Staff Summaries of 2013 Rule Reviews

On December 2, 2022, the Commission published in the Federal Register a list of rules to be reviewed pursuant to section 610 of the Regulatory Flexibility Act ("Rule Review List"). The list included eight rules adopted by the Commission in 2013 (see list below). The list was published to provide the public with notice that these rules were scheduled for review by the agency and to invite public comment on whether the rules should be continued without change, or should be amended or rescinded to minimize any significant economic impact of the rules upon a substantial number of small entities. The staff of the Commission reviewed the comments received and has now completed reviews of the rules identified in the list of rules to be reviewed. If, based on a review, it is anticipated that the agency would take further action, a forthcoming Regulatory Flexibility Act agenda will so indicate.

The following are brief summaries of the reviews completed:

- Removal of Certain References to Credit Ratings under the Investment Company Act - The staff conducted a review concerning the impact on small entities of amendments to rule 5b-3 under the under the Investment Company Act of 1940 and amendments to Forms N-1A, N-2, and N-3 under the Investment Company Act of 1940 ("Investment Company Act") and the Securities Act of 1933 (collectively, the "amendments"), adopted in 2013. *See* Release Nos. 33-9506, IC-30847 (Dec. 27, 2013), available at https://www.federalregister.gov/documents/2014/01/08/2013-31425/removal-of-certain-references-to-credit-ratings-under-the-investment-company-act. Rule 5b-3 was amended in 2013 to replace a reference to credit ratings in determining when an investment company ("fund") may treat a repurchase agreement as an acquisition of securities collateralizing the repurchase agreement for certain purposes under the Investment Company Act. The amendments replaced this reference to credit ratings with an alternative standard designed to retain a similar degree of credit quality to that in prior rule 5b-3. Forms N-1A, N-2, and N-3 also were amended in 2013 to eliminate the required use of nationally recognized statistical rating organizations ("NRSRO") credit ratings when a fund chooses to depict its portfolio holdings by credit quality. After considering the statutory review factors, the staff does not believe that the amendments would need to change to minimize any significant economic impact of the rule or forms upon a substantial number of small entities.

  Rule 31a-1 under the Investment Company Act requires the retention of ledger accounts for each portfolio security and each person through which a portfolio transaction is effected, including certain records of collateral for monies borrowed and loaned. Although some of the procedures under the amendments to rule 5b-3 may overlap with information in the ledgers, the staff believes that any overlap is minimal and the rule 5b-3 procedures contain additional information specifically related to the concerns underlying these rules.

  The staff does not believe that the amendments are complex, and no aspect of the amendments was identified during the "RFA" analysis as presenting a unique burden or

cost to small entities. The Commission did not receive any comments from the public in response to the request for comments in the 2023 Rule Review List with respect to the RFA analysis of the amendments.

- Registration of Municipal Advisors **-** The staff conducted a review concerning the impact on small entities of Rules 15Ba1-1 through 15Ba1-8 and Rule 15Bc4-1 (collectively, the "rules") and Forms MA, MA-I, MA-W, and MA-NR (collectively, the "forms") under the Securities Exchange Act of 1934, which the Commission adopted in 2013. *See*, Release No. 34-70462 (Sept. 20, 2013), available at https://www.federalregister.gov/documents/2013/11/12/2013-23524/registration-of-municipal-advisors. The Commission adopted the rules and forms to implement the requirements of Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which amended Section 15B of the Exchange Act to create a new class of regulated persons, "municipal advisors," and required these advisors to register with the Commission. The rules, among other things: (i) interpret the definition of the term "municipal advisor," interpret the statutory exclusions from that definition, and provide certain additional regulatory exemptions; (ii) require municipal advisors to file the forms with the Commission to obtain, maintain, or terminate their registration with the Commission; and (iii) require municipal advisors to maintain certain books and records in accordance with the Exchange Act. After considering the five statutory review factors set forth in 5 U.S.C. 610(b), the staff does not believe that the rules or forms would need to change to minimize any significant economic impact of the rules or forms upon a substantial number of small entities.

  First, the staff believes the rules and forms continue to be necessary to implement the requirements of Section 975 of the Dodd-Frank Act; to aid municipal entities, obligated persons, and others in accessing up-to-date information when choosing municipal advisors or engaging in transactions with municipal advisors; to incentivize municipal advisors not to engage in misconduct; and to further the Commission's oversight of municipal advisors and their activities in the municipal securities market.

