013	-	$20,000
Yuma	Ridenour	Manis	1/31/2013	-	$16,000
Seaview	Ridenour	Manis	1/31/2013	-	$10,000

Appendix B

The De Joya Issuers

Issuer	Engagement Partner	EQR Partner	Audited Financial Statement Errors/ Conflict Between Audited Financial Statements and Other Registration Statement Information
Tuba City	Zhang	Griffith	<u>Audited Financial Statement Errors</u> • The Total Liabilities and Stockholders Equity amount on the Balance Sheet on Page F-3 does not foot. It is reported as \$27,325, but the accurately footed amount is \$19,825. • The amounts for Net Cash Used in Operating Activities of \$(10,175), Net Cash Used in Investing Activities of \$(7,500) and Net Cash Provided by Financing Activities of \$30,000 do not foot to the amount presented as Increase in Cash on the Statement of Cash Flows on Page F-6. The amount presented is \$19,825, but the amount accurately footed is \$12,325. • Note 3, Acquisition of a Mineral Claim, on Page F-11 discloses that "the acquisitions costs have been impaired and expensed during 2012." The line Mineral property for \$7,500 on the Balance Sheet on Page F-3 and the Statement of Operations on page F-4 reflect an unimpaired amount. • Note 6, Going Concern on page F-11, discloses that the company "has incurred a loss of \$4,008." This amount does not match the Net loss of \$10,175 presented on the Statement of Operations on Page F-4. • Note 7, Income Tax on Page F-11, discloses that the company "has \$4,008 of net operating losses carried forward." This amount does not match the Net loss of \$10,175 presented on the Statement of Operations on Page F-4. The SEC staff has not found any audit workpapers related to income taxes. <u>Conflicts Between Audited Financial Statements and Other Registration Statement Information</u> • The Net loss from operations of \$4,008 in the Consolidated Statements of Income under Summary Financial Information on Page 5 does not match the same line item on the Statement of Operations on Page F-4 of \$(10,175). The period for the \$4,008 amount, however, was not specified. • The accounts payable amount of \$1,333 in the Balance Sheet Data under Summary Financial Information on Page 5 does not match the same line item on the Balance Sheet on Page F-3, which is \$0. • The deficit accumulated during exploration period amount of \$(4,008) in the Balance Sheet Data under Summary Financial Information on Page 5 does not match the same line item on the Balance Sheet on Page F-3, which is \$(10,175).

Issuer	Engagement Partner	EQR Partner	Audited Financial Statement Errors/ Conflict Between Audited Financial Statements and Other Registration Statement Information
Canyon	Zhang	Griffith	<u>Audited Financial Statement Error</u> • The Stockholder's Equity section of the Balance Sheet does not foot. The amount reported is $25,325, but the accurate footing is $24,325.

Appendix C

The M&K Issuers

Issuer	Engagement Partner	EQR Partner	Audited Financial Statement Errors/ Conflict Between Audited Financial Statements and Other Registration Statement Information
Stone Boat	Manis	Ridenour	Audited Financial Statement Errors • The amounts for Net Cash Used in Operating Activities of $(20,430), Net Cash Used in Investing Activities of $(20,000) and Net Cash Provided by Financing Activities of $30,000 do not foot to the amount presented as Net Change in Cash of $9,570 on the Statement of Cash Flows on Page F-6. The accurately footed amount is $(10,430). • The Net Change in Cash of $9,570 reported on Page F-6 of the Statements of Cash Flows and the Cash at beginning of period of $30,000 do not foot to the Cash at End of Period reported as $9,570. The accurately footed amount is $19,570. • The Recognition of an Impairment Loss (Mineral Claims) of $0 in the Statement of Cash Flows on Page F-6 does not match the Recognition of an Impairment Loss (Property Expenses) of $20,000 on the Statement of Operations on Page F-4. The Statement of Cash Flows is effectively prepared incorrectly. The Net Cash Used in Operating Activities of ($20,430) is overstated for both periods presented. • The Cash at beginning of period of $30,000 "For the period ending" May 31, 2012 does not match the amount of $0 in the column From Inception (September 28, 2011) to May 31, 2012, both amounts appear on the Statement of Cash Flows on Page F-6. The amounts in both columns on page F-6 appear to be the same for both periods presented until the $30,000 amount at the beginning of period in "For the period ending May 31, 2012" column. There is no balance sheet presented that shows the $30,000 opening balance for cash. Conflict Between Audited Financial Statements and Other Registration Statement Information • The Weighted average shares outstanding basic of 16,175,342 under Consolidated Statements of Income and Summary Financial Information on Page 5 does not match the amount of 24,000,000 listed on the Statement of Operations on Page F-4.
Kingman	Ridenour	Manis	Audited Financial Statement Errors • The Net Cash Used in Operating Activities of $0 does not foot to the amount of Net Change in Cash of $(1,995) on the Statement of Cash Flows for the 3 months ended November 30, 2012 (Page F-16). The Cash at the End of Period of $14,330 on page F-16 does not match cash of $16,325 as of November 30, 2012 on the Balance Sheet on page F-14. • The NOL listed in Note 2 as $13,675 is not consistent with Note 7, which lists the NOL as $6,175.

Issuer	Engagement Partner	EQR Partner	Audited Financial Statement Errors/ Conflict Between Audited Financial Statements and Other Registration Statement Information
			Conflict Between Audited Financial Statements and Other Registration Statement Information • "The Company has incurred a net loss of $15,670 for the period from inception to August 31, 2012" as disclosed on Page 34 under Liquidity and Capital Resources, does not match the amount in the Statement of Operations for the same period, which is $(13,675) (Page F-4).
Bonanza	Ridenour	Manis	Audited Financial Statement Error • The NOL listed in Note 2 on page F-7 as $13,675 is not consistent with Note 7 on page F-12, which lists the NOL as $6,175. Conflict Between Audited Financial Statements and Other Registration Statement Information • "The Company has current assets of $14,330… as of November 30, 2012" as disclosed on Page 30 under Liquidity and Capital Resources does not match the amount of Total current assets as of November 30, 2012 on the Balance Sheet, which is $16,325 (Page F-14).
CBL	Ridenour	Manis	Audited Financial Statement Error • The NOL listed in Note 2 on page F-7 as $13,675 is not consistent with Note 7 on page F-12, which lists the NOL as $6,175. Conflict Between Audited Financial Statements and Other Registration Statement Information • "The Company has incurred a net loss of $13,675 for the period from inception to November 30, 2012" as disclosed on Page 32 under Liquidity and Capital Resources does not match the amount in the Statement of Operations for the same period, which is $(15,670) (Page F-15).
Lost Hills	Ridenour	Manis	Audited Financial Statement Error • The NOL listed in Note 2 on page F-7 as $13,675 is not consistent with Note 7 on page F-12, which lists the NOL as $6,175.
Yuma	Ridenour	Manis	Audited Financial Statement Error • The NOL listed in Note 2 on page F-7 as $13,675 is not consistent with Note 7 on page F-12, which lists the NOL as $6,175.
Eclipse	Ortego	Manis	Audited Financial Statement Error • The NOL listed in Note 2 on page F-7 as $11,175 is not consistent with Note 7 on page F-11, which lists the NOL as $2,675.

Issuer	Engagement Partner	EQR Partner	Audited Financial Statement Errors/ Conflict Between Audited Financial Statements and Other Registration Statement Information
Chum	Ortego	Manis	Audited Financial Statement Error • The NOL listed in Note 2 on page F-7 as $10,175 is not consistent with the table in Note 7 on page F-12, which lists the net loss before taxes as $2,675.

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9700 / January 15, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74066 / January 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16340

In the Matter of **STUART CARNIE,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 15(b) 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 Section 8A of the Securities Act of 1933 ("Securities Act") and Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Stuart Carnie ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

1. Respondent made false and misleading statements in registration statements filed with the Commission by three issuers, Goldstream Mining Inc., Gaspard Mining Inc., and Coronation Mining Corp. (collectively, the "Issuers"). According to the registration statements, Respondent was the sole executive officer and director of the Issuers, who were exploration stage mining companies that had not begun any mining activity and had no revenue. Each registration statement stated that Respondent (1) solely controlled and governed the issuer, (2) purchased issuer stock for $30,000, (3) that the issuer owned certain British Columbia mineral claims, and (4) was not a "blank check" company. These statements were false or misleading, and Respondent was reckless in not knowing that the statements were false or misleading when he signed the registration statements.

2. Accordingly, Respondent willfully violated Section 17(a)(1) of the Securities Act.

Respondent

3. **Stuart Carnie**, 45, of Ocala, Florida, was the sole chief executive officer and director of the Issuers. Respondent participated in offerings of the Issuers' securities, which were penny stocks.

Relevant Individual and Entities

4. **Goldstream Mining Inc. ("Goldstream")** is a Nevada corporation headquartered in Ocala, Florida. On August 6, 2012, Goldstream filed a Form S-1 registration statement with the Commission seeking to register management's common shares for resale in a $15,000 public offering. Goldstream filed amendments to its registration statement on September 24, 2012 and October 17, 2012. In an Initial Decision dated March 20, 2014, the Commission issued a stop order suspending the effectiveness of this registration statement. The stop order became final on May 2, 2014.

5. **Gaspard Mining Inc. ("Gaspard")** is a Nevada corporation headquartered in Ocala, Florida. On January 25, 2013, Gaspard filed a Form S-1 registration statement with the Commission seeking to register management's common shares for resale in a $20,000 public offering. On March 20, 2014, in an initial decision the Commission issued a stop order suspending the effectiveness of this registration statement. The stop order became final on May 2, 2014.

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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.

6. **Coronation Mining Corp. ("Coronation")** is a Nevada corporation headquartered in Ocala, Florida. On January 25, 2013, Coronation filed a Form S-1 registration statement with the Commission seeking to register management's common shares for resale in a $30,000 public offering. In an Initial Decision dated March 20, 2014, the Commission issued a stop order suspending the effectiveness of this registration statement. The stop order became final on May 2, 2014.

7. **Jervis Explorations Inc. ("Jervis")** is a British Columbia corporation whose sole director is John Briner. Jervis purportedly sold certain British Columbia mineral claims to each of the Issuers.

8. **John Briner ("Briner")**, 35, is an attorney residing in Vancouver, British Columbia, Canada. Briner was the subject of a prior Commission action alleging a pump-and-dump and market manipulation scheme. That action resulted in, among other things, Briner being enjoined from violating the antifraud provisions of the securities law and suspended from appearing before the Commission for five years. SEC v. Golden Apple Oil and Gas, Inc., et al., 09-Civ-7580 (S.D.N.Y) (HB); In the Matter of John Briner, Exchange Act Release No. 63371 (Nov. 24, 2010).

Background

9. In 2011, Respondent was recruited by Briner to serve as the sole executive officer and director for the Issuers. The Issuers each purported to be exploration stage mining companies that have not begun any mining activity and have no revenue. Each purported to have been capitalized by Respondent's purchase of Issuer stock for $30,000. Each claimed to have purchased certain British Columbia mineral claims from Jervis.

10. After Respondent agreed to serve as the sole executive officer and director for the Issuers, he was paid $6,000 for such service, or $2,000 for each Issuer. Respondent was promised an additional $8,000 per Issuer when the Issuer obtained a trading symbol.

11. Despite serving as the sole executive officer and director for the Issuers, Respondent did not make any material decisions for the Issuers or have control over the Issuers' funds. All material decisions were made by Briner and Briner had custody and control of the Issuers' funds.

12. Respondent's responsibilities were limited to signing documents in connection with the filing of the Registration Statements. Further, none of the Issuers maintained a bank account. Each of the Issuers' purported funds were held in a commingled account controlled by Briner, and Respondent did not have access to this account.

13. In July 2012 and January 2013, Respondent signed the Registration Statements, which stated that they were for the registration and sale of Respondent's stock. Respondent was reckless in not knowing that the Registration Statements contained the following false or misleading statements and omissions.

14. First, the Registration Statements stated that management for each Issuer consisted of Respondent who "control[led]" and "solely govern[ed]" the Issuer. Each of the Registration Statements also stated that other than management agreements between the Issuers and Respondent, "there [we]re no, and have not been since inception, any other material agreements or proposed transactions, whether direct or indirect, with . . . any promoters." As discussed herein, Respondent did not control the Issuers, and the Registration Statements failed to disclose Briner's role as a control person of the Issuers.

15. Second, the Registration Statements stated that Respondent capitalized the Issuers via a purchase of Issuer stock (the stock the Issuers sought to register with the Registration Statements) for $30,000 in cash. Respondent, however, did not provide his own funds to any Issuer or obtain a loan for the purchase. Instead, the funds used to purportedly capitalize the Issuers came from an undisclosed third party.

16. Third, the Registration Statements stated that the Issuers purchased their mineral claims from Jervis and that the Issuers "own[] 100% of the rights to the property." In fact, the rights to the mineral claims were never transferred from Jervis to the Issuers.

17. Finally, the Registration Statement stated that the Issuers "are not a 'blank check company,' as [they] do not intend to participate in a reverse acquisition or merger transaction." The Issuers were in fact "blank check" companies as they intended to participate in reverse acquisitions or merger transactions.

18. As a result of the conduct described above, Respondent willfully violated Section 17(a)(1) of the Securities Act.

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 Respondent's Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Section 15(b) 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 Section 17(a) of the Securities Act.

B. Respondent be, and hereby is:

(1) prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of the Exchange Act, or that is required to file reports pursuant to 15(d) of that Act; and

(2) barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or

trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

with the right to apply for reentry after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Respondent shall pay disgorgement of $6,000.00 and prejudgment interest of $337.85, which represents profits gained as a result of the conduct described herein, and civil penalties of $12,000.00, to the Securities and Exchange Commission for a total of $18,337.85. Payment shall be made in the following installments: (1) $2,000.00, within 10 days of the entry of this Order, (2) $4,000.00, within 90 days of the entry of this Order, (3) $4,000.00, within 180 days of the entry of this Order, (4) $4,000.00, within 270 days of the entry of this Order, and (5) $4,337.85, within 360 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of 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 at the discretion of the staff of the Commission, 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 Stuart Carnie 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 Lara Shalov Mehraban, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, New York, NY 10281.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9701 / January 15, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74068 / January 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16341

In the Matter of **CHARLES IRIZARRY,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 15(b) 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 Section 8A of the Securities Act of 1933 ("Securities Act") and Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Charles Irizarry ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

1. Respondent made false and misleading statements in registration statements filed with the Commission by three issuers, La Paz Mining Corp., Braxton Resources, Inc., and Clearpoint Resources Inc. (collectively, the "Issuers"). According to the registration statements, Respondent was the sole executive officer and director of the Issuers, who were exploration stage mining companies that had not begun any mining activity and had no revenue. Each registration statement stated that Respondent (1) solely controlled and governed the issuer, (2) purchased issuer stock for $30,000, (3) that the issuer owned certain British Columbia mineral claims, and (4) was not a "blank check" company. These statements were false or misleading, and Respondent was reckless in not knowing that the statements were false or misleading when he signed the registration statements.

2. Accordingly, Respondent willfully violated Section 17(a)(1) of the Securities Act.

Respondent

3. **Charles Irizarry**, 49, of Peoria, Arizona, was the sole chief executive officer and director of the Issuers. Respondent participated in offerings of the Issuers' securities, which were penny stocks.

Relevant Individual and Entities

4. **La Paz Mining Corp. ("La Paz")** is a Nevada corporation headquartered in Peoria, Arizona. On July 19, 2012, La Paz filed a Form S-1 registration statement with the Commission seeking to register management's common shares for resale in a $20,000 public offering. La Paz filed an amendment to its registration statement on September 25, 2012. In an Initial Decision dated March 20, 2014, the Commission issued a stop order suspending the effectiveness of this registration statement. The stop order became final on May 2, 2014.

5. **Braxton Resources, Inc. ("Braxton")** is a Nevada corporation headquartered in Peoria, Arizona. On January 2, 2013, Braxton filed a Form S-1 registration statement with the Commission seeking to register management's common shares for resale in a $24,000 public offering. On March 20, 2014, in an initial decision the Commission issued a stop order suspending the effectiveness of this registration statement. The stop order became final on May 2, 2014.

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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.

6. **Clearpoint Resources, Inc. ("Clearpoint")** is a Nevada corporation headquartered in Peoria, Arizona. On January 2, 2013, Clearpoint filed a Form S-1 registration statement with the Commission seeking to register management's common shares for resale in a $16,000 public offering (together with the registration statements filed by La Paz and Braxton, the "Registration Statements"). In an Initial Decision dated March 20, 2014, the Commission issued a stop order suspending the effectiveness of this registration statement. The stop order became final on May 2, 2014.

7. **Jervis Explorations Inc. ("Jervis")** is a British Columbia corporation whose sole director is John Briner. Jervis purportedly sold certain British Columbia mineral claims to each of the Issuers.

8. **John Briner ("Briner")**, 35, is an attorney residing in Vancouver, British Columbia, Canada. Briner was the subject of a prior Commission action alleging a pump-and-dump and market manipulation scheme. That action resulted in, among other things, Briner being enjoined from violating the antifraud provisions of the securities law and suspended from appearing before the Commission for five years. SEC v. Golden Apple Oil and Gas, Inc., et al., 09-Civ-7580 (S.D.N.Y) (HB); In the Matter of John Briner, Exchange Act Release No. 63371 (Nov. 24, 2010).

Background

9. In 2011, Respondent was recruited by Briner to serve as the sole executive officer and director for the Issuers. The Issuers each purported to be exploration stage mining companies that have not begun any mining activity and have no revenue. Each purported to have been capitalized by Respondent's purchase of Issuer stock for $30,000. Each claimed to have purchased certain British Columbia mineral claims from Jervis.

10. After Respondent agreed to serve as the sole executive officer and director for the Issuers, he was paid $6,000 for such service, or $2,000 for each Issuer. Respondent was promised an additional $8,000 per Issuer when the Issuer obtained a trading symbol.

11. Despite serving as the sole executive officer and director for the Issuers, Respondent did not make any material decisions for the Issuers or have control over the Issuers' funds. All material decisions were made by Briner and Briner had custody and control of the Issuers' funds.

12. Respondent's responsibilities were limited to signing documents in connection with the filing of the Registration Statements. Further, none of the Issuers maintained a bank account. Each of the Issuers' purported funds were held in a commingled account controlled by Briner, and Respondent did not have access to this account.

13. In July 2012 and January 2013, Respondent signed the Registration Statements, which stated that they were for the registration and sale of Respondent's stock. Respondent was

reckless in not knowing that the Registration Statements contained the following false or misleading statements and omissions.

14. First, the Registration Statements stated that management for each Issuer consisted of Respondent who "control[led]" and "solely govern[ed]" the Issuer. Each of the Registration Statements also stated that other than management agreements between the Issuers and Respondent, "there [we]re no, and have not been since inception, any other material agreements or proposed transactions, whether direct or indirect, with . . . any promoters." As discussed herein, Respondent did not control the Issuers, and the Registration Statements failed to disclose Briner's role as a control person of the Issuers.

15. Second, the Registration Statements stated that Respondent capitalized the Issuers via a purchase of Issuer stock (the stock the Issuers sought to register with the Registration Statements) for $30,000 in cash. Respondent, however, did not provide his own funds to any Issuer or obtain a loan for the purchase. Instead, the funds used to purportedly capitalize the Issuers came from an undisclosed third party.

16. Third, the Registration Statements stated that the Issuers purchased their mineral claims from Jervis and that the Issuers "own[] 100% of the rights to the property." In fact, the rights to the mineral claims were never transferred from Jervis to the Issuers.

17. Finally, the Registration Statement stated that the Issuers "are not a 'blank check company,' as [they] do not intend to participate in a reverse acquisition or merger transaction." The Issuers were in fact "blank check" companies as they intended to participate in reverse acquisitions or merger transactions.

18. As a result of the conduct described above, Respondent willfully violated Section 17(a)(1) of the Securities Act.

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 Respondent's Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Section 15(b) 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 Section 17(a) of the Securities Act.

B. Respondent be, and hereby is:

(1) prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of the Exchange Act, or that is required to file reports pursuant to 15(d) of that Act; and

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

with the right to apply for reentry after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Respondent shall pay disgorgement of $6,000.00 and prejudgment interest of $337.85, which represents profits gained as a result of the conduct described herein, and civil penalties of $12,000.00, to the Securities and Exchange Commission for a total of $18,337.85. Payment shall be made in the following installments: (1) $2,000.00, within 10 days of the entry of this Order, (2) $4,000.00, within 90 days of the entry of this Order, (3) $4,000.00, within 180 days of the entry of this Order, (4) $4,000.00, within 270 days of the entry of this Order, and (5) $4,337.85, within 360 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of 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 at the discretion of the staff of the Commission, 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 Charles Irizarry 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 Lara Shalov Mehraban, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, New York, NY 10281.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74070 / January 15, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 3998 / January 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16343

In the Matter of **BILL C. (BILLY) CRAFTON, JR.,** **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 Bill C. (Billy) Crafton, Jr. ("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 prior to a hearing pursuant to the Commission's Rules of Practice, 17 C.F.R. § 201.100 et seq., 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 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. Crafton, age 38 and a resident of San Diego, California, was from June 2006 through at least September 2010 associated with investment advisers registered with the Commission, including Martin Kelly Capital Management LLC, for which he served as Chief Executive Officer and was the sole owner. For compensation, Crafton personally provided investment and financial advice to high net worth individuals, primarily professional athletes, throughout as well as after the aforementioned period.

2. On December 16, 2014, a final judgment was entered by consent against Crafton, permanently enjoining him from future violations of Section 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, and Sections 206(1)-(3) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Bill C. (Billy) Crafton, Jr., Civil Action Number 3:14-cv-02916-DMS-JLB in the United States District Court for the Southern District of California ("SEC v. Crafton").

3. On November 5, 2014, Crafton entered a plea of guilty to one count of conspiracy to commit wire fraud (18 U.S.C. § 1343) in violation of 18 U.S.C. § 1349, in the United States District Court for the Southern District of California in the action styled United States v. Bill Crafton, Case No. 3:14-cr-02981-BTM. In connection with that plea, Crafton admitted the facts set forth in the factual basis portion of his Plea Agreement.

4. The Commission's complaint alleged, among other things, that, between 2006 and at least 2011, and while serving as an investment adviser, Crafton received undisclosed compensation totaling in excess of $1.5 million in connection with investments, as well as mortgage and life insurance products, that he recommended to his investment advisory clients; that this compensation included more than $300,000 in brokerage commissions; and that, in addition, in June 2010, while acting as an investment adviser and while associated with a registered investment adviser, Crafton misappropriated a total of $700,000 from two of his clients and used the funds to redeem, and assign to them, a third client's investment in a private fund that—only days prior to the misappropriation, and as Crafton well knew—had been the subject of an emergency action filed by the Commission, in which a freeze of the fund's assets had been obtained based on allegations it was being operated as a Ponzi-like 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'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 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.

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

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.

Brent J. Fields
Secretary

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

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9702 / January 15, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74069 / January 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16342

In the Matter of **WAYNE MIDDLETON,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 15(b) 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 Section 8A of the Securities Act of 1933 ("Securities Act") and Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Wayne Middleton ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

1. Respondent made false and misleading statements in registration statements filed with the Commission by two issuers, PRWC Energy Inc. and Canyon Minerals Inc. (collectively, the "Issuers"). According to the registration statements, Respondent was the sole executive officer and director of the Issuers, who were exploration stage mining companies that had not begun any mining activity and had no revenue. Each registration statement stated that Respondent (1) solely controlled and governed the issuer, (2) purchased issuer stock for $30,000, (3) that the issuer owned certain British Columbia mineral claims, and (4) was not a "blank check" company. These statements were false or misleading, and Respondent was reckless in not knowing that the statements were false or misleading when he signed the registration statements.

2. Accordingly, Respondent willfully violated Section 17(a)(1) of the Securities Act.

Respondent

3. **Wayne Middleton**, 42, of Salt Lake City, Utah, was the nominee officer and director of PRWC and Canyon.

Relevant Individual and Entities

4. **PRWC Energy Inc. ("PRWC")** is a Nevada corporation headquartered in Salt Lake City, Utah. On December 6, 2012, PRWC filed a Form S-1 registration statement with the Commission seeking to register management's common shares for resale in a $20,000 public offering. In an Initial Decision dated March 20, 2014, the Commission issued a stop order suspending the effectiveness of this registration statement. The stop order became final on May 2, 2014.

5. **Canyon Minerals, Inc. ("Canyon")** is a Nevada corporation headquartered in Salt Lake City, Utah. On January 25, 2013, Canyon filed a Form S-1 registration statement with the Commission seeking to register management's common shares for resale in a $24,000 public offering. In an Initial Decision dated March 20, 2014, the Commission issued a stop order suspending the effectiveness of this registration statement. The stop order became final on May 2, 2014.

[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.

6. **Jervis Explorations Inc. ("Jervis")** is a British Columbia corporation whose sole director is John Briner. Jervis purportedly sold certain British Columbia mineral claims to each of the Issuers.

7. **John Briner ("Briner")**, 35, is an attorney residing in Vancouver, British Columbia, Canada. Briner was the subject of a prior Commission action alleging a pump-and-dump and market manipulation scheme. That action resulted in, among other things, Briner being enjoined from violating the antifraud provisions of the securities law and suspended from appearing before the Commission for five years. SEC v. Golden Apple Oil and Gas, Inc., et al., 09-Civ-7580 (S.D.N.Y) (HB); In the Matter of John Briner, Exchange Act Release No. 63371 (Nov. 24, 2010).

Background

8. In 2011, Respondent was recruited by Briner to serve as the sole executive officer and director for the Issuers. The Issuers each purported to be exploration stage mining companies that have not begun any mining activity and have no revenue. Each purported to have been capitalized by Respondent's purchase of Issuer stock for $30,000. Each claimed to have purchased certain British Columbia mineral claims from Jervis.

9. After Respondent agreed to serve as the sole executive officer and director for the Issuers, he was paid $4,000 for such service, or $2,000 for each Issuer. Respondent was promised an additional $8,000 per Issuer when the Issuer obtained a trading symbol.

10. Despite serving as the sole executive officer and director for the Issuers, Respondent did not make any material decisions for the Issuers or have control over the Issuers' funds. All material decisions were made by Briner and Briner had custody and control of the Issuers' funds.

11. Respondent's responsibilities were limited to signing documents in connection with the filing of the Registration Statements. Further, none of the Issuers maintained a bank account. Each of the Issuers' purported funds were held in a commingled account controlled by Briner, and Respondent did not have access to this account.

12. In July 2012 and January 2013, Respondent signed the Registration Statements, which stated that they were for the registration and sale of Respondent's stock. Respondent was reckless in not knowing that the Registration Statements contained the following false or misleading statements and omissions.

13. First, the Registration Statements stated that management for each Issuer consisted of Respondent who "control[led]" and "solely govern[ed]" the Issuer. Each of the Registration Statements also stated that other than management agreements between the Issuers and Respondent, "there [we]re no, and have not been since inception, any other material agreements or proposed transactions, whether direct or indirect, with . . . any promoters." As discussed herein,

Respondent did not control the Issuers, and the Registration Statements failed to disclose Briner's role as a control person of the Issuers.

14. Second, the Registration Statements stated that Respondent capitalized the Issuers via a purchase of Issuer stock (the stock the Issuers sought to register with the Registration Statements) for $30,000 in cash. Respondent, however, did not provide his own funds to any Issuer or obtain a loan for the purchase. Instead, the funds used to purportedly capitalize the Issuers came from an undisclosed third party.

15. Third, the Registration Statements stated that the Issuers purchased their mineral claims from Jervis and that the Issuers "own[] 100% of the rights to the property." In fact, the rights to the mineral claims were never transferred from Jervis to the Issuers.

16. Finally, the Registration Statement stated that the Issuers "are not a 'blank check company,' as [they] do not intend to participate in a reverse acquisition or merger transaction." The Issuers were in fact "blank check" companies as they intended to participate in reverse acquisitions or merger transactions.

17. As a result of the conduct described above, Respondent willfully violated Section 17(a)(1) of the Securities Act.

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 Respondent's Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Section 15(b) 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 Section 17(a) of the Securities Act.

B. Respondent be, and hereby is:

(1) prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of the Exchange Act, or that is required to file reports pursuant to 15(d) of that Act; and

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

with the right to apply for reentry after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Respondent shall pay disgorgement of $4,000.00 and prejudgment interest of $225.24, which represents profits gained as a result of the conduct described herein, and civil penalties of $8,000.00, to the Securities and Exchange Commission for a total of $12,225.24. Payment shall be made in the following installments: (1) $3,000.00, within 10 days of the entry of this Order, (2) $2,000.00, within 90 days of the entry of this Order, (3) $2,000.00, within 180 days of the entry of this Order, (4) $2,000.00, within 270 days of the entry of this Order, and (5) $3,225.24, within 360 days of the entry of this Order. If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of 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 at the discretion of the staff of the Commission, 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 Wayne Middleton 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 Lara Shalov Mehraban, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, New York, NY 10281.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74071 / January 15, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-11645

In the Matter of **PA FUND MANAGEMENT LLC f/k/a PIMCO ADVISORS FUND MANAGEMENT LLC, PEA CAPITAL LLC f/k/a PIMCO EQUITY ADVISORS LLC, and PA DISTRIBUTORS LLC f/k/a PIMCO ADVISORS DISTRIBUTORS LLC** **Respondents.**	**ORDER DIRECTING DISBURSEMENT**

On October 7, 2010, the Commission issued a Notice of Proposed Plan of Distribution and Opportunity for Comment ("Notice") in connection with this proceeding (Exchange Act Release No. 63059) pursuant to Rule 1103 of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.1103. No comments were received by the Commission in response to the Notice and on December 10, 2010, the Secretary of the Commission, pursuant to delegated authority, approved the proposed plan of distribution ("Plan") (Exchange Act Release No. 63518).

The Fair Fund in this proceeding totaled $55,479,005, consisting of disgorgement, civil penalties, and accrued interest. The Plan provides that $23,417,366 of the Fair Fund, representing the total harm to investors in the PIMCO mutual funds, be transferred to Deutsche Bank Trust Company Americas ("Deutsche Bank') to be disbursed by the Fund Administrator to eligible investors according to the methodology set forth in the Plan. The Plan provides that the Commission will arrange for distribution of the Fair Fund when a validated payment file listing the payees with the identification information required to make the distribution has been received and accepted. A total amount of $20,015,287.98 was distributed directly to investors beginning on May 12, 2011 (Exchange Act Release No. 64477).

The Plan further provides that any monies not distributed to investors may be distributed to the PIMCO mutual funds, or their successors, harmed by market timing activity in proportion to the portion of overall harm each fund suffered.[1] The Fund Administrator was unable to distribute a total of $3,404,162.72, which is currently held by the Commission.

Accordingly, it is ORDERED that the Commission staff shall disburse the amount stated in the validated payment file of $3,404,162.72 as provided for in the Plan.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

[1] This amount is net of any tax reserve, which will remain in the account pending satisfaction of tax liabilities.

Commissioner Gallagher-
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74089 / January 16, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 3999 / January 16, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31421 / January 16, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16344

In the Matter of **EDGAR LEE GIOVANNETTI,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940**

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 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Edgar Lee Giovannetti ("Respondent" or "Giovannetti").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Giovannetti, 58, is a resident of Memphis, Tennessee. Giovannetti began working in the securities industry and has held securities licenses Series 7 and 63 since 1980.

2. Giovannetti was the co-founder of Consulting Services Group, LLC ("CSG"), a formerly Commission-registered investment adviser based in Memphis, Tennessee. For all relevant time periods herein until December 30, 2011, Giovannetti was the Chief Executive Officer ("CEO") of CSG, as well as the CEO and Chairman of the Executive Management Committee of CSG's parent holding company CSG Holdings, LLC ("CSGH"). During those time periods, Giovannetti was also a registered investment adviser representative and registered representative associated with CSG and two other investment advisers wholly owned by CSGH's subsidiary holding company and its affiliate broker-dealer. At all relevant times, Giovannetti held the second largest equity interest in CSG's parent entity. He currently holds the largest equity interest.

3. On December 30, 2011, Giovannetti resigned his executive positions with CSG and CSGH and voluntarily terminated his registrations with CSG and CSGH's affiliate broker-dealer and remained registered with the two investment advisers owned by CSGH's holding company until December 13, 2013.

4. On July 19, 2012, Giovannetti consented to the Financial Industry Regulatory Authority's ("FINRA") imposition upon him of a three-month suspension from association in all capacities with any FINRA member firm, plus a $15,000 fine, for three separate episodes of alleged misconduct that violated certain NASD and FINRA Rules and By-Laws.

5. Giovannetti is currently associated with LW Partners Capital Group, LLC, a registered broker-dealer with the Commission and based in New York, New York.

B. <u>RELEVANT ENTITY</u>

6. Consulting Services Group, LLC ("CSG" or the "Firm"), is a Tennessee limited liability company with its principal office located in Memphis, Tennessee. CSG was registered with the Commission as an investment adviser from July 6, 1990, until October 4, 2013, when it withdrew its registration and ceased investment advisory activities. During the relevant time period, CSG stated in its ADV that it had certain assets under management ranging from $21.7 million in one client account on a discretionary basis in 2009 to $22.5 billion in 74 client accounts on a non-discretionary basis in 2012. CSG's clients included public and private pension and retirement plans, endowments and high net worth individuals.

C. GIOVANNETTI FAILS TO DISCLOSE HIS PERSONAL LOAN FROM A THIRD-PARTY INVESTMENT ADVISER AND FILES FALSE <u>FORMS ADV</u>

7. From 1990 until his resignation on December 30, 2011, Giovannetti effectively controlled CSG as its CEO, and as the CEO and Chairman of CSG's parent

entity. Giovannetti held the second largest equity interest in CSG and later CSG's parent entity.

8. Prior to, and after, April 2009, CSG and Giovannetti recommended a particular New York-based third-party investment adviser registered with the Commission (the "New York Investment Adviser") and its funds to several CSG clients. Approximately seven CSG clients, including two public pension funds, followed CSG's and Giovannetti's recommendations by investing in at least one of the New York Investment Adviser's funds. On July 29, 2009, one of those public pension fund clients made a further capital contribution investment of $10 million into one of the funds of the New York Investment Adviser.

9. In or about April 2009, Giovannetti was undergoing significant personal financial challenges.

10. On April 21, 2009, Giovannetti obtained a personal loan of $50,000 from the New York Investment Adviser and executed a promissory note in connection therewith (the "Note"). The Note required payment of principal and interest within 90 days, on July 21, 2009. Under the terms of the Note, the rate of interest during its term was 3.10%, but the rate of interest following default (which was defined to include failure to pay by the end of the loan's term) was 8%.

11. Giovannetti failed to disclose the existence of the loan to CSG's Compliance Group ("CSG Compliance") in violation of CSG's policies and procedures.[1]

12. By a memo dated August 5, 2009, CSG Compliance advised Giovannetti that a review of emails by the compliance department had discovered the existence of his loan from the New York Investment Adviser (the "Memo"). The Memo noted that the New York Investment Adviser from whom he had obtained the loan managed the assets of seven CSG clients (including some of his own clients) and created a "potential conflict of interest:"

> [w]hile CSG's Code of Ethics does not specifically restrict borrowing Money from investment managers, the borrowing of money by CSG employees from investment managers that manage CSG client assets creates a potential conflict of interest in that such CSG employee may be more inclined to recommend the utilization of such investment manager due to the personal indebtedness to such investment manager.

13. The Memo concluded by asking Giovannetti whether the debt remained outstanding and noting that, "[if] the indebtedness is still in place," then CSG and/or he would need to disclose the loan "to the clients that you work with that invest with [the New York Investment Adviser]."

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[1] Between in or about December 2002 and July 2009, Giovannetti also personally invested in investments offered by the New York Investment Adviser.

14. On August 8, 2009, Giovannetti sent an email to CSG's Chief Compliance Officer, falsely stating, among other things, that he had paid off the loan. As stated in that email:

> I am a personal investor in [the New York Investment Adviser's] hedge fund and about six months ago I submitted a redemption request due to serious cash flow issues I am dealing with. The [request] was beyond the standard period stated in the PPM so ... [the New York Investment Adviser] decided the best way to assist me with my personal needs was to make a loan to me...until the window to redeem was open. *I redeemed July 1st and paid the loan off.* (emphasis added).

15. In fact, Giovannetti had not repaid the loan and it was still outstanding as of the date of that communication to CSG's Chief Compliance Officer.

16. Contrary to his statements to CSG Compliance, Giovannetti —both directly or indirectly — acknowledged on multiple occasions in 2009 and 2010 to the New York Investment Adviser that he had not paid back the loan. Nevertheless, Giovannetti failed to advise CSG or CSG Compliance that the loan had not been paid back.

17. By Giovannetti's initial concealment of the loan, and his subsequent misstatement and omissions about its status, required disclosure regarding the loan, including information relating to the conflict, were not disclosed in the Firm's Forms ADV Part II, dated August 6, 2009, and July 6, 2010 nor in the Form ADV Part 2A, dated March 31, 2011. As a result, those Forms ADV Parts II and 2A contained material omissions when filed with the Commission.

D. GIOVANNETTI'S CONTINUED FALSE AND MISLEADING STATEMENTS AND FORMS ADV

18. In August 2011, in connection with an examination of CSG conducted by staff from the Commission's National Examination Program, Giovannetti admitted to Commission staff that the debt owed to the New York Investment Adviser was still outstanding.

19. Shortly thereafter, CSG disclosed the existence of that Giovannetti debt in its Form ADV Part 2A, dated August 24, 2011:

> Potential Conflict – Loan from [the New York Investment Adviser] to Lee Giovannetti, CEO of CSG holdings, LLC. In 2009, Mr. Giovannetti borrowed $50,000 at 3.10% interest *as an advance of a redemption related to* his investment in [the New York Investment Adviser]'s long/short hedge fund. *Repayment has not been made and is pending.* This presents a potential conflict in that CSG may

recommend [the New York Investment Adviser] over other money managers as a result of the loan. (emphasis added).

20. No mention was made in that disclosure that, among other things, Giovannetti had already redeemed the monies in his fund but had not paid off the loan from such redemption proceeds, that he had previously falsely stated to CSG Compliance that he had paid off the loan, that the loan was currently in default, and that the interest rate was accruing at 8%, given that the default rate of interest had become applicable.

21. Between at least September 2011 and October 2011, Giovannetti made multiple false statements to CSG Compliance concerning the loan, including that he had "retired the loan" and that he had "communicated [this] to the SEC when [he] was interviewed during the last exam."

22. CSG repeated the same inaccurate and incomplete disclosures that it had previously made in its Form ADV Part 2A of August 24, 2011, in its subsequent Form ADV Part 2A of March 28, 2012. As a result, this Form ADV Part 2A contained material omissions when filed with the Commission.

23. On or about July 20, 2012, Giovannetti finally repaid the loan and interest (totaling $63,044) to the New York Investment Adviser.

E. <u>VIOLATIONS</u>

24. As a result of the conduct described above, Giovannetti willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit an investment adviser from employing a device, scheme, or artifice to defraud any client or prospective client, and from engaging in conduct which operates as a fraud or deceit upon any client or prospective client.

25. As a result of the conduct described above that occurred between April 21, 2009, and December 30, 2011, Giovannetti violated Section 207 of the Advisers Act which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

26. As a result of the conduct described above that occurred between April 21, 2009, and December 30, 2011, Giovannetti willfully aided and abetted and caused CSG's violations of Section 207 of the Advisers Act, which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

27. As a result of the conduct described above that occurred after December 30, 2011, Giovannetti caused CSG's violation of Section 207 of the Advisers

Act which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

III.

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

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

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

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

D. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 9(b) of the Investment Company Act; and,

E. Whether, pursuant to Section 203(k) of the Advisers Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 206(1) and 206(2) and 207 of the Advisers Act, whether Respondent should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act, and Section 9(d) of the Investment Company Act, and whether Respondent should be ordered to pay disgorgement pursuant to Section 203 of the Advisers Act and Section 9 of the Investment Company Act.

IV.

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

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

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

This Order shall be served forthwith upon Respondent as provided for in the Commission's Rules of Practice.

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.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4000 / January 16, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16345

In the Matter of

CONSULTING SERVICES GROUP, LLC

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Consulting Services Group, LLC ("Respondent" or "CSG").

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 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

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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. During the relevant time period, CSG was a registered investment adviser whose business included providing consulting services to public pension funds. These consulting services included recommending third-party investment advisers to actively manage public pension accounts. During the relevant time period, CSG either failed to disclose or mischaracterized in its Forms ADV Parts II and 2A a 2009 $50,000 personal loan between its then Chief Executive Officer, Edgar Lee Giovannetti, and a New York-based third-party investment adviser (the "New York Investment Adviser") that CSG had recommended to certain of its public pension and other clients. CSG's failure to disclose this conflict of interest to its pension fund clients was in violation of Sections 206(2) and 207 of the Advisers Act.

Respondent

2. Consulting Services Group, LLC ("CSG"), is a Tennessee limited liability company with its principal office located in Memphis, Tennessee. CSG was registered with the Commission as an investment adviser from July 6, 1990, until October 4, 2013, when it withdrew its registration and ceased investment advisory activities. During the relevant time period, CSG reported assets under management ranging from $21.7 million 2009 to $22.5 billion in 2012. CSG's clients included public and private pension and retirement plans, endowments and high net worth individuals. In October 2007, the Commission censured CSG and ordered it to pay a civil penalty of $20,000 for failing to adopt a code of ethics compliant with applicable rules; failing to adopt written policies and procedures reasonably designed to prevent violations of the Advisers Act; and, the back-dating of written code of ethics acknowledgement forms by supervised persons in violation of the Sections 204 and 206(4) of the Advisers Act and Rules 204-2(a)(12), 204A-1(a)(5) and 206(4)-7, thereunder.

Relevant Person

3. Edgar Lee Giovannetti, age 58, resides in Memphis, Tennessee. At all relevant times, Giovannetti was the Chief Executive Officer of CSG and its holding company, CSG Holdings, LLC ("CSGH"), as well as Chairman of its Executive Management Committee. On December 30, 2011, he resigned his executive positions and voluntarily terminated his dual registrations with CSG and CSGH's broker-dealer. At all relevant times, Giovannetti held the second largest equity interest in CSG's parent entity; he currently holds the largest equity interest.

Giovannetti Obtained a Personal Loan from The New York Investment Adviser, Creating a Conflict of Interest

4. From 1990 until his resignation on December 30, 2011, Giovannetti effectively controlled CSG as its CEO and as the CEO and Chairman of CSG's parent entity. Giovannetti also held the second largest equity interest in CSG's parent entity with more than a 20% ownership.

5. On April 21, 2009, Giovannetti obtained a $50,000 personal loan from the New York Investment Adviser and executed a promissory note in connection with the loan (the "Note"). The Note required payment of principal and interest within 90 days, on July 21, 2009. When he obtained the loan in April 2009, Giovannetti did not disclose it to CSG's Compliance Department ("CSG Compliance").[2]

6. Prior to, and after, April 2009, CSG recommended the New York Investment Adviser to several clients. Approximately seven CSG clients, including two public pension funds, followed CSG's recommendation. On July 29, 2009, one of the public pension funds made an additional capital contribution of $10 million to its investment with the New York Investment Adviser.

<u>CSG Discovers the Conflict of Interest but Does Not Disclose It</u>

7. In August 2009, CSG Compliance discovered the loan through regular email surveillance. CSG notified Giovannetti that borrowing money from an investment adviser that manages assets of CSG's clients created a potential conflict of interest. In a written notice to Giovannetti, CSG Compliance attached the Note and explained that the New York Investment Adviser from whom he obtained the loan managed the assets of seven CSG clients. The notice described the potential conflict as follows:

> [w]hile CSG's Code of Ethics does not specifically restrict borrowing money from investment managers, the borrowing of money by CSG employees from investment managers that manage CSG client assets creates a potential conflict of interest in that such CSG employee may be more inclined to recommend the utilization of such investment manager due to the personal indebtedness to such investment manager.

8. CSG compliance personnel requested Giovannetti provide an update on the status of his loan. On August 8, 2009, Giovannetti sent an email to CSG's Chief Compliance Officer in which he provided false and misleading information about the current state of his indebtedness to the New York Investment Adviser:

> I am a personal investor in [the Investment Adviser's] hedge fund and about six months ago I submitted a redemption request due to serious cash flow issues I am dealing with. The [request] was beyond the standard period stated in the PPM so … [the New York *Investment Adviser*] *decided the best way to assist me with my personal needs was to make a loan to me…until the window to redeem was open.* ***I redeemed July 1st and paid the loan off.*** (emphasis added).

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2 Between December 2002 and July 2009, Giovannetti also personally invested in investments offered by the New York Investment Adviser.

9. In fact, Giovannetti had not repaid the loan and it was still outstanding as of the date of his false and misleading communication to CSG Compliance. CSG Compliance accepted Giovannetti's false explanation that the loan was fully satisfied.

10. CSG failed to disclose the loan and the material conflict of interest it created to its clients. CSG did not meet the requirements relating to disclosure of the loan in its Forms ADV Part II, dated August 6, 2009, and July 6, 2010, and in its Form ADV Part 2A, dated March 31, 2011, which contained material omissions when filed with the Commission.

CSG Continues to File False and Misleading Forms ADV Part 2A

11. In August 2011, in connection with an examination of CSG conducted by the Commission staff, Giovannetti admitted that the debt he owed to the New York Investment Adviser was still outstanding.

12. Shortly after Giovannetti's admission, CSG disclosed the existence of the debt and the potential conflict of interest in its Form ADV Part 2A, dated August 24, 2011. The same disclosure was repeated in CSG's Form ADV Part 2A, dated March 28, 2012, as follows:

> Potential Conflict – Loan from [Investment Adviser] to [Giovannetti], CEO of CSG Holdings, LLC. In 2009, [Giovannetti] borrowed $50,000 at 3.10% interest *as an advance of a redemption related to* his investment in [Investment Adviser's] long/short hedge fund. *Repayment has not been made and is pending.* This presents a potential conflict in that CSG may recommend [Investment Adviser] over other money managers as a result of the loan. (emphasis added).

13. These statements were false and misleading. CSG failed to disclose that the note was over two years past due, and accruing interest at the default rate of 8% per year. Additionally, the loan was not "an advance of a redemption" and it was not "related to" Giovannetti's investment. Indeed, on June 3, 2009, Giovannetti had redeemed the full value of his investment with the New York Investment Adviser in the total amount of $84,761. He was therefore not obligated to, and did not, use the redeemed proceeds or any other funds to pay the loan back by its due date. As a result, CSG's Forms ADV Part 2A, dated August 24, 2011, and March 28, 2012, were false when filed with the Commission.

14. Giovannetti finally repaid the loan to New York Investment Adviser on July 20, 2012.

Violations

15. As a result of the conduct described above, CSG violated Section 206(2) of the Advisers Act which 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.

16. As a result of the conduct described above, CSG violated Section 207 of the Advisers Act which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 203(k) of the Advisers Act, Respondent CSG cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 207 of the Advisers Act.

B. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $150,000 to the 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 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 Consulting Services Group, 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 William P. Hicks, Associate Regional Director. Division of Enforcement, U.S. Securities and Exchange Commission, Atlanta, Regional Office, 950 East Paces Ferry Road, N.E., Suite 900, Atlanta, Georgia 30326.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-74092; File No. 265-29]

SUBJECT: Equity Market Structure Advisory Committee.

AGENCY: Securities and Exchange Commission.

ACTION: Notice of Federal Advisory Committee Establishment.

SUMMARY: The Securities and Exchange Commission intends to establish the Securities and Exchange Commission Equity Market Structure Advisory Committee.

ADDRESSES: Written comments may be submitted by the following methods:

Electronic Comments

- Use the Commission's Internet submission form (http://www.sec.gov/rules/other.shtml); or
- Send an e-mail message to rule-comments@sec.gov, including File No. 265-29 on the subject line.

Paper Comments

- Send paper comments to Brent J. Fields, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. 265-29. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/other.shtml). Comments also will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from your submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Arisa Tinaves, Special Counsel, Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549-3628, (202) 551-5676.

SUPPLEMENTARY INFORMATION: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. – App., the Commission is publishing this notice that the Chair of the Commission, with the concurrence of the other Commissioners, intends to establish the Securities and Exchange Commission Equity Market Structure Advisory Committee (the "Committee"). The Committee's objective is to provide the Commission with diverse perspectives on the structure and operations of the U.S. equities markets, as well as advice and recommendations on matters related to equity market structure.

No more than seventeen voting members will be appointed to the Committee. Such members shall represent a cross-section of those directly affected by, interested in, and/or qualified to provide advice to the Commission on matters related to equity market structure. The Committee's membership will be balanced fairly in terms of points of view represented and functions to be performed.

The Committee may be established 15 days after publication of this notice in the *Federal Register* by filing a charter for the Committee with the Committee on Banking, Housing, and Urban Affairs of the United States Senate, the Committee on Financial Services of the United States House of Representatives, and the Committee Management Secretariat of the General Services Administration. A copy of the charter as so filed also will be filed with the Chair of the Commission, furnished to the Library of Congress, and posted on the Commission's website at www.sec.gov.

The Committee will operate for two years from the date the charter is filed with the appropriate entities unless the Commission directs that the Committee terminate on an earlier date. Prior to the expiration of this two-year period, the Committee's charter may be re-established or renewed in accordance with the Federal Advisory Committee Act.

The Committee will meet at such intervals as are necessary to carry out its functions. The charter contemplates that the full Committee will meet four times annually. Meetings of subgroups or subcommittees of the full Committee may occur more frequently.

The charter will provide that the duties of the Committee are to be solely advisory. The Commission alone will make any determinations of action to be taken and policy to be expressed with respect to matters within the Commission's authority as to which the Committee provides advice or makes recommendations. The Chair of the Commission affirms that the establishment of the Committee is necessary and in the public interest.

By the Commission.

Brent J. Fields
Secretary

January 20, 2015

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74091; File No. SR-OCC-2014-811)

January 20, 2015

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of an Advance Notice, and Amendment No. 1 Thereto, to Establish Procedures Regarding the Monthly Resizing of its Clearing Fund and the Addition of Financial Resources

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 ("Payment, Clearing and Settlement Supervision Act")[1] and Rule 19b-4(n)(1)(i) under the Securities Exchange Act of 1934 ("Exchange Act")[2] notice is hereby given that on December 1, 2014, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the advance notice as described in Items I, II and III below, which Items have been prepared by OCC. On December 16, 2014, OCC filed amendment no. 1 to the advance notice ("Amendment No. 1").[3] This Amendment No. 1 amends and replaces, in its entirety, the advance notice as originally filed on December 1, 2014. The Commission is publishing this notice to solicit comments on the advance notice, as amended, from interested persons.

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

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

3 In Amendment No. 1, OCC amended the advance notice to include the Monthly Clearing Fund Sizing Procedure and the Financial Resource Monitoring and Call Procedure as exhibits to the filing, both defined hereinafter, as Exhibit 5A and Exhibit 5B, respectively. OCC has requested confidential treatment for Exhibit 5A and Exhibit 5B pursuant to the Rule 24b-2 under the Exchange Act.

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

This advance notice is filed by OCC in connection with OCC's proposal to establish procedures regarding the monthly resizing of its Clearing Fund and the addition of financial resources through intra-day margin calls and/or an intra-month increase of the Clearing Fund to ensure that it maintains adequate financial resources in the event of a default of a Clearing Member or group of affiliated Clearing Members presenting the largest exposure to OCC.

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 these statements.

(A) 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.

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

This Amendment No. 1 to SR-OCC-2014-811 ("Filing") amends and replaces in its entirety the Filing as originally submitted on December 1, 2014. The purpose of this Amendment No. 1 to the Filing is to include the procedures that support the processes described in Item 3 of the Filing as Exhibit 5A, Monthly Clearing Fund Sizing Procedure, and Exhibit 5B, Financial Resources Monitoring and Call Procedure.

The proposed change would establish new procedures regarding the monthly resizing of the Clearing Fund and the addition of financial resources through intra-day margin calls and/or an intra-month increase of the Clearing Fund to ensure that OCC maintains adequate Financial Resources in the event of a default of a Clearing Member or group of affiliated Clearing Members presenting the largest exposure to OCC.

PURPOSE OF THE PROPOSED CHANGE

The proposed change is intended to describe the situations in which OCC would exercise authority under its Rules to ensure that it maintains adequate Financial Resources[4] in the event that stress tests reveal a default of the Clearing Member or Clearing Member Group[5] presenting the largest exposure would threaten the then-current Financial Resources. This proposed change would establish procedures governing: (i) OCC's resizing of the Clearing Fund on a monthly basis pursuant to Rule 1001(a) (the "Monthly Clearing Fund Sizing Procedure"); and (ii) the addition of Financial Resources through an intra-day margin call on one or more Clearing Members under Rule 609 and, if necessary, an intra-month increase of the Clearing Fund pursuant to Rule 1001(a) (the "Financial Resource Monitoring and Call Procedure").[6] The Monthly Clearing Fund

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4 "Financial Resources" means, with respect to a projected loss attributable to a particular Clearing Member, the sum of the margin deposits and deposits in lieu of margin in respect of such Clearing Member' accounts, and the value of OCC's Clearing Fund, including both the Base Amount, as defined below, and the prudential margin of safety, as discussed below.

5 "Clearing Member Group" means a Clearing Member and any affiliated entities that control, are controlled by or are under common control with such Clearing Member. *See* OCC By-Laws, Article I, Sections 1.C.(15) and 1.M(11).

6 This advance notice filing has also been filed as a proposed rule change (SR-OCC-2014-22).

Sizing Procedure would permit OCC to determine the size of the Clearing Fund by relying on a broader range of sound risk management practices than those historically used under Rule 1001(a).[7] The Financial Resource Monitoring and Call Procedure would require OCC to collect additional Financial Resources in certain circumstances, establish how OCC calculates and collects such resources and provide the timing by which such resources would be required to be deposited by Clearing Members.

Background

OCC monitors the sufficiency of the Clearing Fund on a daily basis but, prior to emergency action taken on October 15, 2014,[8] OCC had no express authority to increase the size of the Clearing Fund on an intra-month basis.[9] During ordinary course daily monitoring on October 15, 2014, and as a result of increased volatility in the financial markets in October 2014, OCC determined that the Financial Resources needed to cover the potential loss associated with a default of the Clearing Member or Clearing Member

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7 The procedures described herein would be in effect until the development of a new standard Clearing Fund sizing methodology. Following such development, which will include a quantitative approach to calculating the "prudential margin of safety," as discussed below, OCC will file a separate rule change and advance notice with the Commission that will include a description of the new methodology as well as a revised Monthly Clearing Fund Sizing Procedure.

8 On October 16, 2014, OCC filed an emergency notice with the Commission to suspend the effectiveness of the second sentence of Rule 1001(a). *See* Securities Exchange Act Release No. 73579 (November 12, 2014), 79 FR 68747 (November 18, 2014) (SR-OCC-2014-807). On November 13, 2014, OCC filed SR-OCC-2014-21 with the Commission to delete the second sentence of Rule 1001(a), preserving the suspended effectiveness of that sentence until such time as the Commission approves or disapproves SR-OCC-2014-21. *See* Securities Exchange Act Release No. 73685 (November 25, 2014) (SR-OCC-2014-21). At the time of this filing, the referenced Securities Exchange Act Release had not yet been published in the Federal Register.

9 *See* OCC Rule 1001(a).

Group presenting the largest exposure could have exceeded the Financial Resources then available to apply to such a default.

To permit OCC to increase the size of its Clearing Fund prior to the next monthly resizing that was scheduled to take place on the first business day of November 2014, OCC's Executive Chairman, on October 15, 2014, exercised certain emergency powers as set forth in Article IX, Section 14 of OCC's By-Laws[10] to waive the effectiveness of the second sentence of Rule 1001(a), which states that OCC will adjust the size of the Clearing Fund monthly and that any resizing will be based on data from the preceding month. OCC then filed an emergency notice with the Commission pursuant to Section 806(e)(2) of the Payment, Clearing and Settlement Supervision Act of 2010[11] and increased the Clearing Fund size for the remainder of October 2014 as otherwise provided for in the first sentence of Rule 1001(a).[12]

Clearing Members were informed of the action taken by the Executive Chairman[13] and the amount of their additional Clearing Fund requirements, which were

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10 OCC also has submitted an advance notice that would provide greater detail concerning conditions under which OCC would increase the size of the Clearing Fund intra-month. The change would permit an intra-month increase in the event that the five-day rolling average of projected draws are 150% or more of the Clearing Fund's then current size. *See* Securities Exchange Act Release No. 72804 (August 11, 2014), 79 FR 48276 (August 15, 2014) (SR-OCC-2014-804).

11 12 U.S.C. 5465(e)(2).

12 *See supra*, note 9.

13 *See* Information Memorandum #35397, dated October 16, 2014, available on OCC's website, http://www.theocc.com/clearing/clearing-infomemos/infomemos1.jsp. Clearing members also were informed that a prudential margin of safety of $1.8 billion would be retained until a new Clearing Fund sizing formula has been approved and implemented.

met without incident. As a result of these actions, OCC's Clearing Fund for October 2014 was increased by $1.8 billion. In continued reliance on the emergency rule waiver and in accordance with the first sentence of Rule 1001(a), OCC set the November 2014 Clearing Fund size at $7.8 billion, which included an amount determined by OCC to be sufficient to protect OCC against loss under simulated default scenarios (*i.e.*, $6 billion), plus a prudential margin of safety (the additional $1.8 billion collected in October).[14] All required contributions to the November 2014 Clearing Fund were met by affected Clearing Members.

Under Article IX, Section 14(c), absent the submission of a proposed rule change to the Commission seeking approval of OCC's waiver of the provisions of the second sentence of Rule 1001(a), such waiver would not be permitted to continue for more than thirty calendar days from the date thereof.[15] Accordingly, on November 13, 2014, OCC submitted SR-OCC-2014-21 to delete the second sentence of Rule 1001(a) and, by the terms of Article IX, Section 14(c), preserve the suspended effectiveness of the second sentence of Rule 1001(a) beyond thirty calendar days.[16]

SR-OCC-2014-21 was submitted in part to permit OCC to determine the size of its Clearing Fund by relying on a broader range of sound risk management practices than considered in basing such size on the average daily calculations under Rule 1001(a) that are performed during the preceding calendar month. The Monthly Clearing Fund Sizing

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14 *See* Information Memorandum # 35507, dated October 31, 2014, available on OCC's website, http://www.theocc.com/clearing/clearing-infomemos/infomemos1.jsp.

15 *See* OCC By-Laws, Article IX, Section 14(c).

16 *See supra*, note 9. OCC also submitted this proposed rule change to the Commodity Futures Trading Commission.

Procedure, as described below, is based on such broader risk management practices and establishes the procedures OCC would use to determine the size of the Clearing Fund on a monthly basis. Similarly, SR-OCC-2014-21 was submitted in part to permit OCC to resize the Clearing Fund more frequently than monthly when the circumstances warrant an increase of the Clearing Fund. The Financial Resource Monitoring and Call Procedure, as described below, establishes the procedures that OCC would use to add Financial Resources through an intra-day margin call on one or more Clearing Members under Rule 609 and, if necessary, an intra-month increase of the Clearing Fund pursuant to Rule 1001(a).[17]

Monthly Clearing Fund Sizing Procedure

Under the Monthly Clearing Fund Sizing Procedure, OCC would continue to calculate the size of the Clearing Fund based on its daily stress test exposures under simulated default scenarios as described in the first sentence of Rule 1001(a) and resize the Clearing Fund on the first business day of each month. However, instead of resizing the Clearing Fund based on the average of the daily calculations during the preceding calendar month, as stated in the suspended second sentence of Rule 1001, OCC would resize the Clearing Fund so that it is the sum of: (i) an amount equal to the peak five-day rolling average of Clearing Fund draws observed over the preceding three calendar months of daily idiosyncratic default and minor systemic default scenario calculations

17 As noted in SR-OCC-2014-21, OCC would use its intra-month resizing authority only to increase the size of the Clearing Fund where appropriate, not to decrease the size of the Clearing Fund.

based on OCC's daily Monte Carlo simulations ("Base Amount") and (ii) a prudential margin of safety determined by OCC and currently set at $1.8 billion.[18]

OCC believes that the proposed Monthly Clearing Fund Sizing Procedure provides a sound and prudent approach to ensure that the Financial Resources are adequate to protect against the largest risk of loss presented by the default of a Clearing Member or Clearing Member Group. By virtue of using only the peak five-day rolling average and by extending the look-back period, the proposed Monthly Clearing Fund Sizing Procedure is both more responsive to sudden increases in exposure and less susceptible to recently observed decreases in exposure that would reduce the overall sizing of the Clearing Fund, thus mitigating procyclicality.[19] Furthermore, the prudential margin of safety provides an additional buffer to absorb potential future exposures not previously observed during the look-back period. The proposed Monthly Clearing Fund Sizing Procedure would be supplemented by the Financial Resource Monitoring and Call Procedure, described below, to provide further assurance that the Financial Resources are adequate to protect against such risk of loss.

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18 On a daily basis, OCC computes its exposure under the idiosyncratic and minor systemic events. The greater of these two exposures is that day's "peak exposure." To calculate the "rolling five day average" OCC computes the average of the peak exposure for each consecutive five-day period observed over the prior three-month period. To determine the Base Amount, OCC would use the largest five-day rolling average observed over the past three-months. This methodology was used to determine the Base Amount of the Clearing Fund for November 2014 and December 2014.

19 Considering only the peak exposures is a more conservative methodology that gives greater weighting to sudden increases in exposure experienced by Clearing Members, thus enhancing the responsiveness of the procedure to such sudden increases. By using a longer look-back period, the methodology would respond more slowly to recently observed decreases in peak exposures.

Financial Resource Monitoring and Call Procedure

Under the Financial Resource Monitoring and Call Procedure, OCC would use the same daily idiosyncratic default calculation as under the Monthly Clearing Fund Sizing Procedure to monitor daily the adequacy of the Financial Resources to withstand a default by the Clearing Member or Clearing Member Group presenting the largest exposure under extreme but plausible market conditions.[20] If such a daily idiosyncratic default calculation projected a draw on the Clearing Fund (a "Projected Draw") that is at least 75% of the Clearing Fund maintained by OCC, OCC would be required to issue an intra-day margin call pursuant to Rule 609 against the Clearing Member or Clearing Member Group that caused such a draw ("Margin Call Event").[21] Subject to a limitation described below, the amount of the margin call would be the difference between the Projected Draw and the Base Clearing Fund ("Exceedance Above Base Amount"). In the case of a Clearing Member Group that causes the Exceedance Above Base Amount, the Exceedance Above Base Amount would be pro-rated among the individual Clearing Members that compose the Clearing Member Group based on each individual Clearing

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20 Since the minor systemic default scenario contemplates two Clearing Members' simultaneously defaulting and OCC maintains Financial Resources sufficient to cover a default by a Clearing Member or Clearing Member Group representing the greatest exposure to OCC, OCC does not use the minor systemic default scenario to determine the adequacy of the Financial Resources under the Financial Resource Monitoring and Call Procedure.

21 Rule 609 authorizes OCC to require the deposit of additional margin in any account at any time during any business day by any Clearing Member for, *inter alia*, the protection of OCC, other Clearing Members or the general public. Clearing Members must meet a required deposit of intra-day margin in immediately available funds at a time prescribed by OCC or within one hour of OCC's issuance of debit settlement instructions against the bank account(s) of the applicable Clearing Member(s), thereby ensuring the prompt deposit of additional Financial Resources.

Member's proportionate share of the "total risk" for such Clearing Member Group as defined in Rule 1001(b), *i.e.*, the margin requirement with respect to all accounts of the Clearing Member Group exclusive of the net asset value of the positions in such accounts aggregated across all such accounts. However, in the case of an individual Clearing Member or a Clearing Member Group, the margin call would be subject to a limitation under which it could not exceed the lower[22] of: (a) \$500 million, or (b) 100% of a Clearing Member's net capital, measured cumulatively with any other funds deposited with OCC by the same Clearing Member pursuant to a Margin Call Event within the same month (the "500/100 Limitation").[23]

Upon satisfaction of the margin call, OCC would use its authority under Rule 608 to preclude the withdrawal of such additional margin amount until the next monthly resizing of the Clearing Fund. Based on three years of back testing data, OCC determined that it would have had Margin Call Events in 10 of the months during this time period. For each of these months, the maximum call amount would have been equal to \$500 million, with one exception in which the maximum call amount for the month

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22 "Capping" the intra-day margin call avoids placing a "liquidity squeeze" on the subject Clearing Member(s) based on exposures presented by a hypothetical stress test, which would have the potential for causing a default on the intra-day margin call. Back testing results determined that such calls would have been made against Clearing Members that are large, well-capitalized firms, with more than sufficient resources to satisfy the call for additional margin with the proposed limitations.

23 The Risk Committee would be notified, and could take action to address potential Financial Resource deficiencies, in the event that a Projected Draw resulted in a Margin Call Event and as a result of the 500/100 Limitation the margin call was less than the Exceedance Above Base Amount, but the Projected Draw was not so large as to result in an increase in the Clearing Fund as discussed below.

was \$7.7 million.[24] After giving effect to the intra-day margin calls, *i.e.*, by increasing the Financial Resources by \$500 million, there was only one Margin Call Event where there was an observed stress test exceedance of the Financial Resources.

To address this one observed instance, the Financial Resource Monitoring and Call Procedure also would require OCC to increase the size of the Clearing Fund ("Clearing Fund Intra-month Increase Event") if a Projected Draw exceeds 90% of the Clearing Fund, after applying any funds then on deposit with OCC from the applicable Clearing Member or Clearing Member Group pursuant to a Margin Call Event. The amount of such increase ("Clearing Fund Increase") would be the greater of: (a) \$1 billion; or (b) 125% of the difference between (i) the Projected Draw, as reduced by the deposits resulting from the Margin Call Event and (ii) the Clearing Fund. Each Clearing Member's proportionate share of the Clearing Fund Increase would equal its proportionate share of the variable portion of the Clearing Fund for the month in question as calculated pursuant to Rule 1001(b). OCC would notify the Risk Committee of the Board of Directors (the "Risk Committee"), Clearing Members and appropriate regulatory authorities of the Clearing Fund Increase on the business day on which the Clearing Fund Intra-month Increase Event occurred. This ensures that OCC management maintains authority to address any potential Financial Resource deficiencies when compared to its Projected Draw estimates. The Risk Committee would then determine whether the Clearing Fund Increase was sufficient, and would retain authority to increase the Clearing Fund Increase or the margin call made pursuant to a Margin Call Event in its

24 The back testing analysis performed assumed a single Clearing Member caused the exceedance.

discretion. Clearing Members would be required to meet the call for additional Clearing Fund assets by 9:00 AM CT on the second business day following the Clearing Fund Intra-month Increase Event. OCC believes that this collection process ensures additional Clearing Fund assets are promptly deposited by Clearing Members following notice of a Clearing Fund Increase, while also providing Clearing Members with a reasonable period of time to source such assets. Based on OCC's back testing results, after giving effect to the intra-day margin call in response to a Margin Call Event plus the prudential margin of safety, the Financial Resources would have been sufficient upon implementing the one instance of a Clearing Fund Intra-month Increase Event.

OCC believes the Financial Resource Monitoring and Call Procedure strikes a prudent balance between mutualizing the burden of requiring additional Financial Resources and requiring the Clearing Member or Clearing Member Group causing the increased exposure to bear such burden. As noted above, in the event of a Margin Call Event, OCC limits the margin call to a monthly aggregate of $500 million, or 100% of a Clearing Member's net capital in order to avoid putting an undue liquidity strain on any one Clearing Member. However, where a Projected Draw exceeds 90% of OCC's Clearing Fund, OCC must act to ensure that it has sufficient Financial Resources, and determined that it should mutualize the burden of the additional Financial Resources at this threshold through a Clearing Fund Increase. OCC believes that this balance would provide OCC with sufficient Financial Resources without increasing the likelihood that its procedures would, based solely on stress testing results, cause a liquidity strain on any on Clearing Member that could result in such member's default.

The following examples illustrate the manner in which the Financial Resource Monitoring and Call Procedure would be applied. All assume that the Clearing Fund size is $7.8 billion, $6 billion of which is the Base Amount and $1.8 billion of which is the prudential margin of safety. The 75% threshold in these examples is $5.85 billion.

Example 1: Single CM.

Under OCC's stress testing the Projected Draw attributable to Clearing Member ABC, a Clearing Member with no affiliated Clearing Members and net capital of $500 million, is $6.4 billion, or 82% of the Clearing Fund. OCC would make a margin call for $400 million, which represents the Exceedance Above Base Amount. In this case the 500/100 Limitation would not be applicable because the Exceedance Above Base Amount is less than $500 million and 100% of the Clearing Member's net capital. The Clearing Member would be required to meet the $400 million call within one hour unless OCC prescribed a different time, and OCC would retain the $400 million until the next monthly Clearing Fund sizing calculation.

If, on a different day within the same month, CM ABC's Projected Draw minus the $400 million already deposited with OCC results in an Exceedance Above Base Amount, another Margin Call Event would be triggered, with the amount currently deposited with OCC applying toward the 500/100 Limitation.

Example 2: Clearing Member Group.

Under OCC's stress testing the Projected Draw attributable to Clearing Member Group DEF, comprised of two Clearing Members each with net capital of $800 million, is $6.2 billion, or 79% of OCC's Clearing Fund. OCC would initiate a margin call on Clearing Member Group DEF for $200 million. The call would be allocated to the two

Clearing Members that compose the Clearing Member Group based on each Clearing Member's risk margin allocation. In this case the 500/100 Limitation would not be applicable because the Exceedance Above Base Amount is less than $500 million and 100% of net capital. The margin call would be required to be met within one hour of the call unless OCC prescribed a different time. For example, in the case where one Clearing Member accounts for 75% of the risk margin for the Clearing Member Group, that Clearing Member would be allocated $150 million of the call and the other Clearing Member, accounting for 25% of the risk margin for the Clearing Member Group, would be allocated $50 million of the call. The funds would remain deposited with OCC until the next monthly Clearing Fund sizing calculation.

Example 3: Clearing Member Group with $500 million cap.

Under OCC's stress testing the Projected Draw attributable to Clearing Member Group GHI, comprised of two Clearing Members each with net capital of $800 million, is $6.8 billion, or 87% of the Clearing Fund. The Exceedance Above Base Amount would be $800 million, allocated to the two Clearing Members that compose the Clearing Member Group based on each Clearing Member's risk margin allocation. Using the 75/25 risk margin allocation from Example 2, one Clearing Member would be allocated $600 million and the other Clearing Member would be allocated $200 million. The first Clearing Member would be required to deposit $500 million with OCC, which is the lowest of $500 million, that member's net capital, or that member's share of the Exceedance Above Base Amount, and the other Clearing Member would be required to deposit $200 million with OCC. After collecting the additional margin, OCC would determine whether the Projected Draw would exceed 90% of the Clearing Fund after reducing the Projected Draw by the additional margin. This calculation would divide a Projected Draw of \$6.1 billion, which is the original Projected Draw of \$6.8 billion reduced by the additional margin, by the Clearing Fund of \$7.8 billion. The resulting percentage of 78% would be below the 90% threshold, and accordingly there would not be a Clearing Fund Intra-month Increase Event.

Example 4: Margin Call and Increase in Size of Clearing Fund

Under OCC's stress testing the Projected Draw attributable to Clearing Member JKL, a Clearing Member with no affiliated Clearing Members and net capital of \$600 million, is \$10.0 billion, or 128% of the Clearing Fund. OCC would make a margin call for \$500 million, which represents the lowest of the Exceedance Above Base Amount, \$500 million and 100% of net capital. The Clearing Member would be required to meet the \$500 million call within one hour unless OCC prescribed a different time, and OCC would retain the \$500 million until the next monthly Clearing Fund sizing calculation.

After collecting the additional margin, OCC would determine whether the Projected Draw would exceed 90% of the Clearing Fund after reducing the Projected Draw by the additional margin. This calculation would divide a Projected Draw of \$9.5 billion, which is the original Projected Draw of \$10 billion reduced by the additional margin, by the Clearing Fund of \$7.8 billion. The resulting percentage of 122%, while lower, would still exceed the 90% threshold, and accordingly OCC would declare a Clearing Fund Intra-month Increase Event. To calculate the Clearing Fund Increase, OCC would first determine the difference between the modified Projected Draw (\$9.5 billion) and the Clearing Fund (\$7.8 billion), which in this case would be \$1.7 billion, OCC would then multiply this by 1.25, resulting in \$2.125 billion. Because this amount is greater than $1 billion, the Clearing Fund Increase would be $2.125 billion and a modified Clearing Fund of OCC totaling $9.925 billion ($425 million in excess of the modified Projected Draw of $9.5 billion).

CONSISTENCY WITH THE PAYMENT, CLEARING AND SETTLEMENT SUPERVISION ACT

OCC believes that the proposed change regarding the establishment of the Monthly Clearing Fund Sizing Procedure and Financial Resource Monitoring and Call Procedure described above is consistent with Section 805(b)(1) of the Payment, Clearing and Settlement Supervision Act[25] because the proposed procedures will promote robust risk management by setting forth a process in order to ensure that OCC maintains adequate Financial Resources in the event of a default of a Clearing Member or Clearing Member Group presenting the largest exposure to OCC. The proposed change regarding the establishment of these procedures is also consistent with Section 806(e)(2) of the Payment, Clearing and Settlement Supervision Act, upon which OCC relied in originally suspending the effectiveness of the second sentence of Rule 1001(a) and increasing the size of the Clearing Fund on October 15, 2014, because it allows OCC to continue to provide its services in a safe and sound manner.[26]

ANTICIPATED EFFECT ON AND MANAGEMENT OF RISK

OCC believes that the proposed change will reduce OCC's overall level of risk because the proposed change makes it less likely that OCC's Clearing Fund would be insufficient should OCC need to use its Clearing Fund to manage a Clearing Member or Clearing Member Group default. The Monthly Clearing Fund Sizing Procedure would

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25 12 U.S.C. 5464(b)(1).

26 12 U.S.C. 5464(e)(2); *see* SR-OCC-2014-807, *supra*, note 9.

permit OCC to determine the size of its Clearing Fund by relying on a broader range of sound risk management practices than those considered in the suspended second sentence of Rule 1001(a). OCC believes that using the peak five-day rolling average of Clearing Fund draws observed over a three-month period will result in a monthly resizing of the Clearing Fund that will better reflect the risks posed by sudden increases in exposure experienced by Clearing Members. OCC also believes that the proposed prudential margin of safety will provide an additional buffer to protect against exposures not reflected in the three-month look-back period. The Financial Resource Monitoring and Call Procedure would enable OCC to minimize losses in the event of a default of a Clearing Member or Clearing Member Group presenting the largest exposure to OCC, by allowing it the flexibility to obtain additional Financial Resources either through an intra-day margin call or an intra-month increase in the size of the Clearing Fund, which would ensure that the clearance and settlement of transactions in options and other contracts occurs without interruption. Accordingly, OCC believes that the proposed changes would reduce risks to OCC and its participants. Moreover, and for the same reasons, the proposed change will facilitate OCC's ability to manage risk.

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

The advance notice may be implemented if the Commission does not object to the advance notice 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. OCC shall not implement the advance notice if the Commission has any objection to the advance notice.

The Commission may extend the period for review by an additional 60 days if the advance notice raises novel or complex issues, subject to the Commission providing OCC with prompt written notice of the extension. An advance notice 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 OCC in writing that it does not object to the advance notice and authorizes OCC to implement the advance notice on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its website of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

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-2014-811 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 Number SR-OCC-2014-811. 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 am and 3:00 pm. Copies of the filing 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-2014-811 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.

Brent J. Fields
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9704 / January 21, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74102 / January 21, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16346

In the Matter of STANDARD & POOR'S RATINGS SERVICES, Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15E(d) 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 Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15E(d) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Standard & Poor's Ratings Services ("S&P" or "Respondent").

II.

In anticipation of the institution of these proceedings, S&P 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 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, S&P consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act and Sections 15E(d) 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 S&P's Offer, the Commission finds[1] that:

Summary

1. These proceedings involve misconduct by S&P in 2012 concerning its criteria for rating conduit/fusion Commercial Mortgage Backed Securities ("CF CMBS") and related research. After being frozen out of the market for rating CF CMBS in late 2011, S&P sought to re-enter the market in 2012 by publishing new ratings criteria (the "2012 CMBS Criteria").

2. In connection with its release of the 2012 CMBS Criteria, S&P published an article describing an internal study purportedly showing average commercial mortgage loan pool losses of about 20% under Great Depression levels of economic stress. The article was flawed, in part because it relied on significant assumptions that were not adequately disclosed in the article and thereby contained false and misleading statements. The article was nonetheless published in June 2012 as additional support for the target credit enhancement (CE) level of 20% in the 2012 CMBS Criteria.

3. Separately, S&P also did not accurately describe certain aspects of its 2012 CMBS Criteria in the publication setting forth their operation.

4. S&P used the 2012 CMBS Criteria to determine credit ratings on approximately 25 CF CMBS between October 2012 and June 2014.

Respondent

5. S&P is a Nationally Recognized Statistical Rating Organization ("NRSRO") headquartered in New York City, New York. Standard & Poor's Ratings Services is comprised of a separately identifiable business unit within Standard & Poor's Financial Services LLC, a Delaware limited liability company wholly-owned by the McGraw Hill Financial ("MHFI"), and the credit ratings business housed within certain other wholly-owned subsidiaries of, or businesses continuing to operate as divisions of, MHFI.

[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.

Facts

A. Background

6. Rating agencies' transparency is crucial to investors, including in the CF CMBS market. Without transparency, investors can neither assess the methodology employed by the rating agency nor the application of that methodology. S&P's policies reflected these priorities by requiring S&P employees to publish sufficient information about S&P's procedures and assumptions so that users of credit ratings could understand how S&P arrived at its ratings.

7. A CF CMBS is a type of mortgage-backed security backed by a pool of commercial real estate loans. Commercial properties that secure loans in CF CMBS pools are broadly divided into five categories: retail, office, multifamily, lodging, and industrial. CF CMBS are typically structured as multiple "tranches," or bonds, which have differing risk/return profiles. The bonds at the top of the capital structure generally receive priority in payment of principal and interest, while the bonds at the bottom experience losses first after the underlying loans incur losses. Because of these differences, the bonds at the bottom of the capital structure generally receive the highest rate of return, while the bonds at the top receive the lowest rate of return. The bonds at the bottom of the structure thus provide a cushion against loss to the bonds at the top of the structure. This cushion is a key element of the CE applicable to each bond in a CF CMBS transaction.

8. On June 26, 2009, S&P published an article entitled "U.S. CMBS Rating Methodology And Assumptions For Conduit/Fusion Pools." That criteria article established a 19% CE level for the AAA-rated tranche of a CF CMBS backed by an "archetypical pool" of commercial real estate loans. In July 2011 S&P published preliminary ratings for two CF CMBS transactions. On one of the deals, S&P gave a preliminary AAA rating to bonds with only 14.5% CE. After potential investors questioned the low level of CE for the AAA bonds in this transaction, S&P withdrew its preliminary ratings for the two transactions.

9. Following withdrawal of the preliminary ratings on the July 2011 transactions, S&P lost significant market share for rating new issuance CF CMBS. S&P sought to re-enter the market in 2012 by publishing new ratings criteria. The prior criteria had been described as being calibrated to produce a AAA credit enhancement level ("AAA CE") of 19% for an "Archetypical Pool" described in that criteria. The 2012 CMBS Criteria were described as having a "target" AAA CE of approximately 20% for a "typical well-diversified conduit-fusion CMBS transaction."

B. S&P's Great Depression Article

10. On June 4, 2012, as part of the development of new CF CMBS Criteria, S&P published an article entitled "Request For Comment: Rating Methodology And Assumptions for U.S. And Canadian CMBS." That publication outlined the parameters of S&P's proposed new CMBS ratings criteria and invited feedback and questions from market participants.

11. With respect to the CE to be provided to CF CMBS under the new Criteria, the article stated in relevant part: "For a typical conduit/fusion transaction, the application of the proposed criteria supports 'AAA' CE level around 20% . . . . This level was supported by multiple factors, including [S&P's] analysis of commercial real estate bond defaults and losses during the Great Depression . . . ."

12. The reference to analysis of Great Depression data corresponded, in part, to an internal study undertaken by a senior S&P employee, which S&P thereafter decided to summarize in an article to provide additional information supporting the 2012 CMBS Criteria. On June 28, 2012, S&P published an article entitled "Estimating U.S. Commercial Mortgage Loan Losses Using Data From The Great Depression" (the "Great Depression Article"). The Great Depression Article relied on data gathered by the staff of the Federal Reserve Bank of New York in preparing a February 2012 report analyzing commercial bond performance during the Great Depression era (the "Fed Data"). Among other things, the Great Depression Article stated that S&P's analysis of Great Depression loss and default information "suggest[s] an average loss of about 20% in periods of extreme economic conditions," thereby supporting the 20% target AAA CE in the proposed new criteria.

13. S&P's focus on the Great Depression, which is commonly understood to have begun in 1929 and to have continued for years thereafter, was consistent with existing S&P ratings practices and methodology. In 2009, S&P published "Understanding Standard & Poor's Ratings Definitions," in which it stated that AAA-rated bonds "should be able to withstand an extreme level of stress and still meet [their] financial obligations." A historical example of such a scenario is the Great Depression in the U.S. The Great Depression Article reinforced the selection of the Great Depression as the "benchmark" for testing the sufficiency of the proposed 20% CE level: "We [S&P] often use the U.S. Great Depression as a benchmark period for determining the appropriate CE level for 'AAA' ratings."

14. The Great Depression Article was flawed, in part because it suggested "about 20%" losses in periods of "extreme economic conditions" without adequately disclosing certain significant assumptions, including the following:

a) S&P's analysis of purported Great Depression losses and defaults included analysis of performance of commercial mortgages originated between 1900 and 1935, many of which were not affected by the extreme economic stress of the Great Depression;

b) The Fed Data analyzed by S&P incorporated discounting assumptions. Discounting loss estimates is contrary to industry standards. The application of a discounting factor lowered the Fed Data losses compared to industry standards; and

c) S&P excluded defaulted commercial mortgages that took longer than three years to resolve, thereby removing from its analysis many of the loans with the most severe losses. The exclusion of these loans also affected the results discussed in the Great Depression Article concerning estimated losses.

15. The impact of the assumptions and methodology incorporated in the Great Depression Article was inadequately disclosed when it was published on June 28, 2012. As a result, S&P knew, or was reckless in not knowing, that the Article was false and misleading.

16. Contemporaneous written evidence prepared by the senior criteria officer ("SCO") who conducted the analysis underlying the Great Depression Article reflects his concerns over his ability to furnish robust and unbiased research to support S&P's proposed CE level of 20%. The SCO's initial determination was that the CE calibration of the 2012 Criteria "may be understating the potential losses in a 'AAA' scenario."

17. For example, on April 16, 2012, after computing loss estimates that ranged above 50%, the SCO wrote in his handwritten notes "Criteria Committee has considered an anchor of 20% for 'AAA'—not sure of justification." After completing his independent analytical work, the SCO estimated losses of approximately 29.5%. He also concluded that the 20% AAA CE benchmark "may be understating the potential losses in a 'AAA scenario.'" His handwritten notes, written contemporaneously with the completion of his independent analytical work, asked "How do we reconcile the [underlying] data and my analysis with the 20% Benchmark?"

18. After discussions with the S&P CMBS ratings group responsible for rating new issuance transactions under the new Criteria, and its Criteria Officer, the SCO modified his analysis to incorporate one of the significant and inadequately described assumptions referenced above relating to time to resolution, and reached results that supported the 20% AAA CE anchor point.

19. In June 2012, when the SCO's study was being prepared for publication, the SCO repeatedly complained about the CMBS group's removal of information from the study.

20. In an unguarded contemporaneous discussion with a confidant, the SCO expressed his reservations generally that the Great Depression Article had become a "sales pitch" for the new criteria, and specifically concerning the removal of certain disclosures concerning the comparable transactions analyzed in connection with the Article.

21. The SCO also expressed concerns about the fact that the removal of those disclosures was reflected in "electronic document[s]" and "discoverable" and he could one day be "sit[ting] in front of Department of Justice, or the SEC . . . ."

22. Despite those concerns, in a self-evaluation written after the Great Depression Article was publicly released in support of the 2012 CMBS Criteria, the SCO lauded his role in the publication and stated that "In my role, I recognize the need to balance between the best theoretical solution and the best business solution."

23. As a result of the conduct described above, S&P willfully violated Section 17(a)(l) of the Securities Act, which prohibits fraudulent conduct in the offer and sale of securities. The Great Depression Article was expressly referenced in the final 2012 CMBS Criteria, which were considered by investors in the offer and sale of securities.

C. S&P's 2012 CMBS Criteria

24. On September 5, 2012, S&P published its new CMBS Criteria in a publication titled "Rating Methodology And Assumptions For U.S. And Canadian CMBS" (the "Criteria Publication").

25. With respect to CE under the new 2012 CMBS Criteria, the Criteria Publication provided at Paragraph 51: "For a typical well-diversified conduit/fusion transaction, the application of the criteria support a 'AAA' CE level of approximately 20%. This would generally be reflective of a transaction with an S&P LTV range between 70% and 75%, S&P DSC between 1.40x and 1.70x and an effective loan count of around 30." Debt service coverage (DSC) and loan-to-value (LTV) ratios are the two key quantitative metrics used to rate CMBS.

26. Impact testing on a sample of transactions during the development of the criteria did not support the range of S&P DSC and S&P LTV referenced in Paragraph 51. Eight U.S. Non-agency transactions from that sample had metrics within the range cited in Paragraph 51. The impact testing showed that the AAA CE level for those eight transactions would range between 14.8% and 21.3% (with an average AAA CE of 18.8%) under the 2012 Criteria. In addition, six of the eight transactions had an effective loan count of less than 30 and thus were not "well diversified" within the meaning of the criteria. These transactions would have resulted in lower AAA CE if they had been well diversified. Paragraph 51 of the Criteria Publication thus was inaccurate.

27. Following publication and adoption of the 2012 CMBS Criteria, between October 2012 and June 2014, CMBS issuers engaged S&P to rate approximately 25 new issuance CMBS transactions using the new criteria.

28. As a result of the conduct described above, S&P violated Exchange Act Rule 17g-2(a)(6), which requires that NRSROs make and retain books and records which must be complete and current documenting the established procedures and methodologies used to determine credit ratings.

Undertakings

Respondent has undertaken to, within thirty (30) days of the date of the entry of this Order, retract all publicly available versions of the June 28, 2012 Great Depression Article, and remove references to the Article in the Criteria Publication.

Respondent has further undertaken to, within thirty (30) days of the entry of this Order, revise Paragraph 51 of the Criteria Publication to accurately describe the anchor point used to develop the DF Matrix that results in the credit enhancement level as described in that paragraph and to publicly disclose a corrected version of the Criteria Publication.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in S&P's Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Sections 15E(d) and 21C of the Exchange Act, it is hereby ORDERED that:

A. S&P cease and desist from committing or causing any violations and any future violations of Section 17(a)(l) of the Securities Act and Exchange Act Rule 17g-2(a)(6).

B. S&P is censured.

C. S&P shall, within thirty (30) days of the entry of this Order, pay a civil money penalty of $15 million to the 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) S&P may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) S&P 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) S&P 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 S&P 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 Michael J. Osnato, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 4000, New York, New York 10281.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9705 / January 21, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74104 / January 21, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16348

In the Matter of **STANDARD & POOR'S RATINGS SERVICES,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15E (d) 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 Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15E(d) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Standard & Poor's Ratings Services ("S&P" or the "Respondent").

II.

In anticipation of the institution of these proceedings, S&P 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, the subject matter of these proceedings, and the facts set forth in Annex A attached hereto, which are admitted, S&P consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the

Securities Act and Sections 15E(d) 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 S&P's Offer, the Commission finds[1] that:

Summary

These proceedings involve statements by S&P concerning its methodology for rating conduit/fusion Commercial Mortgage Backed Securities ("CF CMBS"). Conduit/fusion transactions are those that are comprised of geographically diversified pools of at least 20 mortgages loans made to unrelated borrowers. The disclosures at issue concern S&P's application of the Debt Service Coverage Ratio ("DSCR"), a key quantitative metric used to rate CF CMBS transactions.

S&P used DSCRs to estimate term defaults of loans in CF CMBS as part of its analysis of appropriate levels of Credit Enhancement ("CE") for particular ratings. CE is a critical consideration for a credit rating; in general terms, ratings with higher levels of CE are more conservative and provide greater protection against loss to investors. In late 2010, S&P changed its methodology for calculating DSCRs, which had the impact of lowering the amount of CE necessary to achieve a particular rating for transactions then in the market.

S&P published eight CF CMBS Presale reports between February and July 2011 in which it failed to describe its changed methodology for calculating DSCRs. The reports included DSCRs calculated using its prior methodology, which were misleading because they communicated that the ratings at issue were more conservative than they actually were. S&P did not follow its internal policies and procedures when making the change to its method for calculating DSCRs. S&P's internal control structure also did not sufficiently address red flags – including an internal complaint – that S&P had improperly changed its method for rating CF CMBS.

Respondent

S&P is a Nationally Recognized Statistical Rating Organization ("NRSRO") headquartered in New York City, New York. S&P is comprised of a separately identifiable business unit within Standard & Poor's Financial Services LLC, a Delaware limited liability company wholly-owned by McGraw Hill Financial, Inc. ("MHFI"), and the credit ratings business housed within certain other wholly-owned subsidiaries of, or businesses continuing to operate as divisions of, MHFI.

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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.

Facts

A. S&P's CMBS ratings.

1. Rating agencies' consistency and transparency are crucial to investors, including in the CF CMBS market. Without consistent application of rating methodology, ratings are not comparable from deal to deal. Similarly, without transparency, investors can assess neither the methodology employed by the rating agency nor the application of that methodology. S&P's policies reflected these priorities by requiring S&P employees to consistently apply established Criteria, avoid being influenced by business relationships with the issuers, and publish sufficient information about S&P's procedures and assumptions so that users of credit ratings could understand how S&P arrived at its ratings.

2. A CF CMBS is a type of mortgage-backed security backed by a pool of commercial real estate loans. Commercial properties that secure loans in CF CMBS pools are broadly divided into five categories: retail, office, multifamily, lodging, and industrial. CF CMBS are typically structured as multiple "tranches," or bonds, which have differing risk/return profiles. The bonds at the top of the capital structure generally receive priority in payment of principal and interest, while the bonds at the bottom experience losses first after the underlying loans incur losses. Because of these differences, the bonds at the bottom of the capital structure generally receive the highest rate of return, while the bonds at the top receive the lowest rate of return. The bonds at the bottom of the structure thus provide a cushion against loss to the bonds at the top of the structure. This cushion is a key element of the CE applicable to each bond in a CF CMBS transaction.

3. During the time frame covered by this Order (2010 and 2011), fees for rating CF CMBS transactions were paid by the issuers. Issuers typically announced potential CF CMBS transactions privately to NRSROs several months before they anticipated selling the bonds. NRSROs typically responded to these announcements by undertaking initial analyses of the pool and providing feedback to the issuers concerning how much CE they would require for each bond in the capital structure to be rated at particular levels. Typically, the issuers then retained two NRSROs to rate the transaction, usually choosing the agencies that proposed the lowest credible CE.

4. S&P competed for and sometimes obtained CF CMBS rating assignments in 2010 and 2011. After being hired to rate a transaction, S&P spent approximately two months analyzing the loans and properties. As part of this analysis, S&P made reductions to projected cash flows and property values for the purpose of estimating how the loans would perform under stressed economic conditions. S&P then gave final feedback to the issuer concerning recommended ratings for levels of the capital structure proposed by the issuer. The feedback included summary data concerning DSCRs and other key metrics, which reflected the stress that S&P placed on the loans.

5. After receiving final feedback, the issuers announced the transactions to the public. Shortly after the announcements, S&P publicly disseminated Presale reports setting forth S&P's preliminary recommended ratings and the detailed rationale for the ratings. Although these ratings were designated as preliminary, they were issued in the offer and sale of the CMBS bonds because issuers and investors used the Presales as part of the total mix of information available to analyze the transactions. Final ratings were not issued until after the closing of the transactions. Investors typically had approximately one week after the announcement of the proposed transaction to make their investment decisions.

B. S&P's established rating methodology for CF CMBS used published loan constants for calculating DSCR.

6. On or about June 26, 2009, S&P published "U.S. CMBS Rating Methodology And Assumptions For Conduit/Fusion Pools" ("the Criteria Article"). The Criteria Article was intended to inform market participants, including investors, how S&P calculated net cash flow, how S&P used DSCRs and other information to estimate losses on loans in CF CMBS pools, and how S&P used estimated losses to calculate recommended CE for the various rating levels, among other things.

7. The Criteria Article established a 19% "AAA" CE for an "archetypical pool" of commercial real estate loans. In S&P's view, bonds rated at the AAA level would withstand market conditions commensurate with an extreme economic downturn like the Great Depression without defaulting.

8. S&P used DSCRs to estimate term defaults of loans in CF CMBS pools in connection with determining appropriate levels of CE for particular ratings. The DSCR is the ratio of the annual net cash flow produced by an income-generating property, divided by the annual debt service payment required under the mortgage loans. DSCRs are usually expressed as a multiple, for example, 1.2x. DSCRs give a measure of a property's ability to cover debt service payments. Put another way, an initial DSCR shows the cushion that is available to absorb a decline in net cash flow generated by a property during the term of the mortgage loan.

9. For the purposes of estimating whether a loan would default during its term (as opposed to at its maturity date), S&P calculated the numerator in the DSCR (the net cash flow) by beginning with the current net cash flow data provided by the issuers of the CF CMBS transaction and then applying stresses and discounts to estimate how the income from the property would be affected by economic circumstances. S&P calculated the denominator in the DSCR (the debt service) by multiplying the original principal amount of the loan by a "loan constant" reflecting an interest rate and an amortization schedule.

10. Although the Criteria Article provided loan constants for an "archetypical pool" of loans in a table identified as Table 1 by property type – Retail 8.25%, Office 8.25%,

Multifamily 7.75%, Lodging 10.00% and Industrial 8.50% – it did not state whether S&P would calculate the denominator of the DSCR using the Table 1 loan constants for the purpose of estimating whether a loan would default during its term.

11. After internal discussion, on or about July 31, 2009, S&P decided to use the Table 1 loan constants to calculate DSCRs. On or about March 10, 2010, the CMBS criteria committee further decided that S&P would use the "higher of" the actual constants or Table 1 loan constants to determine debt service payments. S&P incorporated the methodology that resulted from these decisions into the model that it used to analyze CF CMBS transactions.

12. On or about June 22, 2010, S&P published a commentary on a CF CMBS transaction called JPMCC 2010-C1. S&P did not rate the transaction. In the commentary, S&P included DSCR data based on actual loan constants, but then stated that the firm "typically evaluates a transaction's loan default probability using a stressed DSC based on 'BBB' and 'AAA' cash flow scenarios and a stressed loan constant. For JPMCC 2010-Cl, the pool's weighted average stressed debt constant would equal approximately 8.33%, based primarily on the retail and office exposure, for which our constant is 8.25%." S&P closed the commentary with a direct comparison of the JPMCC 2010-C1 pool to the archetypical pool. In that comparison S&P stated that the pool's DSCR was based upon "stressed constants." Through these statements, S&P informed the public that it used the Table 1 loan constants to calculate DSCRs in its analysis of CF CMBS transactions.

13. On or about September 24, 2010, S&P published a Presale for a CF CMBS transaction called JPMCC 2010-C2. The Presale set forth preliminary ratings for the transaction and detailed S&P's analysis that led to its ratings. It began with a summary overview that highlighted the pool-wide DSCR, and the subsequent analysis contained approximately 45 DSCR representations, an indication of the importance of the DSCR in commercial real estate analysis. In addition to the pool-wide DSCR, the Presale presented DSCRs for stratified portions of the pool and for individual loans. In each case, the DSCRs were calculated using the "higher of" the actual loan constants or Table 1 loan constants.

14. As a result of its internal actions described above, including decisions and model implementation, the published commentary on JPMCC 2010-Cl, and the published Presale for JPMCC 2010-C2, S&P established that it used the "higher of" the actual loan constants or Table 1 loan constants to calculate DSCRs.

C. In late 2010, S&P adjusted its methodology for calculating DSCRs.

15. S&P's market position for rating CMBS transactions had declined in the years following the financial crisis, which essentially halted the new issuance CMBS market. When issuers started marketing CMBS transactions again in 2010, S&P's market share did not rebound

to its pre-2008 level, a fact that some members of the CMBS Group believed was caused by, among other things, the conservatism of the firm's criteria.

16. In or around mid-December 2010, the CMBS Analytical Group made a change to the assumption embodied in its model for analyzing new issue CF CMBS transactions. While the model previously calculated the DSCR for each loan by using the "higher of" the actual loan constant or Table 1 loan constant, the assumption was changed to calculate the DSCR for each loan by using the simple average of (1) the higher of the actual loan constant or the Table 1 loan constant and (2) the actual loan constant.

17. Personnel within S&P described the average constants as "blended constants." In all cases in which a loan's actual constant was lower than the Table 1 loan constant, the blended constant would also be lower than the Table 1 loan constants. The use of blended constants generally resulted in lower annual debt service calculations and, therefore, higher DSCRs, which led the model to estimate fewer defaults under a "AAA" stress during the term of a loan, but more defaults at the maturity of the loan, but ultimately leading to lower losses from defaults. This resulted in CE requirements that were lower than they would have been had S&P calculated DSCRs using the "higher of" Table 1 or actual constants, which was more attractive as a commercial matter because issuers seek lower CE levels.

D. S&P rated six transactions and produced preliminary ratings for two more transactions using the revised DSCR methodology, but published data using different DSCRs.

18. During the first half of 2011, S&P used its blended constant methodology to rate the following six CF CMBS transactions: MSC 2011-C1, FREMF 2011-K701, JPMCC 2011-C3, FREMF 2011-K11, FREMF 2011-K13 and JPMCC 2011-C4. Issuers paid S&P approximately $7 million to rate and conduct surveillance on these six transactions.

19. For each transaction, S&P published a Presale. Each Presale contained over 40 representations of DSCRs calculated using the "higher of" the actual loan constants or Table 1 loan constants. These representations included DSCRs for the entire pool, stratified portions of the pool, and individual loans. Three of the six Presales also included DSCRs calculated from actual loan constants, but none of the Presales included any DSCRs calculated from the blended constants that S&P actually used to rate the transactions.

20. Had S&P actually used the DSCRs derived from the Table 1 loan constants, as set forth in the Presales, it would have required materially higher amounts of CE in the six rated transactions.

21. The Presales for the 2011 transactions included a sentence that stated, "[i]n determining a loan's DSCR, Standard & Poor's will consider both the loan's actual debt constant

and a stressed constant based on property type as further detailed in our conduit/fusion criteria." This sentence did not inform investors that S&P had changed its methodology to use blended constants, but was consistent with its previously established methodology of calculating DSCRs with the higher of Table 1 or actual constants.

22. S&P's statements in the Presales concerning DSCRs were thus knowingly or recklessly false and misleading concerning the amount of stress S&P applied in rating the transactions.

23. On at least four of the 2011 transactions, while S&P reported DSCRs based on the Table 1 loan constants to the public, the CMBS Group reported the DSCRs they actually used, based on the blended constants, to the issuers who paid S&P. Thus, the CMBS Group knew that the DSCRs they actually used were important to assessing the ratings, but still did not provide them to investors who used their ratings.

24. S&P also misrepresented the calculation of DSCRs in internal documents known as Rating Analysis and Methodology Profile ("RAMP"), despite acknowledging, in a December 2010 internal email that "[i]f we do [use an alternate debt constant], we would document it in the RAMP."

25. According to S&P's RAMP Guidelines, "The RAMP's objective is to explain the rating recommendation to voting committee members [who approved the proposed rating] through application of criteria. The RAMP captures the key drivers of the issue being rated, the relevant facets of analysis, the pertinent information being considered, and the underlying criteria and applicable assumptions...." S&P's Model Use Guidelines described various matters pertaining to models that must be documented in RAMPs, including key assumptions used in models and modifications to models.

26. The RAMPs for each of the six transactions listed above disclosed DSCRs calculated using the Table 1 loan constants and, for three transactions, the actual constants, when in fact S&P rated the transactions using blended constants. The RAMPs did not describe the use of blended constants, the data derived from blended constants, or the fact that the models were modified to apply blended constants.

27. In July 2011 S&P published Presales with preliminary ratings for two additional CF CMBS transactions called GSMS 2011-GC4 and FREMF 2011-K14. As with the previous six transactions, the Presales contained multiple DSCRs calculated using the higher of the actual loan constants or Table 1 loan constants. They also included DSCRs calculated from actual loan constants, but did not provide any DSCRs derived from the blended constants S&P actually used for the preliminary ratings. As a result, these Presales also made false and misleading statements about the amount of stress that S&P placed on the loans in the pools when assigning its ratings.

The RAMPs for these transactions similarly provided data based on the Table 1 loan constants, and actual constants, but not blended constants.

28. Several potential investors questioned the low level of CE for the AAA bonds in the GSMS 2011 GC-4 transaction. S&P gave a preliminary AAA rating to bonds with 14.5% CE Using the higher of the actual loan constants or Table 1 loan constants, rather than the blended constants, S&P's model would have resulted in approximately 20% CE for the AAA bond.

29. In light of the investor questions, S&P's senior management reviewed S&P's ratings and discovered the use of blended constants. S&P then withdrew its preliminary ratings for the two transactions. As a result, these transactions did not close on schedule.

30. Following withdrawal of the preliminary ratings on the July transactions, S&P reviewed the ratings on the six transactions from earlier in 2011. S&P's Chief Credit Officer believed that those ratings were not assigned in accordance with S&P's criteria because they were based on blended constants.

31. On or about August 5, 2011 and August 16, 2011, S&P issued press releases called "Advanced Notice of Proposed Criteria Change[,]" which disclosed the methodology S&P had used in rating the CMBS transactions and stated that the ratings were "consistent with S&P's rating definitions." These publications did not inform investors of the effect of the change in methodology on required CE levels.

E. S&P's internal controls did not detect and prevent the Criteria change.

32. In 2010 and 2011, S&P purported to maintain a system of internal controls designed to ensure, among other things, that ratings were assigned using S&P's approved criteria. However, S&P's internal controls failed to identify and respond adequately to red flags that the CMBS Group had changed its methodology for rating CF CMBS transactions without appropriate process or disclosures.

33. The internal controls failures included:

a. S&P's Model Quality Review Group ("MQR"), which was supposed to determine whether numerical models used by rating practice groups appropriately implemented S&P's criteria, conducted a review of the CMBS model during the time that the CMBS Group was using blended constants to calculate DSCRs. MQR began its review with a model that used the higher of the actual loan constants or Table 1 loan constants. The CMBS Group modified the model to use blended constants while the review was ongoing, but failed to provide the modified model to MQR. Nevertheless, the CMBS Group provided information to MQR which, although vague, was a red flag that the CMBS Group was no longer applying the "higher of" methodology. MQR failed to respond to this red flag and never requested the modified model.

b. In January 2011, S&P received an anonymous email asserting that the CMBS Group was inappropriately using blended constants to produce lower CE levels and make S&P more competitive. S&P's Quality Group, whose responsibilities included reviews of ratings files to determine whether ratings analytical groups were complying with S&P's criteria, investigated the complaint. The Quality Group did not conduct a sufficient investigation of how the CMBS Group calculated DSCRs, and the complaint was not discussed with S&P's Chief Credit Officer.

c. S&P's Criteria Group was supposed to enforce S&P's Criteria Process Guidelines, which set forth procedures for researching and approving proposed criteria changes and publicizing any resulting changes. The Criteria Group knew that the CMBS Group was considering changes to the methodology for calculating DSCRs, and that the Quality Group was investigating such possible changes. However, the Criteria Group failed to identify the change the CMBS Group actually made to the methodology for calculating DSCRs, and failed to enforce the Criteria Process Guidelines despite these red flags.

Violations

34. As a result of the conduct described above, S&P willfully violated Section 17(a)(l) of the Securities Act, which prohibits fraudulent conduct in the offer and sale of securities.

35. As a result of the conduct described above, S&P violated Section 15E(c)(3) of the Exchange Act, which requires NRSROs to establish, maintain, enforce, and document an effective internal control structure governing the implementation of and adherence to policies, procedures, and methodologies for determining credit ratings.

36. As a result of the conduct described above, S&P violated Rules 17g-2(a)(2)(iii) and 17g-2(a)(6) under the Exchange Act, which require NRSROs to make and retain complete and current records of the rationale for any material difference between the credit rating implied by a model and the final credit rating issued and of the established procedures and methodologies used by the NRSRO to determine credit ratings.

Undertakings

Respondent has undertaken to refrain from making preliminary or final ratings for any new issue U.S. conduit/fusion CMBS transaction for a period of twelve months from the date of this Order, including engaging in any marketing activity related thereto. This prohibition extends to all new issuance ratings activity whether undertaken for a fee or otherwise. This undertaking does not prohibit S&P from engaging in surveillance of outstanding conduit/fusion CMBS issues that S&P has previously rated.

Within 180 days of the entry of this Order, or as otherwise agreed to with the Commission's Office of Credit Ratings, S&P shall adopt, implement, and maintain policies, procedures, practices and internal controls that address the recommendations and issues identified in the September 9, 2014 summary letter concerning the completed 2014 Section 15E Examination of S&P conducted by the Commission's Office of Credit Ratings ("2014 S&P Exam").

S&P shall submit a report, approved and signed under penalty of perjury by the President and the Chief Compliance Officer of S&P, to Thomas Butler, Director, Office of Credit Ratings, Securities and Exchange Commission New York Regional Office, 3 World Financial Center, Suite 400, New York, NY 10281-1022, and Michael J. Osnato, Jr., Chief, Complex Financial Instruments Unit, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022, which details the new policies, procedures, practices, and internal controls adopted, and the actions taken to implement and maintain the new policies, procedures, practices, and internal controls.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in S&P's Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Sections 15E(d) and 21C of the Exchange Act, it is hereby ORDERED that:

A. S&P cease and desist from committing or causing any violations and any future violations of Section 17(a)(1) of the Securities Act, Section 15E(c)(3) of the Exchange Act, and Exchange Act Rules 17g-2(a)(2)(iii) and 17g-2(a)(6).

B. S&P is censured.

C. S&P shall, within thirty (30) days of the entry of this Order, pay disgorgement of $6.2 million, prejudgment interest of $800,000, and a civil money penalty of $35 million to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 or 31 U.S.C. § 3717 as applicable. Payment must be made in one of the following ways:

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

(2) S&P 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) S&P 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 cover letter identifying S&P 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 Michael J. Osnato, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 4000, New York, New York 10281.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

ANNEX A

S&P admits to the facts set forth below.

Beginning in 2009, S&P developed new commercial mortgage backed securities ("CMBS") ratings criteria that generally increased the required credit enhancement levels for conduit/fusion CMBS ("CF CMBS").

On June 26, 2009, S&P published "US. CMBS Ratings Methodology and Assumptions for Conduit/Fusion Pools" setting forth its methodology for rating CF CMBS. That article described how S&P used the debt service coverage ratio ("DSCR") to estimate whether the loans comprising the conduit/fusion pool would default during their term. This term default estimate was an important variable in S&P's calculation of the amount of credit enhancement S&P would require for each rating level (AAA, AA, A, etc.).

The Criteria article defined the DSCR as "the ratio of a real property's [Net Cash Flow] to the scheduled debt service expressed as a multiple (e.g. 1.2x)." Debt service on a loan can be calculated by multiplying the outstanding principal balance by a loan constant, which reflects both an interest rate and an amortization schedule. The Criteria article also included a table, called Table 1, which defined an "archetypical" CF CMBS pool. Table 1 included loan constants for five property types as follows (the "Table 1 constants"):

Retail: 8.25%
Office: 8.25%
Multifamily: 7.75%
Lodging: 10.00%
Industrial: 8.50%

In July 2009, S&P decided to use the Table 1 constants to calculate DSCRs when analyzing loans as part of the rating of CF CMBS. Subsequently, in March 2010, the CMBS Criteria Committee approved the use of the actual loan constant to calculate a loan's DSCR when the actual loan constant was higher than the Table 1 constant. These decisions were incorporated in the mathematical model that S&P used to calculate credit enhancement requirements for various rating levels.

In December 2010, S&P's CMBS Ratings Group began analyzing loans in new issue CF CMBS using the higher of the actual loan constant or the average of the actual loan constant and the Table 1 constant to calculate debt service. Members of the CMBS ratings group sometimes described this average as a "blended constant." The usage of blended constants rather than the higher of the actual loan constant or the Table 1 loan constant had the effect of lowering the debt service for loans that had actual loan constants that were lower than the Table 1 loan constants, which in turn could have the effect of lowering the credit enhancement applicable to each rating level.

Between February 2011 and May 2011, S&P published Presale reports for six CF CMBS transactions the company ultimately rated. The reports reflected S&P's preliminary ratings of the offerings and its methodology for arriving at the ratings. In these reports, S&P

published pool level data, data on stratifications of the pool, and data concerning the top 10 loans.