  Second, the Commission did not receive any comments from the public in response to the request for comments in the 2023 Rule Review List with respect to the RFA analysis of the rule; however, in response to interpretive questions from the public after the Commission adopted the rules, the staff has issued Frequently Asked Questions to provide the staff views on certain aspects of the rules and forms.

  Third, the staff does not believe that it is possible to meaningfully simplify the rules and forms in a manner that would be appropriate or consistent with the protection of municipal entities, obligated persons, or investors, or with the Commission's understanding of Congress's intent to have the Commission register municipal advisors and oversee their activities.

  Fourth, although the staff recognizes that some of the information that respondents collect under the forms and recordkeeping rules overlaps with information collected under other registration regimes or recordkeeping rules, the staff believes the rules and

forms have taken into account and appropriately reduced overlap, conflict, or duplication. *Fifth*, the Commission last evaluated the rules and forms in 2018, in connection with amendments to Form MA and Form MA-I, and the staff is not aware of any material changes in technology, economic conditions, or other factors in the area affected by the rules or forms since their adoption in 2013 that reduce the need for the rules or forms or necessitate a review of the approach taken. No aspect of the rules or forms was identified during the RFA analysis as presenting a unique burden or cost to small entities.

- Broker-Dealer Reports **-** The staff conducted a review concerning the impact on small entities of amendments to broker-dealer annual reporting, audit, and notification requirements in Rule 17a-5 ("Rule 17a-5") and Rule 17a-11 ("Rule 17a-11") (together, "amendments") and new Form Custody ("Form Custody"), under the Exchange Act, which the Commission adopted in 2013. *See* Release No. 34-70073 (July 30, 2013), available at https://www.federalregister.gov/documents/2013/08/21/2013-18738/broker-dealer-reports. The amendments and Form Custody are designed, among other things, to provide additional safeguards with respect to broker-dealer custody of customer securities and funds, to enhance the ability of the Commission to oversee broker-dealer custody practices, to increase the focus of carrying broker-dealers and their independent public accountants on compliance, and internal control over compliance, with certain financial and custodial requirements, to facilitate the ability of the Public Company Accounting Oversight Board ("PCAOB") to implement the explicit oversight authority over broker-dealer audits provided to the PCAOB by the Dodd-Frank Act, and to satisfy the internal control report requirement in Rule 206(4)-2 under the Investment Advisers Act of 1940 for certain broker-dealers affiliated with, or dually-registered as, investment advisers. After considering the statutory review factors, staff does not believe that the amendments and Form Custody would need to change to minimize any significant economic impact of the amendments and Form Custody upon a substantial number of small entities.

  The staff is not aware of any overlap, conflict, or duplication of the amendments and Form Custody with other federal rules or with state and local government rules. The staff does not consider the amendments and Form Custody unduly complex, and no aspect of the rules was identified during the statutory analysis as presenting a unique burden or cost to small entities. The amendments and Form Custody were motivated initially by several cases the Commission brought alleging fraudulent conduct by investment advisers and broker-dealers, including, among other things, misappropriation or other misuse of customer securities and funds. The staff believes that the amendments and Form Custody continue to be necessary to provide safeguards with respect to carrying broker-dealers' custody of securities and funds of customers and others by, among other things, requiring carrying broker-dealers to file a compliance report with the Commission that must be examined by the auditor in accordance with PCAOB standards.

  Changes in technology and economic conditions or other factors since the adoption of the amendments and Form Custody have not affected the continued need for the amendments and Form Custody. The staff believes that the amendments and Form Custody continue to be necessary to help mitigate the risk of misappropriation or other misuse of customer securities and funds held by broker-dealers. The Commission did not receive any

comments from the public in response to the request for comments in the 2023 Rule Review List with respect to the RFA analysis of the amendments and Form Custody.

- Financial Responsibility Rules for Broker-Dealers **-** The staff conducted a review concerning the impact on small entities of amendments to the broker-dealer net capital rule ("Rule 15c3-1"), customer protection rule ("Rule 15c3-3"), books and records rules ("Rule 17a-3" and "Rule 17a-4"), and notification rule ("Rule 17a-11") (collectively, the "broker-dealer financial responsibility rules") under the Exchange Act, which the Commission adopted in 2013 (collectively, the "amendments"). *See* Release No. 34-70072 (July 30, 2013), available at https://www.federalregister.gov/documents/2013/08/21/2013-18734/financial-responsibility-rules-for-broker-dealers. The Commission adopted the amendments to address several areas of concern regarding broker-dealer financial responsibility rules, specifically net capital, customer protection, books and records, and notification rules for broker-dealers. The amendments were designed to better protect a broker-dealer's customers and enhance the Commission's ability to monitor and prevent unsound business practices. After considering the statutory review factors, staff does not believe that the amendments would need to change to minimize any significant economic impact of the rule upon a substantial number of small entities.