The DSCRs in the Presale reports generally were calculated using the higher of the actual loan constants or the Table loan constants. In three of the six Presale reports, S&P also presented DSCRs based on actual loan constants. The Presale reports, in a section called "Conduit/fusion methodology[,]" stated: "In determining a loan's DSCR, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria."

S&P did not, however, determine its ratings based on the Table 1 loan constants or the actual debt service data in the manner it disclosed in the Presale reports. Rather, the CMBS ratings group used blended constants to arrive at ratings for these CF CMBS.

In connection with each preliminary and final set of ratings on the six transactions described above, S&P analysts prepared a Rating Analysis and Methodology Profile ("RAMP") as required by S&P's policies and procedures. According to S&P's RAMP guidelines, the purpose of a RAMP "is to explain the rating recommendation" to S&P personnel who would vote on the rating. The RAMP guidelines further stated that, "[t]he RAMP captures the key drivers of the issue being rated, the relevant facets of the analysis, the pertinent information considered, and the underlying criteria and applicable assumptions . . . ."

The RAMPs for the six transactions described above included DSCR data derived from the Table 1 constants but did not include the data derived using blended constants that were actually used to rate the transactions, other than by reference to the model results that were considered in arriving at the ratings.

The issuers of the six rated transactions paid S&P approximately $7 million to rate and conduct surveillance on those transactions.

In July 2011, S&P published Presale reports for two additional CF CMBS conduit/fusion transactions. As with the earlier transactions rated in 2011, S&P used the higher of the actual loan constants or the blended constants to calculate DSCRs for these transactions, while its publicly disclosed Presale reports included data using the Table 1 constants and, in both cases, the actual constants. After investors questioned the credit enhancement levels on one of those transactions, S&P's senior management conducted a review which concluded that the CMBS ratings group was in fact using blended constants to calculate DSCRs.

S&P voluntarily withdrew the preliminary ratings described in the Presales for the two July 2011 transactions.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9706 / January 21, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74105 / January 21, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31425 / January 21, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16349

In the Matter of BARBARA DUKA, Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15E(d) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15E(d) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 9(b) of the Investment Company Act ("Investment Company Act') against Barbara Duka ("Respondent" or "Duka").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Barbara Duka, age 49, is a resident of New York City, New York. During 2009 through 2011, Duka was managing director at Standard & Poor's Ratings Services with

responsibility for new issue ratings of Commercial Mortgage Backed Securities ("CMBS") and, after approximately early January 2011, surveillance ratings of CMBS.

B. OTHER RELEVANT ENTITY

2. Standard & Poor's Ratings Services ("S&P") is a Nationally Recognized Statistical Rating Organization ("NRSRO") headquartered in New York City, New York. S&P is comprised of a separately identifiable business unit within Standard & Poor's Financial Services LLC, a Delaware limited liability company wholly-owned by the McGraw-Hill Companies, Inc. ("McGraw-Hill"), and the credit ratings business housed within certain other wholly-owned subsidiaries of, or businesses continuing to operate as divisions of, McGraw-Hill.

C. SUMMARY

3. These proceedings involve a scheme and fraudulent practice or course of business that led to false and misleading statements by S&P concerning its post-financial crisis methodology for rating conduit/fusion CMBS. The disclosures at issue concern S&P's calculation of the Debt Service Coverage Ratio ("DSCR"), a key quantitative metric used to rate CMBS transactions.

4. S&P used DSCRs to predict defaults of loans in CMBS pools and thereby determine appropriate levels of Credit Enhancement ("CE") for particular ratings. CE is a critical component of a credit rating; in general terms, ratings with higher levels of CE are more conservative and provide greater protection against loss to investors.

5. Duka led and was responsible for the actions of the analytical group within S&P that analyzed and assigned ratings to new issue CMBS transactions, and (after approximately early January 2011) that assigned surveillance ratings to outstanding CMBS bonds (the "CMBS Group"). In late 2010, S&P's CMBS Group, acting through and led by Duka, loosened its methodology for calculating DSCRs, resulting in CE requirements that were approximately 25% to 60% lower for bonds at each different level of the capital structure. This change to S&P's methodology was designed to make S&P's ratings more attractive to fee-paying CMBS issuers. Duka ordered the change because she perceived that S&P's criteria were too conservative and were causing S&P to lose rating assignments, thereby threatening both the profitability of the CMBS Group she led and her position within the firm.

6. S&P's CMBS Group, acting through and led by Duka, published eight CMBS Presale reports between February and July 2011 in which S&P failed to disclose its relaxed methodology for calculating DSCRs. The reports instead represented that S&P used a more conservative methodology for calculating DSCRs when rating the transactions. Market participants were therefore misled into believing that the ratings at issue were more conservative than they actually were.

7. S&P and Duka acted with scienter in connection with the false and misleading CMBS Presales, in that Duka and the CMBS Group knew that the Presales contained inaccurate data and intentionally or recklessly caused such inaccurate data to be published, and for other reasons discussed below.

8. S&P failed to follow its own established internal policies and procedures when the CMBS Group changed its method for calculating DSCRs and in connection with ratings that the CMBS Group assigned by using the undisclosed new methodology. Duka caused and aided and abetted such failures, among other things, by causing the CMBS Group to prepare internal documents that failed to describe the new methodology, contrary to the policies that governed such documents, and by changing the numerical model for CMBS ratings without adequately communicating those changes to the responsible persons within S&P's internal control structure.

D. S&P's CMBS RATINGS

9. Rating agencies' consistency and transparency are important to investors, including in the CMBS market. Without consistent application of rating methodology, ratings are not comparable from deal to deal. Similarly, without transparency, investors can neither assess the methodology employed by the rating agency nor the application of that methodology, and thus cannot determine what weight to accord the rating. S&P's Code of Conduct reflected these priorities by requiring S&P employees to consistently apply established criteria, avoid being influenced by non-criteria factors, such as business relationships with the issuers, and publish sufficient information about S&P's procedures and assumptions so that users of credit ratings could understand how S&P arrived at its ratings.

10. A conduit/fusion CMBS is a group of bonds, payment of which is backed by a pool of loans secured by commercial real estate. The bonds at the top of the capital structure receive priority in payment of principal and interest, while the bonds at the bottom experience losses first when obligors default on the underlying loans. Because of these differences, the bonds at the bottom of the capital structure receive the highest rate of return, while the bonds at the top receive the lowest rate of return. The bonds at the bottom of the structure thus provide a cushion against loss to the bonds at the top of the structure. This cushion is a key aspect of the CE applicable to each bond in a CMBS transaction.

11. During the time frame covered by this Order (2010 and 2011), fees for rating CMBS transactions were paid by the issuers. Issuers typically announced a potential CMBS transaction privately to most or all of the NRSROs that rate CMBS several months before the issuer anticipated selling the bonds. NRSROs typically responded to these announcements by undertaking initial analyses of the transaction and providing feedback to the issuers concerning how much CE they would require for each bond in the capital structure to be rated at particular levels. Typically, the issuer then retained two NRSROs to rate the transaction, usually choosing the agencies that proposed the lowest CE.

12. The CMBS Group led by Duka competed for and sometimes obtained CMBS rating assignments in 2010 and 2011. After being hired to rate a transaction, the CMBS Group spent approximately two months analyzing the loans and properties. The CMBS Group then gave final feedback to the issuer concerning recommended ratings for levels of the capital structure proposed by the issuer. The feedback included summary data concerning DSCRs and other key metrics.

13. After receiving final feedback, the issuer announced the transaction to the public. Shortly after the announcements, the CMBS Group publicly disseminated a Presale report setting

forth S&P's preliminary recommended ratings and the detailed rationale for the ratings. Although these ratings were designated as preliminary, they were issued in the offer and sale and in connection with the purchase and sale of the CMBS bonds because issuers and investors used the Presales as part of the total mix of information available to analyze the transactions. Final ratings were not issued until after the closing of the transactions. Investors typically had approximately one week after the announcement of the proposed transaction to make their investment decisions.

14. Duka, as managing director of the CMBS Group, oversaw the entire process whereby the CMBS Group analyzed CMBS transactions, submitted feedback to issuers, made ratings determinations, prepared models and internal documents pertaining to such ratings, published reports and commentaries announcing ratings or other actions taken by the CMBS Group, and, in conjunction with S&P's criteria organization, decided and published matters regarding the criteria that S&P used to rate CMBS. As an experienced employee of S&P, Duka was thoroughly familiar with S&P's internal policies and procedures governing CMBS ratings, and in particular the requirement that the CMBS Group comply with published criteria when assigning ratings to transactions.

E. S&P'S ESTABLISHED METHODOLOGY FOR RATING CMBS USING PUBLISHED CRITERIA CONSTANTS TO CALCUATE DEBT SERVICE COVERAGE RATIOS

15. On or about June 26, 2009, S&P published "U.S. CMBS Rating Methodology And Assumptions For Conduit/Fusion Pools" ("the Criteria Article"). The Criteria Article was intended to inform market participants, including investors, how S&P determined its ratings. Specifically, the Criteria Article explained how S&P calculated net cash flow, used DSCRs to estimate losses on loans in CMBS pools, and used those loss estimates to calculate the CE necessary for the various rating levels.

16. The DSCR is the annual net cash flow produced by an income-generating property, divided by the annual debt service payment required under the mortgage loans. DSCRs are usually expressed as a multiple, for example, 1.2x. DSCRs give a measure of a property's ability to cover debt service payments. Put another way, DSCRs show the cushion that is available to absorb a decline in net cash flow generated by a property during the term of the mortgage loan.

17. The CMBS Group calculated the denominator in the DSCR (the debt service) by multiplying the original principal amount of the loan by a "loan constant" reflecting an interest rate and an amortization schedule.

18. The Criteria Article's methodology is based on an "archetypical pool" of commercial real estate loans. The "archetypical pool" is described in a table identified as Table 1. Table 1 included loan constants by property type – Retail 8.25%, Office 8.25%, Multifamily 7.75%, Lodging 10.00% and Industrial 8.50%. The Criteria Article did not clearly state how S&P used the loan constants in Table 1 (the "criteria constants") in its analysis for CMBS ratings.

19. After publication of the Criteria Article, extensive internal discussions ensued concerning the loan constants that S&P would use to calculate debt service. Some personnel took

the position that S&P should use the published criteria constants while others argued that S&P should use "actual constants" derived from the terms of the loans. On or about July 31, 2009, senior S&P management affirmed that the firm would use the criteria constants to calculate DSCRs. On or about March 10, 2010, the CMBS criteria committee further decided that S&P would use the actual constants if higher than the criteria constants to determine debt service payments. Duka was the lead CMBS Group member on the CMBS criteria committee and signed the written decision of the CMBS criteria committee. The March decision was a minor change to the prior practice because actual loan constants were rarely higher than the criteria constants. The CMBS Group, with Duka's knowledge and acquiescence, incorporated the methodology that resulted from these decisions into the model that it used to analyze CMBS transactions.

20. On or about June 22, 2010, S&P published a commentary on a CMBS transaction called JPMCC 2010-C1. S&P did not rate the transaction. The Commentary was prepared under Duka's guidance, identified Duka as the Analytical Manager for U.S. CMBS New Issuance, and listed persons supervised by Duka as Primary Credit Analysts. In the commentary, S&P included DSCRs based on actual loan constants, but then stated that the firm "typically evaluates a transaction's loan default probability using a stressed DSC based on . . . a stressed loan constant. For JPMCC 2010-C1, the pool's weighted average stressed debt constant would equal approximately 8.33%, based primarily on the retail and office exposure, for which our constant is 8.25%." S&P closed the commentary with a direct comparison of the JPMCC 2010-C1 pool to the archetypical pool. In that comparison S&P stated that the pool's DSCR was based upon "stressed constants." Through these statements, S&P informed the public that it used the criteria constants to calculate DSCRs in its analysis of CMBS transactions.

21. On or about September 24, 2010, S&P published a Presale for a CMBS transaction called JPMCC 2010-C2. Duka supervised the preparation and publication of the Presale. The Presale set forth preliminary ratings for the transaction and detailed S&P's analysis that led to its ratings. It began with a summary overview that highlighted the pool-wide DSCR, and the subsequent analysis contained approximately 45 DSCR representations. In addition to the pool-wide DSCR, the Presale presented DSCRs for stratified portions of the pool and for individual loans. In each case, the DSCR was calculated based upon the criteria constants.

22. As a result of its internal actions described above, including decisions and model implementation, the published commentary on JPMCC 2010-C1, and the published Presale for JPMCC 2010-C2, S&P established that it based its calculation of DSCRs on the criteria constants. Duka, by virtue of her active participation in the relevant decisions and ratings activity, was fully aware of this fact.

F. <u>DUKA'S DECISION TO RELAX S&P'S METHODOLOGY IN ORDER TO ATTRACT MORE BUSINESS</u>

23. Prior to the financial crisis, S&P held a dominant share of the market for rating CMBS. The financial crisis essentially halted the new issuance CMBS market. When issuers started marketing CMBS transactions again in 2010, S&P's market share did not rebound to its pre-crisis level. Instead, S&P was losing market share to other NRSROs, a fact that members of the CMBS Group believed was caused by the conservatism of the firm's criteria.

24. Duka was aware of and concerned about S&P's low market share and blamed it in part on her perception that S&P's CMBS criteria were producing CE levels that were too high for S&P to get rating assignments from CMBS issuers. In an email dated October 11, 2010, Duka wrote that "we looked at and lost [a CMBS new issue] because our feedback was much more conservative than the other rating agencies." In an email dated November 11, 2010, Duka wrote that S&P's "more conservative criteria . . . could impact the business" and were among the "key challenges" facing the CMBS Group. In a December 2010 activity report to S&P management, Duka noted that S&P had lost a different CMBS new issue assignment due to criteria and again noted that "our criteria has historically been somewhat more conservative than the other agencies."

25. Duka's concerns about S&P's conservative criteria culminated in mid-December 2010. At the time, S&P's Model Quality Review group ("MQR") had just produced a draft report concerning the CMBS model. The purpose of the MQR review was to determine whether the model was an appropriate computer implementation of the S&P criteria. The model MQR reviewed used the methodology based on the criteria constants, as determined by the CMBS criteria committee.

26. Duka and several other persons within the CMBS Group circulated emails within the Group concerning how to respond to the draft report. They asserted that they were basing their DSCRs on the criteria constants, which had been "vetted in a criteria committee." Nevertheless, Duka wrote that a member of the CMBS Group was "starting to convince me that we should rethink this, as it doe[s] not have the intended result."

27. At that time, S&P had an internal procedure, called the Criteria Process Guidelines, that was specifically designed to respond to situations where analytical practice groups perceived weaknesses in S&P's criteria. The Guidelines created a five-step process of initiation, research, approval, dissemination, and review so that such issues could be resolved in a rigorous and well-documented fashion. The Guidelines were a key part of S&P's internal controls because they were intended to ensure that criteria were developed with the active input and approval of independent criteria experts, and not solely by practice groups such as the CMBS Group, which were viewed as susceptible to commercial influence.

28. Rather than seeking a rigorous and comprehensive review through the criteria process as to why S&P's CMBS criteria were too conservative, Duka and her CMBS Group devised a scheme to rapidly and materially decrease CE levels with a simple change to their numerical model. In or around mid-December 2010, the CMBS Group materially changed their methodology. While the model previously calculated the DSCR for each loan by using the higher of the actual loan constant or the criteria constant, the new model calculated the DSCR for each loan by using the higher of the actual loan constant or the *average* of the actual loan constant and the criteria constant.

29. Personnel within S&P described the average constants as "blended constants." Blended constants were in all cases *lower* than the criteria constants. The use of blended constants resulted in lower annual debt service calculations and, therefore, higher DSCRs, which led the model to estimate fewer anticipated defaults as well as lower losses from defaults. This resulted in CE requirements that were approximately 25% to 60% lower than they would have been had the

CMBS Group used the criteria constants to compute DSCRs. As a result, the CMBS Group had a ratings methodology that would produce more attractive CE levels to fee-paying issuers.

30. Duka failed to adequately follow the Criteria Process Guidelines. Instead, Duka's effort to apply the criteria process was at best minimal and informal, and violated the standard of care applicable to a person in Duka's position. At S&P's holiday party, she and one or two other members of the CMBS Group approached the new CMBS criteria officer, who had just joined S&P earlier on the same day, and pushed him to agree to use blended constants. When he demurred, Duka approached the chief of S&P's structured finance criteria organization with the same request early the next morning. After a brief meeting, Duka unilaterally concluded that she had obtained his approval for use of the blended constants, but she made no record of the meeting or this decision. Moreover, approval from the structured finance criteria chief, even if given, would not have satisfied the requirements of the Criteria Process Guidelines. A reasonable person in Duka's position would have documented her actions concerning the change in methodology and would have made a reasonable effort to follow S&P's policies and procedures concerning criteria changes.

31. The structured finance criteria chief denies that he gave any approval to Duka for the CMBS Group to broadly use blended constants. He and Duka, however, both agree that he instructed Duka to document the methodology that the CMBS Group used for calculating DSCRs, and any changes to that methodology, in public and internal documents, including Presales and RAMPs discussed below. Duka has admitted receiving that instruction from the structure finance criteria chief.

G. DUKA'S FALSE AND MISLEADING STATEMENTS TO INVESTORS, AND INTERNALLY, CONCERNING RATINGS USING THE RELAXED DSCR METHODOLOGY

32. During the first half of 2011, the CMBS Group experienced a surge in ratings engagements. S&P used its blended constant methodology to rate the following six conduit/fusion CMBS transactions: MSC 2011-C1, FREMF 2011-K701, JPMCC 2011-C3, FREMF 2011-K11, FREMF 2011-K13 and JPMCC 2011-C4. Issuers paid S&P approximately $7 million to rate these six transactions.

33. For each transaction, the CMBS Group published a Presale. Each Presale set forth the recommended S&P ratings for the various bonds in the CMBS capital structure, which were based on the CE that the structure provided to each level. The text of the Presale then began with a paragraph entitled "Rationale," which was in essence an executive summary of the document. The Rationales for each of the six rated transactions explicitly stated S&P's DSCR for the pool based on the criteria constants, implying that those DSCRs formed the analytical basis for the assigned ratings. The Rationale did not disclose that S&P in fact had based its recommended CE on a far less conservative analysis that was based on blended constants.

34. The placement of the DSCRs and constants in this executive summary reflects the importance of DSCRs in the analysis of CMBS bonds. But the deceptive nature of the Presales did not stop there. The Presales continued with over 40 more representations of DSCRs calculated

using the criteria constants. These representations included DSCRs for the entire pool, stratified portions of the pool, and individual loans. Some Presales also included DSCRs calculated from actual loan constants, but none of the Presales included any DSCRs calculated from the blended constants that S&P actually used to rate the transactions.

35. Had S&P actually used the DSCRs derived from the criteria constants, as set forth in the Presales, it would have required materially higher amounts of CE in the six rated transactions. For the AAA bonds, which were by far the largest part of the transactions, CE was lowered between approximately 500 and 750 basis points by using DSCRs derived from blended constants. For the BBB bonds, CE was lowered by approximately 250 to 300 basis points by using DSCRs derived from the blended constants.

36. The inclusion of data in the Presales based on criteria constants did not result from error, mistake, or negligence. Since the CMBS Group did not use the data that it published in the Presales, the CMBS Group had no analytical reason to calculate it. In order to calculate such data, the CMBS Group needed to enter the models, know where the blended loan constants appeared in the formulas, change those formulas to reflect the criteria constants, re-run the models with the criteria constants, and copy the resulting data into the Presales. These acts were all done intentionally.

37. Before publishing the Presales, Duka engaged in a conversation with her chief subordinate concerning whether to disclose anything about the relaxed criteria in the Presales. They decided to add the following sentence to a section in the middle of each Presale that described the conduit/fusion methodology: "[i]n determining a loan's DSCR, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria." This sentence did not inform investors that S&P had changed its methodology to use blended constants. It was instead consistent with S&P's established methodology that considered both the actual constant and the criteria constant, and then chose the higher of the two. Duka's subordinate, in sworn testimony, stated that the sentence was "written to be vague . . . based upon her instruction."

38. Duka also used vague language internally in responding to the MQR review of the CMBS model, which was not concluded until June 2011. MQR focused part of its review on the loan constants, and explicitly requested that Duka certify that she was "comfortable with the assumption that loan constants used to derive debt service are appropriate to estimate the debt service amount." In response, Duka stated that "we consider both the constants in [Criteria Table 1] and the actual constants," and that "New Issuance would use the actual (if higher) but look at both if the actual constant is lower than the [Criteria Table 1 constant]." This language suggested that Duka's group engaged in some sort of analysis when deciding upon which constant to use, when in fact Duka had decided to simply use a 50/50 blended constant for all loans in all pools.

39. Significantly, even though Duka's CMBS Group changed the model in the midst of the MQR review, Duka never showed the new model to MQR. Instead, Duka knowingly allowed MQR to perform its important internal control function with a model that was outdated and applied criteria that the CMBS Group had rejected. Duka's frustration of the MQR process violated the

standard of care for a person in Duka's position and aided and abetted and caused failures of S&P's internal controls.

40. On at least four of the 2011 transactions, while S&P reported DSCRs based on the criteria constants to the public, the CMBS Group reported the DSCRs they actually used, based on the blended constants, to the issuers who paid S&P. Thus, the CMBS Group knew that the DSCRs they actually used were important to assessing the ratings, but still did not provide them to investors who used their ratings.

41. Duka also caused the CMBS Group to misrepresent the calculation of DSCRs in internal documents known as Rating Analysis and Methodology Profiles ("RAMPs"). According to S&P's RAMP Guidelines, "The RAMP's objective is to explain the rating recommendation to voting committee members [who approved the proposed rating] through application of criteria. The RAMP captures the key drivers of the issue being rated, the relevant facets of analysis, the pertinent information being considered, and the underlying criteria and applicable assumptions . . . ." S&P's Model Use Guidelines described various matters pertaining to models that must be documented in RAMPs, including key assumptions used in models and modifications to models.

42. As noted above, Duka met briefly with S&P's chief structured finance criteria officer in December before starting to use blended constants. As further noted above, Duka agreed that she and her CMBS Group would disclose the methodology used to calculate DSCRs, and any changes to that methodology, in the RAMPs. Instead, the RAMPs for each of the six transactions listed above disclosed DSCRs calculated using the criteria constants, when in fact S&P rated the transactions using blended constants. The RAMPs did not describe the use of blended constants, the data derived from blended constants, or the fact that the models were modified to apply blended constants. Thus, Duka violated the standard of care set forth in S&P's policies and procedures and documentation requirements, and aided and abetted and caused failures of S&P's internal controls and failures by S&P to comply with requirements to make and retain books and records.

43. In July 2011, S&P published Presales with preliminary ratings for two additional CMBS transactions called GSMS 2011-GC4 and FREMF 2011-K14. As for the previous six transactions, the Presales contained multiple DSCRs calculated based on the criteria constants. They also included DSCRs calculated from actual loan constants, but did not provide any DSCRs derived from the blended constants S&P actually used for the preliminary ratings. As a result, these Presales also made numerous false and misleading statements about the amount of stress that S&P placed on the loans in the pools when assigning its ratings. The RAMPs for these transactions similarly provided data based on the criteria constants, and to some extent actual constants, but not blended constants. Duka's continuing failure to meet the standard of care set forth in S&P's policies and procedures concerning RAMPs aided and abetted and caused failures of S&P's internal controls and failures by S&P to comply with requirements to make and retain books and records.

44. The day before S&P published the Presale for GSMS 2011-GC4, one of the rating analysts on the transaction asked Duka's chief subordinate whether "BD [Duka] wants us to report DSC based on the blend as well as the stressed [criteria] constant?" The chief subordinate replied,

"I spoke with her and she wants to show both the dsc using stressed constant and the dsc using actual constant." Thus, Duka explicitly decided not to disclose DSCRs using blended constants – the data that the analyst actually used to calculate the ratings.

45. Several potential investors questioned the low level of CE for the AAA bonds in the GSMS 2011 GC-4 transaction. S&P gave a preliminary AAA rating to bonds with 14.5% CE. Using the DSCRs described in the Presale, which calculated DSCRs based on the criteria constants, S&P's model would have required approximately 20% CE for the AAA bond.

46. In light of the investor questions, S&P's senior management reviewed S&P's ratings and discovered the use of blended constants. S&P then withdrew its preliminary ratings for the two transactions. As a result, these transactions did not close on schedule, even though, at least with regards to the GSMS 2011-GC4 transaction the issuer and investors had entered into contracts for purchase and sale. S&P's decision to withdraw the ratings occurred over a series of internal meetings. Several persons who attended those meetings reported that Duka admitted that the decision not to disclose blended constants in the Presales was intentional.

47. On May 24, 2012, S&P's Compliance Department issued a memorandum regarding a Targeted Post Event Review of the GSMS 2011-GC4 transaction. The Compliance Department found that Duka violated the S&P Ratings Services Codes of Conduct in eight separate instances and the Model Quality Review Guidelines in one instance. Because Duka had resigned and left S&P on March 5, 2012, the Compliance Department did not recommend any remedial action against her.

48. S&P and Duka thus intentionally, knowingly or recklessly made and caused to be made false and misleading statements to investors concerning the DSCRs used and the amount of stress S&P applied in ratings or preliminary ratings, or both, for the eight transactions, and Duka violated the standard of care for a person in her position. S&P and Duka further intentionally, knowingly or recklessly engaged in a scheme and practice or course of business that operated as a fraud or deceit on investors.

H. <u>VIOLATIONS</u>

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

50. In the alternative, as a result of the conduct described above, Duka willfully aided and abetted and caused S&P's violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

51. As a result of the conduct described above, Duka willfully aided and abetted and caused S&P's violations of Section 15E(c)(3) of the Exchange Act, which requires NRSROs to establish, maintain, enforce, and document an effective internal control structure governing the implementation of and adherence to policies, procedures, and methodologies for determining credit ratings.

52. As a result of the conduct described above, Duka willfully aided and abetted and caused S&P's violations of Rule 17g-6(a)(2) under the Exchange Act, which prohibits NRSROs from issuing, or offering or threatening to issue, a credit rating that is not determined in accordance with the NRSRO's established procedures and methodologies for determining credit ratings, based on whether the rated person purchases or will purchase the credit rating.

53. As a result of the conduct described above, Duka willfully aided and abetted and caused S&P's violations of Rules 17g-2(a)(2)(iii) and 17g-2(a)(6) under the Exchange Act, which require NRSROs to make and retain complete and current records of the rationale for any material difference between the credit rating implied by a model and the final credit rating issued and of the established procedures and methodologies used by the NRSRO to determine credit ratings.

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 Respondent Duka an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent Duka pursuant to Section 15E(d) of the Exchange Act and Section 9(b) of the Investment Company Act of 1940;

C. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent Duka should be ordered to cease and desist from committing or causing or aiding and abetting violations of and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 15E(c)(3) of the Exchange Act, and Exchange Act Rules 17g-6(a)(2), 17g-2(a)(2)(iii), and 17g-2(a)(6), whether Respondent Duka should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act and Section 21B(a) of the Exchange Act, and whether Respondent Duka should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and 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 Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against her 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 as provided for in the Commission's Rules of Practice.

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.

Brent J. Fields
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74103 / January 21, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16347

In the Matter of **STANDARD & POOR'S RATINGS SERVICES,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 15E(d) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND 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 15E(d) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Standard & Poor's Ratings Services ("S&P" or "Respondent").

II.

In anticipation of the institution of these proceedings, S&P 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, S&P consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15E(d) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

SUMMARY

1. These proceedings involve S&P's failure to maintain and enforce internal controls regarding changes made to an assumption used in surveilling certain Residential Mortgage Backed Securities ("RMBS") supported primarily by seasoned (*i.e.*, pre-2005) collateral with amortization periods of less than 30 years (*i.e.*, short-amortizing collateral or loans).

2. In August 2012, S&P published updated criteria for surveillance of ratings of RMBS backed by pre-2009 originations (the "Criteria"). The Criteria sets forth S&P's established methodology for determining the appropriate loss severity ("LS") assumptions to be used in surveilling these ratings. S&P's LS assumptions represent the estimated losses that would be incurred if a mortgage defaults and are a significant part of S&P's ratings analyses.

3. However, from approximately October 2012 through January 2014, S&P did not apply the LS assumptions set forth in the Criteria to its surveillance reviews in connection with bonds supported by seasoned, short-amortizing loans with low loan-to-value ("LTV") ratios. Instead, S&P conducted surveillance reviews of approximately 150 transactions containing short-amortizing loans using LS assumptions that were lower than those set forth in the Criteria.

4. When changing its LS assumptions for this type of loan pool, S&P did not follow its internal control policies and procedures for making changes to criteria. Throughout the relevant time period, the group that performed RMBS surveillance (the "RMBS Group") communicated with various persons within S&P's internal control structure about the proper approach to surveilling ratings of bonds backed by these pools and possible changes to the Criteria, but none of these persons assured that S&P timely updated the Criteria or disclosed and documented the LS assumptions actually used in its surveillance reviews.

5. While S&P did disclose the use of lower LS assumptions in a few press releases, S&P did not fully explain its methodology to determine the specific LS assumptions used to surveil ratings of bonds supported by pools with seasoned, short-amortizing loans until September 2014, when it published notices about its different methodology. Throughout the relevant period, S&P produced inconsistent and incomplete external disclosures and internal records concerning the LS assumptions it used in its surveillance of bonds supported by seasoned, short-amortizing collateral. S&P's internal controls failed to timely detect and prevent these documentation errors.

6. S&P self-reported this issue to the Commission and took voluntarily steps to remediate and address the issues that are described herein, including clarifying its approach to the surveillance of transactions supported by short-amortizing collateral in a published Criteria

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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.

FAQ entitled "Criteria FAQ: Loss Severity Assumptions For Securitizations Backed By Highly Seasoned Prime Jumbo And Larger-Balance Alt-A Loans" which explained S&P's past and future use of LS assumptions. S&P has also voluntarily undertaken significant remedial measures and, in response to the Commission's investigation in this matter, has provided substantial cooperation to Commission staff.

RESPONDENT

7. S&P is a Nationally Recognized Statistical Rating Organization ("NRSRO") headquartered in New York City, New York. Standard & Poor's Ratings Services is comprised of a separately identifiable business unit within Standard & Poor's Financial Services LLC, a Delaware limited liability company wholly-owned by McGraw Hill Financial, Inc. ("MHFI"), and the credit ratings business housed within certain other wholly-owned subsidiaries of, or businesses continuing to operate as divisions of, MHFI.

FACTS

The Criteria and Pools with Short-Amortizing Loans

8. On August 9, 2012, S&P published the Criteria in an update called "Methodology And Assumptions: U.S. RMBS Surveillance Credit And Cash Flow Analysis For Pre-2009 Originations[.]" Among other things, the Criteria described the methodology that S&P would follow to determine the LS assumptions to be used to conduct surveillance on ratings of RMBS bonds containing pre-2009 collateral. First, the Criteria provides that if sufficient data were available S&P would calculate the LS assumptions based on the actual performance of the pool, or of closely related pools, over a finite time period. Second, if the data were not sufficient for such a calculation, S&P would assume LS based on the loan type and the year that the RMBS pool was created. Loan types were designated as prime, Alt-A, negative amortization, or subprime. The assumptions were published in the Criteria in a matrix called Table 3. For example, pursuant to Table 3, the LS assumption for prime pools formed before 2005 would be 40%, while the LS for Alt-A pools formed before 2005 would be 50%. Finally, Paragraph 14 of the Criteria stated as follows:

> We have derived the credit and cash flow assumptions in these criteria at the loan, pool, or cohort level and will apply them to all in-scope transactions. We may apply additional quantitative and/or or [sic] qualitative analysis in certain limited circumstances. We expect to conduct additional analysis for less than 10% of the cases. For instance, in situations where we apply cohortwide rating assumptions to a specific transaction whose performance or portfolio characteristics vary significantly from other transactions within its cohort, we may consider the specific differentiating factors when determining the appropriate assumptions to apply.

9. Once the applicable LS assumptions were determined, S&P would then multiply the LS percentage by the anticipated frequency of loan defaults to estimate total potential losses for the loan pool. Based on these calculations, which included assumptions designed to estimate how

the loans would perform in stressed economic conditions, S&P would determine whether to take a rating action (*i.e.,* upgrade, downgrade or affirm) on its ratings of the bonds.

10. While S&P was considering publication of the Criteria, persons within the RMBS Group raised the concern that the LS assumptions in Table 3 might be too high for pools with seasoned, short-amortizing loans. It is generally expected that LS for seasoned, short-amortizing loans could be lower than for 30-year loans. The final Criteria, however, made no distinction between pools with short-amortizing loans and pools containing loans with 30-year amortization schedules.

11. Throughout the relevant period, S&P had a specific methodology for changing criteria, called the Criteria Process Guidelines. These Guidelines set forth procedures for researching and approving proposed criteria changes and publishing those changes when made. Before September 2014, S&P did not publish any Criteria article specifying different LS assumptions used to surveil RMBS pools with short-amortizing loans.

Application of Lower LS Assumptions to Pools of Loans With Less than 30-Year Amortization Schedules

12. Following publication of the Criteria in August 2012, S&P policy required that the firm review all outstanding ratings within the scope of the Criteria within six months. This meant that the RMBS Group needed to review ratings for approximately 5,000 RMBS transactions. Because RMBS transactions typically include many different bonds, each of which carries its own rating, this required review of approximately 60,000 ratings within a six-month period. This represented a large volume of surveillance reviews for S&P's RMBS Group to conduct within this time period.

13. Shortly after beginning its surveillance, the RMBS Group concluded that the Table 3 LS assumptions were not appropriate for pools with predominately seasoned, short-amortizing loans. However, rather than proposing a revision to the Criteria, the RMBS Group determined that it could apply lower LS assumptions under Paragraph 14 of the Criteria and developed an approach to consistently apply lower LS assumptions in surveillance reviews of such pools.

14. The RMBS Group discussed the application of lower LS assumptions with certain persons from two separate groups within S&P's internal control structure: the Quality Group and the Criteria Group.[2]

15. In an October 15, 2012 email, the RMBS Criteria Officer told the RMBS Group that she agreed with the use of a 20% LS assumption, rather than the 40% provided for by Table 3, for the surveillance of ratings on pools with prime jumbo collateral, originated prior to 2005, with at least 85% of the pool composed of 15-year fixed rate loans. Neither the Quality Group nor the

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2 The Quality Group was responsible for reviewing ratings to determine whether the ratings procedure was appropriately documented and complied with published criteria. The Criteria Group was responsible for providing guidance to the analytical group on application of criteria and for enforcing the internal procedures for changes to criteria.

Criteria Group required that the change in LS assumptions for these short-amortizing loans follow the process outlined in S&P's Criteria Process Guidelines because they believed the use of a lower LS assumption for this limited subset of collateral was permissible under Paragraph 14 of the Criteria.

16. In October and December 2012, the RMBS Group submitted two instructions to the production staff, which maintained the model that S&P used for RMBS surveillance, to override the default 40% LS assumption and to apply a lower LS assumption for a number of RMBS structures with short-amortizing collateral. These modifications to the LS assumptions resulted in material differences in the output of S&P's surveillance model.

17. From October 2012 through January 2014, S&P published rating actions in connection with its surveillance of multiple batches of RMBS, which included approximately 150 transactions that S&P surveilled using LS assumptions (usually 20%) that were lower than the values in Table 3 of the Criteria. The RMBS Group believed these lower assumptions were analytically appropriate.

18. For each bulk surveillance review conducted, S&P prepared an internal document called a Rating Analysis and Methodology Profile ("RAMP"). RAMPs are a critical part of S&P's internal control procedures. According to S&P's RAMP Guidelines, "The RAMP's objective is to explain the rating recommendation to voting committee members [who approved the proposed rating] through application of criteria. The RAMP captures the key drivers of the issue being rated, the relevant facets of analysis, the pertinent information being considered, and the underlying criteria and applicable assumptions . . . ." Each of the RAMPs included a copy of the Criteria Table 3, along with adjacent text that indicated that the LS assumptions in Table 3 were used to surveil at least some of the bonds in the batch. However, none of the RAMPs included any discussions about deviations from Table 3 for pools with short-amortizing loans as part of the text adjacent to Table 3, although some of the RAMPs did include some information about the use of different LS assumptions for pools with short-amortizing loans elsewhere in the RAMP document.

19. In addition, in connection with each bulk surveillance review conducted, S&P published a press release describing its ratings actions and its methodology for such actions. Only three of the press releases contained meaningful discussions of the deviations from Table 3.

20. The RMBS Group recognized the importance of internal and external disclosure and record-keeping whenever they departed from the Table 3 LS assumptions. In an email dated December 14, 2012, the Lead Analytical Manager of the RMBS Group asked for the following when analysts used the different LS assumptions:

1. Consistent ramp disclosure – consider press release disclosure also
2. Maintaining a database of deals where this is applied
3. Documentation of process – how often will these be updated
4. External article in Jan or Feb (when all deals have been resolved) about this type of collateral (less than 30 mainly 15 year).

21. Still, the RMBS group did not consistently include information about S&P's different approach to pools with seasoned, short-amortizing loans in the RAMPs and press releases. The omission of information from the RAMPs and press releases about the actual LS assumptions used for the relevant pools rendered these documents incomplete for their intended purposes. The Quality Group, which was responsible for assuring adequate documentation of S&P's ratings, knew about the RMBS Group's different approach to these pools but did not identify or correct this omission.

First Proposal to Amend Criteria for Short-Amortizing Loans

22. In December 2012 and January 2013, members of the RMBS Group developed, but then later withdrew, a written proposal to change the Criteria's LS assumptions for pools with short-amortizing loans, including proposed modifications to Table 3. The proposal did not disclose that the RMBS Group had already changed its approach to pools with seasoned, short-amortizing loans, and it went beyond the changes the Criteria Officer previously considered in October 2012. The Criteria Officer concluded that the new proposal constituted a criteria change, rather than an interpretation.

23. After the RMBS Group withdrew the proposal, senior personnel in the Criteria Group stated in emails to certain members of the RMBS Group that the application of Paragraph 14 of the Criteria should be limited to unique situations, and not applied on a systematic basis. Despite these statements, the RMBS Group continued to believe that the Table 3 assumptions were not analytically appropriate for seasoned, short-amortizing loans. The RMBS Group continued to apply lower LS assumptions in surveilling pools with seasoned, short-amortizing loans and thereby did not surveil ratings in compliance with the Criteria.

Compliance Review of LS Assumptions as Part of a Broad Inquiry into Employee Complaint

24. In February 2013, an employee in the RMBS Group brought numerous concerns to the attention of S&P's Compliance Department. The Compliance Department was responsible for conducting an internal investigation of the concerns raised to evaluate whether there was evidence of possible violations of internal S&P policies and procedures and to recommend appropriate action.

25. One of the concerns raised by the RMBS employee was that the Table 3 assumptions in the Criteria were too high for pools with short-amortizing loans. The Compliance Department conducted an inquiry and found that the employee's analytical disagreement with the Table 3 assumptions was not a policy violation.

26. The Compliance Department inquiry regarding the employee's complaints ended May 1, 2013. Later in May, the Compliance Department learned that the RMBS Group was not consistently applying the Table 3 assumptions to pools with short-amortizing loans, but had conducted surveillance reviews of over 100 ratings using LS assumptions that were lower than the values provided for in Table 3. The Compliance Department opened a second inquiry into whether the use of the lower LS assumptions was consistent with the Criteria.

Second Proposal to Amend Criteria and Continuing Uncertainty Concerning Methodology

27. At various points in the spring and summer of 2013, members of the Criteria and Quality Groups learned that the RMBS Group was conducting surveillance reviews of RMBS using non-Table 3 LS assumptions. In July 2013 the RMBS Group approached the Structured Finance Criteria Committee ("SFCC") with a written proposal to amend the Criteria to clarify the LS assumptions that were being applied during the surveillance process for short-amortizing collateral.

28. The SFCC considered the proposal at a meeting on July 24, 2013, and requested additional research into the impact of the change. S&P then formed a "working group" to continue to research and develop the criteria proposal about LS assumptions for short-amortizing loans. Although there was widespread agreement within S&P that the application of lower LS assumptions for short-amortizing collateral was analytically appropriate and should be formally incorporated into the Criteria, S&P did not reach a consensus on specific changes until more than a year later.

29. Both in the written proposal and at the SFCC meeting, the RMBS Group clearly informed the SFCC that the purpose of the proposal was to ratify the existing practice of the RMBS Group, rather than to propose new action for the future. However, no one associated with the SFCC deliberations took any steps to ensure that the Criteria was updated before the RMBS Group continued to apply the lower LS assumptions to seasoned, short-amortizing loans. They also did not confirm whether the RMBS Group was adequately documenting and disclosing the LS assumptions being used for short-amortizing collateral.

30. As noted above, in August 2013, the Compliance Department opened a second inquiry to consider the RMBS Group's use of non-Table 3 LS assumptions. During the Compliance Department's review, it became apparent that there was a lack of clarity among relevant S&P personnel as to the specific LS assumptions that were being used and should be used. There were also inconsistent views as to whether the use of lower LS assumptions was permissible under Paragraph 14 of the Criteria or was a change to the Criteria. The Compliance Officer who conducted the inquiry determined in a preliminary draft report that non-Table 3 LS assumptions should not have been applied without additional levels of review and approval within S&P.

31. In January 2014, the RMBS Group decided to stop using non-Table 3 LS assumptions for the surveillance of ratings of bonds supported by pools with short-amortizing loans, pending the resolution of the pending criteria proposal. This decision was made with the expectation that the SFCC would soon consider and approve LS assumptions for pools with short-amortizing loans. However, the SFCC continued to consider different methodologies for several months.

32. S&P still used non-Table 3 LS assumptions to surveil a small number of bonds supported by pools with seasoned, short-amortizing loans in 2014, but surveillance reviews on other bonds supported by such pools were delayed pending the resolution of the criteria proposal. As a result of the delay in amending the Criteria, the RMBS Group experienced a backlog of

delayed surveillance. These delays conflicted with S&P policies and procedures that required timely surveillance of ratings.

S&P's Notices to the Public

33. In addition to the press releases referenced above, on May 3, 2013, the RMBS Group published an article entitled "Examining The Components Of Loan-Level Loss Severity in U.S. RMBS." The article stated, *inter alia*, that "[t]he 15-year fixed-rate structure is an example of when we might adjust our loss-severity assumption based on differentiating factors such as product type and group-level HPI-adjusted LTV."

34. On August 28, 2014, S&P's highest criteria board, the Analytics Policy Board ("APB"), reviewed the LS assumptions for seasoned, short-amortizing collateral and concluded that, in the vast majority of instances, the application of lower LS assumptions was analytically appropriate and that the Criteria should be updated. Nevertheless, S&P determined that it needed to review LS assumptions for short-amortizing loans originated between 2005 and 2008, and on September 9, 2014, S&P published an Advance Notice of Criteria Change reflecting that decision.

35. Also on September 9, 2014, S&P published an article entitled "Criteria FAQ: Loss Severity Assumptions For Securitizations Backed By Highly Seasoned Prime Jumbo And Larger-Balance Alt-A Loans" that clarified the LS assumptions S&P had used and intends to use to surveil securitization backed by seasoned, short-amortizing loans consistent with the APB's conclusion. S&P resolved the backlog of its surveillance reviews in connection with bonds supported by short-amortizing collateral. S&P also disclosed error corrections in connection with certain prior rating actions for which a surveillance review had been conducted using a lower LS assumption in circumstances that did not fall within the September 9, 2014 Criteria FAQ.

VIOLATIONS

36. As a result of the conduct described above, S&P violated Section 15E(c)(3)(A) of the Exchange Act, which requires NRSROs to establish, maintain, enforce, and document an effective internal control structure governing the implementation of and adherence to policies, procedures, and methodologies for determining credit ratings.

37. As a result of the conduct described above, S&P willfully violated Rules 17g-2(a)(2)(iii) and 17g-2(a)(6) under the Exchange Act, which require NRSROs to make and retain complete and current records of the rationale for any material difference between the credit rating implied by a model and the final credit rating issued for asset-backed or mortgage-backed securities transactions and of the established procedures and methodologies used by the NRSRO to determine credit ratings.[3]

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

COOPERATION AND REMEDIATION

38. In determining to accept the Offer, the Commission considered S&P's self-reporting of this issue to the Commission staff, the remedial acts promptly undertaken by S&P and the substantial cooperation S&P afforded the Commission staff in this matter.

UNDERTAKINGS

S&P has undertaken the following:

S&P will determine the analytically appropriate LS assumptions for pools with short-amortizing loans and will publish, within thirty (30) days of the date of this Order, updated criteria disclosing these LS assumptions.

S&P, within ninety (90) days of the date of this Order, will develop measures to enhance its written policies and procedures and internal control structure relating to the process for changes to and approval of criteria which will be implemented on a timeframe set in consultation with the Office of Credit Ratings.

S&P, within sixty (60) days of the date of this Order, will address any future deviations from criteria in two ways: (1) development of standard and conspicuous language to be used at the start of press releases and presales where ratings resulted from deviations from published criteria; and (2) tracking of all deviations from published criteria, including records of the corresponding approval for such deviations, with the appointment of an overseer for purposes of collection and on-going review of such data.

S&P shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to, Thomas Butler, Director, Office of Credit Ratings, Securities and Exchange Commission New York Regional Office, 3 World Financial Center, Suite 400, New York, NY 10281-1022, and Michael J. Osnato, Jr., Chief, Complex Financial Instruments Unit, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281-1022, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in S&P's Offer.

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

A. S&P cease and desist from committing or causing any violations and any future violations of Section 15E(c)(3)(a) of the Exchange Act and Exchange Act Rules 17g-2(a)(2)(iii) and 17g-2(a)(6).

B. S&P is censured.

C. S&P shall, within thirty (30) days of the entry of this Order, pay a civil money penalty of $1 million to the 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) S&P may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) S&P 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) S&P 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 S&P 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 Michael J. Osnato, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 4000, New York, New York 10281.

By the Commission.

Brent J. Fields
Secretary

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

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74110; File No. 4-631)

January 21, 2015

Joint Industry Plan; Notice of Filing of the Eighth Amendment to the National Market System Plan to Address Extraordinary Market Volatility by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc.

I. Introduction

On December 24, 2014, Financial Industry Regulatory Authority, Inc. ("FINRA"), on behalf of the following parties to the National Market System Plan: BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, the Nasdaq Stock Market LLC, and National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc. (collectively with FINRA, the "Participants"), filed with the Securities and Exchange Commission ("Commission") pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")[1] and Rule 608 thereunder,[2] a proposal to amend the Plan to Address Extraordinary Market Volatility ("Plan").[3] The proposal represents the eighth amendment to the Plan ("Eighth Amendment"), and reflects changes unanimously approved by the Participants. The Eighth Amendment to the Plan proposes to: (i) establish a requirement for the Participants to submit a supplemental joint assessment to the Commission by May 29, 2015; and (ii) extend the end date of the pilot period

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1 15 U.S.C. 78k-1.

2 17 CFR 242.608.

3 See Letter from Christopher B. Stone, Vice President, FINRA, to Brent Fields, Secretary, Commission, dated December 24, 2014 ("Transmittal Letter").

of the Plan from February 20, 2015 to October 23, 2015. A copy of the Plan, as proposed to be amended is attached as Exhibit A hereto. The Commission is publishing this notice to solicit comments from interested persons on the Eighth Amendment to the Plan.[4]

II. Description of the Proposal

A. Purpose of the Plan

The Participants filed the Plan in order to create a market-wide limit up-limit down mechanism that is intended to address extraordinary market volatility in "NMS Stocks," as defined in Rule 600(b)(47) of Regulation NMS under the Act.[5] The Plan sets forth procedures that provide for market-wide limit up-limit down requirements that are designed to prevent trades in individual NMS Stocks from occurring outside of the specified price bands.[6] These limit up-limit down requirements are coupled with Trading Pauses, as defined in Section I(Y) of the Plan, to accommodate more fundamental price moves (as opposed to erroneous trades or momentary gaps in liquidity).

As set forth in Section V of the Plan, the price bands consist of a Lower Price Band and an Upper Price Band for each NMS Stock.[7] The price bands are calculated by the Securities

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4 "Any two or more self-regulatory organizations, acting jointly, . . . may propose an amendment to an effective national market system plan [] by submitting the text of the plan or amendment to the Secretary of the Commission, together with a statement of the purpose of such plan or amendment…" 17 CFR 242.608(a)(1) The Commission is required to publish notice of the filing of any proposed amendment to any effective national market system plan, together with the terms of substance of the filing or a description of the subjects and issues involved, and shall provide interested persons an opportunity to submit written comments. See 17 CFR 242.608(b)(1). No amendment to a national market system plan shall become effective unless approved by the Commission or otherwise permitted in accordance with Rule 608(b)(3). See id.

5 17 CFR 242.600(b)(47). See also Section I(H) of the Plan.

6 See Section V of the Plan.

7 Capitalized terms used herein but not otherwise defined shall have the meaning ascribed to such terms in the Plan. See Exhibit A, infra.

Information Processors ("SIPs" or "Processors") responsible for consolidation of information for an NMS Stock pursuant to Rule 603(b) of Regulation NMS under the Act.[8] Those price bands are based on a Reference Price[9] for each NMS Stock that equals the arithmetic mean price of Eligible Reported Transactions for the NMS Stock over the immediately preceding five-minute period. The price bands for an NMS Stock are calculated by applying the Percentage Parameter for such NMS Stock to the Reference Price, with the Lower Price Band being a Percentage Parameter[10] below the Reference Price, and the Upper Price Band being a Percentage Parameter above the Reference Price. Between 9:30 a.m. and 9:45 a.m. ET and 3:35 p.m. and 4:00 p.m. ET, the price bands are calculated by applying double the Percentage Parameters as set forth in Appendix A of the Plan.

The Processors also calculate a Pro-Forma Reference Price for each NMS Stock on a continuous basis during Regular Trading Hours. If a Pro-Forma Reference Price does not move by one percent or more from the Reference Price in effect, no new price bands are disseminated, and the current Reference Price remains the effective Reference Price. If the Pro-Forma

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8 17 CFR 242.603(b). The Plan refers to this entity as the Processor.

9 See Section I(T) of the Plan.

10 As initially proposed by the Participants, the Percentage Parameters for Tier 1 NMS Stocks (i.e., stocks in the S&P 500 Index or Russell 1000 Index and certain ETPs) with a Reference Price of $1.00 or more would be five percent and less than $1.00 would be the lesser of (a) $0.15 or (b) 75 percent. The Percentage Parameters for Tier 2 NMS Stocks (i.e., all NMS Stocks other than those in Tier 1) with a Reference Price of $1.00 or more would be 10 percent and less than $1.00 would be the lesser of (a) $0.15 or (b) 75 percent. The Percentage Parameters for a Tier 2 NMS Stock that is a leveraged ETP would be the applicable Percentage Parameter set forth above multiplied by the leverage ratio of such product. On May 24, 2012, the Participants amended the Plan to create a 20% price band for Tier 1 and Tier 2 stocks with a Reference Price of $0.75 or more and up to and including $3.00. The Percentage Parameter for stocks with a Reference Price below $0.75 would be the lesser of (a) $0.15 or (b) 75 percent. See Letter from Janet M. McGinness, Senior Vice President, Legal and Corporate Secretary, NYSE Euronext, to Elizabeth M. Murphy, Secretary, Commission, dated May 24, 2012.

Reference Price moves by one percent or more from the Reference Price in effect, the Pro-Forma Reference Price becomes the Reference Price, and the Processors disseminate new price bands based on the new Reference Price. Each new Reference Price remains in effect for at least 30 seconds.

When one side of the market for an individual security is outside the applicable price band, the Processors are required to disseminate such National Best Bid[11] or National Best Offer[12] with an appropriate flag identifying it as non-executable. When the other side of the market reaches the applicable price band, the market for an individual security enters a Limit State,[13] and the Processors are required to disseminate such National Best Offer or National Best Bid with an appropriate flag identifying it as a Limit State Quotation.[14] All trading immediately enters a Limit State if the National Best Offer equals the Lower Limit Band and does not cross the National Best Bid, or the National Best Bid equals the Upper Limit Band and does not cross the National Best Offer. Trading for an NMS Stock exits a Limit State if, within 15 seconds of entering the Limit State, all Limit State Quotations are executed or canceled in their entirety. If the market does not exit a Limit State within 15 seconds, then the Primary Listing Exchange declares a five-minute Trading Pause, which is applicable to all markets trading the security.

These limit up-limit down requirements are coupled with Trading Pauses[15] to accommodate more fundamental price moves (as opposed to erroneous trades or momentary

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11 17 CFR 242.600(b)(42). See also Section I(G) of the Plan.

12 Id.

13 A stock enters the Limit State if the National Best Offer equals the Lower Price Band and does not cross the National Best Bid, or the National Best Bid equals the Upper Price Band and does not cross the National Best Offer. See Section VI(B) of the Plan.

14 See Section I(D) of the Plan.

15 The primary listing market declares a Trading Pause in an NMS Stock; upon notification by the primary listing market, the Processor disseminates this information to the public.

gaps in liquidity). As set forth in more detail in the Plan, all trading centers[16] in NMS Stocks, including both those operated by Participants and those operated by members of Participants, are required to establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the limit up-limit down and Trading Pause requirements specified in the Plan.

Under the Plan, all trading centers are required to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the display of offers below the Lower Price Band and bids above the Upper Price Band for an NMS Stock. The Processors disseminate an offer below the Lower Price Band or bid above the Upper Price Band that nevertheless inadvertently may be submitted despite such reasonable policies and procedures, but with an appropriate flag identifying it as non-executable; such bid or offer would not be included in National Best Bid or National Best Offer calculations. In addition, all trading centers are required to develop, maintain, and enforce policies and procedures reasonably designed to prevent trades at prices outside the price bands, with the exception of single-priced opening, reopening, and closing transactions on the Primary Listing Exchange.

As stated by the Participants in the Plan, the limit up-limit down mechanism is intended to reduce the negative impacts of sudden, unanticipated price movements in NMS Stocks,[17] thereby protecting investors and promoting a fair and orderly market.[18] In particular, the Plan is

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No trades in that NMS Stock could occur during the Trading Pause, but all bids and offers may be displayed. See Section VII(A) of the Plan.

16 As defined in Section I(X) of the Plan, a trading center shall have the meaning provided in Rule 600(b)(78) of Regulation NMS under the Act.

17 17 CFR 242.600(b)(47).

18 See Transmittal Letter, supra note 3.

designed to address the type of sudden price movements that the market experienced on the afternoon of May 6, 2010.[19] The initial date of Plan operations was April 8, 2013.[20]

The following summarizes the Eighth Amendment to the Plan and the rationale behind those changes:

Proposed Amendment

The Eighth Amendment proposes two changes to the Plan. First, the Participants propose to amend Appendix B of the Plan to state that, by May 29, 2015, the Participants shall provide to the Commission a supplemental joint assessment relating to the impact of the Plan. On September 29, 2014, the Participants submitted a Participant Impact Assessment,[21] which provided the Commission with the Participants' initial observations in each area required to be addressed under Appendix B to the Plan. Though the Participants have submitted the Participant Impact Assessment, they believe that a supplemental joint assessment is appropriate. The supplemental joint assessment would evaluate the impact of the Plan using the measures set forth in Appendix B, but would be an extensive assessment based upon a data-driven analysis across trading centers using methodology agreed upon by the Participants, which would allow the Participants to make unified recommendations, where appropriate, that would be of greater value to the Commission and the public than separate submissions. The Participants also state that they intend to make the supplemental joint assessment publicly available.

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19 The limit up-limit down mechanism set forth in the Plan replaces the existing single-stock circuit breaker pilot. See e.g., Securities Exchange Act Release Nos. 62251 (June 10, 2010), 75 FR 34183 (June 16, 2010) (SR-FINRA-2010-025); 62883 (September 10, 2010), 75 FR 56608 (September 16, 2010) (SR-FINRA-2010-033).

20 See Securities Exchange Act Release No. 68953 (February 20, 2013), 78 FR 13113 (February 26, 2013).

21 See Letter from Participants to Brent J. Fields, Secretary, Commission, dated September 29, 2014 ("Participant Impact Assessment").

The Participants intend to engage a third-party consultant to assist in conducting the cross-market analysis and preparing the supplemental joint assessment. The Participants believe that the process of selecting, engaging, meeting with, and providing required data to the ultimate third-party consultant will be time consuming, but beneficial in that it would facilitate the development of a joint assessment that, unlike individual Participant submissions, would not need to be compared and reconciled.

Second, the Participants propose to amend Section VIII.C the Plan to extend the pilot period of the Plan from February 20, 2015 through October 23, 2015. The Participants believe that extension of the pilot period is necessary and appropriate in the interest of the public, including because additional time will: (i) provide a reasonable period of time for the public to comment on the supplemental joint assessment and recommendations; (ii) provide Participants time to use the information collected during the operation of the Plan to perform further analysis and recommend amendments to the Plan; and (iii) allow the Commission adequate time to review the supplemental joint assessment and recommendations provided by the Participants, and determine if any modifications to the Plan are appropriate. The Participants also believe that the proposed amendment is consistent with the approval order for the Plan, in which the Commission stated that having a pilot period would allow "the public, the Participants, and the Commission to assess the operation of the Plan and whether the Plan should be modified prior to approval on a permanent basis."[22] Finally, the Participants believe that the proposed amendment, which provides for additional time to observe the operation of the Pilot, as well as to prepare and submit a supplemental joint assessment, will facilitate the development of better

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22 See Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 at 33508 (June 6, 2012).

recommendations and will allow the Participants to make unified recommendations, where appropriate, regarding the operation of the Plan.

The Participants note that the amended version of the Plan also includes the revised Appendix A – Schedule 1, which was updated for trading beginning July 1, 2014. As set forth in Appendix A – Percentage Parameters, the Primary Listing Exchange updates Schedule 1 to Appendix A semi-annually based on the fiscal year and such updates do not require a Plan amendment.

B. Governing or Constituent Documents

The governing documents of the Processor, as defined in Section I(P) of the Plan, will not be affected by the Plan, but once the Plan is implemented, the Processor's obligations will change, as set forth in detail in the Plan.

C. Implementation of Plan

The initial date of the Plan operations was April 8, 2013.

D. Development and Implementation Phases

The Plan was initially implemented as a one-year pilot program in two Phases, consistent with Section VIII of the Plan: Phase I of Plan implementation began on April 8, 2013 and was completed on May 3, 2013. Implementation of Phase II of the Plan began on August 5, 2013 and was completed on February 24, 2014. Pursuant to this proposed amendment, the Participants propose to extend the pilot period so that it is set to end October 23, 2015.

E. Analysis of Impact on Competition

The proposed Plan does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Participants do not believe that the proposed Plan introduces terms that are unreasonably discriminatory for the purposes of Section 11A(c)(1)(D) of the Exchange Act.

F. Written Understanding or Agreements relating to Interpretation of, or Participation in the Plan

The Participants have no written understandings or agreements relating to interpretation of the Plan. Section II(C) of the Plan sets forth how any entity registered as a national securities exchange or national securities association may become a Participant.

G. Approval of Amendment of the Plan

Each of the Plan's Participants has executed a written amended Plan.

H. Terms and Conditions of Access

Section II(C) of the Plan provides that any entity registered as a national securities exchange or national securities association under the Exchange Act may become a Participant by: (1) becoming a participant in the applicable Market Data Plans, as defined in Section I(F) of the Plan; (2) executing a copy of the Plan, as then in effect; (3) providing each then-current Participant with a copy of such executed Plan; and (4) effecting an amendment to the Plan as specified in Section III(B) of the Plan.

I. Method of Determination and Imposition, and Amount of, Fees and Charges

Not applicable.

J. Method and Frequency of Processor Evaluation

Not applicable.

K. Dispute Resolution

Section III(C) of the Plan provides for each Participant to designate an individual to represent the Participant as a member of an Operating Committee. No later than the initial date of the Plan, the Operating Committee shall designate one member of the Operating Committee to act as the Chair of the Operating Committee. Any recommendation for an amendment to the Plan from the Operating Committee that receives an affirmative vote of at least two-thirds of the

Participants, but is less than unanimous, shall be submitted to the Commission as a request for an amendment to the Plan initiated by the Commission under Rule 608.

On September 18, 2014, the Operating Committee, duly constituted and chaired by Mr. Christopher B. Stone of FINRA, met and voted to amend the Plan as set forth herein in accordance with Section III(C) of the Plan.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed Eighth Amendment 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/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 4-631 on the subject line.

Paper comments:

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

All submissions should refer to File Number 4-631. 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 Plan that are filed with the Commission, and all written communications relating to the Plan 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 Participants' principal offices. 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 4-631 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.

Brent J. Fields
Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4004 / January 21, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16350

In the Matter of

DU PASQUIER & CO., INC.,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against du Pasquier & Co., Inc. ("du Pasquier" 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 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

These proceedings are brought against du Pasquier, a formerly registered investment adviser that had approximately \$48 million in assets under management ("AUM"), shortly before it ceased operations in July 2014. Du Pasquier failed both to maintain adequate investment advisory compliance policies and procedures and to ensure proper and timely disclosures about its investment advisory business.

At various times from at least 2007 forward, as described more fully below, du Pasquier failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and rules thereunder, including relying on an "off-the-shelf" template for a compliance manual without modifying certain sections of the template to take into consideration the nature of du Pasquier's investment advisory business. Du Pasquier also failed to implement procedures it did adopt, for example, failing to conduct adequate "best execution" reviews and failing to adequately review the firm's marketing materials. Additionally, du Pasquier failed to annually review the adequacy of its compliance policies and procedures and the effectiveness of their implementation. Du Pasquier also conducted inadequate reviews of access persons' personal securities transactions. Finally, du Pasquier failed to amend its Form ADV to correct certain misstatements therein, and failed to deliver its Form ADV Part 2A and Part 2B to various clients.

A number of the violations described herein were recurring, continuing from at least 2007, despite the firm being alerted to the potential compliance failures through examinations conducted by the Office of Compliance Inspections and Examinations ("OCIE") in 2004 and 2007. Du Pasquier remediated some deficiencies identified in those examinations, but the firm failed to prevent the violations set forth below.

Respondent

1. **Du Pasquier & Co., Inc.**, headquartered in New York, New York, was dually registered with the Commission as an investment adviser and broker-dealer during the relevant period. Du Pasquier became registered with the Commission as an investment adviser in 2003, and its investment advisory business operated under the name, du Pasquier Asset Management. As of April 2014, du Pasquier's investment advisory business was managing approximately 118 advisory accounts with approximately \$48 million in AUM. Du Pasquier ceased to operate as of July 31, 2014, having transferred its employees, assets under management, and other customer accounts to Aegis Capital Corporation, which is also dually registered with the Commission as a broker-dealer and investment adviser. Du Pasquier's withdrawals as an investment adviser and as a broker-dealer registered with the Commission both became effective on September 29, 2014.

Background

Failure to Adopt and Implement Reasonably Designed Compliance Policies and Procedures

2. Section 206(4) of the Advisers Act and Rule 206(4)-7(a) thereunder require a registered investment adviser to adopt and implement written policies and procedures reasonably designed to prevent violations by the adviser and its supervised persons of the Advisers Act and the rules adopted thereunder.

3. From at least 2009 forward, du Pasquier relied on an off-the-shelf investment advisory compliance manual template. Du Pasquier tailored a number of sections of the template appropriately, but failed to edit certain others, leaving the firm without a customized set of established procedures. For example, on the issue of safeguarding client information, the template provided a number of different possible procedures and advised that certain security measures "should" be taken by the firm. Du Pasquier retained that language from the template unedited, without clarifying which of the measures it would use.

4. With respect to certain procedures that du Pasquier did adopt, du Pasquier failed to ensure they were implemented. For example, whereas the advisory compliance manual required that marketing materials be reviewed by the designated compliance officer, two publications were disseminated to the public without such a review. The first publication, provided to prospective clients, was a 17-page marketing brochure, entitled "The du Pasquier Edge." It described the firm's business. The second publication, a weekly "Market Commentary," was written by one of du Pasquier's senior employees and contained that employee's assessment of the current market outlook. Du Pasquier posted these commentaries on du Pasquier's website and provided them to du Pasquier's advisory clients. No one at the firm aside from that employee reviewed, or even knew any of the content of these commentaries, before publication.

5. From at least 2007 forward, du Pasquier failed to conduct adequate reviews to insure its compliance with its "best execution" obligations. Specifically, du Pasquier sampled trades from across the entire firm, which was dominated by its brokerage business, and therefore, the number of trades reviewed in investment advisory accounts was insufficient. In addition, there was no way to differentiate readily between investment advisory and brokerage accounts. Therefore, when du Pasquier, as part of its best execution review, examined trades to ensure that fees and commissions had been appropriately charged to clients, that review was conducted by a du Pasquier employee who relied on her personal knowledge as to whether each account in which the given trade was conducted was fee-based, commission-based, or both.

6. Du Pasquier's Chief Compliance Officer ("CCO") carried out few if any compliance responsibilities from at least 2008 to 2012, but rather devoted her time to managing individual accounts of brokerage customers. From 2008 until 2011, one of du Pasquier's two principals performed the compliance responsibilities for the firm's investment advisory business. As the head of the investment advisory firm, he was an appropriate person to handle such responsibilities. However, he had inadequate training and knowledge about the Advisers Act. In

2011, du Pasquier hired an employee to be the designated compliance officer (a position separate from the CCO), but he also had little Advisers Act compliance experience or training. More generally, du Pasquier also failed to provide adequate training to its employees regarding the firm's investment advisory compliance policies and procedures. Employees took yearly computer-based training regarding the firm's policies and procedures, but the firm provided neither periodic targeted trainings throughout the year for current employees nor initial training for new employees.

Failure to Conduct Annual Reviews

7. Under Section 206(4) of the Advisers Act and Rule 206(4)-7(b) thereunder, an investment adviser must review, no less frequently than annually, the adequacy of its compliance policies and procedures established pursuant to Rule 206(4)-7 and the effectiveness of their implementation. However, from at least 2007 until December 2012, du Pasquier failed to conduct annual reviews of the adequacy of its investment advisory compliance program. Du Pasquier reviewed its investment advisory procedures and policies to the extent they were touched upon in reviews of the firm's broker-dealer policies and procedures, and when du Pasquier incorporated or updated policies based on compliance-related industry updates that it received regularly from a compliance consulting company. However, du Pasquier did not conduct any reviews that surveyed its investment advisory compliance program as a whole, or on an annual basis.

Code of Ethics – Failure to Adequately Review Access Persons' Transactions

8. Section 204A and Rule 204A-1 thereunder, require that a registered investment adviser establish, maintain and enforce a written code of ethics with provisions requiring that all of the adviser's access persons report, and the adviser review, personal securities transactions quarterly and securities holdings annually. In adopting Rule 204A-1, the Commission stated that an investment adviser, in addition to "compar[ing] the personal trading to any restricted lists," should, among other things, "assess whether the access person is trading for his own account in the same securities he is trading for clients, and if so whether the clients are receiving terms as favorable as the access person takes for himself." Investment Adviser Code of Ethics, Advisers Act Release No. 2256, 69 Fed. Reg. 41696, 41700-701 (July 9, 2004).

9. Du Pasquier's Code of Ethics, contained in the firm's compliance manual, simply set forth that access persons' personal transactions and holdings reports be reviewed periodically, without indicating how the review should be carried out. In implementing the procedure, du Pasquier did not assess whether a given access person had traded in his own account in the same security he was trading for clients.

Failure to Amend Form ADV

10. Section 204 of the Advisers Act and Rule 204-1 thereunder require an investment adviser to make certain amendments to its Form ADV. Under Rule 204-1(a)(1), an investment adviser must amend its Form ADV at least annually, and under Rule 204-1(a)(2), amendments must be made more frequently if required by the instructions to Form ADV. Rule 204-1(e) provides that each amendment required to be filed under the rule is a "report" within the meaning of Sections 204 and 207 of the Advisers Act.

11. Section 207 of the Advisers Act makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

12. From at least 2009 to 2011, the amount of assets under management and number of accounts managed were misstated in the annual amendments to du Pasquier's Form ADV. In each of the amendments to its Form ADV filed from March 2009 through March 2011, du Pasquier failed to update those figures at all from the previous year's filing, even though the information had changed. Instead, the stated figures remained unchanged in the Form ADV amendments filed from March 2008 through March 2011.

13. Also, du Pasquier's Form ADV Part 2 filed in March 2011 and March 2012 contained materially inaccurate statements regarding certain periodic reviews and reconciliations. Although the Form ADV Part 2 stated that du Pasquier reconciled its portfolio management system with monthly customer account statements issued by du Pasquier's clearing broker, such reconciliations were not performed.

14. Further, du Pasquier's Form ADV Part 2 filed in March 2011 and March 2012 stated that du Pasquier reviewed clients' accounts quarterly to ensure that clients' investment guidelines were being followed. However, such reviews were conducted for the accounts of only one of the firm's four investment adviser representatives.

15. Additionally, du Pasquier's March 2011 Form ADV Part 2A Appendix 1, the Wrap Fee Brochure, stated that senior management "meets frequently to review asset allocation, portfolio performance and general economic outlook." Although this version of the Wrap Fee Brochure was still on file as current in February 2012, the referenced Senior Management meetings had ceased to be held a year earlier.

Failure to Deliver Form ADV Part 2 Brochure and Supplement

16. Section 204 of the Advisers Act and Rule 204-3(b) thereunder (as modified by paragraph (g) of the Rule), require that within 60 days after the date by which an investment adviser is first required to electronically file its Form ADV Part 2A ("brochure") with the Commission, it must deliver to each of its existing clients its current brochure and any current brochure supplement. On December 28, 2010, the Commission extended the deadline for the compliance date for the delivery of Form ADV, Part 2B brochure supplements to new and prospective clients to July 31, 2011, and to existing clients to September 30, 2011. Amendments to Form ADV; Extension of Compliance Date, Advisers Act Release No. 3129, 76 Fed. Reg. 255, 256 (Jan. 4, 2011).

17. Du Pasquier failed to deliver its brochure to existing clients within 60 days after electronically filing that document with the Commission, and also failed to deliver a required brochure supplement to existing clients by September 30, 2011.

Recurring violations

18. A number of the violations described above involve recurring conduct that was identified by OCIE in examinations of du Pasquier in 2004 and 2007. At the time of those exams, OCIE alerted du Pasquier to its potential compliance failures. Du Pasquier remediated some deficiencies identified in those examinations, but the firm failed to prevent the violations set forth herein.

Violations

19. As a result of du Pasquier's failure to adopt and implement certain compliance policies and procedures, as described in paragraphs 3 to 6 above, and its failure to perform annual compliance reviews as described in paragraph 7 above, du Pasquier violated Section 206(4) of the Advisers Act and Rule 206(4)-7(a) and (b) thereunder.

20. As a result of du Pasquier's failure to conduct adequate reviews of its access persons' personal securities transactions as described in paragraph 9 above, du Pasquier violated Section 204A of the Advisers Act, and Rule 204A-1 thereunder.

21. As a result of du Pasquier's failure to amend its Form ADV regarding the amount of client assets under management and the number of accounts du Pasquier was managing, as described in paragraph 12 above, du Pasquier violated Section 204 of the Advisers Act and Rule 204-1(a)(1) thereunder.

22. Additionally, as a result of du Pasquier's failure to correct inaccurate statements in its Form ADV Part 2 regarding periodic reviews and reconciliations of client accounts, as described in paragraphs 13 to 15 above, du Pasquier violated Section 204 of the Advisers Act and Rule 204-1(a)(2) thereunder, and by willfully making untrue statements of material fact, violated Section 207 of the Advisers Act.

23. As a result of du Pasquier's failure to deliver its Form ADV Part 2A and Part 2B to existing clients, as described in paragraph 17 above, du Pasquier violated Section 204 and Rule 204-3(b) thereunder (as modified by paragraph (g) of the Rule).

Du Pasquier's Remedial Efforts

24. In determining to accept the Offer, the Commission considered remedial acts undertaken by Respondent and cooperation afforded the Commission staff, including certain steps taken prior to Respondent becoming aware of the staff's investigation.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 203(k) of the Advisers Act, Respondent du Pasquier cease and desist from committing or causing any violations and any future violations of Sections 204, 204A, 206(4) and 207 of the Advisers Act, and Rules 204-1(a)(1) and (2), 204-3(b), 204A-1, and 206(4)-7(a) and (b) promulgated thereunder.

B. Respondent du Pasquier shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $50,000 to the 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 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 du Pasquier & Co., Inc. as the 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 Amelia A. Cottrell, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Brookfield Place, 200 Vesey Street, Room 400, New York, NY 10281.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: 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. 74108 / January 21, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16351

In the Matter of **ROBERT A. RAMSEY, CPA** **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 Robert A. Ramsey ("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, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

1. These proceedings involve insider trading by Respondent in the securities of American Safety Insurance Holdings, Ltd. ("ASI") in advance of the June 3, 2013 announcement that Fairfax Financial Holdings Ltd. ("Fairfax Financial") had agreed to acquire ASI.

2. In the months prior to the June 3, 2013 announcement, Respondent misappropriated information about the sale of ASI from his friend and client Individual A, a senior ASI executive. Individual A provided Respondent with information in confidence about the possible sale in the course of seeking tax advice from Respondent. Respondent then traded on the basis of the information. After the announcement, Respondent sold his ASI shares for profits over $130,000.

3. By virtue of his conduct, Respondent violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Respondent

4. Robert A. Ramsey, CPA, age 50, resides in Centerville, Indiana. He is a self-employed accountant, licensed in Indiana. He is a friend of and was the personal tax accountant to Individual A, a senior ASI executive.

Other Relevant Entity and Person

5. ASI was headquartered in Hamilton, Bermuda and Atlanta, Georgia. Its common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the New York Stock Exchange, until ASI was acquired by Fairfax Financial pursuant an agreement announced on June 3, 2013.

6. Individual A, age 51, resides in Marietta, Georgia. He was a senior ASI executive.

Facts

7. On September 28, 2012, Individual A told Respondent in confidence that ASI was exploring a possible sale and retained Respondent to evaluate Individual A's personal tax liability

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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.

in the event of a sale. Individual A told Respondent to assume for this analysis that ASI would be sold for $28 to $30 per share. At the time, ASI was trading below $19 per share. Respondent understood as Individual A's accountant and friend that the information he received from Individual A was confidential.

8. On the basis of material nonpublic information he misappropriated from Individual A, Respondent began acquiring ASI shares in October 2012 and continued to acquire shares through the following May. At one point, he opened a new brokerage account. Prior to the sale of his ASI shares, he only purchased shares of ASI in that account. He acquired a total of 18,650 shares. Respondent also told a friend to buy ASI shares.

9. On June 3, 2013, ASI announced that it had entered into an agreement with Fairfax Financial to be acquired for $29.25 per share. After the announcement, the closing price was $28.91, an increase of $4.95 or 21% from the prior days' closing price. Respondent sold his ASI shares after the announcement for a profit of over $130,000.

10. As a result of the conduct described above, Respondent violated Section 10(b) of the Exchange Act and Rule 10b-5.

IV.

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

Accordingly, pursuant to Sections 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent shall, within 30 days of the entry of this Order, pay disgorgement of $130,176 and prejudgment interest of $5,974 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600.

C. Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $130,176 to the Securities and Exchange Commission for transfer to the general fund of United States Treasury in accordance with Exchange Act Section 21F(g)(3). 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 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 Robert A. Ramsey 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 Stephen L. Cohen, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5553.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this 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 judgment, order, consent order, 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.

Brent J. Fields
Secretary

Jill M. Peterson

By Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74116; File No. 10-214)

January 22, 2015

Automated Matching Systems Exchange, LLC; Notice of Designation of a Longer Period for Commission Action on Proceedings to Determine Whether to Grant or Deny a Limited Volume Exemption from Registration as a National Securities Exchange Under Section 5 of the Securities Exchange Act of 1934

On July 7, 2014, Automated Matching Systems Exchange, LLC ("AMSE") submitted to the Securities and Exchange Commission ("Commission") an application seeking a limited volume exemption under Section 5 of the Securities Exchange Act ("Exchange Act") from registration as a national securities exchange under Section 6 of the Exchange Act.[1] Notice of AMSE's exemption application was published for comment in the Federal Register on July 29, 2014.[2] On October 23, 2014, the Commission issued an order instituting proceedings to determine whether to grant or deny AMSE's exemption application.[3] On November 10, 2014, AMSE submitted Amendment No. 1 to its exemption application. Notice of Amendment No. 1 to AMSE's exemption application was published for comment in the Federal Register on on December 30, 2014.[4]

Section 19(a) of the Exchange Act provides that the Commission shall, upon the filing of an application for registration as a national securities exchange pursuant to Section 6 of the

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1 The Commission notes that AMSE's application only seeks a limited volume exemption under Section 5 of the Exchange Act from registration as a national securities exchange under Section 6 of the Exchange Act. AMSE's application does not seek to register as a national securities exchange.

2 See Securities Exchange Act Release No. 72661 (July 23, 2014), 79 FR 44070 ("Notice").

3 See Securities Exchange Act Release No. 73419 (October 23, 2014), 79 FR 64421 (October 29, 2014) ("Order Instituting Proceedings").

4 See Securities Exchange Act Release No. 73991 (December 22, 2014), 79 FR 78507 (action by delegated authority) ("Amendment Notice").

Exchange Act,[5] publish notice of such filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application, and within 90 days of the date of publication of such notice (or within such longer period as to which the applicant consents), by order grant such registration or institute proceedings to determine whether such registration should be denied. Such proceedings must be concluded within 180 days of the date of a publication of notice of the filing of the application for registration.[6] However, the Commission may extend the time for conclusion of such proceedings for up to 90 days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents. AMSE's exemption application was published for notice and comment in the Federal Register on July 29, 2014.[7] The 180th day after publication of the notice of AMSE's exemption application in the Federal Register is January 25, 2014, and the 270th day after publication of the notice of AMSE's exemption application in the Federal Register is April 25, 2015.

The Commission finds that good cause exists to extend the time for conclusion of the proceedings to determine whether to grant or deny AMSE's exemption application in order for the Commission to have sufficient time to consider AMSE's amended exemption application, including any comment letters received on AMSE's amended exemption application.[8] Accordingly, pursuant to Section 19(a)(1)(B) of the Exchange Act, the Commission extends the

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5 AMSE's exemption application has been filed pursuant to Section 5 of the Exchange Act. The Commission is affording AMSE's exemption application a process similar to that for exchange registration applications under Section 19(a) of the Exchange Act.

6 See id. and Section 19(a) of the Exchange Act.

7 Id.

8 See supra note 4.

time for conclusion of the proceedings to determine whether to grant or deny AMSE's exemption application to April 24, 2015.

By the Commission.

Brent J. Fields
Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74112 / January 22, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3620 / January 22, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16352

In the Matter of **Walid Hatoum** **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 Walid Hatoum ("Hatoum" 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, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

1. These proceedings arise from violations of the Foreign Corrupt Practices Act of 1977 (the "FCPA") [15 U.S.C. 78dd] by Respondent Walid Hatoum concerning offers of payment and other benefits to foreign officials in Qatar in connection with the award of government contracts to PBS&J International, Inc. ("PBSJ&J Int'l"), a wholly-owned subsidiary of PBSJ Corporation ("PBSJ").

Respondent

2. Walid Hatoum ("Hatoum"), age 55, is a United States citizen who initially worked for PBSJ as an engineer from 1986 until 1990. In February 2009, Hatoum was rehired to join PBS&J Int'l as its Director of International Marketing, even though his prior employment file at PBSJ had been marked "Ineligible for Rehire." Although Hatoum did not formally join PBS&J Int'l until April 2009, he assisted PBS&J Int'l with identifying projects as early as November 2008. Hatoum was promoted to President of PBS&J Int'l in mid-June 2009, and became an officer of PBSJ at the same time.

Relevant Entities

3. The PBSJ Corporation ("PBSJ") was an employee-owned engineering and construction firm incorporated in Florida and headquartered in Tampa. Through the relevant period, PBSJ's common stock was registered pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") and PBSJ filed annual and quarterly reports as required under Section 13(a) of the Exchange Act and Rules thereunder.[2]

4. PBS&J International, Inc. ("PBS&J Int'l") was a wholly-owned subsidiary of PBSJ headquartered and incorporated in Florida. PBS&J Int'l was a provider of engineering,

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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 On October 1, 2010, after the conduct at issue, WS Atkins plc ("Atkins"), a public limited engineering and design company based in the United Kingdom and organized under the laws of England and Wales, acquired PBSJ and all of its common stock. Atkins is traded on the London Stock Exchange under the symbol ATK.L. That day, PBSJ filed a Form 15 with the Commission, which terminated all offerings of its securities and removed all remaining securities from registration under Section 12(g). Post-acquisition, PBSJ became an indirect wholly-owned subsidiary of Atkins. On April 1, 2011, PBSJ changed its name to The Atkins North America Holdings Corporation.

architectural and planning services in international markets, including the Middle East. PBS&J Int'l currently is a subsidiary of Atkins.

Facts

5. During 2009, PBS&J Int'l won two multi-million dollar development contracts. One contract was for work in Qatar and the other was for work in Morocco. Both were competitively solicited and approved by the Qatari Diar Real Estate Investment Company ("Qatari Diar"). Qatari Diar was established by the Qatari government to coordinate the country's real estate development.

6. PBSJ and PBS&J Int'l, through Hatoum, offered bribes to the then-Director of International Projects at Qatari Diar ("Foreign Official"), to secure Qatari government contracts by planning to funnel funds to a local company the Foreign Official owned and controlled ("Local Partner"). Foreign Official, a former business colleague of Hatoum's at another U.S. engineering firm, worked for Qatari Diar throughout 2009, until his resignation from Qatari Diar on December 21, 2009. Prior to joining PBSJ, Hatoum and Foreign Official discussed directing business in the Middle East to Local Partner.

7. In return, Foreign Official provided PBS&J Int'l with access to confidential sealed-bid information and pricing information on the two government contracts that helped PBS&J Int'l tender bids that had a greater likelihood of being awarded, including a government contract for which the Foreign Official was the project manager.

Offers and Promises Made to Foreign Official

LRT Project in Qatar

8. In November and December 2008, Hatoum began discussing potential employment with PBSJ. Even before he received a formal employment contract, Hatoum met with PBS&J Int'l to discuss opportunities to grow PBS&J Int'l business in the Middle East. Hatoum discussed projects involving Qatari Diar, including a light rail transit project in Qatar ("the LRT Project").

9. In January 2009, Hatoum arranged for Foreign Official's brother, through Local Partner, to introduce PBS&J Int'l to Qatari Diar senior executives involved in the LRT Project. Soon after that meeting, PBS&J Int'l decided to bid on the LRT Project. PBS&J Int'l added Foreign Official's company, Local Partner, on its proposal team as a subcontractor to handle local operations such as hiring local labor, as well as complying with bonding and insurance requirements. In return, Hatoum and PBS&J Int'l agreed to pay the Foreign Official, through Local Partner, 40% of profits realized from any LRT Project contract as well as reimburse its direct costs. The remaining profits were to be split between PBS&J Int'l (40%) and another U.S.-based subcontractor (20%), which would perform all of the planning and engineering services for the LRT project.

10. At that time, Hatoum was the only person at PBS&J Int'l who had any knowledge about Foreign Official's ownership interest in Local Partner. Had PBSJ conducted meaningful due diligence at that time, it would have discovered the Foreign Official's dual role as both government official and third-party owner/operator of Local Partner.

11. During the bidding process, Foreign Official gave confidential sealed bid information to PBS&J Int'l to assist it in winning the LRT Project in return for promised payments. Foreign Official also made strategic and technical decisions on many aspects of the LRT Project that favored PBS&J Int'l with Hatoum's knowledge.

12. Foreign Official used a Local Partner alias to communicate that information to Hatoum and other PBSJ and PBS&J Int'l employees while disguising his involvement on multiple conference calls and in dozens of emails to the United States. Hatoum was aware that Foreign Official was using the alias in communications with PBSJ employees, officers, and directors and with Qatari Diar. Hatoum flew to the Middle East to meet with Qatari Diar officials, including Foreign Official, to discuss PBS&J Int'l's qualifications for the LRT Project. At the meeting, neither Foreign Official nor Hatoum informed Qatari Diar that Foreign Official was working for Local Partner and providing confidential information and other assistance to help PBS&J Int'l win the contracts.

13. Following its initial submission, PBS&J Int'l revised its bid, based on information and guidance provided by the Foreign Official, to best position itself to win the LRT Project and to withstand possible challenges from competitors. On or about August 3, 2009, Qatari Diar awarded the LRT Project contract worth approximately $35.6 million to PBS&J Int'l.

14. After the award, PBS&J Int'l opened a joint account with Local Partner that was accessible to Foreign Official's wife. PBS&J Int'l also authorized a four-year letter of credit relating to a bank guarantee in Qatar. The letter of credit was a precondition for receipt of the first contract payment by Qatari Diar to PBS&J Int'l, an upfront, 10% (approximately $3.6 million) payment, which was deposited into the joint account.

15. Once the award was received, Hatoum offered Foreign Official an "agency fee" to Local Partner for 1.8% of the LRT Project contract amount (equivalent to approximately $640,000). Additionally, PBS&J Int'l agreed to pay half of the salary of Foreign Official's wife, who worked for Local Partner.

<u>Design Contract in Morocco</u>

16. In addition to the LRT Project, Qatari Diar opened a Morocco hotel resort development ("Morocco Project") for competitive bid. On August 7, 2009, PBS&J Int'l emailed its Statement of Qualifications for the design contract to Foreign Official, the Qatari Diar project manager for the Morocco Project.

17. In October 2009, Hatoum offered payment to Foreign Official in the form of an agency fee to Local Partner to secure the Morocco Project. The Morocco Project was worth

approximately $25 million to PBSJ Int'l, of which the Foreign Official was offered an agency fee of 3% of the contract amount, which equates to approximately $750,000. Hatoum instructed a PBS&J Int'l employee to hide the agency fee within the company's bid proposal by inflating other components of the offer for the Morocco Project.

18. Foreign Official attended meetings with PBS&J Int'l employees to discuss the project but neither Foreign Official nor Hatoum told employees that he was working for Local Partner. At the same time, Foreign Official, using his Local Partner alias, reviewed and made changes to PBS&J Int'l's original bid offer via email and phone. He also made key technical and strategic proposal decisions throughout the bidding process and instructed PBS&J Int'l to lower its offer to a specific dollar amount. By doing so, he ensured PBS&J Int'l's final bid had a greater likelihood of being approved by Qatari Diar. On or around October 19, 2009, Qatari Diar informed PBS&J Int'l that it was awarded the Morocco Project.

Red Flags

19. PBSJ and PBS&J Int'l officers and employees ignored multiple red flags that should have led them to uncover the payment scheme. For example, PBS&J Int'l and PBSJ employees knew that Local Partner was providing them with confidential sealed bid information. Hatoum also informed the employees that he was obtaining information from someone that Hatoum described as a "good friend" and "top executive" at Qatari Diar. Before PBS&J Int'l submitted its bid for the Morocco Project, a PBS&J Int'l officer learned that the husband of one of the Local Partner employees was a government official working on the Morocco Project. The PBS&J Int'l officer learned of Foreign Official's role while attending dinner with Hatoum, Foreign Official and the Foreign Official's wife. In addition, a PBSJ employee knew that "agency fees" to Local Partner were disguised as legitimate costs within the Morocco Project bid.

Discovery of the Payment Scheme

20. Shortly after PBS&J Int'l was awarded the Morocco Project contract, PBSJ's former Chief Operating Officer commented to PBSJ's then-general counsel that PBS&J Int'l was successful in winning two contracts in the Middle East within a fairly short period of time. PBSJ's then-general counsel asked Hatoum how he was able to win the LRT and Morocco Project contracts over companies with far more international experience. Hatoum told PBSJ's then-general counsel PBSJ offered "agency fees" in order to win the projects and, when asked, admitted there "would be a problem" if the agency fees were not paid. PBSJ's then-general counsel immediately launched an investigation of this issue.

21. Three weeks later, in November 2009, a Qatari government official informed Hatoum and the then-President of PBSJ that Qatari Diar had discovered Foreign Official's involvement in Local Partner and was rescinding PBS&J Int'l's contract for the Morocco Project. Hatoum then secretly made an offer of employment to a second Qatari foreign official in return for influencing Qatari Diar to reinstate the contract. However, Qatari Diar refused to

reinstate the contract and did not provide PBS&J Int'l any proceeds for the project. PBSJ suspended Hatoum in December 2009. Hatoum also began deleting emails and other records.

22. PBS&J Int'l and Qatari Diar negotiated a termination of the LRT Project contract effective December 31, 2009. In January 2010, Qatari Diar entered into a bridge contract with PBS&J Int'l to continue work on the LRT Project (the "Bridge Contract") until a replacement company could be found. Ultimately, the period of performance on the Bridge Contract was 16 ½ months. PBS&J Int'l earned $2,892,504 in profits on the Bridge Contract. PBSJ and Qatari Diar caught Hatoum's scheme before any of the offered and authorized amounts were paid.

Hatoum Caused PBSJ's Inaccurate Books and Records

23. Hatoum authorized illicit payments to Foreign Official that were not accurately and fairly reflected on PBSJ's books and records. Hatoum directed subordinates to conceal some of the payments he offered and authorized to Foreign Official within bids. Other offers and promises to pay authorized by Hatoum to Foreign Official were improperly described in the books and records as legitimate transaction costs with his knowledge.

Hatoum Caused PBSJ's Internal Accounting Control Failure

24. On April 22, 2009, Hatoum signed a "Business Conduct Standards" agreement for PBSJ employees in which he agreed that "I will neither accept nor give bribes or kickbacks of any value for services or favorable treatment for contracts." As a high level manager at PBS&J Int'l and later as an officer of PBSJ, Hatoum was responsible for maintaining and ensuring compliance with PBSJ's internal accounting controls at PBS&J Int'l. Hatoum, however, repeatedly exploited the company's internal accounting control deficiencies to offer and authorize payments to Foreign Official through Local Partner totaling approximately $1,390,000 to secure the LRT and Morocco Projects, plus 40% of any profits realized from the LRT Project and partial salary to Foreign Official's wife. Hatoum instructed subordinates to inflate PBS&J Int'l bids by concealing payments to Local Partner intended for Foreign Official. Hatoum took advantage of PBSJ's accounting controls system by introducing Local Partner as a "legitimate" potential partner for the LRT Project and authorized a subordinate to execute an agreement to pay Local Partner 40% of the LRT Project profits without subjecting Local Partner or its employees to any meaningful due diligence. Hatoum also knowingly executed - and caused a PBS&J Int'l employee to send a questionnaire requesting advocacy assistance from the United States Department of Commerce that included false representations about Local Partner and PBS&J Int'l. Although Hatoum did not participate in PBSJ's FCPA training until after the scheme was uncovered, Hatoum was aware of the prohibitions of the FCPA from annual FCPA training that he received from his former employer.

Legal Standards and Violations

25. Under Section 21C(a) of the Exchange Act, the Commission may impose a cease-and-desist order upon any person who is violating, has violated, or is about to violate any

provision of the Exchange Act or any rule or regulation thereunder, and upon any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation.

FCPA Violations

26. As a result of the conduct described above, Hatoum violated Section 30A of the Exchange Act, which prohibits any issuer, officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of the issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official or any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official for the purposes of (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

27. As a result of the conduct described above, Hatoum caused violations of Section 13(b)(2)(A) of the Exchange Act by PBSJ, which requires reporting companies to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets.

28. Lastly, as a result of the conduct described above, Hatoum caused violations of Section 13(b)(2)(B) of the Exchange Act by PBSJ, and violated Section 13(b)(5) and Rule 13b2-1 thereunder, which requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles; and prohibit persons from knowingly circumventing or knowingly failing to implement a system of internal accounting controls, knowingly falsifying any book, record or account, and directly or indirectly falsifying or causing to be falsified any book, record, or account.

Undertaking

29. Respondent undertakes to do the following: in connection with this action and any related judicial or administrative proceeding or investigation commenced by the Commission or to which the Commission is a party, Respondent (i) agrees to appear and be interviewed by Commission staff at such times and places as the staff requests upon reasonable notice; (ii) will accept service by mail or facsimile transmission of notices or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (iii) appoints Respondent's undersigned attorney as agent to receive service of such notices and subpoenas; (iv) with respect

to such notices and subpoenas, waives the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Respondent's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (v) consents to personal jurisdiction over Respondent in any United States District Court for purposes of enforcing any such subpoena.

30. 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 Respondent Walid Hatoum's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent cease and desist from committing or causing any violations and any future violations of Sections 13(b)(2)(A), 13(b)(2)(B), 13(b)(5), and 30A of the Exchange Act [15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), and 78dd-1] and Rule 13b2-1 thereunder [17 C.F.R. § 240.13b2-1].

B. Respondent shall, within fourteen days of the entry of this Order, pay a civil money penalty in the amount of $50,000 to the 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 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 Walid Hatoum 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 Tracy L. Price, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-5631.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this 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 judgment, order, consent order, 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.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallegher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74119 / January 22, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31426 / January 22, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16353

In the Matter of **Spring Hill Capital Markets, LLC,** **Spring Hill Capital Partners, LLC,** **Spring Hill Capital Holdings, LLC,** **and Kevin D. White,** **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 against Spring Hill Capital Markets, LLC ("SHCM"), Spring Hill Capital Partners, LLC ("SHCP"), Spring Hill Capital Holdings, LLC ("SHCH"), and Kevin D. White ("White") 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").

II.

After an investigation, the Division of Enforcement alleges that:

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Summary

1. These proceedings arise out of violations of the broker-dealer registration requirements of the Exchange Act by SHCP, an unregistered entity; violations of the net capital, record-keeping, and reporting requirements of the Exchange Act by affiliate SHCM, a registered broker-dealer; and the conduct of their parent company, SHCH, and founding CEO, Kevin White, to aid and abet and cause these and other violations.

2. At the direction of White, SHCP entered into a written agreement with an unaffiliated registered broker-dealer ("Company A") to allow SHCP to trade fixed income securities and earn transaction-based compensation. Beginning in 2009, SHCP began introducing trades in fixed income securities to Company A. Although five employees of SHCP became registered representatives of Company A and executed trades introduced by SHCP, SHCP itself never registered with the Commission.

3. At White's direction and for the most part under the management of SHCH, from May 2009 through February 2010, SHCP introduced approximately 100 trades in asset-backed securities that generated over $4 million in compensation. Based on the agreement with Company A, SHCP retained 85 percent of this compensation, which totaled approximately $3,740,000, and paid the balance, approximately $640,000, to Company A for its provision of trade clearing and processing services.

4. In March 2010, White also directed a trader to withhold a trade ticket from Company A in order to conceal that Spring Hill did not have a customer for the transaction. This caused Company A's books and records to be inaccurate. Later that month, SHCM, which like SHCP was under the management of SHCH, executed an additional purchase without there being a customer. SHCM's blotter also contained incorrect trade dates for the two purchases so as to appear in each case that there was a customer as of the purchase date. The latter purchase resulted in SHCM having a net capital deficiency in violation of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder, which SHCM failed to report to the Commission.

Respondents

5. Spring Hill Capital Holdings, LLC ("SHCH"), a Delaware company headquartered in New York, New York, is a holding company that is the sole direct owner of Spring Hill Capital Partners, LLC ("SHCP"), Spring Hill Capital Markets, LLC ("SHCM"), and Spring Hill Management Company, LLC ("SHMC") (collectively, "Spring Hill" or the "Spring Hill Entities"). SHCH is majority owned by Kevin White. Pursuant to Spring Hill's operating agreements, SHCH acts as the "full and exclusive" manager of the business and affairs for each of its subsidiaries. SHCH has never been registered with the Commission in any capacity.

6. Spring Hill Capital Markets, LLC ("SHCM"), is a registered broker-dealer organized under the laws of Delaware and headquartered in New York, New York. It is majority owned, through SHCH, by Kevin White. SHCM's broker-dealer registration became effective on February 26, 2010. From March 2010 to January 2014, SHCM conducted fixed income trading through Company A.

7. Spring Hill Capital Partners, LLC ("SHCP"), a Delaware company headquartered in New York, New York, has never been registered with the Commission in any capacity. It is majority owned, through SHCH, by Kevin White. From May 2009 until the broker-dealer registration of SHCM became effective on February 26, 2010, SHCP traded securities in SHCP-designated customer accounts held by Company A. SHCP has had virtually no business activity since the effective date of SHCM's registration with the Commission.

8. Kevin D. White, age 51, resides in Ridgefield, CT. He founded the Spring Hill Entities and is their CEO. He holds Series 3, 7, 9, 10, 24, and 63 licenses. He previously was associated with three registered broker-dealers in a variety of capacities over the periods 1986 to 1988 and 1991-2008.

Other Relevant Entities

9. Company A, a New York company headquartered in Garden City, New York, is a broker-dealer registered with the Commission. During the relevant period, Company A provided trade clearing and processing services for trades introduced by SHCM and SHCP.

SHCP Acts as Unregistered Broker-Dealer at White's Direction

10. In early 2009, SHCP entered into a business relationship with Company A to allow SHCP to trade fixed income assets. As White explained in investigative testimony, SHCP "joined the [Company A] platform, because it has the pipes and plumbing . . . required . . . to do our business."

11. In an early email, an executive from Company A described the arrangement to White as follows: "We can act as B/D of record for your [*i.e.*, SHCP'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."

12. White negotiated that SHCP would receive 85 percent of the compensation for trades conducted under this arrangement, with the 15 percent balance being paid to Company A for its services. In April 2009, SHCP and Company A memorialized their understanding by executing a "Services and Cost Sharing Agreement" to facilitate the "clearing and trade processing for trades introduced by [SHCP]." The agreement provided that certain SHCP employees would register as "independent" representatives of Company A.

13. Following the formation of SHCH as a holding company with the "full and exclusive right, power and authority to manage" SHCP's business, SHCP and Company A reaffirmed their arrangement in July 2009 through an updated agreement that provided for continuation of the 85 percent/15 percent allocation of transaction-based compensation between the two firms.

14. Consistent with these agreements, several employees of SHCP registered as representatives of Company A and as directed by White, conducted trades for SHCP customers over a ten-month period from May 2009 through February 2010.

15. SHCP exercised control over these "independent" representatives of Company A, all of whom worked out of SHCP's offices. SHCP had authority over their trading decisions and determined their compensation.

16. Despite the lack of registration, SHCP held itself out as a broker-dealer. White distributed marketing materials to industry contacts that described SHCP as a "Broker/Dealer [that] trades securities, focusing on highly structured consumer and non-consumer ABS, CMBS, and RMBS" and that "also originates new and existing securitizations."

17. From May 2009 through February 2010, SHCP introduced approximately 100 trades in asset-backed securities, *i.e.*, approximately 100 purchases and 100 sales, that generated over $4 million in compensation. SHCP received approximately $3,740,000, including $540,000 that it directed Company A to pay directly to the registered representatives.

18. SHCH directed SHCP to "side-stream" approximately $2.6 million of revenues, earned primarily from trades conducted during this period, to affiliated entities including Spring Hill Management Company, LLC, an administrative services company that used the revenues largely to pay for SHCM's payroll and operating expenses after SHCP ceased business activity.

White's Conduct Results in Net Capital and Books and Records Violations

19. On March 1, 2010, White instructed a trader at Spring Hill to buy a bond but to delay submitting the trade ticket for the purchase to Company A to conceal that there was no customer for the transaction.[1] As a result, Company A failed to make and keep current its books and records by failing to timely reflect this transaction in its trade blotters.

20. SHCM's trade blotter also contained an incorrect trade date for the transaction.

21. Ten days after the purchase, the Spring Hill trader sold the bond to a third-party, broker dealer.

22. White then instructed the trader to offer to repurchase the bond on behalf of SHCM, despite there again being no customer for the transaction and White's knowledge of the same. By March 15, 2010, SHCM reached an "agreement in principle" on the purchase terms, and on the morning of March 16, executed the trade with the seller. At the time, SHCM was under the "full and exclusive" management of SHCH.

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1 Although SHCM's registration became effective February 26, 2010, SHCM does not appear to have commenced business until after it received authorization from FINRA to do so on March 4, 2010, after the date of this trade. Accordingly, the March 1, 2010 trade is not being charged as a net capital violation.

23. White directed the repurchase of the bond – a restricted nonconvertible debt security – because he expected that SHCM could eventually sell it to an interested party.

24. The transaction resulted in a net capital deficiency for SHCM of at least approximately $1.2 - $1.4 million. SHCM did not notify the Commission that it was out of compliance with its net capital requirements.

25. SHCM's blotter also contained an incorrect trade date for the purchase.

26. Approximately seven hours after purchasing the bond, SHCM agreed to sell it to a customer for a profit of $414,375.

Violations

27. As a result of the conduct described above, SHCP willfully violated Section 15(a) of the Exchange Act, which makes it illegal for a broker or dealer to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security unless the broker is registered with the Commission.

28. As a result of the conduct described above, SHCH and White willfully aided and abetted and caused SHCP's violations of Section 15(a) of the Exchange Act.

29. As a result of the conduct described above, SHCM willfully violated Section 17(a) of the Exchange Act and Rule 17a-3(a)(1) thereunder, which requires that each broker-dealer registered with the Commission make and keep current blotters (or other records of original entry) containing an accurate itemized daily record of all purchases and sales of securities.

30. As a result of the conduct described above, Company A violated Section 17(a) of the Exchange Act and Rule 17a-3(a)(1) thereunder.

31. As a result of the conduct described above, SHCH and White willfully aided and abetted and caused Company A's violations of Section 17(a) of the Exchange Act and Rule 17a-3(a)(1) thereunder.

32. As a result of the conduct described above, SHCM willfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder, which require a broker-dealer to maintain a certain minimum net capital at all times while effecting transactions in securities.

33. As a result of the conduct described above, SHCH and White willfully aided and abetted and caused SHCM's violations of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.

34. As a result of the conduct described above, SHCM willfully violated Section 17(a) of the Exchange Act and Rule 17a-11(b)(1) thereunder, which require a broker-dealer to notify the Commission the "same day" of the occurrence of a net capital deficiency.

35. As a result of the conduct described above, SHCH and White willfully aided and abetted and caused SHCM's violations of Section 17(a) of the Exchange Act and Rule 17a-11(b)(1) 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 and cease-and-desist proceedings be instituted to determine:

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

B. What, if any, remedial action is appropriate in the public interest against Respondents SHCH, SHCP, SHCM, and White, pursuant to Section 15(b) of the Exchange Act, including, but not limited to, an accounting, disgorgement, and civil penalties pursuant to Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Respondents SHCH, SHCP, SHCM, and White pursuant to Section 9(b) of the Investment Company Act, including, but not limited to, disgorgement, and civil penalties pursuant to Section 9 of the Investment Company Act;

D. Whether, pursuant to Section 21C of the Exchange Act, Respondent SHCP should be ordered to cease and desist from committing or causing violations of and any future violations of Section 15(a) of the Exchange Act, whether Respondent SHCP should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Respondent SHCP should be ordered to provide an accounting and pay disgorgement pursuant to Section 21C(e) of the Exchange Act;

E. Whether, pursuant to Section 21C of the Exchange Act, Respondent White should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 15(a), 15(c), and 17(a) of the Exchange Act and Rules 15c3-1, 17a-3, and 17a-11(b)(1) thereunder, whether Respondent White should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Respondent White should be ordered to provide an accounting and pay disgorgement pursuant to Section 21C(e) of the Exchange Act;

F. Whether, pursuant to Section 21C of the Exchange Act, Respondent SHCH should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 15(a), 15(c), and 17(a) of the Exchange Act and Rules 15c3-1, 17a-3, and 17a-11(b)(1) thereunder, whether Respondent SHCH should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Respondent SHCH should be ordered to provide an accounting and pay disgorgement pursuant to Section 21C(e) of the Exchange Act; and

G. Whether, pursuant to Section 21C of the Exchange Act, Respondent SHCM should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 15(c) and 17(a) of the Exchange Act and Rules 15c3-1, 17a-3, and 17a-11(b)(1) thereunder, whether Respondent SHCM should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Respondent SHCM should be ordered to provide an accounting and pay disgorgement pursuant to Section 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, the Respondent may be deemed in default and the proceedings may be determined against the Respondent 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 each Respondent as provided for in the Commission's Rules of Practice.

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.

Brent J. Fields
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9709 / January 23, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74123 / January 23, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16358

In the Matter of	ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING
SPECTRUM CONCEPTS, LLC, DONALD JAMES WORSWICK, MICHAEL NICHOLAS GROSSO, and MICHAEL PATRICK BROWN,	
Respondents.	

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that cease-and-desist proceedings be, and hereby are, instituted against Spectrum Concepts, LLC ("Spectrum"), Donald James Worswick ("Worswick"), Michael Nicholas Grosso ("Grosso"), and Michael Patrick Brown ("Brown") (collectively, "Respondents") pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act").

II.

After an investigation, the Division of Enforcement alleges that:

SUMMARY

1. This matter concerns a prime bank scheme conducted through Spectrum by Worswick, its president and owner. In perpetrating the scheme, Worswick was helped by Brown and Grosso.

2. Between approximately May 2012 and October 2012 (the "Offering Period"), Worswick, acting through Spectrum, offered and sold to at least five elderly investors $465,000 of investments in what he called "Private Joint Venture Credit Enhancement Agreements" ("Enhancement Agreements"). In selling the Enhancement Agreements, Worswick was helped by Brown, who devised and drafted the language of the Enhancement Agreements and helped sell them to at least two investors, and Grosso who also helped sell them to investors while portraying himself falsely as an officer or employee of Spectrum. Worswick, Brown, and Grosso were helped in their sale efforts by one or more of four individuals (collectively, the "Finders") who helped to identify and refer investors interested in Spectrum's Enhancement Agreements.

3. The Enhancement Agreements represented to investors that investor funds would be placed by Spectrum in "private funding projects" and used to "set up" a "credit facility" and something called a "trade slot" that would then be "blocked" for the benefit of a supposed "trade platform." In selling Enhancement Agreements, Worswick, Brown, and Grosso told investors that, by investing in an Enhancement Agreement, the investors, along with Spectrum, would earn returns ranging from 900% in 20 days to 4,627% annually. The investments were fictitious.

4. Worswick signed each Enhancement Agreement on behalf of Spectrum in exchange for receiving investor funds. At least four of the Enhancement Agreements also included the representation that the investor would receive a full return of his or her principal investment after a specified number of days, but the investor would continue nonetheless to receive a steady stream of promised returns.

5. Worswick's scheme was a blatant fraud. The supposed "private funding projects," "credit facilit[ies]," and "trade slot[s]" described in the Enhancement Agreements did not exist, and none of the funds Worswick obtained from investors was used for the investors' benefit. Moreover, none of the investors has received a return of their principal.

6. Of the $465,000 of investor funds raised, two investors were subsequently able to obtain a return of their funds of $265,000 when they had second thoughts about the investments. However, most of the remainder of $200,000 was misappropriated by Worswick for his own purposes. Among other things, he spent a portion of this amount on living expenses and paid other portions to a variety of people, including Grosso, who received $27,500.

<u>RESPONDENTS</u>

7. <u>Spectrum</u> is a Florida limited liability company that Worswick created in January 2010 for the supposed purpose of sponsoring and promoting concerts. However, other than the investor funds which Spectrum received into its bank account, Spectrum has never had any corporate assets or business operations, and has served only as a vehicle for Worswick's fraud. Spectrum has never registered an offering of securities under the Securities Act or a class of securities under the Exchange Act.

8. <u>Worswick</u> is 64 years of age and a resident of Eustis, Florida. He is president and owner of Spectrum.

9. Grosso is 60 years of age and a resident of Rocky Point, New York. During the Offering Period, Grosso was not an employee or officer of Spectrum. Previously, he has worked as a nutritionist and fitness trainer.

10. Brown is 47 years old and a resident of Boca Raton, Florida. During the Offering Period, Brown portrayed himself to be an attorney-at-law but, in fact, has never been licensed as an attorney by any state. In 2004, Brown was charged by the Commission with violations of Section 10(b) of the Exchange Act and Rule 10b-5, thereunder. In 2005, Brown settled those charges by consenting to a Court order enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5, thereunder, and barring him for a period of two years from participating in the offering of a penny stock.

BACKGROUND

11. After forming Spectrum, Worswick began looking for ways to raise money in order to fund Spectrum's concert promotion business. To this end, he explored various "investment programs" advertised on the internet as a means to earn a return that he could use for Spectrum's business. Through his efforts, Worswick met Brown who presented himself as an attorney with years of experience with such investment programs. Worswick hired Brown to draft the Enhancement Agreements for Spectrum that Worswick, Grosso, and Brown subsequently offered and sold to investors. Through the sale of Enhancement Agreements, Worswick and Brown hoped to raise upwards of $15 million for Spectrum from investors.

12. Shortly after Worswick hired Brown, Worswick met Grosso and elicited his help in recruiting investors to invest in Enhancement Agreements.