  The staff is not aware of any overlap, conflict, or duplication of the amendments with other federal rules or with state and local government rules. The staff does not consider the amendments unduly complex. Among other things, the goal of the amendments was to reduce potential ambiguities or gaps in the rules in the interest of increasing clarity and eliminating unnecessary complexity. The complexity of the amendments scales with the complexity of the securities business conducted by the broker-dealer to which the rules apply. Changes in technology and economic conditions or other factors since the adoption of the amendments have not affected the continued need for the amendments. The staff continues to believe that these amendments appropriately addressed several areas of concern regarding the financial responsibility requirements for broker-dealers. The Commission did not receive any comments from the public in response to the request for comments in the 2023 Rule Review List with respect to the RFA analysis of the amendments.

- Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings **-** The staff conducted a review concerning the impact on small entities of Securities Act Rule 506 and amendments to Securities Act Rule 144A and Form D, which the Commission adopted in 2013. *See* Release No. 33-9415 (July 10, 2013), available at https://www.federalregister.gov/documents/2013/07/24/2013-16883/eliminating-the-prohibition-against-general-solicitation-and-general-advertising-in-rule-506-and. The Commission adopted the rule to implement Section 201(a) of the Jumpstart Our Business Startups Act ("JOBS Act"). Section 201(a)(1) of the JOBS Act directed the Commission to revise Rule 506 of Regulation D to eliminate the prohibition against general solicitation and general advertising in offers and sales made under Rule 506 provided that all purchasers of securities are accredited investors. Section 201(a)(1) further provides that the revised rule requires the issuer to take reasonable steps to verify

that purchasers of the securities are accredited investors, using such methods as determined by the Commission. The amendments adopting Rule 506 implement this statutory mandate. The rule also includes a non-exclusive list of methods that an issuer may use to satisfy the verification requirement for purchasers who are natural persons. The Commission also amended Form D to add a checkbox that requires an issuer to indicate whether it is relying on Rule 506(c) to conduct its Regulation D offering. Section 201(a)(2) of the JOBS Act directed the Commission to revise Rule 144A(d)(1) to provide that securities sold under the exemption may be offered to persons other than qualified institutional buyers ("QIBs"), including by means of general solicitation or general advertising, provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a QIB. The amendments to Rule 144A implement this statutory mandate. After considering the statutory review factors, the staff does not believe that the rule amendments would need to change to minimize any significant economic impact of the rule upon a substantial number of small entities.

The staff believes there is a continuing need for the rule in light of the existing statutory mandates set forth in Sections 201(a)(1) and 201(a)(2) of the JOBS Act and the significant markets for Rule 144A offerings. The staff does not believe that the rule overlaps with other federal or state rules or that the rule is complex as it adheres closely to the requirements of the statutory mandate, and no aspect of the rule was identified during the RFA analysis as presenting a unique burden or cost to small entities. The Commission did not receive any comments from the public in response to the request for comments in the 2023 Rule Review List with respect to the RFA analysis of the rule.

- Disqualification of Felons and Other 'Bad Actors' from Rule 506 Offerings **-** The staff conducted a review concerning the impact on small entities of amendments to Securities Act Rule 506, which the Commission adopted in 2013. *See* Release No. 33-9414 (July 10, 2013), available at https://www.federalregister.gov/documents/2013/07/24/2013-16983/disqualification-of-felons-and-other-bad-actors-from-rule-506-offerings. The Commission adopted the rule amendments to implement Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Section 926 of the Dodd-Frank Act directed the Commission to adopt rules to disqualify certain securities offerings from reliance on Rule 506 of Regulation D. "Bad actor" provisions disqualify securities offerings from reliance on exemptions from registration if the issuer or other relevant persons (such as underwriters, placement agents and the directors, officers, and significant shareholders of the issuer) have been convicted of or are subject to court or administrative sanctions for securities fraud or other violations of specified laws. Section 926 further directed that the disqualification rules for Rule 506 offerings be "substantially similar" to the bad actor disqualification provisions in Rule 262 of Regulation A and that the provisions disqualify offers and sales by certain persons specified in the statute. The amendments to Rule 506 implement this statutory mandate. After considering the statutory review factors, the staff does not believe that the rule amendments would need to change to minimize any significant economic impact of the rule upon a substantial number of small entities.