THE OFFERING

13. Between approximately May 2012 and October 2012, Spectrum offered and sold $465,000 of Enhancement Agreements to at least five investors. Brown drafted the language of the Enhancement Agreements, as well as other documents presented, or intended to be presented, to investors as part of the offering. These included: (i) a Board Resolution; (ii) an Origin and History of Funds; (iii) an Authorization to Verify Funds; (iv) a Letter of Intent; (v) a Letter of Request for Information and Non-Solicitation; (vi) an Investor Letter; and (vii) a Client Information Form. Brown also communicated with investors directly (or indirectly through one or more of the Finders) if investors had questions or wanted more information about the offering.

14. Worswick and Grosso reviewed, edited, and disseminated to investors the documents created by Brown, and also themselves solicited investors. Additionally, Grosso posted information about the offering on a classified advertisement website in order to attract investors broadly. To further facilitate the fraud, Worswick provided Brown and Grosso with access to Spectrum's letterhead for use in communicating with investors and drafting documents. Moreover, Worswick allowed Spectrum's bank account to be used for receipt of investor funds, and Worswick signed the documents related to each investment, including the Enhancement Agreements, on behalf of Spectrum.

15. With the final three investors, Grosso and Worswick also made some revisions to the Enhancement Agreements drafted by Brown.

16. With regards to early investors in the program, Worswick or Grosso informed Brown of an expressed interest by a prospective investor. Worswick or Grosso also asked the investor to complete and sign various forms, whose purpose was portrayed as verifying that an investor had the financial resources to invest. After an investor completed and signed the forms, he or she was allowed to discuss his or her potential investment with Brown. When an investor decided to invest, Brown, Grosso, or Worswick finalized an Enhancement Agreement for that particular investor and provided it to the investor to sign.

17. In or about the late summer of 2012, Brown's role in the fraud lessened and the recruitment of subsequent investors occurred in a less formal manner.

18. To add legitimacy to the offering, Worswick arranged for an escrow agent to receive funds from the investors and then release the funds to Spectrum at the direction of the investors once Spectrum had met certain pre-conditions. These pre-conditions included the creation of the "trade slot" or "credit facility," which Worswick, Brown, or Grosso would tell the investors had occurred or, in the case of two investors, the provision of a "financial guarantee" from an insurance company, insuring the investors against the loss of their principal. In actuality, the use of an escrow agent provided a façade of legitimacy. Investors in the Enhancement Agreements had no means to verify independently whether Spectrum had created the "trade slot" or "credit facility," as represented. Moreover, the financial guarantee provided to two investors in was fictitious.

19. The escrow agreement also gave the escrow agent responsibility for receiving profits from the trade platform and disbursing those profits to the investors.

20. The Enhancement Agreements only vaguely described how investor funds would be used. According to their terms, Spectrum would establish a credit facility and trade slot "approximately 7 banking days" after it received investor funds from escrow. Afterwards, the credit facility and trade slot would be "blocked for the benefit of a trade platform." The Enhancement Agreements further represented that the trade platform would begin making profit payments to the escrow attorney within 30 banking days of the trade platform being blocked, and that the escrow agent would disperse profit payments to investors within one business day of the escrow agent receiving them. In addition, Spectrum itself would somehow participate in the investment with the investors and share in the profits accordingly.

21. The Enhancement Agreements, signed by Worswick, varied. At least one agreement represented that the return of the initial investment would occur immediately after the supposed line of credit was established or within 15 days prior to the trade platform being entered. At least two Enhancement Agreements promised that the respective investor would be paid \$100,000 per week for 52 weeks for a total of \$5.2 million—a return of 4,627% return on the investments.

22. At least two Enhancement Agreements also stated that Spectrum was required to provide a financial guarantee of the investors' principal from a particular insurance company. The Enhancement Agreement further specified that no escrowed funds could be released by the escrow agent until such a financial guarantee was provided. On June 18, 2012, Spectrum provided the investors with a financial guarantee, drafted by Brown and signed by Worswick, and purportedly backed by this particular insurance company. In a June 18, 2012 email, Brown communicated through an intermediary to one of the investors that the "policy will be effective tomorrow . . . and must be signed by [the investor] and Mr. Worswick and sent back to [Brown]." Brown added that the investor needed to release the funds from the escrow agent so that the policy premium could be paid. In fact, the financial guarantee provided by Spectrum was fictitious.

23. In August 2012, Spectrum obtained investments of $50,000 each from two additional investors. The investors each signed Enhancement Agreements, dated August 2, 2012 and August 6, 2012, respectively, that were essentially identical to the earlier versions used by Spectrum. Worswick signed the Enhancement Agreements on behalf of Spectrum. Each of these Enhancement Agreements acknowledged receipt of $50,000 of investor funds and promised in return that the investor would receive profit payments of $50,000 a month for 12 months for a total of $600,000 for each investor. This represented an 1100% return on each investment. Additionally, each investor was promised a return of their initial investment thirty days after the trade platform was entered.

24. On August 6 and 7, 2012, the new investors signed letters authorizing the escrow agent to release their respective funds to Spectrum. Spectrum's bank records show that Spectrum received the $100,000 into its bank account on August 14, 2012. The next day, on August 15, 2012, without knowledge of the new investors, Worswick transferred $20,000 of these funds to an individual who had located other investors.

25. One of the investors received a single page letter from Spectrum, addressed to "Dear Client" with the typed name of "Mike Grosso" at the bottom, describing a supposed "Standby Letter of Credit" ("SBLC") in which the investor was supposed to be investing (hereafter, the "Dear Client letter"). The Dear Client letter described in detail how Spectrum works with a "Credit Facility" to use a "Proof of Funds" to leverage a bank instrument which then goes through a "monetizing" process.

26. Despite the language of the Enhancement Agreements, Grosso directly or indirectly told the investors that each was investing in a SBLC issued by a Channel Islands entity called, the Advance Funding Group ("AFG").

27. In early September 2012, Spectrum obtained an investment of $100,000 from another investor (who invested through an entity the investor controlled). The investor was introduced to Spectrum by an intermediary, and was recruited to invest by Grosso. Grosso represented himself to the investor as an agent or representative of Spectrum.

28. Grosso offered the investor the opportunity to purchase an interest in a SBLC that was supposed to be purchased by AFG from a European bank. Grosso told the investor that this SBLC would cost $200,000 in total, but that the investor would only need to invest $100,000 since Grosso had identified two other individuals who together would invest the remaining $100,000. Grosso further told the investor that AFG would use the invested funds to purchase the SBLC and, thereafter, transfer the SBLC to another entity that would then somehow "monetize" the SBLC by investing the proceeds in long-term investments. Grosso provided the investor with the same Dear Client letter referenced above, and gave the investor the documents to sign to make the investment, including the Enhancement Agreement and the escrow agreement. Grosso represented to the investor that the investment would yield a total return of $6.5 million.

29. Based on Grosso's representations, the investor signed an Enhancement Agreement with Spectrum on September 10, 2012 and, thereafter, authorized the escrow agent to release the investor's funds to Spectrum. Worswick signed the Enhancement Agreement on behalf of Spectrum. While the language of this Enhancement Agreement was substantially similar to the terms of the earlier Enhancement Agreements, there were notable differences. For instance, for a $100,000 investment, Spectrum promised the investor a profit of $1 million in 20 banking days, a return of 900%, after Spectrum supposedly received "its anticipated profit payment." Also, the Enhancement Agreement actually referenced a SBLC. In any event, Grosso promised the investment return no later than 20 days after November 19, 2012, the date on which Grosso claimed the SBLC would be "monetized."

30. The investment programs described to the investors by the Respondents were fictitious. Contrary to the representations to investors, Worswick largely diverted for his own purposes the investor funds Spectrum received. Between August 2012 and December 2012, Spectrum received into its bank account $245,000 of investor proceeds from the sale of Enhancement Agreements. Of the $245,000 Spectrum obtained, Worswick returned $45,000 to the initial investors. Starting on August 15, 2012, after receiving $100,000 in later investments, Worswick made four payments to Grosso totaling $27,500. Additionally, on August 15, 2012, Worswick wired $20,000 to an intermediary who had found earlier investors, also described above. Worswick also paid Brown a total of between $15,000 and $20,000.

31. Worswick also used Spectrum funds received from investors for expenses of his own. For instance, Worswick wired $30,000 to his personal attorney, withdrew approximately $6,400 in cash, and transferred $17,000 to another bank account he controlled. He also wrote checks totaling approximately $8,769, and paid $2,701, for personal expenses such as purchases made at convenient stores or on the internet for diet items.

VIOLATIONS

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

33. As a result of the conduct described above, Respondents committed violations of Sections 5(a) and 5(c), which prohibit, absent an exemption, any person, directly or indirectly, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell a security for which a registration statement is not in effect or to offer to sell a security for which a registration statement has not been filed.

III.

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

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

B. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5, thereunder, whether Respondents should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act and Section 21B(a)(2) of the Exchange Act, and whether Respondents should be ordered to pay disgorgement plus prejudgment interest pursuant to Section 8A of the Securities Act and Section 21C 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 Respondents shall file Answers 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 a 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 Respondent 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.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9708 / January 23, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74120 / January 23, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4005 / January 23, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16354

In the Matter of David B. Havanich, Jr., Carmine A. DellaSala, Matthew D. Welch, Richard Hampton Scurlock, III, RTAG Inc. d/b/a Retirement Tax Advisory Group, Jose F. Carrio, Dennis K. Karasik, Carrio, Karasik & Associates, LLP, and Michael J. Salovay, Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTIONS 203(e) AND (f) OF THE INVESTMENT ADVISERS ACT OF 1940

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against David B. Havanich, Jr. ("Havanich"), Carmine A. DellaSala ("DellaSala"), and Matthew D. Welch ("Welch"), 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 against Richard Hampton Scurlock, III ("Scurlock"), RTAG Inc. d/b/a Retirement Tax Advisory Group ("RTAG"), Jose F. Carrio ("Carrio"), Dennis K. Karasik ("Karasik"), Carrio, Karasik & Associates, LLP ("CKA"), and Michael J. Salovay ("Salovay"), Section 203(f) of the

Investment Advisers Act of 1940 ("Advisers Act"), as to Scurlock and Karasik, and Section 203(e) of the Advisers Act as to RTAG (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Havanich is 48 years old and resides in Jupiter, Florida. He was the co-founder, president, and director of Diversified Energy Group, Inc. ("Diversified") and is the president and director of St. Vincent de Paul Childrens Foundation Inc. ("St. Vincent"), a non-operating, non-profit corporation.

2. DellaSala is 54 years old and resides in Jupiter, Florida. DellaSala was the co-founder, vice president of business development, and director of Diversified and is the vice president and director of St. Vincent. DellaSala previously held a series 3 commodities license at various times between 1988 and 2002 while associated with 10 different commodities firms. In addition, DellaSala previously was a registered representative of SEC-registered broker dealers Meyers Pollock Robbins, Inc. and Joseph Charles & Assoc., Inc. between February 1997 and May 1997. The state of Kansas issued a cease-and-desist order against DellaSala as president of Apex Petroleum, Inc. ("Apex") in December 1995 in connection with the offer and sale of Apex securities. In the Matter of Apex Petroleum, Inc., et. al, Docket No. 96E046 (December 20, 1995).

3. Welch is 34 years old and resides in Gainesville, Florida. He was the vice president of investor relations of Diversified and is a board member of St. Vincent. Welch previously held a series 3 commodities license from approximately 2000-2002.

4. Scurlock is 37 years old and resides in Lexington, Kentucky. Scurlock is the owner and president, and therefore an associated person of, RTAG, a Kentucky registered investment adviser. Between 1999 and 2005, in ascending order, Scurlock was a registered representative of SEC-registered broker-dealers IDS Life Insurance Company ("IDS Life"), Ameriprise Financial Services, Inc., Ameritas Investment Corp., and Synergy Investment Group, LLC.

5. RTAG is a Kentucky corporation and a Kentucky registered investment adviser. Scurlock is the owner and president of RTAG.

6. Carrio is 49 years old and resides in York, Pennsylvania. He is the co-founder and 50% owner of CKA, a limited liability partnership doing business in Baltimore County, Maryland. Carrio was not registered as a broker-dealer nor associated with a registered broker-dealer during the relevant period. Between 1989 and 2006, in ascending order, Carrio was a registered representative of SEC-registered broker-dealers First Investors Corporation, The Prudential Insurance Company of America, Pruco Securities Corporation, Equity Services, Inc., and New England Securities. On April 1, 2014 the Securities Division of the Office of the Maryland Attorney General ("Maryland AG") issued a consent order against Carrio in connection

with his offer and sale of Diversified's bonds ordering that he cease and desist from violating certain of Maryland's anti-fraud and registration statutes and that he pay a $1,499,315.87 penalty which was waived based on his sworn financial statements. The consent order also permanently barred Carrio from engaging in the securities or investment advisory business in Maryland. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).

7. Karasik is 59 years old and resides in Reisterstown, Maryland. He is the co-founder and 50% owner of CKA. Between 1984 and 2013, in ascending order, Karasik was a registered representative of SEC-registered broker-dealers NEL Equity Services Corporation, MML Investors Services, Inc., VIP Financial Companies, Inc., Equity Services Inc., New England Securities, Multi-Financial Securities Corporation, and H. Beck, Inc. Between 2009 and 2013, Karasik was an investment adviser representative of, and associated with, first Multi-Financial Securities Corporation and later H. Beck, Inc, both dually registered as broker-dealers and investment advisers. Karasik was also a party to the Maryland AG consent order and received the same sanctions and waiver of penalty as Carrio and CKA. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).[1] On July 8, 2014, by consent, FINRA imposed a bar from association with any FINRA member firm against Karasik in connection with Karasik's offer and sale of Diversified's bonds. Dennis Keith Karasik, Letter of Acceptance, Waiver and Consent, No. 2012034750401 (Jul. 8, 2014).

8. CKA is a limited liability partnership doing business in Baltimore County, Maryland. CKA states it is an independent financial services firm for wealth management issues. Carrio and Karasik each own 50% of CKA. CKA was not registered as a broker-dealer or an investment advisor during the relevant period. CKA was also a party to the Maryland AG consent order and received the same sanctions and waiver of penalty as Carrio and Karasik. In the Matter of Jose F. Carrio et al. (Case No. 2012-0463).

9. Salovay is 43 years old and resides in Pittsburgh, Pennsylvania. Salovay's current employment status is unknown. Between 1997 and 2007, in ascending order, Salovay was a registered representative of SEC-registered broker-dealers IDS Life, American Express Financial Advisors Inc., Metropolitan Life Insurance Company, Metlife Securities Inc., First Security Investments, Inc., Midsouth Capital, Inc., Nations Financial Group, Inc. and Natcity Investments, Inc. In October 2008, he settled an action with FINRA related to his failure to disclose material information on a Form U4 by agreeing to a nine-month suspension and a $5,000 fine.

B. OTHER RELEVANT ENTITIES

1. Diversified was a Delaware corporation founded by Havanich and DellaSala in 2006 and located in Tequesta, Florida. Diversified was dissolved on April 28, 2014. Diversified represented that it was primarily engaged in the business of buying and selling fractional interests in oil and gas producing properties and commodities trading in the futures market. Diversified filed nine Form Ds with the Commission between 2007 and 2012 claiming exemptions under Rules 504 and 506 of the Securities Act for approximately $19 million in stock and bonds in nine purportedly separate offerings but did not file Forms D for an additional

[1] In addition, the Maryland consent order revoked Karasik's Maryland investment adviser representative registration.

$8 million in stock and bonds in five other purported separate offerings. Diversified has never been registered with the Commission nor registered any offering of securities under the Securities Act or a class of securities under the Exchange Act.

C. SUMMARY

1. Between 2006 and 2012, Diversified and its principal officers, Havanich, DellaSala, and Welch, raised at least $17.4 million from approximately 440 investors nationwide through a series of fraudulent, unregistered offerings of stock and bonds. Diversified represented that it was primarily engaged in the business of buying and selling fractional interests in oil and gas producing properties and also engaged in commodities trading in the futures market. Ultimately, as its disclosed use of proceeds expanded, Diversified used a portion of the investor funds to buy fractional interests in oil and gas wells, cattle, a hydrogen device that purported to increase gas mileage on vehicles, trade commodities contracts, and invest in real estate. Diversified, Havanich, DellaSala, and Welch made material misrepresentations and omissions about Diversified's financial performance and use of industry experts and technologies in Diversified's offering material and correspondence to investors. Havanich, DellaSala, and Welch also touted their affiliation with a charity organization in Diversified's offering materials but that charity never had any substantive charitable activities.

2. Starting in 2009, Diversified also hired unregistered sales agents to sell Diversified's bonds paying them commissions of 5% or 10% of the investor proceeds. Diversified and DellaSala employed the unregistered sales agents to raise money for Diversified even after receiving an email and other correspondence from Diversified's outside counsel detailing the limits on Diversified's use of unregistered sales agents. Diversified's top grossing independent sales agents were (1) Scurlock and his state registered investment advisory firm RTAG, (2) Carrio, Karasik, and their limited liability partnership CKA, and (3) Salovay. Collectively, they earned approximately $985,000 in transaction-based compensation in connection with their sales activities.

D. OFFER AND SALE OF UNREGISTERED SECURITIES

1. Beginning in 2006 and continuing through approximately 2008, Diversified submitted to potential investors one or more versions of a private placement memoranda ("PPM"), offering to sell Diversified common stock at per share prices ranging from 20 cents to $1.55 (the "Stock Offerings").

2. As a result of the Stock Offerings, Diversified raised approximately $910,304 from 160 investors both inside and outside the State of Florida.

3. No registration statement was filed or in effect with the Commission pursuant to the Securities Act with respect to the Stock Offerings.

4. No exemption from registration existed with respect to the Stock Offerings.

5. Between 2006 and 2008, there was no period of six months or more in which there was no offer or sale of Diversified's stock.

6. Beginning in approximately 2009 and continuing through 2012, Diversified submitted to potential investors various versions of a brochure, PPM, and business plan as part of offers to sell Diversified bonds with maturities between 12 and 24 months and paying annual interest rates between 8% and 10.25% (the "Bond Offerings"). Some of the bonds included an option to purchase Diversified common stock.

7. As a result of the Bond Offerings, Diversified raised approximately $16.5 million from 280 investors both inside and outside the State of Florida.

8. No registration statement was filed or in effect with the Commission pursuant to the Securities Act with respect to the Bond Offerings.

9. No exemption from registration existed with respect to the Bond Offerings.

10. Between 2009 and 2012, there was no period of six months or more in which there was no offer or sale of Diversified's bonds.

11. DellaSala, Havanich, and Welch participated in the Stock Offerings and the Bond Offerings by undertaking the offerings, by drafting and reviewing the brochures and business plans, reviewing and approving the PPMs, engaging sales agents to sell the bonds, facilitating Diversified's website, participating in presentations to potential investors, and soliciting potential investors for at least one stock offering using "lead lists." In addition, Havanich and DellaSala touted Diversified's securities on radio broadcasts, where Havanich appeared under his own name and DellaSala appeared under the alias "Jim Clark."

E. DIVERSIFIED AND DELLASALA'S USE OF UNREGISTERED SALES AGENTS

1. Starting in April 2009, Diversified had a formal contract, titled Finder's Fee Agreement ("Finders agreement") that it used to employ unregistered sales agents to act as commissioned sales agents.

2. The unregistered sales agents solicited investors and received a commission of either 5% or 10% from Diversified based on the amount invested.

3. Diversified participated in the unregistered sales agents' solicitation of investment in Diversified bonds by entering into written agreements with the unregistered sales agents, paying them a commission, and supplying them with brochures, PPMs, and business plans relating to Diversified bonds. DellaSala participated in the unregistered sales agents' solicitation of investment in Diversified bonds by paying them commissions in his role as a principal of Diversified.

4. In connection with their efforts to obtain purchasers for Diversified bonds, the unregistered sales agents used the mails or means or instrumentality of interstate commerce.

5. The unregistered sales agents were either not associated with any registered brokers or dealers or were engaged in sales activities that occurred outside and without the knowledge of the broker-dealers with which they were associated.

F. THE UNREGISTERED SALES AGENTS' INVOLVEMENT IN THE SALE OF DIVERSIFIED'S BONDS

1. Scurlock and RTAG

a. Scurlock entered into a Finders agreement with Diversified in December 2009. That agreement stated Scurlock would be paid a 5% commission for each investor that purchased Diversified's bonds although in practice he was actually paid a 10% commission.

b. While RTAG did not enter into a Finders agreement with Diversified, starting in February 2012, Diversified paid commissions to RTAG instead of directly to Scurlock.

c. Between January 2010 and March 2012, Scurlock recommended Diversified's bonds to RTAG's clients and other investors, provided and discussed offering materials with prospective investors, highlighted the risks associated with the Diversified investment to prospective investors, assisted prospective investors with completing paperwork necessary for an investment in Diversified bonds, fielded investor inquiries, and handled investor funds.

d. Scurlock and RTAG collectively received approximately $448,000 in transaction-based compensation for selling Diversified bonds to approximately 50 investors while not registered as a broker-dealer or associated with a registered broker-dealer.

2. Carrio, Karasik, and CKA

a. In November 2009, Carrio entered into a Finders agreement with Diversified that paid him a 10% commission for each investor that purchased Diversified's bonds.

b. While Karasik and CKA did not enter into Finders agreements with Diversified, starting in December 2010, Carrio and CKA began equally sharing Diversified commissions. Karasik received either all or a supermajority of the Diversified commissions paid to CKA as some of the commissions were used to pay CKA expenses.

c. Between December 2009 and March 2012 Carrio, Karasik, and CKA recommended the bonds to CKA clients, provided prospective investors with offering documents, discussed the returns of the bond offerings with prospective investors, weighed in on the merits of the bond investment, provided and directed prospective investors to complete the paperwork necessary for an investment in the bonds, and, as to Karasik and CKA, handled investor funds.

d. Carrio, Karasik, and CKA collectively received approximately $434,974 in transaction-based compensation for selling Diversified's bonds to approximately 40 investors.

e. Between December 2009 and March 2012, Carrio and CKA were not registered as broker-dealers or associated with a registered broker-dealer.

f. Between December 2010 and March 2012, Karasik's activities occurred outside and without the knowledge of the broker-dealers with which he was associated during the relevant time.

3. Salovay

a. Salovay entered into a Finders agreement with Diversified in July 2009. That agreement provided that Salovay would be paid a 10% commission for each investor that purchased Diversified bonds.

b. Between August 2009 and March 2012, Salovay recommended Diversified's bonds to his insurance clients, provided and discussed offering materials with prospective investors, highlighted the risks associated with the Diversified investment to prospective investors, assisted prospective investors with completing paperwork necessary for an investment in the bonds, fielded investor inquiries, and handled investor funds.

c. Salovay received approximately $101,790 in transaction-based compensation for selling Diversified's bonds to approximately 20 investors while not registered as a broker-dealer or associated with a registered broker-dealer.

G. MISREPRESENTATIONS AND OMISSIONS TO INVESTORS

During the course of the Bond Offerings, Diversified, Havanich, DellaSala, and Welch made numerous false and misleading statements and omissions, many of which are described below. At the time these statements and omissions were made, Diversified. Havanich, DellaSala, and Welch either knew, or should have known, or were severely reckless in not knowing their false and misleading nature.

1. Misrepresentations and Omissions Concerning Diversified's Financial Performance

a. The PPMs Respondents distributed beginning in 2009 and continuing through 2010 list "Operating Deficits" as one of several risk factors, stating: "The expenses of operating the Company may exceed its income, thereby requiring that the difference be paid out of the Company's capital, reducing the Company's investments and potential for profitability." Diversified omitted disclosures regarding Diversified's current or past profitability, stating only that "[a]dditional financial information is available on a confidential basis upon request." In fact, Diversified's incurring of losses was not a mere contingency. To the contrary, Diversified had suffered steadily rising losses from its inception, as described below:

YEAR	NET INCOME (LOSS)
2006	(31,200)
2007	(257,975)
2008	(564,347))
2009	(672,749)
2010	(1,114,901)

b. While Diversified's October 2011 PPM disclosed that Diversified had recently sustained losses, omitted the five-year history of losses.

c. In addition, Diversified's brochures paint a rosy picture of the company, claiming consistently over a three-year period of deepening insolvency that its bonds would produce "reliable monthly cash flow," were backed by "continually growing" assets, and were "[s]uperior to traditional fixed income instruments," while omitting that Diversified's survival depended upon its ability to borrow greater and greater sums.

d. In a brochure distributed in 2009 to prospective bond purchasers:

i. Diversified claimed one of Diversified's "Revenue Sources" was a "Hedge Account (for asset protection)," which earned an average monthly return on investment of 14.73%.

ii. Diversified represented that as of June 2009, Diversified had $2,126,269 in "Oil and Gas Assets," and that its "Asset Allocation" was 39% "Oil and Gas Acquisition" and 61% "Hedging Portfolio," implying that its Hedging Portfolio was worth $3,325,703.

iii. Diversified presented a bar chart comparing the three year returns of the "Trading Strategy History" with the returns on the "S&P." According to the chart, the trading strategy returned 82.70% in 2006, 138.70% in 2007, and 29.4% in 2008, for a three year average of 83.60%.

e. In brochures distributed in 2010, Diversified included a chart showing Diversified's "4 YR Average Strategy History" producing an average annual return of 90.9%.

f. In brochures distributed in 2010 and 2011, Diversified included a chart showing Diversified's "5 YR Average Strategy History" producing an average annual return of 79.4%

g. As Diversified, Havanich, DellaSala, and Welch knew, the representations in the brochures distributed in 2009 and 2010 were false and misleading as to material matters. In fact, in 2006 and 2007, Diversified had no hedging assets and had engaged in no commodities trading. In 2008, Diversified never had more than $6500 in hedging assets and Diversified's portfolio had an annual return of -95%. During June 2009, Diversified had far less than $3,325,703 in its hedging portfolio—during this period the value of the Diversified portfolio ranged from $38,000 to $75,000.

h. On March 30, 2010, Welch signed and sent to at least 9 individuals in Pennsylvania who had bought Diversified bonds a letter stating: "Due to the tremendous demand for [Diversified] Bonds, and the favorable financial position in which the company finds itself, management has decided to 'call' the existing bonds and is providing you a complete repayment" of principal and interest. This statement was false and misleading:

i. as of March 30, 2010, Diversified was not in a "favorable" financial condition but had been suffering significant and increasing losses since its inception;

ii. Diversified was not calling all of its bonds, as the letter implied, but rather was only calling bonds sold to some Pennsylvania investors; and

iii. Diversified's motivation for calling the bonds was not related to the demand for Diversified's bonds or Diversified's financial condition; rather, Diversified called the bonds because Pennsylvania regulatory authorities had raised questions regarding the legality of Diversified's sale of bonds to Pennsylvania residents.

i. Within approximately one month, several of the Pennsylvania investors reinvested their returned capital and some later invested additional funds.

2. <u>Misrepresentations Concerning Diversified's Use of Industry Experts and Technologies</u>

a. In business plans distributed to prospective investors between 2006 and 2011, Diversified stated, "Diversified will from time to time retain the advice and recommendation of experts based on the prospects we are looking at. … [T]he company will look to hire the best qualified individuals to evaluate each new prospect before we make an investment."

b. In business plans distributed to prospective investors between at least 2009 and 2011, Diversified stated, "[t]he key is working with *our geologists* and industry partners to find the best prospects that meet the companies risk to reward ratio." (emphasis added).

c. Diversified's website stated that its business strategy includes, among other things, acquiring "proven producing properties which meet the standards of management and *our* independent reservoir engineering firm." (emphasis added).

d. In several 2009 and 2010 versions of Diversified's investor power point presentations, shown at investor summits in various cities and led by Havanich, DellaSala, and Welch, Diversified included the names of an independent geologist and a reservoir engineering firm as part of its "independent team."

e. In a business plan provided to a mid-2009 investor, Diversified stated, "[w]e utilize advanced 3-D seismic imaging, drilling and completion technologies to systematically evaluate domestic onshore oil and natural gas reserves." Later Diversified business plans utilized similar language until late 2010 when the language was ultimately changed to read, "...Diversified Energy Group focuses its acquisition and development activities in provinces where we believe technology and the knowledge of our technical staff can effectively maximize return and reduce risk...."

f. Diversified stated in each of its marketing brochures that it had "[a]n Experienced Location and Acquisition Team boasting a proven track record with such companies as Chesapeake Energy, Marathon Oil, Union Pacific, Hess and Torch Energy, to name a few."

g. The foregoing statements were false and misleading. In fact:

i. Diversified did not hire geologists or a reservoir engineering firm as represented to evaluate the oil and gas wells in which it invested. Diversified made at least 93 separate investments in at least 44 oil and gas prospects between 2006 and 2011, the majority of which were in producing oil and gas wells. While Diversified did retain a geologist in early 2007, that geologist only provided Diversified with 15 reports related to *non-producing* oil and gas prospects and it did not retain an independent reservoir engineering firm in connection with any of its investments;

ii. Diversified never had 3-D seismic imaging, drilling and completion technologies;

iii. Diversified did not have a technical staff; and,

iv. DellaSala, Havanich, and Welch were the sole members of Diversified's "location and acquisition team" and they had never worked with any of the major energy companies listed in the brochures.

H. HAVANICH, DELLASLA, AND WELCH TOUTED THEIR AFFILIATION WITH ST. VINCENT

1. In September 2006, shortly before the start of Diversified's capital raising activities, Havanich and DellaSala created St. Vincent. St. Vincent has no relationship to the St. Vincent de Paul Catholic voluntary organization.

2. In Diversified's business plans, Diversified described St. Vincent as "a non-profit corporation to benefit children in need around the world," and described DellaSala and Havanich as officers and directors of St. Vincent, and Welch as member of St. Vincent's board.

3. St. Vincent never raised any money for children or had any substantive charitable activities.

I. VIOLATIONS

1. As a result of the conduct described above, Havanich, DellaSala, and Welch violated Sections 5(a) and (c) of the Securities Act, which makes it unlawful for any person, directly or indirectly, to sell or to offer to sell a security for which a registration statement is not filed or not in effect or there is not an applicable exemption from registration.

2. As a result of the conduct described above, Havanich and DellaSala violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, or, in the alternative, as to Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder, caused Diversified's violations of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

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

4. As a result of the conduct described above, Welch caused Diversified's violations of Section 17(a)(2) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

5. As a result of the conduct described above, Scurlock, RTAG, Carrio, Karasik, CKA, and Salovay willfully violated Section 15(a) of the Exchange Act, which makes it unlawful for any broker or dealer to effect and transactions in, or to induce or attempt to induce the purchase or sale of, any security, unless such broker or dealer is registered or associated with a registered broker-dealer.

6. As a result of the conduct described above DellaSala caused the unregistered sales agents' violations of Section 15(a) of the Exchange Act, which makes it unlawful for any broker or dealer to effect and transactions in, or to induce or attempt to induce the purchase or sale of, any security, unless such broker or dealer is registered or associated with a registered broker-dealer.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Scurlock, RTAG, Carrio, Karasik, CKA, and Salovay pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

C. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, DellaSala should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5 and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, whether DellaSala should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act and Section 21B(a) of the Exchange Act, and whether DellaSala should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act;

D. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Havanich and Welch should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5 and 17(a) of the Securities Act, Sections 10(b) of the Exchange Act and Rule 10b-5 thereunder, whether Havanich and Welch should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act and Section 21B(a) of the Exchange Act, and whether Havanich and Welch should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act;

E. Whether, pursuant to Section 21C of the Exchange Act, Scurlock, RTAG, Carrio, Karasik, CKA, and Salovay should be ordered to cease and desist from committing or causing violations of and any future violations of Section 15(a) of the Exchange Act, whether Scurlock, RTAG, Carrio, Karasik, CKA, and Salovay should be ordered to pay a civil penalty pursuant to Section 21B(a) of the Exchange Act, and whether Scurlock, RTAG, Carrio, Karasik, CKA, and Salovay should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act;

F. What, if any, remedial action is appropriate in the public interest against Scurlock and Karasik pursuant to Section 203(f) of the Advisers Act;

G. What, if any, remedial action is appropriate in the public interest against RTAG pursuant to Section 203(e) of the Advisers Act.

IV.

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

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

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

This Order shall be served forthwith upon Respondents as provided for in the Commission's Rules of Practice.

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.

Brent J. Fields
Secretary

Jill M. Peterson

By: 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. 74121 / January 23, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16355

In the Matter of **MICHAEL T. LOMBARDO, JR.,** **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 (the "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 Michael T. Lombardo, Jr. ("Lombardo" 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 Sections III.1., III.2., and III.3. below, and 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. Lombardo worked as a registered representative in the Westport, Connecticut office of David Lerner Associates, Inc. ("David Lerner") from September 2002 to March 2014. David Lerner, incorporated in New York in 1975, is a broker-dealer that has been registered with the Commission since October 22, 1976.

2. On September 11, 2014, Lombardo pled guilty in the United States District Court for the District of Connecticut to one count of violating Title 18 U.S. Code Section 1343 (wire fraud) in a criminal action entitled *United States v. Lombardo*, Case No. 3:14-cr-00189-AVC-1.

3. In connection with his guilty plea, Lombardo admitted, inter alia, that he defrauded more than twenty clients of David Lerner by diverting a total of over $190,000.00 from their individual accounts for his personal use. Lombardo admitted that, as part of this scheme, he submitted fraudulent requests to disburse a portion of the retirement account of a client of David Lerner. He admitted that he requested that disbursement checks be sent from the client's account to him at David Lerner's Westport, CT office, forged the client's signature on the back of the checks, and then caused the checks to be deposited into his personal bank account where he would subsequently use the funds for his personal benefit.

IV.

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

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

Brent J. Fields
Secretary

Jill M. Peterson
By: 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. 74124 / January 23, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4006 / January 23, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16359

In the Matter of **Glen Allan Galemmo,** **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 Glen Allan Galemmo ("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. Galemmo is the managing partner of Queen City Advisors, LLC, an unregistered investment adviser located in Cincinnati, Ohio. Since September 2000, Queen City Advisors has acted as the manager of Queen City Investment Fund II, LLC, a hedge fund controlled by Galemmo. From March 2002 until September 2012, Galemmo was a registered representative for three different brokerage firms located in New York and New Jersey. Galemmo, 49 years old, is a resident of Simpsonville, South Carolina.

2. On December 17, 2013, Galemmo pled guilty to one count of wire fraud in violation of Title 18 United States Code, Section 1343 and one count of money laundering in violation of Title 18 United States Code, Section 1956 before the United States District Court for the Southern District of Ohio, in United States v. Glen Galemmo, Case No. 1:13-CR-141.

3. The counts to which Galemmo pled guilty alleged, inter alia, that Galemmo devised a scheme to defraud in order to obtain money and property by means of false and fraudulent pretenses, representations and promises, that the scheme included a material misrepresentation or concealment of a material fact, that Galemmo had the intent to defraud, and that Galemmo used or caused another to use wire, radio or television communications in interstate commerce in furtherance of the scheme. Specifically, Galemmo stipulated that he perpetrated a scheme to defraud investors by soliciting millions of dollars under false pretenses, failing to invest investor's funds as promised, and misappropriating and converting investors' funds to Galemmo's own benefit.

IV.

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

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

Any reapplication for association by 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.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74138 / January 26, 2015

Admin. Proc. File No. 3-16190

In the Matter of the Application of

Marcos A. Santana
New York, NY 10034

for Review of Disciplinary Action Taken by FINRA

ORDER GRANTING MOTION TO DISMISS APPLICATION FOR REVIEW

Marcos A. Santana, formerly a registered representative associated with J.P. Morgan Securities LLC ("J.P. Morgan" or the "Firm"), seeks review of a Financial Industry Regulatory Authority ("FINRA") disciplinary action. FINRA barred Santana from associating with any FINRA member in any capacity, effective September 2, 2014, because he failed to respond to three requests for information issued pursuant to FINRA Rule 8210.[1] On October 20, 2014, FINRA filed a motion to dismiss Santana's application for review, arguing that Santana failed to exhaust his administrative remedies. Santana did not respond to the motion. For the reasons set forth below, we have determined to grant FINRA's motion and dismiss the appeal.

1 FINRA Rule 8210(a)(1) states, in relevant part, that FINRA staff has the right to "require a member, person associated with a member, or person subject to the Association's jurisdiction to provide information orally, in writing, or electronically . . . with respect to any matter involved in the investigation."

I. Background

A. Santana failed to respond to three FINRA Rule 8210 requests for information.

Santana was associated with J.P. Morgan from October 1, 2012 until November 15, 2013. FINRA opened an inquiry and requested information from Santana pursuant to FINRA Rule 8210 after J.P. Morgan filed a Uniform Termination Notice for Securities Industry Registration on Form U5,[2] reporting that it terminated Santana for "access[ing] bank customer information without a legitimate business purpose and fail[ing] to protect customer information in an alleged attempt to commit fraud."

On December 23, 2013, FINRA sent the first request for information to Santana pursuant to Rule 8210, requesting among other things that he provide a signed statement responding to the allegations in the Form U5 that he accessed bank customer information without a legitimate business purpose and specifically addressing whether he had "ever owned a credit card 'skimming device.'" It also requested copies of all correspondence and memoranda referring or relating to the matter, and information about other complaints, if any, during his employment at the Firm. FINRA set a January 6, 2014 deadline for responding and reminded Santana of his obligation under Rule 8210 to respond "fully, promptly, and without qualification." It notified Santana that "any failure on your part to satisfy these obligations could expose you to sanctions, including a permanent bar from the securities industry."

FINRA sent Santana a second Rule 8210 request on January 7, 2014, asking for the same information as its earlier letter. This second request set a response deadline of January 21, 2014 and warned Santana that failure to comply could subject him to disciplinary action.

FINRA sent Santana a third Rule 8210 request on January 22, 2014, asking for the same information as the prior two requests. This third request set a response deadline of February 5, 2014 and once again reminded Santana that failure to comply could subject him to disciplinary action.

Santana failed to respond to these Rule 8210 requests. FINRA sent each request by both first-class and certified mail to Santana's address of record contained in the Central Registration Depository (the "CRD"), which Santana is required to keep current.[3] Claim notices for the first

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2 Broker-dealers, investment advisers, and issuers of securities must file a Form U5 with FINRA to terminate the registration of an individual associated with such broker-dealer, investment adviser, or issuer.

3 As part of the registration process, associated persons are required to sign and file with FINRA a Form U4, which obligates them to keep a current address on file with FINRA at all times. *Perpetual Sec., Inc.*, Securities Exchange Act Release No. 56613, 2007 WL 2892696, at *9 (Oct. 4, 2007); *Nazmi C. Hassanieh*, Exchange Act Release No. 35029, 52 SEC 87, 1994 WL 681723, at *3 (Nov. 30, 1994). A notice issued pursuant to Rule 8210 is deemed received by such person when mailed to the individual's last known CRD address. FINRA Rule 8210(d); *see also* NASD Notice to Members 97-31, 1997 WL 1909798, at *1-2 (May 1, 1997) (reminding

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two certified mailings were left at this address on December 26, 2013 and January 9, 2014, respectively, and delivery was confirmed for both by signed return receipt on January 15, 2014. None of the three first-class mailings were returned.

B. FINRA suspended and then barred Santana for his failure to respond.

After Santana failed to respond, FINRA's Department of Enforcement, in a May 27, 2014 letter, notified him that he would be suspended from associating with any FINRA member in any capacity on June 20, 2014.[4] The notice informed Santana that he could take corrective action to prevent the automatic suspension, request a hearing in response to the notice, or, if suspended, request termination of the suspension on the ground of full compliance. The notice warned Santana that if he failed to request termination of the suspension within three months, FINRA would automatically bar him from associating with any member firm in any capacity on September 2, 2014.[5] Santana never responded to the notice, nor did he answer the outstanding requests for information.

On June 20, 2014, FINRA sent Santana a letter informing him that, as of that date, he was suspended from associating with any FINRA member in any capacity.[6] That letter reminded Santana that an automatic bar would be imposed on September 2, 2014 if he did not request

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registered persons to keep a current mailing address with NASD "[f]or at least two years *after* an individual registration has been terminated by the filing of . . . [a] Form U5") (emphasis in original).

FINRA also sent the second and third Rule 8210 requests by first-class and certified mail to a Lawrence, New York address. Both of these certified mailings were returned unclaimed.

4 FINRA Rule 9552(a) states that if an associated person fails to provide the staff with requested information pursuant to FINRA rules, the association may provide written notice "specifying the nature of the failure and stating that a failure to take corrective action within 21 days after service of the notice will result in [a] suspension."

5 FINRA Rule 9552(f) permits a suspended individual to file a written request for termination of the suspension on the ground of full compliance with the notice of suspension. FINRA Rule 9552(h) provides that a suspended person who fails to request termination of the suspension within three months of issuance of the original notice of suspension will be barred automatically.

6 FINRA Rule 9552(b) provides for service of a notice of suspension in accordance with FINRA Rule 9134, which permits service by both mail and courier service at an individual's residential CRD address. FINRA Rule 9134(a) – (b)(1). FINRA served the May 27, 2014 and June 20, 2014 written notices on Santana by overnight courier service and first-class mail to the same CRD address it used in sending the earlier Rule 8210 requests. A June 18, 2014 Lexis public records search confirmed that Santana's CRD address was his then-current mailing address.

termination of the suspension within three months of the May 27, 2014 notice of suspension. FINRA did not receive a response.

Pursuant to FINRA Rule 9552(h), Santana was barred from association with any FINRA member in any capacity on September 2, 2014. On that same date, FINRA sent Santana written notice of the bar, which also informed him that any appeal to the Commission must be filed within thirty days of receipt of the notice.[7]

C. Santana appealed the bar.

Santana filed an application for review with the Commission on October 6, 2014. In his application, Santana claims that he attempted to respond to FINRA on August 15, 2014, but that FINRA never received his letter. Attached to his application are his response to the FINRA 8210 requests ("8210 Response") and a receipt purporting to show that the 8210 Response was scanned at a Staples Copy Center on August 15, 2014. In moving to dismiss Santana's application for review, FINRA argues that the relevant issue is not whether Santana failed to respond to the Rule 8210 requests, but rather whether Santana "forfeited his ability to challenge FINRA's actions before the Commission" because he failed to follow FINRA procedures for challenging his suspension.

II. Analysis

We find that Santana failed to exhaust his administrative remedies. We have emphasized that "[i]t is clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review."[8] On this basis, we consistently have held that "we will not consider an application for review if the applicant failed to exhaust FINRA's procedures for contesting the sanction at issue."[9] Holding otherwise would severely hinder the self-regulatory capabilities of the SROs

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7 FINRA sent the bar notice by certified and first-class mail to the same CRD address it used in sending the earlier notices. FINRA also sent the bar notice to a Lawrence, New York address that an August 27, 2014 Lexis public records listed as Santana's then-current mailing address.

8 *MFS Sec. Corp.*, Exchange Act Release No. 47626, 56 SEC 380, 2003 WL 1751581, at *5 & n.29 (Apr. 3, 2003) (citing *Royal Sec. Corp.*, Exchange Act Release No. 5171, 36 SEC 275, 1955 WL 43159, at *2 (May 20, 1955)), *aff'd*, 380 F.3d 611 (2d Cir. 2004).

9 *See, e.g.*, *Mark Steven Steckler*, Exchange Act Release No. 71391, 2014 WL 265812, at *2 (Jan. 24, 2014) (dismissing applicant's appeal for failure to exhaust administrative remedies where FINRA barred applicant under Rule 9552 for failing to respond to Rule 8210 information requests); *Norman Chen*, Exchange Act Release No. 65345, 2011 WL 4336720, at *2, *4 (Sept. 16, 2011) (same); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 WL 1840609, at *2-3 (May 6, 2010) (same); *Jeffrey A. King*, Exchange Act Release No. 52571, 2005 WL 2481485, at *2-3 (Oct. 7, 2005) (same); *see also MFS Sec.*, 2003 WL 1751581, at *5-6 (refusing

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and prevent the efficient resolution of disputes between SROs and their members.[10] As the Second Circuit has reasoned:

> Were SRO members, or former SRO members, free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised. Moreover, like other administrative exhaustion requirements, the SEC's promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review. It also provides SROs with the opportunity to correct their own errors prior to review by the Commission. The SEC's exhaustion requirement thus promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations.[11]

In this case, FINRA specified the procedural requirements for contesting the suspension and bar. It also explained the consequences for failing to follow the 8210 requirements. FINRA repeatedly reminded Santana that he was obligated to provide full, prompt, and unqualified responses to its 8210 requests and warned that any failure to satisfy these obligations could result in a permanent bar from the securities industry. FINRA then sent pre-suspension and suspension notices explaining that he would automatically be barred on September 2, 2014 if he did not timely request termination of his suspension based on full compliance with his 8210 obligations. The pre-suspension notice also explained the procedures for requesting termination, which included a requirement that Santana seek a FINRA hearing.

Santana failed to exhaust these FINRA requirements for challenging the suspension and bar. We find that he did not timely request termination of the suspension from FINRA based on full compliance. As we have explained, in order to request termination under FINRA Rule 9552(f) and ultimately to preserve the right to Commission review, a suspended individual is required to send a timely request to FINRA in the first instance.[12] In his application for review, Santana claims that he "signed, notarized and sent" the 8210 Response on August 15, 2014 and includes records purporting to support this claim. But even if we construe the 8210 Response as a request for termination, Santana acknowledges in his application that the letter was "never received" by FINRA, and further, the documents he attaches to his application fail to show that

(...continued)

to consider applicant's denial of access to services claim because applicant failed to exhaust New York Stock Exchange's procedures).

10 *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004).

11 *Id.*

12 *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *5 (Mar. 1, 2013).

he timely sent this request to FINRA. Rather than demonstrating that it was signed, notarized and sent to FINRA on August 15 as he claims, the 8210 Response is dated September 2, and was notarized on September 3—after Santana's bar was already effective.[13] Under these circumstances and given the well-established precedent discussed above, we see no basis for denying FINRA's motion to dismiss.

Accordingly, IT IS ORDERED that FINRA's motion to dismiss the application for review filed by Marcos A. Santana is GRANTED.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

13 We note that, even if Santana had sent the 8210 Response on August 15 as he claims, it does not appear to satisfy the procedural requirements for terminating a suspension, which include full compliance. Santana's 8210 Response did not fully answer the Rule 8210 requests. For instance, Santana failed to state whether he ever owned a credit card "skimming device," failed to provide any correspondence or memoranda referring or relating to the matter, and failed to state whether there were any complaints regarding his employment at the Firm. Nor does Santana provide any explanation, either in the 8210 Response or in his application for review, for his failure to respond in a timely manner to the December 23, 2013, January 7, 2014, or January 22, 2014 Rule 8210 requests or to the May 27, 2014 pre-suspension notice.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9710 / January 26, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74139 / January 26, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4007 / January 26, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31429 / January 26, 2015

Admin. Proc. File No. 3-15514

In the Matter of DONALD J. ANTHONY, JR., FRANK H. CHIAPPOINE, RICHARD D. FELDMANN, WILLIAM P. GAMELLO, ANDREW G. GUZZETTI, WILLIAM F. LEX, THOMAS E. LIVINGSTON, BRIAN T. MAYER, PHILIP S. RABINOVICH, and RYAN C. ROGERS	ORDER GRANTING SECOND MOTION FOR EXTENSION

Chief Administrative Law Judge Brenda P. Murray has moved, pursuant to Commission Rule of Practice 360(a)(3),[1] for an extension of thirty additional days to issue the initial decision in this proceeding.[2] As discussed below, we grant her motion.

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1 17 C.F.R. § 201.360(a)(3).

2 We previously granted an extension request in this proceeding. *Donald J. Anthony, Jr.*, Exchange Act Release No. 72788 (Aug. 7, 2014).

On September 23, 2013, we issued an Order Instituting Proceedings ("OIP") against ten persons associated with McGinn, Smith & Co., Inc. ("MS & Co." or the "Firm"), a former registered broker-dealer and investment adviser.[3] The OIP alleges, among other things, that nine of MS & Co.'s top-selling brokers ignored numerous red flags in selling millions of dollars of securities in private placement offerings created and controlled by the Firm's founders in violation of registration provisions.[4] It further alleges related violations of antifraud provisions[5] and supervisory failures.[6]

The OIP directed that an initial decision be issued within 300 days of the date of service of the OIP. On August 7, 2014, we granted the Chief Administrative Law Judge's first motion requesting an extension of time until January 26, 2015 to file the initial decision based in part on the length and complexity of the proceeding.[7] On December 16, 2014, Chief Judge Murray requested a second extension based on timing conflicts with initial decision deadlines for other pending complex matters in the Office of Administrative Law Judges.[8]

We adopted Rules of Practice 360(a)(2) and 360(a)(3) to enhance the timely and efficient adjudication and disposition of Commission administrative proceedings by setting deadlines for issuance of initial decisions.[9] The rules further provide for extensions under certain circumstances, if supported by a motion from the Chief Administrative Law Judge and we determine, as in this case, that "additional time is necessary or appropriate in the public interest."[10]

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3 *Donald J. Anthony, Jr.*, Securities Exchange Act Release No. 70473, 2013 WL 5306694 (Sept. 23, 2013).

4 Sections 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a), 77e(c).

5 Securities Act Section 17(a), 15 U.S.C. § 77q(a); Securities Exchange Act of 1934 Section 10(b), 15 U.S.C. § 78j(b) and Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5.

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

7 *See* note 2, *infra*.

8 Chief Judge Murray supports her request by stating "[i]t will be impossible to meet these other deadlines, keep up with normal case assignments, and meet the January 26, 2015, *Anthony* deadline."

9 *See Adopting Release*, Exchange Act Release No. 48018, 2003 WL 21354791, at *2 (June 11, 2003).

10 17 C.F.R. § 201.360(a)(3).

Accordingly, IT IS ORDERED that the deadline for filing the initial decision in this proceeding is extended to February 25, 2015.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski
By: Lynn M. Powalski
Deputy Secretary

Commissioner Gallagher
Not participating.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74137 / January 26, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16151

In the Matter of **STEPHEN STUART,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

On September 22, 2014, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Stephen Stuart ("Stuart" or "Respondent").

II.

In response to these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") 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, Respondent admits the Commission's jurisdiction over him and the subject matter of these proceedings, and consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Order") as set forth below.

III.

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

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

Summary

These proceedings arise out of a fraudulent scheme in which insiders of publicly-traded penny stock companies paid secret kickbacks to a purported corrupt hedge Fund Manager, who was in fact an undercover agent with the Federal Bureau of Investigation ("Fund Manager"), in exchange for the Fund Manager's purchase of restricted stock of the penny stock companies on behalf of his purported hedge fund ("the Fund"), which did not actually exist.

Respondent

1. Respondent, age 51, is a resident of Monrovia, Maryland. During the period June 29, 2011 through July 8, 2011, Respondent was a consultant to and shareholder of ComCam International, Inc. ("ComCam"). During that period, Respondent participated in an offering of ComCam stock, which is a penny stock. On October 24, 2013, Respondent pleaded guilty to one count of wire fraud and one count of mail fraud in *U.S. v. Stuart, et al.*, 11-CR-10416-DJC (D. Mass.). He was sentenced on February 12, 2014 to 16 months' probation, the first two months to be served in community confinement followed by home detention for a period of six months. He was also ordered to pay a fine of $2,000.

Other Relevant Entities and Individuals

2. ComCam International, Inc., a Delaware company with its principal place of business in West Chester, Pennsylvania, designs, manufactures, and sells video surveillance systems. ComCam's common stock is currently quoted on the OTCQB under the symbol "CMCJ." Its common stock was registered with the Commission under Section 12(g) of the Exchange Act, but the company filed a notice of termination of its registration on March 19, 2012. On December 1, 2011, the Commission, pursuant to Section 12(k) of the Exchange Act, suspended trading in the securities of ComCam for a period of ten business days.

3. Donald Gilbreath, age 58, is a resident of West Chester, Pennsylvania. During the period June 29, 2011 through July 8, 2011, Gilbreath was the Chairman and Chief Executive Officer of ComCam. On June 13, 2012, Gilbreath was charged by criminal information with one count of conspiracy to commit securities fraud and pleaded guilty to that charge on June 29, 2012 in *U.S. v. Donald Gilbreath*, 12-CR-10186 (D. Mass.). Gilbreath was sentenced on December 19, 2013 to 18 months' probation and was ordered to pay a fine of $2,000 and to forfeit $17,000.

Background

4. On or about June 29, 2011, Stuart and Gilbreath met with the Fund Manager (the "June 29 Meeting"). The Fund Manager explained to Stuart and Gilbreath that he was prepared to invest Fund monies of up to $5 million in ComCam stock, in exchange for a secret fifty percent kickback, thereby enabling the Fund Manager to keep half of the money he was supposedly investing on behalf of the Fund.

5. At the June 29 Meeting, the Fund Manager also explained the mechanics of the funding, informing Stuart and Gilbreath that, while the Fund Manager could commit to an investment of $5 million of the Fund's money, with $2.5 million being kicked back to the Fund Manager, the Fund Manager did not want to invest the entire amount at once. Therefore, the Fund Manager told Stuart and Gilbreath that he would invest the money over time in tranches, or installments, of increasing amounts.

6. At the June 29 Meeting, the Fund Manager further discussed with Stuart and Gilbreath the mechanics of how monies would be kicked back to the Fund Manager. The Fund Manager arranged with Stuart and Gilbreath that ComCam would execute a consulting agreement with a nominee consulting company that the Fund Manager purportedly controlled, but that the Fund Manager would not actually provide any consulting services. Stuart and Gilbreath were told that invoices would be issued by the Fund Manager's nominee company to ComCam in order to disguise the kickbacks.

7. At the June 29 Meeting, Stuart and Gilbreath agreed to the funding/kickback arrangement.

8. On various dates between June 30, 2011 and July 8, 2011, Gilbreath sent the Fund Manager documents related to the kickback transaction, including a consulting agreement between ComCam and the Fund Manager's nominee consulting company, stock purchase agreements between ComCam and the Fund, and a phony invoice for non-existent consulting services purportedly rendered by the Fund Manager's nominee company.

9. On or about July 5, 2011, in accordance with wiring instructions provided by Gilbreath, $34,000.20 was sent by wire transfer from a bank account maintained in Massachusetts, purportedly belonging to the Fund, to a ComCam corporate bank account outside of Massachusetts. This wire transfer represented the first tranche of funding to ComCam.

10. On or about July 6, 2011, Stuart and Gilbreath caused a total of $17,000 to be sent by wire transfer from a ComCam corporate bank account outside of Massachusetts to a Citizens Bank account held in the name of the Fund Manager's nominee company in Massachusetts. This wire transfer represented Gilbreath's and Stuart's kickback to the Fund Manager from the first tranche of funding to ComCam.

11. On or about July 8, 2011, Stuart and Gilbreath caused a stock certificate representing the purchase by the Fund of 65,385 ComCam shares to be sent to the Fund Manager.

12. As a result of the conduct described above, Stuart willfully violated Section 10(b) of the Exchange Act and Rule 10b-5(a) 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 and in the public interest to impose the sanctions agreed to in Respondent Stuart's Offer.

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

A. Respondent Stuart shall 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 Stuart be, and hereby is:

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

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74142; File Nos. SR-FICC-2014-810; SR-NSCC-2014-811; SR-DTC-2014-812)

January 27, 2015

Self-Regulatory Organizations; Fixed Income Clearing Corporation; National Securities Clearing Corporation; The Depository Trust Company; Notice of No Objection to Advance Notices, as Amended, to Amend and Restate the Third Amended and Restated Shareholders Agreement, Dated as of December 7, 2005

On November 5, 2014, Fixed Income Clearing Corporation ("FICC"), National Securities Clearing Corporation ("NSCC"), and The Depository Trust Company ("DTC," together with FICC and NSCC, "Clearing Agencies") filed with the Securities and Exchange Commission ("Commission") advance notices SR-FICC-2014-810, SR-NSCC-2014-811 and SR-DTC-2014-812 ("Advance Notices"), 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) under the Securities Exchange Act of 1934.[2] On November 17, 2014, the Clearing Agencies each filed Amendments No. 1 to the Advance Notices.[3] On November 17, 2014 FICC withdrew Amendment No. 1 and filed Amendment No. 2 to advance notice SR-FICC-2014-810.[4] The Advance Notices, as

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

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

3 NSCC and DTC filed Amendment Nos. 1 to provide additional description of the changes proposed in advance notices SR-NSCC-2014-811 and SR-DTC-2014-812, respectively.

4 FICC withdrew Amendment No. 1 to advance notice SR-FICC-2014-810 due to an error in filing the amendment. FICC filed Amendment No. 2 to advance notice SR-FICC-2014-810 in order to provide additional description of the changes proposed in the advance notice.

amended, were published for comment in the Federal Register on December 11, 2014.[5] On December 31, 2014, the Commission published notice of its extension of the review period for the Advance Notices.[6] The Commission did not receive any comments on the Advance Notices. This publication serves as notice of no objection to the Advance Notices, as amended.

I. Description of the Advance Notices

The Advance Notices are a proposal by the Clearing Agencies, which are wholly owned subsidiaries of the Depository Trust and Clearing Corporation ("DTCC"), to amend and restate their Third Amended and Restated Shareholders Agreement, dated as of December 7, 2005 ("Existing Shareholders Agreement")[7] — a single agreement covering all of the Clearing Agencies and their respective members and participants ("Members"). The Clearing Agencies state that the proposed revisions to the Existing Shareholders Agreement ("Revised Shareholders Agreement") are the product of a comprehensive review by DTCC of its ownership, governance, and capital structure, undertaken for the purposes of increasing the financial resources available to support the conduct of the businesses of the Clearing Agencies and enhancing regulatory risk management.

With the Advance Notices of the Revised Shareholders Agreement, the Clearing Agencies propose: (1) to issue new common stock of DTCC ("Common Shares"), which

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5 Release No. 34-73755 (Dec. 5, 2014), 79 FR 73665 (Dec. 11, 2014).

6 Release No. 34-73975 (Dec. 31, 2014), 80 FR 918 (Jan. 7, 2015).

7 When the changes proposed in the Advance Notices become effective, the title of the Existing Shareholders Agreement will become the "Fourth Amended and Restated Shareholders Agreement."

mandatory common shareholders ("Mandatory Shareholders")[8] will be required to purchase, upon approval by the DTCC Board of Directors ("Board") and two-thirds of Mandatory Shareholders; (2) to buyback such newly issued Common Shares from Mandatory Shareholders, at the Board's discretion and approval; (3) to modify the formula for allocating Common Shares among shareholders ("Common Shareholders"); (4) to modify the formula for pricing the Common Shares; (5) to remove restrictions on the frequency with which DTCC can reallocate Common Shares; and (6) make other conforming and technical changes. Details of these proposed changes are summarized below.

A. Capital Raise through the Sale of Newly Issued Common Shares to Mandatory Shareholders

Historically, the Clearing Agencies have operated on an at-cost or near-cost basis and rebated excess revenues to Members. Recently, however, the Clearing Agencies have experienced a greater need to increase capital to meet higher operating costs and, as systemically important financial market utilities ("SIFMUs"), to satisfy heightened risk-management requirements.

In order to raise capital for business purposes, the Revised Shareholders Agreement will enable DTCC to sell newly issued Common Shares to Mandatory Shareholders, who will be required to purchase such shares. The exercise of this new authority will require approval by the Board and two-thirds of the Mandatory

8 Pursuant to the Existing Shareholders Agreement and the rules of each of the Clearing Agencies, some Members, generally full-service Members, are required to own Common Shares (i.e., Mandatory Shareholders) while other Members, generally limited-service Members, are permitted but not required to own such shares ("Voluntary Shareholders"). Further, certain Members are not permitted to purchase and own Common Shares or become parties to the Existing Shareholders Agreement.

Shareholders. The proceeds of the sale of the new issuance will be provided by DTCC to the Clearing Agencies as working capital. Voluntary Shareholders will not be required or permitted to purchase newly issued Common Shares.

DTCC states that it has performed extensive analyses to determine these needs and has considered alternative means to address them. DTCC deemed an increase in fees impractical because it would not necessarily generate sufficient resources in a reasonable period and fees depend on transactional volumes, which may be volatile. DTCC also was concerned with the financial burden that significant fee increases could place on Members over an extended period.

B. Mandatory Repurchase of Newly Issued Common Shares from Mandatory Shareholders

To allow flexibility to return capital to Mandatory Shareholders if the Clearing Agencies have excess, the Revised Shareholders Agreement will provide a mechanism under which DTCC may repurchase Common Shares from Mandatory Shareholders, on a mandatory basis, in an aggregate amount up to the aggregate amount of all newly issued Common Shares. Exercise of this new authority will be at the discretion of the Board.[9]

C. Updates to the Common Share Allocation Formula

The formula used to periodically reallocate entitlements to purchase Common Shares ("Allocation Formula") is based on the historic development of DTCC.[10] The Allocation Formula provides that (i) 80% of the entitlement to purchase Common Shares is based on the amount of fees paid by a Member to the Clearing Agencies, and (ii) the

9 The directors of the boards of FICC, NSCC, and DTC are the same as the Board's directors.

10 See Release No. 34-73755 (Dec. 5, 2014), 79 FR 73665, 73667 (Dec. 11, 2014).

remaining 20% of the entitlement is based on the average market value of all securities credited to the DTC account of that Member ("Long Positions").

Today, all users of the Clearing Agencies pay fees to one or more of the Clearing Agencies based on usage of the services and facilities of the Clearing Agencies, including fees for Long Positions. Accordingly, DTCC has determined that it is no longer appropriate for the Allocation Formula to include both the market value of Long Positions and fees paid to DTC for such Long Positions. As such, the Revised Shareholders Agreement will update the Allocation Formula to eliminate the market value of Long Positions, so that the formula will be based solely on fees paid to the Clearing Agencies.

D. Amendments to the Common Share Price Formula

The price of Common Shares is used in connection with the purchase and sale of such shares among Common Shareholders in the periodic reallocation of Common Shares, as well as in connection with the transfer of the Common Shares of retiring or disqualified Common Shareholders.

Under the Existing Shareholders Agreement, the price of Common Shares is determined by a formula ("Pricing Formula") that excludes a portion of the retained earnings of the Clearing Agencies from DTCC's book value, which DTCC argues is a vestige of the historical development of DTCC.[11] Additionally, the basis of the Pricing Formula is the full book value of DTCC, which includes intangibles such as goodwill.[12]

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11 See id.

12 Intangible items of book value used in this calculation are shown on DTCC's Consolidated Statement of Financial Condition. DTCC Financial Statements, available at http://dtcc.com/legal/financial-statements.aspx.

To make the price of the Common Shares more closely reflect the liquidation value of DTCC, the Revised Shareholders Agreement will make two amendments to the Pricing Formula. First, the formula will be updated to no longer exclude a portion of the retained earnings of the Clearing Agencies from DTCC's book value. Second, the formula will be updated to reflect the tangible book value of DTCC and the liquidation preference of the preferred stock of DTCC.

E. Amendments to the Frequency of Reallocating Common Shares

The reallocation of Common Shares among Common Shareholders is a means of aligning the entitlement to own such shares with the use of the Clearing Agencies by the Common Shareholders. The Existing Shareholders Agreement limits reallocations to no more than once a year, but no less than every three years.

To allow more frequent reallocations, the Revised Shareholders Agreement will permit reallocations to occur more than once a year, as determined by the Board, but still no less than once every three years.

F. Other Conforming and Technical Amendments to the Existing Shareholders Agreement

The Revised Shareholders Agreement will also include certain other technical amendments, including conforming and clarifying changes. For example, the Revised Shareholders Agreement will: (i) amend the definition of "Common Share Amount" to clarify that the calculation does not include any fees that are pass-through fees (i.e., amounts collected by one of the Clearing Agencies for the account of a third party and paid by that Clearing Agency to a third party); (ii) amend the definition of "Settlement" to move the time at which settlement is effected from 5:00 p.m. New York City Time on the Settlement Date, as such terms are defined in the Existing Shareholders Agreement, to 4:00 p.m. New York City Time on the Settlement Date;[13] (iii) update the definition of "Deliver" to include more convenient and contemporary methods of delivering notices, (e.g., by electronic mail), as appropriate; and (iv) include Members of FICC's Mortgage-Backed Security Division ("MBSD"), other than Cash-Settling Bank Members (as such term is defined in the rules of MBSD),[14] within the definition of "Mandatory Purchaser Participants."

The Revised Shareholders Agreement also will amend the definition of "Qualified Person," which sets forth the types of entities that may hold Common Shares, to exclude: (i) Federal Reserve Banks because DTCC never intended that such governmental authorities should be required to own shares in DTCC, notwithstanding that they may use certain services of the Clearing Agencies; (ii) central counterparties or central securities depositories because these link arrangements are for the purpose of extending clearing agency services across borders, or among closely related activities and products, but not for ownership purposes; and (iii) any other financial market infrastructure or utility that the Board determines shall not be a Qualified Person.

Finally, the Revised Shareholders Agreement will provide that the pro-rata re-distribution of the Common Shares of a Common Shareholder that is no longer a Qualified Person to all other Common Shareholders takes place at the beginning of the

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13 This is an operational change in order to align Common Share settlement times with the routine times of end of day settlement for each of the Clearing Agencies.

14 MBSD Rules & Procedures, available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_mbsd_rules.pdf. As a result of FICC becoming a central counterparty for transactions processed and cleared at MBSD, Release No. 34-66550 (Mar. 9, 2012), 77 FR 15155 (Mar. 14, 2012), the general rule that full-service Members, including users of guaranteed services, of one of the Clearing Agencies are Mandatory Purchaser Participants applies to Members of MBSD.

following calendar year, rather than contemporaneously with such Common Shareholder ceasing to be a Qualified Person. This change reflects current practice and is more administratively practical.

II. Discussion and Commission Findings

Although the Clearing Supervision Act does not specify a standard of review for an advance notice, the Commission believes that the stated purpose of the Clearing Supervision Act is instructive.[15] 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 SIFMUs and strengthening the liquidity of SIFMUs.[16]

Section 805(a)(2) of the Clearing Supervision Act[17] 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. Section 805(b) of the Clearing Supervision Act[18] 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

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15 See 12 U.S.C. 5461(b).

16 Id.

17 12 U.S.C. 5464(a)(2).

18 12 U.S.C. 5464(b).

- support the stability of the broader financial system.

The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act[19] ("Clearing Agency Standards").[20] 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. As such, it is appropriate for the Commission to review advance notices against these Clearing Agency Standards and the objectives and principles of these risk management standards as described in Section 805(b) of the Clearing Supervision Act.[21] The Commission believes that the proposed changes to the Existing Shareholders Agreement promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system, and, thus, align with the stated purpose of the Clearing Supervision Act.

First, allowing DTCC to issue new Common Shares to Mandatory Shareholders for the purpose of infusing the Clearing Agencies with additional working capital will enable the Clearing Agencies, which are designated SIFMUs, to maintain operations for a longer period during times of financial stress. As such, the proposed change promotes the safety and soundness of the Clearing Agencies, reduces systemic risks presented by the Clearing Agencies, and supports the stability of the broader financial system.

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19 12 U.S.C. 5464(a)(2).

20 Rule 17Ad-22, 17 CFR 240.17Ad-22. Release No. 34-68080 (Oct. 22, 2012), 77 FR 66220 (Nov. 2, 2012).

21 12 U.S.C. 5464(b).

Second, allowing DTCC to buy back newly issued Common Shares from Mandatory Shareholders will enable DTCC to return capital to those Members, most of which play substantial roles in the financial system, when the Clearing Agencies have excess capital. Therefore, the proposed change further supports the stability of the broader financial system by enabling capital to move from the Clearing Agencies back to Members when appropriate.

Third, the proposal to update the Allocation Formula to no longer account for securities held at DTC will more closely align the allocation of Common Shares with Common Shareholder's use of the Clearing Agencies. Therefore, ownership of the Clearing Agencies will more accurately reflect usage of the Clearing Agencies, which should further align risks and promote robust management at the Clearing Agencies.

Fourth, the proposal to update the Pricing Formula to (i) no longer exclude a portion of the retained earnings of the Clearing Agencies, and (ii) change the basis of the formula from DTCC's book value to its tangible book value will more accurately reflect the actual liquidation value of DTCC. By more accurately reflecting the liquidation value of DTCC, shareholders can more accurately account for the value of their shares and payments that they may make or receive in a future reallocation of Common Shares. Thus, the Mandatory and Voluntary Shareholders can better assess their financial position, promoting stability of the broader financial system.

Fifth, the proposal to allow for more than one reallocation of Common Shares among Common Shareholders per year will enable DTCC to contemporaneously align ownership of Common Shares with Common Shareholders' usage of the Clearing Agencies as needed. Similar to the proposed change to the Allocation Formula, discussed above, the ability to allocate Common Shares more often helps ensure that ownership of the Clearing Agencies more accurately reflects use of the Clearing Agencies, which should further promote robust risk management at the Clearing Agencies.

Sixth, the technical and conforming changes to the Shareholders Agreement will make the Shareholders Agreement more consistent, current, and clear, which promotes a more safe and sound execution of the agreement by DTCC and its applicable Members.

Conclusion

IT IS THEREFORE NOTICED, pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act,[22] that the Commission DOES NOT OBJECT to advance notices SR-FICC-2014-810, SR-NSCC-2014-811, and SR-DTC-2014-812, as amended, and that FICC, NSCC, and DTC be and hereby are AUTHORIZED to implement the changes contained in their respective advance notices as of the date of this notice.

By the Commission.

Brent J. Fields
Secretary

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4008 / January 27, 2015

Administrative Proc. File No. 3-15925

In the Matter of MICHAEL S. STEINBERG	ORDER POSTPONING BRIEFING SCHEDULE

Michael S. Steinberg, a former portfolio manager at Sigma Capital Management, LLC, a New York-based investment adviser, seeks a stay of the briefing schedule in this proceeding. Our rules do not provide for a stay in such circumstances, but they allow for a postponement. As explained below, we have determined that a postponement is appropriate under the circumstances presented in this case.

I.

On October 14, 2014, an administrative law judge issued an initial decision barring Steinberg from the securities industry.[1] The law judge's decision was based on Steinberg's criminal conviction in December 2013, following a jury trial in the United States District Court for the Southern District of New York, for insider trading.[2] Steinberg appealed his conviction to the United States Court of Appeals for the Second Circuit, which granted his unopposed motion to hold his criminal appeal in abeyance pending a decision in *United States v. Newman*[3] based on what he represented to the court to be substantial overlapping factual and legal issues. Our civil

[1] *Michael S. Steinberg*, Initial Decision Release No. 690, 2014 WL 5141532 (Oct. 14, 2014).

[2] *United States v. Steinberg*, No. 1:12-cr-121 (RJS) (S.D.N.Y. Dec. 18, 2013), *appeal filed*, No. 14-2141 (2d Cir. May 29, 2014). Steinberg was sentenced to a term of 42 months in prison, followed by three years of supervised release. He was also ordered to pay a $2 million fine and $365,142.30 in criminal forfeiture.

[3] 773 F.3d 438 (2d Cir. 2014). Although the Second Circuit lifted the stay of Steinberg's appeal on the same day that it issued its opinion in *Newman*, on December 19, 2014, Steinberg filed an unopposed motion requesting that the Second Circuit again hold his appeal in abeyance. On December 31, 2014, the Second Circuit granted the motion.

injunctive action against Steinberg in the Southern District of New York is based on the same facts alleged in the criminal case.[4] The civil action has also been stayed pending a final resolution in the *Newman* appeal.[5]

On November 26, 2014, we issued an order granting Steinberg's petition for review of the law judge's decision and setting forth a briefing schedule.[6] The time for filing briefs was subsequently extended.[7]

On December 10, 2014, the Second Circuit issued its decision in *Newman*. The Second Circuit held that "in order to sustain a conviction for insider trading, the Government must prove beyond a reasonable doubt that the tippee knew that an insider disclosed confidential information *and* that he did so in exchange for a personal benefit."[8] Finding that the district court's instruction to the jury was erroneous because it failed to accurately advise the jury of the law, the Second Circuit reversed the convictions of the defendants Todd Newman and Anthony Chiasson and remanded with instructions to dismiss the indictment as it pertains to them with prejudice.

Steinberg cites *Newman* in support of his stay request. He contends that, because the district court judge in his criminal case gave the same instruction to the jury that *Newman* held was erroneous, and because the facts concerning tipper benefit were "necessarily identical" both in his case and in *Newman*, Steinberg would be entitled to the same relief as the defendants in *Newman*. Specifically, Steinberg contends that unless the panel's decision in *Newman* is either vacated or modified, he will be entitled to reversal of his conviction and dismissal of the indictment with prejudice, thereby vitiating the basis for the bar imposed by the law judge. Accordingly, Steinberg requests that we "stay" the current briefing schedule until "(1) the United States Attorney's Office decides whether to petition for rehearing, rehearing en banc, and/or certiorari in *Newman* . . . and (2) any such petitions are finally decided." The Division of Enforcement consents to this request.

II.

Steinberg does not cite to a particular Rule of Practice in support of his stay request. Rule of Practice 401 governs our issuance of stays.[9] Rule 401(c) permits motions for stays by persons aggrieved by a Commission order "who would be entitled to review in a federal court of

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4 *SEC v. Steinberg*, No. 13 Civ. 2082 (SAS) (S.D.N.Y. Mar. 29, 2013).

5 *SEC v. Steinberg*, No. 13 Civ. 2082 (SAS) (S.D.N.Y. Dec. 22, 2014).

6 *Michael S. Steinberg*, Exchange Act Release No. 73700, 2014 WL 6680114 (Nov. 26, 2014).

7 *See Michael S. Steinberg*, Exchange Act Release No. 73915, 2014 WL 7271549 (Dec. 22, 2014). After issuance of this extension order, Steinberg requested a further extension. A second extension was granted. *Michael S. Steinberg*, Exchange Act Release No. 74014, 2015 WL 107083 (Jan. 8, 2015).

8 *Newman*, 733 F.3d at 442 (emphasis in original).

9 17 C.F.R. § 201.401.

appeals."[10] However, Rule 401(c) is inapplicable here because no such final, appealable order has been entered in this proceeding.[11]

Although Rule 401 is inapplicable, we will consider Steinberg's request under Rule of Practice 161, which authorizes us to order postponements for "good cause shown."[12] In light of the status of the *Newman* appeal and its likely impact on Steinberg's conviction, the Division's consent to Steinberg's request, and Steinberg's assurance that "[t]he parties will provide the Commission with written updates upon the disposition of these matters," we find that there exists "good cause" to postpone the briefing schedule in this proceeding until the *Newman* appeal is finally resolved. Postponement of the briefing schedule will not prejudice either party and will serve the public interest in administrative efficiency.

Accordingly, IT IS ORDERED that the Commission's November 26, 2014, briefing order and subsequent extension orders be, and they hereby are, postponed until the United States Attorney's Office decides whether to petition for rehearing, rehearing en banc, and/or certiorari, and any such petition is finally resolved.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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10 *Id.*, § 201.401(c).

11 *See Michael J. Markowski*, Order Denying Request for a Stay and Granting Extension of Time for Filing Briefs, Exchange Act Release No. 40748, 1998 WL 960587, at *2 (Dec. 4, 1998) (stating that "[n]either the initial decision of the law judge nor our order scheduling briefing in this proceeding is a Commission order entitling [respondent] to appellate review").

12 17 C.F.R. § 201.161(a). In determining whether to grant a postponement, we consider such factors as the length of the proceeding to date, the number of postponements previously granted, the stage of the proceeding at the time of the request for a postponement, and any other matters justice requires. *Id.* § 201.161(b)(1). Postponements may not exceed 21 days unless we find that a longer period is necessary. *Id.* § 201.161(c)(1). We "adhere to a policy of strongly disfavoring such requests except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case." *Id.* § 201.161(b)(1).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74153 / January 27, 2015

Admin. Proc. File No. 3-16036

In the Matter of

DRC VENTURES, INC.

ORDER DISMISSING PROCEEDING

On August 25, 2014, we instituted an administrative proceeding against DRC Ventures, Inc. and six other respondents under Section 12(j) of the Securities Exchange Act of 1934.[1] The Order Instituting Proceedings alleged that DRC had violated periodic reporting requirements and sought to determine, based on those allegations, whether it was "necessary and appropriate for the protection of investors to suspend . . . or revoke" the registration of DRC's securities.

On September 4, 2014, DRC filed a Form 15, seeking to terminate voluntarily the registration of its securities under Section 12(g) of the Exchange Act.[2] Under Exchange Act Rule 12g-4(a), an issuer's registration is terminated ninety days after the issuer files Form 15,[3] in this case, on December 3, 2014. The Division of Enforcement has now moved to dismiss the proceeding against DRC.[4]

1 15 U.S.C. § 78*l*(j). The remaining respondents defaulted, resulting in the revocation of the registration of their securities. *China Clean Energy Acquisition Corp.*, Initial Decision Release No. 684, 2014 SEC LEXIS 3624 (Oct. 1, 2014). *See also China Clean Energy Acquisition Corp.*, Exchange Act Release No. 73828, 2014 SEC LEXIS 4795 (Dec. 12, 2014) (giving notice that the initial decision of the law judge has become the final decision of the Commission with respect to respondents other than DRC).

2 *See* 17 C.F.R. § 240.12g-4(a) (providing for certification of termination of registration under Section 12(g), 15 U.S.C. § 78*l*(g)). DRC relied on Rule 12g-4(a)(1), which permits the termination of registration if the issuer certifies that the class of securities being deregistered is held of record by fewer than 300 persons. 17 C.F.R. § 240.12g-4(a)(1). In its Form 15, DRC certified that the approximate number of holders of record, as of September 4, 2014, was two.

3 17 C.F.R.§ 240.12g-4(a).

4 DRC has not responded to the Division's motion.

We have determined to grant the Division's motion. DRC no longer has a class of securities registered under Section 12 of the Exchange Act. Because revocation and suspension of registration are the only remedies available in a proceeding instituted under Section 12(j), we find it appropriate to dismiss this proceeding against DRC.[5]

IT IS therefore ORDERED that this proceeding is dismissed with respect to respondent DRC Ventures, Inc.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

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5 *See, e.g., Tapslide, Inc.,* Securities Exchange Act Release No. 67125, 2012 SEC LEXIS 1757 (June 5, 2012) (dismissing proceeding against respondent who no longer had securities registered under Exchange Act Section 12); *TelcoBlue, Inc.*, Exchange Act Release No. 58061, 2008 SEC LEXIS 1509 (June 30, 2008) (same).

Commissioner Aguilar
Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74154 / January 27, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-12628

In the Matter of **ZURICH CAPITAL MARKETS INC.,** **Respondent.**	**ORDER AUTHORIZING THE TRANSFER OF RESIDUAL FUNDS AND ANY FUTURE FUNDS RETURNED TO THE FAIR FUND TO THE U.S. TREASURY, DISCHARGING THE FUND ADMINISTRATOR AND TERMINATING THE FAIR FUND**

On May 7, 2007, the Commission issued an order instituting and simultaneously settling public administrative and cease-and-desist proceedings (the "Order") against Zurich Capital Markets Inc. ("Respondent") in this matter.[1] In the Order, the Commission found that Respondent, an entity that provided financing, aided and abetted four hedge funds that were carrying out schemes to defraud mutual funds that prohibited market timing. Respondent came to learn that the hedge funds were utilizing deceptive practices to market time mutual funds, and nonetheless Respondent provided financing to them and took administrative steps that substantially assisted them from 1999 through 2003. The Order established a Fair Fund, comprised of $16.8 million in disgorgement, prejudgment interest, and penalty paid by Respondent, and provided that the Fair Fund was to be distributed pursuant to a plan developed by Respondent, in consultation with the staff of the Commission and with the assistance of an expert consultant. On June 3, 2010, the Commission issued an order approving the distribution plan.[2]

The Plan of Distribution ("Plan") provides that the Fair Fund be distributed by the Fund Administrator to affected mutual funds, according to the methodology set forth in the Plan. On

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[1] *See* Exchange Act Release No. 55711 (May 7, 2007).
[2] *See* Exchange Act Release No. 62217 (June 3, 2010).

December 2, 2010, the Commission entered an order directing disbursement of $17,264,322.93,[3] and on December 5, 2010 this amount was distributed to the affected mutual funds. All distributions have been made to and accepted by the mutual funds, and no amounts were returned to the Fair Fund.

The Plan provides that the Fair Fund shall be eligible for termination, and the Fund Administrator shall be discharged, after all of the following have occurred: (1) a final accounting has been submitted by the Fund Administrator for approval of, and has been approved by, the Commission; (2) all taxes, fees and expenses have been paid; and (3) any amount remaining in the Fair Fund has been received by the Commission. A final accounting, which was submitted to the Commission for approval as required by Rule 1105(f) of the Commission's Rules on Fair Fund and Disgorgement Plans and as set forth in the Plan, is now approved. Staff has verified that all taxes, fees, and expenses have been paid, and the Commission is in possession of the remaining Fair Fund monies.

Accordingly, IT IS ORDERED that:

A. The remaining Fair Fund balance of $164,908.76 and any future funds returned to the Fair Fund shall be transferred to the U.S. Treasury;

B. The Fair Fund is terminated; and

C. The Fund Administrator, Vincent A. Warther, is discharged.

By the Commission.

Brent J. Fields
Secretary

Lynn M. Powalski
By: Lynn M. Powalski
Deputy Secretary

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[3] *See* Exchange Act Release No. 63420 (Dec. 2, 2010).

Commissioner Aguilar
Commissioner Stein
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9712 \ January 27, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16361

In the Matter of **Oppenheimer & Co. Inc.** **Respondent.**	**ORDER UNDER RULE 506(d) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 506(d)(1)(ii) DISQUALIFICATION PROVISION**

I.

Oppenheimer & Co. Inc. ("Oppenheimer"), submitted a letter dated December 10, 2014, requesting that the Securities and Exchange Commission (the "Commission") grant a waiver of disqualification under Rule 506(d)(1)(ii) of Regulation D under the Securities Act of 1933 (the "Securities Act").

II.

The Commission issued an order instituting administrative and cease-and-desist proceedings against Oppenheimer (the "Order") pursuant to Section 8A of the Securities Act and Sections 15(b) and 21C of the Securities Exchange Act of 1934 (the "Exchange Act") for violations of Sections 5(a) and (c) of the Securities Act, and failing reasonably to supervise with a view to preventing violations of Section 5 of the Securities Act; for violations of Section 17(a) of the Exchange Act and Rules 17a-3(a)(2), 17a-3(a)(9), and 17a-8 thereunder, and willfully aiding and abetting and causing violations of Section 15(a) of the Exchange Act.

III.

Rule 506(d)(2)(ii) of Regulation D provides that 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." The Commission has determined that as part of the Rule 506(d)(2)(ii) showing of good cause, Oppenheimer will comply with the conditions stated in its December 10, 2014 waiver request letter, including that it will retain a law firm to review its policies and procedures relating to Rule 506 offerings, and that it will adopt improvements or changes, both as private placement agent in its investment banking business and as issuer and as compensated solicitor in its wealth management business. Oppenheimer's waiver is also conditioned upon its completing firm wide training for all registered persons on compliance with Rule 506 of Regulation D.

IV.

Based on the foregoing and Oppenheimer's compliance with the stated conditions, the Commission has determined that pursuant to Rule 506(d)(2)(ii) of Regulation D under the Securities Act a showing of good cause has been made that it is not necessary under the circumstances that the exemptions be denied.

Accordingly, **IT IS ORDERED**, pursuant to Rule 506(d) of Regulation D under the Securities Act, that a waiver from the application of the disqualification provision of Rule 506(d)(1)(ii) under the Securities Act resulting from the entry of the Order is hereby granted to Oppenheimer.

By the Commission.

Brent J. Fields
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9711 / January 27, 2015

SECURITIES EXCHANGE ACT O F 1934
Release No. 74141 / January 27, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3621 / January 27, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16361

In the Matter of **OPPENHEIMER & CO. INC.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Oppenheimer & Co. Inc. ("Oppenheimer" or "Respondent").

II.

In anticipation of the institution of these proceedings, Oppenheimer has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Oppenheimer admits the Commission's jurisdiction over it and over the subject matter of these proceedings, admits the facts set forth in Sections III.B, III.C, III.D, and III.F below, acknowledges that its conduct violated the federal securities laws, and consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections

15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. SUMMARY

1. Oppenheimer engaged in two separate courses of conduct, the first during the period July 2008 through May 2009 ("Oppenheimer I") and the second during the period October 2009 through December 2010 ("Oppenheimer II"), each of which violated the federal securities laws.

Oppenheimer I

2. Between July 2008 and May 2009, Oppenheimer executed sales of billions of shares of penny stocks[2] for an account in the name of its customer, Gibraltar Global Securities, Inc. ("Gibraltar") —a broker-dealer licensed in the Bahamas. Although Gibraltar purportedly maintained a proprietary account, Oppenheimer knew that Gibraltar was actually executing transactions and providing brokerage services for its customers, many of whom were U.S. persons. Through this conduct, Gibraltar acted as a broker in the United States even though it was not registered with the Commission as required by the federal securities laws.

3. Although Gibraltar was exempt from paying U.S. taxes on its own profits from sales of securities in the U.S., it used its exempt status as a means to enable its U.S. customers to avoid paying taxes. Gibraltar accomplished this by providing Oppenheimer with an Internal Revenue Service ("IRS") Form W-8BEN, which purportedly exempted Gibraltar from U.S. tax withholding based on a false certification that Gibraltar was the sole owner of all of the income generated in its Oppenheimer account. Oppenheimer, however, knew that Gibraltar's customers (and not Gibraltar) were the beneficial owners of the securities deposited, sold and or transferred. As a result Oppenheimer knew or should have known that Gibraltar's IRS withholding form was false and could not be relied on. Presented with a false withholding form, and information revealing that many Gibraltar customers were U.S. persons, Oppenheimer was required to begin withholding taxes from the gross proceeds from sales of securities in the Gibraltar account, which it did not do. Oppenheimer failed to properly withhold and remit taxes to the IRS, and therefore became liable for taxes it was obligated to withhold. Oppenheimer, however, failed to record this liability and resulting expenses, which caused its books and records to become inaccurate.

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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] The securities qualified as "penny stocks" because they did not meet any of the exceptions from the definition of a "penny stock," as defined by Section 3(a)(51) of the Exchange Act and Rule 3a51-1 thereunder.

Oppenheimer's records were also inaccurate because they reflected the account in which Gibraltar's customers' shares were deposited, sold and transferred as a proprietary account of Gibraltar, rather than an account for Gibraltar's customers.

4. Oppenheimer was responsible for reporting suspicious activity to the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") on Suspicious Activity Reports ("SARs"). In instances when suspicious activity occurred in the Gibraltar account, Oppenheimer failed to file the requisite SARs. Suspicious activities included instances where Gibraltar deposited into, and sold out of, its Oppenheimer account large quantities of penny stocks which should have raised concern that Gibraltar and its customers might be participating in unregistered offerings or sales of securities in violation of Section 5 of the Securities Act. In some instances, Gibraltar deposited billions of shares of penny stocks into its Oppenheimer account and then simply transferred them to other U.S. broker-dealers without any apparent legitimate economic or business purpose.

5. By allowing Gibraltar to operate as a broker-dealer servicing U.S. customers through its account at Oppenheimer, Oppenheimer willfully[3] aided and abetted and was a cause of Gibraltar's violation of Section 15(a) of the Exchange Act. In addition, by failing to recognize liabilities and expenses associated with its failure to properly withhold and remit back-up withholding taxes from sales proceeds in the Gibraltar account, Oppenheimer also willfully violated Section 17(a) of the Exchange Act and Rule 17a-3(a)(2), which requires broker-dealers to maintain ledgers accurately reflecting liabilities and expenses. By recording transactions for Gibraltar's customers in an account inaccurately maintained on Oppenheimer's books and records as Gibraltar's proprietary account, Oppenheimer also willfully violated Rule 17a-3(a)(9). Finally, Oppenheimer willfully violated Section 17(a) of the Exchange Act and Rule 17a-8 by failing to file SARs in connection with Gibraltar's suspicious activities.

Oppenheimer II

6. From October 6, 2009 through December 10, 2010, Oppenheimer, through a registered representative then associated with Oppenheimer who held a position as a Financial Advisor ("FA") and his immediate supervisor, a Branch Office Manager, willfully violated Sections 5(a) and (c) of the Securities Act when it engaged in the unregistered distribution of the securities of Quasar Aerospace, Inc. ("QASP"), Encounter Technologies, Inc. ("ENTI"), My Social Income, Inc. ("MSOA"), Strategic Rare Earth Metals, Inc. ("SREH"), Sebastian River Holdings, Inc. ("SBRH"), and Shot Spirit Corporation ("SSPT") on behalf of a customer (the "Customer"). The over 2.5 billion cumulative shares sold through the Customer's account generated approximately $12,000,000 in proceeds of which Oppenheimer was paid $588,400 in commissions.

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

7. No registration statement was on file or in effect as to the Customer's offers and sales of securities as required by Section 5 of the Securities Act. In certain instances, the securities were restricted because the Customer acquired them directly or indirectly from the issuers, or from affiliates of the issuers, in transactions or chains of transactions not involving any public offering. The only exemption applicable to offers and sales of restricted securities into the public markets is Securities Act Section 4(a)(1)'s exemption for "transactions by any person other than an issuer, underwriter, or dealer." The Customer's offers and sales of those restricted securities into the public market did not, however, comply with the Rule 144 safe harbor from being considered a statutory underwriter. More particularly, the Customer did not hold the securities of each of the six non-reporting issuers for at least a year prior to resale, as required by Rule 144(d); and there was a lack of adequate current public information available for QASP, MSOA, ENTI and SREH at the time of the Customer's resale, as required by Rule 144(c).

8. Thus, the Customer's offers and resales did not comply with Rule 144 or qualify for Section 4(a)(1) or any other exemption under the federal securities laws, and violated Sections 5(a) and (c).

9. Oppenheimer willfully violated Sections 5(a) and (c) of the Securities Act in executing the Customer's orders to sell the securities of the six issues. It cannot claim an exemption from Section 5 liability under Section 4(a)(4) of the Securities Act which exempts from the registration requirements of Section 5 "brokers' transactions." *John A. Carley*, Exchange Act Rel. No. 57,246, 2008 WL 268598, *8 (Jan. 31, 2008) (Commission opinion). To rely on the exemption, the broker-dealer must, among other things, conduct a reasonable inquiry and, after such an inquiry, it must not be "aware of circumstances indicating that the person for whose account the securities are sold is an underwriter with respect to the securities or that the transaction is part of a distribution of the securities of the issuer." 15 U.S.C. § 77d(a)(4); 17 CFR § 230.144(g)(4).

10. Oppenheimer personnel, including Branch Office personnel and senior management, recognized red flags previously identified by the Commission as indicative of illegal unregistered distributions and did not properly follow up on those red flags and analyze the information in order to be able to rely on the Section 4(a)(4) exemption. *Distribution by Broker-Dealers of Unregistered Securities*, Securities Act Rel. No. 33-4445 (Feb. 2, 1962) (Commission interpretative release). As a result, Oppenheimer personnel did not conduct a reasonable inquiry to determine whether the Customer's offers and resales were exempt from the Section 5 registration requirements.

11. In failing to establish and implement policies and procedures reasonably designed to prevent and detect Oppenheimer personnel's violations of Section 5, Oppenheimer also failed reasonably to supervise. In this regard, Oppenheimer failed to establish procedures reasonably designed to achieve compliance with Section 5, for example, in formulating policies related to sales of penny stocks; and failed to implement such procedures as existed for purposes of

determining whether Oppenheimer's personnel conducted a reasonable inquiry regarding whether the Customer's resale transactions complied with Rule 144.

B. RESPONDENT

12. Oppenheimer, a New York corporation, is a broker-dealer and an investment adviser registered with the Commission and headquartered in New York, New York. Oppenheimer is a subsidiary of Oppenheimer Holdings, Inc., a publicly traded company with securities registered with the Commission pursuant to Section 12(b) of the Exchange Act.

C. OTHER ENTITY RELEVANT TO OPPENHEIMER I

13. Gibraltar Global Securities, Inc., is a broker-dealer, investment management and advisory firm established in 2004 that is domiciled in the Commonwealth of the Bahamas. Gibraltar is licensed and regulated by the Securities Commission of the Bahamas. Gibraltar serviced its customers through an account it maintained at Oppenheimer (among other U.S. broker-dealers). In 2013, the Commission charged Gibraltar and its president with violating Section 15(a) of the Exchange Act and Section 5 of the Securities Act. (*SEC v. Gibraltar Global Securities, Inc. and Warren A. Davis*, 13 cv 2575 (S.D.N.Y.)) Gibraltar is also a defendant in *SEC v. Carillo Huettel LLP, et al.*, 13 cv 1735 (S.D.N.Y.), in which the Commission, in 2013, charged Gibraltar with violations of Section 5 of the Securities Act and the antifraud provisions of the federal securities laws in connection with pump-and-dump schemes concerning two penny stocks.

D. OPPENHEIMER I FACTS

14. In May 2007, Gibraltar opened an account at Oppenheimer. In its account opening documents, Gibraltar described itself simply as a broker-dealer in the business of investments. Oppenheimer designated Gibraltar as a high risk account because, among other reasons, it was located in the Bahamas. At the time, Oppenheimer knew that Gibraltar was a foreign broker-dealer.

15. As part of its account opening documents, Gibraltar submitted an IRS Form W-8BEN, "Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding," which exempted Gibraltar from tax withholding and information reporting of securities sales proceeds to the IRS, based upon Gibraltar's status as a foreign entity. In its IRS Form W-8BEN, Gibraltar falsely represented that it was the beneficial owner of all the income generated in its account at Oppenheimer and that "the beneficial owner [was] not a U.S. person."

16. Oppenheimer knew or should have known that Gibraltar's Form W-8BEN was false because, among other things, Gibraltar instructed Oppenheimer to accept deposits and execute sales for Gibraltar's clients, some of whom maintained U.S. addresses. Oppenheimer also knew or should have known that it could not rely on the Form W-8BEN. However, during the period February 2009 through June 2009, Oppenheimer failed to withhold taxes from the sales of securities in Gibraltar's account and similarly failed to remit the amounts that it was obligated to withhold and report the sales proceeds to the IRS. Oppenheimer also failed to recognize liabilities

and expenses associated with its failure to withhold taxes from sales of securities in Gibraltar's account.

17. Gibraltar used its Oppenheimer account almost exclusively to deposit, sell and transfer shares of penny stocks into the United States on behalf of its customers. From July 2008 through June 2009, Gibraltar conducted approximately 1,800 trades in its Oppenheimer account. Almost all of those trades were orders to sell, resulting in proceeds over $14.68 million from the sale of approximately 7.6 billion shares of over 92 different issuers. Gibraltar also used its Oppenheimer account to distribute billions of shares of over 130 different issuers of thinly traded penny stocks into U.S. markets by depositing shares and instructing Oppenheimer to transfer those shares to other broker-dealers.

18. Oppenheimer knew or was reckless in not knowing that Gibraltar was selling shares on behalf of its customers and that Gibraltar was not the beneficial owner of the securities sold. In fact, in or about January 2009 Gibraltar's president informed Oppenheimer personnel that Gibraltar's customers wanted to liquidate shares of penny stocks. Gibraltar's president told Oppenheimer that even though the securities to be liquidated were deposited into Gibraltar's account and in Gibraltar's name, those securities actually belonged to its underlying customers.

19. Oppenheimer was aware of additional facts showing that Gibraltar was not the beneficial owner of certain securities in the Gibraltar account. In fact, beginning by at least November 2008, several Oppenheimer employees, including a registered representative and his assistant, accepted share certificates for deposit into Gibraltar's account that were titled "Gibraltar Global Securities fbo (or "for the benefit of") [Gibraltar's customer]." Gibraltar also instructed Oppenheimer's registered representatives via e-mail to deposit shares of numerous penny stock issuers electronically through the facilities of the Depository Trust Company. In its e-mails to Oppenheimer, Gibraltar stated that the deposits were "for the benefit of" or "fbo" its customers. In certain instances, Gibraltar forwarded its customers' instructions to Oppenheimer. In other instances, Gibraltar's customers were also Oppenheimer's customers. A number of Gibraltar's customers maintained U.S. addresses.

20. Oppenheimer employees also became aware that Gibraltar had used its account to service brokerage customers by processing securities transfers between Gibraltar's customers and Oppenheimer's own customers. On certain occasions Gibraltar requested that Oppenheimer transfer shares from Gibraltar's Oppenheimer account to other Oppenheimer customers' accounts and vice versa. Oppenheimer described these transfers as "third party journals" or "journals." To approve journals, Gibraltar provided Oppenheimer with letters of authorization to transfer securities from the Gibraltar account to its clients' individual accounts at Oppenheimer. To complete journals, Oppenheimer's representatives were required to fill out questionnaires stating the specific purpose of the journals and the relationship between the parties sending and receiving the shares. On at least one occasion concerning a journal between Gibraltar and another Oppenheimer U.S. customer, Oppenheimer's employees stated on the questionnaire that the purpose of the journal was to transfer stock to a "client of Gibraltar." Thus, Oppenheimer knew

that some of its own customers were also Gibraltar's customers, and that Gibraltar was servicing them through transfers between the accounts.

21. In January 2009, Oppenheimer's Anti-Money Laundering ("AML") Officer inquired about a suspicious journal (i.e., a transfer) between Gibraltar and another Oppenheimer customer located in California. As a result, Oppenheimer assigned a surveillance analyst to review Gibraltar's activity. Oppenheimer's surveillance analyst concluded that Gibraltar's activities needed to be "escalated" because they raised red flags, namely that Gibraltar: (i) was a foreign broker-dealer doing business in the U.S.; (ii) selling "low-priced stock" on behalf of customers; and (iii) that it immediately wired the proceeds out of the Oppenheimer account. Oppenheimer's surveillance analyst also reviewed Gibraltar's website. The analyst concluded that Gibraltar's website offered trading, charged competitive commissions and provided customer statements online. In addition to the surveillance analyst, other Oppenheimer personnel—including its registered representatives servicing the Gibraltar account—visited Gibraltar's website in connection with their "know your customer" obligations. Gibraltar's website described itself as a Bahamian "off-shore" broker-dealer and offered its trading, commissions, and numerous other services commonly provided by brokers.

22. Oppenheimer's AML Policies and Procedures prohibited "foreign financial institutions" ("FFIs") from trading on behalf of customers instead requiring each customer of a FFI to create a separate account transacting on a fully disclosed basis. To obtain an exemption from Oppenheimer's prohibition, FFIs were required to submit an application explaining (among other things) the purpose of the account. In connection with Oppenheimer's surveillance analyst's January 2009 investigation into the suspicious third party journal, Gibraltar submitted a request to maintain a single account at Oppenheimer notwithstanding the fact that it was trading on behalf of customers. Gibraltar's exemption request, which was ultimately denied, stated that Gibraltar was a "stock broker-dealer." The exemption request further indicated that Gibraltar intended to provide trading services on behalf of customers, and that the "markets served" were the "United States, Canada, [and] Europe."

23. From July 2008 through June 2009, Oppenheimer routinely accepted large deposits of penny stocks from Gibraltar either electronically or by accepting physical certificates. These deposits identified certain U.S. persons (individuals and/or entities) on the face of the security certificates or as the beneficial owners of the shares. Thereafter Oppenheimer followed Gibraltar's instructions to either sell the shares or transfer them to other broker-dealers. The transactions were suspicious because, although the deposits were made into Gibraltar's proprietary account, the securities belonged to Gibraltar's customers and were in fact titled "for the benefit of" or "fbo" Gibraltar's customers. In addition, Gibraltar deposited large blocks of penny stocks and sold a significant portion of those securities shortly after deposit. Accordingly, these deposits (and subsequent sales) on behalf of Gibraltar's customers should have raised red flags that Gibraltar was participating in unlawful offerings or sales of securities that may have required registration or exemption from registration.

24. Gibraltar's deposits (and subsequent sales and transfers) of penny stocks were also indicia of suspicious activity under Oppenheimer's AML Policies and Procedures. Oppenheimer's AML Policies and Procedures required Oppenheimer personnel to raise red flags such as clients delivering physical certificates representing large blocks of thinly traded or low priced securities. Nevertheless, Oppenheimer did virtually nothing to monitor Gibraltar's sales of penny stocks and failed to conduct any due diligence or further inquiry. Oppenheimer's personnel responsible for reviewing Gibraltar's trading failed to do anything to review Gibraltar's sales to confirm that they were legitimate transactions, as required by Oppenheimer's AML Policies and Procedures, and not suspicious transactions that required reporting. Moreover, had due diligence and further inquiry been conducted as required, Oppenheimer's personnel would have likely detected additional indicia of possible market manipulation; specifically, that Gibraltar's deposits, sales and transfers of thinly traded penny stock often coincided with suspicious news stories and dubious promotion. Furthermore, on certain occasions after April 2009, Oppenheimer received regulatory or other inquiries concerning Gibraltar's activity. On at least one occasion, Oppenheimer received a specific inquiry asking whether Oppenheimer had AML concerns about Gibraltar's possible activity in unregistered offerings or sales of securities. Because of AML-related inquiries and other red flags of potential misconduct in the Gibraltar account, Oppenheimer had reason to suspect that the transactions involved unlawful activity.

25. Oppenheimer had reason to suspect that Gibraltar's U.S. customers may not have been paying taxes (or not reporting income to the IRS) on the profits from the sales of their stocks made by Gibraltar through the Oppenheimer account. For example, Oppenheimer knew or should have known that: (i) Gibraltar was selling penny stocks on behalf of its customers—many of whom maintained addresses in the U.S.; (ii) Gibraltar's IRS Form W-8BEN was false because it certified that Gibraltar was the beneficial owner of the income in the Oppenheimer account; and (iii) Gibraltar was located in a jurisdiction that it considered a tax haven. As mentioned, on certain occasions, various Oppenheimer employees (including certain Oppenheimer registered representatives) accessed Gibraltar's website. Gibraltar's website advertised that its customers were not required to pay taxes on their profits.

E. OPPENHEIMER I VIOLATIONS

Broker-Dealer Registration Violations

26. Section 3(a)(4) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." Being "engaged in the business" is demonstrated by, among other things, regularity of participation through active solicitation, the dollar amount of securities sold, and the extent to which advertisement and investor solicitation are utilized.

27. In addition to regularity of participation, Section 3(a)(4) also requires that the person effect securities transactions on behalf of others. Among the indicia that a person is effecting transactions on behalf of others are: (1) active solicitation of investors; (2) receiving

transaction-based compensation; (3) facilitating or participating in the execution of transactions; and (4) handling the securities or funds of others in connection with securities transactions.

28. Gibraltar used its Oppenheimer account to act as a "broker" within the meaning of Section 3(a)(4) of the Exchange Act. As described in Section III.D above, Gibraltar advertised its brokerage services through its website. Gibraltar solicited U.S. customers through its website, and earned commissions executing transactions on behalf of United States persons through its Oppenheimer account. Gibraltar also took an active role in handling the securities and funds of U.S. customers which was facilitated by Oppenheimer.

29. Oppenheimer knew that Gibraltar was acting as a broker within the meaning of Section 3(a)(4) of the Exchange Act and that Gibraltar was engaged in brokerage activities in the United States. Oppenheimer also knew that Gibraltar: (1) maintained a website that advertised its services; (2) executed transactions on behalf of its customers through Oppenheimer; (3) charged commissions; and (4) actively handled securities and funds for its customers. In addition, Oppenheimer knew that Gibraltar was not registered as a broker in the U.S.

30. By accepting share deposits on behalf of Gibraltar's customers and thereafter executing sales (and transfers) of penny stocks for proceeds of over $14.68 million, Oppenheimer provided substantial assistance and aided and abetted and was a cause of Gibraltar's violation of Section 15(a) of the Exchange Act, which requires any broker or dealer that uses the mails or any means of interstate commerce to effect transactions in, or to induce or attempt to induce purchases or sales of securities (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) to register with the Commission in accordance with Section 15(b).

Anti-Money Laundering Violations

31. The Bank Secrecy Act ("BSA"), as amended by the USA PATRIOT Act, and implemented under rules promulgated by FinCEN, requires that broker-dealers file Suspicious Activity Reports ("SARs") with FinCEN to report a transaction (or a pattern of transactions of which the transaction is a part) conducted or attempted by, at, or through the broker-dealer involving or aggregating to at least $5,000 that the broker-dealer knows, suspects, or has reason to suspect: (1) involves funds derived from illegal activity or is conducted to disguise funds derived from illegal activities; (2) is designed to evade any requirements of the Bank Secrecy Act; (3) has no business or apparent lawful purpose and the broker-dealer knows of no reasonable explanation for the transaction after examining the available facts; or (4) involves use of the broker-dealer to facilitate criminal activity. 31 C.F.R. § 1023.320(a)(2) ("SAR Rule").

32. Exchange Act Rule 17a-8 requires broker-dealers to comply with the reporting, record-keeping and record retention requirements of the BSA. The failure to file a SAR as required by the SAR Rule is a violation of Section 17(a) of the Exchange Act and Rule 17a-8 thereunder, and is enforceable by the Commission.

33. As a result of Gibraltar's activity described in Section III.D above, Oppenheimer knew, suspected or had reason to suspect that Gibraltar was using its Oppenheimer account to facilitate unlawful activity, specifically, that Gibraltar was using its Oppenheimer account to:

a. participate in unregistered offerings and sales of securities in violation of Section 5 of the Securities Act;

b. engage in penny stock market manipulation, in violation of Sections 10(b) of the Exchange Act and 17(a) of the Securities Act;

c. evade the payment of U.S. taxes (or not report income to the IRS);

d. operate as a broker-dealer in the U.S. in violation of Section 15(a) of the Exchange Act; and

e. Moreover, Gibraltar's deposits and subsequent transfers of penny stocks were suspicious because they lacked any apparent business or lawful purpose.

34. By failing to file SARs with FinCEN as required by the BSA as amended by the PATRIOT Act with respect to any of Gibraltar's activity described above, Oppenheimer willfully violated Section 17(a) of the Exchange Act and Rule 17a-8.

Books-and-Records Violations

35. Section 17(a) of the Exchange Act provides that each broker-dealer "shall keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title." Under Section 17(a)(1) of the Exchange Act and Rule 17a-3 promulgated thereunder, broker-dealer are required to make and keep current certain specified books and records relating to their business. Under Rule 17a-3(a)(2) broker-dealers are required to maintain "[l]edgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts." The requirement to maintain books and records under Rule 17a-3 requires that they also be accurate. Oppenheimer's books and records were inaccurate because they failed to recognize Oppenheimer's tax liability and expenses associated with the Gibraltar account.

36. U.S. broker-dealers are required to report sales of securities by each customer (including the customer's tax identification number ("TIN")) who is a U.S. person to the IRS. Sales of securities for customers who are not U.S. persons, however, are exempt from reporting. U.S. broker-dealers are required to withhold 28% of all proceeds of sales of securities by U.S. persons if they have not provided a Form W-9 with a valid TIN. No such withholding is required for customers who are not U.S. persons if their foreign status is established by a valid Form W-

8BEN. A U.S. broker-dealer may only rely on a Form W-8BEN to establish foreign status absent actual knowledge or reason to know that the form is inaccurate otherwise.

37. As described in Section III.D above, Gibraltar submitted a Form W-8BEN, "Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding," in order to obtain exemption from tax withholding. Gibraltar's W-8BEN certified, under penalties of perjury, that Gibraltar was the sole owner of the income generated in its Oppenheimer account and that the beneficial owner was not a U.S. person. This certification was false. Gibraltar was transacting on behalf of its underlying customers—many of whom maintained U.S. addresses. These underlying customers (and not Gibraltar) were the beneficial owners of the securities sold from (and the income generated in) Gibraltar's account. By submitting the false W-8BEN, Gibraltar was able to avoid having Oppenheimer withhold taxes and/or report proceeds of the sale of securities income to the IRS.

38. As described in Section III.D above, by February 2009 at the latest, Oppenheimer became aware that Gibraltar deposited and sold securities for the benefit of Gibraltar's underlying customers. It therefore knew or had reason to know that Gibraltar's W-8BEN was false and could no longer rely on Gibraltar's W-8BEN. At that point it was obligated to withhold 28% of the gross proceeds from the sale of securities in Gibraltar's account.

39. A U.S. broker-dealer that fails to back up withhold 28% of all proceeds of sales of securities (and thereafter remit) taxes when it knows or has reason to know of facts indicating that a withholding exemption form (such as a W-8BEN) is false or inaccurate is jointly and severally liable for any amounts that were required to be withheld.

40. As described in Section III.D above during the period February 2009 through June 2009, Oppenheimer failed to withhold 28% of the gross proceeds from sales of securities in the Gibraltar account and remit the amounts withheld to the IRS. Accordingly, Oppenheimer was liable for the amounts it was obligated to withhold and remit to the IRS. As a result Oppenheimer incurred an expense that it also failed to record in its books, records and ledgers. Oppenheimer's books, records and ledgers were inaccurate because they did not reflect the tax withholding liabilities and resulting expenses.

41. Pursuant to Rule 17a-3(a)(2) of the Exchange Act Oppenheimer was required to maintain "[l]edgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts." Beginning in February 2009, these records did not accurately reflect tax liabilities and associated expenses relating to the Gibraltar account.