The staff believes there is a continuing need for the rule amendments in light of the statutory mandate and the significant market for Rule 506 offerings and the need to ensure compliance with the conditions of Regulation D. Prior to the rule amendments, there were no bad actor disqualifying provisions for Rule 506 offerings; state blue sky bad actor provisions do not apply. The staff does not believe that the rule overlaps with other federal or state rules or that the rule is complex as it adheres closely to the statutory requirements, and no aspect of the rule was identified during the RFA analysis as presenting a unique burden or cost to small entities. The Commission did not receive any comments from the public in response to the request for comments in the 2023 Rule Review List with respect to the RFA analysis of the rule.

- Identity Theft Red Flags **-** The staff conducted a review concerning the impact on small entities of new subpart C to part 248 of the Commission's regulations adopted in 2013 ("Regulation S-ID"). *See* Release No. 34-69359 (Apr. 10, 2013), available at https://www.federalregister.gov/documents/2013/04/19/2013-08830/identity-theft-red-flags-rules. Regulation S-ID implemented sections 615(e)(1)(A) and (B) of the Fair Credit Reporting Act of 1970, as amended by the Dodd-Frank Act. Regulation S-ID includes 17 CFR 248.201 ("Duties regarding the detection, prevention, and mitigation of identity theft"), 17 CFR 248.202 ("Duties of card issuers regarding change of address"), and Appendix A ("Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation"). The Commission adopted Regulation S-ID to address risks related to identity theft. Regulation S-ID requires certain entities subject to the Commission's jurisdiction—including brokers or dealers, investment companies, and investment advisers—that meet the rule's definitions of "financial institutions" and "creditors" to address identity theft. After considering the statutory review factors, staff does not believe that amendments to the rule would need to change to minimize any significant economic impact of the rule upon a substantial number of small entities.

  The staff is not aware of any overlap, conflict, or duplication of the rule with other federal rules or with state and local government rules. The staff does not consider Regulation S-ID particularly complex, and no aspect of the rule was identified during the statutory analysis as presenting a unique burden or cost to small entities. The staff believes Regulation S-ID continues to be necessary to implement the requirements of the Dodd-Frank Act and to help ensure that financial institutions and creditors have in place identity theft prevention programs designed to detect, prevent, and mitigate identity theft. The Commission did not receive any comments from the public in response to the request for comments in the 2023 Rule Review List with respect to the RFA analysis of Regulation S-ID.

- Lost Securityholders and Unresponsive Payees **-** The staff conducted a review concerning the impact on small entities of amendments to Rule 17Ad-17 ("Rule 17Ad-17") under Section 17A of the Securities Exchange Act of 1934 ("Exchange Act"), which the Commission adopted in 2013. *See* Release No. 34-68668, (January 16, 2013) ("amendments"), available at https://www.federalregister.gov/documents/2013/01/23/2013-01269/lost-securityholders-and-unresponsive-payees. The Commission adopted the amendments to implement the

requirements of Section 929W of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[1] Section 929W of the Dodd-Frank Act added a new subsection (g), "Due Diligence for the Delivery of Dividends, Interest, and Other Valuable Property Rights," to Section 17A of the Exchange Act. Section 17A(g) directs the Commission to revise Rule 17Ad-17, "Transfer Agents' Obligation to Search for Lost Securityholders" to: 1) extend the requirements of Rule 17Ad-17 to search for lost securityholders from only recordkeeping transfer agents to brokers and dealers as well; 2) add a requirement that the paying agent provide a single written notification to each missing securityholder that the missing securityholder has been sent a check that has not yet been negotiated; and 3) add certain other provisions. After considering the statutory review factors, staff does not believe that the amendments would need to change to minimize any significant economic impact upon a substantial number of small entities.

The staff is not aware of any overlap, conflict, or duplication of the Rule 17Ad-17 with other federal rules or with state and local government rules. The staff does not consider the amendments to be complex, and no aspect of the amendments were identified during the statutory analysis as presenting a unique burden or cost to small entities. The staff believes the amendments continue to be necessary to implement the requirements of Section 929W of the Dodd-Frank Act, to help reduce the number of lost securityholders and unresponsive payees, and to further the Commission's mission of protecting investors. The Commission did not receive any comments from the public in response to the request for comments in the 2023 Rule Review List with respect to the RFA analysis of the amendments.

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