42. Because its ledgers were inaccurate, Oppenheimer violated Section 17(a) of the Exchange Act and Rule 17a-3(a)(2).

43. Rule 17a–3(a)(9) of the Exchange Act requires broker-dealers to maintain records for each cash and margin account, showing, among other things, the name and address of the beneficial owner. As set forth above, Oppenheimer violated Section 17(a) and Rule 17a-3(a)(9) of

the Exchange Act by recording transactions for Gibraltar's customers in an account inaccurately maintained on Oppenheimer's books and records as Gibraltar's proprietary account.

F. OPPENHEIMER II FACTS

44. In October 2009, the Customer opened an account with Oppenheimer. Its first deposit, on October 6, 2009, was of 200 million QASP shares.

45. The Customer acquired penny stocks in the six issuers through wrap-around agreements or through third-party stock purchase agreements. In both scenarios, the transactions were predicated upon the issuer owing a debt with no convertibility provision to an affiliate of the issuer or an unaffiliated third party, such as a service provider, for more than one year.

46. With respect to the securities of four issuers, QASP, MSOA, SBRH, and SSPT, the Customer entered into wrap-around agreements with each issuer and an affiliate of the issuer pursuant to which the affiliate assigned to the Customer the right to collect an amount owed to the affiliate by the issuer in exchange for the Customer giving a promissory note to the issuer. The agreements between the Customer and issuer each added a convertibility provision pursuant to which the Customer could convert the debt now owed to it by the issuer into common stock. The Customer then converted the debt into shares of the issuer, deposited and liquidated the shares in its Oppenheimer account, and withdrew the proceeds.

47. With respect to the securities of two issuers, ENTI and SREH, the Customer entered into a stock purchase agreement with a third-party purportedly unaffiliated with the issuer to whom the issuer owed a debt. On the same day or shortly before the Customer entered the agreement, the third party converted its debt into issuer shares with the consent of the issuer, even though no conversion provision had been previously included with the debt. Pursuant to the stock purchase agreement, the third party then sold those shares to the Customer.

48. In most instances, the Customer had deposited and liquidated each tranche of the six issuers' penny stocks through its Oppenheimer account shortly after acquiring them. In any event, the Customer had liquidated all tranches of each issuer's securities in less than eight months.

49. As a result of this pattern of acquisition and liquidation, the Customer owned the following percentages of the outstanding shares over the dates given:

Security	Date range	Percentage owned by Customer
QASP	December 2009 to February 2010	23%
MSOA	March 19, 2010 to June 29, 2010	18%
SBRH	June 10, 2010 to July 27, 2010	49.6%
ENTI	June 22, 2010 to July 28, 2010	31%

50. No registration statement was filed with the Commission or in effect with respect to the conversion of the debt into shares, the Customer's initial purchase of the securities, or the Customer's subsequent resales. The Customer's resales were effected through interstate commerce.

51. The Customer represented to Oppenheimer that its resales qualified for the Rule 144 safe harbor and the Securities Act Section 4(a)(1) exemption from registration.

52. The Customer's resales of the securities of all six issuers did not qualify for exemption from registration because the Customer did not meet Rule 144(d)'s one-year holding period requirement.

53. The Customer's resales of four of the issuers—QASP, MSOA, ENTI, and SREH—also did not qualify for exemption from registration because there was no adequate current public information available with respect to those issuers as required by Rule 144(c).

54. QASP shares were deposited at Oppenheimer by Deposit/Withdrawal At Custodian, which is an electronic transfer of the shares from the transfer agent. With respect to the securities of the other five issuers, the Customer deposited the shares at Oppenheimer in the form of physical certificates.

55. The per-share price of the securities was in many cases below one cent, and never exceeded $0.24 per share.

56. From the time the Customer began selling penny stocks through its Oppenheimer account, Oppenheimer was aware or should have been aware that the Customer was engaging in illegal unregistered distributions of securities based on the presence of red flags.

57. During the relevant period, for example, Oppenheimer personnel were aware that the Customer's business model was to acquire and immediately liquidate large blocks of shares for the purpose of raising capital to finance penny stock issuers.

58. On January 13, 2009, the Financial Industry Regulatory Authority ("FINRA") issued Notice to Members 09-05 in which FINRA reminded firms of their obligations to determine whether sales comply with the registration requirements of the federal securities laws. FINRA listed the red flags that broker-dealers should be on the alert for in identifying illegal unregistered distributions. The red flags were consistent with red flags previously identified by the Commission as indicative of illegal unregistered distributions.

59. Oppenheimer's compliance department issued internal guidance in October 2009, in response to FINRA Notice 09-05, expressly referencing certain of these red flags which broker-dealers should be on the alert for in identifying illegal unregistered distributions. The red flags included the following: (i) a customer opens a new account and delivers physical certificates representing a large block of thinly traded or "low-priced securities"; (ii) a customer has a pattern

of depositing physical share certificates, immediately selling the shares, and then withdrawing the proceeds from the account; (iii) a customer deposits share certificates that have been recently issued or represent a large percentage of the float of the security; and (iv) the lack of a restrictive legend on deposited shares seems inconsistent with the date the customer acquired the securities or the nature of the transactions in which the securities were acquired.

60. The Customer's account activity exhibited a pattern of red flags identified in Commission precedent and the FINRA notice indicating the transactions were part of illegal unregistered distributions. For example, the Customer opened the account in October 2009 and deposited 2.5 billion shares of penny stocks, mostly in the form of physical certificates. In many instances, the Customer obtained the shares pursuant to conversion provisions put in place coincident with or shortly before each share issuance. The Customer had a pattern of depositing and liquidating the shares and withdrawing the proceeds from each sale. The certificates deposited did not have restricted legends even though the Customer had only recently acquired them in a private transaction with the issuer or third parties who themselves had recently acquired them from the issuer. In addition, the cumulative number of shares owned and sold over relatively short periods of time constituted a significant percentage of the issued and outstanding shares. The per share price of each liquidated share of the six issuers was generally sub-penny and never exceeded $0.24.

61. Oppenheimer personnel became aware of these red flags raised by the Customer's account activity but did not reasonably follow up to determine whether the transactions were part of an illegal unregistered distribution. Because many of the Customer's transactions described above were for shares priced below a penny, the FA had to obtain senior management personnel's exceptions to the firm's policy prohibiting the sale of sub-penny shares. In granting the FA's requests, certain senior management personnel became aware of certain of these red flags.

62. Oppenheimer personnel did not conduct a reasonable inquiry sufficient to claim reliance on the Section 4(a)(4) exemption.

63. For resale transactions of the securities of QASP, Oppenheimer did not ascertain reasonably that an exemption from registration was available. For the majority of the QASP deposits and resales, Oppenheimer personnel did not gather any other information or inquire about them. Oppenheimer personnel did not receive attorney opinion letters from the Customer for any deposits and resales.

64. For resale transactions of the securities of the remaining five issuers, the relevant Branch Office generally made inquiries consisting of contacting the transfer agent; conducting searches of databases for information, including adequate current public information, on the issuer; and reviewing the agreement and other paperwork the Customer provided to determine that the Customer owned the shares being deposited. The Branch Office personnel conducting this inquiry did not, however, reasonably review this information with a view towards determining whether the transactions met any exemption from the registration requirements; nor could they have, as they did not adequately understand Section 5 or Rule 144's requirements. As a result, these inquiries

either revealed facts that called into question the availability of the purported Rule 144 safe harbor, on which the Branch Office personnel failed to follow up, or did not sufficiently address facts necessary to support the representations of the Customer that a Rule 144 safe harbor was available for its resale transactions.

65. In connection with most of the deposits of the securities of the five issuers, the Customer also submitted an attorney opinion letter written on behalf of the issuer or the Customer and directed to the transfer agent. Those letters identified Rule 144 as the applicable safe harbor allowing the Customer to use the Section 4(a)(1) exemption from the registration requirements of the Securities Act and purported to explain why Rule 144 was available. These attorney opinion letters indicated that the legal conclusions were based primarily on documents provided by and representations made by the Customer and issuers, and they indicated that the attorneys did not independently verify the facts forming the basis for their opinions.

66. Given that the pattern of recurring red flags of which Oppenheimer personnel was aware strongly suggested that the Customer was engaged in illegal unregistered distributions of securities, the attorney opinion letters that the Customer submitted did not provide Oppenheimer with a reasonable basis upon which to conclude that the Rule 144 safe harbor was available. First, the letters with respect to ENTI and SREH applied only to the sale of the third-party to the Customer, and on their face did not apply to the Customer's resale of the shares. Second, none of the letters set forth all of the elements of Rule 144, nor did they explain how those elements were met in the context of facts known to Oppenheimer which indicated that the elements were not met. Third, all of the attorney opinion letters were based primarily on conclusory representations by the issuers and the Customer.

67. During the relevant period, Oppenheimer's policies and procedures did not address compliance with Section 5, including how to conduct a reasonable inquiry to determine whether a customer's transactions were subject to an available exemption from the registration requirements of Section 5, except in relation to compliance with certain requirements of Rule 144.

68. In response to trading in penny stocks, among other things, Oppenheimer formulated policies designed to limit customers' transactions in penny stocks and address capital costs of clearing the stocks. Although these policies purportedly sought to address potential unregistered distributions, among other regulatory risks, no feature of the policies reflected consideration of Section 5 requirements, except for the limited consideration of affiliate status.

69. Oppenheimer also did not adequately implement its policies and procedures to prevent or detect Oppenheimer personnel's Section 5 violations.

70. Before September 2010, Oppenheimer's written policy required that all shares subject to Rule 144 be reviewed and cleared by the firm's National Sales department. With respect to physical stock certificates, the practice at the relevant Branch Office for identifying "restricted" securities, however, was to see whether the certificate bore a restricted legend, and route only those certificates bearing such a legend to this department. The Branch Office did not route to this

department those certificates without a legend, even if they were accompanied by a Rule 144 opinion letter from outside counsel, unless it determined the customer may be an affiliate of the issuer.

71. Beginning around September 2010, Oppenheimer eliminated certain procedures designed to detect or prevent Section 5 violations concerning resales of securities not stamped "restricted" and accompanied by an opinion letter when Oppenheimer had the National Sales department perform a limited review of the certificates bearing no restricted legends. Personnel from this National Sales department reviewed the deposit of SSPT shares, described above, under this limited review but did not detect that the transactions failed to meet the requirements of Rule 144.

G. OPPENHEIMER II VIOLATIONS

Section 5 Violations

72. Sections 5(a) and 5(c) of the Securities Act prohibit the offer and sale of securities through interstate commerce or the mails, unless a registration statement is filed with the Commission and is in effect, or the offer and sale are subject to an exemption.

73. No registration statement was filed with the Commission or in effect with respect to the conversion of the debt into shares, the Customer's initial purchase of the securities, or the Customer's subsequent resales. The Customer's resales were effected through interstate commerce.

74. Rule 144 provides a non-exclusive safe harbor for individuals or entities to sell restricted or affiliate-owned shares without being deemed to be a statutory underwriter and therefore qualify for Securities Act Section 4(a)(1)'s exemption from registration for "transactions by any person other than an issuer, underwriter, or dealer." To qualify for the safe harbor, the resale must meet each of the following conditions: the individual or entity must hold the shares of a non-reporting issuer for at least a year prior to reselling them and there must be adequate current public information available. 17 C.F.R. § 230.144(c) & (d).

75. The Customer's resale of the securities of the six issuers did not meet Rule 144's holding period requirement. In circumstances involving a conversion or exchange of securities, Rule 144(d)(3)(ii) allows a security holder which acquired a security in exchange for other securities of the same issuer to tack the holding period back to the date at which the surrendered security was first acquired. The debts the Customer converted to acquire the shares did not qualify as "securities" for purposes of Rule 144(d)(3)(ii). *See Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990). Additionally, in this case, even if the debt had been a security from the outset, the Customer could not tack back its holding period to that of previous affiliated owners. *See Resales of Restricted and Other Securities,* Securities Act Rel. No. 33-6099 (August 2, 1979), 1979 WL 174360 (at Item 33). Thus, the Customer could not tack its holding period back to the onset of the original debt. Lastly, Rule 144(d)(2) requires payment in full before the holding period can

commence. In this instance, the wrap-around agreements indicated that the Customer paid for the QASP, MSOA, SBRH, and SSPT securities with a promissory note, which does not qualify as full payment in this case. 17 C.F.R. §230.144(d)(2). The Customer paid for the shares around the time of the conversions, at which time the holding period commenced.

76. Further, the Customer's resales of QASP, MSOA, ENTI, and SREH also did not qualify for exemption from registration because there was no adequate current public information available with respect to those issuers as required by Rule 144(c).

77. Section 4(a)(4) of the Securities Act exempts from the registration requirements of Section 5 "brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders." Section 4(a)(4) of the Securities Act is unavailable when a broker-dealer "knows or has reasonable grounds to believe that the selling customer's part of the transaction is not exempt from Section 5 of the Securities Act." *John A. Carley*, Exchange Act Rel. No. 57246, 2008 WL 268598, *8. To rely on this exemption, the broker-dealer must, among other things, conduct a reasonable inquiry into the facts surrounding the proposed unregistered sale, and after such inquiry it must not be "aware of circumstances indicating that the person for whose account the securities are sold is an underwriter with respect to the securities or that the transaction is part of a distribution of the securities of the issuer." 15 U.S.C. § 77d(a)(4); 17 CFR § 230.144(g)(4). Section 2(a)(11) of the Securities Act defines an underwriter as "any person who has purchased from an issuer, with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking." 15 U.S.C. § 77b(a)(11).

78. From the time the Customer began selling penny stocks through its Oppenheimer account, Oppenheimer was aware or should have been aware that the Customer was engaging in illegal unregistered distributions of securities.

79. There were ample red flags, as noted in paragraph 61 of Section III.F above, of which Oppenheimer personnel, including senior management, were aware that required Oppenheimer to conduct a reasonable inquiry.

80. A reasonable inquiry must be an "adequate inquiry under the circumstances." *Wonsover*, 205 F.3d at 409. "The amount of inquiry called for necessarily varies with the circumstances of particular cases. A dealer who is offered a modest amount of a widely traded security by a responsible customer, whose lack of relationship to the issuer is well known to him, may ordinarily proceed with considerable confidence. On the other hand, when a dealer is offered a substantial block of a little-known security, either by persons who appear reluctant to disclose exactly where the securities came from, or where the surrounding circumstances raise a question as to whether or not the ostensible sellers may be merely intermediaries for controlling persons or statutory underwriters, then *searching inquiry* is called for." *Distribution by Broker-Dealers of Unregistered Securities*, Securities Act Rel. No. 33-4445 (emphasis added).

81. Given the specific red flags associated with the Customer's deposits and resales of the six securities, as noted in Section III.F above, Oppenheimer was required to engage in a searching inquiry to properly rely on the Section 4(a)(4) brokers' transaction exemption. *See World Trade Financial Corp., et al.*, Exchange Act Rel. No. 66114, 8 (Jan. 6, 2012) (Commission opinion), *petition denied*, 739 F.3d 1243 (9th Cir. 2014); *Stone Summers & Co., et al.*, 45 S.E.C. 105, 108 (1972) (Commission opinion). However, Oppenheimer personnel did not conduct a reasonable inquiry sufficient to claim reliance on the Section 4(a)(4) exemption.

82. Brokers, however, in the face of recurring red flags suggesting that their customers are engaging in unregistered distributions of securities, cannot satisfy their reasonable inquiry obligations by relying on the mere representations of their customers, the issuers, or counsel for the same, without reasonably investigating the potential for opposing facts. *See World Trade Financial Corp. v. SEC*, 739 F.3d 1243, 1249 (9^{th} Cir. 2014) (rejecting the argument that under the circumstances the duty of reasonable inquiry was met by reliance on third parties in conformity with industry practice and stating "brokers rely on third–parties at their own peril, and will not avoid liability through that reliance when the duty of reasonable inquiry rests with the brokers"); *Wonsover*, 205 F.3d at 415-16 (rejecting broker's argument that under the circumstances he justifiably relied on the clearance of sales by his firm's restricted stock department, the transfer agent, and counsel). A broker-dealer cannot "rely upon the absence of restrictive legends on the stock certificates when the circumstances surrounding the transaction indicate the need for a thorough investigation." *Transactions in Securities of Laser Arms Corporations by Certain Broker-Dealers*, Exchange Act Rel. No. 34-28878, 13 (Feb. 14, 1991) (Commission opinion).

83. As described in paragraphs 64 and 65 of Section III.F, Oppenheimer personnel collected information and made certain inquiries which either revealed facts that called into question the availability of the purported Rule 144 safe harbor, on which the Branch Office personnel failed to follow up, or did not sufficiently address facts necessary to support the representations of the Customer that a Rule 144 safe harbor was available for its resale transactions.

84. Oppenheimer personnel received attorney opinion letters in connection with most of the deposits of the securities of the five issuers other than QASP. A broker may reasonably rely on an attorney opinion concluding that an exemption from registration is available only where: (1) that opinion letter describes "the relevant facts in sufficient detail to provide an explicit basis for the legal conclusions stated," *Sales of Unregistered Securities by Broker-Dealers*, Exchange Act Rel. No. 9239 (July 7, 1971); and (2) the broker's reasonable independent investigation does not uncover contrary facts. As noted in paragraph 67 of Section III.F, in the context of the red flags known to Oppenheimer personnel, they could not rely on these letters because: (1) the letters with respect to ENTI and SREH applied only to the sale of the third-party to the Customer, and on their face did not apply to the Customer's resale of the shares; (2) none of the letters set forth all of the elements of Rule 144, nor did they explain how those elements were met in the context of facts known to Oppenheimer which indicated that the elements were not met; and (3) all of the attorney opinion letters were based primarily on conclusory representations by the issuers and the Customer.

85. As a consequence, Oppenheimer and its personnel could not claim the brokers' transaction exemption under Section 4(a)(4) with respect to the Customer's unregistered resales of securities, and willfully violated Sections 5(a) and (c).

Failure Reasonably to Supervise

86. Section 15(b)(4)(E) of the Exchange Act provides that the Commission may sanction a broker-dealer for failing reasonably to supervise, with a view to preventing violations of the federal securities laws, another person subject to its supervision who commits such a violation.

87. Broker-dealers must establish procedures reasonably designed to prevent and detect the particular violation at issue. *See Midas Securities, LLC, et al.*, Exchange Act Rel. No. 66200, 2012 WL 169138 at*12 (Jan. 20, 2012) (Commission opinion). Procedures addressing the unregistered sale of securities that fail to instruct sales staff on how to identify an illegal unregistered distribution, such as providing guidance setting forth: (1) "'reasonable inquiry' procedures ... when customers [seek] to sell large amounts of an unknown stock to the public without registration," and (2) "how to determine whether a proposed sale was exempt from registration, including asking their customer how, when, and under what circumstances the customer acquired the stock" may be unreasonable. *Id.*

88. As described in paragraphs 68 and 69 of Section III.F, Oppenheimer did not establish policies and procedures that addressed compliance with Section 5, including how to conduct a reasonable inquiry to determine whether a customer's transactions were subject to an available exemption from the registration requirements of Section 5, except in relation to compliance with certain requirements of Rule 144.

89. Although Oppenheimer's policies related to penny stocks purportedly sought to address potential unregistered distributions, among other regulatory risks, except for the limited consideration of affiliate status, no feature of the policies reflected consideration of the requirements to comply with Section 5 and related rules and Commission interpretative statements.

90. In addition to establishing reasonable policies and procedures, a broker-dealer must also have effective systems in place to implement them. *See Quest Capital Strategies, Inc.*, Exchange Act Rel. No. 44935, 2001 WL 1230619 at *6 (Oct. 15, 2001) (Commission opinion). A system of follow up and review when irregularities are detected is also a critical part of the implementation of policies and procedures. *See World Trade Fin. Corp.*, Exchange Act Rel. No. 66114, *11-12 (Jan. 6, 2012) (Commission opinion).

91. Oppenheimer also did not adequately implement its policies and procedures to prevent or detect Oppenheimer personnel's Section 5 violations. Before September 2010, Oppenheimer's written policy required that all shares subject to Rule 144 be reviewed and cleared by a National Sales department, but the Branch Office did not route to this department physical stock certificates without a restricted legend, even if they were accompanied by a Rule 144 opinion letter from outside counsel, unless it determined the customer may be an affiliate of the issuer. If

the firm's written policy had been reasonably implemented and all certificates subject to Rule 144 had been routed to this department for review, Oppenheimer might have detected and prevented Oppenheimer personnel's Section 5 violations.

92. Beginning around September 2010, Oppenheimer eliminated certain procedures designed to detect or prevent Section 5 violations concerning resales of securities not stamped "restricted" and accompanied by an opinion letter when Oppenheimer had the National Sales department perform a limited review of the certificates bearing no restricted legends. As a result, they did not prevent the resulting SSPT resale that violated Sections 5(a) and (c) which they otherwise might have if they had subjected the transactions to the more fulsome review for compliance with the requirements of Rule 144.

93. As a result of Oppenheimer's failure to establish reasonable policies and procedures and failure to implement its policies and procedures, Oppenheimer failed reasonably to supervise with a view to prevent and detect the violations of Section 5 by Oppenheimer personnel.

H. UNDERTAKINGS

Oppenheimer has undertaken to:

94. Independent Compliance Consultant. With respect to its retention of an independent compliance consultant, Oppenheimer has agreed to the following undertakings:

a. Oppenheimer will retain the services of an independent consultant (the "Independent Consultant") that is not unacceptable to the Commission staff. The Independent Consultant's compensation and expenses shall be borne exclusively by Oppenheimer. Prior to the retention of the Independent Consultant, Oppenheimer will provide to the staff of the Commission a copy of the engagement letter detailing the Independent Consultant's responsibilities, which includes the reviews to be made by the Independent Consultant as described in this Order.

b. Oppenheimer shall require that the Independent Consultant conduct a review of Oppenheimer's policies and procedures as they relate to compliance with Section 5 of the Securities Act, Bank Secrecy Act, the Patriot Act, Oppenheimer's AML program and proper recognition of liabilities and expenses associated with accounting for failure to withhold taxes and report on income on accounts of foreign entities trading on behalf of customers, and to report income for U.S. customers trading through foreign financial institutions.

c. Within one hundred twenty (120) days after the entry of this Order, the Independent Consultant shall submit a written and dated report of its finding to Oppenheimer and to the Commission staff (the "Report").

Oppenheimer shall require that each Report include a description of the review performed, the names of the individuals who performed the review, the conclusions reached, the Independent Consultant's recommendations for changes in or improvements to Oppenheimer's policies and procedures, and a procedure for implementing the recommended changes in or improvements to Oppenheimer's policies and procedures.

d. Oppenheimer shall adopt all recommendations contained in the Report within sixty (60) days of the Report; provided, however, that within thirty (30) days after the date of the Report, Oppenheimer shall in writing advise the Independent Consultant and the Commission staff of any recommendations that Oppenheimer considers to be unduly burdensome, impractical, or inappropriate. With respect to any recommendation that Oppenheimer considers unduly burdensome, impractical, or inappropriate, Oppenheimer need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure, or system designed to achieve the same objective or purpose.

e. As to any recommendation with respect to Oppenheimer's policies and procedures on which Oppenheimer and the Independent Consultant do not agree, Oppenheimer and the Independent Consultant shall attempt in good faith to reach an agreement within sixty (60) days after the date of the Report. Within fifteen (15) days after the conclusion of the discussion and evaluation by Oppenheimer and the Independent Consultant, Oppenheimer shall require that the Independent Consultant inform Oppenheimer and the Commission staff in writing of the Independent Consultant's final determination concerning any recommendation that Oppenheimer considers to be unduly burdensome, impractical, or inappropriate. Oppenheimer shall abide by the determinations of the Independent Consultant and, within thirty (30) days after final agreement between Oppenheimer and the Independent Consultant or final determination of the Independent Consultant, whichever occurs first, Oppenheimer shall adopt and implement all of the recommendations that the Independent Consultant deems appropriate.

f. Within thirty (30) days of Oppenheimer's adoption of all of the recommendations in the Report that the Independent Consultant deems appropriate, as determined pursuant to the procedures set forth herein, Oppenheimer shall certify in writing to the Independent Consultant and the Commission staff that Oppenheimer has adopted and implemented all of the Independent Consultant's recommendations in the Report. Thereafter, beginning one hundred eighty days (180) after the entry of this Order, the Independent Consultant shall conduct such review as it deems appropriate to verify that Oppenheimer has appropriately implemented the recommendations in the Report. Prior to two hundred and ten (210) days after the entry of this Order, the Independent Consultant shall confirm to the Commission staff that Oppenheimer has adopted and implemented all of the Independent Consultant's recommendations in the Report. Unless otherwise directed by the Commission staff, all Reports, certifications, and other documents required to be provided to the Commission staff shall be sent to Scott W. Friestad, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-5010 and Gerald Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-6010, or such other address as the Commission staff may provide.

g. On the anniversary of the date of the certification described in subparagraph 94(f), for a period of four (4) years, the Independent Consultant shall conduct a review to determine whether: (1) Oppenheimer is implementing all of the Independent Consultant's recommendations adopted pursuant to the foregoing provisions and this provision; and, (2) there have been any changes in the law or Oppenheimer's business operations such that the recommendations should be amended and updated to take into account any such changed circumstance. Within forty-five (45) days after each anniversary date of the certification, the Independent Consultant shall submit a written and dated report of its findings to Oppenheimer and the Commission staff (the "Anniversary Report"). Oppenheimer shall require that each Anniversary Report include a description of the review performed, the names of the individuals who performed the review, the conclusions reached, and any further recommendations concerning changes in or improvements to Oppenheimer's policies and procedures directed at effecting implementation of the recommendations in the initial Report or an Anniversary Report or directed at addressing any changes in the law or business. Any recommendations made in an Anniversary Report shall be subject to the same processes set forth in subparagraphs 94(d) through 94(f). Each successive review pursuant to this subparagraph shall include a review of any recommendations implemented as a result of the Report or Anniversary Report.

h. Oppenheimer shall cooperate fully with the Independent Consultant and shall provide the Independent Consultant with access to such of its files, books, records, and personnel as are reasonably requested by the Independent Consultant for review.

i. To ensure the independence of the Independent Consultant, Oppenheimer: (1) shall not have the authority to terminate the Independent Consultant or substitute another independent compliance consultant for the initial Independent Consultant without the prior written approval of the Commission staff; and (2) shall compensate the Independent Consultant and persons engaged to assist the Independent Consultant for services rendered pursuant to this Order at their reasonable and customary rates.

j. Oppenheimer shall require the Independent Consultant to enter into an agreement that provides for the period of engagement and for a period of two (2) years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Oppenheimer, 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 Independent Consultant will require that any firm with which the Independent Consultant is affiliated or of which the Independent Consultant is a member, and any person engaged to assist the Independent Consultant in the performance of the Independent Consultant's duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Oppenheimer, 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 engagements.

95. Recordkeeping. Oppenheimer shall preserve for a period of not less than six years from the end of the fiscal year last used, the first two years in an easily accessible place, any record of its compliance with the undertakings set forth herein.

96. Deadlines. For good cause shown, the Commission staff may extend any of the procedural dates relating to the undertakings. Deadlines for procedural dates shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.

97. Certifications of Compliance by Respondents. Oppenheimer shall certify, in writing, compliance with its undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Oppenheimer agrees to provide such evidence. The certification and supporting material shall be submitted to Scott W. Friestad, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-5010 and Gérald Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-6010, or such other address as the staff of the

Commission may provide, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act and Sections 15(b) and 21C of the Exchange Act it is hereby ORDERED that Oppenheimer:

1. 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-8 thereunder and of Section 5 of the Securities Act;

2. is censured;

3. shall pay to the Commission $10 million comprised of $4,168,400 in disgorgement; $753,471 in prejudgment interest; and $5,078,129 in civil penalties. A penalty amount that includes an additional $10 million is appropriate for the conduct at issue herein, however, in light of the civil money penalty paid by Oppenheimer to FinCEN in *In the Matter of Oppenheimer & Co. Inc.*, Number 2015-01, no additional penalty is being ordered at this time. Oppenheimer's total obligation to pay in this proceeding would be $20 million in the event it fails to pay its $10 million of a civil money penalty to FinCEN.

   Payment of disgorgement, prejudgment interest, and $78,129 in civil penalties will be due ten (10) days after institution of this Order, with the remaining $5,000,000 in civil penalties, and interest accrued pursuant to 31 U.S.C. 3717, due no later than the second anniversary of the institution of this Order. The Commission acknowledges that Oppenheimer has placed certain assets in escrow which Oppenheimer believes will satisfy the payment required to be made by the second anniversary of the institution of this Order; however, Oppenheimer retains its payment obligation irrespective of any amounts realized by payment from, sale of, or redemption of, any escrowed assets.

   If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued pursuant to SEC Rule of Practice 600 or pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment 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 (for transfer to the general fund of United States Treasury in accordance with Exchange Act Section 21F(g)(3)) 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 Oppenheimer & Co. Inc. 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 Scott W. Friestad, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5030 and Gerald Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-6010.

4. shall comply with the undertakings enumerated in Section III.H above.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9715 / January 28, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74162 / January 28, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31434 / January 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-15736

In the Matter of

RYAN C. KING,

Respondent.

ORDER MAKING FINDINGS AND CONCERNING CIVIL PENALTY AND TERMINATING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940

I.

The Securities and Exchange Commission ("Commission") instituted an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order and Notice of Hearing against Ryan C. King ("King") on February 4, 2014 ("Order Instituting Proceedings").

In anticipation of those proceedings, King submitted an Offer of Settlement in which, among other things, he agreed to additional proceedings in these proceedings to determine what, if any, civil penalties pursuant to Section 8A(g) of the Securities Act, Section 21B(a) of the Exchange Act, and Section 9(d) of the Investment Company Act against him are in the public interest.

II.

In connection with the anticipated additional proceedings, King has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, King consents to the entry of this Order Making Findings and Concerning Civil Penalty and Terminating Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940 ("Order"), as set forth below.

III.

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

1. King has satisfied his obligation under the Order Instituting Proceedings to pay disgorgement and prejudgment interest to the United States Treasury.

2. King fully complied with his obligations under a cooperation agreement entered into by him and the Division of Enforcement ("Division").

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. These proceedings are terminated.

B. King acknowledges that the Commission is not imposing a civil penalty based upon his cooperation in a Commission investigation and related enforcement action. If at any time following the entry of the Order, the Division obtains information indicating that King knowingly provided materially false or misleading information or materials to the Commission or in a related proceeding, the Division may, at its sole discretion and with prior notice to King, petition the Commission to reopen this matter and seek an order directing that King pay a civil money penalty. King may contest by way of defense in any resulting administrative proceeding whether he

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

knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order Instituting Proceedings; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Gallagher
Commissioner Piwowar
Dissented as to the
penalties

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9714 / January 28, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74161 / January 28, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3622 / January 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16363

In the Matter of **FIRST NATIONAL COMMUNITY BANCORP INC. AND WILLIAM LANCE,** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND 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 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against First National Community Bancorp Inc. ("FNCB") and William Lance ("Lance").

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 Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and 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 Respondents' Offers, the Commission finds[1] that:

SUMMARY

1. First National Community Bancorp ("FNCB" or "the Company"), the holding company of First National Community Bank located in Dunmore, Pennsylvania, materially understated the provision for other-than-temporary impairment ("OTTI" or "losses") for its investment securities portfolio in FNCB's financial statements filed with its Annual Report on Form 10-K for the year-ended December 31, 2009 ("2009 Annual Report") and quarterly reports on Form 10-Q for the first and second quarters of 2010.

2. In 2009, FNCB's investment securities portfolio included certain pooled trust preferred securities, and other securities. Pursuant to generally accepted accounting principles ("GAAP"), FNCB was required to report in its financial statements filed with the Commission the amount of OTTI on the securities in its investment portfolio. FNCB's methodology for determining the amount of OTTI did not comply with GAAP and, as a result, FNCB understated OTTI for the relevant reporting periods.

3. During 2009, FNCB's former Principal Financial Officer, William Lance, was responsible for establishing and maintaining accounting policies and procedures to ensure that FNCB calculated OTTI in accordance with GAAP. Lance, however, failed to establish and maintain the necessary policies and procedures and, as a result, he caused FNCB to record materially understated OTTI in its 2009 annual financial statement filed with the Commission. The material understatement of OTTI at year-end 2009 also resulted in FNCB reporting materially misstated OTTI in its quarterly reports for the first and second quarters of 2010. Lance, however, had resigned from FNCB prior to the preparation and filing of the quarterly reports Form 10-Q for the period ended March 31, 2010 and June 30, 2010.

4. On October 27, 2010, FNCB disclosed that the Company's 2009 Annual Report and the financial statements filed for the quarters-ended March 31, 2010 and June 30, 2010, should no longer be relied upon. FNCB further disclosed that the previously filed financial statements contained errors relating to, among other things, the accounting for OTTI on certain investment securities. On December 2, 2011, over a year later, FNCB filed restated financial statements for the year-ended December 31, 2009 ("2009 Restatement"), which provided for additional pre-tax losses of $31.5 million, increasing the originally reported net loss before income taxes of $21.4 million to $52.9 million. FNCB also concluded that its disclosure controls and procedures and internal controls over financial reporting of OTTI losses during the relevant reporting period were materially deficient.

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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.

5. In the 2009 Restatement, FNCB increased OTTI losses by $14.4 million for a reported total of $20.6 million - more than 230 percent over the originally reported $6.2 million OTTI amount. Approximately $13.6 million of the $14.4 million increase was attributed specifically to the flawed methodology used by FNCB for the original OTTI valuations.

6. In August 2010, approximately two months before FNCB publically announced its intention to restate its financial statements, FNCB sold 100,000 shares of unregistered stock to a private investor. The subscription agreement used in the sale incorporated by reference the materially misstated financial statements for year-end 2009 and the first quarter of 2010.

7. As a result, FNCB violated several provisions of the federal securities laws, including the reporting, internal controls, and books and records provisions. Lance was a cause of FNCB's reporting, internal controls, and books and records violations with regard to the 2009 Annual Report.

RESPONDENTS

8. First National Community Bancorp Inc. ("FNCB"), the holding company of First National Community Bank, is located in Dunmore, Pennsylvania. FNCB's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act, and currently trades under the symbol "FNCB" and is quoted on the OTCQB.

9. William Lance ("Lance") was the Principal Financial Officer ("PFO") and Executive Vice President at FNCB in 2009. Lance resigned from FNCB in February 2010.

FACTS

A. FNCB's Assets in 2009 Included a Portfolio of Investment Securities For Which an Analysis of OTTI was Required Pursuant to GAAP.

10. As of December 31, 2009, FNCB's investment securities portfolio was valued at $273.6 million. The portfolio was comprised of pooled trust preferred securities that were marketed as Preferred Term Securities, Ltd. ("PreTSLs),[2] as well as U.S. Government agency securities, tax-exempt obligations of states and political subdivisions, government sponsored agency and private label collateralized mortgage obligations, residential mortgage-backed securities, and corporate debt and equity securities.

11. The PreTSLs in FNCB's investment portfolio were reported as available-for-sale securities ("AFS"). AFS are reported at fair value with net unrealized gains and losses included

[2] "PreTSLs" are a proprietary product developed and marketed by two broker-dealers. They are collateralized debt obligations created by pooling and securitizing trust preferred securities issued by community and regional banks and thrifts, insurance companies, and/or real estate investment subsidiaries.

in accumulated other comprehensive income, which is a component of shareholders' equity.[3] When the fair value of FNCB's PreTSLs declined below their amortized cost, FNCB was required to assess whether the decline in fair value was other than temporary. GAAP requires that an OTTI loss be recognized in the statement of operations when the present value of cash flows expected to be collected from a security is below its amortized costs.[4] In other words, to determine whether the decline in fair value of its PreTSLs was other-than-temporary, FNCB needed to assess whether these securities had experienced a credit loss as a result of a decrease in expected cash flows to be received on the securities. To measure credit losses to be recognized in the statement of operations, GAAP requires the holder of a security to estimate expected future cash flows considering all available information relevant to the collectability of the security, including information about past events, current conditions, and reasonable and supportable forecasts.[5]

12. Banks and other financial institutions may retain consultants to create models to calculate the present value of expected cash flows which are used to estimate the amount of OTTI to be recognized for investment securities. In order for the models used by valuation experts to measure OTTI in a manner consistent with GAAP, the selection of the assumptions to estimate expected future cash flows must be reasonable and supportable. The work of a consultant does not relieve a reporting company or its management of the ultimate responsibility for accurately reporting the amount of OTTI for its investment securities.

B. FNCB's Methodology for Determining OTTI Losses on the PreTSLs Did Not Comply with GAAP.

13. Lance was responsible for developing and implementing policies and procedures to ensure that FNCB recorded OTTI in accordance with GAAP. Lance failed to do so. Lance relied on OTTI calculations that were not based on reasonable and supportable assumptions in preparing the OTTI disclosures in FNCB's 2009 Annual Report.[6]

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3 ASC 320-10-25 and ASC 320-10-35. In July 2009, the Financial Accounting Standards Board issued the *FASB Accounting Standards Codification* ("ASC") as the single source of authoritative nongovernmental U.S. generally accepted accounting principles. The Codification was effective for annual periods ending after September 15, 2009. All existing accounting standards documents were superseded.

4 ASC 320-10-35-33C.

5 ASC 320-10-35-33G.

6 Both prior to and during the time when Lance was supervising the preparation of FNCB's 2009 Annual Report, the staff of the Commission's Division of Corporation Finance questioned FNCB about its OTTI methodology, including the manner in which FNCB chose the assumptions on which it based its OTTI estimates. In particular, in a letter to FNCB dated September 25, 2009, the staff asked FNCB, among other things, to identify all of the "key assumptions" that it used, including whether it considered "the specific collateral underlying *each* individual security" (emphasis in the original) and had "different estimates of deferrals and defaults for each security," and explain how FNCB determined that the assumptions were appropriate and consistent with GAAP. Lance reviewed the comment letter and coordinated the preparation of FNCB's response. The Commission staff again wrote to FNCB, in January 2010, prior to Lance's departure and before FNCB's 2009 Annual Report had been filed, specifically raising concerns about FNCB's practice of applying the same deferral and default rate to all of the

14. During 2009 and as of year-end 2009, FNCB used the services of two private valuation consultants, Valuation Firm A ("VFA") and Valuation Firm B ("VFB") to assist it in estimating OTTI on the PreTSLs in its investment portfolio.[7]

15. VFA was the vendor from whom FNCB had purchased the PreSTL securities. In 2009, VFA offered Lance a selection of pre-determined assumption scenarios for use with its OTTI valuation model, each representing a different combination of outcomes for, among other things, default and deferral rates, loss severity, prepayment speeds, and other factors that are to be taken into account in determining OTTI. The scenarios ranged from a scenario that resulted in little or no impairment (referred to as "Scenario 6," which, among other things, assumed the lowest default rate and the highest recovery rate) to a scenario that yielded significant impairment. However, it was Lance's responsibility to select for each individual security in FNCB's portfolio a set of assumptions or factors (whether a pre-determined scenario, such as those developed by VFA, or some other combination of factors that was appropriate to each security) to be used in measuring OTTI for each PreSTL held by FNCB.

16. Instead of evaluating what would be reasonable and supportable cash flow assumptions for each security prior to each periodic report by appropriately considering the characteristics of each security, including the underlying collateral, changes in default and deferral rates, and other relevant criteria, Lance chose to apply a single valuation scenario provided by VFA – "Scenario 6" – to all of the PreSTLs held by FNCB. According to Lance, Scenario 6 projected defaults based on the long-term historical loss rates for FDIC-insured banks, which Lance conceded was "obviously a very low number" and he acknowledged that "[l]osses were occurring at a higher rate at that point." Lance chose the scenario that yielded the least amount of impairment, but testified that he did so based on an expectation that bank failures and, therefore, default and deferral rates would not continue at the then-current levels for an extended period of time. Lance did not document his rationale or why he believed such assumptions were reasonable and supportable. Scenario 6, the scenario that Lance selected, was applied by VFA to model OTTI for all of the PreTSLs in FNCB's portfolio as of year-end 2009.

17. VFB also calculated OTTI for the PreTSLs held by FNCB at year-end 2009. VFB's model relied upon unreasonable assumptions regarding future cash flows and the timing of the liquidation of the collateral related to issuers that had deferred or defaulted. Lance did not

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PreTSLs in FNCB's portfolio, without regard to, among other things, differences in the collateral underlying each PreTSL and other individual characteristics of each security. In the January 2010 letter, the Commission staff commented, "[W]e believe you must look at the specific collateral of each individual security to develop the credit deferral/default assumptions for your estimated cash flows and that simply using the same credit default assumption . . . for all of your securities is not a reasonable methodology consistent with the guidance."

7 FNCB had used VFA to model the amount of impairment of the PreTSLs since their purchase. By mid-2009, in response to questions raised by its regulators, FNCB sought the assistance of a second valuation expert to model OTTI impairment for its securities investments. FNCB considered both models in determining the amount of OTTI to record.

know, and never inquired about, the assumptions that VFB used to model the OTTI for the PreTSLs in FNCB's investment portfolio and, for that reason, was unable to assess whether the assumptions used by VFB were reasonable in light of the particular circumstances, and the condition of the collateral underlying each, of the securities in question.

18. VFB modelled OTTI for the PreTSLs in FNCB's portfolio using assumptions that it chose and concluded that there was no material impairment for all but one of the PreTSLs. VFB, however, calculated a material impairment for the security denominated "PreTSL-XXVIII" and provided Lance with a range of potential impairment for that security from $4.1 million to $1.1 million. Despite having failed to determine whether the assumptions used by VFB were reasonable and supportable, Lance caused FNCB to record the lowest amount of impairment on the range: $1.1 million.

C. FNCB Recorded Materially Misstated OTTI at Year-End 2009 and Lance Was a Cause of That Failure.

19. Lance relied on the analyses provided by VFA and VFB and caused FNCB to record OTTI that had been estimated using models that did not include reasonable and supportable assumptions and therefore did not estimate OTTI credit losses consistent with GAAP, despite the concerns raised by the Commission staff. As a result, FNCB materially understated OTTI for the PreTSLs in FNCB's portfolio as of year-end 2009. In the 2009 Restatement, FNCB re-calculated estimated future cash flows based on revised assumptions consistent with GAAP requirements and as a result recorded an additional OTTI loss of approximately $13.6 million for the PreTSL securities, including an additional loss of approximately $5.9 million for PreTSL-XXVIII.

20. Lance resigned from FNCB on or about February 11, 2010, a month before FNCB filed its 2009 Annual Report with the Commission on March 10, 2010. However, he was primarily responsible for compiling FNCB's 2009 year-end financial statements that were filed with the Annual Report, including with respect to the methodology and calculation of OTTI. Lance did not participate in the preparation of FNCB's quarterly reports for the first and second quarters of 2010.

D. FNCB Materially Misstated OTTI in its Quarterly Reports for the First and Second Quarters of 2010.

21. FNCB materially misstated OTTI in its Form 10-Qs for the quarters ended March 31, 2010 and June 30, 2010, as a result of the same accounting errors, including the flawed OTTI methodology, and books and records and internal control deficiencies that affected the 2009 Annual Report.

22. For the periods ending March 31 and June 30, 2010, the application of FNCB's revised OTTI methodology for the PreTSLs resulted in increased impairment losses. However, FNCB determined that certain of the first quarter losses reflected impairments that had existed as of the fourth quarter of 2009. Accordingly, in its restatement, FNCB recorded a portion of the increased losses for the first quarter of 2010 in its restated 2009 Annual Report, rather than in the

restated quarterly report for the first quarter of 2010. Consequently, net OTTI losses for the first quarter of 2010 as restated decreased from $0.9 million to $0.3 million. For the second quarter of 2010, however, net OTTI losses as restated increased from $0.6 million to $2.6 million.

23. FNCB also revised its prior financial disclosures regarding internal control over financial reporting to reflect FNCB's conclusion that internal control over financial reporting were not effective at the time the original financial statements were filed, and that FNCB had failed to keep accurate books and records and implement policies and procedures to enable it to prepare financial statements for these periods that complied with GAAP.

E. FNCB Provided Materially Misstated Financial Statements to an Investor Who Purchased FNCB Stock.

24. On August 4, 2010, FNCB sold 100,000 shares of unregistered common stock at $3.60 per share to a private investor for a total purchase price of $360,000. The subscription agreement for this sale of securities expressly incorporated by reference the materially misstated 2009 annual and first quarter 2010 financial statements.

VIOLATIONS

C.

25. As a result of the conduct described above:

a. FNCB violated Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)], and Rules 12b-20, 13a-1, and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1, and 240.13a-13], which require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission information, documents, and annual and quarterly 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.

b. Lance caused FNCB's violations of Section 13(a) of the Exchange Act [15 U.S.C. § 78m (a)], and Rules 12b-20 and 13a-1 thereunder [17 C.F.R. §§ 240.12b-20 and 240.13a-1] by failing to ensure that FNCB's OTTI estimates were based on reasonable and supportable assumptions and by causing FNCB to record materially understated OTTI for a portion of its investment portfolio in its 2009 Annual Report.

c. FNCB also violated Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)] which requires reporting companies to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets.

d. Lance caused FNCB's violation of Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)] by failing to ensure the FNCB made and kept books, records, and accounts which in reasonable detail accurately and fairly reflected the amount of OTTI to be recorded at year-end 2009.

e. FNCB also violated Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)], which requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles.

f. Lance caused FNCB's violation of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)] by failing to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that FNCB's financial statements, and, in particular its valuation of OTTI, were prepared in accordance with generally accepted accounting principles.

g. With respect to FNCB's sale of stock, FNCB violated Section 17(a)(2) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)(2)], which makes it unlawful for anyone in the offer or sale of securities, to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

IV.

UNDERTAKING

Lance has agreed to the following undertaking:

Lance shall, within ten (10) days of the entry of the Order, make a payment in the nature of a penalty in the amount of $20,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Such payment shall be made in one of the following ways:

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

2. Lance 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. Lance 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 Lance 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:

Antonia Chion, Associate Director
Division of Enforcement
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-5720.

In determining whether to accept Lance's Offer, the Commission has considered this undertaking. Lance agrees that, if he fails to timely comply with this undertaking, the Division of Enforcement may petition the Commission to reopen this matter to determine whether additional sanctions are appropriate.

V.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, FNCB cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) of the Securities Act and Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder.

B. Pursuant to Section 21C of the Exchange Act, Lance cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

C. FNCB shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $175,000 to the 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. FNCB may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

2. FNCB 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. FNCB 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 FNCB 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:

Antonia Chion, Associate Director
Division of Enforcement
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-5720.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4009 / January 28, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16365

In the Matter of **MARSHA BASS,** **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 Marsha Bass ("Respondent" or "Bass").

II.

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

III.

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

1. Bass was the Chief Operating Officer and an 8% shareholder of MayfieldGentry Realty Advisors, LLC ("MGRA"), an investment adviser registered with the Commission from 2004 through July 2013. Bass, 60 years old, is a resident of Bloomfield Hills, Michigan.

2. On January 21, 2015, a final judgment was entered by consent against Bass, permanently enjoining her from future violations of Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled United States Securities and Exchange Commission v. MayfieldGentry Realty Advisors, LLC, et al., Civil Action Number 13-cv-12520, in the United States District Court for the Eastern District of Michigan.

3. The Commission's complaint alleged that, in early 2008, MGRA and its Chief Executive Officer, Chauncey C. Mayfield ("Mayfield"), misappropriated approximately $3.1 million belonging to one of the Detroit public employee pension funds and used the money to purchase two retail shopping centers on behalf of MGRA affiliates.

4. The complaint alleged that Bass learned of the misappropriation in May 2011. The complaint further alleged that, despite her fiduciary obligations, Bass kept the misappropriation a secret from the pension fund, and devised a plan with MGRA's other principals to secretly pay back the pension fund without the pension fund ever learning of the theft.

5. The complaint alleged that Bass and the other MGRA principals affirmatively misled the pension fund through financial reporting and an extensive budget presentation. The complaint further alleged that MGRA eventually disclosed the misappropriation to the pension fund in late April 2012, after which the pension fund promptly fired MGRA.

6. The complaint alleged that Bass's actions aided and abetted MGRA's and Mayfield's violations of Sections 206(1) and 206(2) of the Advisers Act.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Bass 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 one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this 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 judgment, order, consent order, 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.

Brent J. Fields
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9717 / January 29, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74172 / January 29, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31437 / January 29, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16366

In the Matter of **INTERNATIONAL CAPITAL GROUP, LLC, BRIAN R. NORD, LARRY RUSSELL, JR., and TODD J. BERGERON** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, 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 ("SEC" or "Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against International Capital Group, LLC ("ICG"), Brian R. Nord ("Nord"), Larry Russell, Jr. ("Russell"), and Todd J. Bergeron ("Bergeron") (collectively, "Respondents").

II.

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

Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company 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 Respondents' Offers, the Commission finds that

Summary

This matter involves violations of the broker-dealer and securities registration provisions by ICG and its principals, Nord, Russell, and Bergeron, in connection with ICG's purchase and sale of securities of over 64 microcap stock companies and other issuers. ICG, an entity located in Schaumburg, Illinois, held itself out as a stock-based lender. From its formation in August 2008 to May 2011, ICG violated Section 15(a) of the Exchange Act by selling over 9 billion shares worth more than $62 million in connection with purported stock-based loans, block trades, and other transactions. Through at least 149 stock-based loans, ICG systematically liquidated stock obtained as collateral from at least 85 individuals and entities, many of which were affiliates of the issuers, without registering as a broker or dealer. ICG's business during that time period also involved "block trades," lending against stock portfolios, and convertible debt transactions entered with issuers and affiliates of issuers. ICG also violated Section 5 of the Securities Act. On multiple occasions, ICG distributed stock that it acquired from the issuers of that stock or their affiliates through stock-based loans, block trades, and other transactions without registering the transactions with the Commission.

Respondents

1. ICG, a Delaware limited liability company formed on August 13, 2008 and headquartered in Schaumburg, Illinois, held itself out as a financial services company that, until 2011, provided stock-based loans and engaged in other lines of business involving the sale of securities on behalf of customers. ICG has never been registered with the Commission in any capacity.

2. Nord, age 40, resides in Deer Park, Illinois. At all times relevant, Nord served as Managing Partner of ICG. Nord co-founded ICG several months after separating from a registered broker-dealer with whom he was associated. On December 16, 2008, based on Nord's consent, FINRA barred Nord from association with any FINRA member in any capacity for failing to appear for an on-the-record interview regarding allegations that he engaged in loans with customers while working as a registered representative.

3. Russell, age 47, resides in Terre Haute, Indiana. Russell is a Co-Founder and, at all times relevant, served as Managing Partner of ICG.

4. Bergeron, age 42, resides in Elgin, Illinois. From 2008 to 2010, Bergeron served as a consultant and Managing Partner of ICG. From 2010 until March 2012, Bergeron served as

ICG's Chief Operating Officer ("COO"), during which time he held a 20 percent interest in ICG. Bergeron resigned from ICG in March 2012.

Background

5. From August 2008 to 2011, ICG purported to be in the business of providing nonrecourse loans to individuals and entities on the basis of stock collateral. From August 2008 to May 2011, ICG "loaned" approximately $35 million based primarily on microcap stock collateral through at least 149 stock-based loans. ICG's business during this time period also involved, on a more limited basis, block purchases of stock, lending against stock portfolios, and convertible debt transactions. ICG's principals, Nord, Russell, and Bergeron, participated in, directed, or authorized these stock-based loans, block trades, portfolio loans, and convertible debt transactions.

6. ICG advertised its services through its loan broker network, which included individuals who were and were not associated with registered broker-dealers. It also publicly advertised its financial services and structured products through its website and general marketing. In 2011, ICG was the only unregistered entity with a prominent advertisement banner displayed on the OTC Markets website. ICG also hired employees to identify potential customers and to market its loans and other products.

ICG Stock-Based Loan Process

7. The typical stock-based loan at ICG was initiated through third-party loan brokers, intermediaries who connected potential customers to ICG in exchange for referral and origination fees, or, less frequently, through direct contact with ICG. Following an initial indication of interest, ICG undertook what it characterized as an underwriting process that focused on the volume and number of outstanding shares for the security, not the borrower's ability to repay the debt. Generally, ICG did not accept a loan if the number of collateral shares exceeded the average daily trading volume by several times.

8. Following ICG's underwriting process, the customer was provided with a proposed set of terms or rough term sheet. If the customer accepted the proposed terms, ICG and the customer then entered into a standard master loan agreement that could, and often did, contemplate multiple loan funding rounds, or loan tranches. The master agreement gave ICG "the absolute right to pledge, transfer, assign, hypothecate, lend, encumber, sell short, or sell outright those stocks." The language of the agreement and other documents provided in connection with the loan specified that these collateral stock sales could be used "to procure" or "to fund" a loan. The agreement also provided for quarterly interest, but not principal, payments and the return of the collateral upon final repayment of the loan. The typical term for loan agreements was three years.

9. The loans were nonrecourse: in the event of default, which could be triggered, inter alia, by a 60 percent decline in the price of the collateral stock, the debtor had the option to tender additional collateral or to forfeit the securities with no contingent liability.

10. Specific loans and loan terms were documented by an addendum to the master agreement, which provided a more specific estimate of the terms associated with a particular tranche. The ultimate loan amount was determined by a formula that valued the collateral based on an average price of the securities in the days leading to the "closing." In most cases, the date of closing also was the date of funding.

11. Pursuant to the agreement, the debtor transferred the stock to ICG through the registered broker-dealers at which ICG's accounts were held before the pricing, closing, and funding of the "loan."[1]

12. Upon closing, the customer received some percentage of the market value of the securities at the time, based on the loan-to-value ("LTV") ratio. The LTV ratio on loans generally ranged from 50 to 75 percent, with most loans set at 50 percent LTV. Thus, after the deduction of fees, the customer received roughly half of the value of the stock collateral transferred to ICG. ICG also generally deducted 5 percent from the "loan" proceeds for "origination fees," which ICG used to pay referral fees to the loan brokers who introduced the transaction.

Trading and Financial Activity

13. Through the stock-based loans, ICG sold billions of shares of stock on behalf of individuals and entities that were unable or unwilling to sell or margin the stock through other channels. ICG made at least 149 stock-based loans from September 2008 to the middle of 2011, "loaning" approximately $35 million based primarily on microcap stock collateral. ICG liquidated nearly all of the 2.2 billion collateral shares associated with the loans, generating at least $49 million in total trading proceeds, approximately $32 million of which was paid to customers in net loan proceeds.

14. On average, ICG began selling shares associated with each loan three days *prior* to loan closing and funding, and completed the sale of all remaining collateral within two weeks of receiving the stock from the customer. In many instances, ICG did not wire funds to the customer from its bank account until it had sold sufficient collateral shares in its brokerage account to generate an equivalent amount of proceeds. ICG's principals personally oversaw and authorized sales of stock by ICG.

15. ICG structured its loans to profit from the volatile nature of microcap securities. ICG's master loan agreement generally did not allow the customer to repay the principal prior to the maturity date. Due to the volatile nature of the microcap securities that served as collateral, nearly all loans defaulted well before the end of the three-year term. Given the high rate of default, ICG rarely was obligated to redeliver collateral. Among the loan customers with the standard three-year loan term, a substantial majority made no more than a single quarterly payment. In nearly every instance of default, the customer forfeited the securities, rather than providing additional collateral.

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[1] Oftentimes, affiliates and issuers provided opinions of counsel to transfer agents and broker-dealers to facilitate the transfer of stock to ICG.

16. Unlike a traditional lender, ICG generated relatively little of its cash flow from the customers' payment of interest, fees, or repayment of principal. In addition, because ICG expected many of its loans to default, it generally did not maintain cash reserves to return collateral shares at maturity.

Block Trades

17. Beginning in late 2009, ICG also purchased blocks of shares from certain customers. In connection with these transactions, ICG purchased the stock for a discount, in many instances from an affiliate of the issuer, and then liquidated the entire position.

18. From 2009 through the middle of 2011, ICG engaged in at least 68 block trades with 23 individuals involving the stock of multiple microcap issuers. In connection with these transactions, ICG purchased stock from its customer at a discount and then resold these shares into the public market, often within weeks of receiving the shares. In the aggregate, ICG purchased over 6 billion shares for approximately $7.9 million and sold those shares in the market, generating sales proceeds of at least $9.6 million.

Participation in Unregistered Distributions

19. On multiple occasions, ICG distributed stock that it acquired from issuers of that stock or their affiliates through stock-based loans or block purchases.[2] None of these transactions was registered with the Commission. The discussion below reviews four such transactions.

Issuer A

20. From March to June 2010, ICG entered into four transactions with Affiliate A, the CEO, majority shareholder, and acting CFO of Issuer A, pursuant to which ICG provided a total of $258,438 to Affiliate A from loans and block trades. From March to July 2010, ICG sold the 4,561,162 shares of Issuer A that it received from Affiliate A for $445,670. ICG's profit from these four transactions was $187,232, before payment of referral fees to loan brokers. At the time, Issuer A, which purportedly was engaged in the development and sale of alternative fuels and additives, was a non-current reporting company quoted on the Pink Sheets Electronic Quotation System.

21. From March 22 to April 14, 2010, ICG sold 1,875,000 shares of Issuer A that it had acquired as collateral for three stock-based loan tranches on March 24, April 1, and April 9, 2010. ICG documented these first three securities transactions with Affiliate A as a stock-based loan arrangement between ICG and Trust A, an attorney trust for which Attorney A served as trustee. The master loan agreement contemplated a loan based on 2.5 million shares, divided into tranches of 625,000 shares. ICG understood that Affiliate A was the ultimate customer for

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2 The Commission or state securities regulators have taken some form of regulatory action against several of the issuers and affiliates that were customers of ICG. In most instances, these regulatory actions took place after the actions with ICG.

the loan. For instance, the trust loan documentation originally reflected that Affiliate A owned Trust A, but later forms identified Attorney A as the trustee and contact person for the loan.

22. According to brokerage forms submitted to transfer 2.5 million shares into ICG's name, Affiliate A gifted the shares to Trust A in January 2009, and the shares were rendered unrestricted through operation of Rule 144. However, Issuer A's transfer agent records reflect that the transfer from Affiliate A to Trust A took place on April 6 or 15, 2009 and that the shares were issued as restricted securities. Immediately following each transfer of stock, ICG sold the collateral shares, completing all sales from March 22 to April 14, 2010. However, because Issuer A was a non-current reporting issuer at the time, and the shares effectively were sold to ICG by an affiliate, ICG was required to hold the securities for one year prior to selling.

23. On June 21, 2010, ICG entered into a block transaction with Entity A, an entity controlled and owned by Affiliate A. The block purchase agreement between ICG and Entity A was executed by Affiliate A, Affiliate A directed the funds to various entities and accounts, and Affiliate A and ICG communicated about the transaction. Under the agreement, ICG purchased 2.6 million shares from Entity A for $100,000, with an additional $25,000 to be distributed to Entity A if the shares generated more than $150,000 of profits for ICG. ICG sold the shares from June 21 to July 13, 2010. ICG did not hold the securities obtained from Affiliate A, an affiliate of Issuer A, for the required one-year period.

Issuer B

24. On March 24 and May 24, 2010, ICG closed two loans for a total of $1,661,880 with Issuer B, a medical imaging device company, and its President and COO. Pursuant to these loans, ICG sold 6 million shares for $2,990,156. ICG's profit from these transactions was $1,328,276, before payment of referral fees to loan brokers. At the time of the transactions, Issuer B was a reporting company. Issuer B's stock traded on the OTC Bulletin Board Market. In both instances, rather than holding the shares purchased from the issuer and affiliate for six months, ICG liquidated the collateral shares to fund the loans and then completed the sales within a day of the loan closing.

25. On January 21, 2010, ICG entered a master loan agreement directly with Issuer B for a loan based on 10 million shares of Issuer B. The agreement was signed by Affiliate B1, the CEO, Chairman of the Board, beneficial owner, and founder of Issuer B. Immediately before and after closing and funding the loan on March 24, 2010, ICG liquidated the collateral shares associated with the loan.

26. On April 23, 2010, ICG entered a second stock-based loan agreement with an affiliate of Issuer B, Affiliate B2, who served as the President and COO of Issuer B. Affiliate B2 received net proceeds of $600,353 on the basis of 3 million collateral shares. ICG received 3 million shares on May 18, 2010 and immediately liquidated them, completing the sales on May 25, 2010.

Issuer C

27. From May to August 2010, ICG entered multiple transactions with Affiliate C, the CEO of Issuer C, providing him with a total of $237,623 on the basis of 403 million shares of Issuer C, which it sold for total proceeds of $399,570. ICG's profit from these transactions was $162,127, before payment of referral fees to loan brokers. At the time, Issuer C, which purportedly produced a hot air popcorn machine capable of delivering single servings, was a reporting company that was not current in its filings. Rather than holding these securities for one year, within weeks of receiving each tranche of shares, ICG liquidated more than 389 million shares, generating aggregate proceeds of $399,750.

28. The first two transactions were structured as block purchases. On May 25, 2010, ICG purchased for resale 70 million shares at a discount of 40 percent. ICG closed a second block purchase of 100 million shares on June 4, 2010, selling the shares it acquired by June 14, 2010. The block purchases originally were contemplated as a stock-based loan for Affiliate C. Although the loan application ultimately was submitted by Nominee C, a consultant to Issuer C, on behalf of Entity C, the initial securities loan proposal was prepared for Affiliate C. In addition, a draft master loan agreement prepared for the loan listed Affiliate C as the signatory. A loan application placed in Entity C's name stated that the funds from the loan were to be used for Issuer C financing. After ICG declined to enter into the loan agreement, the loan broker proposed a block purchase transaction. Again, draft agreements prepared for the block purchase contained Affiliate C's name in the signature block, signing on behalf of Entity C. In the final draft, Nominee C signed on behalf of Entity C. Affiliate C also arranged for the transfer of shares from Entity C to ICG, coordinating the deposit of shares, and executing written consents on behalf of the Issuer C Board of Directors.

29. Following the block purchase transactions, ICG entered a master loan agreement with Entity C on July 22, 2010. ICG then closed a second tranche on August 17, 2010. ICG began selling the shares it acquired in connection with the first tranche on July 23, 2010 and completed its sales by August 11, 2010. ICG began selling the shares it acquired in connection with the second tranche on August 16, 2010 and completed its sales by September 3, 2010.

Issuer D

30. In late 2009, ICG provided purported stock-based loans based on the stock of Issuer D to Entity D, which was formed and controlled by Affiliate D1, and to Affiliate D2 totaling $206,640. ICG immediately sold the 18 million shares of stock it received as collateral for the loans, both of which defaulted shortly thereafter, for total proceeds of $362,249. ICG's profit from these transactions was $155,609, before payment of referral fees to loan brokers.

31. Both Affiliate D1 and Affiliate D2 were formerly affiliates of the predecessor entity of Issuer D, Predecessor D, which participated in an unregistered distribution of Issuer D stock that ultimately resulted in a Commission enforcement action against Issuer D and multiple defendants in 2013.

32. Affiliate D1 incorporated Predecessor D and controlled Predecessor D through his role as a third-party consultant until Issuer D's reverse merger into Predecessor D on June 2009. Affiliate D2 was the CEO of Predecessor D until June 2009. Issuer D issued Affiliate D1 and Affiliate D2 the stock used in the ICG transactions in early June 2009 pursuant to their conversion of backdated purported convertible debt assigned by Affiliate D3, an affiliate of Issuer D. Affiliate D3 assigned the convertible debt to Affiliate D1 and D2 in connection with a reverse merger between Issuer D and Predecessor D. Issuer D used the reverse merger to gain access to the publicly traded stock of Predecessor D, which was a shell entity at the time. At the time of the loans, Issuer D was a non-reporting company.

33. Because Affiliate D1 and Affiliate D2 experienced difficulty selling their shares, they turned to ICG for stock-based loans. In connection with the first of these loans, on September 1, 2009, Entity D transferred 5 million shares to ICG. Thereafter, ICG loaned Entity D $69,750, or 50 percent of the collateral value less fees on September 4, 2009. Upon receiving the shares, ICG immediately began to sell them beginning on September 2, 2009. Most of the shares were sold by September 11, 2009 and the remainder by October 26, 2009.

34. Three months after his resignation as Predecessor D CEO on June 23, 2009, Affiliate D2 also entered a securities loan arrangement with ICG, using shares that he had been received from an affiliate of Issuer D. On November 20, 2009, Affiliate D2 transferred 13 million shares to ICG, receiving $130,046. ICG began selling Affiliate D2's collateral shares on December 8, 2009, three days prior to funding the loan, and completed its sales on December 15, 2009.

35. Because Issuer D was a non-reporting company, ICG was required to hold the securities for one year from June 2009, which it did not do.

Violations

36. As a result of the conduct described above, ICG willfully violated Section 15(a) of the Exchange Act, which makes it unlawful for a broker or dealer "to effect any transactions in, or to induce or to attempt to induce the purchase or sale of, any security" without being registered as or associated with a registered broker-dealer. ICG also willfully violated Sections 5(a) and 5(c) of the Securities Act, which makes it unlawful, for any person, directly or indirectly, to sell or offer a security through the use of any means or instrument of transportation or communication in interstate commerce or the mails unless a registration statement is in effect as to the security.

37. As a result of the conduct described above, Nord, Russell, and Bergeron each willfully aided and abetted and caused ICG's violations of Section 15(a) of the Exchange Act and Sections 5(a) and 5(c) of the Securities Act. Nord, Russell, and Bergeron also each willfully violated Sections 5(a) and 5(c) of the Securities Act.

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' Offers.

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent ICG is censured.

B. Respondents ICG, Nord, Russell, and Bergeron cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act and Sections 5(a) and 5(c) of the Securities Act.

C. Respondents ICG, Nord, and Russell shall, jointly and severally, pay disgorgement of $1,466,595 and prejudgment interest of $203,459 to the SEC, for a total of $1,670,054. Within fourteen business days of this Order, ICG shall pay $400,000 of the disgorgement and prejudgment interest. The remaining balance of disgorgement and prejudgment interest shall be made in the following installments: $635,027 on or before March 31, 2015 and $635,027 on or before June 30, 2015.

D. Respondent Bergeron shall pay disgorgement of $366,649 and prejudgment interest of $50,865 to the SEC, for a total of $417,514. Within fourteen business days of this Order, Bergeron shall pay $75,000 of the disgorgement and prejudgment interest. The remaining balance of disgorgement and prejudgment interest, together with the civil penalties, shall be made in the following installments: $114,171 on or before May 31, 2015, $114,171 on or before September 30, 2015, and $114,171 on or before January 31, 2016.

E. Respondent ICG shall pay civil penalties of $1,500,000 to the SEC. Payment shall be made in the following installments: $750,000 on or before September 30, 2015 and $750,000 on or before December 31, 2015.

F. Respondent Nord shall pay civil penalties of $300,000 to the SEC. Payment shall be made in the following installments: $150,000 on or before September 30, 2015 and $150,000 on or before December 31, 2015.

G. Respondent Russell shall pay civil penalties of $250,000 to the SEC. Payment shall be made in the following installments: $125,000 on or before September 30, 2015 and $125,000 on or before December 31, 2015.

H. Respondent Bergeron shall pay civil penalties of $150,000 to the SEC on or before January 31, 2016.

I. Payments of disgorgement and civil money penalties by Respondents shall be made to the SEC for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and civil penalties, plus any additional interest accrued, since the date of this Order, 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 Building, Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, Oklahoma 73169

Payments by check or money order must be accompanied by a cover letter identifying, as applicable, ICG, Nord, Russell, or Bergeron 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:

Timothy L. Warren
Associate Director
Division of Enforcement
Securities and Exchange Commission
175 West Jackson Boulevard, Suite 900
Chicago, Illinois 60604

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

K. Respondents Nord and Russell be, and hereby are:

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

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock,

with the right to apply for reentry after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

L. Respondent Bergeron be, and hereby is:

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

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

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

with the right to apply for reentry after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

M. Any reapplication for association by the Respondents ICG, Nord, Russell, or Bergeron 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: (1) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (2) any arbitration award related to the conduct that served as the basis for the Commission order; (3) 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 (4) 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.

Brent J. Fields
Secretary

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

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74176 / January 29, 2015

Admin. Proc. File No. 3-16184

In the Matter of JORDAN PEIXOTO

ORDER DISMISSING PROCEEDING

On September 30, 2014, we issued an order instituting proceedings ("OIP") against Jordan Peixoto to determine whether he engaged in insider trading in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.[1] The proceedings are currently before an administrative law judge.

The Division of Enforcement now moves for dismissal of the proceedings because it asserts that two essential witnesses to its case are unavailable to testify at the hearing.[2] Those witnesses, Filip Syzmik and Mariusz Adamski, were central participants in the events alleged in the OIP.

In particular, the OIP alleged that Peixoto traded securities based on material, non-public information that he learned from his friend, Szymik, who in turn learned the information from his friend and roommate, Adamski, in breach of Adamski's duty of confidence to his employer. Szymik and Adamski are both Polish citizens who had been living in New York City when we issued the OIP.

But the Division states that shortly after the proceedings commenced, it was informed by Syzmik's counsel that Syzmik had returned to Poland, had no immediate intention of returning to the United States, and would assert his Fifth Amendment privilege if compelled to testify. The Division states that it then learned from Adamski's counsel on December 8, 2014, that Adamski had also returned to Poland, had no immediate intention of returning to the United States, and would consider asserting his Fifth Amendment privilege if compelled to testify. The Division asserts that it is unable to compel Syzmik or Adamski to testify at the hearing.

Given the circumstances, it is appropriate to grant the Division's motion.

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1 *Jordan Peixoto*, Exchange Act Release No. 73263, 2014 WL 4826820 (Sept. 30, 2014).

2 The Division states that Peixoto concurs with its request.

Accordingly, IT IS ORDERED that this proceeding be dismissed.[3]

By the Commission.

Brent J. Fields
Secretary

By: Lynn M. Powalski
Deputy Secretary

[3] The parties' pending stay requests to the Commission are rendered moot by this order and are therefore denied.

Commissioner Gallagher
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74177 / January 29, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3624 / January 29, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of	ORDER MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER AGAINST JOHN BUONO PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE
LAURIE BEBO, and JOHN BUONO, CPA	
Respondents.	

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to accept the Offer of Settlement submitted by John Buono, CPA ("Buono" 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 December 3, 2014, pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e) of the Commission's Rules of Practice.

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Against John Buono Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice ("Order"), as set forth below.

III.

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

A. Summary

1. This matter involves disclosure fraud, a fraudulent scheme, lying to auditors, and reporting, record-keeping and internal controls violations by Laurie Bebo ("Bebo") and Buono, respectively the CEO and CFO of Assisted Living Concepts, Inc. ("ALC"). During the relevant period, ALC was a publicly-traded assisted living and senior residence provider headquartered in Menomonee Falls, Wisconsin.

2. From 2009 through early 2012, Bebo and Buono knew, or were reckless in not knowing, that ALC misrepresented in its Forms 10-K and 10-Q that it was in compliance with occupancy and financial covenants included in a lease pursuant to which ALC leased eight of its senior residence facilities. Furthermore, Bebo and Buono undertook an elaborate scheme to hide ALC's lack of compliance with the covenants. Bebo and Buono engaged in the misconduct to avoid defaulting on the lease, which would have required, among other things, ALC to pay the landlord the amount of rent due on the remaining term of the lease. That amount was between $16 million and $25 million in the relevant time frame.

3. To execute the scheme, Bebo and Buono directed ALC personnel to include in the lease covenant calculations large numbers of fabricated occupants who did not reside at the facilities. Bebo and Buono further directed ALC personnel to record journal entries increasing revenue associated with the fabricated occupancy in the accounts for the leased facilities. ALC made a corresponding journal entry decreasing revenue each period to mask the fraud in ALC's accounting records. To establish the number of fabricated occupants to be included in the covenant calculations, ALC personnel, at Bebo and Buono's direction, reverse-engineered the requisite number of fabricated occupants needed to meet the covenants. Then, shortly after the end of each quarter, ALC provided the facilities' landlord with covenant calculations which included the fabricated occupants and the associated revenue, thus falsely showing that ALC was meeting the covenants.

4. In furtherance of the scheme, Bebo and Buono each quarter created lists identifying the fictitious occupants and their associated lengths of stay at the facilities. These lists contained the following types of non-residents that Bebo and Buono directed ALC to include in the covenant calculations: (1) Bebo's family members and friends; (2) family members (including the seven-year old nephew) of one of Bebo's friends; (3) employees who did not travel to, let alone stay at, the facilities; (4) employees of the leased facilities, who lived nearby and rarely or never stayed at those facilities; (5) employees who had been terminated by ALC or employees who ALC anticipated hiring but who had not yet started; (6) employees who ALC listed as occupants of multiple facilities for the same time period; and (7) other individuals who were neither ALC employees nor residents of the leased facilities.

5. ALC's landlord never agreed to the inclusion of such individuals in the covenant calculations. In addition, ALC's landlord never knew that ALC was including such individuals in

[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.

the covenant calculations and never knew that ALC would have failed the covenants, by significant amounts, without their inclusion.

6. Nevertheless, in each ALC Form 10-K and 10-Q from the third quarter of 2009 to the fourth quarter of 2011, Bebo and Buono certified the accuracy of ALC's representations that it was in compliance with the lease covenants. Bebo and Buono knew, or were reckless in not knowing, that ALC's representations about the lease covenants were false, misleading, and omitted material information.

B. Respondents

7. Bebo, age 43, is a resident of Hartland, Wisconsin. From November 2006 through May 2012, when she was terminated, Bebo was ALC's President and Chief Executive Officer. From May 2008 through July 2012, Bebo was also a member of ALC's Board of Directors.

8. Buono, age 51, is a resident of Pewaukee, Wisconsin. From October 2006 through July 2013, Buono was ALC's Chief Financial Officer, Senior Vice President, and Treasurer. From March 1988 through at least September 2013, Buono was a licensed certified public accountant in the state of Wisconsin.

C. Relevant Entities

9. ALC was a Nevada corporation with its principal place of business in Menomonee Falls, Wisconsin. Between November 2006 and July 2013, ALC's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the New York Stock Exchange. During the relevant time period, ALC's primary business was the operation of senior living residences in the United States. In February 2013, ALC agreed to be sold to a private equity firm. In July 2013, when the sale was completed, ALC's stock ceased trading on the New York Stock Exchange.

10. Ventas, Inc. ("Ventas") is a Delaware corporation with its principal place of business in Chicago, Illinois. Ventas's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the New York Stock Exchange. Ventas is a real estate investment trust ("REIT") with a portfolio of nearly 1,500 senior housing and healthcare properties in the United States and Canada.

D. ALC and the Ventas Lease

11. During the relevant time period, approximately 2008 through mid-2012, ALC operated more than 200 senior living residences in the United States, totaling more than 9,000 units. ALC employed approximately 4,200 people, approximately 200 of whom worked at: (1) ALC's corporate headquarters; or (2) regional or divisional levels, which meant that they worked out of their home or at a regional office. The remainder of ALC's employees worked at the assisted living facilities themselves. For the years 2008 through 2012, ALC's annual revenues ranged from $225 to $234 million.

12. In 2007, Bebo and ALC's Board of Directors were interested in expanding ALC's operations and were offered an opportunity to acquire the operations of a firm which operated eight

assisted living facilities that the firm leased from Ventas and were located in Alabama, Florida, Georgia, and South Carolina (the "Ventas facilities"). In order to acquire the operations of the Ventas facilities, ALC was required to enter into a lease with Ventas.

13. As of January 1, 2008, ALC acquired the operations of the Ventas facilities and simultaneously entered into a lease with Ventas to operate those facilities (the "Ventas lease"). These facilities were comprised of approximately 540 total units. The Ventas lease specifically provided that it could only be modified by a writing signed by authorized representatives of both ALC and Ventas and that all "notices, demands, requests, consents, approvals and other communications" under the lease were to be in writing with a copy to Ventas's general counsel.

14. ALC entered the Ventas lease even though it considered various provisions of the lease to be potentially onerous. For instance, the lease contained financial covenants (the "financial covenants"), which required that ALC maintain: (1) a quarterly occupancy of at least 65% at each individual Ventas facility; (2) a trailing twelve-month occupancy of at least 75% at each individual facility; (3) a trailing twelve-month occupancy of at least 82% for the eight-facility portfolio; (4) a trailing twelve-month coverage ratio of at least 0.8 for each facility; and (5) a trailing twelve-month coverage ratio of at least 1.0 for the entire portfolio. The lease defined "coverage ratio" as each facility's cash flow for an applicable period, divided by ALC's rent payments to Ventas for that facility. The cash flow component of the coverage ratio calculation generally correlated to a facility's occupancy, such that a decline in occupancy would result in an attendant decline in coverage ratio, and vice-versa.

15. The lease's default provisions had significant consequences to ALC. In the event that ALC violated any of the financial covenants, Ventas could: (1) terminate the lease in its entirety; (2) evict ALC from all eight facilities; and (3) require ALC to pay damages equal to the net present value of the unpaid rent for the remaining term of the lease (through March 2015) for the entire portfolio. These damages as of ALC's 2009, 2010, and 2011 fiscal year end would have been \$24.9 million, \$20.9 million and \$16.7 million, respectively. For ALC's 2009, 2010 and 2011 fiscal years, the damage amounts approximated 101%, 81%, and 46% respectively of ALC's income from operations before income taxes, and 56%, 45%, and 31% respectively of ALC's cash flows from operations. Such amounts were material to ALC's financial statements.

16. While Bebo was a strong proponent of entering the Ventas lease, certain ALC officers and directors advocated against entering the lease because of the lease's many disadvantageous provisions, including those referenced above related to the financial covenants. In response to those concerns, Bebo assured the directors that she was confident that ALC could meet the financial covenants.

17. On January 7, 2008, ALC filed a Form 8-K which announced that it had entered the lease with Ventas. The Form 8-K specifically disclosed the financial covenants and the consequences for non-compliance discussed above, and ALC attached the lease as an exhibit to the filing.

E. Less Than a Year After Entering the Ventas Lease, Bebo and Buono <u>Realized that a Financial Covenant Default Was Likely</u>

18. Under the terms of the Ventas lease, ALC was required to demonstrate its compliance with the financial covenants on a quarterly basis. In that regard, ALC was required to provide Ventas within 45 days of the end of a quarter: trailing twelve month income statements for each Ventas facility and for the entire portfolio; quarterly financial statements for each facility, prepared in accordance with Generally Accepted Accounting Principles ("GAAP"); and schedules documenting compliance with the financial covenants. In addition, an ALC executive was required to attest to the completeness and accuracy of such information by signing an officer's certificate and providing it to Ventas along with the information.

19. Bebo, Buono, and various members of ALC's accounting department regularly reviewed and monitored occupancy and coverage ratios at the Ventas facilities to ensure that ALC was meeting the financial covenants and to prepare the required documentation. Both Bebo and Buono were generally aware of the facilities' occupancy rates and coverage ratios at all times in the relevant time period. In addition, ALC's board required Bebo and Buono to report on ALC's compliance with the covenants in advance of meetings. At each board meeting during the relevant time period (from 2008 through early 2012), Bebo and Buono reported that ALC was in compliance with the covenants.

20. Ventas also paid close attention to ALC's compliance, and considered occupancy and coverage ratio to be key metrics of its properties' performance. For these reasons, Ventas reviewed and scrutinized the financial covenant calculations, quarterly financial statements and other information which accompanied ALC's officer certificates. Ventas personnel also held quarterly conference calls with Bebo and Buono and periodically visited the facilities, during which Ventas representatives asked detailed questions about the financial performance of the Ventas facilities.

21. Shortly after ALC assumed operations of the Ventas facilities, occupancy began declining. In response to concerns raised by the board in the August 2008 meeting regarding ALC's ability to meet the financial covenants, Buono prepared a memo for the November board meeting. That memo, which Bebo reviewed and approved, stated that ALC needed immediate improvement at four of the facilities to meet the financial covenants. By mid-January 2009, Bebo and Buono both knew that ALC would likely default on one or more of the financial covenants in the near future.

F. Bebo and Buono's Scheme to Include ALC Employees and Other Non-Residents in the Ventas Lease Covenant Calculations

22. In an attempt to avoid defaulting on the financial covenants, Bebo initially devised a plan to include ALC employees who stayed overnight at the Ventas facilities as occupants of the properties for purposes of the financial covenant calculations. At certain times, a limited number of ALC corporate, regional and divisional level employees travelled to the Ventas facilities as part of their normal job responsibilities. In an effort to save money, Bebo had directed that some of those employees stay overnight at the facilities in lieu of staying at a hotel.

23. Bebo sought the advice of ALC's general counsel on the permissibility of including employees who stayed at the Ventas facilities in the financial covenant calculations. In response, on January 19, 2009, the general counsel wrote Bebo and Buono an email advising them that for

such a practice to be permissible under the Ventas lease, ALC needed to fully disclose the practice to Ventas and obtain Ventas's approval in writing. Nevertheless, ALC never obtained Ventas's written approval to include employees in the covenant calculations or disclosed to Ventas the scheme discussed herein.

24. Beginning in the first quarter of 2009, occupancy at the Ventas facilities had declined to the point where ALC was in violation of certain financial covenants in the Ventas lease. Rather than report the defaults to Ventas, ALC's board of directors, or ALC's shareholders, Bebo directed Buono and his staff to include employees and other non-residents in the financial covenant calculations.

25. Among the non-residents that ALC included in the financial covenant calculations at Bebo and Buono's direction were:

a. ALC employees who never stayed at or traveled to the Ventas facilities;

b. ALC employees who occasionally stayed at the Ventas facilities, but were included in the financial covenant calculations beyond the limited periods that they actually stayed at the facilities;

c. ALC employees who worked at the Ventas facilities, who lived nearby and did not stay overnight at the facilities;

d. Bebo's friends and family members, including her parents and her husband (under different last names than Bebo);

e. Family members, including the seven-year old nephew, of one of Bebo's friends;

f. Former ALC employees who had been terminated by the company;

g. Employees who ALC anticipated hiring but who had not yet started working for the company;

h. ALC employees and other individuals who ALC listed as occupants of multiple Ventas facilities for the same time period; and

i. Other individuals who were neither ALC employees nor residents of the Ventas facilities.

26. At Bebo and Buono's direction, from the third quarter of 2009 to the fourth quarter of 2011, ALC included between 45 and 103 non-residents, such as those persons described in the preceding paragraph, in the Ventas financial covenant calculations. When ALC included such non-residents in the financial covenant calculations, ALC generally included each non-resident in the calculations for every day of the quarter. For each quarter during that time period, ALC would have failed certain occupancy and coverage ratio requirements in the Ventas lease, by significant margins, without the inclusion of such non-residents in the financial covenant calculations.

27. Ventas never agreed to, and was unaware of, ALC's inclusion of such non-residents in the financial covenant calculations. Ventas was also unaware that, without the inclusion of such individuals, ALC would have failed the financial covenant calculations.

G. ALC's Process for Including Employees and Other Non-Residents in the Ventas Lease Covenant Calculations

28. To effectuate the above-described scheme, ALC personnel developed a complex process to determine the required number of employees and other non-residents needed to meet the financial covenants. The process involved the following steps, all of which were performed as directed by Buono, with Bebo's approval, or performed by Bebo and Buono themselves.

29. First, after the end of each month in a given quarter, ALC accounting personnel determined the amount by which ALC would fail any of the financial covenants. Then, ALC personnel reverse-engineered the number of non-residents necessary for the month to at least meet, if not exceed, the financial covenants. In doing so, ALC presumed that each non-resident would be included in the financial covenant calculations for every day of the month.

30. ALC then prepared monthly journal entries which recorded revenue associated with the non-residents' inclusion in the financial covenant calculations. These journal entries: (1) increased revenue for the individual Ventas facilities; and (2) decreased revenue in the same amount in a corporate revenue account. Either Buono or Bebo initialed the entry before it was recorded in ALC's books and records.

31. After the revenue for the last month of a given quarter was recorded, ALC accounting personnel performed the financial covenant calculations, including the above-referenced non-resident occupancy and revenue adjustments, to ensure that all the financial covenants had been met.

32. Following the end of each quarter, after ALC calculated the number of non-residents to include in the financial covenant calculations, Bebo personally determined the identities of the non-residents that ALC would include in the financial covenant calculations, and provided a list of such individuals to Buono and ALC accounting personnel, who then provided the list to ALC's auditors.

33. Each quarter, beginning with the first quarter of 2009, ALC prepared and sent to Ventas: (1) the quarterly financial covenant calculations which included the above-referenced non-residents and attendant revenue, and thus showed ALC meeting or exceeding the financial covenants; (2) financial statements for the Ventas facilities which incorporated the revenue associated with the non-residents; and (3) an officer's certificate signed by Buono in which he attested that the information provided was complete and accurate and that the financial statements for the Ventas facilities complied with GAAP. The quarterly materials ALC sent to Ventas did not reference the inclusion of non-residents in the covenant calculations.

H. Bebo and Buono Actively Sought to Prevent Ventas from Learning About the Inclusion of Non-Residents in the Covenant Calculations

34. At Buono's and Bebo's direction, ALC personnel did not provide Ventas with any information indicating that ALC had included non-residents in the financial covenant calculations. As a result, Ventas was unaware that ALC was including non-residents in the financial covenant calculations. Moreover, rather than disclose the inclusion of the non-residents in the financial covenant calculations, Bebo and Buono employed a variety of measures to hide the practice from Ventas.

35. For instance, on a number of occasions, Bebo or Buono provided Ventas with fictitious explanations for quarterly occupancy or coverage ratio changes at the Ventas facilities in lieu of providing the only possible truthful explanation, which was an increase or decrease in the number of non-residents being included in the financial covenant calculations.

36. On at least two occasions, Buono changed the number of non-residents being included in the financial covenant calculations to avoid arousing suspicion on the part of Ventas. Buono did so to make it appear that ALC was exceeding the financial covenants, as opposed to just meeting them, or to make changes in the number of non-residents so that changes in occupancy and coverage ratio ALC reported to Ventas appeared less dramatic and more realistic.

37. On another occasion, ALC had to revise the number of non-residents included in the financial covenant calculations, because it had initially reported occupancy to Ventas in excess of 100%. At Buono's direction, ALC told Ventas that the initial reporting was due to an accounting error and did not disclose that the revision related to the number of non-residents included in the financial covenant calculations.

38. In summer 2011, ALC was exploring a sale of the company, and was preparing due diligence materials to be reviewed by potential buyers, one of which was Ventas. Bebo directed ALC's investment bankers not to provide Ventas with actual occupancy figures at the Ventas facilities but permitted the investment bankers to provide such information to other interested buyers.

39. Moreover, Bebo attempted to thwart Ventas's ability to determine actual occupancy during Ventas's periodic inspections of the Ventas facilities. To that end, Bebo: (a) restricted Ventas from visiting certain facilities at particular times, and (b) directed that resident name tags be removed from their doors during Ventas's inspections, such that Ventas could not manually count the number of occupied rooms.

40. In March 2012, Bebo tried to convince ALC's board not to disclose the inclusion of non-residents in the Ventas financial covenant calculations to the remaining potential bidders interested in purchasing ALC.

I. <u>ALC's False and Misleading Disclosures in its Commission Filings</u>

41. ALC's Forms 10-K for the years ending December 31, 2009, 2010 and 2011 (which Bebo and Buono signed) and its Forms 10-Q for the first three quarters of those years (which Buono signed) contained the representation that ALC was in compliance with the financial covenants in the Ventas lease.

42. Moreover, ALC's Form 10-K for the year ending December 31, 2011 and its Forms 10-Q for the second and third quarter of that year contained the following representation: "ALC does not believe that there is a reasonably likely degree of risk of breach of the [Ventas financial] covenants."

43. As a result of the improper inclusion of employees and other non-residents in the Ventas financial covenant calculations, and the fact that ALC would have failed the covenants without the inclusion of such persons, the above-described statements in ALC's Forms 10-K and 10-Q were false, misleading, and omitted material information.

44. In connection with each of the above-referenced Forms 10-K and 10-Q, Bebo and Buono signed certifications which certified that: (1) ALC's filings did not contain any material misstatements or omissions; (2) ALC's filings fairly presented in all material respects ALC's financial condition, results of operation and cash flows; and (3) they had designed or caused to be designed such internal controls to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements in accordance with GAAP.

45. Given the inclusion of employees and other non-residents in the Ventas financial covenant calculations, Bebo and Buono either knew, or were reckless in not knowing, that ALC's above-referenced Forms 10-K and 10-Q and the above-referenced certifications were false, misleading, and omitted material information.

46. In each of the above-referenced Forms 10-K and 10-Q, ALC additionally failed to disclose a loss contingency associated with ALC's violation of the Ventas financial covenants and the impact of such contingency on ALC's operations and financial statements. Such a disclosure was required under GAAP. Accounting Standards Codification ("ASC") 450-20-50-3. Buono either knew, or was reckless in not knowing, that ALC's filings improperly failed to disclose such a loss contingency.

J. Bebo and Buono Made False Representations to ALC's Auditors

47. In connection with the audits of ALC's financial statements for the years ending December 31, 2009, 2010 and 2011, and in connection with the reviews of ALC's quarterly financial statements for the first three quarters of those years, Bebo and Buono signed representation letters addressed to ALC's auditors in which they falsely represented that ALC had "complied with all aspects of contractual agreements that would have a material effect on the financial statements in the event of a noncompliance." Bebo, Buono, and ALC's auditors understood these representations to attest to compliance with the Ventas financial covenants.

48. Given the inclusion of employees and other non-residents in the Ventas financial covenant calculations, Bebo and Buono either knew, or were reckless in not knowing, that their above-described representation to ALC's auditors was false, misleading, and omitted material information.

49. In connection with the same audits and reviews, ALC, at Bebo's and Buono's direction, provided the auditors with the above-referenced lists, created by Bebo and Buono, identifying fictitious occupants at the Ventas facilities and their associated lengths of stay at the facilities.

50. Moreover, in connection with the audit of ALC's financial statements for the year ending December 31, 2011, Bebo and Buono signed a representation letter addressed to ALC's auditors that represented that Bebo and Buono had no knowledge of any allegations of fraud or suspected fraud by any ALC employee. Bebo and Buono either knew, or were reckless in not knowing, that such statement was false and misleading, given that in approximately November 2011, an ALC employee confronted Bebo and Buono with concerns that the inclusion of employees in the Ventas financial covenant calculations was fraudulent.

K. The Scheme Unravels

51. In April 2012, Ventas filed a lawsuit against ALC unrelated to the financial covenants. At the time, Ventas was unaware that ALC had been including employees and other non-residents in the financial covenant calculations.

52. In connection with related settlement negotiations with Ventas, Bebo tried to convince ALC's board not to disclose to Ventas ALC's inclusion of employees and other nonresidents in the Ventas financial covenant calculations. Bebo actively lobbied against a director's demand that ALC include in any settlement proposal specific language whereby Ventas would release claims arising from ALC's inclusion of employees in the financial covenant calculations.

53. Bebo's efforts were unsuccessful, and ALC sought a release from Ventas expressly relating to the inclusion of employees in the financial covenant calculations and the quarterly certifications ALC sent to Ventas. After receiving ALC's request for the release, Ventas moved to amend its complaint against ALC to include allegations relating to ALC's inclusion of employees in the covenant calculations.

54. In June 2012, ALC and Ventas settled the lawsuit, which included a release of all claims related to the Ventas lease. As part of the settlement, ALC purchased the Ventas facilities and certain other facilities from Ventas for an amount far greater than the appraised value of the facilities. ALC paid approximately $100 million to settle the litigation and purchase the facilities, even though independent third party appraisals only valued the purchased facilities at $62.8 million. Thus, in its financial statements for the second quarter of 2012, ALC included as an expense $37.2 million for "lease termination and settlement" and also wrote off the entirety of the remaining lease intangible assets associated with the Ventas facilities, which were approximately $8.96 million.

L. Violations

55. As a result of the conduct described above, Buono willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of any security involving: a) the use of any device, scheme, or artifice to defraud; b) the making of material misrepresentations or omissions; and c) any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. Also, by engaging in the conduct described above, Buono willfully aided and abetted and caused ALC's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

56. As a result of the conduct described above, Buono willfully aided and abetted and caused ALC's violations of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, which require issuers with securities registered under Section 12 of the Exchange Act to file factually accurate annual and quarterly reports. Also, Buono willfully aided and abetted and caused ALC's violations of Rule 12b-20 of the Exchange Act, which requires the addition to such reports any further material information necessary to make the required reports not misleading.

57. As a result of the conduct described above, Buono willfully violated Exchange Act Rule 13a-14, which requires an issuer's principal executive officer and principal financial officer to certify each periodic report containing financial statements filed by the issuer pursuant to Section 13(a) of the Exchange Act.

58. As a result of the conduct described above, Buono willfully violated Exchange Act Section 13(b)(5), which prohibits any person from knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record or account subject to Exchange Act Section 13(b)(2). Also, Buono willfully violated Exchange Act Rule 13b2-1, which prohibits any person from, directly or indirectly, falsifying or causing to be falsified, any book, record or account subject to Exchange Act Section 13(b)(2).

59. As a result of the conduct described above, Buono willfully violated Exchange Act Rule 13b2-2, which prohibits any director or officer of an issuer from, directly or indirectly from: (a) making or causing to be made a materially false or misleading statement; or (b) omitting or causing another person to omit to state a material fact necessary in order to make statements made, in light of the circumstances under which such statements were made, not misleading, to an accountant in connection with financial statement audits, reviews, or examinations or the preparation or filing of any document or report required to be filed with the Commission.

60. By engaging in the conduct described above, Buono willfully aided and abetted and caused ALC's violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, which requires an issuer of securities registered under Section 12 of the Exchange Act to make and keep accurate books, records, and accounts, and to devise and maintain a sufficient system of internal accounting controls.

IV.

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

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

A. Buono shall cease and desist from committing or causing any violations and any future violations of Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B), and13(b)(5) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13a-13, 13a-14, 13b2-1, and 13b2-2 thereunder.

B. Buono is prohibited, pursuant to Section 21C(f) of the Exchange Act, from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

C. Buono, pursuant to Section 4C of the Exchange Act and Rule 102(e) of the Commission's Rules of Practice, is denied the privilege of appearing or practicing before the Commission as an accountant.

D. Buono shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $100,000.00 to the 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 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 John Buono 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 Robert Burson, Division of Enforcement, Securities and Exchange Commission, 175 West Jackson, Suite 900, Chicago, IL 60604.

By the Commission.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9719 / January 30, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74183 / January 30, 2015

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3625 / January 30, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16033

In the Matter of AIRTOUCH COMMUNICATIONS, INC., HIDEYUKI KANAKUBO, AND JEROME KAISER, CPA, Respondents.	ORDER MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO AIRTOUCH COMMUNICATIONS, INC. AND HIDEYUKI KANAKUBO

I.

On August 22, 2014, the Securities and Exchange Commission ("Commission") instituted proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against AirTouch Communications, Inc., Hideyuki Kanakubo, and Jerome Kaiser, CPA (collectively, "Respondents"), and additionally as to Kaiser, pursuant to Section 4C of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.

II.

Respondents AirTouch Communications, Inc. ("AirTouch") and Hideyuki Kanakubo ("Kanakubo") 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 AirTouch and Kanakubo consent to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 as to AirTouch Communications, Inc. and Hideyuki Kanakubo ("Order"), as set forth below.

III.

On the basis of this Order and Respondents AirTouch's and Kanakubo's Offers, the Commission finds[1] that:

Summary

1. This matter involves fraudulent financial misstatements by AirTouch, a Newport Beach, California issuer, its founder and former president and CEO Kanakubo, and its former CFO and corporate secretary Jerome Kaiser, CPA ("Kaiser"), in the company's voluntarily filed Form 10-Q for the third quarter of 2012, and to an investor in connection with a $2 million loan made to the company in the fall of 2012.

2. In the third quarter of 2012, AirTouch improperly recognized net revenues of $1.031 million based on $1.24 million of inventory shipped to a Florida entity. This revenue recognition was improper because, as Kanakubo and Kaiser knew, or were reckless in not knowing, a fulfillment and logistics agreement executed contemporaneously with the Florida entity's purchase order—and upon which the purchase order was conditioned—relieved that entity of any obligation to pay AirTouch unless and until an AirTouch customer purchased the inventory. Kanakubo and Kaiser also knowingly, recklessly or negligently made false representations and omissions about this revenue to an AirTouch investor and lender. This conduct in inflating the revenues and obtaining financing was also deceptive and constituted a scheme to defraud.

3. In early 2013, AirTouch filed a Form 8-K disclosing its intention to restate net revenues for the third quarter of 2012, based on erroneous revenue recognition.

Respondents

4. **AirTouch Communications, Inc.** is a Delaware corporation with its principal place of business in Newport Beach, California. AirTouch's common stock is quoted on the OTC Pinks under the symbol "ATCH." AirTouch develops and sells telecommunications equipment designed to integrate mobile telephones into landline telephone systems within a consumer's home.

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

5. **Hideyuki Kanakubo** resides in Irvine, California. He is AirTouch's founder and former president, CEO, and director. At all relevant times, Kanakubo was responsible for the management of AirTouch's business. As of May 31, 2014, Kanakubo beneficially owned or controlled 1,858,143 shares of AirTouch common stock, or 9% of the company's total outstanding shares. Kanakubo resigned as president and CEO in March 2013.

6. **Jerome Kaiser, CPA** resides in Santa Barbara, California. Kaiser is a licensed Certified Public Accountant and an active member in the AICPA and California Society of Public Accountants. Kaiser holds a BS in Accounting and an MS in Business Taxation. He is AirTouch's former CFO and corporate secretary. At all relevant times, Kaiser was responsible for the management of AirTouch's business. As of May 31, 2014, Kaiser owned options to acquire 520,096 shares of AirTouch common stock at a strike price of $2 per share. He resigned from AirTouch in April 2013.

Background

7. In or around early 2012, AirTouch developed a new product, the "U250 SmartLinx", designed for sale to Mexico's largest provider of landline telephone services (the "Mexican Entity").

8. On July 30, 2012, AirTouch contacted a Florida provider of logistics and fulfillment services (the "Florida Entity") about the possibility of warehousing AirTouch's U250 SmartLinx product for possible sale to the Mexican Entity. AirTouch had never done business with the Florida Entity prior to July 30, 2012.

9. During contract negotiations related to this potential warehousing arrangement, the Florida Entity's CEO told Kanakubo that the Florida Entity was not buying any product from AirTouch, but rather would only warehouse the U250 SmartLinx inventory for eventual delivery to the Mexican Entity or other customers of AirTouch. AirTouch's salesperson relayed the same information to Kaiser.

10. On July 30, 2012, Kaiser sent Kanakubo a Fulfillment and Logistics Agreement between AirTouch and the Florida Entity (the "Agreement"), asking him to immediately review and sign it, which Kanakubo did. The Agreement included, among other terms, the following provisions:

a) "Section 3 (Orders and Acceptance): [The Florida Entity]'s purchase orders are subject to purchase orders by [the Mexican Entity] and/or any other customer that may be assigned from time to time by AirTouch. In the event [the Mexican Entity] or any of the customers does not fulfill the purchase orders and/or cancels the orders, [the Florida Entity] shall have the right to return these products to AirTouch and obtain a full credit equal to the original purchase amount with no offsets or deductions or any kind.";

b) "Section 5 (Resale to [the Mexican Entity] and/or Assigned Customers by AirTouch): [The Florida Entity] shall store the merchandise until shipment of the Products and shall invoice AirTouch for storage of the products, in/out control, invoicing, stock reconciliation, at 1.5% of the invoice value for the first 30 days and an additional 1% for each additional 30 days."; and

c) "Section 6 (Payment): [The Florida Entity] shall pay for Products in 90 days in accordance with the payment terms invoiced by AirTouch. However, [the Florida Entity] shall not be obligated to pay AirTouch until the Products have been received by [the Mexican Entity] and [the Florida Entity] has received full payment therefor, at which time then [the Florida Entity] shall pay AirTouch for the Products within 10 days thereafter."

11. The same day, the Florida Entity issued a $1.74 million "purchase order" for 20,000 U250 SmartLinx (the "Purchase Order"). The Purchase Order stated a payment term of "Net 90" but also stated that its payment terms were "according to term sheet." The Agreement was the "term sheet." Kaiser received emails where representatives of the Florida Entity described the Purchase Order as "conditional" upon AirTouch's execution of the Agreement. Kanakubo was also made aware that the Florida Entity would not issue the Purchase Order unless AirTouch first executed the Agreement.

12. On July 31, 2012, the Florida Entity sent Kaiser the counter-signed Agreement and the Purchase Order in a single email. Before forwarding this email to AirTouch's controller, he deleted the Agreement as an attachment, and forwarded only the Purchase Order.

13. AirTouch shipped approximately $1.24 million of inventory to the Florida Entity during the third quarter of 2012, pursuant to the Agreement and the Purchase Order. AirTouch recognized revenue on all $1.24 million of inventory shipped to the Florida Entity during the quarter.

14. In October 2012, in connection with AirTouch's quarterly review, AirTouch's controller provided its outside independent accountant with a copy of the Purchase Order, but not the Agreement. The outside independent accountant did not receive the Agreement since Kaiser had never provided AirTouch's controller with the agreement.

15. When discussing the purported receivable AirTouch booked from the Florida Entity at board meetings, Kanakubo and Kaiser did not inform AirTouch's outside directors, including the chairman of the audit committee, that shipments to the Florida Entity were controlled by the Agreement.

16. AirTouch did not receive any payment from the Florida Entity during the third quarter of 2012, and likewise received no commitment from the Mexican Entity that it would buy product shipped to the Florida Entity, or otherwise.

1. AirTouch's Form 10-Q for the Third Quarter 2012

17. On November 14, 2012, AirTouch filed its Form 10-Q for the third quarter of 2012, reporting net revenues of $1,031,747. Without the revenue recognized on the inventory shipped to the Florida Entity, AirTouch would not have had any positive revenue for the quarter.

18. Under Generally Accepted Accounting Principles ("GAAP"), revenue cannot be recognized unless it is "realized or realizable" and "earned."

19. AirTouch's recognition of revenues for the inventory shipped to the Florida Entity did not comply with GAAP. Because AirTouch did not sell any product to the Florida Entity—the Purchase Order and the Agreement merely documented, for tracking purposes, the transfer of AirTouch inventory to the Florida Entity in contemplation of future sales—the revenue associated with shipments to the Florida Entity was not realized, realizable or earned.

20. AirTouch's revenue recognition policy, which was disclosed in the 10-Q and was consistent with the requirements of GAAP, permitted the recognition of revenue only where: "(1) persuasive evidence of an arrangement exists in the form of an accepted purchase order or equivalent documentation; (2) delivery has occurred, based on shipping terms, or services have been provided; (3) the company's price to the buyer is fixed or determinable, as documented on the accepted purchase order or similar documentation; and (4) collectability is reasonably assured."

21. Given the terms of the Purchase Order and the Agreement, AirTouch had no reasonable assurance of collectability from the Florida Entity because AirTouch did not have a valid receivable to collect from the Florida Entity.

22. Kanakubo and Kaiser signed certifications intended to be made pursuant to the Sarbanes-Oxley Act of 2002, stating that the Form 10-Q fairly presented AirTouch's financial condition and results.

23. Kanakubo and Kaiser knew, or were reckless in not knowing, that AirTouch's Form 10-Q contained materially false or misleading statements concerning reported net revenues and compliance with GAAP or AirTouch's revenue recognition policy.

24. The false and misleading statements in AirTouch's Form 10-Q occurred in connection with the purchase or sale of securities.

25. The false and misleading statements in AirTouch's Form 10-Q were material. These statements would have been viewed by a reasonable investor as significantly altering the total mix of available information, given that AirTouch would not have had any positive revenues for the quarter if it did not recognize the revenue from the Florida Entity. The Form 10-Q also reflected AirTouch's largest revenues ever reported for a quarter.

26. Kanakubo and Kaiser each knew about the Agreement but did not provide it to others involved in AirTouch's financial reporting process, including the controller, the chairman of the audit committee, and the company's outside independent accountant. This and other deceptive conduct contributed to a revenue recognition scheme and operated as a fraud.

27. Because of Kanakubo's and Kaiser's positions as AirTouch's senior management, their scienter is attributable to AirTouch.

28. At all relevant times, Kanakubo and Kaiser were the company's principal officers; they were the members of management in charge of AirTouch's day-to-day management,

policies, and operations; and they were responsible for preparing and signing AirTouch's SEC filings.

2. Misstatements and Omissions Made to an Investor

29. In or around 2012, Kanakubo and Kaiser solicited a short term bridge loan from an existing AirTouch investor ("Investor A"), in exchange for a promissory note and a warrant to purchase 100,000 shares of AirTouch common stock. Investor A recommended the loan and warrant acquisition opportunity to a related entity, for which he served as the authorized agent during the due diligence process.

30. On October 3, 2012, Kanakubo falsely told Investor A by email that the inventory to be shipped by AirTouch to the Florida Entity—which he mischaracterized as an "authorized fulfillment house" for the Mexican Entity—pertained to an existing purchase order from the Mexican Entity.

31. Around the same time, Kaiser provided Investor A's representatives with the Purchase Order, but did not provide them with or disclose the existence of the Agreement.

32. On October 17, 2012, AirTouch received the loan of $2 million from Investor A in exchange for a warrant to purchase its common stock.

33. On October 19, 2012, Kanakubo approved a $15,000 bonus payment to Kaiser for his work on raising capital. The same day, Kanakubo authorized a $15,000 payment to himself in connection with unused vacation time.

34. Kanakubo and Kaiser knew, or were reckless in not knowing, that their statements to Investor A concerning revenues from the Florida Entity were materially false and misleading.

35. Kanakubo and Kaiser also failed to act with reasonable care because they did not ensure that Investor A was provided with all material information necessary to make their statements to him concerning the inventory shipped to the Florida Entity not misleading.

36. The false and misleading statements and omissions to Investor A occurred in the offer or sale of, and in connection with the purchase or sale of, securities.

37. Kanakubo's and Kaiser's false and misleading statements to Investor A, and their failure to disclose the terms of the Agreement, were material. Kanakubo's and Kaiser's statements to Investor A, and the terms of the Agreement, would have been viewed by a reasonable investor as significantly altering the total mix of available information because, among other reasons, AirTouch had not sold any of the inventory warehoused with the Florida Entity to the Mexican Entity, and thus had no basis to represent that it expected to collect revenue from the Florida Entity.

38. Kanakubo and Kaiser persuaded Investor A over several months into loaning AirTouch $2 million based on a distorted view of AirTouch's financial relationships with the Mexican Entity and the Florida Entity. They led Investor A to believe that AirTouch would

receive a substantial financial commitment from the Mexican Entity, which would then provide AirTouch with sufficient cash flow for AirTouch to service and repay the loan. These inducements by Kanakubo and Kaiser, along with other deceptive conduct, contributed to an offering fraud scheme and a fraudulent transaction.

39. Because of Kanakubo's and Kaiser's positions as AirTouch's senior management, their scienter and their negligence are attributable to AirTouch.

40. At all relevant times, Kanakubo and Kaiser were the company's principal officers; there were the members of management in charge of AirTouch's day-to-day management, policies, and operations; and they were responsible for negotiating with Investor A, providing Investor A with due diligence materials, and for preparing and signing AirTouch's SEC filings.

3. AirTouch's Restatement

41. In January 2013, AirTouch's board of directors commenced an internal investigation concerning the net revenues reported in the Form 10-Q for the third quarter of 2012.

42. AirTouch's board of directors and its outside auditor subsequently received the Agreement, and determined to restate reported revenues for the third quarter of 2012.

43. AirTouch filed a Form 8-K on February 7, 2013, announcing errors in revenue recognition and the intention to file an amended Form 10-Q. No amended Form 10-Q has been filed.

Violations

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

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondents AirTouch and Kanakubo shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Sections 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent Kanakubo is prohibited, pursuant to Section 8A(f) of the Securities Act and Section 21C(f) of the Exchange Act, for five years following the date of entry of this Order, from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

C. Respondent Kanakubo shall pay a civil money penalty in the amount of $50,000 to the Securities and Exchange Commission. Payment shall be made within 365 days of entry of the Order. If payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. Payment must be made in one of the following ways:

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

(2) Respondent Kanakubo 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 Kanakubo 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 Kanakubo 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 Diana Tani, Assistant Regional Director, Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 444 South Flower St., Suite 900, Los Angeles, CA 90071.

D. Respondent Kanakubo shall pay disgorgement of $15,000, which represents profits gained as a result of the conduct described herein, to the Securities and Exchange Commission. Payment shall be made within 365 days of entry of the Order. If payment is not made by the date the payment is required by this Order, any interest accrued 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 Kanakubo may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent Kanakubo 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 Kanakubo 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 Kanakubo 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 Diana Tani, Assistant Regional Director, Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 444 South Flower St., Suite 900, Los Angeles, CA 90071.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent Kanakubo, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent Kanakubo under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent Kanakubo 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.

Brent J. Fields
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary