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:

CHRISTOPHER COX, CHAIRMAN

PAUL S. ATKINS, COMMISSIONER

ROEL C. CAMPOS, COMMISSIONER

ANNETTE L. NAZARETH, COMMISSIONER

KATHLEEN L. CASEY, COMMISSIONER

105 Documents

Commissioner Atkins
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2641 / September 4, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12743

In the Matter of

BRENT WILLIAM FEDERIGHI,

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 Brent William Federighi ("Federighi" or "Respondent").

II.

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

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III.

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

1. Federighi was a member of Ilytat, LLC, which was registered with the State of California as an investment adviser, from 1999 through 2002. Federighi was the sole member of Gage Capital, LLC, which was registered with the State of California as an investment adviser, from 2002 through 2003.

2. On August 22, 2007, a final judgment was entered by consent against Federighi, permanently enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder in the civil action entitled Securities and Exchange Commission v. Brent William Federighi, et al., Civil Action Number 3:05-cv-05305-MMC, in the United States District Court for the Northern District of California.

3. The Commission's complaint alleged that Respondent violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by engaging in late trading and deceptive market timing in mutual fund shares from 2000 through 2003.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Federighi be, and hereby is barred from association with any investment adviser, with the right to reapply for association after 18 months to the appropriate self-regulatory organization, or if there is none, to the Commission;

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

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 4, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12742

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From November 2003 through January 2007, Respondent was president, majority owner, and a person associated with Renaissance Asset Management, LLP and its successor, Renaissance Asset Management, LLC (collectively, "Renaissance"). Respondent, 46 years old, is a resident of Atlanta, Georgia.

2. Renaissance was the managing member of RAM I, LP and its successor, RAM I, LLC (collectively, "RAM"), a private investment pool.

3. Acting through Renaissance, Ramunno made investment decisions, for compensation, for RAM.

4. Renaissance told RAM investors, through a confidential private placement memorandum and disclosure document, that it would determine how to invest RAM funds from a broad menu of choices, including some that were securities. Specifically, it stated: "The Company's accounts trade pursuant to the trading strategies described herein, which emphasize a

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maximum range of diversification in a wide and substantially unrestricted variety of investment instruments. It is not practicable to set forth a breakdown by market sector as the contracts traded by Renaissance vary considerably over time depending on Renaissance's view of the opportunities for profitable trading. Renaissance may trade securities, security futures and security futures products."

5. Renaissance also told RAM investors, through the same private placement memorandum, that it would be paid a monthly administrative fee "equal to 1/12th of 1 ½%," in addition to a quarterly incentive allocation "equal to 20% of any New Trading Profit," for its work as RAM's "Manager" and "Advisor".

6. Renaissance acted as an investment adviser by, for compensation, engaging in the business of advising RAM as to the advisability of investing in, purchasing, or selling securities.

B. ENTRY OF RESPONDENT'S CRIMINAL CONVICTION

1. On May 1, 2007, Ramunno pleaded guilty to one count each of wire fraud and mail fraud in violation of Title 18 United States Code, Sections 1343 and 1341, respectively, before the United States District Court for the Northern District of Georgia, in United States v. Anthony Michael Ramunno, Jr., a/k/a Mick Ramunno, Crim. Indictment No. 1:07-CR-061.

2. The counts of the criminal indictment to which Ramunno pleaded guilty alleged, among other things, that:

a. From in or about November 2003 up to on or about January 18, 2007, Ramunno knowingly devised and intended to devise a scheme and artifice to defraud RAM investors and obtain money and property from RAM investors by means of materially false and fraudulent pretenses, representations and promises, well knowing and having reason to know that said pretenses, representations and promises were and would be false;

b. Ramunno was primarily responsible for investing and trading pooled victim assets, for reporting the results of his trading to RAM participants in the form of annual reports and investor account statements, for allocating profits or losses among pool participants, and for administering the funds entrusted to him by RAM investors, as well as for administering RAM overall;

c. Ramunno fraudulently represented to his victim investors that their funds would be, and were being used for investment in commodity futures, and that they could expect, based on substantial misrepresentation of his past trading performance, significant returns on their investment;

d. Ramunno failed to disclose to pool participants and prospective pool participants that he was consistently losing money in commodity futures trading and was not generating profits for his investors;

e. Ramunno also failed to disclose that he was using participant funds to repay both principal and false trading profits distributed to earlier RAM investors, and that he was misappropriating substantial amounts of victim funds to pay for purely personal expenses, including a luxury home and multiple high-end automobiles and motorcycles, unrelated to RAM;

f. To solicit and maintain investment in RAM, Ramunno also distributed and caused to be distributed to pool participants and to prospective pool participants false written offering materials and financial statements related to Renaissance and RAM, including: RAM annual reports for 2004 and 2005, including purported opinion letters of Grant Thornton, LLP ("Grant Thornton"), a national public accounting form, falsely representing that firm had audited RAM's financial statements; 2003-2006 rate of return schedules for RAM including purported Grant Thornton opinion letters, falsely representing that RAM had generated substantial monthly and annualized profits; a confidential private placement memorandum and disclosure document for RAM dated July 1, 2006, incorporating false RAM rate of return and profit schedules; and RAM investor account statements falsely reporting substantial participant capital appreciation;

g. The purported Grant Thornton opinion letters Ramunno included with the RAM annual reports and rate of return schedules were forgeries, as Grant Thornton never provided any accounting or auditing services to Renaissance or RAM. Ramunno forged the Grant Thornton opinion letters both to misrepresent that RAM's financial statements had been audited by an outside accounting firm as well as to conceal Ramunno's substantial trading losses and theft of investor assets from RAM participants;

h. The RAM private placement memorandum falsely states that Renaissance was registered as a commodity pool operator and commodity trading advisor in November 2003, and that it was a member of the National Futures Association at the same time; however, Renaissance did not obtain those registrations and membership until in or about September 2005;

i. Ramunno's oral and written misrepresentations regarding his trading performance fraudulently induced dozens of investors from, among other states, Georgia, California, Texas, Ohio, Illinois, New Jersey, Tennessee and Wisconsin, to invest in RAM. Initial participant investments ranged from $18,000 to $2,000,000; and

j. As of December 31, 2006, RAM reported approximately 94 participant accounts and total pool assets of approximately $32 million; in reality, however, only a fraction of that amount actually resided in the bank and brokerage accounts associated with Ramunno, Renaissance, and RAM.

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 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.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

FC-N Commissioner Casey Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 5, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12747

In the Matter of **MARIA T. GIESIGE,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative 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 Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), against Maria T. Giesige ("Respondent" or "Giesige").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

Marie T. Giesige is 44 years old and a resident of Ottawa, Ohio. She is an investment adviser registered with the State of Ohio under the name of Provision Financial and Estate Planning. From 2004 until January 2007, Respondent was associated with Investors Capital Corp. ("Investors Capital"), a registered broker-dealer, as a registered representative.

B. OTHER RELEVANT ENTITY

Carolina Development Co. ("Carolina") is a Nevada corporation headquartered in Irvine, California. Carolina raised at least $50 million from over 1400 investors by selling unregistered common stock. The offering was not registered with the Commission and did not qualify for any

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exemption from registration. During the relevant period, Carolina common stock was quoted in the Pink Sheets at approximately 10 cents a share.

C. FACTS

1. The Unregistered Sale of Securities

a. Carolina offered and sold over $50 million of its common stock to over 1400 investors claiming in a private placement memorandum that the offering was exempt from registration pursuant to Section 4(2) of the Securities Act and Rule 506 of Regulation D. Approximately half of the investors who purchased Carolina stock in the offering did not qualify as "accredited investors" as that term is defined in Regulation D. The offering was not registered and did not qualify for any exemption from registration. Potential investors were not provided with the kind of information that registration would provide, such as audited financial statements.

b. From October 2005 through January 2006, Respondent sold approximately $1.5 million of Carolina shares to approximately 50 investors.

c. Respondent's customers were almost exclusively small investors. Of the 50 investors who purchased shares through Respondent, only five could be considered "accredited investors." A number of the investors to whom Respondent sold Carolina stock were clients of her state-registered investment adviser.

2. Misrepresentations made in the Offer and Sale of Carolina Stock

a. During the relevant period, Respondent sold Carolina stock to investors at $3.00 a share; these shares carried restrictions on their resale. Respondent knew that unrestricted shares in Carolina were being quoted in the Pink Sheets at the same time at significantly lower prices but failed to inform investors.

b. In making offers and sales of Carolina stock, Respondent made material misrepresentations and omitted to state material facts. Respondent told investors and advisory clients that: (1) investors could sell the restricted stock they had received in the offering within weeks or months of their purchases while Respondent knew or was reckless in not knowing that the shares were restricted and could not be resold within that time period; (2) Carolina would be conducting an initial public offering of its shares within a short time period at a price of $9.00 per share and that the price would rise to $18.00 a share in aftermarket trading despite Respondent's knowledge that no registration statement had been filed with respect to such an offering of Carolina stock; and (3) an audit had been performed on Carolina's financial statements despite Respondent's knowledge that no audit had been completed.

c. The timing of a public offering was important to Respondent's investors because it would enable them to sell their shares at a substantial profit within a short period of time.

3. <u>Violations of the Broker Registration Provisions</u>

a. Respondent sold shares of Carolina as a regular course of business. Respondent solicited investors to purchase Carolina shares and received commissions on the sale of Carolina shares.

b. While Respondent was associated with a broker-dealer at the time she was selling Carolina shares, she did not inform anyone at Investors Capital that she was selling Carolina shares and she knew that under Investors' Capital procedures all sales of securities had to be authorized by the firm.

D. <u>VIOLATIONS</u>

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

2. As a result of the conduct described above, Respondent willfully violated Sections 5(a) and 5(c) of the Securities Act which prohibits the unregistered sale of securities.

3. As a result of the conduct described above, Respondent willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser,

4. As a result of the conduct described above, Respondent willfully violated Section 15(a) of the Exchange Act which prohibits acting as an unregistered broker or 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 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 including, but not limited to, disgorgement and prejudgment interest, and civil penalties pursuant to Section 21B of the Exchange Act;

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

D. Whether, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, and 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 5(a), 5(c) and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act and whether Respondent should be ordered to pay disgorgement and prejudgment interest pursuant to Section 8A(e) of the Securities Act, Section 21C(e) of the Exchange Act and Section 203(j) of the Advisers Act.

IV.

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

IT IS FURTHER ORDERED that 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 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.

Nancy M. Morris

Nancy M. Morris
Secretary

Commissioners Atkins & Campos Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56352 / September 5, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12744

In the Matter of Boston Stock Exchange, Inc. and James B. Crofwell, Respondents.	**CORRECTED ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 19(h) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it 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) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against the Boston Stock Exchange, Inc. ("BSE") and James B. Crofwell ("Crofwell").

II.

In anticipation of the institution of these proceedings, the BSE and Crofwell 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, the BSE and Crofwell consent 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 Pursuant to Sections 19(h) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

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III.

On the basis of this Order and the BSE's and Crofwell's Offers, the Commission finds that:

SUMMARY

These proceedings concern the failure of the BSE, between 1999 and 2004, to enforce certain of its rules intended to prevent BSE broker-dealer specialist firms from trading in a way that benefited them while disadvantaging their customers who were trying to buy and sell stock. The BSE failed to develop and implement adequate procedures for surveillance of violations of its customer priority rules, which prohibit specialists from trading ahead and interpositioning.[1] Certain problems with the BSE's proprietary trading platform, BEACON (Boston Exchange Automated Communication and Order-Posting Network), and the adoption of a competing specialist initiative during 1996, made such surveillance difficult without fundamental programming changes to BEACON. BSE's failure to implement these programming changes and to otherwise conduct effective surveillance allowed hundreds, if not thousands, of violations per day to go undetected. Violations continued even after the Commission staff had repeatedly warned the BSE of the need to improve surveillance systems.

James B. Crofwell ("Crofwell"), the BSE's President between 1999 and 2003, knew that the procedures then in effect were inadequate. Crofwell provided a written timetable to the Commission indicating target dates to improve surveillance, but failed to devote resources necessary to ensure implementation. Crofwell received detailed written and verbal communications from the Commission staff and others at the BSE concerning these problems.

RESPONDENTS

A. **BSE** (SEC File No. 024-10093) is a national securities exchange, headquartered in Boston, Massachusetts, and registered with the Commission pursuant to Section 6 of the Exchange Act.

B. **Crofwell**, of Scituate, Massachusetts, was employed by the BSE as the Executive Vice-President, Information Systems from October 1986 until 1995, and thereafter as President and Chief Operating Officer of the Boston Stock Exchange until his resignation in 2003. As COO, Crofwell was responsible for all surveillance and technology functions at the BSE, including administration of the BEACON system.

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[1] In essence, these rules prohibit a specialist from trading with a customer from his own proprietary account, and benefiting from the spread between his cost and the price to the customer, if there are customer market orders that could be matched at the same or better price.

FACTS

A. BEACON Trading System and Applicable Rules

The BSE, as a regional stock exchange, maintained a trading floor staffed by employees of member specialist firms, which were registered broker-dealers. While the BSE traded some primary listings, for the most part BSE specialists traded stocks that were also listed on other exchanges. The specialists utilized a proprietary BSE trading system known as BEACON. Using the BEACON system, a specialist at his terminal could enter quotes for principal trades and match customer orders to buy and sell stocks. Generally, customer market and marketable limit orders under 1299 shares were automatically routed to the specialist's automatic execution (commonly referred to as "autoex") window on his trading terminal screen. As designed, BEACON permitted the order to reside on the autoex window for a predetermined number of seconds, during which time the specialist could offer price improvement prior to execution, move the order to a manual execution window to effect a layoff trade,[2] execute the order against his proprietary trading account, or match the order to another order.[3] After the predetermined number of seconds, BEACON would look to execute orders in a combined limit order book and, if there were none, against the specialist's proprietary account. Trades larger than 1299 shares went directly to the manual execution window.

All trades on the BSE are subject to certain rules promulgated by the BSE. BSE Rules, Ch. 2 § 11, titled *Trading While Acting as a Broker as to Market Orders*, prohibits a member from personally buying or initiating the purchase of any security on the exchange for his own account or for any account in which he, his member organization or a partner is directly interested, while such person holds an unexecuted customer market order to buy such a security, and prohibits similar conduct with respect to sales. In addition, BSE Rules, Ch. 2 § 6, titled *Bids and Offers for Stocks*, prohibits a member from making a bid or offer at a lower price than an existing clearly established bid. The rule similarly prohibits a member from making an offer or bid at a higher price than an existing clearly established offer. The rule further requires the highest bid and lowest offer to have precedence. Where bids or offers are at the same price, the rule sets forth a hierarchy of precedence. In addition, BSE Rules, Ch. XV, Sec. 2(b), governing specialists' responsibilities, require a specialist to hold the interests of orders entrusted to him above his own interests, and to ensure timely, best possible execution in accordance with the terms of the order and the rules and policies of the exchange.

B. Competing Specialist Initiative ("CSI")

In 1996, the BSE implemented a program to permit competing specialists, using the BEACON trading system, to trade in the same stocks in order to promote price competition and

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[2] Layoff trades are trades that are executed on other exchanges for the account of the BSE specialist, and may represent either proprietary or customer transactions.

[3] During the relevant period, the predetermined amount of time was generally 15 seconds. While efforts occurred during the relevant period to encourage specialists voluntarily to reduce the time from 15 to 3 seconds, specialists could manually intervene to raise or lower the time, and the BSE lacked the ability to systematically conduct surveillance for compliance with the reduced time.

liquidity.[4] The CSI Approval Order cited the specialists' duty, under BSE Rules, Ch. XV, Sec. 2(b), to hold interests of orders entrusted to them above their own interests, and established a policy that there was only one exchange market in a security.[5] As a result of the CSI implementation, the Exchange assumed a duty to conduct surveillance of competing specialist trading to ensure compliance with customer priority rules. While an innovative business practice, CSI made it more difficult for the Exchange to conduct priority rule surveillance. The BSE did not respond timely or adequately to these problems.

C. How [illegible] ity Rule Violations Occurred on the BSE

There are t [illegible] priority rule violations. Interpositioning occurs where the specialist fails to [illegible] cross) two orders, and instead executes both orders against his proprietary acco [illegible] eby participating on both sides of the trades and making a risk-free profit. Trading [illegible] ad occurs when the specialist, while holding a customer market or marketable limit order, ef [illegible] s a proprietary trade on the same side of the market securing a better price for the firm's account, leaving the customer order to be traded at an inferior price or not at all. The specialist has an affirmative obligation to match the customer orders.

Prior to mid-2004, flaws in the BEACON system made it easier for specialists to violate the BSE's customer priority rules. BEACON did not electronically examine the specialist's own automatic or manual execution screen for an order that could be executed against an incoming order. BEACON also did not electronically examine the automatic or manual execution screens of any competing specialist for an order that could be executed against an incoming order. Other BEACON shortcomings also contributed to the BSE's inability to conduct effective surveillance. For example, BEACON allowed frequent manual overrides, which are very difficult to track. These manual overrides provided opportunities for specialists intentionally to violate priority rules.

D. BSE Fails to Develop Priority Rule Surveillance Systems and Respond to Evidence of Violations

During February 1999, Commission staff informed the BSE in writing of the need to immediately develop trading ahead surveillance procedures. At the time, the BSE had no automated surveillance report that was designed to detect priority rule violations. BSE surveillance staff conducted only limited sampling reviews for priority rule violations, based on block trade reports and specialist general activity reports. There were no written procedures for trading ahead surveillance. The procedures utilized by the BSE were ineffective and did not result in any formal disciplinary actions against specialists during the relevant period.

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[4] *See Boston Stock Exchange Inc., Order Granting Approval of Proposed Rule Change Permitting Competing Specialists on the Floor of the Exchange*, Exchange Act Rel. No. 37045 (March 29, 1996); 61 FR 15318 (April 5, 1996) ("CSI Approval Order").

[5] The CSI Approval Order also stated that competing and regular specialists had the same affirmative and negative market obligations. *Id.* at III.B.

At or about the same time, BSE staff learned that the BEACON trading system allowed numerous trades to be automatically executed in violation of the customer priority rules. The specialist's manual and automatic execution screens did not electronically interact with each other. Accordingly, BSE staff realized that a specialist could execute an order while there was another order in BEACON, which, if the two were matched, could have resulted in a better execution for the customer. BSE staff realized that certain programming changes to the BEACON trading platform were required in order to detect and prevent autoex and other priority rule violations.

BSE internal documents also demonstrate awareness of BEACON's flaws at all levels of the organization. For example, a January 3, 2000 memorandum described priority rule surveillance problems created by the CSI as "major," and proposed a programming change to BEACON to ensure that BEACON auto-ex orders automatically interact with the manual windows for potential agency orders entitled to execution in price and time priority. A February 8, 2000 memorandum stated that, due to shortcomings in existing software, any priority rule surveillance reports that could be generated with the BSE's existing technology yielded too many exceptions to be useful, and characterized priority rule issues as an SEC priority.

A handout prepared for an April 13, 2000, meeting of interested BSE specialists and staff described the interpositioning problem as "critical," and reported that a single-day examination found that, of 79,383 trades executed on the exchange, at least 2,276 (2.8%) involved possible interpositioning. A summary of the meeting reflects that those attending felt both their firms and the Commission staff would view the situation very negatively. The writer observed that the number of price corrections required could be in the thousands per day. A November 27, 2000 memorandum also quantified the number of incidents, finding that 749 out of 37,226 trades (2%) involved priority rule issues.

Throughout 2000-2002, the need to improve priority rule surveillance was being reported as a status item in periodic reports prepared by the BSE internal audit department. These reports reflected a lack of progress on the project to improve priority rule surveillance during this period, and that it was low priority. A February 2002 internal summary discusses an exit interview conducted by the Commission oversight staff that month, as the result of a follow-up examination, and notes that priority rule surveillance deficiencies were viewed as a repeat violation. Between 1999 and 2004, the BSE did not initiate any formal disciplinary action against its members for priority rule violations.

As a result of these failures to act, priority rule violations, which occurred frequently, went undetected at the BSE throughout the period 1999 to mid-2004, when a substantial solution was implemented. Violations occurred both within a specialist's own accounts and between competing specialists. The BSE placed its business interests in developing the CSI ahead of its responsibilities as a self-regulatory organization with a statutory duty to regulate its members.

An exchange's obligation to enforce compliance under Section 19(g)(1) of the Exchange Act "necessarily includes an obligation to monitor and maintain surveillance over its members."[6]

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[6] *Chicago Stock Exchange, Inc.*, Exchange Act Rel. No. 48566, 2003 WL 22245922 at *8 (September 30, 2003), *quoting Boston Stock Exchange, Inc.*, Exchange Act Rel. No. 17183, 1980 WL

An exchange violates Section 19(g)(1) when it fails "to be vigilant in surveilling for, evaluating and effectively addressing issues that could involve violations of its own rules."[7]

E. Crofwell's Role

Crofwell was responsible for ensuring that the changes necessary to comply with the Commission staff's 1999 directive to immediately develop trading ahead surveillance procedures were implemented. In response to initial communications from the Commission staff, Crofwell stated in writing that the BSE would work to implement a same-day review of trading ahead activity by the target date of June 30, 1999 and would keep the staff informed of progress. The June 30 target was not met. Rather, there was no material improvement in the BSE's ability to prevent or detect priority rule violations until mid-2004. Crofwell was made aware of the lack of progress and the surveillance problems through timely and frequent written and verbal communications from other BSE employees. He received many, if not all, of the internal memoranda described above. He was aware that BEACON's shortcomings required a programming solution, not simply creation of a new surveillance report. He was responsible for the allocation of computer staff programming resources, and the project was assigned a low priority. After initial discussions occurred between his IT staff and BSE surveillance staff, he improperly deferred any significant effort to comply with the Commission staff's directive until a redesigned trading system, BEACON 2, was developed.

Crofwell's failures reflect serious errors of judgment despite repeated warnings. Crofwell failed to take necessary additional steps to ensure that the BSE met its obligation to enforce its own rules. He failed to conduct an adequate search for staff that could competently implement a solution, failed to take steps to ensure that adequate financial resources were devoted to the surveillance and enforcement programs, failed to utilize outside consultants to review the situation and make recommendations, and failed to recommend appropriate actions to the Board of Governors. As a result, during the period when Crofwell was responsible for responding to the Commission staff's directive to develop priority rule surveillance procedures, there was effectively no progress. As a result, Crofwell was a cause of the BSE's violations of Section 19(g) of the Exchange Act.

As a result of the conduct described above, the Commission finds that the BSE violated Section 19(g)(1) of the Exchange Act by failing, without reasonable justification or excuse within the meaning of Section 19(h)(1) of the Exchange Act, to enforce compliance with its customer priority rules from at least February 1999 until July 2004.

As a result of the conduct described above, the Commission finds that Crofwell failed to enforce compliance with the BSE's customer priority rules described above, within the meaning

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25454 at *3 (October 1, 1980); *see also New York Stock Exchange, Inc.*, Exchange Act Rel. No. 41574, 1999 WL 430863 at *1 (June 29, 1999); *National Ass'n of Securities Dealers, Inc.*, Exchange Act Rel. No. 37538, 1996 WL 447193 at *2 (August 8, 1996) (same).

[7] *Chicago Stock Exchange*, 2003 WL 22245922 at *8, *quoting National Ass'n of Securities Dealers*, 1996 WL 447193 at *2.

of Section 19(h)(4) of the Exchange Act, and was a cause of the BSE's violations of Section 19(g) of the Exchange Act.[8]

REMEDIAL EFFORTS

In determining to accept the BSE's Offer, the Commission considered remedial acts undertaken by the BSE since 2004, including the replacement of senior management responsible for regulatory compliance during the period in which the violations discussed herein occurred, and the more recent oversight and resources allocated to its regulatory functions.

UNDERTAKINGS

Respondent BSE undertakes to:

1. BSE shall, within 90 days after the issuance of the Order, enhance its existing training programs as necessary to implement a mandatory annual training program for all members of the regulatory staff responsible for surveillance, investigation, examination and discipline, that addresses compliance with the federal securities laws and the BSE's rules in place to prevent and deter unlawful trading.

2. BSE shall, within 30 days after the issuance of the Order, retain a Third Party Auditor (the "Auditor") not unacceptable to the Commission staff to conduct a comprehensive audit of the BSE's surveillance, examination, investigation and disciplinary programs, to determine whether:

   a. the BSE's policies and procedures for surveillance, investigation, examination and discipline of member firms and individuals subject to its regulatory oversight are reasonably designed and effective to ensure compliance with and to detect and deter violations of the federal securities laws and the BSE's rules relating to trading; and

   b. the BSE is in compliance with (i) its policies and procedures; (ii) any outstanding commitments made by the BSE in relation to written recommendations made by the Commission's Office of Compliance Inspections and Examinations ("OCIE") or the Division of Market Regulation ("Market Regulation") concerning trading surveillance; and (iii) any undertakings contained in this Order.

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[8] Section 19(h)(4) of the Exchange Act provides that the Commission is "authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this [Act], to remove from office or censure any officer or director of [a] self regulatory organization, if [the Commission] finds, on the record after notice and opportunity for hearing, that such officer or director . . . without reasonable justification or excuse has failed to enforce compliance . . . (A) in the case of a national securities exchange, with any [provision of this Act, the rules or regulations thereunder, or the rules of such self-regulatory organization] by any member or person associated with a member . . . ."

3. BSE shall require the Auditor to conduct an initial audit commencing within six months of the issuance of this Order and a second audit two years after the date of the initial audit, and, in each audit, to:

a. make the evaluations described in paragraph (2), above;

b. evaluate the adequacy of the resources (including staffing and compensation) that the BSE has devoted to its surveillance, investigation, examination and disciplinary programs;

c. evaluate the adequacy of the BSE's rules then in place to prevent and deter unlawful trading practices;

d. evaluate whether the BSE's practices are in compliance with: (i) its policies and procedures; (ii) any outstanding commitments made by the BSE in relation to written recommendations made by OCIE or Market Regulation concerning trading surveillance; and (iii) any undertakings contained in this Order; and

e. evaluate the BSE's live testing process, to be conducted during non-trading hours, of the BSE's automated surveillance systems using simulated trading data that includes data suggesting possibly abusive trading instances, including an analysis of the effectiveness of such surveillance systems when tested against the simulated trading patterns.

4. BSE shall require the Auditor and other qualified persons hired by the Auditor (collectively the "Auditor") to have adequate knowledge and understanding of the BSE's regulatory programs, policies and procedures and to possess sufficient competence and resources necessary to address the BSE's surveillance, examination, investigation and disciplinary programs.

5. BSE shall require the Auditor to develop a written audit plan of sufficient scope and detail to achieve the audit objectives described in paragraph (3) above, and to identify regulatory areas in need of special consideration. BSE shall further require that, in performing its duties, the Auditor and staff shall exercise due professional care and independence in performing the audit.

6. BSE shall require the Auditor to formulate an opinion based on sufficient, competent evidential matter that is obtained through, among other things, (i) inspection of documents, including written procedures, rules, and staff files; (ii) observation of trading processes and the BSE's regulatory systems and practices; (iii) interviews of regulatory staff, members and other relevant persons; and (iv) case studies and testing of various regulatory functions and trading practices.

7. BSE shall cooperate fully with the Auditor and its staff and provide the Auditor and its staff with access to its files, books, records, and staff as reasonably requested for the audit.

8. BSE shall require that each audit be concluded within 180 days of the field work. Audit work may be conducted in phases. No later than 45 days after each audit is concluded, BSE shall require the auditor to submit an audit opinion as to its assessment of the BSE's surveillance, examination, investigation and disciplinary programs to the BSE's Board of Governors and to the following officials at the Commission ("Commission Officials"): (i) the Director of OCIE; (ii) the Director of the Division of Market Regulation; and (iii) the Director of the Boston Regional Office. The audit opinion shall also be included in the BSE's annual report.

9. BSE shall require that the Auditor, no later than 45 days after each audit is concluded, submit an audit report to the Commission Officials. The audit report shall: (i) describe the purpose, scope and nature of the audit; (ii) set forth its evaluation and conclusions with respect to matters identified in paragraph (3), above; and (iii) identify any significant deficiencies or weaknesses in the BSE's policies and procedures, the BSE's compliance with its policies and procedures, the BSE's compliance with any outstanding commitments made by the BSE in relation to written recommendations made by the OCIE and Market Regulation concerning trading surveillance; or the BSE's compliance with any undertakings contained in this Order, and make recommendations to address any identified deficiencies or weaknesses.

10. The Auditor's recommendations shall be implemented, provided however, that, within 30 days after the date of each report specified in paragraph (9), above, BSE may advise the Auditor, in writing, of any recommendation that it considers to be inappropriate and state in writing the reasons for considering such recommendation inappropriate. With respect to any recommendation with which BSE and the Auditor do not agree, such parties shall attempt in good faith to reach an agreement within 60 days of the date of such report. In the event that BSE and the Auditor are unable to agree on an alternative recommendation, the Auditor's recommendation shall be binding and the BSE shall implement the recommendations.

11. No later than 90 days after the date of each report specified in paragraph (9), above, BSE shall develop a written plan of corrective actions to address each deficiency or weakness, including a date by which each corrective action shall be implemented. The BSE shall maintain a copy of such plan for the entire period of this undertaking and shall provide the plan to the Commission staff upon request.

12. BSE shall bear the full expense of the engagement set forth in paragraph (2), above. BSE shall allocate $500,000 for each of the audits specified herein, for a total of $1 million. If the expenses for the engagements exceed the designated funds, the BSE shall use additional funds to pay the costs of the audits. If any funds remain after the engagements are concluded, those funds shall be used solely for regulatory matters, including surveillance programs.

13. BSE shall require the Auditor to provide the Commission staff with any documents or other information the Commission staff requests regarding the work pursuant to this undertaking. The BSE shall not assert, and shall require the Auditor to agree not to assert, privilege or work product claims in response to any of the Commission staff's requests.

14. BSE shall require the Auditor to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Auditor shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with the BSE, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as representatives of the BSE. The agreement will also provide that the Auditor 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 Auditor in performance of his/her duties under this Order shall not, without prior written consent of the Director of Market Regulation, enter into any employment, consultant, attorney-client, auditing or other professional relationship with the BSE, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

15. The BSE shall implement the enumerated undertakings within the time specified herein unless, upon written request and for good cause shown by the BSE, the Commission staff grants the BSE such additional time as the Commission staff deems reasonable and necessary to implement any of the enumerated undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in the BSE's and Crofwell's Offers.

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

A. Respondents BSE and Crofwell are censured;

B. Respondent BSE shall cease and desist from committing or causing, and Respondent Crofwell shall cease and desist from causing, any violations and any future violations of Section 19(g) of the Exchange Act; and

C. Respondent BSE shall comply with its undertakings as enumerated in Section III, above.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

<u>Service List</u>

Rule 141 of the Commission's Rules of Practice provides that the Secretary, or another duly authorized officer of the Commission, shall serve a copy of the Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 19(h) and 21C of the Securities Exchange Act of 1934 ("Order"), on the Respondents and their legal agents.

The attached Order has been sent to the following parties and other persons entitled to notice:

Honorable Brenda P. Murray
Chief Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Celia Moore, Esq.
Boston Regional Office
Securities and Exchange Commission
33 Arch Street, 23rd Floor
Boston, MA 02110

Boston Stock Exchange, Inc.
c/o John Katovitch, Esq.
Chief Legal Officer
Boston Stock Exchange, Inc.
100 Franklin Street
Boston, MA 02110

Mr. James B. Crofwell
c/o Kimberly Dunn Spelman, Esq.
Demeo & Associates, P.C.
One Lewis Wharf
Boston, MA 02110

Kimberly Dunn Spelman, Esq.
Demeo & Associates, P.C.
One Lewis Wharf
Boston, MA 02110
(Counsel for James B. Crofwell)

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8838 / September 5, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56353 / September 5, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12745

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

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 Martin S. Duffield and Raul A. Jordan ("Respondents").

II.

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

Document 5 of 105

Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 21C of the Securities Exchange Act of 1934, as set forth below.

III.

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

Summary

These proceedings arise out of the offer and sale of promissory notes as part of a fraudulent scheme orchestrated by Daniel W. Heath through his company, D.W. Heath & Associates, Inc. ("Heath & Associates"). From 1996 until late April 2004, Heath & Associates, through sales agents such as Respondents Martin S. Duffield and Raul A. Jordan, raised over $138 million from more than 1,400 investors nationwide, most of whom were senior citizens, in an unregistered notes offering in two Heath-controlled entities, Private Capital Management, Inc. ("PCM") and the PCM Fixed Income Fund I, LLC ("PCM Fund") (collectively "PCM Notes"). Respondents offered and sold more than $6 million in PCM Notes to approximately 80 investors. Respondents made material misstatements and omitted material facts in selling the notes. First, Respondents falsely represented that the PCM Notes were "safe" and "secured" because they were "backed by assets" owned by companies that borrowed funds from PCM, and that returns were "guaranteed." Second, they failed to disclose that they were paid a sales commission by Heath & Associates, or falsely claimed that they received no commission at all or misled prospective investors about the sources of the funds used to pay their commissions. Third, Respondents failed to disclose that in March 1998, the California Department of Corporations ("DOC") had issued two desist-and-refrain orders against Heath, Heath & Associates, PCM, and the PCM Fund for the unregistered sale of securities and for acting as unregistered broker-dealers ("D&R Orders"). During the relevant period, Respondents were associated with registered broker-dealers and sold the PCM Notes without notice to or approval from those firms, and thereby engaged in the practice of selling away.

Respondents

1. Martin S. Duffield ("Duffield") was a senior financial consultant with Heath & Associates from July 2001 to April 2004. From January 2000 to June 2004, Duffield was also a registered representative associated with broker-dealers registered with the Commission. Duffield, 51 years old, is a resident of West Covina, California.

2. Raul A. Jordan ("Jordan") was a senior financial consultant with Heath & Associates from July 2001 to April 2004. From January 2000 to December 2002, Jordan was also a registered representative associated with broker-dealers registered with the Commission. Jordan, 51 years old, is a resident of Pasadena, California.

Relevant Entities

3. Heath & Associates, incorporated in California in 1998, purported to be a financial services company that provided investment advice and estate planning services to senior citizens. Heath & Associates' principal places of business were Brea, California and Hemet, California. It was the servicing agent and marketing agent for PCM and the placement and service agent for the PCM Fund. On March 30, 1998, the DOC issued two desist-and-refrain orders against Heath & Associates, Heath, PCM, and the PCM Fund for the unregistered sale of securities and for acting as unregistered broker-dealers. Heath & Associates was not registered with the Commission. Heath & Associates was placed under a court-ordered receivership in *SEC v. D.W. Heath & Associates, Inc., et al.,* Civil Action No. CV-04-02949 JFW (Ex) (C.D. Cal.), Litigation Release No. 18689 (May 3, 2004).

4. PCM, a business entity of unknown form, was a fictitious business name for Daniel W. Heath, who was its co-founder, president, chief executive officer, and chief financial officer. PCM was purportedly the general manager of the PCM Fund. PCM was not registered with the Commission, and no registration statement had been filed or was in effect with respect to the notes offered by PCM. PCM was placed under a court-ordered receivership in *SEC v. D.W. Heath & Associates, Inc., et al.*

5. PCM Fund, a business entity of unknown form, was another fictitious business name for Daniel W. Heath. The PCM Fund was not registered with the Commission, and no registration statement had been filed or was in effect with respect to the notes offered by the PCM Fund. The PCM Fund was placed under a court-ordered receivership in *SEC v. D.W. Heath & Associates, Inc., et al.*

Background

6. From July 2001 to April 2004, Duffield and Jordan offered and sold over $6 million in PCM Notes to approximately 80 elderly investors who had attended free lunch workshops sponsored by Heath & Associates. At the workshops, Duffield and Jordan explained the benefits of investing in corporate notes that were secured or backed by assets. They compared the notes to a home mortgage, where the lender can foreclose on the property if the borrower defaults. They told prospective investors that corporate notes were much safer than stocks and bonds, did not fluctuate in price, and paid a much higher rate of return than bank certificates of deposit. After the presentations, Duffield and Jordan encouraged the attendees to sign up for a complimentary one-on-one consultation.

7. During these one-on-one consultations, Duffield and Jordan met with prospective investors at an office opened under the name Heath & Associates in Pasadena, California, and they handed out business cards that said each was a Heath & Associates "senior financial consultant." Although prospective investors expected to receive a free financial check-

up at these consultations, the real purpose of the meetings was to solicit them to invest in the PCM Notes.

8. During the follow-up meetings, Duffield and Jordan represented that PCM pooled investor funds to make loans to small and medium-sized companies. They claimed that PCM was experienced in making these loans as well as managing the loan portfolio for the benefit of investors. They assured prospective investors that the notes were "safe" and "secured" because they were "backed by assets" owned by PCM's borrowers. They represented that the notes paid "guaranteed" annual returns ranging from 4.5% to 9%. If a prospective investor did not have sufficient funds readily available, Duffield and Jordan encouraged the investor to liquidate other investments regardless of surrender fees and other charges in order to invest in the notes. They also encouraged investors to use funds held in Individual Retirements Accounts.

9. Duffield and Jordan did not provide prospective investors with offering materials consistently, even after investors asked for documentation on the notes. Although Jordan received copies of the PCM Fund private placement memorandum ("PPM") from Heath & Associates, Jordan stopped giving them out because, when he did so, prospective investors declined to invest due to the lack of financial information in the PPM. Jordan admitted that he "didn't feel comfortable" when he read the PPM because of the dearth of financial and other information. Rather than giving prospective investors a meaningful disclosure document, Duffield and Jordan often based their sales presentations on a 16-page glossy, color brochure from PCM, which provided no financial statements or other material information about the risks of the investment. Some prospects were not even given the brochure. Some investors received the brochure only after they invested. In short, the brochure contained statements about seniors' fears of outliving their money: "Maintaining your standard of living is one concern. The other is how long your money will last....The danger of outliving your assets is real." Duffield and Jordan often repeated these same themes in their one-on-one consultations, telling prospective investors that the notes provided a "guaranteed," "steady flow" of additional income or were an "income producing investment."

10. Duffield and Jordan did not conduct any due diligence on the notes, PCM, or its purported borrowers. Instead, they relied solely upon representations about the investment from Heath or other unlicensed sales agents.

11. Duffield and Jordan told prospective investors that the PCM Notes were "safe" and "secured" because they were "backed by assets" owned by PCM's borrowers. These representations were false because neither PCM nor the PCM Fund filed the necessary documents to secure the loans to unaffiliated borrowers such as UCC-1 financing statements, mortgages, trust deeds, or liens. Consequently, the investors' security interest in any such collateral was not perfected and their funds were at risk. In fact, the vast majority of funds PCM provided to borrowers was not documented in any way and was essentially unsecured cash

advances by PCM. Duffield and Jordan had no basis to represent that the notes were safe, secured, and backed by assets.

12. Duffield and Jordan received commissions from the sale of the PCM Notes. Duffield and Jordan failed to disclose to prospective investors that they received a commission on the sale of the PCM Notes. In some instances, when asked, Duffield and Jordan falsely told prospective investors that they received no commission at all or misled the investors about the sources of the funds used to pay their commissions. Duffield told at least one investor that he was paid a commission by the companies that borrowed money from PCM, assuring her that "You'll never have to write me a check." In fact, Duffield and Jordan received a 6% commission on every sale from Heath & Associates. In addition, Heath & Associates paid them a "bonus" of 1% to 2% if they persuaded the investor to accept a lower interest rate or a longer term of maturity, but they did not disclose this arrangement to investors. Duffield and Jordan were paid commissions of $264,040 and $270,337, respectively, from the sale of the PCM Notes.

13. Duffield and Jordan failed to disclose to potential investors the D&R Orders against Heath, Heath & Associates, PCM, and the PCM Fund after Duffield and Jordan found out about the orders in March 2003. Duffield and Jordan continued to offer and sell the notes even though they knew that Heath and his entities were cited for conducting an unregistered offering of the PCM Notes, and that none was a registered broker-dealer as was required. Moreover, they misled existing investors by minimizing the importance of the D&R Orders. Duffield and Jordan told existing investors that the D&R Orders no longer applied because either the "problem" had been resolved years ago or because they were not selling securities. In fact, as Duffield and Jordan well knew, Heath and his entities were engaged in precisely the same violative conduct at issue in the prior D&R Orders.

14. As a result of the conduct described above, Duffield and Jordan willfully violated Sections 5(a) and 5(c) of the Securities Act, which prohibit the unregistered offer and sale of securities in interstate commerce unless an exemption from registration applies.

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

16. As a result of the conduct described above, Duffield and Jordan willfully violated Section 15(a) of the Exchange Act, which requires brokers and dealers who effect securities transactions through interstate commerce to be registered with the Commission or, if the broker or dealer is a natural person, be associated with a registered broker or dealer that is not a natural person.

Disgorgement and Civil Penalties

17. Respondent Jordan submitted a sworn Statement of Financial Condition dated December 8, 2006, amended July 27, 2007, and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest and a civil penalty. Respondent Duffield submitted a sworn Statement of Financial Condition dated December 8, 2006, amended August 1, 2007, and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest and a civil penalty.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act and Sections 15(b)(6) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondents shall cease and desist from committing or causing any violations and any future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent Duffield be, and hereby is barred from association with any broker or dealer.

C. Respondent Jordan be, and hereby is barred from association with any broker or dealer, with the right to reapply for association after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

E. IT IS FURTHERED ORDERED that Respondent Duffield shall pay disgorgement of $264,040 plus prejudgment interest, but that payment of all but $42,000 is waived based upon Respondent's sworn representations in his Statement of Financial Condition dated December 8, 2006, amended August 1, 2007, and other documents submitted to the Commission. Respondent

Duffield shall, within ten (10) days of the entry of the Order, pay disgorgement of $42,000 to Robb Evans & Associates, LLC, the court-appointed receiver for Heath & Associates, PCM, and the PCM Fund pursuant to Rule 1102 of the Commission's Rules on Fair Fund and Disgorgement Plans [17. C.F.R. § 201.1102]. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to Robb Evans & Associates, LLC; (C) hand-delivered or mailed to Robb Evans & Associates, LLC, 11450 Sheldon Street, Sun Valley, CA 91352; and (D) submitted under cover letter that identifies Duffield as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to the Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California 90036. Based upon Respondent Duffield's sworn representations in his Statement of Financial Condition dated December 8, 2006, amended August 1, 2007, and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent Duffield.

F. IT IS FURTHERED ORDERED that Respondent Jordan shall pay disgorgement of $270,337 plus prejudgment interest, but that payment of all but $5,000 is waived based upon Respondent's sworn representations in his Statement of Financial Condition dated December 8, 2006, amended July 27, 2007, and other documents submitted to the Commission. Respondent shall, within ten (10) days of the entry of the Order, pay disgorgement of $5,000 to Robb Evans & Associates, LLC, the court-appointed receiver for Heath & Associates, PCM, and the PCM Fund pursuant to Rule 1102 of the Commission's Rules on Fair Fund and Disgorgement Plans [17. C.F.R. § 201.1102]. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to Robb Evans & Associates, LLC; (C) hand-delivered or mailed to Robb Evans & Associates, LLC, 11450 Sheldon Street, Sun Valley, CA 91352; and (D) submitted under cover letter that identifies Jordan as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to the Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California 90036. Based upon Respondent Jordan's sworn representations in his Statement of Financial Condition dated December 8, 2006, amended July 27, 2007, and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent Jordan.

G. The Division of Enforcement may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondents provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement, prejudgment and postjudgment interest, and the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondents was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondents may not, by way of defense to any such petition: (1) contest the findings in this

Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense. Respondents agree that if the full amount of any payment described above is not made by the date the payment is required by this Order, the entire amount of disgorgement, prejudgment and postjudgment interest, minus payments made, if any, is due and payable immediately without further application.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

FOIA

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2642 / September 5, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12746

In the Matter of

Yanni Partners, Inc. and
Theresa A. Scotti,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AS TO YANNI PARTNERS, INC. AND THERESA A. SCOTTI

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), against Yanni Partners, Inc. ("Yanni ") and pursuant to Sections 203(f) and 203(k) of the Advisers Act, against Theresa A. Scotti ("Scotti").

II.

In anticipation of the institution of these proceedings, Yanni and Scotti have each submitted an Offer 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, Yanni and Scotti each consent 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 Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, as set forth below.

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III.

On the basis of this Order and Yanni's and Scotti's Offers, the Commission finds that:

Summary

1. This case involves a registered investment adviser and pension consultant, Yanni, which, from at least January 2002 through May 2005, breached its duty to its clients and prospective clients by misrepresenting and omitting to disclose material information about certain potential financial conflicts of interest. Yanni's clients included private and public pension funds which were represented by board members or other persons who themselves owed fiduciary duties to the funds and their beneficiaries. These clients came to Yanni seeking advice in developing appropriate investment strategies and in selecting money managers to invest the funds entrusted to their care. While Yanni's principal business was investment consulting, it also sold subscription services to some of the same money managers it was recommending to its clients. These sales, which generated approximately $600,000 of gross revenues annually, created a potential conflict of interest, which Yanni should have disclosed to its clients and prospective clients. However, in violation of Section 206(2) of the Advisers Act, Yanni and its president, Scotti, provided them with marketing materials and other documents which, as a result of their negligence, contained materially misleading statements and omissions about these potential conflicts of interest.

Respondents

2. **Yanni Partners, Inc.**, a Pennsylvania corporation located in Pittsburgh, Pennsylvania, has been registered with the Commission as an investment adviser since January 13, 1989. The firm is registered under Rule 203A-2(b) of the Advisers Act because it is a pension consultant providing investment advice to employee benefit plans having an aggregate value of $50 million or more. In this regard, Yanni has approximately 135 institutional clients who have more than $21 billion in assets, including 85 private and public pension funds with over $12 billion in assets.

3. **Theresa A. Scotti**, 60 years old, is a resident of Wexford, Pennsylvania. Scotti is the president, a director, a 32.5 percent owner of Yanni and, during the relevant time period, the chief compliance officer. In addition, she was in charge of the firm's marketing to advisory clients and prospective advisory clients.

Yanni's and Scotti's Relevant Conduct

4. During the relevant time period, Yanni provided comprehensive investment consulting services primarily to pension plans, profit sharing plans, endowment funds, and other large institutional clients. As an integral part of these services, it assisted clients in developing appropriate investment strategies and recommended to its clients prospective money managers whose investment styles and track-records met the clients' objectives. It also monitored and evaluated clients' existing money managers to ensure that the managers' performances and

investment styles remained consistent with the clients' investment objectives. However, it did not offer to its clients any discretionary services, did not directly manage any client funds and had no authority to terminate clients' relationships with other money managers.

5. Yanni considered itself to be an independent firm whose sole business was investment consulting. Yanni stated in its marketing and other written materials that the firm's independence and the absence of any financial conflicts of interest were critical factors that clients should weigh favorably when evaluating and retaining any investment consultant.

6. Yanni typically assigned one of its investment consultants and an analyst to work with a client. They would meet with the client to discuss Yanni's services and to identify the client's investment objectives. If the client retained Yanni to conduct a manager search, the analyst conducted a quantitative screening of the money managers (in the relevant investment style category) by using standard criteria, such as 3-year and 5-year performance returns and investment style characteristics. These searches generally produced a list of money managers whose investment performance was in the top of their peer group.

7. To conduct this screening for money managers, other than money managers to mutual funds, the analysts generally utilized two proprietary databases, which Yanni created and maintained. These databases -- GRID (Graphical Ranking of Investment Descriptors) and CA$H -- contained statistical performance results, company profiles and descriptions of the investment products. GRID contained composite and/or individually managed portfolio results and fund information from approximately 1,200 investment managers representing over 5,000 investment products across various asset classes. CA$H, a companion to the GRID database, was limited to managers of short-term liquid money market instruments. In order to be included in these databases and considered for recommendation, money managers had to provide Yanni with current performance results as well as company and product specific profile questionnaires. Yanni did not charge money managers for inclusion in its databases.

8. After conducting the quantitative screening for potential candidates, the analyst and the consultant conducted a qualitative screening of the money managers by refining the quantitative performance measurements, considering client directions or preferences and focusing on areas such as reputation, organization, people and processes. The end-product of the qualitative screening would typically be a slate of 3 to 5 money managers, which Yanni presented to the client for its consideration. The client then made the final selection, often without any additional guidance from Yanni.

9. While the GRID database served as a screening tool for Yanni's investment consultants, the firm also used the database as an additional source of revenue. In this regard, a separate department within Yanni sold subscriptions for periodic reports generated from the data contained in the GRID database, for an annual fee of approximately $13,500, to some of the same money managers whom Yanni was evaluating and/or recommending to its clients. (The actual fee was $13,500 for up to three investment products plus added fees for each additional product.) During the period at issue, approximately 30 to 40 investment management firms subscribed to this

service. From 2002 through 2004, gross annual revenues from the GRID subscriptions were approximately $600,000.

10. In marketing the GRID subscriptions, Yanni promised the subscribing money managers several benefits. First, Yanni provided quarterly reports illustrating a money manager's investment performance on three of its products in relation to the relevant market indices and the performance of its peers (based on similar investment styles and objectives). Yanni also offered subscribers a "360° Product Due Diligence Review" or other meetings where a Yanni principal would meet with the subscriber to explain how the investment manager's product was viewed by Yanni when going through the manager selection process. Finally, Yanni informed subscribers that they would be entitled to priority sponsorship opportunities at certain of Yanni's client events, namely two annual golf outings and a symposium.

11. Investment advisers, such as Yanni, owe fiduciary duties to their clients and, therefore, must, among other things, disclose all actual or potential conflicts of interest.[1] In addition, investment professionals who advise pension funds must be aware of the important role that pension plans play in the financial security of the beneficiaries.

12. Yanni did make disclosures about the GRID subscription sales in its Form ADV Part II, which it provided to all of its actual and prospective clients. However, Yanni and Scotti also provided certain clients and prospective clients with other documents which, as a result of their negligence, contained materially misleading information regarding the potential financial conflicts of interest created by the sale of the GRID subscriptions. Clients and prospective clients, when evaluating Yanni and other investment consultants, typically sent them Requests for Proposals ("RFPs") or Requests for Information ("RFIs"). The RFPs/RFIs contained detailed questions and requested specific types of information about the investment consultants. During the relevant time period, Yanni and Scotti provided written responses to 180 RFPs/RFIs. These responses often did not disclose sufficient information about the GRID subscriptions, such as revenues generated, that could enable Yanni's clients and prospective clients to understand the potential conflicts of interest inherent in such sales. In addition, certain responses contained materially misleading statements which, among other things, created the false impression that Yanni did not have any potential conflicts of interest and that Yanni's only source of revenue was the fees paid by its clients. Such conduct constituted a breach of fiduciary duty.

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[1] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191, 196-97(1963)("The Investment Advisers Act of 1940 thus reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship . . . An investor seeking the advice of a registered investment adviser must, if the legislative purpose is to be served, be permitted to evaluate such overlapping motivations, through appropriate disclosure, in deciding whether the adviser is serving two masters or only one, especially if one happens to be economic self-interest."); In re O'Brien Partners, Inc., Inv. Adv. Act Rel. No. 1772 (Oct. 27, 1998)("Moreover, since even potential conflicts of interest are material and must be disclosed, [the investment adviser] was required to disclose its receipt of third-party payments, even if it had concluded that the payments did not influence the manner in which it advised its clients.").

13. As a result of the conduct described above, Yanni and Scotti willfully[2] violated Section 206(2) of the Advisers Act, which provides that "[i]t shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly . . . to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."[3]

14. At Scotti's direction, Yanni discontinued the sale of the GRID subscriptions at the end of 2005, which had the effect of eliminating this potential conflict of interest. In addition, Yanni has appointed a new chief compliance officer, who, among other things, has implemented new policies and procedures relating to Yanni's preparation, review and distribution of written materials to clients and prospective clients. Such policies and procedures are designed to ensure that the disclosures in all of Yanni's marketing materials, responses to RFPs/RFIs, and other documents provided to clients and prospective clients are accurate and complete.

IV.

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

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

A. Yanni and Scotti are hereby censured;

B. Yanni and Scotti shall cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act;

C. Yanni shall, within 90 days of the entry of this Order, pay a civil money penalty in the amount of $175,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Yanni as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Daniel M. Hawke, Esq., Securities and

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2 "Willfully" as used in this Order means intentionally committing the act which constitutes the violation. Cf. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8(2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

3 Proof of scienter is not required to establish a violation of Section 206(2) of the Advisers Act. Capital Gains, 375 U.S. at 195.

Exchange Commission, Mellon Independence Center, 701 Market St., Suite 2000, Philadelphia, PA 19106; and

D. Scotti shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $40,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Scotti as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Daniel M. Hawke, Esq., Securities and Exchange Commission, Mellon Independence Center, 701 Market St., Suite 2000, Philadelphia, PA 19106.

By the Commission.

Nancy M. Morris
Secretary

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

FOIA

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56362 / September 6, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12749

In the Matter of **COMMONWEALTH EQUITY SERVICES, LLP d/b/a COMMONWEALTH FINANCIAL NETWORK,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Commonwealth Equity Services, LLP d/b/a Commonwealth Financial Network ("Commonwealth" 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 Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings, Making Findings, and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

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III.

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

Summary

1. Respondent failed reasonably to supervise Bradford C. Bleidt ("Bleidt") with a view to preventing and detecting his violations of the federal securities laws during the ten-year period that Bleidt was a Commonwealth registered representative from January 1991 to October 2001. During at least this time period, Bleidt defrauded approximately 34 of Respondent's customers by lying about purchases and sales of securities, misappropriating funds, and sending them falsified statements relating to their investment advisory accounts with Bleidt's independent advisory firm.

Respondent

2. Respondent is a Massachusetts limited liability partnership, headquartered in Waltham, Massachusetts and registered with the Commission since 1979 as a broker-dealer pursuant to Section 15(b) of the Exchange Act and since 1992 as an investment adviser pursuant to Section 203(a) of the Investment Advisers Act of 1940 ("Advisers Act").

3. Respondent is organized as a network of independent contractor registered representatives, most of whom operate out of small independent offices. Certain of these offices act as Offices of Supervisory Jurisdiction ("OSJ") of Respondent.

Other Relevant Person

4. Bleidt, 53, was a registered representative associated with Commonwealth in a Boston, Massachusetts OSJ from January 18, 1991 until October 9, 2001.

5. On November 12, 2004, the Commission filed a civil injunctive action in the United States District Court for the District of Massachusetts against Bleidt and his investment advisory firm, Allocation Plus Asset Management Company, Inc. ("APAM"), alleging that Bleidt defrauded his investment advisory clients of millions of dollars by leading them to believe their money was invested when in fact he was misappropriating it for his own personal benefit. Many of Bleidt's advisory clients also maintained brokerage accounts at Respondent. In that proceeding, the Commission sought appointment of a receiver, which the court granted. Among other things, the receiver brokered a settlement between Commonwealth and its former customers pursuant to which Commonwealth made a payment to a settlement fund, which the receiver distributed to victims.

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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. On July 26, 2005, Bleidt pled guilty to federal charges of mail fraud and money laundering in connection with his fraudulent conduct. On December 5, 2005, Bleidt was sentenced to over 11 years of confinement.

Bleidt's Misconduct

7. From 1991 to October 2001, Bleidt misappropriated over $12 million from approximately 34 customers of Respondent. To perpetrate these misappropriations, he asked his customers to request full or partial liquidation of their brokerage accounts with Respondent, and then to write a check (or in some cases, send a wire) for the amount liquidated to APAM, his investment advisory company. APAM was an independent investment adviser registered under the Advisers Act and not affiliated with or controlled by Commonwealth. APAM did business out of the same office as the OSJ. Bleidt falsely represented to these customers that their money would continue to be invested in securities when, in fact, he misappropriated their funds. Bleidt then deposited these funds into an APAM bank account, of which he had sole control. Bleidt used funds from this APAM account for various business enterprises, including operating a Boston radio station, as well as APAM and a related financial planning firm. He also used the customers' misappropriated funds to pay personal expenses.

8. To further conceal his misappropriations and false representations, Bleidt created and sent his defrauded customers falsified performance reports in the name of APAM that vastly overstated the actual value of the accounts, reflected holdings that did not exist, and reflected purchases and sales of securities that he claimed to have made, but never did.

9. As a result of the conduct described above, Bleidt, during the period that he was associated with Respondent, 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 securities.

Respondent's Failure to Supervise

10. While Bleidt was a registered representative associated with Commonwealth, he also owned the independent office in Boston at which Respondent established an OSJ. Bleidt, not Respondent, hired the OSJ manager as his employee, and only Bleidt had the ability to increase or decrease his salary. Both Bleidt and Commonwealth had the ability to terminate him as OSJ manager. By allowing a person subordinate to Bleidt to supervise Bleidt's activities concerning Respondent's business, Respondent structured its supervisory and compliance functions in a manner that created an inherent risk that Bleidt would not be adequately supervised. The OSJ manager's subordinate status created a conflict of interest that may have compromised his ability to supervise Bleidt in a reasonable manner. This structure may have been a contributing factor in the supervisory failures described below.

Failure to Have Reasonable Supervisory Procedures to Respond to Red Flags Related to Outside Business Activities

11. While associated with Respondent, Bleidt was pursuing other business interests from the same office in which he conducted brokerage activity through Respondent. Respondent's supervisory and compliance personnel were aware that he conducted outside business activities, including two investment advisory businesses and, in the latter part of his association with Respondent, a minority ownership in a radio station. Respondent failed to establish reasonable policies and procedures for responding to red flags related to Bleidt's outside business activities. Respondent's staff received but did not review financial statements for one of Bleidt's businesses, and thus, ignored a red flag that this business was failing such that he was providing significant cash infusions to keep it afloat. In addition, no one at Respondent followed up when Bleidt failed to disclose on Respondent's forms the source of initial and ongoing capital for his radio station venture. In fact, these outside business activities were being funded by Bleidt with misappropriated funds. If Respondent had had in place reasonable policies and procedures to respond to red flags related to Bleidt's outside business activities, it is likely that the firm could have prevented and detected Bleidt's violations of the federal securities laws.

Failure to Have Reasonable Supervisory Procedures for Review of Incoming Mail

12. Incoming mail at the OSJ was sorted – unopened and unreviewed – into registered representatives' mailboxes during the entire time that Bleidt was a registered representative of Respondent. The lack of review of incoming mail enabled Bleidt to receive checks and related correspondence from Respondent's customers who had liquidated their brokerage accounts. These checks were typically in amounts mirroring the amounts liquidated and were sent to Bleidt for the purpose of continuing to invest in securities. Respondent failed to establish reasonable policies and procedures for review of incoming correspondence. For example, Respondent's written procedures did not require central mail opening at the OSJ where Bleidt was located, even though that would have been practicable and feasible to implement. If Respondent had had in place reasonable policies and procedures for review of incoming correspondence, it is likely that the firm could have prevented and detected Bleidt's violations of the federal securities laws.

Conclusions

13. Under Section 15(b)(4)(E) of the Exchange Act, broker-dealers are responsible for reasonably supervising, with a view to preventing violations of the federal securities laws, persons subject to their supervision. Commonwealth was responsible for supervising Bleidt.

14. The Commission has repeatedly emphasized that the "responsibility of broker-dealers to supervise their employees by means of effective, established procedures is a critical component in the federal investor protection scheme regulating the securities markets." *Dean Witter Reynolds, Inc.*, Exchange Act Rel. No. 46578 (October 1, 2002). Section 15(b)(4)(E) provides that a broker-dealer may discharge this responsibility by having "established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect" such violations. "Where there has been an underlying violation of the federal securities

laws, the failure to have or follow compliance procedures has frequently been found to evidence a failure reasonably to supervise the primary violator." *In the Matter of William V. Giordano*, Exchange Act Rel. No. 36742 (January 19, 1996). In addition to adopting effective procedures for supervision, broker-dealers "must provide effective staffing, sufficient resources and a system of follow up and review to determine that any responsibility to supervise delegated to compliance officers, branch managers and other personnel is being diligently exercised." *In the Matter of Mabon, Nugent & Co.*, Exchange Act Rel. No. 19424 (January 13, 1983).

15. Because Bleidt violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Commonwealth failed to establish procedures and systems that would reasonably be expected to prevent and detect such violations, Commonwealth failed reasonably to supervise Bleidt for purposes of Section 15(b)(4)(E) of the Exchange Act.

Commonwealth's Remedial Efforts

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

IV.

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

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

A. Respondent Commonwealth be, and hereby is, censured pursuant to Section 15(b)(4) of the Exchange Act.

B. Respondent shall, within ten days of the entry of this Order, pay disgorgement of $1 and a civil money penalty in the amount of $250,000 to the Securities and Exchange Commission. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Commonwealth as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David P. Bergers, Regional Director, Securities and Exchange Commission, 33 Arch Street, 23rd Floor, Boston, Massachusetts 02110.

C. It is further ordered that, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the disgorgement, interest and penalties referenced in paragraph B above. There may be additional funds from other actions against third parties arising from Bleidt's underlying conduct and violations addressed herein that will be added to the Fair Fund and distributed to injured investors. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that it shall not, after offset or reduction in any Related Investor Action based on Respondent's payment of disgorgement in this action, argue that it is entitled to, nor shall it further benefit by offset or reduction of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Nancy M. Morris
Secretary

Florence E Harmon

By: Florence E. Harmon
Deputy Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56363 / September 6, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12750

In the Matter of **DETWILER, MITCHELL, FENTON & GRAVES, INC.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Detwiler, Mitchell, Fenton & Graves, Inc. ("DMFG" 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 Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings, Making Findings, and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

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III.

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

Summary

1. Respondent failed reasonably to supervise Bradford C. Bleidt ("Bleidt") with a view to preventing and detecting his violations of the federal securities laws during the period that Bleidt was a DMFG registered representative from October 2001 to February 2004. During at least this time period, Bleidt defrauded approximately 25 of Respondent's customers by lying about purchases and sales of securities, misappropriating funds, and sending them falsified statements relating to their investment advisory accounts with Bleidt's independent advisory firm.

Respondent

2. Respondent DMFG is a Massachusetts corporation, headquartered in Boston, Massachusetts, and a wholly-owned subsidiary of Detwiler, Mitchell & Co., a publicly traded holding company. DMFG has been registered with the Commission since 1971 as a broker-dealer pursuant to Section 15(b) of the Exchange Act and since 2006 as an investment adviser pursuant to Section 203(a) of the Investment Advisers Act of 1940 ("Advisers Act").

Other Relevant Person

3. Bleidt, 53, was a registered representative associated with DMFG in a Boston, Massachusetts Office of Supervisory Jurisdiction ("OSJ") from October 9, 2001 until February 12, 2004.

4. On November 12, 2004, the Commission filed a civil injunctive action in the United States District Court for the District of Massachusetts against Bleidt and his investment advisory firm, Allocation Plus Asset Management Company, Inc. ("APAM"), alleging that Bleidt defrauded his investment advisory clients of millions of dollars by leading them to believe their money was invested when in fact he was misappropriating it for his own personal benefit. Many of Bleidt's advisory clients also maintained brokerage accounts at Respondent. In that proceeding, the Commission sought appointment of a receiver, which the court granted. Among other things, the receiver brokered a settlement between DMFG and its former customers pursuant to which DMFG made a voluntary payment to a settlement fund, which the receiver distributed to victims.

5. On July 26, 2005, Bleidt pled guilty to federal charges of mail fraud and money laundering in connection with his fraudulent conduct. On December 5, 2005, Bleidt was sentenced to over 11 years of confinement.

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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.

Bleidt's Misconduct

6. From October 2001 to February 2004, Bleidt misappropriated over $9 million from approximately 25 customers of Respondent.[2] To perpetrate these misappropriations, he asked his customers to request full or partial liquidation of their brokerage accounts with Respondent, and then, after they received the funds or their bank received the funds on their behalf, to write a check (or in some cases, send a wire) for the amount liquidated to APAM, his investment advisory company. APAM was an independent investment adviser registered under the Advisers Act and not affiliated with or controlled by DMFG. APAM did business out of the same office as the OSJ. Bleidt falsely represented to these customers that their money would continue to be invested in securities when, in fact, he misappropriated their funds. Bleidt then deposited these funds into an APAM bank account, of which he had sole control. Bleidt used funds from this APAM account for various business enterprises, including operating a Boston radio station, as well as APAM and a related financial planning firm. He also used the customers' misappropriated funds to pay personal expenses.

7. To further conceal his misappropriations and false representations, Bleidt created and sent his defrauded customers falsified performance reports in the name of APAM that vastly overstated the actual value of the accounts, reflected holdings that did not exist, and reflected purchases and sales of securities that he claimed to have made through DMFG, but never did.

8. As a result of the conduct described above, Bleidt, during the period that he was a registered representative with Respondent, 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 securities.

Respondent's Failure to Supervise

9. While Bleidt was a registered representative associated with DMFG, he also owned the independent office in Boston at which Respondent established an OSJ. Prior to affiliating with Respondent, Bleidt hired the OSJ manager as his employee, and only Bleidt had the ability to increase or decrease his salary. While Bleidt could terminate him as his employee, DMFG had the ability to terminate him as OSJ manager. By allowing a person subordinate to Bleidt to supervise Bleidt's activities concerning Respondent's business, Respondent created an inherent risk that Bleidt would not be adequately supervised. The OSJ manager's subordinate status may have compromised his ability to supervise Bleidt in a reasonable manner. This structure may have been a contributing factor in the supervisory failures described below.

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[2] In the same time period, Bleidt misappropriated approximately another $5 million from approximately 43 additional victims who did not have brokerage accounts at DMFG, but from whom Bleidt received funds directly in the form of a personal check or wire to APAM.

Failure to Implement Existing Supervisory Procedures to Monitor and Review Outside Business Activities

10. While a registered representative of Respondent, Bleidt was pursuing other business interests from the same office in which he conducted brokerage activity through Respondent. Respondent's personnel were aware that he conducted outside business activities, including the two SEC-registered investment advisory businesses and ownership in a radio station. Despite the existence of written procedures regarding outside business activities of its registered representatives, Respondent failed to monitor the outside business activities of Bleidt. For example, DMFG personnel did not reasonably investigate how Bleidt was funding his activities. In addition, no one at Respondent investigated the source of initial and ongoing capital for Bleidt's radio station venture. In fact, these outside business activities were being funded by Bleidt with misappropriated funds. If Respondent had reasonably implemented its existing procedures for review of outside business activities, it is likely that the firm could have prevented and detected Bleidt's violations of the federal securities laws.

Failure to Implement Existing Supervisory Procedures for Review of Incoming Mail

11. Incoming mail at the OSJ was sorted, unopened and unreviewed, into registered representatives' mailboxes during the entire time that Bleidt was a registered representative of Respondent. The lack of review of incoming mail enabled Bleidt to receive checks and related correspondence from Respondent's customers who had liquidated their brokerage accounts. These checks were typically in amounts mirroring the amounts liquidated and were sent to Bleidt for the purpose of purchasing securities. Respondent failed reasonably to implement its incoming mail procedures. For example, although Respondent's written procedures required central mail opening at the OSJ where Bleidt was located, this procedure was not followed at the OSJ and not enforced by Respondent. If Respondent had reasonably implemented existing procedures, it is likely that the firm could have prevented and detected Bleidt's violations of the federal securities laws.

Conclusions

12. Under Section 15(b)(4)(E) of the Exchange Act, broker-dealers are responsible for reasonably supervising, with a view to preventing violations of the federal securities laws, persons subject to their supervision. DMFG was responsible for supervising Bleidt.

13. The Commission has repeatedly emphasized that the "responsibility of broker-dealers to supervise their employees by means of effective, established procedures is a critical component in the federal investor protection scheme regulating the securities markets." *Dean Witter Reynolds, Inc.*, Exchange Act Rel. No. 46578 (October 1, 2002). Section 15(b)(4)(E) provides that a broker-dealer may discharge this responsibility by having "established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect" such violations. "Where there has been an underlying violation of the federal securities laws, the failure to have or follow compliance procedures has frequently been found to evidence a failure reasonably to supervise the primary violator." *In the Matter of William V. Giordano*, Exchange Act Rel. No. 36742 (January 19, 1996). In addition to adopting effective procedures for

supervision, broker-dealers "must provide effective staffing, sufficient resources and a system of follow up and review to determine that any responsibility to supervise delegated to compliance officers, branch managers and other personnel is being diligently exercised." *In the Matter of Mabon, Nugent & Co.*, Exchange Act Rel. No. 19424 (January 13, 1983).

14. Because Bleidt violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and DMFG failed to implement existing procedures, DMFG failed reasonably to supervise Bleidt for purposes of Section 15(b)(4)(E) of the Exchange Act.

<u>DMFG's Remedial Efforts</u>

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

IV.

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

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

A. Respondent DMFG be, and hereby is, censured pursuant to Section 15(b)(4) of the Exchange Act.

B. Respondent shall, within ten days of the entry of this Order, pay disgorgement of $1 and a civil money penalty in the amount of $250,000 to the Securities and Exchange Commission. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies DMFG as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David P. Bergers, Regional Director, Securities and Exchange Commission, 33 Arch Street, 23rd Floor, Boston, Massachusetts 02110.

C. It is further ordered that the disgorgement and penalties referenced in paragraph B above shall be paid into the Fair Fund created pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 in <u>In the Matter of Commonwealth Equity Services, LLP d/b/a Commonwealth Financial Network</u>, Administrative Proceeding File No. 3-12749 (34-56362). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that it shall not, after offset or reduction in any Related Investor Action based on Respondent's payment of disgorgement in this action, argue that it is entitled to, nor shall it further benefit by offset or reduction of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Nancy M. Morris
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56364 / September 6, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2644 / September 6, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12751

In the Matter of

JAMES X. McCARTY,

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative 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 James X. McCarty ("McCarty" 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 Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings, Making Findings, and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940 ("Order"), as set forth below.

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III.

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

Summary

1. Respondent failed reasonably to supervise Bradford C. Bleidt ("Bleidt") with a view to preventing and detecting his violations of the federal securities laws during the ten-year period that McCarty supervised Bleidt as a registered representative of various broker-dealers. During this time period, Bleidt defrauded more than 50 brokerage customers by lying about purchases and sales of securities, misappropriating funds, and sending them falsified statements relating to their investment advisory accounts with Bleidt's independent advisory firm.[2]

Respondent

2. James X. McCarty, age 65, resides in South Dennis, Massachusetts. He was Bleidt's immediate supervisor from at least June 1994 until November 12, 2004. McCarty holds Series 40 and Series 63 securities licenses and has no disciplinary history.

Other Relevant Person

3. Bleidt, age 53, was a registered representative who worked in a Boston, Massachusetts Office of Supervisory Jurisdiction ("OSJ") and was associated with Commonwealth Equity Services, Inc. d/b/a Commonwealth Financial Network ("Commonwealth") from January 18, 1991 until October 9, 2001; with Detwiler, Mitchell, Fenton & Graves, Inc. ("DMFG") from October 9, 2001 to February 12, 2004; and with Winslow, Evans & Crocker ("WEC") from February 12, 2004 to November 12, 2004. Commonwealth has been dually registered as an investment adviser since 1992.

4. On November 12, 2004, the Commission filed a civil injunctive action in the United States District Court for the District of Massachusetts against Bleidt and his investment advisory firm, Allocation Plus Asset Management Company, Inc. ("APAM"), alleging that Bleidt defrauded his investment advisory clients of millions of dollars by leading them to believe their money was invested when in fact he was misappropriating it for his own personal benefit. Many of Bleidt's advisory clients also maintained brokerage accounts with Commonwealth, DMFG, and/or WEC.

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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] During the same time period, Bleidt defrauded at least another 50 victims, who did not have brokerage accounts, but from whom Bleidt received funds directly in the form of a personal check or wire to Bleidt's independent advisory firm.

5. On July 26, 2005, Bleidt pled guilty to federal charges of mail fraud and money laundering in connection with his fraudulent conduct. On December 5, 2005, Bleidt was sentenced to over 11 years of confinement.

<u>Bleidt's Misconduct</u>

6. From 1991 until November 2004, Bleidt misappropriated over $31 million from more than 100 victims, many of whom had brokerage accounts at one or more of three broker-dealers. To perpetrate these misappropriations, he asked his customers to request full or partial liquidation of their existing brokerage accounts, and then to write a personal check (or in some cases, send a wire) for the amount liquidated to his investment advisory company, APAM, which did business at the same address as the OSJ. Bleidt falsely represented to these customers that their money would continue to be invested in securities when, in fact, he misappropriated their funds. Bleidt then deposited these funds into an APAM bank account, of which he had sole control. Bleidt used funds from this APAM account for various business enterprises, including operating a Boston radio station, as well as APAM and a related financial planning firm he also owned, Financial Perspectives Planning Services, Inc. ("FPPS"). He also used the customers' misappropriated funds to pay personal expenses such as his children's high school and college tuition. In some instances during the final years of the fraud, Bleidt induced prospective and current investors to give him funds to open or add to an APAM account and simply misappropriated the funds.

7. To further conceal his misappropriations and false representations, Bleidt created and sent defrauded investors falsified performance reports in the name of APAM that vastly overstated the actual value of the accounts, reflected holdings that did not exist, and reflected purchases and sales of securities that he claimed to have made, but never did.

8. As a result of the conduct described above, Bleidt, during the period that he was associated with Commonwealth, DMFG, and WEC, 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 securities.

<u>Respondent's Failure to Supervise</u>

9. While Bleidt was a registered representative associated with Commonwealth, DMFG, and WEC, he also owned the independent office in Boston at which the brokerage firms each established an OSJ.

Failure to Respond to Red Flags Regarding Bleidt's Financial Situation

10. While under Respondent's supervision at all three broker-dealers, Bleidt was pursuing other business interests. Respondent was aware that he conducted outside business activities, including two investment advisory businesses and ownership in a radio station. Respondent also was aware that one of the investment advisory businesses, FPPS, was not profitable and that Bleidt was providing cash infusions to keep it afloat. These cash infusions

from Bleidt to FPPS and Bleidt's outlay of funds for his radio station activities and ownership were misappropriated funds. McCarty accepted Bleidt's explanation that the source of his money was a "trust fund," without any evidence of the existence of the trust fund and the dollar amounts therein. As Bleidt's supervisor, McCarty was responsible for conducting further investigation into whether Bleidt was violating the securities laws when such "red flags" appeared. McCarty did not discharge his supervisory duties and failed to investigate the red flags presented by Bleidt's ability to fund significant cash requirements and willingness to fund a losing business. If Respondent had investigated these red flags, it is likely that he could have prevented or detected the fraud.

Failure to Follow Written Procedures at DMFG Regarding Opening and Review of Incoming Mail

11. Incoming mail at the OSJ was sorted – unopened and unreviewed – into registered representatives' mailboxes during the entire time that McCarty supervised Bleidt. The lack of review of incoming mail enabled Bleidt to receive checks and related correspondence from Respondent's customers who had liquidated their brokerage accounts. These checks were typically in amounts mirroring the amounts liquidated and were sent to Bleidt for the purpose of continuing to invest in securities. McCarty did not follow DMFG's written supervisory procedures for the opening and review of incoming mail, which required central mail opening at the OSJ. Numerous suspicious checks and correspondence arrived at Bleidt's office throughout the entire period of his fraud. Had McCarty followed DMFG's policy of reviewing all incoming mail, he would have encountered one or more "red flag" pieces of mail and it is likely that he could have prevented or detected the fraud.

Failure to Follow Written Procedures at Commonwealth and DMFG Regarding Annual Audits of Registered Representatives

12. McCarty was not conducting the formal annual audits of each registered representative required by Commonwealth's and DMFG's written supervisory procedures, which involved an interview of the representative and a review of certain books and records. Commonwealth's written procedures dictated that McCarty was to audit each individual representative annually using a checklist, and then Commonwealth was to review those inspections during its own audit of the OSJ. Similarly, DMFG's written procedures required annual interviews of each representative and/or an inspection of certain books and records. Had McCarty conducted the formal audits required by Commonwealth's and DMFG's procedures, it is likely that he would have uncovered evidence of Bleidt's misconduct and could have prevented or detected the fraud.

Conclusions

13. Section 15(b)(6) of the Exchange Act, incorporating by reference Section 15(b)(4)(E) of the Exchange Act, authorizes the Commission to sanction a person who is associated, or at the time of the alleged misconduct was associated, with a broker or dealer for

failing reasonably to supervise, with a view to preventing violations of the federal securities law, another person who commits such a violation, if that person is subject to the person's supervision. McCarty was responsible for supervising Bleidt. Similarly, Section 203(f) of the Advisers Act, incorporating by reference Section 203(e)(6) of the Advisers Act, authorizes the Commission to sanction a person who is associated, or at the time of the alleged misconduct was associated, with an investment adviser for failing reasonably to supervise, with a view to preventing violations of the federal securities law, another person who commits such a violation, if that person is subject to the person's supervision.

14. Because Bleidt violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and McCarty failed to adequately investigate red flags of Bleidt's fraud and failed to follow Commonwealth's and DMFG's written supervisory procedures, McCarty failed reasonably to supervise Bleidt within the meaning of Section 15(b)(6) of the Exchange Act, incorporating by reference Section 15(b)(4)(E) of the Exchange Act, and within the meaning of Section 203(f) of the Advisers Act, incorporating by reference Section 203(e)(6) 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 McCarty's Offer.

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

A. Respondent McCarty be, and hereby is, barred from association in a supervisory capacity with any broker, dealer, or investment adviser.

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

B. It is further ordered that Respondent shall pay disgorgement of $1 and a civil money penalty in the amount of $50,000 to the Securities and Exchange Commission, on the following schedule:

(a) within ten days of the entry of the Order, a payment of $20,001;
(b) within 90 days of entry of the Order, a payment of $7,500;
(c) within 180 days of entry of the Order, a payment of $7,500;
(d) within 270 days of entry of the Order, a payment of $7,500;

(e) within 360 days of entry of the Order, a payment of $7,500;

Such payments shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies McCarty as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David P. Bergers, Regional Director, Securities and Exchange Commission, 33 Arch Street, 23rd Floor, Boston, Massachusetts 02110.

C. It is further ordered that the disgorgement and penalties referenced in paragraph B above shall be paid into the Fair Fund created pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 in In the Matter of Commonwealth Equity Services, LLP d/b/a Commonwealth Financial Network, Administrative Proceeding File No. 3-12749 (34-56362). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that he shall not, after offset or reduction in any Related Investor Action based on Respondent's payment of disgorgement in this action, argue that he is entitled to, nor shall he further benefit by offset or reduction of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Nancy M. Morris
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

FOIA

Commissioner Atkins
Not Participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56366 / September 6, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2675 / September 6, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12752

In the Matter of **Dean A. Nichols (CPA),** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

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

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

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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. Nichols, age 47, is and has been a certified public accountant licensed to practice in the State of New Jersey. He served as Controller of AFI Foodservice Distributor, Inc. ("AFI") from 1995 until his termination in March 2002.

2. At all relevant times, AFI, located in Elizabeth, New Jersey, was a subsidiary of Performance Food Group Company ("PFG"), a Tennessee corporation headquartered in Richmond, Virginia. PFG was, at all relevant times, engaged in marketing, processing and selling food and food-related products to restaurants, hotels, schools, and other businesses and institutions. At all relevant times, PFG's common stock was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the NASDAQ National Market.

3. On July 24, 2007, a final judgment was entered against Nichols, permanently enjoining him from future violations of Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5 and 13b2-1 thereunder, and from aiding and abetting violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder, in the civil action entitled Securities and Exchange Commission v. Dean A. Nichols, Civil Action Number 04-641 (HAA), in the United States District Court for the District of New Jersey. Nichols was also ordered to pay a $25,000 civil money penalty.

4. The Commission's Complaint alleged, among other things, that during 2000 and 2001, Nichols made numerous improper accounting journal entries on the books of AFI that, because AFI's accounts were consolidated with those of PFG, caused PFG to file with the Commission materially misleading financial statements in its quarterly reports for the quarters ended June 30, 2000, September 30, 2000, March 31, 2001 and September 30, 2001. The Complaint alleged that Nichols engaged in a number of improper accounting practices that caused PFG to overstate materially its reported net earnings for those quarters. These practices included, among other things, failing to reconcile properly imbalances in various AFI accounts, and making improper accounting adjustments in an effort to make the accounts appear to balance.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Nichols is suspended from appearing or practicing before the Commission as an accountant.

By the Commission.

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56358 / September 6, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12748

In the Matter of	**ORDER INSTITUTING PROCEEDINGS MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**
800America.com, Inc.,	
Respondent.	

I.

The Securities and Exchange Commission "Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against 800America.com, Inc. ("800America" or "Respondent").

II.

In anticipation of the institution of these proceedings, 800America has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these 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, 800America consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

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1. 800America is a Nevada corporation which formerly maintained offices in New York and Tennessee. At all times relevant to this proceeding, the common stock of 800America was registered with the Commission under Exchange Act Section 12(g).

2. 800America has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder while its securities were registered with the Commission in that it has not filed any periodic reports for any fiscal period subsequent to November 25, 2002.

IV.

Section 12(j) of the Exchange Act provides:

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

In view of the foregoing, the Commission deems it necessary and appropriate for the protection of investors to impose the sanction specified in the Offer.

Accordingly, it is hereby ORDERED, pursuant to Section 12(j) of the Exchange Act, that registration of each class of 800America's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

Commissioners Atkins & Campos Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 7, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12753

In the Matter of PRITCHARD CAPITAL PARTNERS, LLC, THOMAS WARD PRITCHARD, JOSEPH JOHN VANCOOK, AND ELIZABETH ANN MCMAHON, Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTIONS 9(b) AND 9(f) 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 proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Thomas Ward Pritchard ("Thomas Pritchard") and that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Exchange Act and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Pritchard Capital Partners, LLC ("Pritchard Capital"), Joseph John VanCook ("VanCook") and Elizabeth Ann McMahon ("McMahon").

II.

After an investigation, the Division of Enforcement alleges that:

A. Respondents

1. Pritchard Capital is a Louisiana limited liability company that has been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act since March 2000. Pritchard Capital is headquartered in Mandeville, Louisiana and has branch offices in New York, New York and Atlanta, Georgia.

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2. Thomas Pritchard, a resident of Covington, Louisiana, is the managing director of Pritchard Capital. At all times relevant hereto, Thomas Pritchard was also the chief compliance officer of Pritchard Capital. Thomas Pritchard currently owns 80% of Pritchard Capital and holds Series 3, 5, 7, 15, 24, 27 and 63 securities licenses.

3. VanCook is a resident of Rye, New York. From approximately March 2001 through February 2004, VanCook was associated with Pritchard Capital in its New York office. In 2002, VanCook became a partner of Pritchard Capital and by 2003 owned 20% of the firm. VanCook holds Series 7 and 63 securities licenses.

4. McMahon is a resident of Long Beach, New York. From approximately March 2001 through January 2004, McMahon was associated with Pritchard Capital in its New York office. During all relevant times, McMahon held Series 7, 24, 63 and 65 securities licenses. McMahon asserted her Fifth Amendment privilege against self incrimination during the staff's investigation.

B. Background

5. Pritchard Capital opened its New York office and hired VanCook in March 2001. During his tenure at Pritchard Capital, VanCook was instrumental in building the firm's business among clients who traded mutual fund shares.

6. Pritchard Capital hired McMahon in its New York office in approximately March 2001. Pritchard Capital's New York office was classified as an Office of Supervisory Jurisdiction with McMahon listed as the branch manager.

7. "Late trading" refers to the practice of placing orders to buy or sell mutual fund shares after 4:00 p.m. Eastern Time, the time as of which mutual funds typically calculate their net asset value ("NAV"), but receiving the price based on the NAV already determined as of 4:00 p.m. Late trading enables the trader to profit from market events that occur after 4:00 p.m. but are not reflected in that day's price.

8. From as early as approximately November 2001 through July 2003, Pritchard Capital allowed some of its mutual fund customers to late trade mutual fund shares. Virtually all of the late trading occurred through Pritchard Capital's New York office and involved VanCook and McMahon.

C. Late Trading

9. At all times relevant hereto, Pritchard Capital entered its customers' mutual fund trades through an electronic Mutual Fund Order Entry System ("MFRS") operated by the broker-dealer through which Pritchard Capital cleared its trades (the "clearing broker-dealer"). Pritchard Capital had direct access to the MFRS system, through which mutual fund orders could be entered until 5:30 p.m. Eastern Time on any trading day in any of the funds available through the clearing broker-dealer. Mutual fund trades entered up until 5:30 p.m. would receive the NAV calculated as

of 4:00 p.m. that day. Although both VanCook and McMahon entered mutual fund orders into the MFRS system, McMahon entered the majority of the mutual fund orders.

10. The clearing broker-dealer was a dealer within the meaning of Rule 22c-1(a) under the Investment Company Act because it had selling agreements with the mutual funds that were traded through the MFRS system.

11. The clearing broker-dealer supplied Pritchard Capital with written documentation explaining the MFRS system and listing the mutual funds with which the clearing broker-dealer had selling agreements. Among other things, that documentation states that "All orders should be received and time stamped by the close of the NYSE, 4 PM EST."

12. The prospectuses of the mutual funds that were subject to the late trading facilitated by Pritchard Capital contained disclosures stating that the mutual funds calculated their NAV either "at" or "as of" 4:00 p.m. Eastern Time and that an investor would receive the price next calculated after receipt of the order. Many of them stated that orders received after the close of trading on the NYSE (generally 4:00 p.m.) would receive the public offering price next determined on the following business day. Some of the prospectuses even specified that the time that the broker or financial intermediary received the order "shall be" the time used for determining whether the investor received that day's NAV.

13. Pritchard Capital's customers were permitted to place mutual fund orders by e-mailing or faxing spreadsheets to VanCook or McMahon listing proposed or tentative trades. Some of the spreadsheets containing the tentative trades were specifically designated as "tentative" or "contingent" trades. Also, some of the trade sheets or e-mails transmitting the trade sheets expressly instructed Pritchard Capital to wait for the customer's confirming call before entering the trades. The customer's proposed trade order generally was date and time stamped when received, usually before 4:00 p.m. Eastern Time.

14. If a customer submitted tentative mutual fund trades, VanCook and/or McMahon would not actually execute the order through the MFRS system unless and until they received confirmation from the customer. The form of confirmation varied; some customers confirmed their trades by e-mail or facsimile and others confirmed by telephone. The individual at Pritchard Capital who received the trade confirmations would generally make notations on the tentative spreadsheet indicating which trades were to be executed and which were not. On many occasions, customers would wait until after 4:00 p.m. Eastern Time to either confirm trades with Pritchard Capital or to notify Pritchard Capital that they did not wish to do any of the trades previously submitted on the tentative trade sheet.

15. Pritchard Capital generally did not document the time of its customers' final confirmations of tentative mutual fund trades.

16. VanCook and McMahon permitted some of Pritchard Capital's mutual fund customers to buy or sell mutual funds after 4:00 p.m. Eastern Time, the time as of which funds

typically calculate their NAV, but receive the price based on the NAV already determined as of 4:00 p.m. Eastern Time.

17. One mutual fund trader (the "first trader"), who managed fourteen active market timing accounts at Pritchard Capital confirmed over 90% of his mutual fund orders after 4:00 p.m. and received the NAV calculated as of 4:00 p.m. on the day of the trades. The first trader engaged in over 2,600 mutual fund trades through Pritchard Capital during the relevant period. Both VanCook and McMahon told the first trader that he had to submit his final mutual fund orders by 5:00 p.m.

18. Another mutual fund trader (the "second trader") managed seven market timing accounts at Pritchard Capital during the relevant period. From mid-November 2002 through mid-January 2003, the second trader experimented with a late trading strategy with VanCook. In approximately October or November 2002, the second trader was contemplating terminating his market timing business at Pritchard Capital. VanCook, in an effort to retain the business, proposed to the second trader a trading strategy whereby the second trader could submit mutual fund orders to Pritchard Capital before 4:00 p.m. and subsequently choose to cancel or allow those trades to go through any time up until 5:00 or 5:05 p.m. and still receive that day's NAV. The second trader would decide to trade based on activity in the futures market between 4:45 and 5:00 or 5:05 p.m. VanCook told the second trader that there were other customers at Pritchard Capital that engaged in late trading.

19. VanCook and McMahon would also receive communications from additional customers after 4:00 p.m. placing, modifying or confirming mutual fund trades and would subsequently enter those trades into the MFRS system, knowing that those trades would receive the current day's NAV.

D. Compensation

20. Pritchard Capital's market timing customers contracted with the firm to provide mutual fund trading services in exchange for a negotiated wrap fee (generally 1.0% to 1.25%) and, in many cases, a $25 per trade transaction fee.

21. At all times relevant hereto, VanCook received compensation of 50% of the wrap fees related to the business that he generated, with Pritchard Capital retaining the other half.

E. Supervisory Failures

22. At all times relevant hereto, Thomas Pritchard was responsible for developing supervisory policies and procedures at Pritchard Capital.

23. Pritchard Capital and Thomas Pritchard supervised VanCook during all times relevant hereto.

24. Pritchard Capital and Thomas Pritchard failed reasonably to supervise the activities of VanCook with a view to preventing his violations of the federal securities laws in that, among other things:

a. Thomas Pritchard failed reasonably to respond to red flags of potential late trading by VanCook. During his periodic visits to the firm's New York office, Thomas Pritchard's review of files focused on the trade blotters. He gave only a "cursory look" to mutual fund correspondence and trade ticket files. Because of Thomas Pritchard's cursory review, he failed to recognize, and/or failed to respond appropriately to, red flags or indications of wrongdoing by VanCook. For example, many of the "trade ticket files" were designated as "tentative or "contingent" trades." Some of the trade sheets or e-mails transmitting the trade sheets expressly instructed Pritchard Capital to wait for the customer's confirming call before entering the trades. The contingent nature of the tentative trades, coupled with the ability to enter mutual fund trades as late as 5:30 p.m. Eastern Time through the clearing broker-dealer's MFRS system, merited further inquiry into the potential for late trading; and

b. Pritchard Capital's written supervisory procedures did not contain policies or procedures reasonably designed to prevent or detect illegal late trading by VanCook.

F. Books and Records

25. At all times relevant hereto, Pritchard Capital, acting through VanCook and McMahon, generally did not prepare conventional order tickets for its mutual fund transactions. Rather, the firm generally created order tickets for its mutual fund orders and trades by retaining the communication (if written or e-mailed) containing the actual or proposed mutual fund order with the time of receipt noted. Pritchard Capital also printed out a screen from the MFRS system that showed the order as entered on the MFRS system.

26. At all times relevant hereto, Pritchard Capital, acting through VanCook and McMahon, failed to make and keep accurate and complete records regarding the terms and conditions of each mutual fund order and the modifications and cancellations of such orders in that, among other things:

a. In the case of tentative or proposed trades, the records evidencing orders frequently were not accurate reflections of the final order and did not clearly document the terms and conditions of the orders and any modifications or cancellations thereof.

b. From approximately May 2003 through July 2003, Pritchard Capital, acting through VanCook and McMahon, failed to make order tickets for mutual fund orders reflecting the time of receipt of such orders; and

c. In those instances, on or after May 2, 2003, where Pritchard time-stamped a tentative mutual fund order prior to 4:00 p.m. Eastern time and subsequently allowed the customer to confirm, cancel or modify that order after 4:00 p.m. Eastern time, without documenting the time of such confirmation, cancellation or modification, Pritchard Capital failed to document a required record.

G. Violations

27. As a result of the conduct described above, the clearing broker willfully violated Rule 22c-1(a), as adopted under Section 22(c) of the Investment Company Act, which requires certain mutual funds, persons designated in such issuers' prospectuses as authorized to consummate transactions in any such security, their principal underwriters, or dealers in the funds' securities, to sell and redeem fund shares at a price based on the current NAV next computed after receipt of an order to buy or redeem.

28. As a result of the conduct described above, VanCook willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder which makes it unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, to employ any device, scheme or artifice to defraud; to make any untrue statement of a material fact or to omit 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; or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of a security.

29. As a result of the conduct described above, McMahon caused, and Pritchard Capital and VanCook willfully aided and abetted and caused, the clearing broker's violations of Rule 22c-1, promulgated under Section 22(c) of the Investment Company Act, which provides that no registered investment company issuing any redeemable security, no person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in, any such security shall sell, redeem, or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

30. As a result of the conduct described above, Pritchard Capital willfully violated, and VanCook and McMahon willfully aided and abetted and caused Pritchard Capital's violations of, Section 17(a)(1) of the Exchange Act and Rule 17a-3(a)(6) thereunder, which require that broker-dealers registered with the Commission make and keep current, for prescribed periods, certain books and records. Rule 17a-3(a)(6) requires that registered broker-dealers make and keep "[a] memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. The memorandum shall show the terms and conditions of the order or instructions and of any modification or cancellation thereof; the account for which entered; the time the order was received; the time of entry; the price at which executed; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer or, if a customer entered the order on an electronic system, a notation of that entry; and, to the extent feasible, the time of execution or cancellation." Rule 17a-3(a)(6) was amended, effective May 2, 2003, to add the requirement to note the time an order was received from a customer.

31. As a result of the conduct described above, Pritchard Capital and Thomas Pritchard failed reasonably to supervise, within the meaning of Sections 15(b)(4) and 15(b)(6) of the Exchange Act, in that they failed reasonably to supervise VanCook, a person subject to their supervision, with a view to preventing VanCook's violations of the federal securities laws.

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 Pritchard Capital, Thomas Pritchard, VanCook and McMahon the opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Pritchard Capital and VanCook pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement, including reasonable interest, and civil penalties pursuant to Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Thomas Pritchard and McMahon pursuant to Section 15(b) of the Exchange Act including, but not limited to, civil penalties pursuant to Section 21B of the Exchange Act;

D. What, if any, remedial action is appropriate in the public interest against Pritchard Capital, VanCook and McMahon pursuant to Section 9(b) of the Investment Company Act including, but not limited to, civil penalties pursuant to Section 9(d) of the Investment Company Act; and

E. Whether, pursuant to Section 21C of the Exchange Act and Section 9(f) of the Investment Company Act, Pritchard Capital should be ordered to cease and desist from causing violations of and any future violations of Rule 22c-1 of the Investment Company Act and committing or causing violations of and any future violations of Section 17(a)(1) of the Exchange Act and Rule 17a-3(a)(6) thereunder.

F. Whether, pursuant to Section 21C of the Exchange Act and Section 9(f) of the Investment Company Act, VanCook and McMahon should be ordered to cease and desist from causing violations of and any future violations of Rule 22c-1 of the Investment Company Act and Section 17(a)(1) of the Exchange Act and Rule 17a-3(a)(6) thereunder, and VanCook should be ordered to cease and desist from committing or causing violations of and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

IV.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than thirty (30) days and not later than sixty (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 the 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 a 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 or 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 the 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. 17 C.F.R. §201.360(a)(2).

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceedings will be permitted to participate or advise in the decision of this matter, except as a witness or counsel in proceedings held pursuant to notice. Because 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.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56375; File No. SR-NASD-2004-183)

September 7, 2007

Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Notice of Filing of Amendment Nos. 3 and 4 and Order Granting Accelerated Approval of the Proposed Rule, as Amended, Related to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities

I. Introduction

On December 14, 2004, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934[1] ("Exchange Act" or "Act") and Rule 19b-4[2] thereunder, proposed new Rule 2821 ("Proposed Rule 2821") relating to the sales practice standards and supervisory and training requirements applicable to transactions in deferred variable annuities.[3] Proposed Rule 2821, as amended by Amendment No. 1, was published for comment in the Federal Register on July 21, 2005.[4] The Commission received approximately 1500 comments on the

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

2 17 CFR 240.19b-4.

3 On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Exchange Act Release No. 56146 (July 26, 2007); 72 FR 42190 (Aug. 1, 2007).

4 See Exchange Act Release No. 52046A (July 19, 2005); 70 FR 42126 (July 21, 2005) (SR-NASD-2004-183).

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proposal.[5] NASD filed Amendment No. 2 on May 4, 2006, which addressed the comments and proposed responsive amendments. Amendment No. 2 was published for comment in the Federal Register on June 28, 2006.[6] The Commission received approximately 1950 comments on Amendment No. 2.[7] To further explain and modify certain provisions of Proposed Rule 2821 in response to comments, NASD filed Amendment No. 3 on November 15, 2006 and Amendment No. 4 on March 5, 2007. Amendment No. 4 supersedes all of the previous amendments in their entirety. All of the comments that the Commission has received are available on the Commission's Internet Web site (http://www.sec.gov/rules/sro.shtml). This order provides notice of Amendment Nos. 3 and 4 to the proposed rule and approves the proposed rule as amended on an accelerated basis.[8]

II. Description of the Proposal

Proposed Rule 2821 would create recommendation requirements (including a suitability obligation), principal review and approval requirements, and supervisory and training requirements tailored specifically to transactions in deferred variable annuities. It is intended to supplement, not replace, NASD's other rules relating to suitability,

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5 Approximately 1300 of these comments, primarily from licensed insurance professionals and variable product salespersons, are virtually identical. These letters are referred to herein, and on the list of comments on the Commission's Web site as "Letter Type A." The Commission also received multiple copies of other letters, which we refer to as Letters Type B, C, D, E, F, G and H, below.

6 See Exchange Act Release No. 54023 (June 21, 2006); 71 FR 36840 (June 28, 2006) (SR-NASD-2004-183).

7 Approximately 1700 of these comments, primarily from licensed insurance professionals and variable product salespersons, are virtually identical. These letters are referred to herein as "Letter Type B."

8 NASD granted consent for the Commission to approve the proposed rule beyond the timeframes set forth in Section 19(b)(2) of the Act.

supervisory review, supervisory procedures, and training. Thus, to the extent Proposed Rule 2821 does not apply to a particular transaction, NASD's general rules on suitability, supervisory review, supervisory procedures, and training continue to govern when applicable.[9] The text of the proposed rule is available on FINRA's Web site (www.finra.org), at FINRA's principal office, and at the Commission's Public Reference Room.

Proposed Rule 2821 would apply to the purchase or exchange of a deferred variable annuity and to an investor's initial subaccount allocations.[10] It would not apply to reallocations of subaccounts or to subsequent premium payments made after the investor's initial purchase or exchange.[11] It also generally would not apply when an investor's purchase or exchange of a deferred variable annuity is made within a tax-

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9 The general suitability obligation requires a broker-dealer to consider its customer's ability to understand the security being recommended, including changes in the customer's ability to understand, monitor, and make further decisions regarding securities over time.

10 As NASD noted in Amendment No. 2, the proposed rule focuses on customer purchases and exchanges of deferred variable annuities, areas that, to date, have given rise to many of the sales practice abuses associated with variable annuity products. See Exchange Act Release No. 52046A, at 3-5 (discussing various questionable sales practices that NASD examinations and investigations have uncovered and the actions NASD has taken to address those practices). The proposed rule would thus cover a standalone purchase of a deferred variable annuity and an exchange of one deferred variable annuity for another deferred variable annuity. For purposes of the proposed rule, an "exchange" of a product other than a deferred variable annuity (such as a fixed annuity) for a deferred variable annuity would be covered by the proposed rule as a "purchase." The proposed rule would not cover customer sales of deferred variable annuities, including the sale of a deferred variable annuity in connection with an "exchange" of a deferred variable annuity for another product (such as a fixed annuity). However, recommendations of customer sales of deferred variable annuities are covered by Rule 2310, NASD's general suitability rule.

11 NASD's general suitability rule, Rule 2310, would continue to apply to reallocations of subaccounts.

qualified, employer-sponsored retirement or benefit plan.[12] If, however, a member recommends a deferred variable annuity to an individual plan participant, then Proposed Rule 2821 would apply to that purchase (or exchange) and to the initial subaccount allocations.

Proposed Rule 2821 has four main requirements. First, in order to recommend the purchase or exchange of a deferred variable annuity, a member would be required to have a reasonable basis to believe that the transaction is suitable in accordance with NASD's general suitability rule, Rule 2310.[13] In particular the member must have a reasonable basis to believe that:

- The customer has been informed, in general terms, of various features of deferred variable annuities;[14]
- The customer would benefit from certain features of deferred variable annuities, such as tax deferred growth, annuitization, or a death or living benefit;[15] and
- The particular deferred variable annuity that the member is recommending, the underlying subaccounts to which funds are allocated at the time of the

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12 Proposed Rule 2821 defines such plans as either a "qualified plan" under Section 3(a)(12)(C) of the Act or a plan that meets the requirements of Internal Revenue Code Sections 403(b), 457(b), or 457(f).

13 See Proposed Rule 2821(b)(1)(A).

14 See Proposed Rule 2821(b)(1)(A)(i). The proposed rule lists the following features as examples for purposes of this requirement: (1) potential surrender period and surrender charge; (2) potential tax penalty if customers sell or redeem deferred variable annuities before reaching the age of 59½; (3) mortality and expense fees; (4) investment advisory fees; (5) potential charges for and features of riders; (6) the insurance and investment components of deferred variable annuities; and (7) market risk.

15 See Proposed Rule 2821(b)(1)(A)(ii).

purchase or exchange of the deferred variable annuity, and the riders and similar product enhancements are suitable (and in the case of an exchange, the transaction as a whole also is suitable) for the customer based on the information the person associated with the member is required to make a reasonable effort to obtain pursuant to subparagraph (b)(2) of the proposed rule.[16]

Prior to recommending that a customer exchange a deferred variable annuity, a registered representative must not only have a reasonable basis to believe that the exchange is consistent with the suitability determinations in subparagraph (b)(1)(A) of the proposed rule, but must also consider whether:

- The customer would incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits, or be subject to increased fees or charges;[17]
- The customer would benefit from product enhancements and improvements;[18] and
- The customer's account has had another deferred variable annuity exchange within the preceding 36 months.[19]

The associated person recommending the transaction would be required to document these considerations and sign this documentation. He or she would also have to make reasonable efforts to obtain from the customer information regarding the

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16 See Proposed Rule 2821(b)(1)(A)(iii).

17 See Proposed Rule 2821(b)(1)(B)(i).

18 See Proposed Rule 2821(b)(1)(B)(ii).

19 See Proposed Rule 2821(b)(1)(B)(iii).

customer's age, annual income, financial situation and needs, investment experience, investment objectives, intended use of the deferred variable annuity, investment time horizon, existing assets (including investment and life insurance holdings), liquidity needs, liquid net worth, risk tolerance, tax status, and such other information used or considered to be reasonable by the member or person associated with the member in making recommendations to customers.[20]

Second, a registered principal would have to review the transaction and determine whether he or she approves of it prior to transmitting the customer's application to the issuing insurance company for processing, but no later than seven business days after the customer signs the application.[21] The registered principal may approve the transaction only if he or she has determined that there is a reasonable basis to believe that the transaction would be suitable based on all of the factors contained in paragraph (b) ("Recommendation Requirements") of the proposed rule.[22]

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20 See Proposed Rule 2821(b)(2).

21 See Proposed Rule 2821(c). NASD has determined that relief is needed to allow certain broker-dealers to complete their review of deferred variable annuity transactions as required by proposed NASD Rule 2821 without becoming fully subject to Exchange Act Rule 15c3-3 and being required to maintain higher levels of net capital in accordance with Exchange Act Rule 15c3-1. Consequently, NASD has requested relief from Rules 15c3-3 and 15c3-1 for these broker-dealers. In conjunction with the Commission's approval or proposed rule 2821, it is also granting exemptions from Rules 15c3-1 and 15c3-3 of the Exchange Act to allow NASD members to comply with proposed Rule 2821 without becoming fully subject to Exchange Act Rule 15c3-3 and being required to maintain higher levels of net capital in accordance with Rule 15c3-1.

NASD initially submitted a request for relief to the staff prior to the consolidation of its member firm regulatory functions with NYSE Regulation, Inc. This request was replaced by a subsequent request from the consolidated entity, FINRA. For readability, this second request is referred to as an NASD request throughout this order.

22 See Proposed Rule 2821(c).

For purposes of reviewing deferred variable annuity purchases and exchanges, a registered principal must treat all transactions as if they have been recommended.[23] However, if a registered principal determines that a transaction, which is not suitable based on the factors contained in paragraph (b), was not recommended, he or she may nonetheless authorize the processing of it if the customer has been informed of the reason why the transaction has not been approved and the customer affirms that he or she wants to proceed with the transaction.[24]

The registered principal that reviews the transaction must document and sign the determinations that the proposed rule requires him to make.[25] He or she must complete this documentation regardless of whether he or she approves, rejects, or authorizes the transaction.[26]

Third, Proposed Rule 2821 would require members to develop and maintain supervisory procedures that are reasonably designed to achieve compliance with the proposed rule.[27] Members would be required to implement surveillance procedures to determine if associated persons "have rates of effecting deferred variable annuity exchanges that raise for review whether such rates of exchanges evidence conduct inconsistent with the applicable provisions of [the rule], other applicable NASD rules, or the federal securities laws ('inappropriate exchanges')."[28] Members would also be required to have policies and procedures reasonably designed to implement corrective

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23 Id.

24 Id.

25 Id.

26 Id.

27 See Proposed Rule 2821(d).

28 Id.

measures to address inappropriate exchanges and the conduct of associated persons who engage in inappropriate exchanges.[29]

Fourth, Proposed Rule 2821 would require members to develop and implement training programs that are tailored to educate registered representatives and registered principals on the material features of deferred variable annuities and the requirements of the proposed rule.[30]

III. Summary of Comments on Amendment No. 2

In its solicitation of comments on Amendment No. 2, the Commission stated that it would consider the comments it previously received,[31] and that commenters could reiterate or cross-reference previously submitted comments.[32] The Commission has considered all of the comments it received, including commenters' reiterations of and cross-references to previously submitted comments. While the summary below refers to some comments previously submitted, it primarily discusses new comments on portions of the proposed rule that Amendment No. 2 did not change and comments on those provisions of the proposed rule that Amendment No. 2 modified. It also discusses comments received in response to Amendment No. 1 that are relevant to the timing of principal review provision in paragraph (c) of the proposed rule.

A. General Comments

A number of commenters reiterated their general opposition to the proposed rule, viewing it as unnecessary, arguing that NASD has not demonstrated a need for it, and

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29 Id.

30 See Proposed Rule 2821(e).

31 See Exchange Act Release No. 54023 (June 21, 2006); 71 FR at 36846 n.84.

32 Id.

stating that strong enforcement against broker-dealer sales practice abuses provides the best deterrent to negative market conduct.[33] Some commenters also stated that existing NASD rules and the prospectus adequately inform and protect investors.[34]

A few commenters suggested that the proposed rule must take into account an estimate of its competitive and economic impact and asserted that the proposed rule must be subject to a cost/benefit analysis.[35] One commenter took the position that the proposed rule would impose economic and competitive burdens upon broker-dealers.[36] The commenter stated that the rule would require expensive new systems and operation changes that could initially total more than $200,000 for broker-dealers to implement and

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33 See, e.g., Letters from Stephen A. Batman, CEO, 1st Global Capital Corp. (July 19, 2006) ("1st Global Letter II"); Carl B. Wilkerson, Vice President and Chief Counsel, American Counsel of Life Insurers (July 19, 2006) ("ACLI Letter IV"); Gary A. Sanders, Senior Counsel, Law and Government Relations, National Association of Insurance and Financial Advisors and Thomas F. Korb, Vice President of Policy and Public Affairs, Association for Advanced Life Underwriting (July 19, 2006) ("NAIFA/AALU Letter II"); Letter Type B. See also Letter Type D. Unless otherwise noted, all letters are addressed to the Commission.

34 See, e.g., Letters from Dale E. Brown, CAE, Executive Director and CEO, Financial Services Institute (July 19, 2006) ("FSI Letter II"); Ari Burstein, Associate Counsel, Investment Company Institute (July 19, 2006) ("ICI Letter II"); 1st Global Letter II; ACLI Letter IV; Letter Type B. Two commenters suggested that the Commission delay action on the proposed rule until there is some resolution to the Commission's point-of-sale proposal. See ACLI Letter IV; FSI Letter II. Another commenter stated that it is not clear how the proposed rule would work with the Commission's point-of-sale proposal, especially with regard to the disclosure of material features. See Letter from W. Thomas Conner and Eric A. Arnold, Sutherland Asbill and Brennan LLP on behalf of Committee of Annuity Insurers (July 19, 2006) ("CAI Letter II").

35 See Letter from Joan Hinchman, Executive Director, President and CEO, National Society of Compliance Professionals, Inc. (July 19, 2006) ("NSCP Letter"); ACLI Letter IV; NAIFA/AALU Letter II.

36 ACLI Letter IV.

monitor enterprise-wide.[37] It also maintained that the ongoing costs of complying with the proposed rule would be significant and immeasurable.[38] That commenter did not, however, provide any specific information about the system changes it foresaw, or how it arrived at its $200,000 estimate.

Some commenters stated that the proposed rule would impose a burden on competition.[39] One of these commenters stated that the proposed rule would disparately impact smaller companies without state-of-the-art technological resources.[40] In its view, small to mid-sized companies may be forced out of the annuity market, thereby reducing competition and eliminating consumer options.[41] One commenter posited three ways in which the proposed rule would burden competition, stating:

- The proposed rule would disrupt enterprise-wide uniformity of compliance procedures. Compliance with the proposed rule would cost more than compliance procedures for other products, and thus would make variable annuities more expensive to sell than other products.

- Conversion to the proposed rule would provide openings for inadvertent and transitional violations and may dampen distributors' enthusiasm for selling a product with suitability and supervision standards that are different from all other securities.

- Other products have had greater incidences of disciplinary actions and do not have specific supervision and suitability standards "that would dampen distributors' sales enthusiasm for fear of regulatory reprisals or technical violations."[42]

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37 Id.

38 Id.

39 See e.g., ACLI Letter IV; NAIFA/AALU Letter II; NSCP Letter.

40 NSCP Letter.

41 Id.

42 ACLI Letter IV. Another commenter agreed that the proposed rule would place those that sell variable annuities at a competitive disadvantage in comparison with those who market other types of investments. See NAIFA/AALU Letter II. Two commenters also stated that adopting product specific suitability requirements and

This commenter also argued that the rule targets deferred variable annuities in a discriminatory and burdensome fashion without appropriate rationale.[43]

Some commenters stated that implementation of the proposed rule would have unintended consequences.[44] For example, two commenters asserted that the proposed rule would raise barriers to access for investors who could benefit from owning a deferred variable annuity.[45] A few commenters also believed that the product-specific requirements of the proposed rule would signal to investors that something is wrong with the product.[46] One commenter stated that the proposed rule would cause expenses and fees to rise, which in turn would lead consumers to look to other, less expensive investment products that may not be as appropriate for their needs.[47]

NASD responded to concerns regarding the need for the proposed rule, the process by which it developed and revised the proposed rule, and the statutory requirements for its rulemaking in a letter to the Commission.[48] With respect to concerns that the proposed rule is not necessary, NASD reiterated that its examinations,

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supervisory procedures would inhibit sales because registered representatives would be less inclined to sell the product. See Letter from Michael P. DeGeorge, General Counsel, National Association for Variable Annuities (July 19, 2006) ("NAVA Letter III"); FSI Letter II.

43 ACLI Letter IV.

44 See, e.g., Letter from Rick Dahl, CCO, Sorrento Pacific Financial LLC (July 19, 2006) ("Sorrento Letter"); FSI Letter II; NAVA Letter III; NAIFA/AALU Letter II.

45 See FSI Letter II; Sorrento Letter.

46 See Letter from W. Burk Rosenthal, President, Rosenthal Retirement Planning, LP (July 19, 2006); FSI Letter II; NAVA Letter III.

47 See NAIFA/AALU Letter II.

48 See Letter from James S. Wrona, Associate Vice President, NASD (Aug. 31, 2006) ("NASD Response Letter").

investigations, and informal discussions with its members have uncovered numerous instances of questionable sales practices in connection with the purchase or exchange of deferred variable annuities, including unsuitable recommendations, and misrepresentations and omissions.[49] It also stated that member supervision and training procedures are inadequate.[50] NASD noted that these problems stem from the unique complexities of deferred variable annuities, which can cause confusion both for the individuals who sell them and for the customers who purchase or exchange them.[51] Despite issuing Notices to Members, Regulatory and Compliance Alerts, and Investor Alerts, NASD found that these problems continue to exist.[52] NASD stated that recent joint reviews with the Commission, as well as NASD examinations and enforcement actions, demonstrate that an informal approach has not been sufficiently effective at curbing the sales practice abuses in this area.[53]

NASD also discussed its "measured approach" to the rulemaking process.[54] After NASD determined that a rule specific to deferred variable annuities was necessary and appropriate, it issued Notice to Members 04-45 (June 2004) to solicit comments from the public prior to submitting the proposed rule to the Commission.[55] In addition, NASD sought input on the proposal from five NASD standing committees, including two

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49 Id. at 2.

50 Id.

51 Id.

52 Id.

53 Id.

54 Id. at 3.

55 Id.

committees with subject matter expertise in variable annuities.[56] NASD Regulation, Inc.'s Board of Directors then approved the proposal and NASD's Board of Governors had an opportunity to review it.[57] NASD modified the proposed rule in light of comments it received from all of these sources prior to filing it with the Commission.[58]

In addition, NASD stated that nothing in Section 15A, Section 19, or any other provision of the Act requires it to generate a competitive impact statement or otherwise engage in a cost/benefit analysis.[59] It also noted that, as required under Section 19(b)(1) of the Act,[60] NASD submitted to the Commission a concise general statement of the basis and purpose of the proposed rule.[61]

As discussed in Part IV below, in approving a proposed NASD rule, the Commission must find that the rule is consistent with the requirements of Sections 15A(b)(6) and 15A(b)(9) of the Act. Section 15A(b)(6) requires, among other things, the rules of a national securities association to be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.[62] Section 15A(b)(9) provides that

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56 Id. at 4.

57 Id. at 4. NASD noted that its Board of Governors is composed of both industry and non-industry members and that one member must be a representative of an insurance company. Id. at 4, nt. 6. Similarly, NASD Regulation, Inc.'s Board of Directors is composed of both industry and non-industry members, and one member must be a representative of an insurance company or an affiliated NASD Member. Id. at 4, nt. 6.

58 Id. at 4.

59 Id.

60 15 U.S.C. 78s(b)(1).

61 NASD Response Letter at 4.

62 15 U.S.C. 78o-3(b)(6). See also 15 U.S.C. 78c(f) (the Commission must consider whether the action will promote efficiency, competition and capital formation

proposed rules may not create a "burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[63] NASD addressed the consistency of the proposed rule with these requirements, stating:

> NASD believes that the proposed rule will enhance firms' compliance and supervisory systems and provide more comprehensive and targeted protection to investors regarding fraud and manipulative acts, promote just and equitable principles of trade, and increase investor protection. . . . Like all regulation, NASD's rules often impose compliance obligations on the regulated entities. In every case, the compliance burdens associated with a new rule will vary from firm to firm depending on the firm's customer base, business model, and a variety of other factors. Section 15A(b)(9) of the Act does not, therefore, require that NASD rules impose no economic burden on NASD members or burden on competition, but rather that any such burdens are necessary and appropriate to further the purposes of the Act . . . . NASD believes that the proposed rule is consistent with, and promotes the goals of the Act.[64]

B. Comments on Proposed Rule 2821(b) – Recommendation Requirements

1. Comments on Proposed Rule 2821(b)(1)(A) – Renumbered Proposed Rule 2821(b)(1)(A)(i)

As proposed in Amendment No. 2, Proposed Rule 2821(b)(1)(A) would have required registered representatives to have a reasonable belief that the customer has been informed of the material features of deferred variable annuities in general prior to recommending a particular variable annuity to a customer.[65] One commenter stated that

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when it is required to consider whether an action is necessary or appropriate in the public interest).

63 15 U.S.C. 78o-3(b)(9).

64 NASD Response Letter at 4-5.

65 In response to Amendment No. 1, commenters stated this provision would amount to a de facto requirement to provide written disclosure to customers. See, e.g., Letters from Beth L. Climo, Executive Director, American Bankers Insurance

the rule should clarify what constitutes the material features of a deferred variable annuity, and should have a safe harbor to protect good faith attempts to disclose the required information.[66] Some commenters reiterated their support for a plain-English disclosure document to be provided to investors in addition to the prospectus.[67]

The substance of this provision remained the same in Amendment No. 3, but in response to comments NASD explicitly stated that the type of disclosure required is generic and not specific to the particular deferred variable annuity being recommended. The provision now provides that the member or person associated with the member must have a reasonable basis to believe that "the customer has been informed, in general terms, of various features of deferred variable annuities . . . ."

2. Comments on Proposed Rule 2821(b)(1)(B) – Renumbered Proposed Rule 2821(b)(1)(A)(ii)

Association/ABA Securities Association (Sept. 20, 2005); Carl B. Wilkerson, Vice President and Chief Counsel, America Council of Life Insurers (Sept. 19, 2005) ("ACLI Letter II"), Thomas M. Yacovino, Vice President, A.G. Edwards & Sons, Inc. (Sept. 20, 2005); Roger C. Ochs, President, HD Vest Financial Services (Sept. 20, 2005); Michael P. DeGeorge, General Counsel, National Association for Variable Annuities (Sept. 19, 2005) ("NAVA Letter II"); Thomas R. Moriarty, President, Intersecurities, Inc. (Sept. 16, 2005) ("Intersecurities Letter"); Ira D. Hammerman, Senior Vice President and General Counsel, Securities Industry Association (Sept. 19, 2005) ("SIA Letter I"); Ronald C. Long, Senior Vice President, Wachovia Securities, LLC (Sept. 19, 2005) ("Wachovia Letter"). Commenters also asserted that this disclosure, along with the other disclosures already provided to investors who purchase or exchange deferred variable annuities, would be redundant and would overwhelm investors. See e.g., Letter from Leesa M. Easley, Chief Legal Officer, World Group Securities, Inc. (Sept.8, 2005); ACLI Letter II; Intersecurities Letter; NAIFA/AALU Letter II; NAVA Letter II; SIA Letter I.

66 FSI Letter II.

67 See, e.g., Letters from Patricia Struck, President, North American Securities Administrators Association (July 21, 2006) ("NASAA Letter II"); Jill I. Gross, Director of Advocacy, Pace Investor Rights Project (July 19, 2006) ("Pace Letter II"); Robert S. Banks, Jr., President, Public Investors Arbitration Bar Association (July 20, 2006).

As proposed in Amendment No. 2, Proposed Rule 2821(b)(1)(B) would have required a registered representative to have a reasonable basis to believe that a customer would benefit from the unique features of a deferred variable annuity prior to recommending the purchase or exchange of one. Amendment No. 2 included tax-deferred growth, annuitization and death benefits as a non-exhaustive list of unique features.

Some commenters stated that the standard should be that the customer "could" benefit from the features because stating that the customer would benefit implies a level of certainty and guarantee that cannot be known at the time of the purchase or exchange.[68] Other commenters also suggested deleting the modifier "unique," stating that the features NASD lists as examples are not unique to deferred variable annuities.[69] In the alternative, one of these commenters suggested that NASD expand the list of features it gives as examples to include features such as living benefits.[70]

NASD agreed that some other products have features similar to those of a deferred variable annuity, and in Amendment No. 2 deleted the reference to "unique." NASD also adopted commenters' suggestion to include "living benefits" in the list of features and modified the proposed rule accordingly in Amendment No. 3.

3. Comments on Proposed Rule 2821(b)(2)

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68 See, e.g., Letter from Ira D. Hammerman, General Counsel, Securities Industry Association (July 19, 2006) ("SIA Letter II"); ACLI Letter IV; NAVA Letter III. These commenters noted that this comment is also applicable to Proposed Rule 2821(c)(1)(A). See supra note 120.

69 See, e.g., ACLI Letter IV; CAI Letter II; FSI Letter II; NAVA Letter III. These commenters noted that this comment is also applicable to Proposed Rule 2821(c)(1)(A). See supra note 120.

70 CAI Letter II.

The proposed rule would require registered representatives to make reasonable efforts to obtain a variety of information about a customer, including age, financial situation and needs, liquid net worth and intended use of the deferred variable annuity, prior to recommending a purchase or exchange of a deferred variable annuity to that customer.[71] A number of commenters raised interpretive issues about or questioned the relevance of particular information.[72] NASD declined to amend this provision in response to these comments.

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71 In response to Amendment No. 1, some commenters urged NASD to eliminate this provision, stating that NASD Rules 2310 and 3110, as well as Rule 17a-3(a)(17)(i)(A) under the Act, should govern the information that members are required to gather in making recommendations to purchase or exchange deferred variable annuities. See e.g., Letters from Daniel A. Riedl, Senior Vice President and Chief Operating Officer, Northwestern Mutual Investment Services (Sept.16, 2005) ("NMIS Letter"); M. Shawn Dreffein, President and Chief Executive Officer, National Planning Holdings, Inc. (Sept. 9, 2005); John L. Dixon, President, Pacific Select Distributors, Inc. (Sept. 16, 2005); NAVA Letter II.

72 Three commenters stated that the proposed rule should not require a registered representative to obtain information if the customer declines to provide it upon request. Letter from Kerry Cunningham, Head of Risk Management, ING Advisors Network (July 20, 2006) ("ING Advisors Letter II"); ACLI Letter IV; FSI Letter II. One commenter stated that the information should be obtained during the sales process and not necessarily before any recommendation is made. ING Advisors Letter II. One commenter stated that the registered representative should make a reasonable effort to determine overall investment objectives but not intended use. Id. A number of commenters questioned the difference between the intended use of a deferred variable annuity and the customer's investment objective. See, e.g., Letters from Timothy J. Lyle, Senior Vice President and Chief Compliance Officer, Contemporary Financial Solutions (July 19, 2006) ("Contemporary Financial Letter"); Timothy J. Lyle, Senior Vice President and Chief Compliance Officer, Mutual Service Corporation (July 19, 2006) ("Mutual Service Letter II"); FSI Letter II; ING Advisors Letter II. Some commenters suggested that a customer's life insurance holdings are not relevant to a deferred variable annuity suitability analysis. See, e.g., CAI Letter II; Contemporary Financial Letter; FSI Letter II; Mutual Service Letter II; NAVA Letter III; Sorrento Letter; SIA Letter II.

4. Comments on Proposed Rule 2821(c) – Principal Review and Approval

a. General Comments

As proposed in Amendment No. 2, the principal review and approval requirements of paragraph (c) would have applied to both recommended and non-recommended transactions.[73] Commenters stated that the factors a registered principal considers should adequately reflect the differences between recommended and non-recommended transactions.[74] These commenters noted that if a transaction is not recommended, a principal may not have information regarding a customer's overall investment portfolio and would need to request that information from the customer.[75]

In Amendment No. 3, NASD noted some commenters stated that customers should be free to decide whether they want to purchase a deferred variable annuity, and thus the proposed rule's principal review requirements should not apply to non-recommended transactions.[76] NASD agreed that a fully informed customer should be able to make his or her own investment decision and modified this portion of the

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73 In response to Amendment No. 1, some commenters objected to requiring principal review of transactions that are not recommended. See, e.g., Letters from Frances M. Stadler, Deputy Senior Counsel, Investment Company Institute (Sept. 19, 2005) ("ICI Letter"); Henry H. Hopkins, Darrell N. Braman and Sara McCafferty, T. Rowe Price Investment Securities, Inc. (Sept. 19, 2005) ("T. Rowe Price Letter"); NMIS Letter. One commenter noted that the information that would be needed for a principal review is not currently required to be collected for non-recommended annuity transactions. See T. Rowe Price Letter. Some commenters also stated that requiring review for non-recommended transactions would allow principals to second guess investors' decisions. See, e.g., ICI Letter; NMIS Letter.

74 See Letter from Darrell N. Braman, Vice President and Associate Legal Counsel and Sarah McCafferty, Vice President and Associate Legal Counsel, T. Rowe Price Associates, Inc. (July 19, 2006) ("T. Rowe Price Letter II"); ICI Letter II.

75 ICI Letter II; T. Rowe Price Letter II.

76 Amendment No. 3 is available on NASD's Web site at http://www.finra.org/web/groups/rules_regs/documents/rule_filing/p017909.pdf.

proposed rule. As amended, a registered principal "may authorize the processing [of a non-recommended transaction] if the registered principal determines that the transaction was not recommended and that the customer, after being informed of the reason why the registered principal has not approved the transaction, affirms that he or she wants to proceed with the purchase or exchange of the deferred variable annuity."[77]

Two commenters took the position that the supervisory requirements of the proposed rule would run counter to established legal principles and the rules, systems, and divisions of responsibility already in place.[78] One of these commenters stated that the proposed rule would impose affirmative duties upon supervisory and compliance personnel to make individualized suitability determinations, in contravention of the letter and spirit of Section 15(b)(4)(E) of the Act.[79]

Another commenter stated that the proposed rule should provide specific standards for principal review of age, liquidity needs, and the dollar amount involved.[80] In that commenter's view, permitting firms to set their own standards would invite abuse.[81] NASD's initial filing[82] with the Commission and Amendment No. 1[83] would

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77 See Proposed Rule 2821(c).

78 See NAIFA/AALU Letter II; NSCP Letter. In response to Amendment No. 1, several commenters stated that the proposed principal review requirement was unduly duplicative of NASD Rule 3110. See Letters from Deirdre B. Koerick, Vice President, Lincoln Investment Planning, Inc. (Sep. 19, 2005); Jennifer B. Sheehan, Assistant Vice President and Counsel, Massachusetts Mutual Life Insurance Comp. (Sept. 19, 2005); ACLI Letter IV; NAVA Letter II; SIA Letter II.

79 NSCP Letter.

80 Pace Letter II.

81 Id.

82 NASD's initial filing is available at http://www.finra.org/web/groups/rules_regs/documents/rule_filing/p012780.pdf.

have required members to establish standards with respect to a variety of factors, including the customer's age and the extent to which the amount of money invested in the deferred variable annuity exceeds a stated percentage of the customer's net worth. NASD stated in Amendment No. 2 that "while conceptually appealing, the establishment of specific thresholds would unnecessarily limit a firm's discretion in establishing procedures that adequately address its overall operations. NASD did not intend to require a firm to reject all deferred variable annuity transactions involving person over a particular age or dollar amounts over a particular level. Rather, NASD intended only that principals consider the highlighted factors as part of their review, which is a facts and circumstances inquiry."[84]

b. Comments on the Timing of Principal Review

Amendment No. 2 would have required registered principals to review all purchases and exchanges of deferred variable annuities no later than two business days following the date when the customer's application is transmitted to the issuing insurance company.[85] Two commenters stated that the basis for the two-day timeframe is arbitrary and has not been explained or justified.[86] A few commenters viewed the proposed rule as prioritizing speed over diligence without adequate justification.[87] One commenter stated

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83 See supra note 4.

84 Amendment No. 2 is available on NASD's Web site at http://www.finra.org/web/groups/rules_regs/documents/rule_filing/p016480.pdf.

85 Pursuant to Amendment No. 1, registered principals would have been required to review all purchases and exchanges prior to transmitting a customer's application to the issuing insurance company for processing.

86 See ACLI Letter IV; FSI Letter II.

87 See, e.g., FSI Letter II; NAIFA/AALU Letter II; NSCP Letter. Another commenter stated that difficulty complying with the timeframe would force some

that the timeframe was intended to allow principals to catch unsuitable sales before a contract has been issued, but contracts may be issued before the principal's review is completed even under the revised timeframe.[88] One commenter stated that "free look" provisions that are available under some states' insurance laws offer a greater opportunity to redress unsuitable sales.[89]

Numerous commenters stated that it would be difficult to comply with the revised timeframe.[90] Two commenters remarked that the supervisory review timeframe does not take into account the varied business models of member firms.[91] These commenters stated that in some instances, the registered principal who reviews transactions is stationed at the issuing insurance company.[92] In those instances, the commenters stated that those individuals might not be able to serve as the reviewing principal because the

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broker-dealers to cancel contracts once the insurance company has already issued them. See CAI Letter II.

88 CAI Letter II.

89 ACLI Letter IV. In NASD's initial filing with the Commission, it disagreed with commenters who suggested that state-required "free look" periods make early principal review unnecessary. NASD explained that a "free look" period allows the customer to terminate the contract without paying any surrender charges and receive a refund of the purchase payments or the contract value, as required by applicable state law. Free-look periods, which vary by state law, typically range from ten to thirty days. NASD went on to state that allowing a suitability analysis to be reviewed by a principal long after an insurance company issues a deferred variable annuity contract would be inconsistent with an adequate supervisory system and would make it difficult for a member to quickly identify problematic trends. NASD's initial filing is available on its Web site at http://www.finra.org/web/groups/rules_regs/documents/rule_filing/p012780.pdf.

90 See, e.g., CAI Letter II; Contemporary Financial Letter; FSI Letter II; ING Advisors Letter II; Mutual Service Letter II; NAVA Letter III; NSCP Letter; Sorrento Letter.

91 See NSCP Letter; T. Rowe Price Letter II.

92 Id.

triggering event is the transmission to the insurance company.[93] One commenter also noted that the proposed rule would not accommodate instances in which the application is transmitted to the issuing insurance company and the member firm simultaneously.[94]

Commenters stated that it would be especially difficult to comply with the proposed timeframe when the principal needs to get additional information from the customer, registered representative, or Office of Supervisory Jurisdiction ("OSJ") manager.[95] One commenter stated that fear of missing the deadline may discourage principals from seeking this additional information.[96] Another commenter suggested that a review should be required to take place no later than two business days following the date the member transmits the application or no later than two business days after receipt by the insurance company to accommodate instances in which the customer sends the application directly to the insurance company.[97]

In Amendment No. 4, NASD modified the proposed rule to further address these comments.[98] As amended, the proposed rule would require a principal to review the

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93 Id.

94 NSCP Letter. This commenter noted that when this occurs, the application is reviewed by the insurance company and the member firm simultaneously.

95 See, e.g., CAI Letter II; Contemporary Financial Letter; FSI Letter II; ING Advisors Letter II; Mutual Service Letter II; NAVA Letter III; NSCP Letter; Sorrento Letter.

96 CAI Letter II.

97 T. Rowe Price Letter II.

98 NASD also amended the timing or principal review requirement in Amendment No. 3. That amendment would have required principals to review the transaction no later than two business days after the application was sent to the issuing insurance company if no additional contact was necessary with the customer or the registered representative. If additional contact was needed with either the customer or the registered representative, then review would have had to be completed within five business days of the application being sent to the issuing

transaction prior to transmitting a customer's application to the issuing insurance company for processing, but no later than seven business days after the customer signs the application.[99]

One commenter addressed the safeguarding of customer funds during the principal review and stated that "clarification is needed regarding the degree of flexibility afforded to firms with respect to the safekeeping of customer funds during the review period. Rather than dictating specific procedures, firms should be permitted to design

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insurance company. The Commission received several comments on this timing provision, all of which are available on the Commission's Internet Web site (http://www.sec.gov/rules/sro.shtml.) Commenters stated that the limited review period in Amendment No. 3 was problematic and arbitrary. These commenters also suggested requiring principal review to be completed within a reasonable time period, not to exceed the expiration of the free look period, following the date the broker-dealer transmits the application to the issuing insurance company. See e.g., Letter from Dale E. Brown, Executive Director and CEO, Financial Services Institute (Mar. 5, 2007) ("FSI Letter III"); Letters Type E and F.

Comments addressing subparagraph (b)(1)(A) of Amendment No. 3 stated that requiring registered representatives to "determine" whether a transaction was suitable, rather than having a "reasonable basis to believe" it, raised the bar for suitability determinations. See e.g., FSI Letter III and Letters Type E and F. In Amendment No. 4, NASD revised this language to require registered representatives to have "a reasonable basis to believe" that the deferred variably annuity is suitable.

Commenters also stated the reference in subparagraph (b)(1)(A)(i) to the "various" features of deferred variable annuities created an "unacceptable level of ambiguity" and that the prior proposal's use of "material" features was preferable. See e.g., FSI Letter III and Letters Type E and F.

99 In response to Amendment No. 4, commenters requested that the Commission seek additional comment on the proposed rule. Letter from Clifford Kirsch, Sutherland Asbill and Brennan LLP on behalf of Committee of Annuity Insurers (April 9, 2007) ("CAI Letter III"); Letters Type G and H. One commenter stated that commenters have not had an opportunity to address whether Amendment No. 4 causes any unintended consequences regarding the safeguarding of customer funds at the broker-dealer for as many as seven days and to provide feedback regarding the contours of the proposed no-action relief from Exchange Act Rules 15c3-1 and 15c3-3. CAI Letter III. See also infra notes 101-112 and accompanying text.

procedures tailored to their business model."[100] Exchange Act Rule 15c3-3 requires broker-dealers to safeguard customer funds and securities. While Rule 15c3-3 requires that a broker-dealer promptly forward checks and include as a credit in the reserve formula all customer free credit balances, it does not specify any specific procedures that a broker-dealer must use to be in compliance with the rule. Rather, it allows a broker-dealer to tailor its procedures to its particular business model. NASD Rule 2821 will not affect the applicability of Exchange Act Rule 15c3-3 with respect to the safeguarding of customer funds.

The Commission also received comments on the timeframe for principal review proposed in Amendment No. 4.[101] Some commenters addressed NASD's requested no-action relief[102] and highlighted related implementation issues.[103]

One commenter addressed situations in which an insurer's contract issuance unit is physically resident at the same location as one of the insurer's captive broker-dealer offices, and both areas share personnel with one another.[104] It asked for clarification of whether receipt of customer applications by broker-dealer personnel for principal review in these co-located situations would be considered a transmittal to the issuing insurance company for processing under proposed Rule 2821(c).[105] NASD responded by stating that in these situations "[it] would consider the application "transmitted" to the insurance

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100 CAI Letter III

101 Letter from Eric A. Arnold and Clifford E. Kirsch, Sutherland Asbill and Brennan LLP on behalf of Committee of Annuity Insurers (May 24, 2007) ("CAI Letter IV"); Letters Type G and H.

102 See supra note 21.

103 See CAI Letter IV.

104 Id.

105 Id.

company only when the broker-dealer's principal, acting as such, has approved the transaction, provided that the affiliated broker-dealer ensures that arrangements and safeguards exist to prevent the insurance company from issuing the contract prior to principal approval by the broker-dealer.[106]

The Commission believes that NASD can address implementation issues, to the extent they arise, during the proposed six month implementation period. Notably, the revised timeframe in Amendment No. 4 is substantially similar to the timeframe that NASD proposed and that the Commission published for comment in Amendment No. 1, which would have required a principal to review a transaction prior to sending the application to the insurance company for processing. The Commission received numerous comments on the timing of principal review provision as it was proposed in Amendment No. 1.[107] While some commenters supported it because they believed it would give principals sufficient time for a thorough review and provide greater assurances that unsuitable transactions would not be consummated,[108] others objected to it.[109] Some commenters were concerned that members would be subject to liability for market changes affecting the value of the deferred variable annuity during the delay for

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106 See Letter from James S. Wrona, Associate Vice President, FINRA (Aug. 10, 2007).

107 A summary of these comments addressing Amendment No. 1 was published in the Federal Register along with the Commission's notice of Amendment No. 2. See supra notes 4 and 6.

108 Letters from Patricia Struck, President, North American Securities Administrators Association (September 20, 2005) and Rosemary J. Shockman, President, Public Investors Arbitration Bar Association (Sept. 9, 2005).

109 See, e.g., Letters from W. Thomas Conner and Eric A. Arnold, Sutherland Asbill & Brennan on behalf of The Committee of Annuity Insurers (Sept. 19, 2005) ("CAI Letter I); John S. Simmers, CEO, ING Advisors (Sept. 19, 2005) ("ING Letter I"); ACLI Letter II; NAVA Letter II.

supervisory review.[110] Some commenters stated that a delay in pricing the contract would be unfair to customers.[111] Others stated that the timing deadline would require costly reprogramming of broker-dealers' electronic processing systems that forward contracts to the insurance company and the registered representative's home office at the same time.[112]

One commenter stated that the interaction of this provision with other Commission and NASD rules could limit a firm's ability to review applications thoroughly.[113] Another stated that time-linking the application process with supervisory review would impair the goal under the Investment Company Act of 1940 of timely processing.[114]

A few commenters stated that the time deadline would not work in the context of direct sales because in those sales an insurance company may not know of an applicant's interest in a deferred variable annuity until it receives the application.[115] Another stated that the timing deadline would not take into account situations in which the registered

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110 Letters from Denise M. Evans, General Counsel, Associated Securities Corp. (Sept. 19, 2005) ("Associated Securities Letter"); John L. Dixon, President, Pacific Select Distributors (Sept. 16, 2005) ("Pacific Select Letter"); and Julie Gerbert, Vice President, United Planners' Financial Services of America (Sept. 19 2005) ("United Planners Letter").

111 ACLI Letter II; Pacific Select Letter; and United Planners Letter.

112 CAI Letter I; NMIS Letter.

113 ING Letter I.

114 ACLI Letter II.

115 CAI Letter I; NAVA Letter II; T. Rowe Price Letter I. In direct sales, customers may apply for an annuity contract by calling the insurance company or by completing an application on the internet. NAVA Letter II. Receipt of the application is frequently the first time the insurance company even knows that the customer has filled out an application. Id.

principal is housed in the insurance company.[116]

A few commenters also stated that their current supervisory structure as an Office of Supervisory Jurisdiction would be incapable of dealing with the prior approval requirement and they would be forced to eliminate this form of supervisory structure.[117] One commenter stated the requirement could overwhelm principals,[118] and another stated that it would require members to allocate two to three times the supervisory staff for deferred variable annuities than for any other product.[119]

c. Proposed Rule 2821(c) – Principal Review and Approval

In Amendment No. 2, NASD listed a variety of factors that a registered principal would be required to consider in reviewing the purchase or exchange of a deferred variable annuity. In Amendment No. 3, NASD modified this provision to require registered principals to consider all of the factors that a registered representative must consider in Proposed Rule 2821(b) ("Recommendation Requirements") and eliminated

116 NMIS Letter.

117 Letter from Shawn M. Mihal, Chief Compliance Officer, Great American Advisors (Sept. 19, 2005) and ING Letter I. These comments were submitted in response to Amendment No. 1, which would have required principals to review customers' applications prior to transmitting them to the issuing insurance company for processing. The commenters assumed that there would be no relief from Rules 15c3-1 and 15c3-3, and thus broker-dealers would have to forward checks (along with applications) to the insurance company by noon of the next business day after receiving those checks. Based on this assumption, the commenters indicated that there would not be sufficient time for representatives to forward the paperwork to the OSJ manager and the OSJ manager to review the application within the time parameters required by Rules 15c3-1 and 15c3-3. These timing concerns have been addressed by the Commission's exemptions from Rules 15c3-3 and 15c3-3 to allow NASD members to comply with the proposed rule without becoming fully subject to Exchange Act Rule 15c3-3 and being required to maintain higher levels of net capital in accordance with Rule 15c3-1. See Exchange Act Release No. 56376 (Sep. 7, 2007).

118 Wachovia Letter.

119 Associated Securities Letter.

the references to the considerations in subparagraph (c)(1) ("Principal Review and Approval") of the proposed rule. NASD also moved the considerations relating to exchanges that were in subparagraph (c)(1)(D) of Amendment No. 2 to paragraph (b) in Amendments Nos. 3 and 4. By doing this, NASD added these determinations to those factors a registered representative must consider and retained them as considerations for principal review.

i. Comments on Proposed Rule 2821(c)(1)(A) as Amended by Amendment No. 2 – Principal Review and Approval

The rule, as amended by Amendment No. 2, would have required principals to consider the extent to which the customer would benefit from the unique features of a deferred variable annuity. A number of commenters remarked that their comments on proposed Rule 2821(b)(1)(B) are equally applicable to this provision and that "would" should be changed to "could" and that the modifier "unique" should be deleted.[120] In response to comments, NASD changed "unique" to "various." As amended by Amendment No. 3, the rule would require registered principals to have a reasonable basis to believe that the customer has been informed, in general terms, of the various features of deferred variable annuities.[121]

ii. Comments on Proposed Rule 2821(c)(1)(C) as Amended by Amendment No. 2 – Principal Review and Approval

The rule, as amended by Amendment No. 2, would have required principals to consider the extent to which the amount of money invested would result in an undue concentration in a deferred variable annuity or deferred variable annuities in the context

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120 See, e.g., ACLI Letter IV; FSI Letter II; NAVA Letter III; SIA Letter II. See also supra notes 68 and 69.

121 See Proposed Rule 2821(b)(1)(A)(i).

of the customer's overall investment portfolio. Two commenters stated the term "undue concentration" is imprecise and capable of multiple interpretations.[122] Some commenters also viewed the proposed requirement to consider the customer's liquidity needs as subsuming the apparent intent of this provision.[123] In Amendment No. 3, NASD deleted this provision.

iii. Comments on Proposed Rule 2821(c)(1)(D)(ii) as Amended by Amendment No. 2 – Principal Review and Approval

The rule, as modified by Amendment No. 2 would have required registered principals to consider the extent to which the customer would benefit from any potential product enhancements and improvements in the case of an exchange of a deferred variable annuity. One commenter stated that "would" should be changed to "could" because whether a customer benefits is determined years after the contract is purchased and depends on market performance.[124] In Amendment No. 3, NASD deleted this specific paragraph, but, provided in paragraph (b) ("Recommendation Requirements") that principals must consider, in the case of an exchange, whether the customer would benefit from any potential product enhancements and improvements in their review.[125]

iv. Comments on Proposed Rule 2821(c)(1)(D)(iii) as Amended by Amendment No. 2 – Principal Review and Approval

The rule, as modified in Amendment No. 2, would have required principals, in the case of an exchange of a deferred variable annuity, to consider the extent to which the

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122 See, e.g., NAVA Letter III; ACLI Letter IV. Two other commenters noted that NASD should provide more guidance on what would amount to an "undue concentration" because deferred variable annuities often take significant portions of a customer's assets. See FSI Letter II; Sorrento Letter.

123 See, e.g., ACLI Letter IV; CAI Letter II; NAVA Letter III.

124 See NAVA Letter III.

125 See Proposed Rule 2821(c) and Proposed Rule 2821(b)(1)(B)(ii).

customer's account has had another deferred variable annuity exchange within the preceding thirty-six months. One commenter, while supporting this provision, believed that the registered principal should also review the total sales production of variable annuities of associated persons to detect unsuitable sales and other potential abuses.[126] A number of commenters stated that it would be difficult to comply with this requirement.[127] In their view, principals may have a difficult time obtaining this information, especially if the exchange occurred at another broker-dealer.[128] These commenters also stated that customers may not want to share this kind of information, citing privacy concerns or policy concerns with the other broker-dealers.[129]

One commenter stated that the proposed rule should specify whether principals have to collect information on exchanges that occurred at the reviewing firm only or also on exchanges that occurred at other broker-dealers.[130] Two commenters argued that the proposed rule should clarify whether a registered principal is only obligated to consider prior exchange information if it is available to him or her at the time of his or her review.[131]

One commenter stated that the provision would impose substantial administrative and supervisory costs on broker-dealers, which would have to implement cumbersome

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126 See NASAA Letter II.

127 See, e.g., CAI Letter II; Contemporary Financial Letter; FSI Letter II; Mutual Service Letter II; Sorrento Letter; T. Rowe Price Letter II.

128 Id.

129 Id.

130 See CAI Letter II.

131 See Contemporary Financial Letter; Mutual Service Letter II.

and expensive additional surveillance tools.[132] Another commenter stated the proposed rule should clarify the level of inquiry and documentation necessary to comply with this provision.[133] In Amendment No. 3, NASD eliminated this specific provision, but provided in paragraph (b) ("Recommendation Requirements") that principals must consider, in the case of exchange, the extent to which the customer account has had another deferred variably annuity exchange within the preceding thirty-six months.[134] NASD has stated that it will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval and that the effective date will be 120 days following publication of the Notice to Members announcing Commission approval. NASD has indicated that it may address the type of implementation issues commenters raised with respect to determining whether a customer's account has had a deferred variable annuity exchange within the preceding 36 months in connection with that Notice to Members.

d. Comments on Proposed Rule 2821(c)(2) – Principal Review and Approval

The proposed rule would require the registered principal who reviewed and approved, rejected, or authorized the transaction to document and sign the determinations that he or she is required to make pursuant to subparagraph (c) of the proposed rule.

As proposed in Amendment No. 2, the principal who approves a transaction would have been required to sign the registered representative's suitability determination. One commenter stated that this provision should be eliminated because "it would

132 See NSCP Letter.

133 See CAI Letter II.

134 See Proposed Rule 2821(c) and Proposed Rule 2821(b)(1)(B)(iii).

establish an unprecedented standard of requiring principals to fully endorse all of the considerations leading to the salespersons' recommendations."[135] In this commenter's view, the principal's role should be to affirm the fact that the salesperson elicited information for completion of the suitability documents.[136] In Amendment No. 3, NASD eliminated the requirement that registered principals sign the registered representative's suitability determinations.

5. Comments on Proposed Rule 2821(d) – Supervisory Procedures

The rule, as modified by Amendment No. 2, would have required members to implement procedures and require principals to consider whether the associated person effecting the transaction has a particularly high rate of effecting deferred variable annuity exchanges.

Two commenters argued that the phrase "particularly high rate" is vague and unworkable.[137] A number of commenters noted that the proposed rule implies that principals would have to implement a transaction-by-transaction review and stated that members should be able to rely on exception reports as an effective solution to unsuitable exchanges.[138] One commenter also requested clarification regarding what should happen if a registered representative does have a particular high rate of exchanges.[139] NASD modified this provision in Amendment No. 3, eliminating the reference to a "particularly high rate" of exchanges.

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135 See ACLI Letter IV.

136 Id.

137 See ACLI Letter IV; FSI Letter II.

138 See ACLI Letter IV; CAI Letter II; FSI Letter II; NAVA Letter III.

139 See CAI Letter II. The commenter questioned whether the principal has to reject the transaction or just give it closer scrutiny.

6. Comments on Proposed Rule 2821(e) – Training

As provided in Amendment No. 2, members would be required to develop and document specific training policies or programs reasonably designed to ensure that associated persons who effect and registered principals who review transactions in deferred variable annuities comply with the requirements of the proposed rule and that they understand the material features of deferred variable annuities. Several commenters questioned the need for this specific requirement, as well as the standards applicable to the training.[140] NASD declined to amend this provision in response to comments.

7. NASD's Response to Comments

As discussed above, in response to the comments received on Amendment No. 1 NASD amended portions of the proposed rule and responded to comments. NASD also filed a response to the comments received on Amendment No. 2 with the Commission addressing concerns regarding the need for the proposed rule, the regulatory process that NASD undertook in developing the proposed rule, and the statutory requirements for SRO rulemaking.[141] In Amendment Nos. 3 and 4, NASD further responded to comments and modified the proposed rule.

IV. Discussion and Commission Findings

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[140] One commenter stated there is no need for additional training requirements because NASD Rule 2310 requires registered representatives to understand the material features of the products they sell. See FSI Letter II; Letter Type C. Other commenters believed this provision is duplicative of the Firm Element portion of NASD's continuing education requirements. See, e.g., 1st Global Letter II; FSI Letter II. One commenter believed the training requirements would interfere with members' efficient and effective allocation of training resources. See FSI Letter II. A number of commenters also suggested members' programs be held to the standard of being "reasonably designed to achieve compliance" with the proposed rule. See, e.g., Contemporary Financial Letter; ING Advisors Letter II; Mutual Service Letter II.

[141] See NASD Response Letter

The Commission has reviewed carefully Proposed Rule 2821, the comments, and NASD's responses to the comments, and believes that NASD has responded appropriately to the concerns raised by the commenters. The Commission finds that Proposed Rule 2821, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association, and, in particular, with Section 15A(b)(6) of the Act, which requires, among other things, that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.[142]

Over approximately the past three years, the majority of informal actions brought against broker-dealers as a result of NASD examinations of variable annuity sales have involved the failure to establish or follow written supervisory procedures.[143] During this time period, NASD also brought numerous enforcement actions charging broker-dealers with failing to supervise sales of variable annuities.[144] In addition, NASD's examinations found a substantial number of unsuitable recommendations and instances of failing to obtain customer account information.[145] It also brought numerous enforcement actions for making unsuitable recommendations.[146]

The proposed rule is designed to curb sales practice abuses in deferred variable annuities. Its recommendation requirements provide a specific framework for a broker-

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142 15 U.S.C. 78o-3(b)(6).

143 See infra note 148.

144 See infra note 150.

145 See infra note 148.

146 See infra note 150.

dealer's suitability analysis of these securities. By setting forth factors that a broker-dealer must specifically consider in recommending deferred variable annuities and requiring the registered representative to obtain certain information from his or her customers, the proposed rule should improve communications between registered representatives and customers regarding these securities. The supervisory review component should foster a thorough analytical review of every deferred variable annuity transaction in a timeframe that will limit the possibility of unsuitable recommendations and transactions. The proposed rule as a whole is geared to protecting investors by requiring firms to implement more robust compliance cultures, and to give clear consideration of the suitability of these complex products.

Commenters asserted that the proposed rule, because it is product specific, would result in significant burdens on competition. Pursuant to the Act's requirement, the Commission has considered the impact of Proposed Rule 2821 on efficiency, competition and capital formation,[147] as well as whether the rule would impose any burden on competition not necessary or appropriate in furtherance of the Act.[148] We note that other products, including options and penny stocks, are subject to product-specific regulations, due to their complexity or their history of sales practice abuses. NASD has demonstrated through its history of examinations, enforcement actions, and guidance to members that regulating variable annuities like other products has not been sufficient to curb sales practice abuses. Moreover, we note that the Act allows the Commission to approve a self-regulatory organization rule that imposes burdens on competition so long as those

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147 15 U.S.C. 78c(f).

148 15 U.S.C. 78o-3(b)(9).

burdens are necessary or appropriate in furtherance of the purposes of the Act.[149] We believe that to the extent the proposed rule imposes burdens on competition, these burdens are necessary or appropriate in furtherance of the purposes of the Act, and particularly the purpose of protecting investors.

Commenters also expressed the view that Proposed Rule 2821 may impose compliance costs on broker-dealers that exceed their costs of complying with rules applicable to other products. The complexity of deferred variable annuities warrant more targeted regulation. NASD has attempted over the past few years to address problematic and unsuitable sales through non-rulemaking means, but has not found that approach to be successful. We agree with NASD that Proposed Rule 2821 will lead firms to enhance their compliance and supervisory systems, which in turn will provide more comprehensive and targeted protection to investors.[150]

While NASD has issued a number of Notices to Members and Regulatory and Compliance Alerts regarding the suitability of deferred variable annuities,[151] it continues

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149 Id.

150 See NASD Response Letter.

151 See Notice to Members 96-86 and Notice to Members 99-35. In 2002, NASD issued a Regulatory & Compliance Alert, entitled "NASD Regulation Cautions Firms for Deficient Variable Annuity Communications," that, among other things, discussed NASD's discovery of unacceptable sales practices regarding variable annuities. In another Regulatory & Compliance Alert in 2002, entitled "Reminder—Suitability of Variable Annuity Sales," NASD emphasized, in part, that an associated person must be knowledgeable about a variable annuity before he or she can determine whether a recommendation to purchase, sell or exchange the variable annuity is appropriate. NASD has also issued a number of Investor Alerts regarding variable annuities. In 2001, NASD issued an Investor Alert entitled "Should You Exchange Your Variable Annuity?" highlighting important issues that investors should consider before agreeing to exchange a variable annuity. In 2003, NASD issued an Investor Alert entitled "Variable Annuities: Beyond the Hard Sell," which cautioned investors about certain inappropriate sales tactics and highlighted the unique features of these products.

to encounter numerous questionable sales practices through its examinations,[152] as well as through its investigations and informal discussions with its members.[153] Just within the last few years, NASD has brought a number of cases involving failures to supervise, suitability violations, and misrepresentation in connection with purchases and exchanges of deferred variable annuities.[154]

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152 From July 2004 to April 2007, NASD completed a total of 807 routine examinations involving the review of variable annuities. See Letter from James S. Wrona, Associate Vice President, NASD (May 15, 2007) ("NASD Examination/Enforcement Update Letter"). These examinations resulted in 92 Letters of Caution, 45 Compliance Conferences, and 4 Acceptance, Waiver and Consent letters, in which a respondent accepts a finding of a violation, consents to the imposition of sanctions, and agrees to waive the right to a hearing. Id. While the majority of these actions involved the failure to establish or follow written supervisory procedures, a number of actions related to the failure to obtain and maintain customer account information, unsuitable recommendations, and the failure to comply with standards relating to communications with the public. Id. These findings do not include cause examinations, many of which result in formal action that is captured by enforcement actions, discussed in note 150 below. Id. Nor do the findings include information from special examination initiatives. Id.

153 See NASD Response Letter.

154 See, e.g., Phillip Nelson, NASD Case No. 2006004829701 (April 3, 2007) (providing misleading communication to customer regarding a variable annuity); Victoria C. Smotherman, NASD Case No. 2006003897501 (March 21, 2007) (fraudulently inducing purchases of variable annuities); Donna Vogt, NASD Case No. EAF0400730002 (Feb. 21, 2007) (making unsuitable variable annuity recommendations); Raymond James Financial Services, Inc., NASD Case No. EAF0400730001 (Jan. 31, 2007) (failing to properly supervise by permitting producing branch managers to supervise themselves and by not properly reviewing variable annuity sales and exchanges); Peter F. Esposito, NASD Case No. 2005002689601 (Dec. 8, 2006) (submitting falsified account information to his firm concerning the liquidation of a variable annuity); Quick & Reilly, Inc., NASD Case No. E102003158301 (Dec. 1, 2006) (failing to supervise variable annuity sales); Waddell & Reed, Inc., NASD Case No. E062004029603 (Nov. 24, 2006) (failing to supervise sales of variable annuities where unregistered persons were selling such products); David L. McFadden, NASD Case No. E2005000226001 (Nov. 15, 2006) (fraudulent and unsuitable sales of variable annuities, mutual funds, and exchange traded fund shares); CCO Investment Services, Corp., NASD Case No. E112005014002 (Oct. 16, 2006) (failing to, among other things, supervise variable annuity sales); Daniel Carlos Lacey, NASD Case No. E062004000201 (Aug. 11, 2006) (making unsuitable

recommendations regarding variable annuities exchanges); Michael K. Maunsell, NASD Case No. 2005001939501 (Aug. 2, 2006) (making unsuitable variable annuity recommendations); Carole G. Ferraro, NASD Case No. E0520030291 (July 21, 2006) (making unsuitable recommendations regarding variable annuities); Jerry Swicegood, NASD Case No. 2005002683001 (July 13, 2006) (falsifying documents related to variable annuity exchanges); Eric J. Brown, NASD Case No. E112003006903 (June 27, 2006) (making unsuitable recommendations and false statements regarding variable annuities); Joseph Vitetta, NASD Case No. E10200412250 (June 8, 2006) (making unsuitable recommendation regarding a variable annuity, among other violations); AmSouth Investment Services, Inc., NASD Case No. E052004025802 (May 24, 2006) (failing to establish and maintain reasonable supervisory system in connection with sales of variable annuities and mutual funds); Charles Snyder, NASD Case No. E112004042001 (May 2, 2006) (making unsuitable variable annuity recommendations); Frank P. Grasse, No. EL120030533 (April 17, 2006) (falsifying customer information on variable annuity applications); Tyler M. Kerrigan, NASD Case No. E0520030355 (March 10, 2006) (recommending unsuitable variable annuity transactions); Angelisa Savage-Bryant, NASD Case No. E072004064201 (March 6, 2006) (misrepresentation in connection with a variable annuity exchange); Brian Carr, NASD Case No. E9B2003043802 (Feb. 22, 2006) (making unsuitable variable annuity recommendations); John Babiarz, NASD Case No. 2005002047301 (Feb. 10, 2006) (making unsuitable variable annuity recommendations); Michael Lancaster, NASD Case No. E8A20040995-01 (Nov. 30, 2005) (making unsuitable recommendations regarding variable annuity subaccounts); Lawrence LaBine, NASD Case No. C3A20040045 (Nov. 22, 2005) (unsuitable recommendations to five customers involving variable annuity subaccounts and mutual funds); Mansell R. Spedding, NASD Case No. E0220030907 (Sept. 21, 2005) (unsuitable subaccount allocation recommendation for variable annuity); Rita N. Raymer, NASD Case No.E0520030131 (Aug. 16, 2005) (unsuitable recommendations of variable annuities); NY Life Sec., Inc., NASD Case No. E0520040104 (July 22, 2005) (failing to adequately supervise sales of variable annuities and mutual funds); Paul Olsen, NASD Case No. E3A20030539 (June 23, 2005) (negligently failing to tell customers about fees associated with variable annuity exchanges); Bambi Holzer, NASD Case No. E0220020787 (June 17, 2005) (negligently misrepresenting certain aspects of variable annuities); Ilene L. Sonnenberg, NASD Case No. C0520050024 (May 11, 2005) (recommending unsuitable variable annuity); Raymond James & Assocs., Inc., NASD Case No. C0520050020 (May 10, 2005) (finding that registered representative made unsuitable recommendations and firm failed to maintain and enforce written supervisory procedures regarding sales of variable annuities); Issetten Hanif, NASD Case No. C9B20040086 (Apr. 6, 2005) (unsuitable recommendations regarding variable annuity and mutual fund exchanges); Lawrence Labine, NASD Case No. E02020513 (Nov. 19, 2004) (unsuitable variable annuity recommendation); Edward Sadowski, NASD Case No. C9B040102 (Nov. 17, 2004) (unsuitable variable annuity recommendation); James B. Moorehead, NASD Case No. C05040073 (Nov. 11, 2004) (failing to

Some commenters expressed the view that NASD must wait before instituting rulemaking and show that a "demonstrable problem" exists.[155] While we believe NASD's examinations and enforcement actions over the years clearly demonstrate an entrenched problem in the sales culture for these products, nothing in the Act requires NASD to make such a showing. Rather, the Act requires the Commission to determine that a proposed rule is consistent with the Act and consider whether the proposed rule

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gather suitability information for variable annuity sales); Juan Ly, NASD Case No. C07040094 (Nov. 9, 2004) (unsuitable variable annuity switches and misrepresentations); Jenny Chin, NASD Case No. E04030619 (Oct. 29, 2004) (misrepresentation and omissions regarding variable annuities); Glenn W. Ward, NASD Case No. C05040075 (Oct. 14, 2004) (recommending unsuitable variable annuity); Bernard E. Nugent, NASD Case No. C11040031 (Sept. 1, 2004) (unsuitable recommendation involving the liquidation of mutual fund shares to purchase a variable annuity); Samuel D. Hughes, NASD Case No. C07040067 (Aug. 19, 2004) (unsuitable variable annuity switches, unauthorized sub-account allocations, and misrepresentations); SunAmerica Sec., Inc., NASD Case No. C05040051 (July 12, 2004) (lacking adequate written supervisory procedures concerning review of variable annuity and variable universal life contracts); Jamie Engelking, NASD Case No. E3A020441 (July 2, 2004) (unsuitable variable annuity recommendation); Pan-American Fin. Advisers, NASD Case No. C05040034 (June 15, 2004) (failing to have adequate supervisory procedures for variable annuity sales); Scott Weier, NASD Case No. E04010714 (May 27, 2004) (unsuitable variable annuity recommendations); Gregory Jurkiewicz, NASD Case No. E3A030436 (May 4, 2004) (unsuitable variable annuity recommendation); Michael H. Tew, NASD Case No.C05040010 (Apr. 7, 2004) (unsuitable recommendations regarding variable annuities); Steve Morgan, NASD Case No. E3A020410 (Mar. 12, 2004) (unsuitable variable annuity recommendation); Donald Lacavazzi, NASD Case No. C11040009 (Feb. 24, 2004) (recommending unsuitable variable annuity switching); Michael Blandchard, NASD Case No. C11040005 (Feb. 16, 2004) (unsuitable variable annuity recommendations); Prudential Inv. Mgmt. and Prudential Equity Group, Inc., NASD Case No. C05040008 (Jan. 29, 2004) (failing to supervise and maintain accurate records relating to variable annuity replacement sales); Waddell & Reed, Inc., NASD Case No. CAF040002 (Jan. 14, 2004) (failing to ascertain suitability of recommended variable annuity exchanges and failure to supervise). NASD Enforcement actions are available at http://www.nasd.com/RegulatoryEnforcement/MonthlyDisciplinaryActions/index.htm.

155 See supra note 33 and accompanying text.

would promote efficiency, competition and capital formation.[156] So long as its proposed rules meet the requirements of the Act, NASD can – and indeed should – be proactive in addressing problems in the sale of securities.

Some commenters also took the position that the proposed rule should be subject to a cost/benefit analysis.[157] The Act sets forth what the Commission must consider in determining whether to approve a proposed self-regulatory organization rule. It also sets forth requirements that the self-regulatory organizations must meet. The Act does not require a cost/benefit analysis with respect to proposed self-regulatory organization rules that are filed with, and approved by, the Commission.

As a practical matter, however, NASD considered the costs and benefits of the rule as the rule was developed and modified, and NASD's members were actively involved in shaping the proposed rule. As NASD stated in its response to comments on Amendment No. 2 "[i]ndustry members are keenly aware of the potential costs and burdens that can result from rulemaking and, as is often the case, they raised and NASD considered such issues at multiple stages of the rulemaking process."[158]

Accelerated Approval of Amendment Nos. 3 and 4

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156 15 U.S.C. 78c(f).

157 See supra notes 35-38 and accompanying text.

158 As discussed in detail above, in its response to comments to Amendment No. 2, NASD noted the steps it went through as it developed the proposed rule prior to filing it with the Commission. It published the proposed rule in a Notice to Members and solicited comment. The proposal also went to five NASD standing committees (including two committees with subject matter expertise regarding variable annuities) for consultation and comment. NASD considered the public's and the committees' comments and modified the proposed rule in response. The NASD Regulation, Inc. Board of Directors then approved the proposed rule and the NASD Board of Governors had an opportunity to review it. These NASD boards include members of the broker-dealer and insurance industries. For detail on the composition of the boards, see NASD's Response Letter.

As set forth below, the Commission finds good cause to approve Amendment Nos. 3 and 4 to the proposed rule, as amended, prior the thirtieth day after the date of publication of the notice of Amendment Nos. 3 and 4 in the Federal Register. The revisions and clarifications in Amendment Nos. 3 and 4 were made in response to comments.

In Amendment No. 3, NASD modified the Recommendation Requirements in paragraph (b) of the proposed rule. Amendment No. 2 required members to have a reasonable basis to believe the customer has been informed of the material features of a deferred variable annuity. NASD revised the proposed rule to specify that a member must have a reasonable basis to believe that a customer has been informed "in general terms of the various features" of deferred variable annuities. NASD made this change in response to comments to clarify that the customer need only be informed about the features of deferred variable annuities in general terms, rather than be informed about the specific features of the deferred variable annuity the member might recommend.

In addition, in Amendment No. 3, NASD incorporated the factors that a firm must consider when exchanging deferred variable annuities in the recommendation requirements rather than in the principal review and approval requirements, while maintaining a requirement that principals consider these factors. NASD also eliminated two of the considerations relating to exchanges in response to comments: the extent to which the customer would benefit from the unique features of a deferred variable annuity and the extent to which the customer's age or liquidity needs make the investment inappropriate.

Moreover, in Amendment No. 3, NASD revised the proposed rule in response to comments relating to the applicability of the proposed rule to non-recommended transactions. NASD clarified that while principals are to treat all transactions as recommended, a principal may authorize the processing of a transaction if it determines that the transaction was not recommended and that the customer affirms that he or she wants to proceed after being informed of the reason why the registered principal has not approved the transaction.

In Amendment No. 3, NASD also modified the supervisory procedures provisions of the rule in response to comments that the term "particularly high rates of effecting deferred variable annuity exchanges" was vague. NASD revised the proposed rule to require implementation of surveillance procedures to review associated persons' rates of effecting deferred variable annuity exchanges for consistency with the proposed rule, other NASD rules and the federal securities laws. NASD also clarified that members must have policies and procedures reasonably designed to implement corrective measures to address inappropriate exchanges.

In addition, in Amendment No. 3, NASD revised the required timeframe for principal review, which it further revised in Amendment No. 4. As amended by Amendment No. 4, the principal must review the application prior to transmitting it to the issuing insurance company for processing, but no later than seven business days after the customer signs the application. This "prior to transmittal" standard was also incorporated in Amendment No. 1, and the Commission received a substantial number of comments on this standard. Although Amendment No. 1 did not explicitly limit the timeframe for principal review to no more than seven days, provisions of Exchange Act Rule 15c3-3 would have operated to limit the time in which broker-dealers could hold customer funds.

In light of NASD's requested exemption from Rule 15c3-3, the seven-day limit on principal review in Amendment No. 4 would replace that rule's time limitation for transactions subject to that exemption with a more workable limit.

Thus, the Commission finds good cause to approve Amendment Nos. 3 and 4 to the proposed rule, as amended, prior to the thirtieth day after the date of publication of the notice of Amendment Nos. 3 and 4 in the Federal Register.

V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 3 and 4, including whether the proposed rule is consistent with the Act.[159] 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-NASD-2004-183 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASD-2004-183. 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

159 The Commission will consider the comments we previously received. Commenters may reiterate or cross-reference previously submitted comments.

Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change 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 inspection and copying 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 such filing also will be available for inspection and copying at the principal office of FINRA. 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-NASD-2004-183 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[160] that the proposed rule, as amended (SR-NASD-2004-183), be, and it hereby is, approved.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

160 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56376)

September 7, 2007

ORDER GRANTING A CONDITIONAL EXEMPTION TO BROKER-DEALERS FROM REQUIREMENTS IN RULES 15c3-1 AND 15c3-3 UNDER THE SECURITIES EXCHANGE ACT OF 1934 TO PROMPTLY TRANSMIT CUSTOMER CHECKS FOR THE PURCHASE OF DEFERRED VARIABLE ANNUITY CONTRACTS

I. Background

The Securities and Exchange Commission (the "Commission") today approved new National Association of Securities Dealers ("NASD")[1] Rule 2821.[2] NASD Rule 2821 sets forth recommendation requirements (including a suitability obligation), principal review and approval requirements, and supervisory and training requirements with respect to transactions in deferred variable annuities.

According to the NASD, it designed the rule to address significant and persistent sales-practice problems in sales of deferred variable annuities. One component of Rule 2821 is a requirement that registered principals perform a comprehensive and rigorous review of the transactions. Specifically, Rule 2821(c) states, in part, that: "Prior to transmitting a customer's application for a deferred variable annuity to the issuing insurance company for processing, but no later than seven business days after the customer signs the application, a registered principal shall review and determine whether he or she approves of the purchase or exchange of the deferred variable annuity."

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1 On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (Aug. 1, 2007).

2 See Exchange Act Release No. 56375 (Sep. 7, 2007).

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Many broker-dealers are subject to lower net capital requirements under Securities Exchange Act of 1934 ("Exchange Act") Rule 15c3-1[3] and are exempt from the requirement to establish and fund a customer reserve account under Rule 15c3-3[4] because they do not carry customer funds or securities. Some of these broker-dealers receive checks from customers that are made out to third parties. Pursuant to Rules 15c3-1 and 15c3-3, a broker-dealer is not deemed to be carrying customer funds if it "promptly transmits" the checks to the third parties.[5] For purposes of Rules 15c3-1 and 15c3-3, the term "promptly transmit" means when "such transmission or delivery is made no later than noon of the next business day after the receipt of such funds or securities."[6]

According to the NASD, a broker-dealer may need to hold customer checks for more than one business day in order to comply with Rule 2821.

II. Discussion

The Commission has decided to exempt broker-dealers from any additional requirements of Rules 15c3-1 or 15c3-3 due solely to a failure to promptly transmit a check made payable to an insurance company for the purchase of a deferred variable

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3 17 CFR 240.15c3-1. The purpose of Rule 15c3-1 is to ensure that a broker or dealer at all times has sufficient liquid assets to promptly satisfy the claims of customers if the broker or dealer goes out of business.

4 17 CFR 240.15c3-3. The purpose of Rule 15c3-3 is to protect customers by assuring that broker-dealers do not use customers' funds or securities to fund the broker-dealer's operations. Among other things, Rule 15c3-3 requires that a broker-dealer make a periodic computation of the amount of money it is holding that constitutes customer funds or funds obtained from the use of customer securities. If this amount exceeds the amount of money customers owe the firm, the broker-dealer must deposit the excess in a special reserve bank account for the exclusive benefit of the firm's customers.

5 When it amended the net capital rule in 1992, the Commission stated that a broker-dealer shall not be deemed to receive funds from customers if it receives checks made payable to certain entities other than itself (such as another broker-dealer or an escrow agent) and promptly transmits such funds. Exchange Act Release No. 31511 (Nov. 24, 1992), 57 FR 56973 (Dec. 2, 1992).

6 See Exchange Act Release No. 31511 (Nov. 24, 1992), note 11, and 17 CFR 240.15c3-1(c)(9).

annuity product by noon of the business day following the date the broker-dealer receives the check from the customer, provided:

(i) the transaction is subject to the principal review requirements of NASD Rule 2821 and a registered principal has reviewed and determined whether he or she approves of the purchase or exchange of the deferred variable annuity within seven business days in accordance with that rule;

(ii) the broker-dealer promptly transmits the check no later than noon of the business day following the date a registered principal reviews and determines whether he or she approves of the purchase or exchange of the deferred variable annuity; and

(iii) the broker-dealer maintains a copy of each such check and creates a record of the date the check was received from the customer and the date the check was transmitted to the insurance company if approved, or returned to the customer if rejected.

The purpose of Rule 15c3-1 is to ensure that a broker or dealer at all times has sufficient liquid assets to promptly satisfy the claims of customers and other creditors if the broker or dealer goes out of business. One purpose of Rule 15c3-3 is to protect customers by assuring that broker-dealers do not use customers' funds or securities to fund the broker-dealer's operations. The reasons these rules require that a broker-dealer promptly forward checks is to reduce the risk that a broker-dealer or an associated person of a broker-dealer will convert or misuse customer funds or securities and to assure that the price of the security the customer purchases has not moved substantially from the date the customer decided to purchase that security.

In the Approval Order for Rule 2821 we stated,

> "[Proposed Rule 2821] is designed to curb sales practice abuses in deferred variable annuities. Its recommendation requirements provide a specific framework for a broker-dealer's suitability analysis of these securities. By setting forth factors that a broker-dealer must specifically consider in recommending deferred variable annuities and requiring the registered representative to obtain certain information from his or her customers, the proposed rule should improve communications between registered representatives and customers regarding these securities. The supervisory review component should foster a thorough analytical review of every deferred variable annuity transaction in a timeframe that will limit the possibility of unsuitable recommendations and transactions. The proposed rule as a whole is geared to protecting investors by requiring firms to implement more robust compliance cultures, and to give clear consideration of the suitability of these complex products."

Further, we found that Rule 2821 is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Consequently, we approved NASD's proposed Rule 2821.

As we believe the NASD's Rule 2821 to be in the public interest but a broker-dealer would be burdened with additional requirements under Exchange Act Rules 15c3-1 and 15c3-3 were it to comply with Rule 2821, we must balance the investor protections provided by Rules 15c3-1 and 15c3-3 with those provided by Rule 2821. For this reason, we have specifically tailored the above-described exemption.

First, the exemption is specifically limited to situations where a broker-dealer has failed to promptly transmit "a check made payable to an insurance company for the purchase of a deferred variable annuity product," and "the transaction is subject to the principal review requirements of NASD Rule 2821 and a registered principal has reviewed and determined whether he or she approves of the purchase or exchange of the deferred variable annuity within seven business days in accordance with that rule." In all other situations where a check is received by a broker-dealer and is not promptly forwarded, the full provisions of both Rule 15c3-1 and 15c3-3 still apply.

Second, the exemption requires a broker-dealer to promptly transmit such checks no later than noon of the business day following the date a registered principal reviews and determines whether he or she approves of the purchase or exchange of the deferred variable annuity. This is designed to assure that the broker-dealer holds the customer's check no longer than is necessary to comply with Rule 2821.

Third, a broker-dealer must maintain a copy of each such check and create a record of the date the check was received from the customer and the date the check was transmitted to the insurance company if approved, or returned to the customer if rejected. This requirement will allow the broker-dealer's compliance and internal audit departments, as well as Commission, self-regulatory organization, and other examiners to verify that a broker-dealer is complying with the provisions of this exemption.

For the foregoing reasons, the Commission finds that granting the above-described exemption is necessary and appropriate in the public interest, and is consistent with the protection of investors.

III. Conclusion

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act[7] that, a broker-dealer shall be exempt from any additional requirements of Rules 15c3-1 or 15c3-3 due solely to a failure to promptly transmit a check made payable to an insurance

7 Section 36 of the Exchange Act authorizes the Commission, by rule, regulation, or order, to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions from any provision or provisions of the Exchange Act or any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

company for the purchase of a deferred variable annuity product by noon of the business day following the date the broker-dealer receives the check from the customer, provided:

(i) the transaction is subject to the principal review requirements of NASD Rule 2821 and a registered principal has reviewed and determined whether he or she approves of the purchase or exchange of the deferred variable annuity within seven business days in accordance with that rule;

(ii) the broker-dealer promptly transmits the check no later than noon of the business day following the date a registered principal reviews and determines whether he or she approves of the purchase or exchange of the deferred variable annuity; and

(iii) the broker-dealer maintains a copy of each such check and creates a record of the date the check was received from the customer and the date the check was transmitted to the insurance company if approved, or returned to the customer if rejected.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2646 / September 11, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12755

In the Matter of **JAMES J. PEPERNO, JR.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

II.

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

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III.

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

1. JAMES J. PEPERNO, JR., age 43, is an unregistered investment adviser and associated person of JJP Consulting, Ltd. ("JJP Consulting"), an unregistered investment adviser incorporated in the Commonwealth of Pennsylvania, with its principal place of business at 120 N. Main St., Old Forge, Pennsylvania 18518. Peperno was the president, chief executive officer, sole corporate officer and employee of JJP Consulting. Peperno held himself out as a financial consultant qualified to provide investment advice, and in fact provided such advice to clients.

2. On June 7, 2007, Peperno pled guilty to one count of mail fraud in connection with the scheme to defraud investors in violation of Section 1341, Title 18, United States Code, before the United States District Court for the Middle District of Pennsylvania, in United States v. James J. Peperno, No. 3:06 CR 135 (Vanaskie, J.).

3. The count of the criminal indictment to which Respondent pled guilty alleged that, from approximately March 2004 until in or about April 2006, while holding himself out as a financial consultant qualified to provide investment advice, Peperno obtained over $600,000 from investors and, instead of investing those funds as promised, diverted funds for his own use and benefit or the benefit of others. The count further alleged that Peperno unlawfully, willingly, and knowingly by use of the means and instrumentalities of interstate commerce and of the mails, directly and indirectly, (a) employed devices, schemes, and artifices to defraud clients and (b) engaged in transactions, practices, and courses of business which operated as a fraud and deceit upon clients.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Peperno be, and hereby is barred from association with any investment adviser.

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

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 11, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12754

In the Matter of **Aurora Acquisitions, Inc.,** **Can-Ex Minerals Corp.,** **HDF, Inc.,** **Inmold, Inc., and** **Piccard Medical Corp.,** **Respondents.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Aurora Acquisitions, Inc. ("Aurora") (CIK No. 885544) is a Colorado corporation located in Denver, Colorado with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Aurora is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 1999, which reported net losses since inception of $78,447.

2. Can-Ex Minerals Corp. ("Can-Ex") (CIK No. 1074641) is a revoked Nevada corporation located in Colorado Springs, Colorado with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Can-Ex is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement amendment on September 3, 1999, which reported no significant operations.

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petition in the U.S. Bankruptcy Court for the Southern District of Ohio, and the proceeding terminated on June 10, 2003.

3. FN Estate, Inc. ("FN Estate") (CIK No. 1092536) is a Pennsylvania corporation located in Bethlehem, Pennsylvania with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). FN Estate is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2003. The company filed a Chapter 11 bankruptcy petition with the U.S. Bankruptcy Court for the Eastern District of Pennsylvania, and the proceeding terminated on May 23, 2007.

4. Gourmet's Choice Coffee Co., Inc. ("Gourmet's Choice") (CIK No. 1088797) is a revoked Nevada corporation located in New York, New York with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Gourmet's Choice is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 1999, which reported no revenue and a net loss of $4,830. As of August 31, 2007, the company's common stock (symbol "GMCH") was traded on the over-the-counter markets.

5. Harter Financial, Inc. ("Harter") (CIK No. 719774) is an inactive New York corporation located in New Vernon, New Jersey with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Harter is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on July 31, 1998, which reported a net loss of $584,535 for the prior three quarters.

6. Perennial Health Systems, Inc. ("Perennial") (CIK No. 1034042) is a Colorado corporation located in Louisville, Kentucky with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Perennial is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended November 30, 1999, which reported a net loss of $163,303 for the prior three months.

B. DELINQUENT PERIODIC FILINGS

7. As discussed in more detail above, all of the respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

8. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration

is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondents identified in Section II registered pursuant to Section 12 of the Exchange Act.

IV.

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

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Attachment

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

Appendix 1

Chart of Delinquent Filings
In the Matter of Aurora Acquisitions, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Aurora Acquisitions, Inc.					
	10-KSB	12/31/99	03/30/00	Not filed	90
	10-QSB	03/31/00	05/15/00	Not filed	88
	10-QSB	06/30/00	08/14/00	Not filed	85
	10-QSB	09/30/00	11/14/00	Not filed	82
	10-KSB	12/31/00	04/02/01	Not filed	77
	10-QSB	03/31/01	05/15/01	Not filed	76
	10-QSB	06/30/01	08/14/01	Not filed	73
	10-QSB	09/30/01	11/14/01	Not filed	70
	10-KSB	12/31/01	04/01/02	Not filed	65
	10-QSB	03/31/02	05/15/02	Not filed	64
	10-QSB	06/30/02	08/14/02	Not filed	61
	10-QSB	09/30/02	11/14/02	Not filed	58
	10-KSB	12/31/02	03/31/03	Not filed	54
	10-QSB	03/31/03	05/15/03	Not filed	52
	10-QSB	06/30/03	08/14/03	Not filed	49
	10-QSB	09/30/03	11/14/03	Not filed	46
	10-KSB	12/31/03	03/30/04	Not filed	42
	10-QSB	03/31/04	05/17/04	Not filed	40
	10-QSB	06/30/04	08/16/04	Not filed	37
	10-QSB	09/30/04	11/15/04	Not filed	34
	10-KSB	12/31/04	03/31/05	Not filed	30
	10-QSB	03/31/05	05/16/05	Not filed	28
	10-QSB	06/30/05	08/15/05	Not filed	25
	10-QSB	09/30/05	11/14/05	Not filed	22
	10-KSB	12/31/05	03/31/06	Not filed	18
	10-QSB	03/31/06	05/15/06	Not filed	16
	10-QSB	06/30/06	08/14/06	Not filed	13
	10-QSB	09/30/06	11/14/06	Not filed	10
	10-KSB	12/31/06	04/02/07	Not filed	0
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1

Total Filings Delinquent 31

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Can-Ex Minerals Corp.					
	10-QSB	09/30/99	11/15/99	Not filed	94
	10-KSB	12/31/99	03/30/00	Not filed	90
	10-QSB	03/31/00	05/15/00	Not filed	88
	10-QSB	06/30/00	08/14/00	Not filed	85
	10-QSB	09/30/00	11/14/00	Not filed	82
	10-KSB	12/31/00	04/02/01	Not filed	77
	10-QSB	03/31/01	05/15/01	Not filed	76
	10-QSB	06/30/01	08/14/01	Not filed	73
	10-QSB	09/30/01	11/14/01	Not filed	70
	10-KSB	12/31/01	04/01/02	Not filed	65
	10-QSB	03/31/02	05/15/02	Not filed	64
	10-QSB	06/30/02	08/14/02	Not filed	61
	10-QSB	09/30/02	11/14/02	Not filed	58
	10-KSB	12/31/02	03/31/03	Not filed	54
	10-QSB	03/31/03	05/15/03	Not filed	52
	10-QSB	06/30/03	08/14/03	Not filed	49
	10-QSB	09/30/03	11/14/03	Not filed	46
	10-KSB	12/31/03	03/30/04	Not filed	42
	10-QSB	03/31/04	05/17/04	Not filed	40
	10-QSB	06/30/04	08/16/04	Not filed	37
	10-QSB	09/30/04	11/15/04	Not filed	34
	10-KSB	12/31/04	03/31/05	Not filed	30
	10-QSB	03/31/05	05/16/05	Not filed	28
	10-QSB	06/30/05	08/15/05	Not filed	25
	10-QSB	09/30/05	11/14/05	Not filed	22
	10-KSB	12/31/05	03/31/06	Not filed	18
	10-QSB	03/31/06	05/15/06	Not filed	16
	10-QSB	06/30/06	08/14/06	Not filed	13
	10-QSB	09/30/06	12/31/06	Not filed	9
	10-KSB	12/31/06	02/14/07	Not filed	7
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1
Total Filings Delinquent	32				
HDF, Inc.					
	10-QSB	01/31/00	03/16/00	Not filed	90
	10-KSB	04/30/00	07/31/00	Not filed	86
	10-QSB	07/31/00	09/14/00	Not filed	84
	10-QSB	01/31/01	03/19/01	Not filed	78
	10-KSB	04/30/01	07/30/01	Not filed	74
	10-QSB	07/31/01	09/14/01	Not filed	72

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
HDF, Inc. (continued)	*10-QSB*	10/31/01	12/17/01	Not filed	69
	10-QSB	01/31/02	03/18/02	Not filed	66
	10-KSB	04/30/02	07/29/02	Not filed	62
	10-QSB	07/31/02	09/16/02	Not filed	60
	10-QSB	10/31/02	12/16/02	Not filed	57
	10-QSB	01/31/03	03/17/03	Not filed	54
	10-KSB	04/30/03	07/29/03	Not filed	50
	10-QSB	07/31/03	09/15/03	Not filed	48
	10-QSB	10/31/03	12/15/03	Not filed	45
	10-QSB	01/31/04	03/16/04	Not filed	42
	10-KSB	04/30/04	07/29/04	Not filed	38
	10-QSB	07/31/04	09/14/04	Not filed	36
	10-QSB	10/31/04	12/15/04	Not filed	33
	10-QSB	01/31/05	03/17/05	Not filed	30
	10-KSB	04/30/05	07/29/05	Not filed	26
	10-QSB	07/31/05	09/14/05	Not filed	24
	10-QSB	10/31/05	12/15/05	Not filed	21
	10-QSB	01/31/06	03/17/06	Not filed	18
	10-KSB	04/30/06	07/31/06	Not filed	14
	10-QSB	07/31/06	09/14/06	Not filed	12
	10-QSB	10/31/06	12/15/06	Not filed	9
	10-QSB	01/31/07	03/19/07	Not filed	6
	10-KSB	04/30/07	07/31/07	Not filed	2
Total Filings Delinquent	29				
Inmold, Inc.					
	10-K	05/31/99	08/30/99	Not filed	97
	10-Q	08/31/99	10/15/99	Not filed	95
	10-Q	11/30/99	01/14/00	Not filed	92
	10-Q	02/28/00	04/13/00	Not filed	89
	10-K	05/31/00	08/29/00	Not filed	85
	10-Q	08/31/00	10/16/00	Not filed	83
	10-Q	11/30/00	01/15/01	Not filed	80
	10-Q	02/28/01	04/16/01	Not filed	77
	10-K	05/31/01	08/29/01	Not filed	73
	10-Q	08/31/01	10/15/01	Not filed	71
	10-Q	11/30/01	01/14/02	Not filed	68
	10-Q	02/28/02	04/15/02	Not filed	65
	10-K	05/31/02	08/29/02	Not filed	61
	10-Q	08/31/02	10/15/02	Not filed	59
	10-Q	11/30/02	01/14/03	Not filed	56
	10-Q	02/28/03	04/14/03	Not filed	53
	10-K	05/31/03	08/29/03	Not filed	49

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Piccard Medical Corp. (continued)	*10-QSB*	03/31/06	05/15/06	Not filed	16
	10-QSB	06/30/06	08/14/06	Not filed	13
	10-QSB	09/30/06	11/14/06	Not filed	10
	10-KSB	12/31/06	04/02/07	Not filed	5
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1

Total Filings Delinquent 28

SECURITIES AND EXCHANGE COMMISSION

17 CFR Ch. II

[Release Nos. 33- 8840, 34- 56387, IA-2645, IC-27967, File No. S7-21-07]

Regulatory Flexibility Agenda

AGENCY: Securities and Exchange Commission.

ACTION: Semiannual regulatory agenda.

SUMMARY: The Securities and Exchange Commission approved the publication of an agenda of its rulemaking actions, pursuant to the Regulatory Flexibility Act. The agenda, which is not a part of or attached to this document, was submitted by the Commission to the Regulatory Information Service Center for inclusion in the Unified Agenda of Federal Regulatory and Deregulatory Actions, which is scheduled for publication in its entirety on www.reginfo.gov in October 2007. The version of the Unified Agenda to be published in the Federal Register will only include those rules for which the agency has indicated that preparation of an analysis under the Regulatory Flexibility Act is required. Information in the Commission's agenda was accurate on September 11, 2007, the date on which the Commission's staff completed compilation of the data. To the extent possible, rulemaking actions by the Commission after that date will be reflected in the agenda. The Commission invites questions and public comment on the agenda and on the individual agenda entries.

DATES: Comments should be received on or before December 31, 2007.

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/other.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-21-07 on the

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subject line; or

- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

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

All submissions should refer to File Number S7-21-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/other.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Anne Sullivan, Office of the General Counsel, 202-551-5019.

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

By the Commission.

Florence E. Harmon

Florence E. Harmon
Deputy Secretary

Dated: September 11, 2007

UNITED STATES OF AMERICA
Before the
ECURITIES AND EXCHANGE COMMISSION

XCHANGE ACT OF 1934
6 / September 12, 2007

TIVE PROCEEDING
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of	)
GUNDERSON, ESQ.	)
pondent.	)

ORDER DENYING MOTION TO LIFT TEMPORARY SUSPENSION AND DIRECTING HEARING

On June 6, 2007, we instituted proceedings against Chris G. Gunderson pursuant to Rule 102(e) of this Commission's Rules of Practice and temporarily suspended him from appearing or practicing before the Commission.[1]

On February 21, 2007, the U.S. District Court for the Southern District of New

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1 Rule 102(e)(3) of the Commission's Rules of Practice (17 C.F.R. § 201.102(e)(3)) provides in relevant part that:

(i) The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any attorney . . . who has been by name:

(A) permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder; or

(B) found by any court of competent jurisdiction in any action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal Securities laws or of the rules and regulations thereunder.

Document 1 8 of

York entered a permanent injunction against Gunderson in an action brought by this Commission.[2] The order permanently enjoined Gunderson from violating, directly or indirectly, Section 5 and Section 17(a) of the Securities Act of 1933[3] and Section 10(b) of the Securities Exchange Act of 1934[4] and Exchange Act Rule 10b-5.[5]

The Court found that Gunderson and others issued and distributed more than 500 million shares of unregistered stock in violation of Section 5 of the Securities Act of 1933. To create the appearance that the issuances qualified for registration on Form S-8, the Court found that Gunderson prepared questionable "consulting agreements." The Court also found that Gunderson informed Universal Express Inc.'s transfer agent that the stock was validly registered, even though it was not.

The Court also found that Gunderson and others engaged in a fraudulent scheme to defraud investors by issuing false or misleading press releases announcing large funding commitments that would enable Universal Express to acquire other companies. The Court found that Gunderson drafted or edited the press releases and then reviewed and approved them before their release, and that the statements in the releases were "at best misleading and sometimes wholly fantastical." Each of these press releases was followed by a substantial increase in Universal Express's share price and trading volume, permitting several of the defendants in the case to dispose of large amounts of the unregistered shares.

Gunderson argues that the Commission lacks jurisdiction to impose the temporary suspension because the injunction does not constitute a final order or judgment within the meaning of the Rule. Gunderson has filed an appeal in the Second Circuit challenging the propriety of the Court's order on which the Commission's temporary suspension is based. Gunderson also argues that at all times he acted in good faith reliance on the pertinent provisions of the United States Bankruptcy Code, Universal Express's Plan for Reorganization, and the Bankruptcy Court's order confirming the plan for reorganization. In opposition to Gunderson's petition, the Office of the General Counsel argues that Gunderson impermissibly attempts to relitigate his liability for securities law violations, lifting the temporary suspension is not in the public interest, and Gunderson is not likely to succeed on the merits of his appeal.

Rule 102(e)(3) permits the Commission to suspend any attorney or other professional or expert who has been permanently enjoined from violating or aiding and abetting the violation of the Federal securities laws or found to have violated or aided and abetted the violation of the Federal securities laws. The findings of the Court, which Gunderson is precluded from contesting in this proceeding, as well as the injunction

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2 SEC v. Universal Express, Inc., Civil Action No. 04-2322 (S.D. N.Y.).

3 15 U.S.C. § 77e and 15 U.S.C. § 77q(a).

4 15 U.S.C. § 78j(b).

5 17 C.F.R. § 240.10b-5.

issued against him justify the continuance of his suspension until it can be determined what, if any, action may be appropriate to protect this Commission's processes.[6] As provided in Rule 102(e)(3)(iii), we will set the matter down for a public hearing.

Accordingly, IT IS ORDERED that the petition of Chris G. Gunderson to lift our order of temporary suspension be, and it hereby is, denied; and

It is further ORDERED that this proceeding be set down for a public hearing before an administrative law judge in accordance with Rule 110 of our Rules of Practice. As specified in Rule 102(e)(3)(iii), the hearing in this matter shall be expedited in accordance with Rule 500 of our Rules of Practice. Therefore, it is ORDERED that the administrative law judge shall issue an initial decision no later than 120 days from the date of service of this Order.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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6 See Rule 102(e)(3)(iv) (providing that the petitioner may not contest any finding made against him or her).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56395 / September 12, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2677 / September 12, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12759

In the Matter of **DAVID HEYMAN, CPA,** **Respondent.**	**ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of David Heyman pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. § 200.102(e)(2)].[1]

II.

The Commission finds that:

1. Heyman is a certified public accountant licensed in the State of New York.

2. On July 31, 2007, a judgment of conviction was entered against Heyman in *United States v. Zvi Rosenthal, et al.*, No. 07-CR-69-01 (JG), in the United States District Court for the Eastern District of New York, finding him guilty of one count of conspiracy to commit securities fraud.

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[1] Rule 102(e)(2) provides in pertinent part: "Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

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3. As a result of this conviction, Heyman was sentenced to fifteen months' imprisonment in a federal penitentiary, three years of supervised release following his incarceration and four hundred hours of community service.

III.

In view of the foregoing, the Commission finds that Heyman has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that David Heyman is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 12, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12756

In the Matter of **Golf Training Systems, Inc. (n/k/a Perfect Computer Solutions, Inc.), Mas Acquisition XIX Corp., and Merry-Go-Round Enterprises, Inc.,** **Respondents.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Golf Training Systems, Inc. ("Golf Training Systems") (n/k/a Perfect Computer Solutions, Inc.) (CIK No. 879712) is a void Delaware corporation located in Duluth, Georgia with a class of equity securities and redeemable warrants registered with the Commission pursuant to Exchange Act Section 12(g). Golf Training Systems is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 1998, which reported a net loss of $2,001,077 for the prior nine months. On September 11, 1998, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Georgia, which was converted to Chapter 7, and the case was closed on April 19, 2006.

2. Mas Acquisition XIX Corp. ("Mas Acquisition") (CIK No. 1093989) is an Indiana corporation located in Clearwater, Florida with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Mas Acquisition is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2005, which reported a net loss of $15,000 for the prior nine months.

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3. Merry-Go-Round Enterprises, Inc. ("Merry-Go-Round") (CIK No. 719721) is a forfeited Maryland corporation located in Joppa, Maryland with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Merry-Go-Round is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended October 28, 1995, which reported a net loss of $66,398,000 for the prior nine months. On January 11, 1994, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Maryland, which was converted to Chapter 7, and is still pending. As of September 5, 2007, the company's stock (symbol "MGREQ") was traded on the over-the-counter markets.

B. DELINQUENT PERIODIC FILINGS

4. As discussed in more detail above, all of the respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondents identified in Section II registered pursuant to Section 12 of the Exchange Act.

IV.

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

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

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

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

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice.

Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Attachment

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 12, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12757

In the Matter of **Lapta Acquisition Corp. I,** **Lapta Acquisition Corp. II,** **Lapta Acquisition Corp. III,** **Lapta Acquisition Corp. IV, and** **Lapta Acquisition Corp. V,** **Respondents.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Lapta Acquisition Corp. I (CIK No. 1118182) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Lapta Acquisition Corp. I is delinquent in its periodic filings with the Commission, having not filed any periodic reports since they filed a Form 10-QSB for the period ended September 30, 2000, which reported zero revenues and a net loss.

2. Lapta Acquisition Corp. II (CIK No. 1118167) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Lapta Acquisition Corp. II is delinquent in its periodic filings with the Commission, having not filed any periodic reports since they filed a Form 10-QSB for the period ended September 30, 2000, which reported zero revenues and a net loss.

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3. Lapta Acquisition Corp. III (CIK No. 1118169) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Lapta Acquisition Corp. III is delinquent in its periodic filings with the Commission, having not filed any periodic reports since they filed a Form 10-QSB for the period ended September 30, 2000, which reported zero revenues and a net loss.

4. Lapta Acquisition Corp. IV (CIK No. 1118171) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Lapta Acquisition Corp. IV is delinquent in its periodic filings with the Commission, having not filed any periodic reports since they filed a Form 10-QSB for the period ended September 30, 2000, which reported zero revenues and a net loss.

5. Lapta Acquisition Corp. V (CIK No. 1118172) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Lapta Acquisition Corp. V is delinquent in its periodic filings with the Commission, having not filed any periodic reports since they filed a Form 10-QSB for the period ended September 30, 2000, which reported zero revenues and a net loss.

B. DELINQUENT PERIODIC FILINGS

6. As discussed in more detail above, all of the respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondents identified in Section II registered pursuant to Section 12 of the Exchange Act.

IV.

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

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Attachment

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 12, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12758

In the Matter of **Lapta Acquisition Corp. VI,** **Lapta Acquisition Corp. VII,** **Lapta Acquisition Corp. VIII,** **Lapta Acquisition Corp. IX, and** **Lapta Acquisition Corp. X,** **Respondents.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Lapta Acquisition Corp. VI (CIK No. 1118175) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Lapta Acquisition Corp. VI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since they filed a Form 10-QSB for the period ended September 30, 2000, which reported zero revenues and a net loss.

2. Lapta Acquisition Corp. VII (CIK No. 1118177) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Lapta Acquisition Corp. VII is delinquent in its periodic filings with the Commission, having not filed any periodic reports since they filed a Form 10-QSB for the period ended September 30, 2000, which reported zero revenues and a net loss.

3. Lapta Acquisition Corp. VIII (CIK No. 1118178) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of equity securities

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registered with the Commission pursuant to Exchange Act Section 12(g). Lapta Acquisition Corp. VIII is delinquent in its periodic filings with the Commission, having not filed any periodic reports since they filed a Form 10-QSB for the period ended September 30, 2000, which reported zero revenues and a net loss.

4. Lapta Acquisition Corp. IX (CIK No. 1118179) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Lapta Acquisition Corp. IX is delinquent in its periodic filings with the Commission, having not filed any periodic reports since they filed a Form 10-QSB for the period ended September 30, 2000, which reported zero revenues and a net loss.

5. Lapta Acquisition Corp. X (CIK No. 1118181) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Lapta Acquisition Corp. X is delinquent in its periodic filings with the Commission, having not filed any periodic reports since they filed a Form 10-QSB for the period ended September 30, 2000, which reported zero revenues and a net loss.

B. DELINQUENT PERIODIC FILINGS

6. As discussed in more detail above, all of the respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondents identified in Section II registered pursuant to Section 12 of the Exchange Act.

IV.

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

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Attachment

Appendix 1
Chart of Delinquent Filings by
In the Matter of Lapta Acquisition Corp. VI, et al.

Company Name	Form Type	Period Ended	Due Date	Date Rec'd	Months Delinquent (rounded up)
Lapta Acquisition Corp. VI - X					
	10-KSB	12/31/00	04/02/01	Not filed	77
	10-QSB	03/31/01	05/15/01	Not filed	76
	10-QSB	06/30/01	08/14/01	Not filed	73
	10-QSB	09/30/01	11/14/01	Not filed	70
	10-KSB	12/31/01	04/01/02	Not filed	65
	10-QSB	03/31/02	05/15/02	Not filed	64
	10-QSB	06/30/02	08/14/02	Not filed	61
	10-QSB	09/30/02	11/14/02	Not filed	58
	10-KSB	12/31/02	03/31/03	Not filed	54
	10-QSB	03/31/03	05/15/03	Not filed	52
	10-QSB	06/30/03	08/14/03	Not filed	49
	10-QSB	09/30/03	11/14/03	Not filed	46
	10-KSB	12/31/03	03/30/04	Not filed	42
	10-QSB	03/31/04	05/17/04	Not filed	40
	10-QSB	06/30/04	08/16/04	Not filed	37
	10-QSB	09/30/04	11/15/04	Not filed	34
	10-KSB	12/31/04	03/31/05	Not filed	30
	10-QSB	03/31/05	05/16/05	Not filed	28
	10-QSB	06/30/05	08/15/05	Not filed	25
	10-QSB	09/30/05	11/14/05	Not filed	22
	10-KSB	12/31/05	03/31/06	Not filed	18
	10-QSB	03/31/06	05/15/06	Not filed	16
	10-QSB	06/30/06	08/14/06	Not filed	13
	10-QSB	09/30/06	11/14/06	Not filed	10
	10-KSB	12/31/06	04/02/07	Not filed	5
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1

Total Filings Delinquent 27

Commissioners Atkins
+ Campos
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56438 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2717 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12798

In the Matter of **FERRO CORPORATION and ANTHONY J. MAIKUT,** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

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 Ferro Corporation ("Ferro") and against Anthony J. Maikut ("Maikut") (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 Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

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III.

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

Respondents

1. Ferro is an Ohio corporation with its principal place of business in Cleveland, Ohio. It manufactures, among other things, performance chemicals in facilities it owns in the U.S. and in foreign countries. Ferro's common stock is registered pursuant to Section 12(b) of the Exchange Act and trades on the New York Stock Exchange.

2. Maikut, age 52, resides in Twinsburg, Ohio. Maikut was the controller for Ferro's Performance Chemicals Group ("Chemicals Group") from 1998 until July 2004, when Ferro terminated his employment. Maikut was a certified public accountant in the State of Ohio until 1997, when he failed to renew his license.

Related Party

3. Brian E. Haylor ("Haylor"), age 39, resides in Avon, Ohio. From November 2000 until his resignation in July 2004, Haylor was the controller for Ferro's Polymer Additives Division ("PAD"), one of three divisions within the Chemicals Group. In his position as PAD controller, Haylor reported directly to Maikut.

Summary

4. Ferro issued materially false and misleading financial statements in its quarterly reports for the first, second and third quarters of 2003, its annual report for 2003 and its quarterly report for the first quarter of 2004. Haylor caused Ferro to issue the false financial statements by making numerous false accounting entries by omitting to make required entries in Ferro's books and records. Maikut, as Haylor's immediate supervisor, failed to adequately review Haylor's journal entries and account balances and participated in some erroneous accounting decisions. Ferro failed to maintain adequate internal controls, which enabled Haylor to engage in his fraudulent scheme. As a result of Haylor and Maikut's conduct, and as a result of other errors, Ferro restated its financial statements for 2003 and the first quarter of 2004.

Haylor's Fraudulent Conduct

5. From at least March 2003 through June 2004, Haylor intentionally recorded false entries and omitted required entries in PAD's accounting records. The false entries and omissions resulted in Ferro overstating its operating income[2] in its Forms 10-Q for the quarters ended March

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

[2] Operating income is net income before income taxes and gains or losses from discontinued operations.

31, June 30 and September 30, 2003, in its 2003 Form 10-K and in its Form 10-Q for the quarter ended March 31, 2004.

6. Haylor made false entries in an account known as temporary accounts receivable. Haylor should have used the temporary accounts receivable account to record sales for items sold and shipped to a customer, but for which Ferro had not issued an invoice. Once Ferro issued the invoice, Haylor should have eliminated the entry to temporary accounts receivable and transferred the balance to trade accounts receivable. Haylor admitted that he recorded fictitious entries to increase temporary accounts receivable and corresponding entries to reduce expenses. Haylor's conduct resulted in an increase in operating income of $1,050,000 in the first quarter of 2003, $527,000 in the second quarter, and $123,000 in the third quarter.

7. Haylor made false accounting entries in an account known as unrecorded liabilities. This account is the mirror image of temporary accounts receivable because it reflects amounts owed by Ferro for which it has not yet received an invoice. Haylor reduced this account by $120,000 in the third quarter of 2003 and by $300,000 in the fourth quarter of 2003, which resulted in a reduction of Ferro's expenses on its income statement. Haylor did not have any legitimate reason for these entries and no documentation to support them.

8. According to Ferro, the approximate effect of Haylor's fraudulent entries and omissions on Ferro's operating income is as follows:

(All Dollar Amounts in Millions)	2003					2004	Total
	Qtr 1	Qtr2	Qtr 3	Qtr 4	Total	Qtr 1	All Periods
Previously Reported Operating Income	$14.2	$7.5	($1.1)	$3.6	$24.2	$19.3	$43.5
Less: Adj. for Fraudulent Accounting	($3.5)	($1.1)	($0.1)	($0.3)	($5.0)	($0.7)	($5.7)
Operating Income as Adjusted	$10.7	$6.4	($1.2)	$3.3	$19.2	$18.6	$37.8
Overstatement as a % of Oper. Inc.	32.7%	17.2%	8.3%	9.1%	26.0%	3.8%	15.1%

Maikut's Negligent Conduct

9. As the Chemicals Group controller, Maikut was responsible for the financial statements prepared by Haylor. Maikut did not, however, adequately review Haylor's monthly and quarterly post-closing adjusting entries or regularly review PAD's balance sheet, even after senior managers asked for more information about certain PAD account balances.

10. Maikut's failure adequately to review Haylor's work enabled Haylor to engage in his fraudulent conduct. Haylor typically recorded false entries or omitted required entries during the monthly or quarterly closing process via post-closing adjustments. Had Maikut adequately reviewed Haylor's adjustments, he could have questioned them. In addition, Haylor's conduct generated irregular account balances. Senior management asked Maikut about an irregular balance in temporary accounts receivable at the end of 2003, but Maikut did not request an account reconciliation from Haylor until June 2004, when senior management demanded an explanation.

When Haylor failed to prepare the requested reconciliation, Ferro discovered his fraudulent conduct.

11. Maikut also participated in some erroneous accounting decisions. For example, in July 2003, PAD sold products to a customer under a 12-month contract beginning in July 2003 and ending in June 2004. By the terms of the contract, the customer could earn rebates if its purchase volume exceeded certain levels. In April 2004, Haylor learned that the customer would earn a rebate of $1.2 million. Consistent with Generally Accepted Accounting Principles, Haylor should have immediately recorded the amount of the rebate earned from July 2003 through April 2004.[3] Haylor, however, at Maikut's direction, began recording the rebate expense in equal monthly installments on a basis that would have fully expensed the item over an eight-month period to avoid having the entire $1.2 million expense appear in PAD's results for the second quarter of 2004. Ferro corrected the erroneous entries when they were discovered after Haylor left Ferro in June 2004 and prior to filling its quarterly report for the second quarter of 2004.

Ferro's Restatement

12. On March 31, 2006, Ferro filed its 2004 Form 10-K, which contained restated financial results for 2003 and the quarter ended March 31, 2004. The restatement corrected inaccurate prior period results caused by Haylor's fraudulent entries and omissions and by numerous errors made by Ferro's accounting personnel. The errors were the result of poor recordkeeping and inadequate internal controls, and caused Ferro to overstate its operating income by an additional $6.6 million in 2003 and $4.6 million in the first quarter of 2004. The individual errors, however, resulted in both increases and decreases in Ferro's operating income.

13. For example, in 2003, Ferro was in the process of incorporating new software for its accounting systems. Some business units used the existing system while others used the new system. This required Ferro to reconcile differences resulting from the use of different systems and to make adjusting entries. In reconciling these differences, Ferro erroneously made adjustments that resulted in an overstatement of its income by $6.1 million in 2003 and by $191,000 in the first quarter of 2004. Another significant accounting error resulted when Ferro computed its employee compensation expense. Errors in these accounts resulted in an understatement of Ferro's income by $2.9 million in 2003 and an overstatement of $158,000 in the first quarter of 2004.

14. Ferro's restatement had a material effect on the company's earnings results for 2003 and the first quarter of 2004, as demonstrated in the following chart:

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[3] See Financial Accounting Standards Board, FAS No. 5.

(All Dollar Amounts in Millions)	2003					2004	Total
	Qtr 1	Qtr2	Qtr 3	Qtr 4	Total	Qtr 1	All Periods
Previously Reported Operating Income	$14.2	$7.5	($1.1)	$3.6	$24.2	$19.3	$43.5
Less: Adj. for Fraudulent Accounting	($3.5)	($1.1)	($0.1)	($0.3)	($5.0)	($0.7)	($5.7)
Adj. for Accounting Errors	($2.8)	($3.4)	($0.8)	$0.4	($6.6)	($4.6)	($11.2)
Total Adjustments	($6.3)	($4.5)	($0.9)	$0.1	($11.6)	($5.3)	($16.9)
Operating Income as Adjusted	$7.9	$3.0	($2.0)	$3.7	$12.6	$14.0	$26.6
Over (Under)statement as a % of Oper. Inc.	79.7%	150.0%	45.9%	(2.70%)	92.1%	37.9%	63.5%

15. Ferro also identified material weaknesses in its internal controls and concluded that they had been ineffective.

16. Ferro's deficient system of internal controls enabled Haylor to engage in his fraudulent conduct. For example, the company concluded that it had failed to perform timely reviews of accounting reconciliations and journal entries. More specifically, management did not consistently approve post-closing journal entries. Haylor was able to record fraudulent post-closing journal entries during 2003 and the first quarter of 2004 because his supervisor, Maikut, did not adequately review and approve them. The company also concluded that it had insufficiently trained accounting personnel coupled with insufficient accounting policies and procedures. Haylor was able to carry out his scheme in part because his supervisor and others did not consistently review and follow-up on suspicious account balances.

17. Ferro's deficient system of internal controls also resulted in numerous errors. For example, the company's failure to consistently review the calculations and accounting for amounts due to employees under various compensation plans led to a material overstatement of employee compensation expenses. In addition, Ferro's failure to timely perform and review accounting reconciliations led to material errors in reconciling different accounting systems and recording adjusting entries.

Legal Analysis

18. Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file accurate quarterly and annual reports with the Commission. Rule 12b-20 under the Exchange Act requires that these reports must contain any material information necessary to make the required statements made in the reports not misleading. As a result of the conduct described above, Ferro violated these provisions of the Exchange Act by issuing a materially inaccurate Form 10-K for 2003 and materially inaccurate Forms 10-Q for the first three quarters of 2003 and the first quarter of 2004.

19. Section 13(b)(2)(A) of the Exchange Act requires issuers to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and disposition of its assets. Section 13(b)(2)(B) of the Exchange Act requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit preparation of financial

statements in conformity with generally accepted accounting principles and to maintain accountability of assets. As a result of the conduct described above, Ferro violated Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act because its books and records contained numerous inaccurate entries and because it failed to devise and maintain a scheme of internal controls adequate to detect and prevent Haylor's false accounting entries.

20. As described above, Maikut, in part, caused Ferro's violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder because he did not adequately review Haylor's post-closing journal entries, did not adequately review Haylor's account balances, and did not follow up on questions from the company's senior management about a suspicious account balance.

Ferro's Remedial Efforts

21. In determining to accept Ferro's Offer, the Commission considered remedial acts promptly undertaken by Ferro and cooperation afforded the Commission staff.

IV.

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

Accordingly, it is hereby ORDERED that:

1. Respondent Ferro 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, 13a-1 and 13a-13 thereunder.

2. Respondent Maikut cease and desist from 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, 13a-1 and 13a-13 thereunder.

By the Commission.

Nancy M. Morris
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. 56424 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2704 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12785

In the Matter of **Sanford H. Feibusch, CPA, PC and Sanford H. Feibusch, CPA** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Sanford H. Feibusch, CPA, PC and Sanford H. Feibusch, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Sanford H. Feibusch, CPA, PC pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Sanford H. Feibusch, CPA, PC (the "Firm") is a Nevada professional corporation and a public accounting firm headquartered in Las Vegas, Nevada. The Firm audited Power-Save Energy Company's ("Power-Save") financial statements for the company's 2003 fiscal year ended December 31, 2003.

2. Sanford H. Feibusch, CPA ("Feibusch"), 53, of Las Vegas, Nevada, is a certified public accountant licensed during the relevant time period in the state of New York and currently licensed in Nevada. Feibusch was the engagement partner in connection with the Firm's audit of Power-Save's financial statements for the company's 2003 fiscal year ended December 31, 2003.

B. FACTS

1. Power-Save (known as Safari Associates, Inc. during the relevant time period) is a Utah corporation with its headquarters in San Luis Obispo, California. Power-Save's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is traded on the OTC Bulletin Board under the symbol PWSV. For its fiscal year ended December 31, 2003, Power-Save reported revenues of $102,533 and total assets of $113,603.

2. Power-Save has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

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[3] 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.

3. The Firm audited Power-Save's 2003 financial statements included in Power-Save's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 24, 2004. As part of that audit, the Firm prepared and issued an audit report dated March 22, 2004 (the "Power-Save audit report"), which the company included in its 2003 Form 10-KSB. Power-Save never paid the Firm the $3,000 that the Firm invoiced for the audit work.

4. At the time the Firm prepared and issued the Power-Save audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Feibusch was the engagement partner on the Firm's audit of Power-Save's 2003 financial statements. Feibusch participated in the preparation and issuance of the Power-Save audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[4]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[5]

3. Based on the conduct described above, the Firm willfully[6] violated Section 102(a) of the Act.

4. Based on the conduct described above, Feibusch caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Feibusch caused the Firm's violation of Section 102(a) of the Act.

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[4] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[5] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

[6] "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from Power-Save in connection with the audit work associated with the Power-Save audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Sanford H. Feibusch, CPA, PC

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. The Firm is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. The Firm has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Sanford H. Feibusch, CPA

A. Feibusch shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Feibusch may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56426 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2706 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12787

In the Matter of **William E. Costello, CPA,** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against William E. Costello, CPA ("Respondent" or "Costello") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

[2] Rule 102(e)(1)(iii) provides, in relevant part, that:

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, 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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

A. RESPONDENT

William E. Costello, CPA, 69, of Bakersfield, California, is a certified public accountant licensed in the state of California since 1965 and doing business as a sole proprietorship. Costello audited Global Links Corp.'s financial statements for the company's 2003 fiscal year ended December 31, 2003.

B. FACTS

1. Global Links Corp. ("Global Links") is a Nevada corporation with its headquarters in Las Vegas, Nevada. Global Links' common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is quoted in the pink sheets under the symbol GLLK.PK. For its fiscal year ended December 31, 2003, Global Links reported revenues of $132,000 and total assets of $1.8 million. Global Links filed a Form 8-K with the Commission on February 2, 2005, announcing that it had dismissed Costello as its independent auditor on February 1, 2005.

2. Global Links has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. Costello audited Global Links' 2003 financial statements included in Global Links' annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 14, 2004. As part of that audit, Costello prepared and issued an audit report dated April 14, 2004 (the

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

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

"Global Links audit report"), which the company included in its 2003 Form 10-KSB. Global Links paid Costello $1,250 for the audit work.[4]

4. At the time Costello prepared and issued the Global Links audit report, he was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, Respondent willfully[7] violated Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that Costello willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002.

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[4] During the course of the Commission's investigation, Costello voluntarily reimbursed Global Links the $1,250 in audit fees. In view of Costello's reimbursement, the Commission is not ordering disgorgement in this matter.

[5] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[6] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. <u>See</u> <u>Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002</u>, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

[7] "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. <u>See</u> <u>Wonsover v. SEC</u>, 205 F.3d 408, 414 (D.C. Cir. 2000); <u>Tager v. SEC</u>, 344 F.2d 5, 8 (2d Cir. 1965).

E. UNDERTAKING

Respondent undertakes not to request, demand, or accept, directly or indirectly, any compensation from Global Links in connection with the audit work associated with the Global Links audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

A. Costello shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Costello is censured.

C. Costello may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56422 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2702 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12783

In the Matter of **Randy Simpson, CPA, P.C. and Randy Simpson, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Randy Simpson, CPA, P.C. and Randy Simpson, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") and that public administrative proceedings be, and hereby are, instituted against Randy Simpson, CPA, P.C. pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Randy Simpson, CPA, P.C. (the "Firm") is a Utah corporation based in Sandy, Utah. The Firm audited Cap Central Access Point, Inc.'s and Franklin Life Resources, Inc.'s financial statements for the companies' 2003 fiscal years ended September 30, 2003, and October 31, 2003, respectively.

2. Randy Simpson, CPA, ("Simpson"), age 52, of Sandy, Utah, is a certified public accountant licensed in the state of Utah since 1976. Simpson was the engagement partner in connection with the Firm's audits of Cap Central Access Point, Inc.'s and Franklin Lake Resources, Inc.'s financial statements for the companies' 2003 fiscal years ended September 30, 2003, and October 31, 2003, respectively.

B. FACTS

1. Cap Central Access Point, Inc. ("Cap Central") is a Nevada corporation based in Las Vegas, Nevada. During the relevant period, Cap Central's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act. For its fiscal year ended September 30, 2003, Cap Central reported no revenue and total assets of $400.

2. Cap Central has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. Franklin Lake Resources, Inc. ("Franklin Lake") is a Nevada corporation based in

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

[3] 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.

South San Francisco, California. Franklin Lake's common stock trades over the OTC Bulletin Board under the symbol FKLR.OB and is registered with the Commission pursuant to Section 12(g) of the Exchange Act. For its fiscal year ended October 31, 2003, Franklin Lake reported no revenue and total assets of $260,000.

4. Franklin Lake has at all relevant times been an issuer as defined by the Act.

5. The Firm audited Cap Central's and Franklin Lakes' 2003 financial statements included in each company's respective annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on November 24, 2003, and February 13, 2004, respectively. As part of the audits, the Firm prepared and issued two audit reports dated November 8, 2003 (the "Cap Central audit report"), and January 22, 2004 (the "Franklin Lake audit report"), which each company included in its respective 2003 Form 10-KSB. The Firm collected no fees for the Cap Central audit work. Franklin Lake paid the Firm $5,000 for the audit work.[4]

6. At the time the Firm issued the Cap Central and Franklin Lake audit reports, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

7. Simpson was the engagement partner on the Firm's audits of Cap Central's and Franklin Lake's 2003 financial statements. Simpson participated in the preparation and issuance of the Cap Central and Franklin Lake audit reports.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

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[4] During the course of the Commission's investigation, the Firm voluntarily reimbursed Franklin Lake $5,000 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

[5] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[6] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

3. Based on the conduct described above, the Firm willfully[7] violated Section 102(a) of the Act.

4. Based on the conduct described above, Simpson caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Simpson caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents undertake not to request, demand, or accept, directly or indirectly, any compensation from Cap Central and Franklin Lake in connection with the audit work associated with the Cap Central and Franklin Lake audit reports. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Randy Simpson, CPA, P.C.

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

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[7] "Willfully" as used in this Offer means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Randy Simpson, CPA

A. Simpson shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Simpson may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56420 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2700 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12781

In the Matter of Norman Stumacher, CPA, Respondent.	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Norman Stumacher, CPA ("Respondent" or "Stumacher") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, 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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

A. RESPONDENT

Norman Stumacher, CPA, 81, of Bellmore, New York, is a certified public accountant licensed in the state of New York since 1960 and doing business as a sole proprietorship. Stumacher audited MediaREADY, Inc.'s ("MediaREADY") financial statements for the company's 2003 fiscal year ended December 31, 2003. MediaREADY dismissed Stumacher as its independent auditor on February 22, 2005.

B. FACTS

1. MediaREADY (known as Video Without Boundaries, Inc. during the relevant time period) is a Florida corporation with its headquarters in Fort Lauderdale, Florida. MediaREADY's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is listed on the Pink Sheets under the symbol MRED. For its fiscal year ended December 31, 2003, MediaREADY reported revenues of $191,000 and total assets of $875,000.

2. MediaREADY has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. Stumacher audited MediaREADY's 2003 financial statements included in MediaREADY's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 14, 2004. As part of that audit, Stumacher prepared and issued an audit report dated April 12, 2004 (the "MediaREADY audit report"), which the company included in its 2003 Form 10-KSB. MediaREADY paid Stumacher $25,000 for the audit work.

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

4. At the time Stumacher prepared and issued the MediaREADY audit report, he was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. By order dated April 26, 2005, the Board disapproved an application for registration submitted by Stumacher based in part on Stumacher's violation of Section 102(a) of the Act in issuing the MediaREADY audit report.[4] The order effectively prevented Stumacher from becoming registered with the Board until after February 15, 2006, approximately one year from the date the Board issued a notice of hearing on Stumacher's application.[5] Stumacher has only worked as an accountant through his sole proprietorship and has not otherwise been associated with a public accounting firm registered with the Board.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[6]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[7]

3. Based on the conduct described above, Respondent willfully[8] violated Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that Stumacher willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002.

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[4] PCAOB Release No. 2005-008 (Apr. 26, 2005). The order also found that Stumacher's issuance of the MediaREADY audit report violated Board Rule 2100, which implemented Section 102(a) of the Act. Id.

[5] The order states that with respect to any new registration application Stumacher submits after February 15, 2006, the Board will not issue a notice of hearing to determine whether to approve or disapprove such application based solely on the violations subject to the Board's order. Id.

[6] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[7] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

[8] "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

E. UNDERTAKING

Respondent has undertaken not to request, demand, or accept, directly or indirectly, any compensation from MediaREADY in connection with the audit work associated with the MediaREADY audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

A. Stumacher shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Stumacher is censured.

C. Stumacher may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

D. IT IS FURTHER ORDERED that Respondent shall, within 10 days of the entry of this Order, pay disgorgement of $25,000 and prejudgment interest of $1,865.60 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Norman Stumacher as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Christopher Conte, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, D.C. 20549.

By the Commission.

Nancy M. Morris
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. 56414 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2694 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12775

In the Matter of **Henry Schiffer, CPA, An Accountancy Corporation and Henry Schiffer, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Henry Schiffer, CPA, An Accountancy Corporation and Henry Schiffer, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Henry Schiffer, CPA, An Accountancy Corporation pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Henry Schiffer, CPA, An Accountancy Corporation (the "Firm") is a California corporation based in Beverly Hills, California. The Firm audited USCorp's financial statements for the company's 2003 fiscal year ended September 30, 2003. USCorp dismissed the Firm as its independent auditor on March 19, 2004.

2. Henry Schiffer, CPA ("Schiffer"), age 65, a resident of Los Angeles, California, is a certified public accountant licensed in the state of California since 1966. Schiffer was the engagement partner in connection with the Firm's audit of USCorp's financial statements for the company's 2003 fiscal year ended September 30, 2003.

B. FACTS

1. USCorp is a Nevada corporation based in Las Vegas, Nevada. USCorp's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and trades on the OTC Bulletin Board under the symbol USCS.OB. For its fiscal year ended September 30, 2003, USCorp reported no revenue and total assets of $2.5 million.

2. USCorp has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited USCorp's 2003 financial statements included in the company's

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> found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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

annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on December 24, 2003. As part of the audit, the Firm prepared and issued an audit report dated December 15, 2003 (the "USCorp audit report") which the company included in its 2003 Form 10-KSB. USCorp paid the Firm $2,500 for the audit work.[4]

4. At the time the Firm issued the USCorp audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Schiffer was the engagement partner on the Firm's audit of USCorp's 2003 financial statements. Schiffer participated in the preparation and issuance of the USCorp audit report.

6. By order dated October 14, 2004, the Board disapproved an application for registration submitted by the Firm based in part on the Firm's violation of Section 102(a) of the Act in issuing the USCorp audit report.[5] The order effectively prevented the Firm from becoming registered with the Board until after February 15, 2005, approximately one year from the date the Board issued a notice of hearing on the Firm's application.[6] Schiffer has only worked as an accountant through the Firm since before the Board's order and has not otherwise been associated with a public accounting firm registered with the Board.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[7]

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4 During the course of the Commission's investigation, the Firm voluntarily reimbursed USCorp the $2,500 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

5 PCAOB Release No. 2004-010 (October 14, 2004). The order also found that the Firm's issuance of the USCorp audit report violated Board Rule 2100, which implemented Section 102(a) of the Act. Id.

6 The order states that with respect to any new registration application the Firm submits after February 15, 2005, the Board will not issue a notice of hearing to determine whether to approve or disapprove such application based solely on the violations subject to the Board's order. Id.

7 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[8]

3. Based on the conduct described above, the Firm willfully[9] violated Section 102(a) of the Act.

4. Based on the conduct described above, Schiffer caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Schiffer caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents undertake not to request, demand, or accept, directly or indirectly, any compensation from USCorp in connection with the audit work associated with the USCorp audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Henry Schiffer, CPA, An Accountancy Corporation

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

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[8] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

[9] "Willfully" as used in this Offer means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Henry Schiffer, CPA

A. Schiffer shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Schiffer may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
Secretary

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

Commissioner Atkins Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12797

In the Matter of **RICHARD E. SELLERS, CPA,** **and** **LESTER REX ANDERSEN, CPA** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C and 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 102(e)(1)(i) and (iii) of the Commission's Rules of Practice[2] against Richard E. Sellers ("Sellers") and Lester Rex Andersen ("Andersen") (collectively, "Respondents").

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1 Section 4C provides, in relevant part, that:
The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (1) not to possess the requisite qualifications to represent others . . . or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

2 Rules 102(e)(1)(i) and (iii) provide, in pertinent part, that:
The Commission may censure any person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found...(i) not to possess the requisite qualifications to represent others; . . . or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

After an investigation the Division of Enforcement alleges that:

A. RESPONDENTS

1. Richard E. Sellers, CPA, is a resident of the State of Utah and has been a licensed CPA for 38 years; he is currently licensed in Nevada and New York. From February 2003 until in or about February 2004 Sellers was affiliated with the public accounting firm of Sellers & Andersen, LLC ("S&A"). Sellers and Andersen were the only members of S&A and it had no other employees. As of June 2007, S&A's legal existence was terminated by the State of Utah for nonpayment of annual fees. Since February 2004, Sellers has been affiliated with a registered public accounting firm for purposes of conducting audits of public reporting companies, while operating under his own name for other professional engagements.

2. Lester Rex Andersen, CPA, is a resident of Utah and has been a licensed CPA for over 48 years; he is currently licensed as a CPA in the State of Utah. From February 2003 until in or about February 2004 Andersen was affiliated with S&A. Since February 2004, he has been affiliated with a registered public accounting firm for purposes of conducting audits of public reporting companies, while operating under his own name for other professional engagements.

B. FACTS

1. Section 102(a) of the Sarbanes-Oxley Act of 2002 (the "Act"), prohibits any person that is not a registered public accounting firm with the Public Company Accounting Oversight Board ("Board") from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any issuer after October 22, 2003. S&A did not register with the Board on or before October 22, 2003.

2. Both Sellers and Andersen were aware of the October 22, 2003 deadline for S&A's registration with the Board. Sellers took it upon himself to be the person in the firm to make an application for registration with the Board on behalf of S&A. S&A ultimately filed a completed application for registration with the Board on December 9, 2003, but never became registered.

3. Even though S&A had failed to register with the Board, it issued reports after the October 22, 2003 deadline on the financial statements of five clients required to file periodic reports with the Commission. These reports were included in filings made by those issuers with the Commission on Form 10-KSB or Form 10-K. Both Sellers and Andersen prepared, issued, or participated in the preparation or issuance, of the five audit reports issued by S&A after October 22, 2003.

4. S&A was paid an aggregate of $9,615 by the issuers in audit fees for conducting audits of the financial statements of the five companies for which S&A filed audit reports after October 22, 2003.

C. S&A's Proceeding Before the Board

1. The Board prepared and sent a Notice of Hearing on the Registration Application of Sellers & Andersen, LLC, to S&A on January 20, 2004, to determine whether to accept or reject that application. In a response letter to the Board dated January 22, 2004, S&A stated it had released only two audit reports after October 22, 2003, when in fact, by that date it had released five audit reports.

2. In a subsequent letter to the Commission's Division of Corporation Finance, dated February 10, 2004, S&A stated that it had found two additional clients for which it had released audit reports after October 22, 2003. Even then, S&A did not admit to having issued a fifth report dated November 26, 2003.

3. S&A justified its actions to the Board by stating the firm had decided to issue the audit reports without being registered because its clients might be harmed if the filings were not made in a timely fashion. Ultimately, S&A withdrew its application for registration.

D. Subsequent Affiliation with Registered Public Accounting Firm

1. Sellers and Andersen referred their audit reporting clients to another Salt Lake City, Utah, public accounting firm that was registered with the Board. They also became employees of that firm for purposes of continuing to conduct audits of those companies, while operating under their own individual names for other non-audit professional engagements.

2. The registered public accounting firm with which Sellers and Andersen became affiliated performed re-audits of, and issued new reports on, all five issuers for which S&A had improperly issued reports. S&A paid the accounting firm $2,000 for these reaudits.

E. Violations

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[3]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[4]

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[3] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[4] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

3. Because S&A had not registered with Board, it lacked "the requisite qualifications" to issue audit reports after October 22, 2003. By participating in the preparation of five audit reports after October 22, 2003, by an audit firm that was not registered with the Board, Sellers and Andersen lacked "the requisite qualifications to represent others."

4. Although Sellers and Andersen were aware of the registration requirement, they nevertheless caused S&A to prepare and issue five audit reports after October 22, 2003, on the financial statements of companies required to file periodic reports with the Commission without first registering S&A with the Board. In so doing, S&A violated Section 102(a) of the Act.

5. Sellers and Andersen knowingly rendered substantial assistance to S&A in its primary violations of the Act, because they failed to register it with the Board before the October 22, 2003 deadline although they were aware of the registration requirement. They knew that their actions would result in the violation by S&A of Section 102(a) of the Act if S&A issued audit reports, without having been registered with the Board, with respect to the financial statements of issuers whose securities were registered with the Commission. In so doing, Sellers and Andersen willfully aided and abetted or caused the violations by S&A.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate 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. Whether, pursuant to Sections 4C(a)(1) and (3) of the Exchange Act and Rules 102(e)(1)(i) and (iii) of the Commission's Rules of Practice, Respondents should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission; and

C. Whether, pursuant to 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 Section 102(a) of the Act, and whether Respondents should be ordered to pay disgorgement of audit fees 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 Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56399 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2679 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12760

In the Matter of **Beckman Kirkland & Whitney,** **James M. Kirkland, CPA, and** **Robert J. Whitney, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Beckman Kirkland & Whitney, James M. Kirkland, CPA, and Robert J. Whitney, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and herby are, instituted against Beckman Kirkland & Whitney pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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Commission's Rules of Practice.[2]

II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Beckman Kirkland & Whitney (the "Firm") is a California partnership and a public accounting firm headquartered in Agoura Hills, California. The Firm audited The Flamemaster Corporation's financial statements for the company's 2003 fiscal year ended September 30, 2003. The firm resigned as The Flamemaster Corporation's independent auditor on May 5, 2004.

2. James M. Kirkland, CPA ("Kirkland"), age 46, is a certified public accountant licensed in the state of California since 1993. Kirkland was the engagement partner in connection with the Firm's audit of The Flamemaster Corporation's financial statements for the company's 2003 fiscal year ended September 30, 2003.

3. Robert J. Whitney, CPA ("Whitney"), age 45, is a certified public accountant licensed in the state of California since 1990. Whitney was the reviewing partner in connection with the Firm's audit of The Flamemaster Corporation's financial statements for the company's

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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

2003 fiscal year ended September 30, 2003.

B. FACTS

1. The Flamemaster Corporation ("Flamemaster") is a corporation with its headquarters in Sun Valley, California. Flamemaster's common stock traded on the pink sheets and was registered with the Commission pursuant to Section 12(g) of the Exchange Act until May 26, 2005, when the company filed a Form 15 with the Commission to terminate the registration of its stock. For its fiscal year ended September 30, 2003, Flamemaster reported revenues of $5.1 million and total assets of $7.4 million.

2. Flamemaster has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited Flamemaster's 2003 financial statements included in Flamemaster's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on December 19, 2003. As part of that audit, the Firm prepared and issued an audit report dated December 8, 2003 (the "Flamemaster audit report"), which the company included in its 2003 Form 10-KSB. Flamemaster paid the Firm $25,800 for the audit work.[4]

4. At the time the Firm issued the Flamemaster audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Kirkland was the engagement partner on the Firm's audit of Flamemaster's 2003 financial statements, and Whitney was the reviewing partner on the audit. Kirkland and Whitney participated in the preparation and issuance of the Flamemaster audit report.

6. By order dated June 8, 2005, the Board accepted an offer of settlement made by the Firm and disapproved an application for registration it had submitted based in part on the Firm's violation of Section 102(a) of the Act in issuing the Flamemaster audit report.[5] The order effectively prevented the Firm from becoming registered with the Board until after October 1, 2005.[6] Kirkland and Whitney have only worked as accountants through the Firm since before

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[4] During the course of the Commission's investigation, the Firm voluntarily reimbursed Flamemaster $25,800 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

[5] PCAOB Release No. 2005-012 (June 8, 2005). The order also found that the Firm's issuance of the Flamemaster audit report violated Board Rule 2100, which implemented Section 102(a) of the Act. Id.

[6] The order states that with respect to any new registration application the Firm submits after October 1, 2005, the Board will not issue a notice of hearing to determine whether to approve or disapprove such application based solely on the violations subject to the Board's order. Id. The Board noted in its order that it had received a registration application from the

the Board's order and have not otherwise been associated with a public accounting firm registered with the Board.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[7]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[8]

3. Based on the conduct described above, the Firm willfully[9] violated Section 102(a) of the Act.

4. Based on the conduct described above, Kirkland and Whitney caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Kirkland and Whitney caused the Firm's violation of Section 102(a) of the Act.

Firm on December 30, 2003. The Board issued a Notice of Hearing on that application dated February 2, 2004. In response, the Firm requested a hearing but then, withdrew its application before a determination by the Board. Id.

7 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

8 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

9 "Willfully" as used in this Offer means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

E. UNDERTAKING

Respondents undertake not to request, demand, or accept, directly or indirectly, any compensation from Flamemaster in connection with the audit work associated with the Flamemaster report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Beckman Kirkland & Whitney

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. James M. Kirkland, CPA

A. Kirkland shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Kirkland may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

3. **Robert J. Whitney, CPA**

A. Whitney shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Whitney may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56401 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2681 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12762

In the Matter of **Beutel Accountancy Corporation and Todd W. Beutel, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Beutel Accountancy Corporation and Todd W. Beutel, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") and that public administrative proceedings be, and hereby are, instituted against Beutel Accountancy Corporation pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Beutel Accountancy Corporation (the "Firm") is a California corporation and a public accounting firm headquartered in Agoura Hills, California. The Firm audited Vital Health Technologies, Inc.'s (also known as Caribbean American Health Resorts, Inc.) financial statements for the company's 2003 and 2004 fiscal years ended December 31, 2003, and December 31, 2004, respectively. Vital Health Technologies, Inc. dismissed the Firm as its independent auditor on May 20, 2005.

2. Todd W. Beutel, CPA ("Beutel"), age 42, is a certified public accountant licensed in the state of California since 1995. Beutel was the engagement partner in connection with the Firm's audit of Vital Health Technologies, Inc.'s financial statements for the company's 2003 and 2004 fiscal years ended December 31, 2003, and December 31, 2004, respectively.

B. FACTS

1. Vital Health Technologies, Inc. ("Vital Health") is a Minnesota corporation with its headquarters in Beverly Hills, California. Vital Health's common stock is quoted on the Pink Sheets under the symbol "CAHR" and is registered with the Commission pursuant to Section 12(g) of the Exchange Act. For fiscal year ended December 31, 2003, Vital Health reported revenues of $10,500, and total assets of $1 million. For fiscal year ended December 31, 2004,

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> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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

Vital Health reported revenues of $5,500, and total assets of $1 million.

2. Vital Health has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited Vital Health's 2003 financial statements included in Vital Health's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 14, 2004. As part of that audit, the Firm prepared and issued an audit report dated March 29, 2004, which the company included in its 2003 Form 10-KSB.

4. The Firm audited Vital Health's 2004 financial statements included in Vital Health's annual report for fiscal year 2004 on Form 10-KSB, filed with the Commission on April 15, 2005. As part of that audit, the Firm prepared and issued an audit report dated April 14, 2005 (together with the March 29, 2004 audit report, the "Vital Health audit reports"), which the company included in its 2004 Form 10-KSB. Vital Health paid the Firm a total of $22,000 for the 2003 and 2004 audit work.[4]

5. At the time the Firm issued the Vital Health audit reports, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

6. Beutel was the engagement partner on the Firm's audits of Vital Health's 2003 and 2004 financial statements. Beutel participated in the preparation and issuance of the Vital Health audit reports.

7. By public notice of disapproval dated July 28, 2005, effective as of May 10, 2005, the Board disapproved an application for registration submitted by the Firm based in part on the Firm's violation of Section 102(a) of the Act in issuing the Vital Health audit reports.[5]

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[6]

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4 During the course of the Commission's investigation, the Firm voluntarily reimbursed Vital Health the $22,000 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

5 PCAOB Release No. 2005-017 (July 28, 2005). The public notice of disapproval also found that the Firm's issuance of the Vital Health audit reports violated Board Rule 2100, which implemented Section 102(a) of the Act. Id.

6 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[7]

3. Based on the conduct described above, the Firm willfully[8] violated Section 102(a) of the Act.

4. Based on the conduct described above, Beutel caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Beutel caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKINGS

Respondents undertake not to request, demand, or accept, directly or indirectly, any compensation from Vital Health in connection with the audit work associated with the Vital Health audit reports. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Beutel Accountancy Corporation

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

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[7] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

[8] "Willfully" as used in this Offer means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Todd W. Beutel, CPA

A. Beutel shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Beutel may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56403 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2683 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12764

In the Matter of **Bruce Redlin, CPA,** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Bruce Redlin, CPA ("Respondent" or "Redlin") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

Document 32 of 105

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, 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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

A. RESPONDENT

Bruce Redlin, CPA, 55, of New Berlin, Wisconsin is a certified public accountant licensed in the state of Wisconsin since 1975 and doing business as a sole proprietorship. Redlin audited Commerce Group Corp.'s ("Commerce Group") financial statements for the company's 2003 fiscal year ended March 31, 2004.

B. FACTS

1. Commerce Group is a Wisconsin corporation with its headquarters in Milwaukee, Wisconsin. Commerce Group's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the OTC Bulletin Board under the symbol CGCO. For its fiscal year ended March 31, 2004, Commerce Group reported no revenues and total assets of $35.4 million.

2. Commerce Group has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. Redlin audited Commerce Group's 2003 financial statements included in Commerce Group's annual report for fiscal year 2003 on Form 10-K, filed with the Commission on May 27, 2004. As part of that audit, Redlin prepared and issued an audit report dated May 10, 2004 (the "Commerce Group audit report"), which the company included in its 2003 Form 10-K. Commerce Group paid Redlin $6,500 for the audit work.[4]

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

[4] During the course of the Commission's investigation, Redlin voluntarily reimbursed Commerce Group the $6,500 in audit fees. In view of Redlin's reimbursement, the Commission is not ordering disgorgement in this matter.

4. At the time Redlin prepared and issued the Commerce Group audit report, he was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, Respondent willfully[7] violated Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that Redlin willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002.

E. UNDERTAKING

Respondent has undertaken not to request, demand, or accept, directly or indirectly, any compensation from Commerce Group in connection with the audit work associated with the Commerce Group audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

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5 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

6 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

7 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

A. Redlin shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Redlin is censured.

C. Redlin may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56406 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2686 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12767

In the Matter of

Charles R. Hunt, CPA, PA and
Charles R. Hunt, CPA,

Respondents.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Charles R. Hunt, CPA, PA and Charles R. Hunt, CPA, (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Charles R. Hunt, CPA, PA pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Charles R. Hunt, CPA, PA (the "Firm") is a Florida professional association headquartered in Edgewater, Florida. The Firm audited E' Prime Aerospace Corporation's ("E' Prime") financial statements for the company's 2003 fiscal year ended September 30, 2003. E' Prime dismissed the Firm as its independent auditor on May 27, 2005.

2. Charles R. Hunt, CPA, ("Hunt"), 64, of Titusville, Florida, is a certified public accountant licensed in the state of Florida since 1989. Hunt was the engagement partner in connection with the Firm's audit of E' Prime's financial statements for the company's 2003 fiscal year ended September 30, 2003.

B. FACTS

1. E' Prime is a Colorado corporation with its headquarters in Titusville, Florida. E' Prime's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and trades on the Pink Sheets under the symbol EPEO. For its fiscal year ended September 30, 2003, E' Prime reported no revenues and total assets of $234,848.

2. E' Prime has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited E' Prime's 2003 financial statements included in E' Prime's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on December 23, 2003. As part of that audit, the Firm prepared and issued an audit report dated December 18, 2003

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3 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.

(the "E' Prime audit report"), which the company included in its 2003 Form 10-KSB. E' Prime paid the Firm $3,500 for the audit work.[4]

4. At the time the Firm issued the E' Prime audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Hunt was the engagement partner on the Firm's audit of E' Prime's 2003 financial statements. Hunt participated in the preparation and issuance of the E' Prime audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, the Firm willfully[7] violated Section 102(a) of the Act.

4. Based on the conduct described above, Hunt caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Hunt caused the Firm's violation of Section 102(a) of the Act.

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[4] During the course of the Commission's investigation, the Firm voluntarily reimbursed E' Prime the $3,500 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

[5] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[6] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

[7] "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from E' Prime in connection with the audit work associated with the E' Prime audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Charles R. Hunt, CPA, PA

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Charles R. Hunt, CPA,

A. Hunt shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Hunt may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12791

In the Matter of

FREDERICK A. KADEN & CO., and FREDERICK A. KADEN, CPA,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 4C 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 that public administrative proceedings be, and hereby are, instituted pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e) of the Commission's Rules of Practice against Frederick A. Kaden & Co. ("Kaden & Co.") and Frederick A. Kaden, CPA ("Kaden") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. **Frederick A. Kaden & Co.** is a New York corporation and public accounting firm headquartered in Brentwood, New York. Kaden & Co. prepared and issued an audit report dated March 17, 2004, in connection with its audit of Daxor Corporation ("Daxor").

2. **Frederick A. Kaden, CPA,** has been a certified public accountant licensed in New York since 1982. As engagement partner on the Daxor engagement, Kaden participated in the preparation and issuance of the March 17, 2004 Daxor audit report.

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B. OTHER RELEVANT ENTITIES

1. Daxor is a New York corporation based in New York, New York. During the relevant period, Daxor's common stock traded on the American Stock Exchange. Its common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act. Daxor reported $3,165,437 in revenue and total assets of $48,300,532 for its fiscal year ended 2003. Daxor has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

C. FAILURE TO REGISTER WITH THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

1. Section 102(a) of the Act prohibits any person that is not a registered public accounting firm with the Public Company Accounting Oversight Board ("PCAOB") from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any public reporting company after October 22, 2003.

2. At no point did any of the Respondents register with the PCAOB as a public accounting firm.

3. Kaden & Co. audited Daxor's financial statements included in Daxor's annual report for fiscal year 2003 on Form 10-K, filed with the Commission on March 30, 2004.

4. Kaden & Co. prepared and issued an audit report dated March 17, 2004, which was included in Daxor's Form 10-K.

5. Kaden participated in auditing the financial statements included in Daxor's annual report for fiscal year 2003 on Form 10-K, filed with the Commission on March 30, 2004.

6. Kaden participated in the preparation and issuance of an audit report dated March 17, 2004, which was included in Daxor's Form 10-K.

7. Kaden & Co. received $22,850 for conducting an audit of Daxor's financial statements for its fiscal year 2003 and for issuing an audit report on those financial statements.

D. VIOLATIONS

1. Section 4C(a) of the Exchange Act provides, in relevant part, that the Commission "may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission … (1) not to possess the requisite qualifications to represent others … or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder."

2. Rule 102(e)(1) of the Commission's Rules of Practice provides that the Commission "may censure a person or deny, temporarily or permanently, the privilege of

appearing or practicing before it in any way to any person who is found by the Commission ... (i) not to possess the requisite qualifications to represent others … or (iii) to have willfully violated … any provision of the Federal securities laws or the rules and regulations thereunder."

3. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."

4. Because Kaden & Co. had not registered with the PCAOB, it lacked "the requisite qualifications" to issue an audit report dated March 17, 2004.

5. By participating in the preparation or issuance of an audit report after October 22, 2003 by an audit firm that was not registered with the PCAOB, Kaden lacked "the requisite qualifications to represent others."

6. In violation of Section 102(a) of the Act, Kaden & Co. prepared and issued an audit report on the financial statements of a reporting company after October 22, 2003, without first registering with the PCAOB. Kaden & Co. thus also willfully violated the federal securities laws.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate that public administrative 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; and

B. Whether, pursuant to Sections 4C(a)(1) and 4C(a)(3) of the Exchange Act and Rules 102(e)(1)(i) and 102(e)(1)(iii) of the Commission's Rules of Practice, Kaden & Co. should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

C. Whether, pursuant to Section 4C(a)(1) of the Exchange Act and Rule 102(e)(1)(i) of the Commission's Rules of Practice, Kaden should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Florence E Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56413 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2693 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12774

In the Matter of

Henry L. Creel Co., Inc. and
Henry L. Creel, CPA,

Respondents.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Henry L. Creel Co., Inc. and Henry L. Creel, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Henry L. Creel Co., Inc. pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Henry L. Creel Co., Inc. (the "Firm") is an Ohio corporation and a public accounting firm headquartered in Shaker Heights, Ohio. The Firm audited AuGRID Corporation's ("AuGRID") financial statements for the company's 2003 fiscal year ended December 31, 2003. AuGRID dismissed the Firm as its independent auditor on January 27, 2005.

2. Henry L. Creel, CPA, ("Creel"), 64, of Shaker Heights, Ohio, is a certified public accountant licensed in the state of Ohio since 1972. Creel was the engagement partner in connection with the Firm's audit of AuGRID's financial statements for the company's 2003 fiscal year ended December 31, 2003.

B. FACTS

1. AuGRID is a Nevada corporation with its headquarters in Houston, Texas. During the relevant period, AuGRID's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and traded on the Pink Sheets under the symbol AGHD. For its fiscal year ended December 31, 2003, AuGRID reported revenues of $111,000 and total assets of $477,000.

2. AuGRID has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited AuGRID's 2003 financial statements included in AuGRID's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 14, 2004. As part of that audit, the Firm prepared and issued an audit report dated March 1, 2004 (the "AuGRID audit report"), which the company included in its 2003 Form 10-KSB. The Firm did not collect any fees for the audit work.

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[3] 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.

4. At the time the Firm issued the AuGRID audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Creel was the engagement partner on the Firm's audit of AuGRID's 2003 financial statements. Creel participated in the preparation and issuance of the AuGRID audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[4]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[5]

3. Based on the conduct described above, the Firm willfully[6] violated Section 102(a) of the Act.

4. Based on the conduct described above, Creel caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Creel caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from AuGRID in connection with the audit work associated with the AuGRID audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

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4 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

5 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

6 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

IV.

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

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

1. **Henry L. Creel Co., Inc.**

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. **Henry L. Creel, CPA**

A. Creel shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Creel may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56415 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2695 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12776

In the Matter of **Isaac Gordon, CPA,** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Isaac Gordon, CPA ("Respondent" or "Gordon") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, 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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

A. RESPONDENT

Isaac Gordon, CPA, 47, of Los Angeles, California, is a certified public accountant licensed in the state of Maryland and doing business as a sole proprietorship. Gordon audited Toffee Sensations, Inc.'s financial statements for the company's 2003 fiscal year ended September 30, 2003, as well as those for the period ended April 30, 2004. Gordon has been licensed as a CPA in Maryland since 1988.

B. FACTS

1. Toffee Sensations, Inc. ("Toffee Sensations") is a California corporation with its headquarters in Los Angeles, California. The audit report in question was issued in connection with a Form SB-2/A registration statement filed with the Commission by Toffee Sensations which has not yet gone effective. For its fiscal year ended September 30, 2003, Toffee Sensations reported revenues of approximately $6,500 and total assets of approximately $1,700.

2. Toffee Sensations has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. Gordon audited Toffee Sensations' 2003 financial statements, as well as those for the period ended April 30, 2004. As part of that audit, Gordon prepared and issued an audit report dated May 13, 2004 (the "Toffee Sensations audit report"), which the company included in its Form SB-2/A registration statement filed with the Commission on August 24, 2004. Gordon received no fees for the audit work.

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

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

4. At the time Gordon prepared and issued the Toffee Sensations audit report, he was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[4]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[5]

3. Based on the conduct described above, Respondent willfully[6] violated Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that Gordon willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002.

E. UNDERTAKING

Respondent undertakes not to request, demand, or accept, directly or indirectly, any compensation from Toffee Sensations in connection with the audit work associated with the Toffee Sensations audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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[4] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[5] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

[6] "Willfully" as used in this Offer means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

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

A. Gordon shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Gordon is censured.

C. Gordon may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56417 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2697 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12778

In the Matter of McNeal, Williamson & Co. and Daniel L. Williamson, CPA, Respondents.	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against McNeal, Williamson & Co. and Daniel L. Williamson, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against McNeal, Williamson & Co. pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

[2] Rule 102(e)(1)(iii) provides, in relevant part, that:

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. McNeal, Williamson & Co. (the "Firm") is a West Virginia partnership and a public accounting firm headquartered in Logan, West Virginia. The Firm audited the financial statements of Logan County BancShares, Inc. ("Logan County") for the company's 2003 fiscal year ended December 31, 2003. The Firm resigned as Logan County's independent auditor on or around July 28, 2004.

2. Daniel L. Williamson, 61, of Kenova, West Virginia, is a certified public accountant licensed in the state of West Virginia since 1976. Williamson was the engagement partner in connection with the Firm's audit of Logan County's financial statements for the company's 2003 fiscal year ended December 31, 2003.

B. FACTS

1. Logan County is a West Virginia corporation with its headquarters in Logan, West Virginia. For its fiscal year ended December 31, 2003, Logan County reported revenues of $8.8 million and total assets of $176 million.

2. Logan County has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited Logan County's 2003 financial statements included in Logan County's annual report for fiscal year 2003 on Form 10-K, filed with the Commission on April 14, 2004. As part of that audit, the Firm prepared and issued an audit report dated February 26, 2004 (the "Logan County audit report"), which the company included in its 2003 Form 10-K. Logan

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[3] 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.

County paid the Firm $32,000 for the audit work.[4]

4. At the time the Firm issued the Logan County audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Williamson was the engagement partner on the Firm's audit of Logan County's 2003 financial statements. Williamson participated in the preparation and issuance of the Logan County audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, the Firm willfully[7] violated Section 102(a) of the Act.

4. Based on the conduct described above, Williamson caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Williamson caused the Firm's violation of Section 102(a) of the Act.

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4 During the course of the Commission's investigation, the Firm voluntarily reimbursed Logan County the $32,000 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

5 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

6 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

7 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from Logan County in connection with the audit work associated with the Logan County audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. McNeal, Williamson & Co.

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Daniel L. Williamson, CPA

A. Williamson shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Williamson may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56419 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2699 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12780

In the Matter of **Milner and Brock, CPA's and Stephen D. Milner, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Milner and Brock, CPA's and Stephen D. Milner, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Milner and Brock, CPA's pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Milner and Brock, CPA's (the "Firm") is a South Carolina partnership and a public accounting firm headquartered in Greenville, South Carolina. The Firm audited Myriad Entertainment & Resorts, Inc.'s ("Myriad") financial statements for the company's 2003 fiscal year ended December 31, 2003. Myriad dismissed the Firm as its independent auditor on January 17, 2005.

2. Stephen D. Milner, CPA, ("Milner"), 54, of Greenville, South Carolina, is a certified public accountant licensed in the state of South Carolina since 1977. Milner was the engagement partner in connection with the Firm's audit of Myriad's financial statements for the company's 2003 fiscal year ended December 31, 2003.

B. FACTS

1. Myriad (known as Synergy 2000, Inc. during the relevant period) is a Delaware corporation with its headquarters in Edmonton, Alberta, Canada. Myriad's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and trades on the Pink Sheets under the symbol MYRA. For its fiscal year ended December 31, 2003, Myriad reported revenues of $949 and total assets of $6,701.

2. Myriad has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited Myriad's 2003 financial statements included in Myriad's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 29, 2004. As part of that audit, the Firm prepared and issued an audit report dated March 22, 2004 (the "Myriad audit report"), which the company included in its 2003 Form 10-KSB. Myriad paid the Firm

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3 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.

$7,500 for the audit work.[4]

4. At the time the Firm issued the Myriad audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Milner was the engagement partner on the Firm's audit of Myriad's 2003 financial statements. Milner participated in the preparation and issuance of the Myriad audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, the Firm willfully[7] violated Section 102(a) of the Act.

4. Based on the conduct described above, Milner caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Milner caused the Firm's violation of Section 102(a) of the Act.

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4 During the course of the Commission's investigation, the Firm voluntarily reimbursed Myriad the $7,500 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

5 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

6 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

7 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from Myriad in connection with the audit work associated with the Myriad audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Milner and Brock, CPA's

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Stephen D. Milner, CPA

A. Milner shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Milner may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56416 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2696 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12777

In the Matter of Joseph Mao, CPA, Respondent.	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Joseph Mao, CPA ("Respondent" or "Mao") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

[2] Rule 102(e)(1)(iii) provides, in relevant part, that:

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, 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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

A. RESPONDENT

Joseph Mao, CPA, 55, of New Hyde Park, New York is a certified public accountant licensed in the state of New York and doing business as a sole proprietorship. Mao audited SOYODO Group Holdings, Inc.'s ("Soyodo") financial statements for the company's 2003 fiscal year ended December 31, 2003. Mao has been licensed as a CPA in New York since 1995.

B. FACTS

1. Soyodo (known as TOP Group Holdings, Inc. during the relevant time period) is a Delaware corporation with its headquarters in New York. Soyodo's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is listed on the OTC Bulletin Board under the symbol SOYD (the company's symbol was QXIT during the relevant time period). For its fiscal year ended December 31, 2003, Soyodo reported no revenues and total assets of $12,500.

2. Soyodo has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. Mao audited Soyodo's 2003 financial statements included in Soyodo's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 13, 2004. As part of that audit, Mao prepared and issued an audit report dated April 5, 2004 (the "Soyodo audit report"), which the company included in its 2003 Form 10-KSB. Soyodo paid Mao $2,000 for the audit work.[4]

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

[4] Before the Commission's investigation, Mao voluntarily reimbursed Soyodo the $2,000 in audit fees. In view of Mao's reimbursement, the Commission is not ordering disgorgement in this matter.

4. At the time Mao prepared and issued the Soyodo audit report, he was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, Respondent willfully[7] violated Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that Mao willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002.

E. UNDERTAKING

Respondent has undertaken not to request, demand, or accept, directly or indirectly, any compensation from Soyodo in connection with the audit work associated with the Soyodo audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

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5 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

6 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

7 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

A. Mao shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Mao is censured.

C. Mao may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56412 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2692 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12773

In the Matter of **Harvey S. Weingard, CPA,** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Harvey S. Weingard, CPA ("Respondent" or "Weingard") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, 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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

A. RESPONDENT

Harvey S. Weingard, CPA, 73, of Boynton Beach, Florida, is a certified public accountant licensed in the state of Florida since 2002 and doing business as a sole proprietorship. Weingard audited The Furia Organization, Inc.'s ("Furia") financial statements for the company's 2003 and 2004 fiscal years ended June 30, 2003, and June 30, 2004, respectively.

B. FACTS

1. Furia is a Delaware corporation with its headquarters in Rockwall, Texas. For its fiscal years ended June 30, 2003, and June 30, 2004, Furia had no revenues and no assets.

2. Furia has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. Weingard audited Furia's 2003 financial statements included in Furia's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on July 6, 2004. As part of that audit, Weingard prepared and issued an audit report dated June 30, 2004, which the company included in its 2003 Form 10-KSB. Furia paid Weingard $3,000 for the audit work.

4. Weingard also audited Furia's 2004 financial statements included in Furia's annual report for fiscal year 2004 on Form 10-KSB, filed with the Commission on October 21, 2004. As part of that audit, Weingard prepared and issued an audit report dated October 13, 2004 (together with the June 30, 2004 audit report, the "Furia audit reports"), which the company included in its

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

2004 Form 10-KSB. Furia paid Weingard $5,000 for the audit work.[4]

5. At the time Weingard prepared and issued the Furia audit reports, he was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

6. By order dated April 18, 2005, the Board disapproved an application for registration submitted by Weingard based in part on Weingard's violation of Section 102(a) of the Act in issuing the Furia audit reports.[5] The order effectively prevented Weingard from becoming registered with the Board until after February 15, 2006, approximately one year from the date the Board issued a notice of hearing on Weingard's application.[6] Weingard has only worked as an accountant through his sole proprietorship and has not otherwise been associated with a public accounting firm registered with the Board.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[7]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[8]

3. Based on the conduct described above, Respondent willfully[9] violated Section 102(a) of the Act.

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4 During the course of the Commission's investigation, Weingard voluntarily reimbursed Furia the $8,000 in audit fees through a combination of repayment and the provision of non-audit services to Furia. In view of Weingard's reimbursement, the Commission is not ordering disgorgement in this matter.

5 PCAOB Release No. 2005-004 (Apr. 18, 2005). The order also found that Weingard's issuance of the Furia audit reports violated Board Rule 2100, which implemented Section 102(a) of the Act.

6 The order states that with respect to any new registration application Weingard submits after February 15, 2006, the Board will not issue a notice of hearing to determine whether to approve or disapprove such application based solely on the violations subject to the Board's order. Id.

7 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

8 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

9 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

D. FINDINGS

Based on the foregoing, the Commission finds that Weingard willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002.

E. UNDERTAKING

Respondent has undertaken not to request, demand, or accept, directly or indirectly, any compensation from Furia in connection with the audit work associated with the Furia audit reports. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

A. Weingard shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Weingard is censured.

C. Weingard may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56418 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2698 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12779

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

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 Michael C. Lingerman, CPA ("Respondent" or "Lingerman").

II.

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

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III.

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

A. RESPONDENT

Michael C. Lingerman, CPA, 40, of Philadelphia, Pennsylvania, is a certified public accountant licensed in the state of Pennsylvania since 1994 and since the dissolution of his previous accounting firm, Gross, Kreger & Passio, L.L.C. (the "Firm"), is doing business as Lingerman and Associates, CPA, a sole proprietorship. The Firm audited the financial statements of Diversified Historic Investments, VI ("Diversified") for the 2002 fiscal year ended December 31, 2002. Lingerman was the engagement partner for the Firm's audit of Diversified.

B. FACTS

1. Diversified is a Pennsylvania limited partnership with its headquarters in Philadelphia, Pennsylvania. Diversified's partnership units are registered with the Commission pursuant to Section 12(g) of the Exchange Act but are not listed on any exchange. For its fiscal year ended December 31, 2002, Diversified reported revenues of $2.4 million and total assets of $13 million.

2. Diversified has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited Diversified's 2002 financial statements included in Diversified's annual report for fiscal year 2002 on Form 10-K, filed with the Commission on September 8, 2004. As part of that audit, the Firm prepared and issued an audit report dated June 10, 2004 (the "Diversified audit report"), which the company included in its 2002 Form 10-K. Diversified never paid the Firm or Lingerman any fee for the audit work.

4. At the time the Firm prepared and issued the Diversified audit report, the Firm was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Lingerman was the engagement partner on the Firm's audit of Diversified's 2002 financial statements. Lingerman participated in the preparation and issuance of the Diversified audit report

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or

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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.

issuance of, any audit report with respect to any issuer."[2]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[3]

3. Based on the conduct described above, Lingerman caused the Firm's violation of Section 102(a) the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that Lingerman caused the Firm's violation of Section 102(a) of the Sarbanes-Oxley Act of 2002.

E. UNDERTAKING

Respondent has undertaken not to request, demand, or accept, directly or indirectly, any compensation from Diversified in connection with the audit work associated with the Diversified audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Lingerman shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Lingerman may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

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[2] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[3] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56421 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2701 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12782

In the Matter of **Preferred Accounting Services, Inc. and Ana Costales, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Preferred Accounting Services, Inc. and Ana Costales, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Preferred Accounting Services, Inc. pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Preferred Accounting Services, Inc. (the "Firm") is a Florida corporation and a public accounting firm headquartered in Miami, Florida. The Firm audited New Era Trading Group, Inc.'s ("New Era") financial statements for the company's 2003 fiscal year ended December 31, 2003.

2. Ana Costales, CPA, ("Costales"), 41, of Miami, Florida is a certified public accountant licensed in the state of Florida since 1982. Costales was the engagement partner in connection with the Firm's audit of New Era's financial statements for the company's 2003 fiscal year ended December 31, 2003. Costales has been licensed as a CPA in Florida since 1982.

B. FACTS

1. New Era is a Florida corporation with its headquarters in Pembroke Pines, Florida. During the relevant period, New Era's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act. For its fiscal year ended December 31, 2003, New Era reported no revenues and no assets.

2. New Era has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited New Era's 2003 financial statements included in New Era's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on July 19, 2004. As part of that audit, the Firm prepared and issued an audit report dated April 17, 2004 (the "New Era audit report"), which the company included in its 2003 Form 10-KSB. New Era paid the Firm

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[3] 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.

$100 for the audit work.[4]

4. At the time the Firm issued the New Era audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Costales was the engagement partner on the Firm's audit of New Era's 2003 financial statements. Costales participated in the preparation and issuance of the New Era audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, the Firm willfully[7] violated Section 102(a) of the Act.

4. Based on the conduct described above, Costales caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Costales caused the Firm's violation of Section 102(a) of the Act.

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4 During the course of the Commission's investigation, the Firm voluntarily reimbursed New Era the $100 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

5 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

6 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

7 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from New Era in connection with the audit work associated with the New Era audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Preferred Accounting Services, Inc.

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Ana Costales, CPA

A. Costales shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Costales may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which she is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. She has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which she is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56423 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2703 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12784

In the Matter of **Reed & Taylor, CPAs, P.C. and Robert E. Reed, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Reed & Taylor, CPAs, P.C. and Robert E. Reed, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Reed & Taylor, CPAs, P.C. pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

[2] Rule 102(e)(1)(iii) provides, in relevant part, that:

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Reed & Taylor, CPAs, P.C. (the "Firm") is a Michigan professional corporation and a public accounting firm headquartered in Detroit, Michigan. The Firm audited Buckeye Ventures, Inc.'s ("Buckeye Ventures") financial statements for the company's 2003 fiscal year ended December 31, 2003. Buckeye Ventures dismissed the Firm as its independent auditor on January 20, 2005.

2. Robert E. Reed, CPA, ("Reed"), 54, of Detroit, Michigan, is a certified public accountant licensed in the state of Michigan. Reed was the engagement partner in connection with the Firm's audit of Buckeye Ventures's financial statements for the company's 2003 fiscal year ended December 31, 2003.

B. FACTS

1. Buckeye Ventures (known as World Wide Motion Pictures Corporation during the relevant period) is a Michigan corporation with its headquarters in San Diego, California. Buckeye Ventures's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and trades on the OTC Bulletin Board under the symbol BEYV. For its fiscal year ended December 31, 2003, Buckeye Ventures reported revenues of $16,300 and total assets of approximately $11 million.

2. Buckeye Ventures has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited Buckeye Ventures's 2003 financial statements included in Buckeye Ventures's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 23, 2004. As part of that audit, the Firm prepared and issued an audit

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3 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.

report dated March 12, 2004 (the "Buckeye Ventures audit report"), which the company included in its 2003 Form 10-KSB. Buckeye Ventures paid the Firm $500 for the audit work.[4]

4. At the time the Firm issued the Buckeye Ventures audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Reed was the engagement partner on the Firm's audit of Buckeye Ventures's 2003 financial statements. Reed participated in the preparation and issuance of the Buckeye Ventures audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, the Firm willfully[7] violated Section 102(a) of the Act.

4. Based on the conduct described above, Reed caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Reed caused the Firm's violation of Section 102(a) of the Act.

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[4] During the course of the Commission's investigation, the Firm voluntarily reimbursed Buckeye Ventures the $500 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

[5] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[6] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

[7] "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from Buckeye Ventures in connection with the audit work associated with the Buckeye Ventures audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Reed & Taylor, CPAs, P.C.

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Robert E. Reed, CPA

A. Reed shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Reed may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56398 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2678 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12759

In the Matter of Andrew M. Smith, CPA, Respondent.	ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Andrew M. Smith, CPA ("Respondent" or "Smith") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, 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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

A. RESPONDENT

Andrew M. Smith, CPA, age 58, of Los Angeles, California, is a certified public accountant licensed in the state of California since 1972, doing business as a sole proprietorship. Smith audited Safe Travel Care, Inc.'s, Meridian Holdings, Inc.'s, and InterCare DX, Inc.'s financial statements for each company's respective 2003 fiscal year ended December 31, 2003.

B. FACTS

1. Safe Travel Care, Inc. ("Safe Travel") is a Nevada corporation based in Cardiff, California. During the relevant period, Safe Travel's common stock traded on the OTC Bulletin Board. Its common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. Safe Travel reported no revenue and total assets of $146,000 for fiscal year ended December 31, 2003.

2. Meridian Holdings, Inc. ("Meridian") is a Colorado corporation based in Culver City, California. Meridian's common stock trades on the Pink Sheets under the symbol MRDH.PK and is registered with the Commission pursuant to Section 12(g) of the Exchange Act. The company reported revenues of approximately $2.6 million and total assets of $5.3 million for fiscal year ended December 31, 2003.

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

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

3. InterCare DX, Inc. ("InterCare") is a California corporation based in Los Angeles, California. InterCare's common stock trades on the OTC Bulletin Board under the symbol ICCO.OB and is registered with the Commission pursuant to Section 12(g) of the Exchange Act. The company reported no revenue and total assets of $1.5 million for fiscal year ended December 31, 2003.

4. Safe Travel, Meridian, and InterCare, each, has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

5. Smith audited Safe Travel's 2003 financial statements included in Safe Travel's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on May 6, 2004. As part of that audit, Smith prepared and issued an audit report dated February 20, 2004 (the "Safe Travel audit report"), which the company included in its 2003 Form 10-KSB. Smith audited Meridian's 2003 financial statements included in Meridian's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 1, 2004. As part of that audit, Smith prepared and issued an audit report dated March 31, 2004 (the "Meridian audit report"), which the company included in its 2003 Form 10-KSB. Smith audited InterCare's 2003 financial statements included in InterCare's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 31, 2004. As part of that audit, Smith prepared and issued an audit report, also dated March 31, 2004 (the "InterCare audit report"), which the company included in its 2003 Form 10-KSB. Safe Travel, Meridian, and InterCare, collectively, paid Smith $9,500 for the audit work.[4]

6. At the time Smith prepared and issued the Safe Travel, Meridian, and InterCare audit reports, he was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

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[4] During the course of the Commission's investigation, Smith voluntarily reimbursed Safe Travel, Meridian, and InterCare the $9,500 in audit fees through the provision of non-audit or other services to the issuers. In view of Smith's reimbursement, the Commission is not ordering disgorgement in this matter.

[5] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[6] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003.

3. Based on the conduct described above, Respondent willfully[7] violated Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that Smith willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002.

E. UNDERTAKING

Respondent undertakes not to request, demand, or accept, directly or indirectly, any compensation from Safe Travel, Meridian, and InterCare in connection with the audit work associated with the audit reports for these companies. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

A. Smith shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Smith is censured.

C. Smith may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

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See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

[7] "Willfully" as used in this Offer means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56425 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2705 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12786

In the Matter of **United Financial CPA PC and Anowar Hossain, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against United Financial CPA PC and Anowar Hossain, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against United Financial CPA PC pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. United Financial CPA PC (the "Firm") (known as United Financial LLC during the relevant time period) is a New York professional corporation and a public accounting firm headquartered in New York, New York. The Firm audited RedHand International, Inc.'s ("RedHand") financial statements for the company's 2003 fiscal year ended December 31, 2003. RedHand dismissed the Firm as its independent auditor in April 2005.

2. Anowar Hossain, CPA, ("Hossain"), 44, of New York, New York, is a certified public accountant licensed in the state of New York since 1994. Hossain was the engagement partner in connection with the Firm's audit of RedHand's financial statements for the company's 2003 fiscal year ended December 31, 2003.

B. FACTS

1. RedHand is a Nevada corporation with its headquarters in New York, New York. RedHand's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. For its fiscal year ended December 31, 2003, RedHand reported no revenues or assets.

2. RedHand has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited RedHand's 2003 financial statements included in RedHand's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on November 24, 2004. As part of that audit, the Firm prepared and issued an audit report dated November 9, 2004 (the "RedHand audit report"), which the company included in its 2003 Form 10-KSB. RedHand

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[3] 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.

paid the Firm $3,500 for the audit work.[4]

4. At the time the Firm issued the RedHand audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Hossain was the engagement partner on the Firm's audit of RedHand's 2003 financial statements. Hossain participated in the preparation and issuance of the RedHand audit report.

6. By order dated August 29, 2005, the Board disapproved an application for registration submitted by the Firm based in part on the Firm's violation of Section 102(a) of the Act in issuing the RedHand audit report.[5] The order effectively prevented the Firm from becoming registered with the Board until after May 15, 2006, approximately one year from the date the Board issued a notice of hearing on the Firm's application.[6] Hossain has only worked as an accountant through the Firm since before the Board's order and has not otherwise been associated with a public accounting firm registered with the Board.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[7]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[8]

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[4] During the course of the Commission's investigation, the Firm voluntarily reimbursed RedHand the $3,500 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

[5] PCAOB Release No. 2005-018 (Aug. 29, 2005). The order also found that the Firm's issuance of the RedHand audit report violated Board Rule 2100, which implemented Section 102(a) of the Act, and that the Firm violated Board Rule 2101 when it failed to identify and to provide required information concerning the RedHand audit report on the Firm's registration application. Id.

[6] The order states that with respect to any new registration application the Firm submits after May 15, 2006, the Board will not issue a notice of hearing to determine whether to approve or disapprove such application based solely on the violations subject to the Board's order. Id.

[7] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[8] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

3. Based on the conduct described above, the Firm willfully[9] violated Section 102(a) of the Act.

4. Based on the conduct described above, Hossain caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Hossain caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from RedHand in connection with the audit work associated with the RedHand audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. United Financial CPA PC

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

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9 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

2. **Anowar Hossain, CPA**

A. Hossain shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Hossain may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56400 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2680 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12761

In the Matter of

Berger, Apple & Associates Ltd. and
Mitchell S. Seifert, CPA,

Respondents.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Berger, Apple & Associates Ltd. and Mitchell S. Seifert, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Berger, Apple & Associates Ltd. pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Berger, Apple & Associates Ltd. (the "Firm") is an Ohio limited liability company and public accounting firm based in Beachwood, Ohio. The Firm audited MC Industrial Group, Inc.'s ("MC Industrial") financial statements for the company's 2003 fiscal year ended December 31, 2003.

2. Mitchell S. Seifert, CPA, ("Seifert"), 43, of Solon, Ohio, is a certified public accountant licensed in the state of Ohio since 1997. Seifert was the engagement partner in connection with the Firm's audit of MC Industrial for the company's 2003 fiscal year ended December 31, 2003.

B. FACTS

1. MC Industrial (known as New Jersey Acquisition, Inc. during the relevant time period) is a Delaware corporation with its headquarters in Lakewood, New Jersey. MC Industrial's common stock is registered pursuant to Section 12(g) of the Exchange Act and does not currently trade on any market. For its fiscal year ended December 31, 2003, MC Industrial reported no revenues and no assets.

2. MC Industrial has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited MC Industrial's 2003 financial statements included in MC Industrial's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 12, 2004. As part of that audit, the Firm prepared and issued an audit report dated March 8, 2004 (the "MC Industrial audit report"), which the company included in its 2003 Form 10-KSB. The Firm did not collect any fees for the audit work.

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[3] 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.

4. At the time the Firm issued the MC Industrial audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Seifert was the engagement partner on the Firm's audit of MC Industrial's 2003 financial statements. Seifert participated in the preparation and issuance of the MC Industrial audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[4]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[5]

3. Based on the conduct described above, the Firm willfully[6] violated Section 102(a) of the Act.

4. Based on the conduct described above, Seifert caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Seifert caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from MC Industrial in connection with the audit work associated with the MC Industrial audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

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4 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

5 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

6 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

IV.

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

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

1. Berger, Apple & Associates Ltd.

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Mitchell S. Seifert, CPA

A. Seifert shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Seifert may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56402 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2682 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 12763

In the Matter of

Bray & Associates CPA's LLC and Arnold David Bray, CPA,

Respondents.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Bray & Associates CPA's LLC and Arnold David Bray, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Bray & Associates CPA's LLC pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Bray & Associates CPA's LLC (the "Firm") is an Indiana limited liability company headquartered in Greencastle, Indiana. The Firm audited Alanar Real Estate Investment Trust Series 1 Corporation's ("Alanar") balance sheet as of May 19, 2004.

2. Arnold David Bray, CPA, ("Bray"), 59, of Greencastle, Indiana, is a certified public accountant licensed in the state of Indiana since 1977. Bray was the engagement partner in connection with the Firm's audit of Alanar's balance sheet as of May 19, 2004.

B. FACTS

1. Alanar is an Indiana corporation with its headquarters in Sullivan, Indiana. As of May 19, 2004, Alanar reported total assets of $200,000.

2. Alanar has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited Alanar's balance sheet as of May 19, 2004, which was included in Alanar's registration statement on Form S-11/A, filed with the Commission on September 15, 2004. As part of that audit, the Firm prepared and issued an audit report dated May 20, 2004 (the "Alanar audit report"), which the company included in its Form S-11/A. Alanar paid the Firm $800 for the audit work.[4]

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[3] 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.

[4] During the course of the Commission's investigation, the Firm voluntarily reimbursed Alanar the $800 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

4. At the time the Firm issued the Alanar audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Bray was the engagement partner on the Firm's audit of Alanar's balance sheet as of May 19, 2004. Bray participated in the preparation and issuance of the Alanar audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, the Firm willfully[7] violated Section 102(a) of the Act.

4. Based on the conduct described above, Bray caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Bray caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from Alanar in connection with the audit work associated with the Alanar audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

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5 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

6 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

7 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

IV.

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

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

1. Bray & Associates CPA's LLC

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Arnold David Bray, CPA

A. Bray shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Bray may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56410 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2690 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12771

In the Matter of **Forbush & Associates and Daniel J. Forbush, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Forbush & Associates and Daniel J. Forbush, CPA (collectively "Respondents"), pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Forbush & Associates pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Forbush & Associates (the "Firm") is a Nevada partnership and a public accounting firm headquartered in Reno, Nevada. The Firm audited SulphCo, Inc.'s financial statements for the company's 2003 fiscal year ended December 31, 2003. SulphCo, Inc. dismissed the Firm as its independent auditor on May 14, 2004.

2. Daniel J. Forbush, CPA ("Forbush"), age 54, is a certified public accountant licensed in the state of Nevada since 1986. Before becoming licensed in Nevada, Forbush became licensed as a CPA in California in 1978. Forbush was the engagement partner in connection with the Firm's audit of SulphCo, Inc.'s financial statements for the company's 2003 fiscal year ended December 31, 2003.

B. FACTS

1. SulphCo, Inc. ("SulphCo") is a Nevada corporation with its headquarters in Sparks, Nevada. SulphCo's common stock trades on the American Stock Exchange under the symbol SUF and is registered with the Commission pursuant to Section 12(g) of the Exchange Act. SulphCo reported no revenues for its fiscal year ended December 31, 2003, and total assets

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> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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

of $2 million.

2. SulphCo has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited SulphCo's 2003 financial statements included in SulphCo's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 29, 2004. As part of that audit, the Firm prepared and issued an audit report dated March 25, 2004 (the "SulphCo audit report"), which the company included in its 2003 Form 10-KSB. SulphCo paid the Firm $15,000 for the audit work.[4]

4. At the time the Firm issued the SulphCo audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Forbush was the engagement partner on the Firm's audit of SulphCo's 2003 financial statements. Forbush participated in the preparation and issuance of the SulphCo audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, the Firm willfully[7] violated Section 102(a)

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4 During the course of the Commission's investigation, the Firm voluntarily reimbursed SulphCo the $15,000 in audit fees through the provision of non-audit services. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

5 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

6 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

7 "Willfully" as used in this Offer means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or

of the Act.

4. Based on the conduct described above, Forbush caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Forbush caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents undertake not to request, demand, or accept, directly or indirectly, any compensation from SulphCo in connection with the audit work associated with the SulphCo audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Forbush & Associates

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

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statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

2. Daniel J. Forbush, CPA

A. Forbush shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Forbush may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56408 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2688 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12769

In the Matter of **Darilek, Butler & Co., P.C. and Robert F. Darilek, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Darilek, Butler & Co., P.C. and Robert F. Darilek, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Darilek, Butler & Co., P.C. pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Darilek, Butler & Co., P.C. (the "Firm") is a Texas professional corporation and a public accounting firm headquartered in San Antonio, Texas. The Firm audited Health Discovery Corporation's ("HDC") financial statements for the company's 2003 fiscal year ended December 31, 2003.

2. Robert F. Darilek, CPA, ("Darilek"), 52, of San Antonio, Texas, is a certified public accountant licensed in the state of Texas. Darilek was the engagement partner in connection with the Firm's audit of HDC's financial statements for the company's 2003 fiscal year ended December 31, 2003. Darilek has been licensed as a CPA in Texas since 1982.

B. FACTS

1. HDC is a Georgia corporation with its headquarters in Savannah, Georgia. HDC's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is traded on the OTC Bulletin Board under the symbol HDVY. For its fiscal year ended December 31, 2003, HDC reported revenues of $50 and total assets of $941,000.

2. HDC has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited HDC's 2003 financial statements included in HDC's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 30, 2004. As part of that audit, the Firm prepared and issued an audit report dated February 27, 2004 (the "HDC audit report"), which the company included in its 2003 Form 10-KSB. HDC paid the Firm

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[3] 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.

$10,000 for the audit work.[4]

4. At the time the Firm issued the HDC audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Darilek was the engagement partner on the Firm's audit of HDC's 2003 financial statements. Darilek participated in the preparation and issuance of the HDC audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, the Firm willfully[7] violated Section 102(a) of the Act.

4. Based on the conduct described above, Darilek caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Darilek caused the Firm's violation of Section 102(a) of the Act.

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4 During the course of the Commission's investigation, the Firm voluntarily reimbursed HDC the $10,000 in audit fees through the provision of non-audit or other services to the issuer. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

5 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

6 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

7 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from HDC in connection with the audit work associated with the HDC audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Darilek, Butler & Co., P.C.

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Robert F. Darilek, CPA

A. Darilek shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Darilek may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56404 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2684 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 12765

In the Matter of **Bujan & Associates, Ltd and Frank Bujan, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Bujan & Associates, Ltd and Frank Bujan, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Bujan & Associates, Ltd pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Bujan & Associates, Ltd (the "Firm") is an Illinois corporation and a public accounting firm headquartered in Homer Glen, Illinois. The Firm audited eNucleus, Inc.'s ("eNucleus") financial statements for the company's 2003 fiscal year ended December 31, 2003. eNucleus dismissed the Firm as its independent auditor on December 15, 2004.

2. Frank Bujan, CPA, ("Bujan") of Homer Glen, Illinois is a certified public accountant licensed in the state of Illinois since 1992. Bujan was the engagement partner in connection with the Firm's audit of eNucleus's financial statements for the company's 2003 fiscal year ended December 31, 2003.

B. FACTS

1. eNucleus is a Delaware corporation with its headquarters in Rolling Meadows, Illinois. eNucleus's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and trades on the OTC Bulletin Board under the symbol ENUI. For its fiscal year ended December 31, 2003, eNucleus reported revenues of $578,000 and total assets of $1.8 million.

2. eNucleus has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited eNucleus's 2003 financial statements included in eNucleus's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 14, 2004. As part of that audit, the Firm prepared and issued an audit report dated April 12, 2004 (the "eNucleus audit report"), which the company included in its 2003 Form 10-KSB. eNucleus paid

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[3] 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.

the Firm $8,500 for the audit work.[4]

4. At the time the Firm issued the eNucleus audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Bujan was the engagement partner on the Firm's audit of eNucleus's 2003 financial statements. Bujan participated in the preparation and issuance of the eNucleus audit report.

6. By order dated July 28, 2005, the Board disapproved an application for registration submitted by the Firm based in part on the Firm's violation of Section 102(a) of the Act in issuing the eNucleus audit report.[5] The order effectively prevented the Firm from becoming registered with the Board until after April 1, 2006, approximately one year from the date the Board issued a notice of hearing on the Firm's application.[6] Bujan has only worked as an accountant through the Firm since before the Board's order and has not otherwise been associated with a public accounting firm registered with the Board.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[7]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[8]

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4 During the course of the Commission's investigation, the Firm voluntarily reimbursed eNucleus the $8,500 in audit fees. In view of the Firm's reimbursement, the Commission is not ordering disgorgement in this matter.

5 PCAOB Release No. 2005-016 (July 28, 2005). The order also found that the Firm's issuance of the eNucleus audit report violated Board Rule 2100, which implemented Section 102(a) of the Act. Id.

6 The order states that with respect to any new registration application the Firm submits after April 1, 2006, the Board will not issue a notice of hearing to determine whether to approve or disapprove such application based solely on the violations subject to the Board's order. Id.

7 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

8 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

3. Based on the conduct described above, the Firm willfully[9] violated Section 102(a) of the Act.

4. Based on the conduct described above, Bujan caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Bujan caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from eNucleus in connection with the audit work associated with the eNucleus audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

1. Bujan & Associates, Ltd

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

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[9] "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

2. Frank Bujan, CPA

A. Bujan shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Bujan may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56405 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2685 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12766

In the Matter of Charles J. Birnberg, CPA, Respondent.	ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Charles J. Birnberg, CPA ("Respondent" or "Birnberg") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

[2] Rule 102(e)(1)(iii) provides, in relevant part, that:

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, 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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

A. RESPONDENT

Charles J. Birnberg, CPA, 65, of West Paterson, New Jersey, is a certified public accountant licensed in the state of New Jersey since 1981 and doing business as a sole proprietorship. Birnberg audited Renewal Fuels, Inc.'s ("Renewal Fuels") financial statements for the company's 2003 fiscal year ended December 31, 2003. Renewal Fuels dismissed Birnberg as its independent auditor on October 1, 2004.

B. FACTS

1. Renewal Fuels (known as Tech Laboratories, Inc. during the relevant period) is a Delaware corporation with its headquarters in Milwaukee, Wisconsin. Renewal Fuels's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and trades on the OTC Bulletin Board under the symbol RNWF. For its fiscal year ended December 31, 2003, Renewal Fuels reported revenues of $236,000 and total assets of $1.75 million.

2. Renewal Fuels has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. Birnberg audited Renewal Fuels's 2003 financial statements included in Renewal Fuels's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 14, 2004. As part of that audit, Birnberg prepared and issued an audit report dated April 14, 2004 (the "Renewal Fuels audit report"), which the company included in its 2003 Form 10-KSB. Renewal Fuels paid Birnberg $10,000 for the audit work.[4]

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

[4] During the course of the Commission's investigation, Birnberg voluntarily reimbursed Renewal Fuels $4,200 of the $10,000 in audit fees through a combination of repayment and the provision of non-audit or other services to Renewal Fuels. In view of Birnberg's $4,200 reimbursement, the Commission is only ordering

4. At the time Birnberg prepared and issued the Renewal Fuels audit report, he was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

3. Based on the conduct described above, Respondent willfully[7] violated Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that Birnberg willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002.

E. UNDERTAKING

Respondent has undertaken not to request, demand, or accept, directly or indirectly, any compensation from Renewal Fuels in connection with the audit work associated with the Renewal Fuels audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

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disgorgement in the amount of $5,800, plus prejudgment interest, to cover the balance of audit fees Birnberg received.

5 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

6 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

7 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

IV.

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

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

A. Birnberg shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Birnberg is censured.

C. Birnberg may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

D. IT IS FURTHER ORDERED that Respondent shall, within 10 days of the entry of this Order, pay disgorgement of $5,800 and prejudgment interest of $521.38 to the Securities and Exchange Commission. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Charles J. Birnberg as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Christopher Conte, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, D.C. 20549.

By the Commission.

Nancy M. Morris
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. 56407/ September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2687 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12768

In the Matter of **Dan Clasby & Company and Daniel E. Clasby, CPA,** **Respondents.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Dan Clasby & Company and Daniel E. Clasby, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against Dan Clasby & Company pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. Dan Clasby & Company (the "Firm") is a sole proprietorship and public accounting firm based in Beverly, Massachusetts. The Firm audited Unitronix Corporation's ("Unitronix") financial statements for the company's 2004 fiscal year ended June 30, 2004. Unitronix dismissed the Firm as its independent auditor on February 11, 2005.

2. Daniel E. Clasby, CPA, ("Clasby"), 51, of Ipswich, Massachusetts, is a certified public accountant licensed in the state of Massachusetts since 1983. Clasby was the engagement partner in connection with the Firm's audit of Unitronix's financial statements for the company's 2004 fiscal year ended June 30, 2004.

B. FACTS

1. Unitronix is a New Jersey corporation with its headquarters in Greenville, South Carolina. Unitronix's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and trades on the Pink Sheets under the symbol UTRX. For its fiscal year ended June 30, 2004, Unitronix reported revenues of $114,000 and total assets of $19,700.

2. Unitronix has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited Unitronix's 2004 financial statements included in Unitronix's annual report for fiscal year 2004 on Form 10-K, filed with the Commission on September 28, 2004. As part of that audit, the Firm prepared and issued an audit report dated September 20, 2004 (the "Unitronix audit report"), which the company included in its 2004 Form 10-K. The Firm did not collect any fees for the audit work.

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[3] 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.

4. At the time the Firm issued the Unitronix audit report, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Clasby was the engagement partner on the Firm's audit of Unitronix's 2004 financial statements. Clasby participated in the preparation and issuance of the Unitronix audit report.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[4]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[5]

3. Based on the conduct described above, the Firm willfully[6] violated Section 102(a) of the Act.

4. Based on the conduct described above, Clasby caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Clasby caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from Unitronix in connection with the audit work associated with the Unitronix audit report. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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4 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

5 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

6 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

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

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

1. Dan Clasby & Company

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Daniel E. Clasby, CPA

A. Clasby shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Clasby may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56409 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2689 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12770

In the Matter of

David M. Winings, CPA, An Accountancy Corporation and David M. Winings, CPA,

Respondents.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against David M. Winings, CPA, An Accountancy Corporation and David M. Winings, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against David M. Winings, CPA, An Accountancy Corporation pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. David M. Winings, CPA, An Accountancy Corporation (the "Firm") is a California corporation and a public accounting firm headquartered in Palm Desert, California. The Firm audited the financial statements of the following six companies: 1) Silver Bow Antique Aviation (fiscal years ended December 31, 2002 and 2003); 2) Animal Cloning Sciences, Inc. (fiscal year ended December 31, 2003); 3) Knickerbocker Capital Corporation (fiscal year ended December 31, 2003); 4) Asian Financial, Inc. (fiscal year ended December 31, 2003); 5) Apex Capital Group, Inc. (fiscal year ended December 31, 2003); and 6) Woodstock Tree Farms, Inc. (fiscal years ended December 31, 2002 and 2003).

2. David M. Winings, CPA, ("Winings"), 43, of Palm Desert, California, is a certified public accountant licensed in the state of California since 1992. Winings was the engagement partner in connection with the Firm's audits of the financial statements of the following six companies: 1) Silver Bow Antique Aviation (fiscal years ended December 31, 2002 and 2003); 2) Animal Cloning Sciences, Inc. (fiscal year ended December 31, 2003); 3) Knickerbocker Capital Corporation (fiscal year ended December 31, 2003); 4) Asian Financial, Inc. (fiscal year ended December 31, 2003); 5) Apex Capital Group, Inc. (fiscal year ended December 31, 2003); and 6) Woodstock Tree Farms, Inc. (fiscal years ended December 31, 2002 and 2003).

B. FACTS

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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

1. During the relevant period, Silver Bow Antique Aviation ("Silver Bow"), Animal Cloning Sciences, Inc. ("Animal Cloning"), Knickerbocker Capital Corporation ("Knickerbocker"), Asian Financial, Inc. ("Asian Financial"), Apex Capital Group, Inc. ("Apex Capital"), and Woodstock Tree Farms, Inc. ("Woodstock"), were all under common control and ownership, and the common stock of Silver Bow, Animal Cloning, Knickerbocker, Asian Financial, and Apex Capital was registered with the Commission pursuant to Section 12(g) of the Exchange Act. None of the companies reported revenue for 2003. Silver Bow reported $37,675 in total assets for December 31, 2003, and Woodstock reported $282,593 in total assets for December 31, 2003.

2. Silver Bow, Animal Cloning, Knickerbocker, Asian Financial, Apex Capital, and Woodstock have at all relevant times each been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited Silver Bow's 2002 financial statements included in Silver Bow's annual report for fiscal year 2002 on Form 10-KSB, filed with the Commission on May 20, 2004. As part of the audit, the Firm prepared and issued an audit report dated November 30, 2003, which the company included in its 2002 Form 10-KSB. The Firm also audited Silver Bow's 2003 financial statements included in Silver Bow's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on May 21, 2004, and in Silver Bow's registration statement on Form SB-2/A, filed with the Commission on May 25, 2004. As part of the audit, the Firm prepared and issued an audit report dated May 3, 2004 (together with the November 30, 2003 audit report, the "Silver Bow audit reports"), which the company included in its 2003 Form 10-KSB and in its registration statement on Form SB-2/A.

4. The Firm audited Animal Cloning's 2003 financial statements included in Animal Cloning's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on February 13, 2004. As part of that audit, the Firm prepared and issued an audit report dated February 9, 2004 (the "Animal Cloning audit report"), which the company included in its 2003 Form 10-KSB.

5. Animal Cloning retained a new, registered firm to audit its financial statements for fiscal year 2004. However, because of a reclassification regarding a note payable, the company restated its financial statements for fiscal year 2003. As a result, because the Firm had originally audited Animal Clonings' financial statements for fiscal year 2003, it issued an updated audit report on October 28, 2005, explaining the reclassification. Animal Cloning included the new audit report in a Form 10-KSB filed with the Commission on December 12, 2005. The Firm issued the October 28, 2005 audit report after the Public Company Accounting Oversight Board (the "Board") had disapproved the Firm's application for registration. See paragraph 13 below.

6. The Firm audited Knickerbocker's 2003 financial statements included in Knickerbocker's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 30, 2004. As part of that audit, the Firm prepared and issued an audit report dated March 23, 2004 (the "Knickerbocker audit report"), which the company included in its 2003 Form 10-KSB. On May 3, 2004, Knickerbocker dismissed the firm as its independent auditor.

7. The Firm audited Asian Financial's 2003 financial statements included in Asian Financial's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 6, 2004. As part of that audit, the Firm prepared and issued an audit report dated March 26, 2004 (the "Asian Financial audit report"), which the company included in its 2003 Form 10-KSB.

8. The Firm audited Apex Capital's 2003 financial statements included in Apex Capital's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 6, 2004. As part of that audit, the Firm prepared and issued an audit report dated March 27, 2004 (the "Apex Capital audit report"), which the company included in its 2003 Form 10-KSB.

9. The Firm audited Woodstock's 2002 and 2003 financial statements, which were included in Woodstock's registration statement on Form SB-2/A, filed with the Commission on June 14, 2004. As part of that audit, the Firm prepared and issued an audit report dated April 29, 2004 (the "Woodstock audit report"), which the company included in its Form SB-2/A.

10. The Firm collected no fees for the audit work performed for Silver Bow, Animal Cloning, Knickerbocker, Asian Financial, Apex Capital, and Woodstock.

11. At the time the Firm issued the Silver Bow, Animal Cloning, Knickerbocker, Asian Financial, Apex Capital, and Woodstock audit reports, it was not registered with the Board as required by Section 102(a) of the Act.

12. Winings was the engagement partner on the Firm's audit of the financial statements of Silver Bow, Animal Cloning, Knickerbocker, Asian Financial, Apex Capital, and Woodstock. Winings participated in the preparation and issuance of the Silver Bow, Animal Cloning, Knickerbocker, Asian Financial, Apex Capital, and Woodstock audit reports.

13. By order dated April 18, 2005, the Board disapproved an application for registration submitted by the Firm based in part on the Firm's violation of Section 102(a) of the Act in issuing the Silver Bow, Animal Cloning, Knickerbocker, Asian Financial, Apex Capital, and Woodstock audit reports.[4] The order effectively prevented the Firm from becoming registered with the Board until after February 15, 2006, approximately 15 months from the date the Board issued a notice of hearing on the Firm's application.[5] Winings has only worked as an accountant through the Firm since before the Board's order and has not otherwise been associated with a public

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[4] PCAOB Release No. 2005-005 (Apr. 18, 2005). The order also found that the Firm's issuance of the Silver Bow, Animal Cloning, Knickerbocker, Asian Financial, Apex Capital, and Woodstock audit reports violated Board Rule 2100, which implemented Section 102(a) of the Act, and that the Firm violated Board Rule 2101 when it failed to identify and to provide required information concerning the Knickerbocker audit report on the Firm's registration application. Id.

[5] The order states that with respect to any new registration application the Firm submits after February 15, 2006, the Board will not issue a notice of hearing to determine whether to approve or disapprove such application based solely on the violations subject to the Board's order. Id.

accounting firm registered with the Board.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[6]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[7]

3. Based on the conduct described above, the Firm willfully[8] violated Section 102(a) of the Act.

4. Based on the conduct described above, Winings caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Winings caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents undertake not to request, demand, or accept, directly or indirectly, any compensation from Silver Bow, Animal Cloning, Knickerbocker, Asian Financial, Apex Capital, and Woodstock in connection with the audit work associated with the respective audit reports. In determining whether to accept the Offer, the Commission has considered this undertaking.

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6 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

7 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

8 "Willfully" as used in this Offer means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

IV.

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

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

1. David M. Winings, CPA, An Accountancy Corporation

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. David M. Winings, CPA

A. Winings shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Winings may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
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. 56411 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2691/ September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12772

In the Matter of

F. X. Duffy & Co., Inc. and
Kevin Patrick Duffy, CPA,

Respondents.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against F. X. Duffy & Co., Inc. and Kevin Patrick Duffy, CPA (collectively "Respondents") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and that public administrative proceedings be, and hereby are, instituted against F. X. Duffy & Co., Inc. pursuant to Section 4C[1] of the Exchange Act and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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II.

In anticipation of the institution of these proceedings, Respondents have 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. RESPONDENTS

1. F. X. Duffy & Co., Inc. (the "Firm") is a Pennsylvania corporation and accounting firm headquartered in Philadelphia, Pennsylvania. The Firm audited Sentry Builders Corp.'s ("Sentry Builders") financial statements for the company's 2003 and 2004 fiscal years ended July 31, 2003 and 2004, respectively.

2. Kevin Patrick Duffy, CPA, ("Duffy"), 40, of Philadelphia, Pennsylvania, is a certified public accountant licensed in the state of Pennsylvania since 1992. Duffy was the engagement partner in connection with the Firm's audit of Sentry Builders' financial statements for the company's 2003 and 2004 fiscal years.

B. FACTS

1. Sentry Builders is a Delaware corporation with its headquarters in Huntington, New York. During the relevant period, Sentry Builders' common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act. For its fiscal year ended July 31, 2003, Sentry Builders reported no revenues and no assets.

2. Sentry Builders has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

3. The Firm audited Sentry Builders' 2003 and 2004 financial statements included in Sentry Builders' annual report for fiscal years 2003 and 2004, respectively, on Form 10-K, both filed with the Commission on August 5, 2004. As part of the audits, the Firm prepared and issued two separate audit reports dated June 18, 2004 (the "Sentry Builders audit reports"), which the company included in its 2003 and 2004 Form 10-Ks.

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[3] 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.

4. At the time the Firm issued the Sentry Builders audit reports, it was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

5. Duffy was the engagement partner on the Firm's audit of Sentry Builders' 2003 and 2004 financial statements. Duffy participated in the preparation and issuance of the Sentry Builders audit reports.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[4]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[5]

3. Based on the conduct described above, the Firm willfully[6] violated Section 102(a) of the Act.

4. Based on the conduct described above, Duffy caused the Firm's violation of Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that the Firm willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002, and that Duffy caused the Firm's violation of Section 102(a) of the Act.

E. UNDERTAKING

Respondents have undertaken not to request, demand, or accept, directly or indirectly, any compensation from Sentry Builders in connection with the audit work associated with the Sentry Builders audit reports. In determining whether to accept the Offer, the Commission has considered this undertaking.

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4 A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

5 Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003. See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

6 "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

IV.

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

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

1. F. X. Duffy & Co., Inc.

A. The Firm shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. The Firm is censured.

C. The Firm may practice before the Commission as an independent accountant provided that:

1. It is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. It has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the Firm that its registration application has been approved.

2. Kevin Patrick Duffy, CPA

A. Duffy shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Duffy may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act and such registration continues to be effective; and

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12793

In the Matter of **JAY J. SHAPIRO, CPA, P.C. and JAY J. SHAPIRO, CPA,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted 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 against Jay J. Shapiro, CPA, P.C. ("Shapiro PC") and Jay J. Shapiro, CPA ("Shapiro") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. **Jay J. Shapiro, CPA, P.C.** is a California corporation and public accounting firm headquartered in Los Angeles, California. Shapiro PC prepared and issued an audit report dated January 12, 2004, in connection with its audit of Daleco Resources Corp. ("Daleco").

2. **Jay J. Shapiro, CPA**, 57, of Los Angeles, California, is a certified public accountant licensed in the states of Wisconsin and California since 1973 and 1978, respectively. As engagement partner on the Daleco engagement, Shapiro participated in the preparation and issuance of the January 12, 2004 Daleco audit report.

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B. OTHER RELEVANT ENTITY

1. Daleco is a Nevada corporation based in West Chester, Pennsylvania. Daleco's common stock trades on the OTC Bulletin Board and is registered with the Commission pursuant to Section 12(g) of the Exchange Act. Daleco reported $1.5 million of revenues and total assets of $25 million for fiscal year ended September 30, 2003. Daleco has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

C. FAILURE TO REGISTER WITH THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

1. Section 102(a) of the Sarbanes-Oxley Act of 2002 (the "Act") prohibits any person that is not a registered public accounting firm with the Public Company Accounting Oversight Board ("PCAOB" or "Board") from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any public reporting company after October 22, 2003.

2. Though Respondents were aware of the PCAOB registration requirement, at no time did Shapiro PC register with the PCAOB as a public accounting firm.

3. Shapiro PC audited Daleco's 2003 financial statements included in Daleco's annual report for fiscal year ended September 30, 2003 on Form 10-K, filed with the Commission on January 14, 2004.

4. Shapiro PC prepared and issued an audit report dated January 12, 2004, which was included in Daleco's Form 10-K.

5. Shapiro participated in auditing the 2003 financial statements included in Daleco's annual report for fiscal year ended September 30, 2003 on Form 10-K, filed with the Commission on January 14, 2004..

6. Shapiro participated in the preparation and issuance of an audit report dated January 12, 2004 which was included in Daleco's Form 10-K.

7. Respondents were aware of the registration requirement and the October 22, 2003 deadline for registration with the Board when Shapiro PC issued the January 12, 2004 audit report.

8. Shapiro PC received $40,000 for conducting an audit of the financial statements of Daleco and for issuing an audit report on those statements.

D. VIOLATIONS

1. Section 4C(a) of the Exchange Act provides, in relevant part, that the Commission "may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission ... (1) not to possess the requisite qualifications to represent others ... or (3) to have

should be ordered to pay disgorgement and prejudgment interest, and make an accounting 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 Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12796

In the Matter of **STORY & COMPANY, P.C., and BRIAN L. STORY, CPA,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 4C 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 that public administrative proceedings be, and hereby are, instituted pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e) of the Commission's Rules of Practice against Story & Company, P.C. ("Story & Company") and Brian L. Story, CPA ("Story") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. **Story & Company, P.C.** is a Colorado professional corporation and public accounting firm headquartered in Centennial, Colorado. Story & Company prepared and issued an audit report dated February 11, 2004, in connection with its audit of Regatta Capital Partners, Inc. ("Regatta Capital").

2. **Brian L. Story, CPA,** 67, of Littleton, Colorado, is a certified public accountant licensed in Colorado and Nebraska since 1974. As engagement partner on the Regatta Capital engagement, Story participated in the preparation and issuance of the February 11, 2004 Regatta Capital audit report.

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B. OTHER RELEVANT ENTITIES

1. Regatta Capital is a Colorado corporation based in Denver, Colorado. During the relevant period, Regatta Capital's common stock traded on the OTC Bulletin Board. Its common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. Regatta Capital reported $2,128 in revenue and total assets of $9,115 for its fiscal year ended 2003. Regatta Capital has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act"). During the relevant period, Regatta was known as Monet Entertainment, Ltd.

C. FAILURE TO REGISTER WITH THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

1. Section 102(a) of the Act prohibits any person that is not a registered public accounting firm with the Public Company Accounting Oversight Board ("PCAOB") from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any public reporting company after October 22, 2003.

2. At no point did any of the Respondents register with the PCAOB as a public accounting firm.

3. Story & Company audited Regatta Capital's financial statements included in Regatta Capital's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 29, 2004.

4. Story & Company prepared and issued an audit report dated February 11, 2004, which was included in Regatta Capital's Form 10-KSB.

5. Story participated in auditing the financial statements included in Regatta Capital's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 29, 2004.

6. Story participated in the preparation and issuance of an audit report dated February 11, 2004, which was included in Regatta Capital's Form 10-KSB.

7. Story & Company received $1,100 for conducting an audit of Regatta Capital's financial statements for its fiscal year 2003 and for issuing an audit report on those financial statements.

D. VIOLATIONS

1. Section 4C(a) of the Exchange Act provides, in relevant part, that the Commission "may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission ... (1) not to possess the requisite qualifications to represent others ... or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder."

2. Rule 102(e)(1) of the Commission's Rules of Practice provides that the Commission "may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission ... (i) not to possess the requisite qualifications to represent others … or (iii) to have willfully violated … any provision of the Federal securities laws or the rules and regulations thereunder."

3. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."

4. Because Story & Company had not registered with the PCAOB, it lacked "the requisite qualifications" to issue an audit report dated February 11, 2004.

5. By participating in the preparation or issuance of an audit report after October 22, 2003 by an audit firm that was not registered with the PCAOB, Story lacked "the requisite qualifications to represent others."

6. In violation of Section 102(a) of the Act, Story & Company prepared and issued an audit report on the financial statements of a reporting company after October 22, 2003, without first registering with the PCAOB. Story & Company thus also willfully violated the federal securities laws.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate that public administrative 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; and

B. Whether, pursuant to Sections 4C(a)(1) and 4C(a)(3) of the Exchange Act and Rules 102(e)(1)(i) and 102(e)(1)(iii) of the Commission's Rules of Practice, Story & Company should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

C. Whether, pursuant to Section 4C(a)(1) of the Exchange Act and Rule 102(e)(1)(i) of the Commission's Rules of Practice, Story should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12794

In the Matter of **MICHAEL DEUTCHMAN, CPA,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Michael Deutchman, CPA ("Respondent" or "Deutchman") 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.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

Michael Deutchman, CPA, of Melville, New York, is a certified public accountant licensed in New York since 1971 and doing business as a sole proprietorship. Deutchman prepared and issued an audit report dated April 14, 2004, in connection with his audit of Cyber Grind, Inc. ("Cyber Grind").

B. OTHER RELEVANT ENTITY

Cyber Grind, Inc. is a Nevada corporation based in Beverly Hills, California. Cyber Grind's common stock does not currently trade and is registered with the Commission pursuant to Section 12(g) of the Exchange Act. Cyber Grind reported no revenues and no assets for fiscal year ended December 31, 2003. Cyber Grind has at all relevant times been an issuer as defined by the Act.

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C. FAILURE TO REGISTER WITH THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

1. Section 102(a) of the Sarbanes-Oxley Act of 2002 (the "Act") prohibits any person that is not a registered public accounting firm with the Public Company Accounting Oversight Board ("PCAOB" or "Board") from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any public reporting company after October 22, 2003.

2. Though Respondent was aware of the PCAOB registration requirement, at no point did Deutchman register with the PCAOB as a public accounting firm.

3. Respondent audited Cyber Grind's 2003 financial statements included in Cyber Grind's annual report for fiscal year ended December 31, 2003 on Form 10-KSB, filed with the Commission on April 14, 2004.

4. Respondent prepared and issued an audit report dated April 14, 2004, which was included in Cyber Grind's Form 10-KSB.

5. Respondent was aware of the registration requirement and the October 22, 2003 registration deadline for registration with the Board when Deutchman issued the audit report dated April 14, 2004.

D. VIOLATIONS

1. Section 4C(a) of the Exchange Act provides, in relevant part, that the Commission "may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission … (1) not to possess the requisite qualifications to represent others … or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder."

2. Rule 102(e)(1) of the Commission's Rules of Practice provides that the Commission "may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission ... (i) not to possess the requisite qualifications to represent others … or (iii) to have willfully violated … any provision of the Federal securities laws or the rules and regulations thereunder."

3. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."

4. Because Respondent had not registered with the PCAOB, he lacked "the requisite qualifications" to issue an audit report dated April 14, 2004.

5. In violation of Section 102(a) of the Act, Respondent prepared and issued an audit report on the financial statements of a reporting company after October 22, 2003, without first registering with the Board. Respondent thus also willfully violated Section 102(a) of the Act.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate 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 Deutchman an opportunity to establish any defenses to such allegations;

B. Whether, pursuant to Sections 4C(a)(1) and 4C(a)(3) of the Exchange Act and Rules 102(e)(1)(i) and 102(e)(1)(iii) of the Commission's Rules of Practice, Deutchman should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission; and

C. Whether, pursuant to Section 21C of the Exchange Act, Deutchman should be ordered to cease and desist from committing or causing violations of and any future violations of Section 102(a) of the 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 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.

Nancy M. Morris
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

CORRECTED

SECURITIES EXCHANGE ACT OF 1934
Release No. 56398 / September 13, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2678 / September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12803

In the Matter of **Andrew M. Smith, CPA,** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Andrew M. Smith, CPA ("Respondent" or "Smith") pursuant to Sections 4C[1] and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

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

> The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder.

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

> The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, 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 Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[3] that:

A. RESPONDENT

Andrew M. Smith, CPA, age 58, of Los Angeles, California, is a certified public accountant licensed in the state of California since 1972, doing business as a sole proprietorship. Smith audited Safe Travel Care, Inc.'s, Meridian Holdings, Inc.'s, and InterCare DX, Inc.'s financial statements for each company's respective 2003 fiscal year ended December 31, 2003.

B. FACTS

1. Safe Travel Care, Inc. ("Safe Travel") is a Nevada corporation based in Cardiff, California. During the relevant period, Safe Travel's common stock traded on the OTC Bulletin Board. Its common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. Safe Travel reported no revenue and total assets of $146,000 for fiscal year ended December 31, 2003.

2. Meridian Holdings, Inc. ("Meridian") is a Colorado corporation based in Culver City, California. Meridian's common stock trades on the Pink Sheets under the symbol MRDH.PK and is registered with the Commission pursuant to Section 12(g) of the Exchange Act. The company reported revenues of approximately $2.6 million and total assets of $5.3 million for fiscal year ended December 31, 2003.

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

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

3. InterCare DX, Inc. ("InterCare") is a California corporation based in Los Angeles, California. InterCare's common stock trades on the OTC Bulletin Board under the symbol ICCO.OB and is registered with the Commission pursuant to Section 12(g) of the Exchange Act. The company reported no revenue and total assets of $1.5 million for fiscal year ended December 31, 2003.

4. Safe Travel, Meridian, and InterCare, each, has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

5. Smith audited Safe Travel's 2003 financial statements included in Safe Travel's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on May 6, 2004. As part of that audit, Smith prepared and issued an audit report dated February 20, 2004 (the "Safe Travel audit report"), which the company included in its 2003 Form 10-KSB. Smith audited Meridian's 2003 financial statements included in Meridian's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on April 1, 2004. As part of that audit, Smith prepared and issued an audit report dated March 31, 2004 (the "Meridian audit report"), which the company included in its 2003 Form 10-KSB. Smith audited InterCare's 2003 financial statements included in InterCare's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on March 31, 2004. As part of that audit, Smith prepared and issued an audit report, also dated March 31, 2004 (the "InterCare audit report"), which the company included in its 2003 Form 10-KSB. Safe Travel, Meridian, and InterCare, collectively, paid Smith $9,500 for the audit work.[4]

6. At the time Smith prepared and issued the Safe Travel, Meridian, and InterCare audit reports, he was not registered with the Public Company Accounting Oversight Board (the "Board"), as required by Section 102(a) of the Act.

C. VIOLATIONS

1. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."[5]

2. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[6]

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[4] During the course of the Commission's investigation, Smith voluntarily reimbursed Safe Travel, Meridian, and InterCare the $9,500 in audit fees through the provision of non-audit or other services to the issuers. In view of Smith's reimbursement, the Commission is not ordering disgorgement in this matter.

[5] A violation of the Act or any rule that the Board issues under the Act is treated for all purposes in the same manner as a violation of the Exchange Act, including with respect to penalties. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 7202(b)(1) (West 2002).

[6] Section 102(a) became effective "[b]eginning 180 days after the date of the determination of the Commission under Section 101(d)" of the Act that the Board was prepared to undertake its statutory responsibilities. The Commission made the required determination on April 25, 2003.

3. Based on the conduct described above, Respondent willfully[7] violated Section 102(a) of the Act.

D. FINDINGS

Based on the foregoing, the Commission finds that Smith willfully violated Section 102(a) of the Sarbanes-Oxley Act of 2002.

E. UNDERTAKING

Respondent undertakes not to request, demand, or accept, directly or indirectly, any compensation from Safe Travel, Meridian, and InterCare in connection with the audit work associated with the audit reports for these companies. In determining whether to accept the Offer, the Commission has considered this undertaking.

IV.

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

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

A. Smith shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Smith is censured.

C. Smith may practice before the Commission as an independent accountant provided that:

1. The public accounting firm with which he is associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

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See Order Regarding Section 101(d) of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8223, Exchange Act Release No. 47746, 2003 WL 1956164 (Apr. 25, 2003).

[7] "Willfully" as used in this Offer means intentionally committing the act that constitutes the violation. There is no requirement that the actor also be aware that he is violating a rule or statute. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

2. He has submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which he is associated that its registration application has been approved.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12792

In the Matter of **HALT, BUZAS & POWELL, LTD., and WAYNE A. POWELL, CPA, and STEVEN R. HALT, CPA,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative proceedings be, and hereby are, instituted pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e) of the Commission's Rules of Practice against Halt, Buzas & Powell, Ltd. ("Halt, Buzas & Powell"), Wayne A. Powell, CPA ("Powell"), and Steven R. Halt, CPA ("Halt") (collectively "Respondents") and that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Halt, Buzas & Powell.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. **Halt, Buzas & Powell** is a Virginia corporation and public accounting firm headquartered in Alexandria, Virginia. Halt, Buzas & Powell prepared and issued audit reports dated August 11, 2004 and October 11, 2004, in connection with its audits of American Utilicraft Corp. ("American Utilicraft").

2. **Wayne A. Powell, CPA**, 40, of Odenton, Maryland, is a certified public accountant licensed in Maryland since 1989. As engagement partner on the American Utilicraft engagement, Powell participated in the preparation and issuance of the August 11, 2004 and October 11, 2004, American Utilicraft audit reports.

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3. **Steven R. Halt, CPA**, 55, of Fort Washington, Maryland, is a certified public accountant licensed in Virginia since 1976. As concurring partner on the American Utilicraft engagement, Halt participated in the preparation and issuance of the August 11, 2004 and October 11, 2004 American Utilicraft audit reports.

B. OTHER RELEVANT ENTITIES

1. American Utilicraft is a Delaware Corporation based in Lawrenceville, Georgia. During the relevant period, American Utilicraft's common stock traded on the OTC Pink Sheets. Its common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. American Utilicraft reported $286,550 in revenue and total assets of $818,233 for its fiscal year ended 2003. American Utilicraft has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

C. FAILURE TO REGISTER WITH THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

1. Section 102(a) of the Act prohibits any person that is not a registered public accounting firm with the Public Company Accounting Oversight Board ("PCAOB") from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any public reporting company after October 22, 2003.

2. Though Respondents were aware of the PCAOB registration requirement, at no point did Halt, Buzas & Powell register with the PCAOB as a public accounting firm.

3. Halt, Buzas & Powell audited the financial statements included in American Utilicraft's annual report for fiscal years 2001, 2002, and 2003 on Forms 10-KSB, filed with the Commission on November 3, 2004 (for fiscal years 2001 and 2002) and on December 6, 2004 (for fiscal year 2003).

4. Halt, Buzas & Powell prepared and issued audit reports dated August 11, 2004 and October 11, 2004, which were included in American Utilicraft's Forms 10-KSB.

5. Powell and Halt participated in auditing the financial statements included in American Utilicraft's annual reports for fiscal years 2001 through 2003 on Forms 10-KSB, filed with the Commission on November 3, 2004 (for fiscal years 2001 and 2002) and on December 6, 2004 (for fiscal year 2003).

6. Powell and Halt participated in the preparation and issuance of audit reports dated August 11, 2004 and October 11, 2004, which were included in American Utilicraft's Form 10-KSB.

7. Halt, Buzas & Powell and Powell were aware of the registration requirement and the October 22, 2003 deadline for registration with the PCAOB when Halt, Buzas & Powell issued the August 11, 2004 and October 11, 2004 audit reports.

8. Halt, Buzas & Powell received $104,797 for conducting audits of American Utilicraft's financial statements for its fiscal year 2001 through 2003 and for issuing audit reports on those financial statements.

D. VIOLATIONS

1. Section 4C(a) of the Exchange Act provides, in relevant part, that the Commission "may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission … (1) not to possess the requisite qualifications to represent others … or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder."

2. Rule 102(e)(1) of the Commission's Rules of Practice provides that the Commission "may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission ... (i) not to possess the requisite qualifications to represent others … or (iii) to have willfully violated … any provision of the Federal securities laws or the rules and regulations thereunder."

3. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."

4. Because Halt, Buzas & Powell had not registered with the PCAOB, it lacked "the requisite qualifications" to issue audit reports dated August 11, 2004 and October 11, 2004.

5. By participating in the preparation or issuance of audit reports after October 22, 2003 by an audit firm that was not registered with the PCAOB, Powell and Halt lacked "the requisite qualifications to represent others."

6. In violation of Section 102(a) of the Act, Halt, Buzas & Powell prepared and issued audit reports on the financial statements of a reporting company after October 22, 2003, without first registering with the PCAOB. Halt, Buzas & Powell thus also willfully violated the federal securities laws.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate 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; and

B. Whether, pursuant to Sections 4C(a)(1) and 4C(a)(3) of the Exchange Act and Rules 102(e)(1)(i) and 102(e)(1)(iii) of the Commission's Rules of Practice, Halt, Buzas & Powell should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

C. Whether, pursuant to Section 4C(a)(1) of the Exchange Act and Rule 102(e)(1)(i) of the Commission's Rules of Practice, Powell and Halt should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

D. Whether, pursuant to Section 21C of the Exchange Act, Halt, Buzas & Powell should be ordered to cease and desist from committing or causing violations and any future violations of Section 102(a) of the Act, and whether Halt, Buzas & Powell should be ordered to pay disgorgement and prejudgment interest and to make an accounting 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 Respondents shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12795

In the Matter of

SCHUHALTER, COUGHLIN & SUOZZO PC, and EDWARD J. SUOZZO, CPA,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 4C 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 that public administrative proceedings be, and hereby are, instituted pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e) of the Commission's Rules of Practice against Schuhalter, Coughlin & Suozzo, PC and Edward J. Suozzo, CPA ("Suozzo") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. **Schuhalter, Coughlin & Suozzo PC** is a New Jersey professional corporation and public accounting firm headquartered in Raritan, New Jersey. Schuhalter, Coughlin & Suozzo PC prepared and issued an audit report dated December 15, 2003, in connection with its audit of Earthworks Entertainment, Inc ("Earthworks").

2. **Edward J. Suozzo, CPA**, 47, of Hillsborough, New Jersey, is a certified public accountant licensed in New Jersey and New York since 1986. As engagement partner on the Earthworks engagement, Suozzo participated in the preparation and issuance of the December 15, 2003 Earthworks audit report.

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B. OTHER RELEVANT ENTITIES

1. Earthworks is a Delaware corporation based in West Palm Beach, Florida. During the relevant period, Earthworks's common stock traded on the OTC Bulletin Board. Its common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. Earthworks reported no revenue and total assets of $98,046 for its fiscal year ended September 30, 2003. Earthworks has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

C. FAILURE TO REGISTER WITH THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

1. Section 102(a) of the Act prohibits any person that is not a registered public accounting firm with the Public Company Accounting Oversight Board ("PCAOB") from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any public reporting company after October 22, 2003.

2. Though Respondents were aware of the PCAOB registration requirement, at no point did Schuhalter, Coughlin & Suozzo register with the PCAOB as a public accounting firm.

3. Schuhalter, Coughlin & Suozzo audited the financial statements included in Earthworks's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on January 6, 2004.

4. Schuhalter, Coughlin & Suozzo prepared and issued an audit report dated December 15, 2003, which was included in Earthworks's Form 10-KSB.

5. Suozzo participated in auditing the financial statements included in Earthworks's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on January 6, 2004.

6. Suozzo participated in the preparation and issuance of an audit report dated December 15, 2003, which was included in Earthworks's Form 10-KSB.

7. Respondents were aware of the registration requirement and the October 22, 2003 deadline for registration with the PCAOB when Schuhalter, Coughlin & Suozzo PC issued the December 15, 2003 audit report.

8. Schuhalter, Coughlin & Suozzo received $7,500 for conducting an audit of Earthworks's financial statements for its fiscal year 2003 and for issuing an audit report on those financial statements.

D. VIOLATIONS

1. Section 4C(a) of the Exchange Act provides, in relevant part, that the Commission "may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the

Commission … (1) not to possess the requisite qualifications to represent others … or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder."

2. Rule 102(e)(1) of the Commission's Rules of Practice provides that the Commission "may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission ... (i) not to possess the requisite qualifications to represent others … or (iii) to have willfully violated … any provision of the Federal securities laws or the rules and regulations thereunder."

3. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."

4. Because Schuhalter, Coughlin & Suozzo had not registered with the PCAOB, it lacked "the requisite qualifications" to issue an audit report dated February 27, 2004.

5. By participating in the preparation or issuance of an audit report after October 22, 2003 by an audit firm that was not registered with the PCAOB, Suozzo lacked "the requisite qualifications to represent others."

6. In violation of Section 102(a) of the Act, Schuhalter, Coughlin & Suozzo prepared and issued an audit report on the financial statements of a reporting company after October 22, 2003, without first registering with the PCAOB, Schuhalter, Coughlin & Suozzo thus also willfully violated the federal securities laws.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate that public administrative 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; and

B. Whether, pursuant to Sections 4C(a)(1) and 4C(a)(3) of the Exchange Act and Rules 102(e)(1)(i) and 102(e)(1)(iii) of the Commission's Rules of Practice, Schuhalter, Coughlin & Suozzo should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

C. Whether, pursuant to Section 4C(a)(1) of the Exchange Act and Rule 102(e)(1)(i) of the Commission's Rules of Practice, Suozzo should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12789

In the Matter of **CARL S. SANKO, CPA,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 4C 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 that public administrative proceedings be, and hereby are, instituted pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e) of the Commission's Rules of Practice against Carl S. Sanko, CPA ("Sanko" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. **Carl S. Sanko, CPA**, 51, of Topanga, California, is a certified public accountant licensed in California since 1987. Sanko operates as a sole proprietorship. Sanko prepared and issued an audit report dated June 3, 2004 in connection with its audit of Platina Energy Group, Inc. ("Platina").

B. OTHER RELEVANT ENTITIES

1. Platina is a Delaware corporation based in New Orleans, Louisiana. During the relevant period, Platina's common stock traded on the OTC Bulletin Board. Its common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. Platina reported $638 in revenue and total assets of $14,312 for its fiscal year ended 2003. Platina has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act"). Platina was known as Federal Protection Services, Inc. during the relevant period.

C. FAILURE TO REGISTER WITH THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

1. Section 102(a) of the Act prohibits any person that is not a registered public accounting firm with the Public Company Accounting Oversight Board ("PCAOB") from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any public reporting company after October 22, 2003.

2. At no point did Sanko register with the PCAOB as a public accounting firm.

3. Sanko audited Platina's financial statements included in Platina's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on June 29, 2004.

4. Sanko prepared and issued an audit report dated June 3, 2004, which was included in Platina's Form 10-KSB.

5. Sanko received $7,500 for conducting an audit of Platina's financial statements for its fiscal year 2003 and for issuing an audit report on those financial statements.

D. VIOLATIONS

1. Section 4C(a) of the Exchange Act provides, in relevant part, that the Commission "may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission … (1) not to possess the requisite qualifications to represent others … or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder."

2. Rule 102(e)(1) of the Commission's Rules of Practice provides that the Commission "may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission ... (i) not to possess the requisite qualifications to represent others … or (iii) to have willfully violated … any provision of the Federal securities laws or the rules and regulations thereunder."

3. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."

4. Because Sanko had not registered with the PCAOB, he lacked "the requisite qualifications" to issue an audit report dated June 3, 2004.

5. In violation of Section 102(a) of the Act, Sanko prepared and issued an audit report on the financial statements of a reporting company after October 22, 2003, without first registering with the PCAOB. Sanko thus also willfully violated the federal securities laws.

III.

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

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

B. Whether, pursuant to Sections 4C(a)(1) and 4C(a)(3) of the Exchange Act and Rules 102(e)(1)(i) and 102(e)(1)(iii) of the Commission's Rules of Practice, Respondent should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

IV.

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

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

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against 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 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.

Nancy M. Morris
Secretary

Florence E Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12790

In the Matter of **CHOI DOW IAN HONG & LEE ACCOUNTANCY CORPORATION and ERNEST E. DOW, CPA,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 4C 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 that public administrative proceedings be, and hereby are, instituted pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e) of the Commission's Rules of Practice against Choi Dow Ian Hong & Lee Accountancy Corporation ("Choi Dow") and Ernest E. Dow, CPA ("Dow") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. **Choi Dow Ian Hong & Lee Accountancy Corporation** is a California corporation and public accounting firm headquartered in Los Angeles, California. Choi Dow prepared and issued an audit report dated December 2, 2004 in connection with its audit of VALCAPX Acquisition Corp. ("VALCAPX").

2. **Ernest E. Dow, CPA**, 58, of Los Angeles, California, is a certified public accountant licensed in California since 1983. As engagement partner on the VALCAPX engagement, Dow participated in the preparation and issuance of the December 2, 2004 VALCAPX audit report.

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B. OTHER RELEVANT ENTITY

1. VALCAPX is a Nevada corporation based in Los Angeles, California. Its common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. VALCAPX reported no revenue and no assets for the fiscal years ended June 30, 2002, 2003, and 2004. VALCAPX has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 (the "Act").

C. FAILURE TO REGISTER WITH THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

1. Section 102(a) of the Sarbanes-Oxley Act of 2002 (the "Act") prohibits any person that is not a registered public accounting firm with the Public Company Accounting Oversight Board ("PCAOB" or "Board") from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any public reporting company after October 22, 2003.

2. Though Respondents were aware of the PCAOB registration requirement, at no point did Choi Dow register with the PCAOB as a public accounting firm.

3. Choi Dow audited VALCAPX's 2002, 2003, and 2004 financial statements included in VALCAPX's annual report for the fiscal years ended June 30, 2002, 2003, and 2004 on Form 10-KSB, filed with the Commission on December 9, 2004.

4. Choi Dow prepared and issued an audit report dated December 2, 2004, which was included in VALCAPX's Form 10-KSB for the fiscal years ended June 30, 2002, 2003, and 2004 filed with the Commission on December 9, 2004.

5. Dow participated in auditing the 2002, 2003, and 2004 financial statements included in VALCAPX's annual report for fiscal years ended June 30, 2002, 2003, and 2004 on Form 10-KSB, filed with the Commission on December 9, 2004.

6. Dow participated in the preparation and issuance of an audit report dated December 2, 2004, which was included in VALCAPX's Form 10-KSB.

7. Even though Choi Dow had failed to register with the Board, Choi Dow issued, and Dow participated in the preparation and issuance of, an audit report on the financial statements of VALCAPX after the October 22, 2003 deadline.

8. As part of the audit, Choi Dow received $3,600 for conducting an audit of the financial statements of VALCAPX and for issuing an audit report on those statements.

D. VIOLATIONS

1. Section 4C(a) of the Exchange Act provides, in relevant part, that the Commission "may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the

Commission … (1) not to possess the requisite qualifications to represent others … or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder."

2. Rule 102(e)(1) of the Commission's Rules of Practice provides that the Commission "may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission ... (i) not to possess the requisite qualifications to represent others … or (iii) to have willfully violated … any provision of the Federal securities laws or the rules and regulations thereunder."

3. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."

4. Because Choi Dow had not registered with the PCAOB, it lacked "the requisite qualifications" to issue an audit report dated December 2, 2004.

5. By participating in the preparation or issuance of an audit report after October 22, 2003 by an audit firm that was not registered with the PCAOB, Dow lacked "the requisite qualifications to represent others."

6. In violation of Section 102(a) of the Act, Choi Dow prepared and issued an audit report on the financial statements of a reporting company after October 22, 2003, without first registering with the Board. In so doing, Choi Dow thus also willfully violated the federal securities laws.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate that public administrative 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. Whether, pursuant to Sections 4C(a)(1) and 4C(a)(3) of the Exchange Act and Rules 102(e)(1)(i) and 102(e)(1)(iii) of the Commission's Rules of Practice, Choi Dow should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission; and

C. Whether, pursuant to Section 4C(a)(1) of the Exchange Act and Rule 102(e)(1)(i) of the Commission's Rules of Practice, Dow should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 13, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12788

In the Matter of BANKER & CO. and JITENDRA S. BANKER, Respondents.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 4C 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 that public administrative proceedings be, and hereby are, instituted pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e) of the Commission's Rules of Practice against Banker & Co. ("Banker & Co.") and Jitendra S. Banker ("Banker") (collectively "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. **Banker & Co.** is a California corporation and public accounting firm headquartered in Costa Mesa, California. Banker & Co. prepared and issued an audit report dated January 31, 2004, in connection with its audit of OTC Dreamwerks, Inc. ("OTC Dreamwerks"), an audit report dated May 21, 2004, in connection with its audit of Morgan Clark Management, Inc. ("Morgan"), and an audit report dated August 10, 2004, in connection with its audit of Mill Creek Research, Inc. ("Mill Creek")

2. **Jitendra S. Banker**, 67, of Costa Mesa, California, has been licensed as a chartered accountant in England since 1969, but he is not licensed as a CPA in any American state. As engagement partner on the OTC Dreamwerks, Morgan, and Mill Creek engagements, Banker participated in the preparation and issuance of the January 31, 2004 OTC Dreamwerks audit report, the May 21, 2004 Morgan Clark audit report, and the August 10, 2004 Mill Creek audit report.

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B. OTHER RELEVANT ENTITIES

1. OTC Dreamwerks is a Utah corporation based in Orange, California. OTC Dreamwerk's common stock does not currently trade and was registered with the Commission pursuant to Section 12(g) of the Exchange Act. OTC Dreamwerks reported no revenue or assets for fiscal year ended December 31, 2003. OTC Dreamwerks has at all relevant times been an issuer as defined by the Sarbanes-Oxley Act of 2002 ("the Act").

2. Morgan is a Utah corporation based in Orange, California. Morgan's common stock does not currently trade and was registered with the Commission pursuant to Section 12(g) of the Exchange Act. Morgan reported no revenue and no assets for fiscal year ended June 30, 2003. Morgan has at all relevant times been an issuer as defined by the Act.

3. Mill Creek is a Utah corporation based in Seymour, Texas. Mill Creek's common stock does not currently trade and was registered with the Commission pursuant to Section 12(g) of the Exchange Act. Mill Creek reported revenues of $200 and total assets of $900,000 for fiscal year ended December 31, 2003. Mill Creek has at all relevant times been issuers as defined by the Act.

C. FAILURE TO REGISTER WITH THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

1. Section 102(a) of the Act prohibits any person that is not a registered public accounting firm with the Public Company Accounting Oversight Board ("PCAOB" or "Board") from preparing or issuing, or participating in the preparation or issuance of, any audit report with respect to any public reporting company after October 22, 2003.

2. Though Respondents were aware of the PCAOB registration requirement, at no point did Respondent Banker & Co. register with the PCAOB as a public accounting firm.

3. Banker & Co. audited OTC Dreamwerk's 2003 financial statements included in OTC Dreamwerk's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on February 26, 2004.

4. Banker & Co. prepared and issued an audit report dated January 31, 2004, which was included in OTC Dreamwerk's Form 10-KSB.

5. Banker participated in auditing the 2003 financial statements included in OTC Dreamwerk's annual report for fiscal year 2003 on Form 10-KSB, filed with the Commission on February 26, 2004.

6. Banker participated in the preparation and issuance of an audit report dated January 31, 2004, which was included in OTC Dreamwerk's Form 10-KSB.

7. Banker & Co. audited Morgan's 2003 financial statements included in Morgan's annual report for fiscal year ended June 30, 2003 on Form 10-KSB, filed with the Commission on May 28, 2004.

8. Banker & Co. prepared and issued an audit report dated May 21, 2004, which was included in Morgan's Form 10-KSB.

9. Banker participated in auditing the 2003 financial statements included in Morgan's annual report for fiscal year ended June 30, 2003 on Form 10-KSB, filed with the Commission on May 28, 2004.

10. Banker participated in the preparation and issuance of an audit report dated May 21, 2004, which was included in Morgan's Form 10-KSB.

11. Banker & Co. audited Mill Creek's 2003 financial statements included in Mill Creek's annual report for fiscal year ended December 31, 2003 on Form 10-KSB, filed with the Commission on September 3, 2004.

12. Banker and Co. prepared and issued an audit report dated August 10, 2004, which was included in Mill Creek's Form 10-KSB.

13. Banker participated in auditing the 2003 financial statements included in Mill Creek's annual report for fiscal year ended December 31, 2003 on Form 10-KSB, filed with the Commission on September 3, 2004.

14. Banker participated in the preparation and issuance of an audit report dated August 10, 2004, which was included in Mill Creek's Form 10-KSB.

15. Banker & Co. received an aggregate of approximately $6,800 for conducting the audits of the financial statements of OTC Dreamwerks, Morgan, and Mill Creek and for issuing audit reports on those respective statements.

D. VIOLATIONS

1. Section 4C(a) of the Exchange Act provides, in relevant part, that the Commission "may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission … (1) not to possess the requisite qualifications to represent others … or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder."

2. Rule 102(e)(1) of the Commission's Rules of Practice provides that the Commission "may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission ... (i) not to possess the requisite qualifications to represent others … or (iii) to have willfully violated … any provision of the Federal securities laws or the rules and regulations thereunder."

3. Section 102(a) of the Act provides that "it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer."

4. Because Banker & Co. had not registered with the PCAOB, it lacked "the requisite qualifications" to issue audit reports dated January 31, 2004, May 21, 2004, and August 10, 2004.

5. By participating in the preparation and issuance of audit reports after October 22, 2003 by an audit firm that was not registered with the PCAOB, Banker lacked "the requisite qualifications to represent others."

6. In violation of Section 102(a) of the Act, Banker & Co. prepared and issued audit reports on the financial statements of reporting companies after October 22, 2003 without first registering with the Board. Banker & Co. thus also willfully violated the federal securities laws.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate that public administrative 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. Whether, pursuant to Sections 4C(a)(1) and 4C(a)(3) of the Exchange Act, and Rules 102(e)(1)(i) and 102(e)(1)(iii) of the Commission's Rules of Practice, Banker & Co. should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission; and

C. Whether, pursuant to Section 4C(a)(1) of the Exchange Act and Rule 102(e)(1)(i) of the Commission's Rules of Practice, Banker should be censured by the Commission or temporarily or permanently denied the privilege of appearing or practicing before the Commission.

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Florence E Harmon

By: Florence E. Harmon
Deputy Secretary

Commissioner Campos
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8841 / September 14, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56440 / September 14, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2647 / September 14, 2007

INVESTMENT COMPANY ACT OF 1940
Release No. 27969 / September 14, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12799

In the Matter of

DAVID BYCK, WILLIAM COLE, CHARLES IRWIN, MICHAEL PRICE, AND JAY SUMNER,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTIONS 9(b) AND 9(f) 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"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against David Byck ("Byck"), William Cole ("Cole"), Charles Irwin ("Irwin"), Michael Price ("Price") and Jay Sumner ("Sumner") (collectively "Respondents").

Document 64 of 105

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 Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 203(f) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings as to David Byck, William Cole, Charles Irwin, Michael Price, and Jay Sumner ("Order"), as set forth below.

III.

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

Summary

1. Between March 2002 and September 2003, Respondents operated two registered investment advisers, LP Advisors, Inc. ("LP Advisors") and Freedom Capital, Inc. ("Freedom Capital") (collectively, the "Advisers"). Through the Advisers, between August 2002 and April 2003, the Respondents utilized two schemes to enable their hedge fund clients to place mutual fund orders after 4:00 p.m. ET, but receive the net asset valuation ("NAV") determined as of 4:00 p.m.

2. Initially, Respondents conducted their late trading through a California broker-dealer, J.B. Oxford Holdings, Inc. ("JB Oxford"). Pursuant to a written agreement between LP Advisors and JB Oxford, LP Advisors could submit trade orders to JB Oxford until 4:15 p.m. ET, and "confirm" or "activate" the orders until 4:45 p.m., and still receive that day's NAV. Between August 22, 2002 and February 26, 2003, Respondents transmitted approximately 1,959 mutual fund purchase orders (with an equal number of sale orders) on behalf of their hedge fund clients to JB Oxford. With respect to each of the 1,959 orders, Respondents allowed their clients the privilege of choosing to confirm, modify, or cancel the order after 4:00 p.m. ET. At least 95 of the 1,959 orders were placed or modified after 4:00 p.m. ET.

3. In March 2003, Respondents began using a new fraudulent scheme to process trades. Respondents created five entities, Unified Pension Services, Inc., National Pension Plans, Inc., Retirement Planning Consultants, Inc., Pension Planning Professionals, Inc., and Benefit Planning Consultants, Inc. (collectively, the "Entities") and, based upon misrepresentations to the

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.

National Securities Clearing Corporation ("NSCC") that the Entities were third-party administrators on behalf of retirement or other benefit plans, received approval to register the Entities as members of NSCC. As NSCC members, the Entities could submit mutual fund trade orders as late as 3:00 a.m. ET the next day and still receive the previous day's NAV. To take advantage of this 3:00 a.m. ET order transmission time, Respondents rented office space near their homes and took turns manning this office space until 3:00 a.m. Between March 5 and April 16, 2003, Respondents processed 63 late mutual fund purchases and 50 sales through two of the Entities on behalf of their hedge fund clients.

Respondents

4. **Byck**, age 32, is a resident of Wellington, Florida. Byck was the sole principal of LP Advisors, an investment adviser registered with the Commission. At all relevant times herein, Byck was associated with the Advisers and the Entities.

5. **Cole**, age 38, is a resident of Orlando, Florida. Cole was a principal of Freedom Capital, an investment adviser registered with the Commission. At all relevant times herein, Cole was associated with the Advisers and the Entities.

6. **Irwin**, age 39, is a resident of Winter Garden, Florida. Irwin was a principal of Freedom Capital, an investment adviser registered with the Commission. At all relevant times herein, Irwin was associated with the Advisers and the Entities.

7. **Price**, age 36, is a resident of Legmary, Florida. Price was a principal of Freedom Capital, an investment adviser registered with the Commission. At all relevant times herein, Price was associated with the Advisers and the Entities.

8. **Sumner**, age 35, is a resident of Windermere, Florida. Sumner was a principal of Freedom Capital, an investment adviser registered with the Commission. At all relevant times herein, Sumner was associated with the Advisers and the Entities.

Other Relevant Entities

9. **LP Advisors** is a New York corporation owned by Byck. Between August 2001 and December 2003, it was registered with the Commission as an investment adviser. In December 2003, its registration with the Commission was withdrawn.

10. **Freedom Capital** is a New York corporation owned initially by Byck and then by Irwin, Price, Cole and Sumner. Between May 2002 and December 2003, it was registered with the Commission as an investment adviser. In December 2003, its registration with the Commission was withdrawn.

11. **Unified Pension Services, Inc.** ("UPS") is a Wisconsin corporation that Byck incorporated in March 2002. UPS is a wholly-owned subsidiary of Freedom Capital; Irwin and Sumner are its officers. In April 2002, UPS became a member of the NSCC, based upon representations that it was a third-party administrator to retirement or other benefit plans. In May 2003, UPS withdrew from NSCC membership.

12. **National Pension Plans, Inc.** ("NPP") is a Georgia corporation that Byck incorporated in March 2002. NPP is a wholly-owned subsidiary of Freedom Capital; Price and Cole are its officers. In April 2002, NPP became a member of the NSCC, based upon representations that it was a third-party administrator to retirement or other benefit plans. In May 2003, NPP withdrew from NSCC membership.

Late Trading of Mutual Funds

13. "Late trading" refers to the practice of placing orders to buy or sell mutual fund shares after the time as of which a mutual fund has calculated its NAV (usually as of the close of trading at 4:00 p.m. ET) but receiving the price based on the prior NAV already determined as of 4:00 p.m. Late trading enables the trader to profit from market events that occur after 4:00 p.m. ET but that are not reflected in that day's price. In particular, the late trader obtains an advantage – at the expense of the other shareholders of the mutual fund – when he learns of market moving information and is able to purchase (or sell) mutual fund shares at prices set *before* the market moving information was released. Late trading harms other shareholders when it dilutes the value of their shares.

Byck Founded LP Advisors and Freedom Capital

14. In April 2001, Byck incorporated LP Advisors and, on August 9, 2001, registered it with the Commission as an investment adviser.

15. In early 2002, Irwin, Price, Sumner and Cole associated themselves with LP Advisors. As Byck resided in New York, and Irwin, Price, Sumner and Cole resided in Florida, Irwin, Price, Sumner and Cole opened a LP Advisors office in Delray, Florida. Byck subsequently transferred control of Freedom Capital, then an inactive corporation, to Irwin, Price, Sumner and Cole. In May 2002, Irwin, Price, Sumner and Cole registered Freedom Capital with the Commission as an investment adviser.

16. Respondents operated LP Advisors and Freedom Capital pursuant to a written agreement, under which Byck received 50% of each entity's profits, while Irwin, Price, Cole and Sumner split the remaining 50%. While nominally separate, Respondents operated the two advisers as a single entity. Byck signed documents as Treasurer of Freedom Capital, and Irwin, Price, Cole and Sumner signed documents as partners of LP Advisors. The Advisers shared office space, a single e-mail server, and telephone lines. Respondents placed trades on behalf of clients for each entity from the Florida office.

Late Trading

17. In 2002 and 2003, Respondents engaged in late trading, whereby their hedge fund clients placed, confirmed or modified orders after 4:00 p.m. ET, but received the NAV determined as of 4:00 p.m.

Late Trading Through JB Oxford

18. In June 2002, Byck, on behalf of LP Advisors, established a business relationship with JB Oxford. JB Oxford offered a service to LP Advisors (and other customers involved in market timing) that the other broker-dealers utilized by the Advisers did not – the ability to submit mutual fund trades as late as 4:15 p.m. ET and to "activate" and "confirm" these trades as late as 4:45 p.m. Sumner took orders from clients up until 4:15 p.m. ET, and from one client until 4:41 p.m. Sumner then submitted these trades to JB Oxford by 4:45 p.m. ET. Although Sumner was the primary individual responsible for trading via JB Oxford, Respondents were each aware that clients were sending or confirming final trade orders after the close of the market, but were receiving that day's NAV. Between August 22, 2002 and February 20, 2003, LP Advisors submitted a total of approximately 1,959 mutual fund purchase orders and 1,959 sale orders through JB Oxford in which it had the privilege of choosing to confirm, modify, or cancel the order after 4:00 p.m. ET. On at least thirteen trading days, trades were transmitted to JB Oxford based on post-4:00 p.m. ET decisions from clients. A total of ninety-five trades were either initially submitted or modified after 4:00 p.m. ET on these trade dates.

19. LP Advisors stopped using JB Oxford as a broker-dealer in February 2003.

Late Trading Through UPS and NPP

20. In 2003, Respondents developed a new method for late trading – placing orders up to 3:00 a.m. ET and still receiving the prior day's NAV by submitting late trades for processing through Entities that they created for the sole purpose of processing Respondents' hedge fund clients' trades.

21. Respondents utilized two entities, UPS and NPP, obtained NSCC membership for UPS and NPP through fraudulent means, and then processed mutual fund orders on behalf of their hedge fund clients through the NSCC's automated mutual fund trading platform, Fund/SERV, until 3:00 a.m. ET, while obtaining the NAV as of 4:00 p.m. the previous day.

22. In March 2002, Byck incorporated the five Entities. He incorporated these Entities in five different states – Wisconsin, Michigan, Texas, Georgia and Florida. Using a mail drop box service, Byck obtained mailing addresses for each Entity in the state in which it was incorporated and cell telephones for each Entity with an area code appropriate for the city in which the relevant mailing address was located.

23. Byck, Price, and Sumner applied for third-party administrator membership with the NSCC on behalf of the five Entities. However, the requisite NSCC membership documentation they submitted contained false and misleading statements. Price and Sumner executed TPA Member's Agreements on behalf of NPP and UPS respectively, that represented that these entities were third-party administrators acting on behalf of a retirement or benefit plan. Byck filled out and submitted these Agreements to NSCC. All Respondents also signed TPA Member Consent and Authorization Forms on behalf of the Entities which represented that these Entities were third-party administrators acting on behalf of a retirement or other benefit plan. All Respondents knew the Entities applied for NSCC membership and falsely represented that the Entities provided administrative services on behalf of retirement or other benefit plans. They knew that the Entities had no such clients. Rather, they knew the Entitities were not third-party administrators to retirement or other benefit plans and were designed solely to facilitate late trading by the Respondents' hedge fund clients.

24. Byck also misrepresented the operational capacities of the Entities. Byck submitted NSCC membership questionnaires that: (a) overstated the number of operational personnel employed by each entity; (b) identified Byck's relatives and business associates as officers of the Entities when they had no involvement with the Entities; and (c) represented that a friend of Byck's family, who was unaware of the Entities' existence, served as the Entities "outside law firm/general counsel."

25. Respondents also executed agreements with various mutual fund families to enable the Entities to process trades in their mutual funds through the NSCC. Typically called "Networking Agreements," these agreements outlined the terms and conditions under which the Entities would submit trades in the particular mutual fund family's funds via NSCC's Fund/SERV platform. Typically these agreements specified that the Entities would only submit trades received before 4:00 p.m. ET for that day's NAV, and each Respondent signed at least one agreement that so specified. For example, an agreement signed on February 18, 2003 by Irwin on behalf of UPS with one mutual fund family, stated:

> Service Provider [UPS] certifies that all instructions delivered to Fund Agent shall have been received by the Service Provider from the Client-shareholder by the close of trading (currently 4:00 pm New York time) on the New York Stock Exchange (the 'Close of Trading') on [sic] before such Business day and that any Instructions received by it after the Close of Trading on any given Business Day will be transmitted to Fund Agent on or after the next Business Day.

26. Other agreements were less specific, but incorporated by reference the terms of the NSCC's Standard Networking Agreement. The NSCC's Standard Networking Agreement specified that:

> The Firm shall conduct each of the foregoing activities in a businesslike and competent manner, and in compliance with (a) all applicable laws, rules and regulations, including NSCC rules and procedures relating to NETWORKING, and if the Firm is a member of the National Association of Securities Dealers, Inc.

("NASD"), the NASD Rules of Fair Practice; (b) the then-current prospectuses and statements of additional information of the Funds; and (c) any provision relating to NETWORKING in any agreement between the Firm and the Underwriter that would affect the Firm's duties and obligations pursuant to this Agreement.

27. The Respondents made no attempts to comply with applicable laws, rules and regulations (including Investment Company Act Rule 22c-1) and failed to comply with the mutual fund prospectuses (which Respondents were contractually required to comply with), which required that orders be received by clients prior to 4:00 p.m. ET in order to receive that day's NAV.

28. In early 2003, Byck and Irwin began asking the clients if they wanted to process trades through the Entities. By April 2, 2003, Respondents' hedge fund clients had committed \$87 million for late trading through the Entities.

29. The Respondents charged a premium to late trade via the Entities. Although the wrap fees that UPS and NPP charged varied according to the client (as did fees charged by the Advisers), Respondents charged an annual wrap fee of approximately 250 basis points of assets under management for processing through the Entities, twice the approximate 125 basis point wrap fee that LP Advisors and Freedom Capital charged for trades placed through brokers-dealers. In the case of one client, Respondents charged an annual wrap fee of 400 basis points.

30. Between March 5 and April 16, 2003, UPS and NPP processed 63 separate purchases of mutual fund shares on behalf of the Advisers' hedge fund clients, where hedge fund clients were given the ability to confirm or cancel orders after 4:00 p.m. ET. The 63 late trades totaled over \$264 million of mutual fund share purchases. All of these trades were short-term, market timing trades, and no position was held longer than six days. These positions were sold out via 50 late trades totaling over \$268 million, the last of which took place on April 16, 2003. The total profit to the hedge fund clients exceeded \$4 million.

31. With respect to all these trades, final trading decisions were not made until 3:00 a.m. ET the next day. In each instance, Irwin, Price, Cole or Sumner received a tentative "order" from the hedge fund client prior to 4:00 p.m. ET. To place the tentative "order," the clients called the offices of LP Advisors/Freedom Capital in Florida – not the cell telephone numbers that Byck had obtained for each Entity and which had been given to the NSCC. At approximately 1:00 a.m. ET, one or more of Respondents would travel to a separate office in Wellington, Florida and stay there until 3:00 a.m. Clients had two options: (i) call at approximately 3:00 a.m. ET and confirm or cancel their preliminary orders, or (ii) Respondents would submit the preliminary orders if clients did not call to cancel by 3:00 a.m.

32. In early April 2003, two of the hedge fund clients told Byck that they had been advised by counsel that the trading through UPS and NPP might be illegal. Shortly thereafter, Respondents shut down the Entities.

33. Respondents collectively received approximately $307,000 in wrap fees from clients for whom they processed late trades through JB Oxford, and approximately $290,000 in wrap fees from late trades processed through the UPS and NPP.

34. UPS and NPP were not third-party administrators to retirement or other benefit plans. Despite the fact that Respondents were utilizing UPS and NPP to participate substantially in the order-taking and order-routing process, including by receiving trade orders directly from hedge fund clients and processing these orders through NSCC, Respondents did not register UPS and NPP as brokers or dealers with the Commission.

Violations

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

36. As a result of the conduct described above, Respondents willfully aided and abetted and caused UPS's and NPP's violations of Section 15(a)(1) of the Exchange Act, which provides that "[i]t shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section."

37. As a result of the conduct described above, Respondents willfully aided and abetted and caused UPS's and NPP's violations of Rule 22c-1 promulgated under Section 22(c) of the Investment Company Act, which provides that "[n]o registered investment company issuing any redeemable security, no person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in any such security shall sell, redeem, or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security."

Cooperation

38. In determining to accept the Offers, the Commission considered the cooperation afforded by Respondents to the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate in the public interest 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, Section 203(f) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and from committing or causing any violations and future violations of Section 15(a) of the Exchange Act and Rule 22c-1 promulgated under Section 22(c) of the Investment Company Act.

B. Respondents Byck, Irwin, Price, Sumner and Cole be, and hereby are, barred from association with any broker, dealer, or investment adviser, and are 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, with the right to reapply for association after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission;

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

C. Respondent David Byck shall, within 30 days of the entry of this Order, pay disgorgement of $121,576.34 and prejudgment interest of $21,754.16 in the total amount of $143,330.50 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies David Byck as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Gerald Gross, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281-1022.

D. Respondent William Cole shall, within 30 days of the entry of this Order, pay disgorgement of $31,649.50 and prejudgment interest of $5,613.86 in the total amount of $37,263.36 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies William Cole as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Gerald Gross, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281-1022.

E. Respondent Jay Sumner shall, within 30 days of the entry of this Order, pay disgorgement of $31,649.50 and prejudgment interest of $5,613.86 in the total amount of $37,263.36 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies Jay Sumner as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Gerald Gross, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281-1022.

F. Respondent Charles Irwin shall, within 30 days of the entry of this Order, pay disgorgement of $51,637.97 and prejudgment interest of $9,200.71 in the total amount of $60,838.68 to the United States Treasury, but that payment of $22,838.68 is waived based upon Respondent Irwin's sworn representations in his Statements of Financial Condition dated May 1, 2006 and August 31, 2006, and other documents submitted to the Commission. Therefore, within 30 days of this Order, Respondent Irwin shall pay disgorgement of $38,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies Charles Irwin as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Gerald Gross, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281-1022.

G. Respondent Michael Price shall, within 30 days of the entry of this Order, pay disgorgement of $51,637.97 and prejudgment interest of $9,200.71 in the total amount of $60,838.68, but that payment of $22,838.68 is waived based upon Respondent Price's sworn representations in his Statements of Financial Condition dated June 12, 2006 and August 7, 2006, and other documents submitted to the Commission. Therefore, within 30 days of the entry of this Order, Respondent Price shall pay disgorgement of $38,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies Michael Price as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Gerald Gross, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281-1022.

H. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondents Irwin and/or Price provided accurate and complete financial information at the time such representations were made; (2) seek an order directing Irwin's and/or Price's payment of disgorgement and pre-judgment interest; and (3) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Irwin and/or Price was fraudulent, misleading, inaccurate, or incomplete in any material respect. Irwin and/or Price may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; (4) assert that payment of a penalty should not be ordered; (5) contest the imposition of the maximum penalty allowable under the law; or (6) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Nancy M. Morris
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 14, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12800

In the Matter of **Austrian Trading Services, Inc.,** **Fix-Corp International, Inc.,** **FN Estate, Inc.,** **Gourmet's Choice Coffee Co., Inc.,** **Harter Financial, Inc., and** **Perennial Health Systems, Inc.,** **Respondents.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Austrian Trading Services, Inc. ("Austrian") (CIK No. 1020635) is a void Delaware corporation located in Linz, Austria with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Austrian is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on July 2, 1997. In a Form 10-SB amendment filed on February 12, 1999, the company reported a net loss of $3.9 million in fiscal year 1997, and a $2 million loss for the first three quarters of fiscal 1998.

2. Fix-Corp International, Inc. ("Fix-Corp") (CIK No. 1029672) is a void Delaware corporation located in Heath, Ohio with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Fix-Corp is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1998, which reported a net loss of $1.4 million. On November 16, 1998, the company filed a Chapter 11 bankruptcy

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petition in the U.S. Bankruptcy Court for the Southern District of Ohio, and the proceeding terminated on June 10, 2003.

3. FN Estate, Inc. ("FN Estate") (CIK No. 1092536) is a Pennsylvania corporation located in Bethlehem, Pennsylvania with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). FN Estate is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2003. The company filed a Chapter 11 bankruptcy petition with the U.S. Bankruptcy Court for the Eastern District of Pennsylvania, and the proceeding terminated on May 23, 2007.

4. Gourmet's Choice Coffee Co., Inc. ("Gourmet's Choice") (CIK No. 1088797) is a revoked Nevada corporation located in New York, New York with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Gourmet's Choice is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 1999, which reported no revenue and a net loss of $4,830. As of August 31, 2007, the company's common stock (symbol "GMCH") was traded on the over-the-counter markets.

5. Harter Financial, Inc. ("Harter") (CIK No. 719774) is an inactive New York corporation located in New Vernon, New Jersey with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Harter is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on July 31, 1998, which reported a net loss of $584,535 for the prior three quarters.

6. Perennial Health Systems, Inc. ("Perennial") (CIK No. 1034042) is a Colorado corporation located in Louisville, Kentucky with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Perennial is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended November 30, 1999, which reported a net loss of $163,303 for the prior three months.

B. DELINQUENT PERIODIC FILINGS

7. As discussed in more detail above, all of the respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

8. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration

is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondents identified in Section II registered pursuant to Section 12 of the Exchange Act.

IV.

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

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Attachment

J Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Appendix 1

Chart of Delinquent Filings
In the Matter of Austrian Trading Services, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Austrian Trading Services, Inc.					
	10-KSB	12/31/99	03/30/00	Not filed	90
	10-QSB	03/31/00	05/15/00	Not filed	88
	10-QSB	06/30/00	08/14/00	Not filed	85
	10-QSB	09/30/00	11/14/00	Not filed	82
	10-KSB	12/31/00	04/02/01	Not filed	77
	10-QSB	03/31/01	05/15/01	Not filed	76
	10-QSB	06/30/01	08/14/01	Not filed	73
	10-QSB	09/30/01	11/14/01	Not filed	70
	10-KSB	12/31/01	04/01/02	Not filed	65
	10-QSB	03/31/02	05/15/02	Not filed	64
	10-QSB	06/30/02	08/14/02	Not filed	61
	10-QSB	09/30/02	11/14/02	Not filed	58
	10-KSB	12/31/02	03/31/03	Not filed	54
	10-QSB	03/31/03	05/15/03	Not filed	52
	10-QSB	06/30/03	08/14/03	Not filed	49
	10-QSB	09/30/03	11/14/03	Not filed	46
	10-KSB	12/31/03	03/30/04	Not filed	42
	10-QSB	03/31/04	05/17/04	Not filed	40
	10-QSB	06/30/04	08/16/04	Not filed	37
	10-QSB	09/30/04	11/15/04	Not filed	34
	10-KSB	12/31/04	03/31/05	Not filed	30
	10-QSB	03/31/05	05/16/05	Not filed	28
	10-QSB	06/30/05	08/15/05	Not filed	25
	10-QSB	09/30/05	11/14/05	Not filed	22
	10-KSB	12/31/05	03/31/06	Not filed	18
	10-QSB	03/31/06	05/15/06	Not filed	16
	10-QSB	06/30/06	08/14/06	Not filed	13
	10-QSB	09/30/06	11/14/06	Not filed	10
	10-KSB	12/31/06	04/02/07	Not filed	5
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1

Total Filings Delinquent 30

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Fix-Corp International, Inc.					
	10-KSB	12/31/98	03/31/99	Not filed	102
	10-QSB	03/31/99	05/17/99	Not filed	100
	10-QSB	06/30/99	08/16/99	Not filed	97
	10-QSB	09/30/99	11/15/99	Not filed	94
	10-KSB	12/31/99	03/30/00	Not filed	90
	10-QSB	03/31/00	05/15/00	Not filed	88
	10-QSB	06/30/00	08/14/00	Not filed	85
	10-QSB	09/30/00	11/14/00	Not filed	82
	10-KSB	12/31/00	04/02/01	Not filed	77
	10-QSB	03/31/01	05/15/01	Not filed	76
	10-QSB	06/30/01	08/14/01	Not filed	73
	10-QSB	09/30/01	11/14/01	Not filed	70
	10-KSB	12/31/01	04/01/02	Not filed	65
	10-QSB	03/31/02	05/15/02	Not filed	64
	10-QSB	06/30/02	08/14/02	Not filed	61
	10-QSB	09/30/02	11/14/02	Not filed	58
	10-KSB	12/31/02	03/31/03	Not filed	54
	10-QSB	03/31/03	05/15/03	Not filed	52
	10-QSB	06/30/03	08/14/03	Not filed	49
	10-QSB	09/30/03	11/14/03	Not filed	46
	10-KSB	12/31/03	03/30/04	Not filed	42
	10-QSB	03/31/04	05/17/04	Not filed	40
	10-QSB	06/30/04	08/16/04	Not filed	37
	10-QSB	09/30/04	11/15/04	Not filed	34
	10-KSB	12/31/04	03/31/05	Not filed	30
	10-QSB	03/31/05	05/16/05	Not filed	28
	10-QSB	06/30/05	08/15/05	Not filed	25
	10-QSB	09/30/05	11/14/05	Not filed	22
	10-KSB	12/31/05	03/31/06	Not filed	18
	10-QSB	03/31/06	05/15/06	Not filed	16
	10-QSB	06/30/06	08/14/06	Not filed	13
	10-QSB	09/30/06	11/14/06	Not filed	10
	10-KSB	12/31/06	04/02/07	Not filed	5
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1

Total Filings Delinquent 33

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
FN Estate, Inc.					
	10-Q	09/30/03	11/14/03	Not filed	46
	10-K	12/31/03	03/30/04	Not filed	42
	10-Q	03/31/04	05/17/04	Not filed	40
	10-Q	06/30/04	08/16/04	Not filed	37
	10-Q	09/30/04	11/15/04	Not filed	34
	10-K	12/31/04	03/31/05	Not filed	30
	10-Q	03/31/05	05/16/05	Not filed	28
	10-Q	06/30/05	08/15/05	Not filed	25
	10-Q	09/30/05	11/14/05	Not filed	22
	10-K	12/31/05	03/31/06	Not filed	18
	10-Q	03/31/06	05/15/06	Not filed	16
	10-Q	06/30/06	08/14/06	Not filed	13
	10-Q	09/30/06	11/14/06	Not filed	10
	10-K	12/31/06	04/02/07	Not filed	5
	10-Q	03/31/07	05/15/07	Not filed	4
	10-Q	06/30/07	08/14/07	Not filed	1
Total Filings Delinquent	14				
Gourmet's Choice Coffee Co., Inc.					
	10-KSB	12/31/99	03/30/00	Not filed	90
	10-QSB	03/31/00	05/15/00	Not filed	88
	10-QSB	06/30/00	08/14/00	Not filed	85
	10-QSB	09/30/00	11/14/00	Not filed	82
	10-KSB	12/31/00	04/02/01	Not filed	77
	10-QSB	03/31/01	05/15/01	Not filed	76
	10-QSB	06/30/01	08/14/01	Not filed	73
	10-QSB	09/30/01	11/14/01	Not filed	70
	10-KSB	12/31/01	04/01/02	Not filed	65
	10-QSB	03/31/02	05/15/02	Not filed	64
	10-QSB	06/30/02	08/14/02	Not filed	61
	10-QSB	09/30/02	11/14/02	Not filed	58
	10-KSB	12/31/02	03/31/03	Not filed	54
	10-QSB	03/31/03	05/15/03	Not filed	52
	10-QSB	06/30/03	08/14/03	Not filed	49
	10-QSB	09/30/03	11/14/03	Not filed	46
	10-KSB	12/31/03	03/30/04	Not filed	42
	10-QSB	03/31/04	05/17/04	Not filed	40
	10-QSB	06/30/04	08/16/04	Not filed	37
	10-QSB	09/30/04	11/15/04	Not filed	34
	10-KSB	12/31/04	03/31/05	Not filed	30
	10-QSB	03/31/05	05/16/05	Not filed	28

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Gourmet's Choice Coffee Co., Inc. (continued)	*10-QSB*	06/30/05	08/15/05	Not filed	25
	10-QSB	09/30/05	11/14/05	Not filed	22
	10-KSB	12/31/05	03/31/06	Not filed	18
	10-QSB	03/31/06	05/15/06	Not filed	16
	10-QSB	06/30/06	08/14/06	Not filed	13
	10-QSB	09/30/06	11/14/06	Not filed	10
	10-KSB	12/31/06	04/02/07	Not filed	5
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1
Total Filings Delinquent	29				
Harter Financial, Inc.					
	10-KSB	06/30/98	09/28/98	Not filed	108
	10-QSB	09/30/98	11/16/98	Not filed	106
	10-QSB	12/31/98	02/15/99	Not filed	103
	10-QSB	03/31/99	05/17/99	Not filed	100
	10-KSB	06/30/99	09/28/99	Not filed	96
	10-QSB	09/30/99	11/15/99	Not filed	94
	10-QSB	12/31/99	02/14/00	Not filed	91
	10-QSB	03/31/00	05/15/00	Not filed	88
	10-KSB	06/30/00	09/28/00	Not filed	84
	10-QSB	09/30/00	11/14/00	Not filed	82
	10-QSB	12/31/00	02/14/01	Not filed	79
	10-QSB	03/31/01	05/15/01	Not filed	76
	10-KSB	06/30/01	09/28/01	Not filed	72
	10-QSB	09/30/01	11/14/01	Not filed	70
	10-QSB	12/31/01	02/14/02	Not filed	67
	10-QSB	03/31/02	05/15/02	Not filed	64
	10-KSB	06/30/02	09/30/02	Not filed	60
	10-QSB	09/30/02	11/14/02	Not filed	58
	10-QSB	12/31/02	02/14/03	Not filed	55
	10-QSB	03/31/03	05/15/03	Not filed	52
	10-KSB	06/30/03	09/29/03	Not filed	48
	10-QSB	09/30/03	11/14/03	Not filed	46
	10-QSB	12/31/03	02/16/04	Not filed	43
	10-QSB	03/31/04	05/17/04	Not filed	40
	10-KSB	06/30/04	09/28/04	Not filed	36
	10-QSB	09/30/04	11/15/04	Not filed	34
	10-QSB	12/31/04	02/14/05	Not filed	31
	10-QSB	03/31/05	05/16/05	Not filed	28
	10-KSB	06/30/05	09/28/05	Not filed	24

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Harter Financial, Inc. (continued)	*10-QSB*	09/30/05	11/14/05	Not filed	22
	10-QSB	12/31/05	02/14/06	Not filed	19
	10-QSB	03/31/06	05/15/06	Not filed	16
	10-KSB	06/30/06	09/28/06	Not filed	12
	10-QSB	09/30/06	11/14/06	Not filed	10
	10-QSB	12/31/06	04/02/07	Not filed	5
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1
Total Filings Delinquent	37				
Perennial Health Systems, Inc.					
	10-Q	02/28/00	04/13/00	Not filed	89
	10-K	05/31/00	08/29/00	Not filed	85
	10-Q	08/31/00	10/16/00	Not filed	83
	10-Q	11/30/00	01/15/01	Not filed	80
	10-Q	02/28/01	04/16/01	Not filed	77
	10-K	05/31/01	08/29/01	Not filed	73
	10-Q	08/31/01	10/15/01	Not filed	71
	10-Q	11/30/01	01/14/02	Not filed	68
	10-Q	02/28/02	04/15/02	Not filed	65
	10-K	05/31/02	08/29/02	Not filed	61
	10-Q	08/31/02	10/15/02	Not filed	59
	10-Q	11/30/02	01/14/03	Not filed	56
	10-Q	02/28/03	04/14/03	Not filed	53
	10-K	05/31/03	08/29/03	Not filed	49
	10-Q	08/31/03	10/15/03	Not filed	47
	10-Q	11/30/03	01/14/04	Not filed	44
	10-Q	02/28/04	04/13/04	Not filed	41
	10-K	05/31/04	08/30/04	Not filed	37
	10-Q	08/31/04	10/15/04	Not filed	35
	10-Q	11/30/04	01/14/05	Not filed	32
	10-Q	02/28/05	04/14/05	Not filed	29
	10-K	05/31/05	08/29/05	Not filed	25
	10-Q	08/31/05	10/17/05	Not filed	23
	10-Q	11/30/05	01/16/06	Not filed	20
	10-Q	02/28/06	04/14/06	Not filed	17
	10-K	05/31/06	08/29/06	Not filed	13
	10-Q	08/31/06	10/16/06	Not filed	11
	10-Q	11/30/06	01/15/07	Not filed	8
	10-Q	02/28/07	04/16/07	Not filed	5
	10-K	05/31/07	08/29/07	Not filed	1
Total Filings Delinquent	30				

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56445 / September 14, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2718 / September 14, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12801

In the Matter of **BARRY M. BUDILOV, CPA** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

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

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

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.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. Budilov, age 51, has been a certified public accountant licensed to practice in the Commonwealth of Pennsylvania. His license to practice was issued in March 1981 and it expired on April 20, 2000. During the period of the conduct alleged in the Commission's complaint, discussed more fully below, Budilov was a licensed certified public accountant. In addition, he served as President and Chief Executive Officer of Ambassador Eyewear Group, Inc. from 1995 until he was terminated from those positions in 1999.

2. Ambassador Eyewear Group, Inc. ("Ambassador") was, at all relevant times, a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania. At all relevant times, Ambassador's common stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on both the Chicago Stock Exchange and in the Pink Sheets.

3. On September 26, 2002, the Commission filed a complaint against Budilov in the United States District Court for the Eastern District of Pennsylvania, SEC v. Barry M. Budilov et al. (Civil Action No. 02-CV-7479). On September 13, 2007, the Court entered an order permanently enjoining Budilov, by consent, from future violations of Section 17 of the Securities Act of 1933, Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13b2-1 and 13b2-2 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder.

4. The Commission's complaint alleged, among other things, that, from at least 1997 through at least December 1998, Budilov engaged in a fraudulent scheme to artificially inflate Ambassador's assets, income, and retained earnings. As a result of the scheme, the complaint alleged that Ambassador falsely claimed, in a registration statement, annual and quarterly reports filed with the Commission, and in press releases, that it was profitable when, in fact, the company had incurred substantial losses. In addition, Ambassador overstated its assets by as much as 35 percent. The Commission's complaint alleged that, as part of the scheme, Budilov falsified Ambassador's books and records related to income, expense, accounts receivable,

retained earnings, and inventory, and lied to Ambassador's auditor. The complaint further alleged that, after others began suspecting the fraud, Budilov attempted to conceal his involvement by destroying evidence, causing others to destroy evidence, and persuading others to accept responsibility for the fraud.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Budilov is suspended from appearing or practicing before the Commission as an accountant.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 27970 / September 17, 2007

In the Matter of

AMERICAN INTERNATIONAL GROUP, INC.
AIG EQUITY SALES CORP.
AIG GLOBAL INVESTMENT CORP.
70 Pine Street
New York, NY 10270

AIG ANNUITY INSURANCE COMPANY
AMERICAN GENERAL DISTRIBUTORS, INC.
THE VARIABLE ANNUITY LIFE INSURANCE COMPANY
2929 Allen Parkway, L4-01
Houston, TX 77019

AIG LIFE INSURANCE COMPANY
One ALICO Plaza
600 King Street
Wilmington, DE 19801

AIG SUNAMERICA ASSET MANAGEMENT CORP.
AIG SUNAMERICA CAPITAL SERVICES, INC.
Harborside Financial Center
3200 Plaza 5
Jersey City, NJ 07311-4992

AIG SUNAMERICA LIFE ASSURANCE COMPANY
1999 Avenue of the Stars
Los Angeles, CA 90067

AMERICAN GENERAL EQUITY SERVICES CORP.
AMERICAN GENERAL LIFE INSURANCE COMPANY
2727 Allen Parkway
Houston, TX 77019

AMERICAN INTERNATIONAL LIFE ASSURANCE COMPANY OF NEW YORK
80 Pine Street
New York, NY 10005

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BRAZOS CAPITAL MANAGEMENT, L.P.
5949 Sherry Lane, Suite 1600
Dallas, TX 75225

FIRST SUNAMERICA LIFE INSURANCE COMPANY
70 Pine Street
New York, NY 10270

THE UNITED STATES LIFE INSURANCE COMPANY
IN THE CITY OF NEW YORK
830 Third Avenue
New York, NY 10022

(812-13259)

ORDER PURSUANT TO SECTION 9(c) OF THE INVESTMENT COMPANY ACT OF 1940 GRANTING A PERMANENT EXEMPTION FROM SECTION 9(a) OF THE ACT

American International Group, Inc. ("AIG"), AIG Annuity Life Insurance Company, AIG Equity Sales Corp., AIG Global Investment Corp., AIG Life Insurance Company, AIG SunAmerica Asset Management Corp., AIG SunAmerica Capital Services, Inc., SunAmerica Life Assurance Company, American General Distributors, Inc., American General Equity Services Corp., American General Life Insurance Company, American International Life Assurance Company of New York, Brazos Capital Management, L.P., First SunAmerica Life Insurance Company, The United States Life Insurance Company In The City of New York, and The Variable Annuity Life Insurance Company filed an application on February 10, 2006, and an amendment to the application on August 16, 2007 requesting temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 ("Act") exempting applicants and any other company of which AIG is or hereafter becomes an affiliated person (collectively, "Covered Persons") from section 9(a) of the Act with respect to a securities-related injunction entered by the U.S. District Court for the Southern District of New York on February 17, 2006.

On February 21, 2006, the Commission issued a temporary order exempting the Covered Persons from section 9(a) of the Act until the earlier of August 21, 2006 or the date the Commission takes final action on the application for a permanent order (Investment Company Act Release No. 27227). On August 18, 2006, and on February 16, 2007, the Commission issued additional temporary orders that extended the temporary exemption to August 21, 2007, or the date the Commission takes final action on the application for a permanent order (Investment Company Act Release Nos. 27446 and 27700). On August 20, 2007, the Commission simultaneously issued a notice of the filing of the application and a temporary order exempting applicants from section 9(a) of the Act (Investment Company Act Release No. 27931) from August 20, 2007 until the Commission takes final action on the application for a permanent order. The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found that the prohibitions of section 9(a) as applied to the applicants would be unduly and disproportionately severe and the conduct of the applicants has been such as not to make it against the public interest or protection of investors to grant the permanent exemption from the provisions of section 9(a) of the Act.

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application, as amended, filed by AIG, et al. (File No. 812-13259), that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of an injunction, described in the application, entered by the U.S. District Court for the Southern District of New York on February 17, 2006.

By the Commission.

Florence E. Harmon

Florence E. Harmon
Deputy Secretary

Commissioner Nazareth
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56450 / September 18, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12804

In the Matter of

SWISS RE FINANCIAL PRODUCTS CORPORATION,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934

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 Swiss Re Financial Products Corporation ("SRFP," "the firm" 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, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

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III.

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

SUMMARY

1. Over a period of approximately eighteen months, from mid-2003 until early 2005, on thirteen occasions, SRFP violated Rule 105 of Regulation M. On each occasion, in connection with a follow-on offering, SRFP sold securities short within five business days before the pricing of the offering, and covered the short sale, in whole or in part, with shares purchased in the offering. SRFP profited on all but one of the thirteen transactions, realizing total profits of $380,517 on the profitable transactions.

RESPONDENT

2. **SRFP** is a Delaware corporation. It is a wholly-owned subsidiary of Swiss Re America Holding Corporation, which is wholly owned by Swiss Reinsurance Company, a Swiss corporation. SRFP engages in, among other things, proprietary trading.

LEGAL FRAMEWORK

3. Rule 105 of Regulation M, "Short Selling in Connection with a Public Offering," prohibits covering a short sale with securities obtained in a public offering if the short sale occurred within the shorter of the period five business days before pricing and ending with pricing, or the period beginning with the initial filing of the registration statement or notification on Form 1-A and ending with pricing. In pertinent part, Rule 105 provides:

> In connection with an offering of securities for cash pursuant to a registration statement . . . filed under the Securities Act, it shall be unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if such short sale occurred during the . . . period beginning five business days before the pricing of the offered securities and ending with such pricing.

17 C.F.R. § 242.105. "The goal of Rule 105 is to promote offering prices that are based upon open market prices determined by supply and demand rather than artificial forces." Final Rule: Short Sales, Exchange Act Release No. 50103, 2004 WL 1697019, at *19 (July 28, 2004).

SRFP'S TRADES

4. From June 2003 until February 2005, in connection with thirteen public offerings, SRFP engaged in short sales and covering transactions prohibited by Rule 105 in securities of eleven issuers: Nextel Partners, Inc.; Montpelier Re Holdings Ltd.; Chicago Mercantile Exchange Holdings, Inc.; Monster Worldwide, Inc.; Estee Lauder Companies, Inc.; WellChoice,

Inc.; AU Optronics Corp.; Bucyrus International, Inc.; Wesco International, Inc.; Owens-Illinois, Inc. (two transactions); and Taiwan Semiconductor Manufacturing Co. Ltd. (two transactions). SRFP incurred a loss on one of the transactions and realized profits totaling $380,517 on the other twelve.

5. The transactions were effected by several traders located in New York and London. Those traders were part of a group of traders that is no longer associated with SRFP or its affiliates.

6. Most of the transactions followed the same general pattern. SRFP sold securities short either the day of, or the day before, the follow-on offering. In each instance, the short sale occurred before the offering was priced. The firm covered all or part of the short position with shares it was allocated in the offering. On two occasions, the number of shares the firm received in the offering was exactly the same as the number of shares it had sold short. On four occasions, SRFP's offering allocation was insufficient to cover the entire short position, and the firm purchased additional shares on the open market to cover the remainder of its short position on the day of the offering or the following day. In the remaining instances, SRFP received more shares in the offering than it needed to cover the short position, and generally sold the excess shares the day of the offering or the following day.

7. The firm's transactions in shares of Nextel Partners are illustrative. On November 13, 2003, SRFP sold short 150,000 shares of Nextel Partners at $11.329 per share, obtaining proceeds of $1,699,350. Later that day, Nextel Partners priced an offering of its securities at $10.80. SRFP received an allocation of 400,000 shares in the offering, for which it paid a total of $4,320,000. Of those 400,000 shares, the firm used 150,000 (at a cost of $1,620,000) to cover the short sale, resulting in a profit of $79,350 on the transaction. The next day, November 14, 2003, SRFP sold the remaining 250,000 shares it had purchased in the offering, eliminating its position in Nextel Partners.

8. During the relevant period, SRFP did not have procedures in place designed to prevent or detect Rule 105 violations and provided no training to the traders concerning Rule 105.

VIOLATIONS

9. As a result of the conduct described above, Respondent violated Rule 105 of Regulation M, which makes it "unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participant in the offering, if such short sale occurred during the . . . period beginning five business days before the pricing of the offered securities and ending with the pricing."

SRFP'S REMEDIAL EFFORTS

10. In determining to accept the Offer,[1] the Commission considered remedial acts promptly undertaken by SRFP and cooperation afforded the Commission staff.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Respondent SRFP cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M.

B. IT IS FURTHERED ORDERED that SRFP shall, within thirty (30) days of the entry of this Order, pay disgorgement in the amount of $380,517, and prejudgment interest in the amount of $77,088 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies SRFP as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Andrew M. Calamari, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, New York, NY 10281.

By the Commission.

Nancy M. Morris
Secretary

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

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[1] The Commission has also accepted SRFP's offer to consent to a final judgment ordering it to pay a civil penalty of $95,000 in a parallel action by the Commission in United States District Court.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8844 / September 19, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12809

In the Matter of

HSBC Bank USA, N.A.,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933

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"), against HSBC Bank USA, N.A. ("HSBC" 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, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 ("Order"), as set forth below.

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III.

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

Summary

1. This action concerns the role of a financial institution in a Miami, Florida based offering fraud. Since at least 1999, Pension Fund of America, L.C. and PFA Assurance Group, Ltd. (hereinafter collectively "Pension Fund") had offered and sold retirement and college "trust plans" that purportedly provided investors with term life insurance and the opportunity to invest in one or more of several pre-selected mutual funds. In August 2003, HSBC agreed to serve as trustee of the investment component of Pension Fund's trust plans. HSBC also agreed to allow Pension Fund to use its name and logo in Pension Fund's offering materials. HSBC allowed Pension Fund to use marketing materials that falsely suggested to prospective investors that the trust plans were co-developed by HSBC and Pension Fund, that their funds would be "totally safe," because the investor's money would be deposited into a trust account at HSBC. One of HSBC's representatives drafted a letter on HSBC letterhead announcing the new relationship and inviting certain of Pension Fund's existing investors to transfer their funds to HSBC. In reality, Pension Fund deposited investors' funds into an ordinary checking account in its name at HSBC, with Pension Fund taking up to 95% of the investment amount to pay expenses and fees. Additionally, because of HSBC's negotiated fee arrangement with Pension Fund, HSBC actively participated in the selection of offshore, high front load mutual funds offered to prospective investors. Neither the amount of these sales loads, nor HSBC's role in the funds' selection, were disclosed to investors. As a result, from August 2003 through March 28, 2005, HSBC caused Pension Fund's violations of Section 17(a)(2) and 17(a)(3) of the Securities Act.

Respondent

2. HSBC is a national banking association with its principal place of business in Wilmington, Delaware. HSBC operates in nine states in the United States. HSBC is the principal subsidiary of HSBC USA Inc., which has certain publicly-traded preferred shares that are listed on the New York Stock Exchange. HSBC USA Inc. is an indirect, wholly-owned subsidiary of HSBC North America Holdings, Inc., which, in turn, is a wholly-owned indirect subsidiary of HSBC Holdings, plc ("HSBC Holdings"), a public limited company organized in the United Kingdom. HSBC Holdings' ordinary shares are admitted to trading on the London Stock Exchange and are listed on The Stock Exchange of Hong Kong, Euronext Paris and the Bermuda Stock Exchange and its American depository shares are listed on the New York Stock Exchange.

Other Relevant Entity

3. Pension Fund of America, L.C. is a Florida limited liability corporation formed in June 1999, with its principal place of business in Coral Gables, Florida. Pension Fund is not registered with the Commission in any capacity. Pension Fund offered unregistered securities in the form of retirement and college "trust plans" that purported to have an investment and insurance component. On March 28, 2005, the United States District Court for the Southern

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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.

District of Florida appointed a receiver over Pension Fund and its affiliated entities in an emergency action filed by the Commission to halt Pension Fund's offering fraud. Securities and Exchange Commission v. Pension Fund of America, L.C., et al., Case No. 05-20863-CIV-MOORE (S.D. Fla.).

Pension Fund's Fraudulent Offering

4. From at least 1999 through March 28, 2005 ("the Relevant Period"), Pension Fund and its principals offered and sold "trust plans" that purported to contain both an investment component and an insurance component. Using a network of over 500 independent sales agents, Pension Fund marketed the trust plans to individuals who primarily lived in Central and South America. Through sales materials and oral presentations, Pension Fund promoted its plans as safe and profitable because the investors could choose mutual funds issued by U.S. fund companies, and U.S. banks and broker-dealers would purportedly serve as "trustees" or "custodians," assuring the safety of their funds. During the Relevant Period, Pension Fund raised at least $127 million from over 3,400 investors.

5. Pension Fund offered two types of trust plans: a monthly or annual contribution plan ("Liberty Plan"), and a one-time contribution plan ("Capital Plan"). The majority of the investors chose to invest in the Liberty Plan, which required annual contributions of between $1,000 and $20,000 a year for a period of 10 to 15 years. The Capital Plan required a minimum one-time contribution of at least $10,000 for a minimum 10-year term. Both plans imposed significant early withdrawal penalties for the entire term of the plan. The "investment component" of both plans provided investors with a choice of several different mutual funds issued by well-known U.S. fund companies. The plans also included a fixed term life insurance component.

6. Throughout the Relevant Period, several U.S. banks and broker-dealers served as a trustee and/or custodian in connection with the investment component of Pension Fund's trust plans. Pension Fund touted its relationships with these institutions as one of the main selling points for its trust plans and included information about these companies in presentations and marketing materials provided to prospective investors. Pension Fund represented to prospective investors that by investing through their plans, the U.S. bank or broker-dealer would act as "trustee" for the investor. The fact that the investment vehicle was a "trust" was important to prospective investors living in South and Central America because it purportedly assured them that their money was safe.

7. In connection with its offer and sale of the trust plans, Pension Fund made material misrepresentations and omissions to investors. Among other things, Pension Fund failed to disclose to Liberty Plan investors that during the first year of the investment up to 95% of their funds were used to pay exorbitant commissions to sales agents, administrative fees, and other costs. Pension Fund charged Capital Plan investors undisclosed, average fees of 30% on their investments. In addition, Pension Fund falsely told investors that their investments would be held "in trust" by the U.S. bank or broker-dealer servicing Pension Fund's trust plans at the time. However, with one exception, none of the institutions executed trust agreements directly with the investors. Pension Fund forged certificates ostensibly issued by the financial institutions, and lulled investors with annual statements depicting false returns. Pension Fund's principals also misappropriated tens of millions of investors' funds.

HSBC Becomes Trustee of Pension Fund's Trust Plans and Approves Certain Language in Pension Fund's Offering Materials

8. In the spring of 2003, Pension Fund approached HSBC Private Bank representatives (the "relationship representatives") to discuss whether HSBC could serve as trustee for the investment component of its trust plans. Pension Fund's principals explained the nature of the trust plans, and told the relationship representatives they were looking for a new bank to serve as Pension Fund's trustee and provide recordkeeping services for its plans. As part of the new relationship, Pension Fund would seek approval from certain of its plan participants to liquidate the mutual fund investments held by other banks and broker-dealers previously affiliated with the plans, and transfer those proceeds to HSBC for investment. Pension Fund requested HSBC's assistance in selecting off-shore mutual funds similar to the domestic funds Pension Fund previously had been offering to its investors through the trust plans. Pension Fund agreed that HSBC could keep all loads paid by the funds in connection with those transactions. The Pension Fund principals also requested the use of HSBC's logo and name in its revised offering materials.

9. In evaluating whether to accept Pension Fund as a client, HSBC obtained information about Pension Fund and its principals. One of the relationship representatives conducted internet searches for press releases and news articles about Pension Fund. Pension Fund's principals provided HSBC with photo identification, information about their personal net worth, and the approximate net asset value of investor shares and amount of funds that HSBC would receive if it accepted the new relationship.

10. The relationship representatives also conducted an on-site visit of Pension Fund to verify the business' existence and learn about Pension Fund's operations. In addition, because HSBC was not going to have direct contact with the Pension Fund investors, the relationship representatives obtained information regarding Pension Fund's "Know Your Customer" procedures. Pension Fund also sent HSBC its unaudited financial statements for the year ended December 31, 2002, which indicated that while Pension Fund had recognized \$14.2 million in gross revenues for that year, \$5.2 and \$6.0 million of those funds were expenses for sales agents' commissions and distributions to Pension Fund's principals, respectively.

11. In August 2003, HSBC agreed to accept Pension Fund as a new customer and serve as trustee for the investment component of the Pension Fund trust plans. On August 7, 2003, Pension Fund and HSBC executed a Master Trust Agreement, which defined the terms and scope of HSBC's duties as trustee. Specifically, under the Master Trust Agreement, HSBC would serve as trustee for the investment component of the Pension Fund plans and create a Master Trust Account to hold the assets designated by Pension Fund as the investment component of the investors' trust plans. The Master Trust Agreement, printed only in English, also indicated that HSBC's duties were limited to acting as custodian of the investment component of the plan, receiving investor funds, retaining custody of those funds in sub-accounts and investing or disbursing investor funds as directed by Pension Fund. The Master Trust Agreement gave Pension Fund the right to use HSBC's name and logo in Pension Fund's marketing materials. Pension Fund prepared new offering materials purportedly reflecting the new relationship with HSBC, and provided the offering materials to HSBC for its review and approval. The offering materials included two contracts titled "Guide to Plan Provisions" and "Plan Transfer Provisions" (collectively "Plan Provisions"), and two glossy marketing brochures.

12. The marketing brochures, printed in both Spanish and Portuguese, contained a general overview of Pension Fund's plans and included HSBC's logo, pictures of HSBC's corporate headquarters, and other general information about HSBC. The brochure stated that HSBC was the "second largest commercial bank in the world." In addition, the marketing brochures represented that: "Pension Fund and HSBC Bank, USA have created the Liberty Trust Plan for you." The brochures further assured investors of the safety of their funds, describing HSBC as the investors' trustee and claiming, "Your money is in the best hands – HSBC Bank, USA." The marketing brochures provided a list of mutual funds offered as part of the trust plans. Pension Fund's marketing brochures did not disclose information about the sales commissions, administrative expenses, or the front load mutual fund fees charged to the investor. These marketing brochures also did not include information about any limitations to HSBC's role as trustee.

13. The Plan Provisions provided more details about the trust plans' investment and insurance components, and included HSBC's logo and the legend "HSBC Bank USA as Trustee" on the cover page. The Plan Provisions defined "Trustee" as "HSBC Bank USA, which shall serve as trustee for the Investment Component of the Plan in accordance with the provisions of the Master Trust Agreement." The Plan Provisions generally disclosed that up to 80% of the investor's initial contribution in the Liberty Plan would be used to pay "plan expenses," which were generally defined as the cost of insurance, the fees associated with purchasing the mutual funds selected by the investor, sales commissions and brokerage fees, and other "administrative fees." The Plan Provisions did not provide a specific breakdown of the nature and specific amount of all the fees and costs associated with the plans, nor did it disclose that up to 50% would be used to pay commissions to sales agents.

14. During the Relevant Period, HSBC had procedures in place providing for the review of any materials using the HSBC name or logo. Those procedures required that the relationship representatives forward the Pension Fund marketing materials to the marketing department for its review of the size, placement, and color of the HSBC logo. The procedures also required the relationship representatives and/or the marketing personnel to forward the materials to the compliance and legal departments for a substantive review of the language in those materials. Finally, the procedures further required that any materials considered to be "co-branding" (i.e., jointly offered or sold by HSBC and another entity), be sent to the Group Head Office and Group Marketing Office ("Group Offices"), located at HSBC's parent company, HSBC Holdings, in London, England. Given the language in the marketing brochures suggesting that the trust plans were "created" by Pension Fund and HSBC, had these procedures been followed, the compliance and legal departments would presumably have reviewed the materials to determine whether the co-branding procedures were triggered or, in the alternative, whether the language of the brochures should have been modified to make clear that the trust plans were not jointly offered by Pension Fund and HSBC.

15. When reviewing Pension Fund's new marketing materials, HSBC failed to follow its own internal marketing approval procedures. Although the relationship representatives forwarded the marketing brochures to the marketing department for review, neither the relationship representatives nor the marketing department forwarded the materials to the compliance and legal departments, or Group Offices, for a substantive review of the language in the marketing materials. While HSBC did send the Master Trust Agreement and Plan Provisions

to outside legal counsel for review, neither of the marketing brochures were reviewed by HSBC's compliance and legal departments, or outside counsel, for the purpose of assessing the adequacy of the representations and disclosures in those materials.

16. HSBC administered its duties as trustee within its Retirement Financial Services ("RFS") group of HSBC's Private Bank. The Pension Fund trust plans were not the typical retirement plans serviced by HSBC's RFS group, which primarily serviced U.S. employer-sponsored retirement plans, where the member employees reside in the U.S. and have direct access to HSBC's services. In contrast, Pension Fund's investors were not employees of Pension Fund, they were not U.S. residents, and they did not have direct contact with or access to HSBC or its services. Pension Fund's investors did not have access to HSBC's Website, Infoline or Call Center, and HSBC instructed its staff to direct all inquiries from Pension Fund's investors to Pension Fund.

17. After the execution of the Master Trust Agreement, HSBC discussed with Pension Fund using off-shore mutual funds, because Pension Fund represented to HSBC and the marketing brochures expressly stated that the trust plans could not be sold in the U.S. and were not available to U.S. citizens or residents. Pension Fund agreed, stating that its only requirement was that the funds have name recognition and that the available selection included a variety of funds. HSBC identified a variety of off-shore mutual funds similar to the domestic funds Pension Fund previously had been offering. Since Pension Fund had agreed that HSBC could keep any of the fees paid by the mutual funds in connection with the trust plans, one of the significant factors considered by the relationship representative was the amount of front load fees paid by the mutual funds selected. HSBC created a Master Trust Account to hold the mutual fund shares purchased on behalf of Pension Fund investors. The mutual fund selections were included in the investor application provided to prospective investors with the revised offering materials.

18. Pension Fund distributed the revised offering materials to its prospective investors, and instructed certain investors to make their contribution checks payable to HSBC. Pension Fund remitted the checks for deposit to a "Gross Premium" account in the name of Pension Fund, which essentially functioned as a checking account. Pension Fund then provided weekly transmittal reports to HSBC that instructed HSBC as to how much to invest in each of the mutual funds selected, and how much should remain in the "Gross Premium" account (or be transferred to another Pension Fund account) in the form of "fees." During the relevant period, the weekly transmittal reports revealed that in certain instances, Pension Fund directed only a minimal portion of its investors' funds be invested in mutual funds, in some cases allocating as much as 95% of the investor's contribution to "fees" to remain in Pension Fund's "Gross Premium" account.

19. In October 2003, one of the relationship representatives drafted a letter on HSBC letterhead announcing the new relationship between HSBC and Pension Fund, and inviting certain of Pension Fund's existing investors to transfer their funds from other financial institutions to HSBC. Pension Fund sent the letter to approximately half of its existing investors, and enclosed a form with the HSBC logo that listed the new mutual fund selections available to investors upon transfer to HSBC. Neither the letter nor the enclosure informed investors that they would incur new front load fees in connection with that transfer, or the amounts of those prospective costs.

20. In February 2004, HSBC learned that some of the mutual fund companies were not charging Pension Fund's investors the full front load fees they had negotiated with Pension Fund. HSBC asked the mutual fund companies to rebook the trades and charge the higher front load fees for the Pension Fund investors. In return, some of the mutual fund companies required HSBC to provide them with hold-harmless letters. HSBC did not disclose the rebooking of these fees to Pension Fund's investors.

21. During 2004, one of the relationship representatives traveled to Central and South America four times at Pension Fund's request to meet with sales agents. Pension Fund asked the relationship representative to attend these meetings to add credibility to Pension Fund and its relationship with HSBC. Some investors attended at least one of these meetings. At these meetings, the relationship representative discussed HSBC's relationship with Pension Fund and, in one of these meetings, used a power-point presentation to describe different banking and investment services offered by HSBC.

22. In July 2004, certain of the relationship representatives first learned about a civil action brought against Pension Fund by the Guatemalan military pension fund, Instituto De Prevision Militar and Inverma S.A. ("IPM"), from an article in *Prensa Libre*, a Guatemalan newspaper. Instituto De Prevision Militar and Iverma S.A. v. Pension Fund of America, et al. Case No. 020730 CA 27 (Fla. Cir. Ct.) ("IPM civil action"). The newspaper reported that IPM had filed a suit in Florida state court in November 2002, alleging that Pension Fund had defrauded the Guatemalan military pension fund, and that its principals had misappropriated $24 million of pensioners' funds. These relationship representatives met with Pension Fund's principals and Pension Fund's outside counsel to discuss IPM's allegations, and were told the allegations were "without merit." HSBC accepted this representation.

23. In September 2004, HSBC Holdings informed the relationship representatives that an HSBC branch office in Brazil had obtained copies of the Pension Fund marketing materials from an unaffiliated sales agent whose client was interested in investing in the trust plans. Among other things, the HSBC branch office in Brazil was concerned that the predominance of HSBC in the marketing brochure incorrectly implied that HSBC sponsored the trust plans. Thereafter, HSBC's compliance department, for the first time, reviewed Pension Fund's marketing brochures and the power point presentation used in Latin America. The compliance department made some changes to the marketing brochures and the power point presentation. The compliance department did not, however, forward the marketing brochures or other materials to HSBC's legal department. Moreover, although HSBC's compliance department did not complete its review of Pension Fund's marketing brochures until December 2004, HSBC allowed Pension Fund to continue to use its marketing brochures in all of its sales territories except Brazil.

24. From August 2003 through March 28, 2005, HSBC earned trust and recordkeeping fees from Pension Fund, and fees paid by mutual fund companies in connection with investors' mutual fund transactions.

Violations

25. As a result of the conduct described above, HSBC caused Pension Fund's violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act. A violation of these provisions may be established by a showing of negligence. *Aaron v. SEC,* 448 U.S. 680, 697 (1980).

IV.

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

Accordingly, it is hereby ORDERED that Respondent HSBC cease and desist from committing or causing any violations and future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

By the Commission.

Nancy M. Morris
Secretary

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

Commissioner Campos Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2650 / September 19, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12808

In the Matter of **Callan Associates,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Callan Associates ("Callan" or "Respondent").

II.

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

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III.

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

Summary

This matter concerns the incomplete disclosure of a conflict of interest by Callan Associates, a registered investment adviser and one of the nation's largest pension consultants in its Form ADV Part II. Since 1999, Callan has referred clients to BNY Brokerage Inc. ("BNY") as Callan's preferred securities broker. Although Callan disclosed in its Form ADV Part II that it had a contractual relationship with BNY that required Callan to identify BNY as its preferred or exclusive broker, Callan failed to disclose that it was receiving annual payments that were contingent on Callan clients generating a certain level of commissions for BNY. The omission of this conflict caused Callan's public disclosures to be misleading.

Respondent

1. Callan Associates is an employee-owned pension consulting firm that is registered as an investment adviser with the Commission. Callan provides consulting services and education services to over 270 institutional retirement plans, endowments, foundations and hospital plans with assets of over $900 billion ("retirement plan clients"). It also offers educational and consulting services to investment managers that provide investment advice to the retirement plan clients ("investment manager clients").

Background

2. In October 1998, Callan sold Alpha Management Inc. ("Alpha"), its affiliated broker-dealer, to BNY ESI & Co., Inc. (the subsidiary is now known as BNY Brokerage Inc.), a subsidiary of the Bank of New York.

3. As a part of that transaction, Callan and BNY entered into a Services Agreement wherein BNY agreed to pay Callan a specified amount per year for eight years, 1998 through 2006. A portion of the annual payment, 8%, was contingent on BNY's generating gross brokerage commissions above a certain minimum threshold from Callan clients. The minimum threshold, which remained constant during the entire eight year period, was based on Alpha's brokerage commissions earned in 1998.

Callan's Inadequate Disclosures

4. Pursuant to the provisions of the Services Agreement, Callan was required to inform its retirement plan clients that BNY was its preferred broker should the clients elect to pay for Callan's services through directed brokerage.[1] Callan sent annual letters to its retirement

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[1] As used in this Order, the term "directed brokerage" refers to an arrangement through which the client requests its investment manager to direct brokerage business to a particular broker-dealer that has agreed to pay Callan's invoices for the client.

plan clients informing them of this option. Similarly, Callan agreed to inform its investment manager clients that BNY was its exclusive broker should the clients elect to pay for Callan's services with soft dollar credits.[2] Callan sent annual letters to its investment manager clients informing them of this option.

5. While the annual letters to the retirement plan and investment manager clients referenced the fact that Callan had sold Alpha to BNY, the letters failed to disclose that Callan was receiving compensation from BNY that depended on a certain level of commissions being generated by Callan clients.

6. As a registered investment adviser, Callan was required to file amendments to Commission registration statements known as Form ADV Part II at least annually. Under Rule 204-1(c) of the Advisers Act, an adviser is deemed to have filed Part II with the Commission by maintaining a copy of the document in its files. Between 1999 and 2005, Callan's Form ADV Part II stated that Callan was obligated by the terms of the Services Agreement to inform its plan sponsor clients that BNY was its preferred broker and investment manager clients that BNY was its exclusive broker if the client chose to pay Callan's fees through soft-dollar or directed brokerage arrangements. Callan further reported that, "[a]ccording to the terms of the transaction, BNY ESI makes periodic <u>fixed</u> payments to Callan each year." (Emphasis added.)

7. The characterization of BNY's payments to Callan as "fixed" was misleading in that a material portion of each annual payment was contingent upon BNY's receipt of a minimum threshold of Callan client brokerage business.

8. Callan's inaccurate public disclosures contributed to Callan employee confusion regarding the relationship between Callan and BNY. For instance, Callan incorrectly informed a potential client that Callan's compensation was not dependent on brokerage activity in any way. In February 2002, a potential plan sponsor client asked Callan whether payments from BNY to Callan were in any way dependent on future brokerage activity. A written response from a Callan employee stated, "[T]he terms of the 1998 sale to BNY ESI provided for semi-annual fixed payments to Callan each year. And simply put, the purchase price is being paid out over time. We once again must emphasize the semi-annual payments are not dependent whatsoever on current or future brokerage activity." Even though Callan had routinely satisfied the commission threshold since selling Alpha to BNY, this response was inaccurate and misleading because the language of the Services Agreement specifically provided that those payments were dependent upon the continuation of BNY receiving from Callan clients gross brokerage commissions exceeding the minimum threshold.

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[2] As used in this Order, the term "soft dollars," also called client commission practices, refers to arrangements under Section 28(e) of the Exchange Act in which advisers direct brokerage to broker-dealers and request that they allocate a percentage of the brokerage commissions to pay for brokerage and research services. In some cases, the broker-dealer creates a client commission or soft dollar account and pays for services, including to third-party vendors. In addition to cash, Callan accepted client commissions or soft dollar credits as payment on its invoices for services rendered to its investment manager clients.

9. In September 2005, following an examination by the Commission staff, Callan revised its Form ADV Part II to include language that disclosed that 8% of its annual Services Agreement payment from BNY was contingent on BNY receiving from Callan clients gross brokerage commissions above the minimum commission threshold.

10. As a result of the conduct described above, Callan willfully 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."[3]

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Callan's Offer. Accordingly, pursuant to Section 203(k) of the Advisers Act it is hereby ORDERED that Respondent Callan cease and desist from committing or causing any violations and any future violations of Section 207 of the Advisers Act.

By the Commission.

Nancy M. Morris
Secretary

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

[3] "Willfully" as used in this Offer means intentionally committing the act which constitutes the violation, Cf. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

Commissioner Atkins
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56469 / September 19, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2720 / September 19, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12810

In the Matter of

ROBERT M. HARBRECHT, CPA, and
BRIAN R. SPIRES, CPA

Respondents.

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 that public administrative proceedings be, and hereby are, instituted against Robert M. Harbrecht, CPA ("Harbrecht") and Brian R. Spires, CPA ("Spires"), pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.[1]

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

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

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II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement ("Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public 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 Respondents' Offers, the Commission finds[2] that:

A. SUMMARY

1. These proceedings concern the improper professional conduct, within the meaning of Commission Rule 102(e)(1)(iv)(B)(2), of Robert M. Harbrecht and Brian R. Spires (collectively the "Respondents") in connection with the audit of the 2000 consolidated financial statements ("2000 audit") of National Century Financial Enterprises, Inc. ("NCFE"), a Dublin, Ohio privately owned healthcare finance company. Harbrecht was the engagement partner for Deloitte & Touche LLP's ("Deloitte") audits of NCFE for the years ended 1999 through 2001, and Spires was the engagement manager for the 1999 and 2000 year-end audits. Deloitte completed the 2000 audit in May 2001.

2. NCFE operated programs through which special purpose subsidiaries conducted private placement note offerings, the proceeds of which were used to purchase healthcare receivables. NCFE represented to the note holders that NCFE would use the proceeds from the note offerings exclusively for the purchase of patient-specific healthcare accounts receivable. Although NCFE used note holder funds to purchase healthcare accounts receivable, NCFE used a substantial portion of the private placement proceeds to make either unsecured loans or loans secured by collateral other than healthcare accounts receivable ("non-permitted advances"), contrary to NCFE's representations to note holders and contrary to the requirements of the master trust indentures ("indentures") that governed NCFE's programs. The quality of the receivables purchased in the programs was material to note holders because the pool of purchased receivables was the sole source from which note holders would be repaid. As part of a complex scheme, NCFE concealed its non-permitted uses of note holder funds by, among other things, making false and misleading statements in its annual financial statements, including in the 2000 consolidated financial statements ("2000 Financials") and by making false and misleading statements to its note holders, the program trustees, rating agencies, and the auditors.

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

3. As the engagement partner, Harbrecht signed an unqualified audit report for the 2000 audit and had overall responsibility for the planning and execution of the 2000 audit. As the engagement manager, Spires also participated in the planning and execution of the 2000 audit. Respondents failed to plan and execute the 2000 audit in accordance with generally accepted auditing standards ("GAAS"). They failed to obtain sufficient competent evidential matter to corroborate that NCFE's receivables portfolio consisted of purchased healthcare accounts receivables or to properly evaluate the adequacy of NCFE's allowance for losses relating to those receivables. Respondents also did not properly evaluate red flags during the audit which should have alerted them to NCFE's non-permitted advances and its borrowers' inability to repay those advances. Additionally, Respondents failed to obtain sufficient competent evidential matter with regard to the nature and substance of material related party transactions. Many of these transactions with related parties were non-permitted advances.

4. These audit deficiencies caused Harbrecht to sign an unqualified audit report that erroneously stated that NCFE's 2000 Financials were prepared in accordance with generally accepted accounting principles ("GAAP") and that Deloitte conducted its audit in accordance with GAAS. Respondents engaged in improper professional conduct as defined in Rule 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice in connection with the 2000 audit.

B. RESPONDENTS

5. Robert M. Harbrecht, age 57, of Worthington, Ohio, joined Deloitte as an auditor in 1972 and was a partner from 1984 until he retired in 2004. Harbrecht is a certified public accountant in the state of Ohio and was licensed in Ohio until he allowed his license to lapse in early 2006. Harbrecht served as the engagement partner on the 1999 through 2001 audits of NCFE. At the time of the NCFE audits, Harbrecht had more than twenty-five years of auditing experience, including extensive experience in the financial services industry, and he served on Deloitte's National Banking Committee.

6. Brian R. Spires, age 47, of New Albany, Ohio, joined Deloitte as an auditor in 1988 and was a senior manager from 1998 until he left Deloitte in 2001. Spires is a licensed certified public accountant in the state of Ohio. Spires served as the manager on the 1999 and 2000 audits of NCFE. At the time of the NCFE audits, Spires had more than ten years of auditing experience, with a specialization in the financial services industry.

C. OTHER RELEVANT ENTITY

7. **Deloitte & Touche LLP** is a Delaware limited liability partnership whose principal offices are located in New York, New York. Deloitte provides, among other things, audit assurance and business advisory services. Deloitte has numerous branches domestically and abroad, including a branch in Columbus, Ohio. Deloitte served as auditor for NCFE for the 1999 to 2001 audits.

D. FACTS

NCFE Background

8. NCFE was an Ohio corporation with its principal place of business in Dublin, Ohio until it filed for bankruptcy in November 2002. From 1991 through 2002, NCFE operated programs through which special purpose subsidiaries purchased medical accounts receivable from healthcare providers. The programs raised funds for the purchase of accounts receivable through private offerings of highly rated debt securities to institutional investors ("note holders" or "investors"). NCFE represented to note holders that the programs would use the note proceeds exclusively to purchase patient-specific medical accounts receivable from healthcare providers. The programs and note offerings were structured as asset-backed securitizations, with the notes being fully collateralized by the purchased medical accounts receivable and cash reserves held in the programs. From 1991 through 2002, NCFE's subsidiaries issued more than $17 billion in asset-backed bonds or notes through private placements.

9. NCFE's programs were set out in a series of agreements between the special purpose subsidiaries, healthcare providers, program trustees, and note holders, including, among other things, an indenture which outlined the respective parties' rights and obligations. The indentures allowed the programs to engage only in one type of business activity: the purchase of "eligible" medical accounts receivable of a hospital, physicians' group, or other healthcare provider. Eligible receivables were defined to include only the insured portion of a receivable for which medical services had already been rendered. The program agreements required that the special purpose subsidiaries purchase receivables at a price equal to 97% of the receivables' estimated collectible value.

10. The indentures also placed certain requirements on the programs that were designed to protect note holders from loss. Failure to comply with certain key provisions of the indentures constituted an event of default. If NCFE could not cure the defaults within a specified time period, the indentures required the program trustees to declare a principal amortization event. Such an event would cause the program to cease purchasing receivables and would result in an immediate liquidation of the program. For example, to ensure that the programs had sufficient collateral to cover the outstanding notes, the indentures required the programs to maintain at all times cash reserves and eligible receivables equal to at least 111% of the amount of notes outstanding ("collateral coverage test").[3] If the collateral dropped below 111% for more than seven days, the notes were immediately callable and the indentures required the programs to be immediately liquidated. The indentures also required healthcare providers to immediately replace receivables older than 180 days ("defaulted receivables") with new eligible receivables. If they did not, the value of the defaulted receivables was to be deducted from the next funding to that provider, and the defaulted receivables could not be counted as eligible collateral for purposes of the collateral coverage test.

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[3] NCFE withheld 17% of the purchase price of eligible receivables as a safeguard against non-collection, and held this money as collateral in the form of cash reserves for the program note holders.

11. The indentures required an annual audit of NCFE's consolidated financial statements. NCFE's audited financial statements were provided to the program trustees, the rating agencies that rated the notes, and were provided to investors upon request. Deloitte served as auditor of NCFE's consolidated financial statements for the years ended 1999 through 2001. Harbrecht was Deloitte's engagement partner for the 1999 through 2001 year-end audits, and Spires was Deloitte's engagement manager for the 1999 and 2000 audits. Harbrecht signed unqualified audit reports on NCFE's 1999 and 2000 financial statements. He did not sign an audit report on the 2001 financial statements because Deloitte did not complete its audit for that year.

NCFE'S Misuse of Note Proceeds and Misrepresentations

12. From at least 1994 until 2002, NCFE diverted note holder funds to make unsecured loans or loans secured by collateral other than eligible healthcare receivables. This practice contradicted the requirements of the trust indentures and NCFE's representations to investors that NCFE was to use note holder funds exclusively for the purchase of eligible healthcare receivables. NCFE used note holder funds to provide funding to healthcare providers that had already sold all of their medical accounts receivables to NCFE and had no additional eligible receivables to sell. Many of these providers had incurred significant operating losses over a period of years and lacked the ability to repay NCFE. NCFE made material non-permitted advances to providers that were owned in part by NCFE or NCFE's principals.

13. NCFE's non-permitted advances had a much higher collection risk than purchased eligible accounts receivable. Because eligible receivables were to be paid by highly rated third-party payers, such as insurance companies, HMOs, and governmental entities such as Medicare and Medicaid, for medical services that had already been rendered and billed to the payers, the eligible receivables were of the highest credit quality. By contrast, it was much less likely that NCFE would be able to collect on non-permitted advances because they were in substance unsecured loans to severely financially distressed borrowers. In fact, NCFE had very poor collection experience on its non-permitted advances, and in some cases NCFE went more than a year without receiving any payments from certain providers.

14. The amount and significance (as a percentage of NCFE's total receivable portfolio) of the non-permitted advances rapidly grew over time. By 2000, non-permitted advances represented more than half of NCFE's entire provider receivable portfolio.

15. NCFE's practice of making non-permitted advances caused the programs to be under collateralized, with eligible receivables plus cash reserves falling well short of the required 111% of the value of the notes. A violation of this covenant required an immediate acceleration in the maturity of the notes and liquidation of the programs.

16. NCFE concealed its non-permitted advances and the resulting indenture violations by making materially false and misleading statements in its 2000 Financials and to its note holders, the program trustees, rating agencies, and the auditors.[4] The 2000 Financials departed from GAAP due to misstatements and omissions relating to NCFE's non-permitted advances. The 2000

[4] There were similar misstatements and omissions in NCFE's earlier financial statements as well.

Financials materially misrepresented that NCFE's receivable portfolio consisted of purchased medical accounts receivable, when in fact more than half of the portfolio consisted of non-permitted advances. Further, NCFE failed to evaluate the impairment present in its receivable portfolio attributable to the non-permitted advances to insolvent providers. NCFE's allowance for losses was grossly inadequate given its non-permitted lending activity. Finally, NCFE failed to disclose that the programs were in default under the indentures and did not have the ability to cure those defaults.

17. Note holders eventually uncovered NCFE's fraud in October 2002. The note holders called the notes, which drove NCFE into bankruptcy in November 2002. By that point, however, most of NCFE's approximately $3 billion of outstanding receivables were unsecured or backed by collateral that was virtually worthless. As a result of NCFE's fraudulent scheme, note holders suffered more than $2 billion in losses. Such losses do not reflect subsequent recoveries from civil litigation.

Deloitte's 2000 Audit of NCFE

18. NCFE's fraud went undetected and investor losses continued to grow from 2000 through 2002. Harbrecht signed an unqualified audit report on NCFE's 2000 Financials. Deloitte's 2000 audit report erroneously stated that the financial statements were prepared in conformity with GAAP and that the audits had been conducted in accordance with GAAS. Respondents were both responsible for the planning and execution of the 2000 audit. Respondents failed to perform certain audit procedures required by GAAS and failed to properly evaluate red flags that could have alerted them to NCFE's non-permitted advances and to the impairment of NCFE's receivable portfolio.

Existence of Purchased Accounts Receivable

19. According to Respondents, NCFE's accounts receivable was one of the most significant areas of the 2000 audit. NCFE had $2.3 billion of accounts receivable outstanding at the end of 2000, which represented 81% of the company's $2.9 billion of total assets. Nevertheless, Respondents failed to obtain evidential matter sufficient to corroborate NCFE's representation in its 2000 Financials that NCFE's receivable portfolio represented purchased patient-specific healthcare receivables. Respondents' failure to obtain sufficient competent evidential matter supporting the purported purchase of accounts receivable resulted in their failure to discover that NCFE's receivables included a significant amount of non-permitted advances for which no purchased patient-specific receivables existed.

20. Respondents devised an internal control reliance strategy in testing NCFE's receivable portfolio for the 2000 audit, placing some reliance on internal controls associated with the processing of funding advances and the remittance of payments made by third party payers. The testing of these controls had been performed during the 1999 audit and was updated subsequently. However, the internal controls testing performed by the engagement team provided insufficient evidence as to the effectiveness of the controls in these areas. The engagement team's internal controls testing consisted of a "walk-through" of NCFE's control environment, which included discussions with NCFE executive and mid-level management personnel, but did not

include the identification of the specific controls that the engagement team intended to rely upon or the specific documents and functions that it would examine in establishing the effectiveness of those controls. Through this walk-through, the engagement team learned about NCFE's purported process of purchasing eligible receivables that supposedly ensured NCFE's receivable portfolio consisted exclusively of purchased eligible receivables. However, Respondents failed to obtain sufficient competent evidential matter to corroborate that NCFE had in fact adhered to its controls and that the controls operated effectively throughout the accounting period. The engagement team instead relied heavily on management's representations as to how the controls were purportedly operating and reviewed an insufficient sampling of documents that did not provide sufficient competent evidential matter of NCFE's purchase of eligible receivables.

21. Respondents also failed to design substantive audit procedures to corroborate the existence of purchased patient-specific accounts receivable. NCFE had three accounting systems: the servicing department's AS400 system that contained all the patient-specific receivable information ("AS400"); the funding department's DMaster system that tracked the amount funded to providers ("DMaster"); and the general ledger. NCFE represented that the funding department was supposed to limit funding to the amount of patient-specific receivables residing in the AS400. In practice, however, NCFE regularly advanced amounts to providers exceeding the amount of patient-specific receivables available for purchase. Respondents decided that the engagement team should select accounts for confirmation using the amounts in the DMaster, based on their erroneous conclusion that the amounts recorded as funded in the DMaster would be equivalent to the amount of accounts receivable recorded in the AS400. However, by using the DMaster amounts, the engagement team merely confirmed the amounts funded to providers, not the amount of purchased patient-specific receivables. Moreover, the confirmations designed by the engagement team asked only that the provider confirm "the balance due" to the NCFE program rather than the amount of patient-specific receivables purchased by the program.

22. Similarly, the engagement team tested only the accounts receivable reconciliations between the DMaster and the general ledger, despite being provided reconciliations for all three systems by NCFE. NCFE prepared detailed account reconciliations for each healthcare provider with which it did business. By testing the DMaster instead of the AS400, the engagement team merely determined that the amount funded to providers, rather than the amount of purchased receivables, reconciled to the general ledger. This procedure did not provide sufficient competent evidential matter concerning the existence of eligible purchased accounts receivable.

23. Respondents did not adequately investigate audit evidence contained in the accounts receivable reconciliation schedules that revealed NCFE's non-permitted lending. The reconciliation schedules showed significant shortfalls in the AS400 compared to the DMaster for some providers due to the non-permitted advances; these advances appeared in the DMaster but had no corresponding patient-specific receivable data in the AS400. In fact, the single largest reconciling item NCFE used to reconcile the AS400 to the DMaster and general ledger was a line item entitled "Amount Over/(Under)Advanced to Seller," which revealed the non-permitted advances to the providers. The reconciliation for one provider showed an amount over-advanced to that provider in excess of $200 million. For another provider, the reconciliation showed a $42.1 million general ledger receivable balance but no AS400 receivable detail, indicating that the entire general ledger amount constituted non-permitted advances.

The Valuation of NCFE's Accounts Receivable

24. Respondents also failed to obtain evidential matter sufficient to support NCFE's valuation of its receivable portfolio. NCFE created an allowance for losses equal to 2% of its receivable portfolio, which was based on its historical charge-off rate for uncollectible accounts. NCFE's allowance for losses was inadequate because of the impairment resulting from non-permitted advances made to financially insolvent providers. The reason NCFE's historical charge-off rate was so low was because NCFE did not charge off most of its impaired receivables.

25. Respondents determined that collectibility was not a significant issue for NCFE's receivable portfolio, based on their understanding of how the programs were supposed to operate and based on management's representations regarding collections. Respondents understood that there was a low risk of collection loss because the receivables were purportedly payable by financially sound third-party insurers and government programs such as Medicare. They also understood that NCFE was required to return 180-day-old receivables to the selling providers, and that NCFE also held back a percentage of the purchase price of the receivables as a safeguard against unanticipated collection losses. Thus, the engagement team accepted NCFE's $43.7 million allowance for losses for its $2.5 billion receivable portfolio. This allowance was intended to cover the estimated losses in the $2.3 billion provider receivable portfolio and the losses associated with $49.7 million of promissory notes from providers that were identified by the engagement team as having a poor collection history. NCFE deducted holdback reserves from provider fundings that could absorb some credit and collection losses; however, these cash reserves were available to cover only a limited percentage of each provider's respective receivables balance.[5]

26. Respondents did not obtain sufficient competent evidential matter to support its conclusion that management's methods for estimating the allowance for credit and collection losses were reasonable. For example, Deloitte's model audit program for the 2000 audit instructed the engagement team to evaluate the reasonableness of management's methods for its estimates of the allowance for losses. The model audit program advised reviewing, among other things, accounts receivable aging. When the engagement team requested a consolidated receivable aging analysis from NCFE, management informed the team that the company could track aging by program only and was incapable of generating a consolidated aging schedule. Respondents accepted this response and did not require NCFE to produce consolidated aging reports or other similar information that would have enabled the engagement team to evaluate the delinquency rate and collection losses in NCFE's portfolio. The engagement team did not perform an analysis of

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[5] NCFE's programs withheld 17% of the amount funded to providers as cash reserves primarily to provide additional collateral for note holders, and secondarily to absorb credit or collection losses in the portfolio. These reserves totaled $332 million at the end of 2000. These reserves could be used on a provider-by-provider basis to absorb the first 17% of losses incurred for a particular provider. However, the reserves for one provider could not be used to absorb losses in another provider's portfolio. Furthermore, in the event of early amortization of NCFE's programs, the cash reserves were to serve as collateral to guard against note holder losses rather than to absorb losses in NCFE's receivable portfolio.

accounts receivable aging, nor did it review other information relating to delinquent accounts receivable for the 2000 audit. The engagement team did not perform other alternative audit procedures to independently assess the reasonableness of the allowance for losses.

27. Respondents relied excessively on management's representations regarding the operation of the NCFE programs and collectibility of the receivables. Respondents also failed to obtain sufficient competent evidential matter to establish that NCFE was requiring providers to replace 180-day-old receivables with new receivables or, alternatively, was deducting the value of the defaulted receivables from future fundings. Respondents thus failed to implement procedures from which Deloitte could have discovered that NCFE had many receivables over 180 days old still on its books.

28. Respondents did not properly evaluate audit evidence that revealed NCFE was experiencing significant delinquencies in the receivable portfolio. For example, NCFE provided Deloitte with summarized statements for each provider that showed account activity during 2000. The engagement team attached these statements to the audit confirmation requests. These statements revealed that NCFE had collected very little from many of its providers during 2000, and in some cases had not made any collections for the entire year. Similarly, each client prepared accounts receivable reconciliation also contained a roll-forward analysis from the 2000 beginning balance to the ending balance. These schedules also showed poor collections.[6] Despite being presented with this information about collections, Respondents did nothing further to reconcile this evidence with their conclusion that the programs were operating as they were designed.

29. Deloitte's audit work on the reconciliations between the general ledger accounts receivable balance and the DMaster balance also raised questions about the collectibility of NCFE's receivables. Respondents learned that NCFE had reclassified \$110 million of accounts receivable to notes receivable. The reclassified receivables represented instances where NCFE had poor or no collection activity on receivables, and where NCFE set up a note with the provider to establish a collection schedule. Respondents also became aware that NCFE did not recognize \$21 million of program fee revenues because cash collections on the underlying receivables were insufficient to cover the program fees earned on the advances made to those providers. This should have indicated to them that NCFE's receivables portfolio included approximately \$200 million of non-performing, delinquent receivables. Respondents did not make additional audit inquiries into these matters or into collections on NCFE's receivables, despite the contradictions between these facts and management's representations about the operation of the programs and the collectibility of NCFE's receivables.

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[6] Deloitte's confirmation sample represented more than 80% of the value of NCFE's receivable portfolio. Thus, the age of receivables in this sample revealed that a significant portion of NCFE's receivables were more than a year old, even though the programs contemplated the receivables turning over every 90 to 120 days.

NCFE's Compliance with Trust Indenture Covenants

30. Respondents were aware that NCFE's programs were in violation of certain provisions of the trust indentures. Although NCFE misleadingly claimed that the indenture violations were not material, the engagement team identified these violations as an area that would require "heightened audit attention."

31. Respondents failed to obtain sufficient competent evidential matter to determine whether NCFE was in compliance with the key provisions of the indentures that could lead to defaults and require liquidation of the programs. Among other things, the engagement team relied on client-prepared investor reports provided to the program trustees on a monthly basis as evidence of NCFE's compliance with certain indenture covenants. Because these reports were prepared by NCFE, they routinely misrepresented that NCFE was in compliance with the most critical terms of the indentures, as NCFE was concealing its violations from the trustees. The engagement team failed to obtain sufficient competent evidential matter to corroborate the accuracy of the data on these reports.

NCFE's Related Party Transactions

32. Respondents identified related party transactions as a risk area that would require attention during the audit. Approximately half of NCFE's receivables portfolio constituted business with related parties, which was the most Harbrecht had ever encountered in an audit.

33. The engagement team's audit procedures for related party transactions were limited to receiving a schedule from NCFE that depicted related party receivable balances and program fees and agreeing such amounts to the associated disclosures in the footnotes to the 2000 Financials. Respondents relied on management's representations that NCFE had made these related party advances pursuant to the terms and requirements of the programs. Respondents did not scrutinize these transactions in order to understand the nature and business purpose of the transactions, notwithstanding the high concentration of business with related parties. Respondents also failed to obtain information about the financial condition of non-consolidated related parties to determine whether NCFE was avoiding the recognition of losses associated with these business relationships. Further analysis by the engagement team could have revealed that a significant portion of the business conducted with related parties represented non-permitted advances for which the providers did not have the financial capacity to repay. It also could have revealed that, despite the lack of collections, NCFE was continuing to make unsecured advances to these related parties.

34. Furthermore, NCFE's three largest related party relationships constituted 46% of its entire $2.4 billion receivable portfolio at the end of 2000. The engagement team failed to evaluate the risk associated with this concentration of receivables among only a few providers, despite those providers being related parties.

Departures from GAAS

35. The third standard of field work requires that an auditor must obtain "sufficient competent evidential matter" to provide "a reasonable basis for an opinion regarding the financial statements under audit." (AU § 326, Evidential Matter, at AU 326.01) GAAS further states that "representations from management are part of the evidential matter the independent auditor obtains, but they are not a substitute for the application of those auditing procedures necessary to afford a reasonable basis for an opinion regarding the financial statements under audit." (AU § 333, Management Representations, at AU 333.02) The third general standard requires that "[d]ue professional care is to be exercised in the planning and performance of the audit and the preparation of the [audit] report." (AU § 230, Due Professional Care in the Performance of Work, at AU 230.01) "Due professional care requires the auditor to exercise *professional skepticism*," (AU 230.07), and "[i]n exercising professional skepticism, the auditor should not be satisfied with less than persuasive evidence because of a belief that management is honest." (AU 230.09) "The auditor obtains written representations from management to complement other auditing procedures." (AU 333.03)

36. Respondents placed too much reliance on management's representations regarding the operation of NCFE's programs, which led to improper assumptions in several audit areas. Based primarily on management representations, Respondents improperly concluded that all of NCFE's funding to providers represented eligible purchased patient-specific accounts receivable. This caused them to erroneously utilize the funding department's system for confirmation and reconciliation procedures instead of the servicing department's system, which contained the patient-specific accounts receivable detail. Respondents failed to obtain sufficient competent evidential matter to corroborate that NCFE had actually purchased patient-specific receivables from providers. Respondents also relied heavily on management's representations regarding the operation of the programs in concluding that NCFE had a low risk of credit and collection losses. As a result, they decided to forgo performing certain audit procedures designed to corroborate the reasonableness of management's assumptions underlying its estimates of the allowance for losses. Respondents failed to obtain sufficient competent evidential matter and failed to exercise due professional care and professional skepticism when auditing the existence and valuation of NCFE's receivable portfolio.

37. Furthermore, Respondents failed to obtain sufficient competent evidential matter to verify NCFE's compliance with key provisions of the trust indentures. They instead relied on client-prepared monthly investor reports without adequately corroborating the veracity of the data in those reports. Thus, Respondents failed to obtain sufficient competent evidential matter to conclude that NCFE was in compliance with the most significant provisions of the trust indentures.

38. GAAS states that the purpose of assessing control risk during an audit "is to contribute to the auditor's evaluation of the risk that material misstatements exist in the financial statements." (AU § 319, Consideration of Internal Control in a Financial Statement Audit[7], at AU

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[7] AU 319 was modified by Statement on Auditing Standards No. 94, The Effect of Information Technology on the Auditor's Consideration of Internal Control in a Financial Statement Audit, which was integrated into AU 319 in May 2001 and applied to audits of financial statements for

319.79 (pre-amendment), AU 319.105 (post-amendment)) When the auditor intends to place reliance on internal controls, the auditor must identify specific controls that are relevant to specific assertions in the financial statements and perform tests of those controls. (AU 319.48 (pre-amendment), AU 319.70 (post-amendment))

39. Respondents failed to design audit tests of internal control procedures sufficient to justify the amount of reliance the engagement team placed on NCFE's internal controls in connection with auditing NCFE's accounts receivable. With regard to NCFE's receivable portfolio, Respondents failed to identify specific controls that Deloitte would rely upon with respect to specific assertions in NCFE's financial statements and failed to obtain sufficient competent evidential matter to establish the operating effectiveness of those controls.

40. GAAS states that, when testing the effectiveness of internal controls through observation, the auditor should consider "that the observed application of a control might not be performed in the same manner when the auditor is not present." (AU 319.68 (pre-amendment), AU 319.94 (post-amendment)) Observation therefore "may be insufficient to evaluate the effectiveness of the design or operation of controls for periods not subjected to [observation]. In such circumstances, the auditor may decide to supplement [observation] with other tests of controls that are capable of providing evidential matter about the entire audit period." (AU 319.70 (pre-amendment), AU 319.96 (post-amendment))

41. Respondents failed to design adequate internal control testing procedures to ensure that NCFE's internal controls operated effectively throughout the audit period. By making corroborative inquiries as to the operation of controls and by observing NCFE's various control functions, the engagement team obtained an understanding of the design of NCFE's controls. However, Respondents failed to obtain sufficient competent evidential matter that the controls were operating effectively at all times during the audit period, such as tests of those controls at different times throughout the audit period.

42. GAAS states that "for evidence to be competent, it must be reliable and relevant. The relevance of evidence depends on its relationship to the financial statement assertion being addressed." (AU § 330, The Confirmation Process, at AU 330.11) When designing confirmation requests, "the auditor should consider the assertion(s) being addressed and the factors that are likely to affect the reliability of the confirmations." (AU 330.16) An auditor should consider factors such as a confirmation respondent's motivation, objectivity, and freedom from bias when designing confirmation requests, and should consider whether other procedures are necessary as a result. (AU 330.27) Furthermore, "there may be circumstances . . . in which the auditor should exercise a heightened degree of professional skepticism relative to these factors", such as "where the confirmation respondent is the custodian of a material amount of the audited entity's assets." (Id.)

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periods beginning on or after June 1, 2001. These amendments did not apply to the 2000 NCFE audit. Therefore, all citations to AU 319 will include the pre-amendment citation in effect at the time of the audit, as well as the post-amendment citation to the current AU 319.

43. Respondents failed to design confirmation requests tailored to the audit objective of confirming management's financial statement assertion that its receivables constituted eligible purchased patient-specific receivables. The confirmations requested that the provider confirm the "balance due" NCFE instead of the amount of patient-specific receivables NCFE had purchased from the provider. Thus, Deloitte confirmed only the amount funded by NCFE to a particular provider, not the amount of purchased receivables. Based on management's representations and reliance on internal control testing, Respondents decided their confirmation approach was acceptable because they incorrectly concluded that the amount funded by NCFE in all cases equaled the amount of eligible patient specific receivables NCFE had purchased. Furthermore, Respondents failed to exercise the necessary level of professional skepticism by placing too much reliance on confirmation responses from customers in which NCFE had an ownership interest or which were financially dependent on NCFE, and which also were custodians of a significant portion of NCFE's assets. Respondents did not sufficiently evaluate whether these confirmation responses would provide competent evidence given that NCFE was the primary funding source for many of its providers. The engagement team did not obtain sufficient competent evidential matter about the providers' operating histories or their financial condition in order to assess whether those providers were subject to improper influence by NCFE.

44. GAAS states that "[i]f a representation made by management is contradicted by other audit evidence, the auditor should investigate the circumstances and consider the reliability of the representation made. Based on the circumstances, the auditor should consider whether his or her reliance on management's representations relating to other aspects of the financial statements is appropriate and justified." (AU 333.04)

45. Respondents gathered audit evidence during the 2000 audit that should have caused them to question management's representations about the operations of the programs and to reevaluate their conclusions as to the existence of purchased accounts receivable and as to the credit and collection risk for NCFE's receivables. Most notably, they became aware that NCFE had required providers to provide notes receivable to secure $110 million of delinquent accounts receivable. Respondents also became aware that NCFE did not recognize $21 million of program fee revenues because cash collections on the underlying receivables were insufficient to cover the program fees earned on the advances made to those providers. This should have indicated to them that NCFE's receivables portfolio included approximately $200 million of non-performing, delinquent receivables. Respondents failed to exercise professional skepticism when faced with these facts. At a minimum, they should have questioned why, despite these collection issues, NCFE did not create a specific allowance for or write off these receivables.

46. GAAS states that an auditor should "be aware of the possibility that transactions with related parties may have been motivated solely, or in large measure, by conditions" such as, among other things, the "[l]ack of sufficient working capital or credit to continue the business." (AU § 334, Related Parties, at AU 334.06) "The auditor should place emphasis on testing material transactions with [related parties]." (AU 334.07) "The auditor should apply the procedures he considers necessary to obtain satisfaction concerning the purpose, nature, and extent of [related party] transactions and their effect on the financial statements." (AU 334.09) "The procedures should be directed toward obtaining and evaluating sufficient competent evidential matter and should extend beyond inquiry of management." (Id.) Such procedures may include inspecting or

confirming the value of collateral in the transaction. (Id.) When necessary to fully understand a particular transaction, if there are material uncollected balances, an auditor should consider obtaining information about the financial capability of the other party to the transaction. (AU 334.10) "The higher the auditor's assessment of risk regarding related party transactions, the more extensive or effective the audit tests should be." (AU § 9334, Related Parties – Auditing Interpretations of Section 334, at AU 9334.19) To understand a related party transaction, or obtain evidence regarding it, "the auditor may have to refer to . . . financial statements of the related party." (Id.)

47. Respondents did not perform audit procedures necessary to understand and test the terms of NCFE's related party transactions. This was especially significant because approximately half of NCFE's business was with related parties. The risk associated with NCFE's related party transactions was further exacerbated because 46% of NCFE's receivable portfolio was concentrated in three related parties. A careful review of NCFE's relationships with these three related parties would have revealed that these customers were severely financially distressed and were receiving unsecured loans from NCFE to fund their operating losses. Despite this material concentration risk, Respondents failed to properly scrutinize NCFE's related party transactions.

E. RULE 102(e)

48. Rule 102(e)(1)(ii) of the Commission's Rules of Practice states, in pertinent part, that, "[t]he Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have engaged in unethical or improper professional conduct." With respect to persons licensed to practice as accountants, such as Respondents, "improper professional conduct" under Rule 102(e)(1)(ii) includes, among other things, the following type of negligent conduct: "repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission". (Rule 102(e)(1)(ii)(B)(2))

49. As described above, Respondents engaged in improper professional conduct in connection with the 2000 audit. Respondents negligently failed to conduct the 2000 audit of NCFE in conformity with the requirements of GAAS. Harbrecht and Spires engaged in repeated instances of unreasonable conduct, which resulted in violations of GAAS, and which indicate a lack of competence to practice before the Commission.

F. FINDINGS

Based on the foregoing, the Commission finds that Respondents engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

IV.

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

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

A. Harbrecht is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After eighteen months from the date of this order, Harbrecht 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 Harbrecht's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

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

(a) Harbrecht, 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) Harbrecht, 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 Harbrecht's or the firm's quality control system that would indicate that Harbrecht will not receive appropriate supervision;

(c) Harbrecht 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) Harbrecht acknowledges his responsibility, as long as he 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 Harbrecht 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 Harbrecht's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

D. Spires is denied the privilege of appearing or practicing before the Commission as an accountant.

E. After one year from the date of this order, Spires 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 Spires' work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

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

(a) Spires, 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) Spires, 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 Spires' or the firm's quality control system that would indicate that Spires will not receive appropriate supervision;

(c) Spires 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) Spires acknowledges his responsibility, as long as he 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.

F. The Commission will consider an application by Spires 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 Spires' character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

FC/XI

Commissioner Atkins Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56470 / September 19, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2721 / September 19, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12811

In the Matter of **PRESS C. SOUTHWORTH, 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 that public administrative proceedings be, and hereby are, instituted against Press C. Southworth ("Southworth" or "Respondent"), pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as

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

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

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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 Public 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[2] that:

A. SUMMARY

1. These proceedings arise out of Press C. Southworth's improper professional conduct in connection with the audit of the 1998 consolidated financial statements ("1998 audit") of National Century Financial Enterprises, Inc. ("NCFE"). Located in Dublin, Ohio, NCFE was a private healthcare finance company that ultimately went bankrupt in November 2002. Southworth was the engagement partner for PricewaterhouseCoopers LLP's ("PwC") audits of NCFE for the years ended 1995 through 1998. Southworth commenced work on the 1998 audit in approximately the Fall of 1998 and completed the audit in August 1999.

2. NCFE created special purpose subsidiaries to operate separate investment "programs" under which asset-backed notes were issued to institutional investors in private offerings. NCFE represented to investors in the notes ("noteholders") issued by nearly all programs that the proceeds of those notes would be used exclusively for the purchase of patient-specific healthcare accounts receivable. Although NCFE used some noteholder funds to purchase such accounts receivable, NCFE used a substantial portion of the private placement proceeds to make unsecured loans or loans secured by collateral other than healthcare accounts receivable ("non-permitted loans"). These loans violated the requirements of the master trust indentures ("indentures") that governed NCFE's note offerings. The quality of the receivables that the programs purchased was material to noteholders because the pool of purchased receivables was the sole source from which noteholders would be repaid. NCFE concealed its non-permitted uses of noteholder funds by, among other things, making false and misleading statements in its annual financial statements, including the 1998 consolidated financial statements ("1998 Financials").

3. During the course of the 1998 audit, Southworth was aware that NCFE was making these non-permitted loans to various providers through the programs, which made up the vast majority of NCFE's business. Many of those providers did not have the ability to repay those loans. The 1998 Financials did not adequately disclose the non-permitted loans, the resultant scope of the violations of the indentures, or the consequences that such violations had on NCFE's liquidity and its ability to continue as a going concern. NCFE's 1998 Financials also did not reflect a sufficient reserve for the material impairment of its receivables portfolio that existed as of December 1998. Yet, Southworth signed an unqualified audit report that erroneously stated that

[2] 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.

NCFE's 1998 Financials were prepared in accordance with Generally Accepted Accounting Principles ("GAAP") and that the audit had been conducted in accordance with Generally Accepted Auditing Standards ("GAAS").

4. During the course of the 1998 audit, Southworth learned information suggesting that NCFE was reporting inaccurately aged receivables and including ineligible receivables in monthly investor reports ("investor reports") on the performance of the individual programs. In addition to PwC's audit of NCFE's consolidated financial statements, NCFE retained PwC to perform certain non-audit, agreed–upon procedures on one investor report each year for each individual program. NCFE distributed the investor reports every month to the indenture trustees ("trustees" or "indenture trustees"), who in turn provided them to ratings agencies. NCFE also provided copies of the investor reports to investors upon request. This inaccurate reporting by NCFE management should have caused Southworth to question management's integrity and triggered his obligations under GAAS to address evidence of possible fraud and illegal acts by NCFE. Southworth failed to do so and instead continued to place undue reliance on management representations, including representations that non-permitted loans were collectible at the values ascribed to them by NCFE and that the indenture trustees for the programs and noteholders were aware of the non-permitted loans.

5. After NCFE fired PwC as its auditor in early 2000, the successor audit firm of NCFE (the "Successor Auditor") reviewed PwC's workpapers and interviewed Southworth by telephone. In the interview, the Successor Auditor asked Southworth whether he had concerns about NCFE management's integrity. Southworth stated that he had no such concerns. Southworth did not respond fully because Southworth did not also disclose any of the following matters that were relevant to management integrity: (i) NCFE was making non-permitted loans; (ii) NCFE was reporting inaccurately aged receivables and including ineligible receivables on investor reports; and (iii) PwC's internal risk-assessment system rated NCFE's integrity and ethics as "high risk."

6. After this discussion with Southworth, the Successor Auditor subsequently accepted NCFE as a client.

7. NCFE's fraud went undetected until 2002. From early 2000 through 2002, NCFE raised nearly $2.5 billion from noteholders in continuance of its fraud.

B. <u>RESPONDENT</u>

8. **<u>Press C. Southworth</u>**, age 59, of Columbus, Ohio, was an audit partner at PwC (and its predecessor, Coopers & Lybrand, LLP ("Coopers")) from 1985 until he retired in 2001. Southworth was the engagement partner on the audits for NCFE's 1995-1998 financial statements. Southworth is a certified public accountant, who was licensed in Ohio until his license lapsed in December 2006, after his retirement from PwC.

C. OTHER RELEVANT ENTITY

9. **PwC** is a Delaware limited liability partnership with its principal offices located in New York, New York. PwC (and its predecessor, Coopers) served as NCFE's auditor for NCFE's financial statements for the years 1995-1998.

D. FACTS

NCFE Background

10. From 1991 through its bankruptcy in November 2002, NCFE acted through its individual programs to purchase medical accounts receivable from healthcare providers. The programs raised the funds for the purchase of accounts receivable through private offerings of notes to institutional noteholders under SEC Rule 144A, which exempts certain offerings to "qualified institutional buyers" from the Securities Act. Nearly all of the program indentures required the programs to use the note proceeds exclusively to purchase patient-specific healthcare accounts receivable from healthcare providers. The programs and note offerings were structured as asset-backed securitizations, with the notes being fully collateralized by the purchased medical accounts receivable and cash reserves held in the programs. From 1991 through 2002, NCFE's subsidiaries issued more than $17 billion in asset-backed notes through private placements.

11. NCFE's programs were governed by indenture agreements among NCFE's servicing agent, the programs themselves, and the trustees. With the exception of one small program, the indentures required all of the programs to engage only in one type of business activity: the purchase of the "eligible" medical accounts receivable of a hospital, physicians' group, or other healthcare provider. "Eligible receivables" were defined only to include the insured portion of a receivable for which medical services had already been rendered. The programs purchased the receivables at a price equal to 97% of the receivables' estimated collectible value.

12. The indentures also required the programs to comply with certain requirements designed to protect noteholders from loss. Failure to comply with certain key provisions of the indentures constituted an event of default. If NCFE could not cure the defaults within a specified time period, the indentures required the program indenture trustees to declare a principal amortization event, which would cause the program to cease purchasing receivables and would require the trustee to begin distributing cash collections on the healthcare receivables to program investors in repayment of their principal and interest. For example, to ensure that the programs always had sufficient collateral to cover the notes, the program agreements required that at all times the programs have cash reserves and eligible receivables equal to at least 111% of the amount of notes outstanding ("collateral coverage test"). If the collateral dropped below 111% for more than seven days, the programs were required to begin repayment of investors' principal and interest from the cash received on the repayment of the healthcare receivables. The indentures also required healthcare providers to immediately replace receivables that became older than 180 days ("defaulted receivables") with new eligible receivables. If the provider did not, the value of the defaulted receivables was to be deducted from the next funding to that provider, and the defaulted receivables could not be counted as eligible collateral for purposes of the collateral coverage test.

13. The programs required an annual audit of NCFE's consolidated financial statements. NCFE provided those consolidated financial statements to the program indenture trustees, the rating agencies that rated the notes, and some of the noteholders upon request.[3]

NCFE's Use of Note Proceeds in Violation of the Indentures and Misrepresentations to Noteholders

14. From at least 1994 until 2002, NCFE used noteholder funds to make non-permitted loans, which was in violation of the indentures and contrary to NCFE's representations to noteholders. NCFE used significant amounts of noteholder funds to provide unsecured loans to healthcare providers that had already sold all of their medical accounts receivable to NCFE and had no additional such receivables to sell. Most of these providers had incurred significant operating losses over a period of years and required additional funding in order to avoid bankruptcy. NCFE made many of these non-permitted loans to providers that were or became owned in whole or in part by NCFE's principals.

15. NCFE's non-permitted loans were far riskier than purchased eligible accounts receivable. Because eligible receivables were to be paid by highly rated third-party payors, such as insurance companies, HMOs, and government programs such as Medicare and Medicaid, for medical services that had already been rendered and billed to the payors, the eligible receivables were of high credit quality. By contrast, NCFE's ability to collect on non-permitted loans was in many cases speculative, because the non-permitted loans were in substance unsecured loans to severely financially distressed borrowers or loans secured by collateral other than healthcare accounts receivable. In fact, NCFE had very poor collection experience on its non-permitted loans, and in some cases NCFE went more than a year without receiving any payments from certain providers.

16. The amount and significance of the non-permitted loans, as a percentage of the gross receivables reported on NCFE's balance sheet, grew significantly during the period in which PwC audited NCFE's financial statements. Non-permitted loans comprised over 50% of NCFE's receivables portfolio by the end of 1998.

17. NCFE's practice of making non-permitted loans caused the programs to be undercollateralized, with eligible receivables plus cash reserves falling well short of the required 111% value of the notes. This should have caused an immediate acceleration in the maturity of the notes and early amortization of the programs.

18. NCFE obscured its non-permitted loans and the resulting indenture violations by making false and materially incomplete disclosures in the 1998 Financials. Footnote 8 to the 1998 Financials disclosed that "the Company is not in compliance with various provisions of the Trust Indentures[.]" Nonetheless, the 1998 Financials departed from GAAP because they did not properly disclose the nature and scope of these indenture violations and that NCFE was in default

[3] NCFE's audited financial statements and PwC's audit reports were not included in the offering documents for the notes. However, NCFE provided the audited financial statements and PwC's audit reports to noteholders upon request.

and could not cure many of these violations. To the contrary, NCFE's 1998 Financials stated that, in the Company's opinion, the indenture violations in the programs "can be cured or do not represent material performance or covenant defaults." That statement was false and misleading, notwithstanding NCFE's statement that "no assurance can be given that violations will be cured."

19. Footnotes 1 and 3 to the 1998 Financials divided NCFE's healthcare receivables into three categories: "provider receivables," "other provider receivables," and "provider advances." The footnotes provided the following definitions for NCFE's receivables: (1) "Provider receivables consist of purchased account receivables including various components of the client billing process such as third party settlements, disproportionate share, unbilled and monthly capitation amounts;" and (2) "[o]ther provider receivables, notes receivable, and equipment lease receivables represent advances against various forms of collateral including accounts receivable, real property and equipment." The term "provider advances" was not defined. NCFE's quantification and description of these three categories was inadequate to inform the reader of the existence or extent of any non-permitted loans in any particular program. The disclosures: (1) did not state that any of these categories of receivables contained non-permitted loans or the amount of the non-permitted lending; and (2) did not clearly define "provider receivables," "other provider receivables," or "provider advances" so that a reader could understand the nature and substance of each of those categories of receivables.

20. Further, NCFE failed to evaluate the impairment present in its receivables portfolio resulting from NCFE's non-permitted loans to severely financially distressed providers. NCFE's allowance for loan losses was inadequate given its non-permitted lending activity.

21. Noteholders eventually uncovered NCFE's fraud in October 2002, by which time NCFE's notes outstanding had grown to $2.9 billion from $1.25 billion in 1998, the year of PwC's last audit. The noteholders called their notes, which drove NCFE into bankruptcy in November 2002. By that point, however, most of NCFE's outstanding receivables were unsecured or backed by collateral that was virtually worthless. As a result, noteholders lost more than $2 billion from NCFE's fraudulent scheme.

Southworth Knew That NCFE Was Using Investor Funds in
<u>Violation of the Indentures</u>

22. Through PwC's audits of NCFE, Southworth knew about NCFE's widespread violations of the indenture agreements and also should have recognized the threats those violations posed to the noteholders' interests. The amount of the non-permitted loans was material to the programs' assets and to the 1998 Financials.

23. Southworth's concerns about NCFE's business practices were highlighted in a June 25, 1999 memorandum to NCFE management entitled, "Open Items and Additional Audit Procedures for NCFE As of June 25, 1999" (the "June 25 memo"). That memorandum was prepared by Southworth and others after NCFE's principals revealed to Southworth their (later-withdrawn) plans to take NCFE public in the near future. The June 25 memo stated the need to "[m]eet with the Trustees and Investors to discuss the Indenture issues that we have noted in our

audit. We need to ensure that all parties are aware of the items noted below and do not consider them to be material breaches, which could result in an Event of Default." In the June 25 memo, several "Indenture issues" were identified, including:

- "Not forcing providers to repurchase all receivables that have aged out past 180 days";
- "Inaccurately aged receivables being included on the Investor Reports (Location 99)"
- "Ineligible receivables brought on as collateral included in the Investor Reports (Location 99)"; and
- "Whether the proformas, advances, and other items that are out of the 'norm' meet the definition of a purchased receivable pursuant to the sales and subservicing agreement."

Southworth did not communicate with the trustees or noteholders about these issues before completing the audit of NCFE's 1998 Financials, based on his assumption, unsupported by sufficient competent evidential matter, that the trustees and noteholders were already aware of NCFE's violations.

24. As reflected in the June 25 memo, Southworth was aware that NCFE management included inaccurately aged and ineligible receivables on investor reports provided to the indenture trustees and noteholders. This inaccurate reporting allowed NCFE to show compliance with the collateral coverage requirements of the indentures and conceal events of default from the indenture trustees. Southworth should have known that the investor reports failed to reflect NCFE's indenture defaults as a result of its non-compliance with the collateral coverage test. Southworth also was aware that NCFE management had recorded on its books and records $175 million of "Location 99" receivables. PwC's work papers documented that these Location 99 receivables lacked any detailed information, generally were over one year old, and that the agings of these receivables were "frozen." Southworth therefore was aware that NCFE was not forcing providers to repurchase receivables that had aged out past 180 days, as required by the indentures. Southworth also learned that NCFE entered into its system accounts receivable amounts that represented "pro forma" revenues for medical services that providers might render in the future, assuming that the providers continued to remain in business. The pro forma receivables frequently represented periods of four to six months of operating revenues for a particular healthcare provider; these pro forma receivables inflated the medical accounts receivable and NCFE's purported collateral amounts. Southworth should have known that the indentures did not permit the programs to purchase "pro forma" receivables. All of these facts should have indicated to Southworth that there were serious questions about NCFE management's integrity, the possibility that NCFE management engaged in fraud or illegal acts, and whether NCFE's 1998 financial statements were in conformity with GAAP.

NCFE's Departures from GAAP and Incomplete and Misleading Financial Statement <u>Disclosures</u>

25. In August 1999, Southworth signed an unqualified audit report on NCFE's 1998 Financials, stating among other things, that NCFE's financial statements were fairly presented in all material respects in conformity with GAAP. This statement was incorrect. NCFE's 1998 Financials included an allowance for losses at December 31, 1998 of $22.2 million against a portfolio of provider receivables totaling $1.223 billion, more than half of which was comprised of non-permitted loans to financially distressed healthcare providers. The programs required NCFE to establish holdback reserves from provider fundings that could be available to absorb up to 17% of each provider's credit and collection losses.[4] However, the credit and collection losses far exceeded 17% of the receivables portfolio for many providers. The financial statements were not in conformity with GAAP because the holdback reserves and NCFE's allowance for losses were insufficient to cover the material losses arising from the impairment of unsecured loans that NCFE had made to healthcare providers. The financial statements also were not in conformity with GAAP because, although they disclosed the fact of indenture violations, they provided incomplete and misleading disclosure about the nature and significance of those violations, as discussed above. NCFE's violations of the indenture collateral coverage test constituted an event of default requiring NCFE to engage in early amortization of the programs in which there were violations.

26. More than half of NCFE's receivables portfolio consisted of non-permitted loans. Many of NCFE's customers had experienced significant operating losses over a period of several years and were experiencing severe liquidity problems. GAAP required NCFE to evaluate these facts and the degree to which these unsecured loans were impaired so that an appropriate provision for loss could be recorded in accordance with Statements of Financial Accounting Standards No. 5, "Accounting for Contingencies," and Statements of Financial Accounting Standards No. 114, "Accounting by Creditors for the Impairment of a Loan." NCFE did not perform an impairment evaluation in accordance with these accounting standards. Instead, NCFE fabricated collateral and ascribed excessive value to the collateral in order to avoid recognition of impairment losses. Southworth failed to perform sufficient audit procedures to identify the impairment in NCFE's receivables portfolio.

27. In footnote 8 to NCFE's 1998 Financials, NCFE provided additional detail on what was by far the most significant liability on NCFE's balance sheet -- "Notes Payable" -- and discussed the indenture violations in the programs. Although NCFE caused the programs to be in violation of the core provisions of the indentures which prohibited nearly all of the programs from engaging in any business other than the purchase of eligible healthcare receivables, NCFE's footnote description of the indenture violations minimized the significance of the indenture violations and failed to describe or provide any additional substantive information about the nature

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[4] NCFE's programs withheld 17% of the amount funded to providers as cash reserves primarily to provide additional collateral for noteholders, and secondarily to absorb credit or collection losses in the portfolio. These reserves totaled $237 million at the end of 1998. These reserves could be used on a provider-by-provider basis to absorb the first 17% of losses incurred for a particular provider. However, the reserves for one provider could not be used to absorb losses in another provider's portfolio. Furthermore, in the event of early amortization of NCFE's programs, the cash reserves were to serve as collateral to guard against noteholder losses rather than to absorb losses in specific provider accounts or to be used as a receivables valuation account.

and dollar magnitude of the indenture violations or the programs in which the violations were occurring. Instead, NCFE's footnote misleadingly included management's false "opinion" that the violations "can be cured or do not represent material performance or covenant defaults." That footnote disclosure stated in pertinent part:

> The Company is not in compliance with various provisions of the Trust Indentures, however, no Event of Default as defined in the Trust Indentures has been declared by any of the noteholders or trustees. The Company does not expect that an Event of Default will be declared in the near-term under current circumstances because among other matters the Programs are current as to all required interest payments and the Company has successfully concluded six previous Programs. Furthermore, in the opinion of the Company, the violations can be cured or do not represent material performance or covenant defaults, however, the determination of whether a violation is material is not entirely within the discretion of the Company and no assurance can be given that violations will be cured or that a Principal Amortization Event, as described below will not be declared by the trustees or noteholders.
>
> Should an Event of Default be declared with respect to any of the Programs, a Principal Amortization Event would occur under which the respective program would be required to cease purchasing new eligible receivables and to apply all cash received to the principal and interest due on the related notes. This could negatively affect the Company's ability to fund its operations and Programs as well as its ability to fund new programs and enter into relationships with new providers.

28. The footnote 8 disclosure was incomplete and misleading because it failed to disclose information essential to an understanding of the nature of the indenture violations and that those violations constituted events of default. While the footnote stated that in the opinion of the Company the indenture violations in the programs "can be cured or do not represent material performance or covenant defaults," in fact many of the indenture violations could not be cured and were significant violations of the indentures. The disclaimer that "no assurance can be given that violations will be cured or that a Principal Amortization Event . . . will not be declared by the trustees or noteholders" did not adequately remedy that misleading statement. Absent the ability by NCFE to cure the program defaults resulting from these violations or obtain a waiver of these defaults, the indentures required the indenture trustees for the programs to commence a principal amortization event for the particular programs in which the defaults occurred.

NCFE Terminates PwC as NCFE's Auditor, and Southworth Communicates With the Successor Auditor

29. After PwC completed the 1998 audit, the engagement team performed its annual client continuance evaluation of NCFE to determine whether PwC should continue with NCFE as a client. As part of this review, Southworth participated in preparing a computer-generated audit risk assessment report for NCFE. During this post-1998 audit assessment process, the risk rating generated by PwC's risk rating system for NCFE's "Integrity and Ethics" increased from a mid-risk rating in 1998 to the highest risk rating as a result of the answers Southworth and others gave to questions in the report-generation process. Based in part on Southworth's answers on the risk assessment report and on the 1998 audit, PwC placed NCFE into a "high risk" category for purposes of PwC's risk assessment analysis.

30. In approximately February 2000, NCFE terminated PwC as NCFE's auditor, citing a litigation conflict between one of NCFE's largest customers and PwC as the reason for termination.

31. Upon PwC's termination as auditor, NCFE hired the Successor Auditor in April 2000. As part of the Successor Auditor's new client acceptance process, the Successor Auditor reviewed PwC's workpapers and interviewed Southworth by telephone. In this conversation, the engagement partner asked Southworth, among other things, whether PwC had concerns about the integrity of NCFE's management. Southworth responded that there were no such issues. Southworth did not respond fully because Southworth did not also disclose any of the following matters that were relevant to management integrity: (i) NCFE was making non-permitted loans; (ii) NCFE was reporting inaccurately aged receivables and including ineligible receivables on investor reports; and (iii) PwC's internal risk-assessment system rated NCFE's integrity and ethics as "high risk."

32. After this discussion with Southworth, the Successor Auditor subsequently accepted NCFE as a client.

E. Southworth's Departures From GAAS

Failure to Properly Plan and Perform the Audit to Obtain Reasonable Assurance About Whether the Financial Statements Were Free of Material Misstatement

33. GAAS requires that the auditor "plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud." (AU § 110, Responsibilities and Functions of the Independent Auditor, at AU 110.02) In addition, the risk assessment process should "be ongoing throughout the audit" and should consider whether the "nature of audit procedures performed may need to be changed to obtain evidence that is more reliable or to obtain additional corroborative information." (AU § 316, Consideration of Fraud in a Financial Statement Audit[5], at AU 316.33 & .28 (pre-

[5] AU 316 was modified by Statement on Auditing Standards No. 99, Consideration of Fraud in a Financial Statement Audit, which was integrated into AU 316 in October 2002 and applied to audits of financial statements for

amendment), AU 316.68 & .52 (post-amendment)) Among the actions available to an auditor who uncovers evidence of possible fraud or illegal acts are: (1) considering whether the misstatements are indicative of fraud (AU 316.34 (pre-amendment), AU 316.75 (post-amendment)) or illegal acts (AU § 317, Illegal Acts by Clients, at AU 317.07); (2) evaluating the effect and considering implications for other aspects of the audit (AU 316.35 (pre-amendment), AU 316.77 (post-amendment)); (3) attempting to obtain additional evidential matter (AU 316.35 (pre-amendment), AU 316.77 (post-amendment)); (4) confirming significant information concerning the matter with the other party to the transaction or with intermediaries, such as banks or lawyers (AU 317.11); (5) informing the Audit Committee (AU 316.38 (pre-amendment), AU 316.79 (post-amendment)) or equivalent authority (AU 317.17); (6) considering whether to withdraw from the engagement and communicating the reasons to the Audit Committee (AU 316.36 (pre-amendment), AU 316.78 (post-amendment)); (7) consulting with the client's legal counsel (AU 317.10) and the auditor's own legal counsel (AU 317.22); and (8) issuing an audit report that is not unqualified (AU § 508, Reports on Audited Financial Statements, at AU 508.20-.63)

34. Contrary to GAAS, Southworth failed to adequately plan and perform the 1998 audit after learning of numerous facts that, either standing alone or in the context of other facts learned during the audit, warranted heightened scrutiny that should have alerted him to the possibility that NCFE's financial statements were materially misleading in that they contained insufficient disclosure of the nature and extent of NCFE's indenture violations, including non-permitted loans to financially troubled borrowers, and were not in conformity with GAAP. In auditing the 1998 Financials, Southworth failed to properly consider the implications of the scope and significance of the indenture violations. He also failed to probe NCFE's basis for asserting in footnote 8 that, in the Company's opinion, the violations were curable or immaterial.

35. Additionally, as described above, during the 1998 audit, Southworth became aware of information that should have suggested to him that NCFE had falsely reported in monthly investor reports that NCFE was using investor funds exclusively for the purchase of eligible receivables. Such information triggered Southworth's obligations under GAAS to inquire further into possible fraud and illegal acts.

36. If Southworth had exercised due care and professional skepticism, he would have taken significant steps to assess whether NCFE management was engaged in fraud or illegal acts. This failure to properly plan and perform the audit violated AU 316 and AU 317.

Failure to Obtain Sufficient Competent Evidential Matter, Exercise Due Care, and Exercise Professional Skepticism

37. Auditors need to obtain sufficient competent evidence "to afford a reasonable basis for an opinion regarding the financial statements under audit." (AU § 326, Evidential Matter, at AU 326.01) The validity and sufficiency of required evidence depends on the circumstances and the auditors' judgment, but the evidence should be competent, sufficient, and persuasive. (AU

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periods beginning on or after December 15, 2002. These amendments did not apply to the 1998 NCFE audit. Therefore, all citations to AU 316 will include the pre-amendment citation in effect at the time of the audit, as well as the post-amendment citation to the current AU 316.

326.02 & .21-.22) Further, GAAS requires that auditors exercise due professional care in planning and performing an audit and in preparing the audit report. (AU § 230, Due Professional Care in the Performance of Work, at AU 230.01) Due professional care requires that the auditor exercise professional skepticism in performing audit procedures and gathering and analyzing audit evidence. (AU 230.07-.08) "In exercising professional skepticism, the auditor should not be satisfied with less than persuasive evidence because of a belief that management is honest." (AU 230.09) "Professional skepticism is an attitude that includes a questioning mind and a critical assessment of audit evidence." (AU 230.07; *see also* AU 316.27 (pre-amendment), AU 316.13 (post-amendment))

38. As set forth above, during the course of the 1998 audit, Southworth was aware that a substantial portion of NCFE's finance receivables consisted of non-permitted loans instead of purchased eligible healthcare receivables. The non-permitted loans consisted of unsecured loans and loans secured by collateral such as real estate, equipment, and artwork. The audit workpapers documented that many of NCFE's customers had incurred substantial operating losses over a period of years and were not capable of meeting or honoring their business obligations without continued financial support from NCFE; they were severely financially distressed and were dependent on NCFE to fund their negative operating cash flows. These providers did not possess eligible receivables to sell to NCFE, nor did they generally possess other assets of value that could serve as collateral.

39. Southworth did not properly assess the adequacy of NCFE's allowance for losses. Southworth failed to properly evaluate how the providers' negative operating cash flows, negative working capital, and negative net worth impaired their ability to repay the non-permitted loans made to them. Based on the evidence available to him, Southworth should have known that NCFE's financial statements failed to reflect a sufficient reserve for material losses arising from the unsecured loans made to healthcare providers.

40. Southworth improperly accepted overvalued collateral such as pro forma receivables and the Location 99 receivables as an alternative to the purchased accounts receivable required by the indentures. Southworth did not exercise due care or professional skepticism in accepting fabricated collateral proffered by NCFE as an appropriate substitute for purchased accounts receivable. He failed to exercise appropriate professional skepticism or obtain sufficient competent evidence in support of the values that NCFE ascribed to the alternative collateral.

41. Southworth failed to properly evaluate the risk posed to the collectibility of NCFE's finance receivables by the indenture violations in the programs. Southworth knew or should have known that if the indenture trustees for the programs declared a principal amortization event for the programs, NCFE's ability to continue to fund the providers who owed money to NCFE would cease. Southworth failed to properly consider these matters when evaluating the adequacy of NCFE's allowance for loan losses.

Issuance of an Unqualified Audit Report

42. GAAS requires that the auditor's report contain an opinion on the financial statements taken as a whole and contain a clear-cut indication of the character of the auditor's work. (AU 508.04) The auditor can determine that he is able to issue an audit report containing an unqualified opinion only if he has conducted his audit in accordance with GAAS and the financial statements comply with GAAP. (AU 508.07 & .22)

43. GAAS further requires that "[t]he [audit] report shall state whether the financial statements are presented in accordance with generally accepted accounting principles." (AU § 410, Adherence to Generally Accepted Accounting Principles, at AU 410.01) An auditor's report that financial statements are presented in accordance with GAAP should be based on, among other things, whether the financial statements "are informative of matters that may affect their use, understanding, and interpretation." (AU § 411, The Meaning of "Present Fairly in Conformity with Generally Accepted Accounting Principles", at AU 411.04)

44. Under GAAS, "[i]nformative disclosures in the financial statements are to be regarded as reasonably adequate unless otherwise stated in the report." (AU § 431, Adequacy of Disclosure in Financial Statements, at AU 431.01) "The presentation of financial statements in conformity with generally accepted accounting principles includes adequate disclosure of material matters. These matters relate to the form, arrangement, and content of the financial statements and their appended notes, including, for example, the terminology used, the amount of detail given, the classification of items in the statements, and the bases of amounts set forth. An independent auditor considers whether a particular matter should be disclosed in light of the circumstances and facts of which he is aware at the time." (AU 431.02)

45. In auditing NCFE's 1998 Financials, Southworth acted unreasonably in rendering an audit report containing an unqualified audit opinion stating that the audit complied with GAAS and the financial statements comported with GAAP. As described above, NCFE's 1998 Financials did not comport with GAAP because they failed to reflect a sufficient reserve for the impairment of unsecured loans that NCFE had made to healthcare providers and made materially misleading disclosures regarding the NCFE program violations. As described above and below, Southworth did not comply with GAAS in conducting the audit.

Failure to Perform an Adequate Going Concern Analysis

46. AU § 341, The Auditor's Consideration of an Entity's Ability to Continue As a Going Concern, states in pertinent part that "[t]he auditor has a responsibility to evaluate whether there is substantial doubt about the entity's ability to continue as a going concern for a reasonable period of time, not to exceed one year beyond the date of the financial statements being audited." (AU 341.02) Among the conditions and events that may indicate substantial doubt about the entity's ability to continue as a going concern is "default on loan or similar agreements." (AU 341.06) "The auditor's evaluation is based on his knowledge of relevant conditions and events that exist at or have occurred prior to the completion of fieldwork." (AU 341.02) If "the auditor

concludes that substantial doubt about the entity's ability to continue as a going concern for a reasonable period of time remains, the audit report should include an explanatory paragraph . . . to reflect that conclusion." (AU 341.12)

47. Southworth mistakenly concluded that NCFE could continue as a going concern, despite the material defaults in NCFE's programs. In doing so, he failed to adequately evaluate whether there was a substantial doubt about NCFE's ability to continue as a going concern for a reasonable period of time when NCFE had acquired a substantial portion of the assets on its balance sheet in violation of the indentures.

48. Moreover, to the extent that Southworth relied on management's representations that the indenture trustees and noteholders were aware of the indenture violations, such reliance itself was a departure from GAAS, which states in pertinent part that "representations from management are part of the evidential matter the independent auditor obtains, but they are not a substitute for the application of those auditing procedures necessary to afford a reasonable basis for an opinion regarding the financial statements under audit." (AU § 333, Management Representations, at AU 333.02)

49. The significant and material indenture violations in the programs, and the significant impairment of NCFE's receivables, created a substantial doubt about NCFE's ability to continue as a going concern for a reasonable period of time, and Southworth's analysis of NCFE's ability to continue as a going concern constituted a departure from GAAS.

Communications with the Successor Auditor

50. Under GAAS, a predecessor auditor "should respond promptly and fully, on the basis of known facts, to the successor auditor's reasonable inquiries. However, should the predecessor auditor decide, due to unusual circumstances such as impending, threatened, or potential litigation; disciplinary proceedings; or other unusual circumstances, not to respond fully to the inquiries, the predecessor auditor should clearly state that the response is limited." (AU § 315, Communications Between Predecessor and Successor Auditors, at AU 315.10)

51. Southworth failed to respond fully to the Successor Auditor's reasonable inquiries about NCFE's management. In response to the Successor Auditor's inquiries about NCFE management's integrity, Southworth told the Successor Auditor that there were no issues with management integrity. Southworth did not respond fully because Southworth did not also disclose any of the following matters that were relevant to management integrity: (i) NCFE was making non-permitted loans; (ii) NCFE was reporting inaccurately aged receivables and including ineligible receivables on investor reports; and (iii) PwC's internal risk-assessment system rated NCFE's integrity and ethics as "high risk." Southworth's failure to respond fully to the Successor Auditor's inquiries constituted a departure from GAAS.

F. VIOLATIONS

52. Rule 102(e)(1)(ii) of the Commission's Rules of Practice provides, in pertinent part, that, "[t]he Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have engaged in unethical or improper professional conduct."

53. With respect to persons licensed to practice as accountants, such as Southworth, "improper professional conduct" under Rule 102(e)(1)(ii) includes, inter alia:

> (B) negligent conduct, consisting of (1) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted, or (2) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

54. The conduct described above constitutes highly unreasonable conduct that resulted in a violation of applicable professional standards in circumstances in which Southworth knew, or should have known, that heightened scrutiny was warranted.

G. FINDINGS

55. Based on the foregoing, the Commission finds that Southworth engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

IV.

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

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

A. Southworth is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After two (2) years from the date of this order, Southworth 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 Southworth's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

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

(a) Southworth, 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) Southworth, 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 Southworth's or the firm's quality control system that would indicate that Southworth will not receive appropriate supervision;

(c) Southworth 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) Southworth acknowledges his responsibility, as long as he 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 Southworth 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 Southworth's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioners Atkins &
Campos
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56462 / September 19, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2648 / September 19, 2007

INVESTMENT COMPANY ACT OF 1940
Release No. 27973 / September 19, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12805

In the Matter of **Evergreen Investment Management Company, LLC, Evergreen Investment Services, Inc., Evergreen Service Company, LLC and Wachovia Securities, LLC** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 15(b)(4), 17A(c)(3) and 21C 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**

I.

The United States Securities and Exchange Commission (the "Commission") deems it appropriate and in the public interest that administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4), 17A(c)(3) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Evergreen Investment Management Company, LLC, Evergreen Investment Services, Inc., Evergreen Service Company, LLC, and Wachovia Securities, LLC ("EIMCO," "EIS," "ESC" and "Wachovia Securities," respectively, or individually, "Respondent"; collectively, "Respondents").

II.

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II.

In anticipation of the institution of these proceedings, the Respondents have 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 in which the Commission is a party, and without admitting or denying the findings, except those findings pertaining to the jurisdiction of the Commission over Respondents and the subject matter of these proceedings, which are admitted, the Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings pursuant to Sections 15(b)(4), 17A(c)(3) and 21C of the Exchange Act, Sections 203(e) and 203(k) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order") as set forth below. The Order is instituted as to EIMCO pursuant to Sections 203(e) and 203(k) of the Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act. The Order is instituted as to EIS pursuant to Section 15(b)(4) and 21C of the Exchange Act, Section 203(k) of the Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act. The Order is instituted as to ESC pursuant to Section 17A(c)(3) of the Exchange Act, Section 203(k) of the Advisers Act and Section 9(b) of the Investment Company Act. The Order is instituted as to Wachovia Securities pursuant to Section 15(b)(4) of the Exchange Act and Sections 9(b) and 9(f) of the Investment Company Act.

III.

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

<u>Summary</u>

1. This proceeding concerns (a) various violations of the federal securities laws committed by EIMCO, EIS and ESC in connection with their roles in creating and/or implementing two market timing agreements (and the role of Wachovia Securities in creating and/or implementing one of those two agreements) that permitted, in each case, a registered representative to make, on behalf of certain of his customers, frequent trades in certain Evergreen funds in excess of the exchange limits set forth in the funds' prospectuses and (b) EIMCO's misleading disclosure in fund documents concerning exchange limits. Market timing includes (a) frequent buying and selling of shares of the same mutual fund or (b) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not illegal <u>per se</u>, can harm other mutual fund shareholders because it can dilute the value of their shares, if the market timer is exploiting pricing inefficiencies, or disrupt the management of the mutual fund's investment portfolio and can cause the targeted mutual fund to incur costs borne by other shareholders to accommodate frequent buying and selling of shares by the market timer.

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

2. In January 2000, William M. Ennis ("Ennis"), then the senior vice president of Evergreen Investment Company ("EIC") but who is no longer an officer, employee or affiliate of any Respondent, agreed to permit a registered representative of Wachovia Securities to market time one or more Evergreen funds on behalf of certain of his customers even though the prospectus for each Evergreen fund limited exchanges to three per calendar quarter and five per calendar year. The registered representative subsequently made approximately 386 exchanges into and out of the Evergreen Small Company Growth Fund (now known as the Mid Cap Growth Fund) from approximately January 2001 through March 2003. This timing activity harmed the fund. From January 2001 through March 2003, Ennis signed several Small Company Growth Fund registration statements, each of which incorporated the fund's prospectus and the exchange limits contained therein. At no point during the period in which the registered representative was making these exchanges did Ennis or anyone else at Evergreen disclose the market timing arrangement to the fund's board of trustees. Moreover, in January 1999, EIMCO personnel entered into a short-lived agreement with a registered representative of Prudential Securities, Inc. ("Prudential Securities") that permitted the registered representative to exceed the exchange limit in the Evergreen Municipal Bond Fund.

3. During the relevant period, EIMCO was responsible for operating each Evergreen fund in conformity with the terms of its prospectus. Beginning at least in September 1998, EIMCO's failure to adequately enforce the exchange restrictions set forth in each Evergreen fund prospectus resulted in a substantial amount of exchange activity occurring beyond those limits in several Evergreen funds. This excessive exchange activity imposed costs and management disruptions on the funds, impaired their performance, rendered their prospectuses materially misleading and diluted their value. At no point during this period did EIMCO disclose to any fund board that the prospectus-based exchange restrictions were not being enforced. In addition, during this period, EIMCO either filed or directed EIS to file with the Commission registration statements on behalf of each affected fund, all of which incorporated the materially misleading exchange limit provision set forth in the fund prospectus.

Respondents

4. Evergreen Investment Management Company, LLC is the Boston-based registered investment adviser for the Evergreen fund family, one of the 20 largest fund groups in the nation. As of March 31, 2007, EIMCO had more than $312 billion in assets under management.

5. Evergreen Investment Services, Inc. is EIMCO's affiliated registered broker-dealer.

6. Evergreen Service Co., LLC is EIMCO's affiliated registered transfer agent.

7. Wachovia Securities, LLC is a Richmond-based registered broker-dealer that is a majority-owned subsidiary of Wachovia Corporation.

Related Parties

8. Evergreen Investment Company, Inc. is a wholly-owned holding company subsidiary of Wachovia Corporation, a Charlotte, North Carolina-based company whose common stock is registered with the Commission and principally trades on the New York Stock Exchange. EIC owns EIMCO, EIS and ESC (collectively, "Evergreen").

9. William M. Ennis was employed at Evergreen from 1994 to June 2003, when he resigned. In December 1996, Ennis was named a senior vice president of EIC and, in April 2000, Ennis became EIC's president. During the relevant period, Ennis served as a director of and control person for EIMCO, he supervised the president of EIS, he was the president of the Evergreen Equity Trust, a registered investment company of which the Small Company Growth Fund was a series, and he functioned as the chief executive officer of the Evergreen mutual fund complex. Ennis is no longer affiliated with any of the Respondents.

Facts

The Market Timing Agreements

10. In January 2000, Evergreen had in place an "anti-market timing" policy through which it sought to eliminate market timing in the Evergreen funds. Consistent with this policy, each Evergreen fund prospectus contained a provision stating that: "Exchanges are limited to three per calendar quarter, but in no event more than five per calendar year." In January 2000, Ennis was familiar with the exchange limit provision set forth in the Evergreen Small Company Growth Fund prospectus, he understood that a market timer might make more than three exchanges per quarter and five per year, and he was aware that market timing could impose trading costs on a fund, disrupt fund management and harm fund performance.

11. In January 2000, the retail division of Wachovia Securities, then operating under the name First Union Securities, Inc. (which was under common control with Evergreen at the time), was the number one distributor of Evergreen funds, accounting for about $2 billion of the funds' approximately $3 billion in total annual sales. In early January 2000, Wachovia Securities' Private Client Group ("PCG"), the firm's non-bank branch based division, notified an EIS vice president that it was attempting to recruit a top-producing registered representative who was seeking permission to market time one or more Evergreen funds on behalf of one or two of his customers. Convinced that it would otherwise be unable to hire the recruit, the PCG asked the EIS vice president if Evergreen would be willing to accommodate the recruit's market timing activity. The EIS vice president presented the PCG's timing inquiry to EIS' president and to EIMCO's chief investment officer for Equities, both of whom rejected the request. In an e-mail to several PCG officials, the EIS vice president stated that Evergreen would not permit the recruit to time any Evergreen fund because "market timing . . . detrimentally affect[s] the long-term

performance of mutual funds." Subsequently, at the request of the PCG's president, the EIS vice president presented the timing inquiry to Ennis, who was trying at that time to improve Evergreen's sales and distribution through the PCG channel. Despite being told by the EIS vice president that both the EIS president and EIMCO's chief investment officer for Equities had rejected it, Ennis granted the PCG's timing request. Noting that the PCG might not land the recruit, Ennis ordered that this arrangement be kept confidential, specifically instructing that the EIS president not be informed of it.

12. The EIS vice president memorialized the timing agreement in an e-mail to the relevant PCG officials, stating "I talked with Bill Ennis about your recruiting situation . . . this morning and we are going to make an exception for [the recruit's] timing business." The EIS vice president then observed that "I know that you understand that to make this type of agreement is contrary to [Evergreen's] philosophy. However, we also understand that [First Union Securities, Inc.] is our captive broker/dealer and we want to be an asset to your business as much as possible. . . . I hope that this will be a deciding factor in successfully recruiting this broker . . ." Pointing to the "the sensitive nature of market-timing @ Evergreen," the EIS vice president emphasized that this arrangement had to be kept in confidence.

13. About a year later, in approximately January 2001, Wachovia Securities notified the EIS vice president that the recruit had joined the PCG and that he wished to begin market timing the Small Company Growth Fund on behalf of certain of his customers. The EIS vice president then informed a vice president in the ESC, where Evergreen's market timing monitoring operation was located, of the "special arrangement" Evergreen had made to permit the registered representative to exceed the three per quarter and five per year exchange limits and instructed her not to interfere with the registered representative's trading. The ESC vice president complied with this order. The portfolio manager of the Small Company Growth Fund was not made aware of the arrangement.

14. In approximately January 2001, the registered representative began trading in the Small Company Growth Fund on behalf of certain of his customers. From that time through March 2003, the registered representative made approximately 386 exchanges into and out of the fund, thus greatly exceeding the three per quarter and five per year exchange limits set forth in the fund's prospectus. The dollar amounts of the registered representative's trades, which ranged from approximately $50,000 to more than $2.2 million, averaged about $500,000. During the period in which the arrangement was in place, the registered representative made a cumulative total of approximately $282.4 million worth of exchanges into and out of the fund. In approximately March 2003, after the EIS vice president had left Evergreen, the ESC vice president, who had become increasingly frustrated over the difficulty of processing the commissions on the registered representative's trades, told him that Evergreen would no longer permit him to exceed its exchange limits. The registered representative then ceased his market timing in the Small Company Growth Fund and closed out the account through which the activity had occurred. During the period in which the registered representative timed the Small Company Growth Fund, Ennis signed several registration statements on the fund's behalf, each of which incorporated the fund's prospectus and the exchange limits contained therein. At no point during the period in

which the registered representative was making these exchanges did Ennis or anyone else at Evergreen disclose the market timing arrangement to the fund's board of trustees.

15. On October 31, 2003, EIMCO repaid approximately $379,000 to the Small Company Growth Fund, representing EIMCO's calculation of the registered representative's customers' net gain from the trading under the timing arrangement. In November 2003, EIMCO reimbursed the fund for approximately $25,000 in advisory fees EIMCO received and expenses the fund incurred in connection with the trading at issue.

16. In addition to the timing agreement described above, in January 1999, EIMCO authorized a registered representative of Prudential Securities to make, on behalf of certain of his customers, exchanges into and out of the Evergreen Municipal Bond Fund in excess of the prospectus-set limitations. Pursuant to that authorization, the registered representative made exchanges into and out of that fund in excess of the exchange limits before being told to cease the activity in approximately March/April 1999. The registered representative's trading activity during this period harmed the fund.

Evergreen's Misrepresentation of Its Exchange Limits

17. Consistent with its anti-market timing policy, during the relevant period, each Evergreen fund prospectus stated that: "Exchanges are limited to three per calendar quarter, but in no event more than five per calendar year." Under the terms of the Investment Advisory and Management Agreement between itself and the Evergreen Funds, EIMCO assumed responsibility for managing the operation of each Evergreen fund in conformity with this prospectus restriction. During the period in question, EIMCO effectively delegated to ESC the responsibility for detecting problematic trading in the Evergreen funds. Until late 1999, ESC's sole undertaking in this area was to perform a daily review of trading activity in the Evergreen funds for the purpose of notifying portfolio managers of transactions in their funds over a certain dollar amount. The amount trigger varied depending upon the size of the fund. For example, as of September 1998, the trading activity reviewers would inform the portfolio manager of the Evergreen Fund of any transaction in that fund over $3 million. ESC's daily trading activity review did nothing to stop exchange activity beyond the posted limits in dollar amounts below the trigger and would not necessarily impede excessive exchange activity occurring in dollar amounts above that level.

18. Beginning in late 1999, ESC's Field Support Group attempted to combat market timing by generating a "Large Transaction Report" ("LTR") each day that set forth all purchase and exchange transactions over $100,000 in any Evergreen fund ("exchange transactions" involve the movement of money between two Evergreen funds and "purchase transactions" involve the movement of money from outside the Evergreen complex into an Evergreen fund). An ESC employee would review the LTR on a daily basis in an effort to identify market timing trading activity. However, there was an 11 a.m. deadline for completing this review and, until ESC streamlined it in early 2002, the LTR contained so much data that the monitor was usually unable to examine all of the transactions by that hour. Consequently, the responsible ESC manager instructed the monitor to focus the

review on purchase activity in Evergreen international funds. The monitor was often unable to examine anything other than this activity by 11 a.m., thus leaving unmonitored all exchange activity as well as non-international purchase activity.

19. In early 2002, ESC streamlined the LTR and was thus able to typically include all purchase and exchange activity in its daily market timing monitoring sweep. However, shortly thereafter, in the middle of 2002, even though it had cancelled several exchanges beyond the posted limits in dollar amounts below $250,000 prior to that time, ESC increased its monitoring threshold to $250,000. In early 2003, after some of its employees began to suspect that traders were exceeding the exchange limits in dollar amounts below $250,000, ESC lowered its review threshold to $50,000. In addition, in late October 2003, ESC adopted policies to enforce the posted limits without regard to the dollar amount of the exchange. In January 2004, EIMCO amended the prospectus of each Evergreen international fund to require the imposition of a one percent redemption fee on short-term transactions (less than 90 days) in those funds.

20. From at least September 1998 to at least October 2003, EIMCO's failure to adequately enforce the exchange restrictions set forth in each Evergreen fund prospectus resulted in a substantial amount of exchange activity occurring beyond those limits in several Evergreen funds. This excessive exchange activity imposed costs and management disruptions on the funds, impaired their performance, rendered their prospectuses materially misleading and diluted their value. During this period, EIMCO either filed or directed EIS to file with the Commission registration statements on behalf of each of the affected funds, all of which incorporated the exchange limit set forth in each fund prospectus. At no point during this period did EIMCO disclose to any fund board that the prospectus-based exchange restrictions were not being enforced. Moreover, during the period in question and as recently as July 2003, the portfolio managers of several Evergreen international funds repeatedly complained internally (both orally and in writing) to compliance personnel and senior ESC and EIMCO officials that fund management was being disrupted and fund performance was suffering as a result of what they perceived to be Evergreen's apparent lack of ability or aggressiveness in preventing timing.

21. While a significant number of exchanges beyond the posted limits took place in various Evergreen funds from 2000 on, most of the harm resulting from excessive exchange activity at issue occurred from September 1, 1998 through December 31, 1999. Approximately 90% of the disgorgement amount recited in paragraph IV.G.1 of the Order is related to excessive exchange activity from September 1, 1998 through December 31, 1999. The portion of the disgorgement amount related to the arrangement permitting exchanges by a registered representative in the Small Company Growth Fund, described above, is approximately 4%. After Evergreen began instituting procedures to identify and limit excessive trading starting in approximately January 2000, both the number and average size of trades in excess of prospectus limits was substantially reduced.

EIS' Failure to Preserve Communications Related to its Business as a Broker-Dealer

22. From at least January 2001 to September 2003, EIS did not preserve certain

communications relating to its business as a broker-dealer. Throughout this period, EIS also had a policy of instructing employees whose e-mail "in-boxes" had reached their storage capacity to create space by either deleting or archiving e-mails. On a daily basis, the EIS computer server made a backup tape of all in-box e-mails. These backup tapes, however, were taped over every 30 days. As a result, EIS did not preserve certain e-mails related to its business as such.

Violations

23. As a result of the conduct described above, EIMCO willfully violated Sections 206(1) and 206(2) of the Advisers Act. Specifically, through Ennis, EIMCO entered into a market timing agreement that created a conflict of interest between itself, which benefited from the advisory fees generated by the timing activity as well as from the prospects the timing arrangement created for improving its relationship with the PCG, and the Small Company Growth Fund, which suffered the dilutive effect of the timing trades and the transaction costs related thereto. Because neither Ennis nor anyone else associated with EIMCO disclosed either the PCG timing arrangement or the fact that EIMCO was permitting exchange activity above the limits set forth in the Small Company Growth Fund's prospectus to the fund's board of trustees, EIMCO willfully violated Sections 206(1) and 206(2) of the Advisers Act. EIMCO also willfully violated Section 206(2) of the Advisers Act with respect to its failure to adopt procedures to block exchanges beyond the three per quarter and five per year limits set forth in each fund prospectus because it negligently failed to disclose to any fund board that it was not enforcing the prospectus-based exchange limits.

24. As a result of the conduct described above, EIMCO also willfully violated Section 34(b) of the Investment Company Act. Specifically, the registration statements EIMCO either filed or directed EIS to file on behalf of the Small Company Growth Fund and the other Evergreen funds in which excessive exchange activity occurred were materially misleading because they incorporated the unenforced exchange limits set forth in the fund prospectuses.

25. As a result of the conduct described above, EIS and ESC willfully aided and abetted and caused EIMCO's violations of Sections 206(1) and 206(2) of the Advisers Act.

26. As a result of the conduct described above, Wachovia Securities (then operating under the name of First Union Securities, Inc.), which, by virtue of its common control with EIMCO, was affiliated with the Small Company Growth Fund, willfully violated Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder. Specifically, by seeking and ultimately entering into an understanding with EIMCO to allow the Small Company Growth Fund to be market timed, Wachovia Securities formed a joint arrangement with an affiliated fund. As a result, Wachovia Securities willfully violated Section 17(d) and Rule 17d-1 thereunder.

27. By granting Wachovia Securities' request to permit the registered representative to market time the Small Company Growth Fund, Ennis and, through him,

EIMCO and EIS willfully aided and abetted and caused Wachovia Securities' violation of Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder.

28. EIS willfully violated Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder by failing to preserve certain communications related to its business as such, including e-mails, for a period of three years.

Undertakings

29. Compliance and Ethics Oversight Structure. Through 2012, EIMCO shall maintain a compliance and ethics oversight infrastructure having the following characteristics:

a. EIMCO shall maintain a Code of Ethics Oversight Committee having responsibility for all matters relating to issues arising under EIMCO's Code of Ethics. The Code of Ethics Oversight Committee shall be comprised of senior executives of EIMCO's operating businesses. EIMCO shall hold at least quarterly meetings of the Code of Ethics Oversight Committee to review violations of the Code of Ethics, as well as to consider policy matters relating to the Code of Ethics. EIMCO shall report on issues arising under the Code of Ethics, including all violations thereof, to the board of Trustees of each Evergreen fund with such frequency as such board may instruct, and, in any event, at least quarterly, provided, however, that any material violation shall be reported promptly.

b. EIMCO shall maintain an Internal Compliance Controls Committee to be chaired by EIMCO's Chief Compliance Officer, which Committee shall have as its members senior executives of EIMCO's operating businesses. The Internal Compliance Controls Committee shall review compliance issues throughout the business of EIMCO, endeavor to develop solutions to those issues as they may arise from time to time, and oversee the implementation of those solutions. The Internal Compliance Controls Committee shall provide reports on internal compliance matters to the board of Trustees of each Evergreen fund with such frequency as the independent Trustees of each such fund may instruct and, in any event, at least quarterly. The Internal Controls Committee may also serve as EIMCO's Code of Ethics Oversight Committee.

c. EIMCO shall require its Chief Compliance Officer to report to the independent Trustees of each Evergreen fund any breach of a fiduciary duty or of a federal securities law of which he or she becomes aware in the course of carrying out his or her duties, with such frequency as the independent Trustees may instruct, and, in any event, at least quarterly, provided, however, that any material breach (i.e., any breach that would be important, qualitatively or quantitatively, to a reasonable Trustee) shall be reported promptly.

30. Independent Compliance Consultant.

a. EIMCO, EIS and ESC shall retain, within 30 days of the date of entry of the Order, the services of an Independent Compliance Consultant not unacceptable to the staff of the Commission or to a majority of the independent Trustees of any Evergreen fund. The Independent Compliance Consultant's compensation and expenses shall be borne exclusively by EIMCO or its affiliates. EIMCO, EIS and ESC shall require the Independent Compliance Consultant to conduct a comprehensive review of EIMCO, EIS and ESC's supervisory, compliance, and other policies and procedures designed to prevent and detect breaches of fiduciary duty, breaches of the Code of Ethics and federal securities law violations by EIMCO, ESC, EIS and their employees. This review shall include, but shall not be limited to, a review of EIMCO, EIS and ESC's market timing controls across all areas of its business, a review of EIMCO, EIS and ESC's policies and procedures for enforcing any limit on trading activity set forth in any Evergreen fund prospectus, a review of any EIMCO's funds' pricing practices that may make those funds vulnerable to market timing, a review of each Evergreen fund's utilization of short-term trading fees and other controls for deterring excessive short-term trading, and a review of EIMCO, EIS and ESC's policies and procedures concerning conflicts of interest. EIMCO, EIS and ESC shall cooperate fully with the Independent Compliance Consultant and shall provide the Independent Compliance Consultant with access to files, books, records, and personnel as reasonably requested for the review.

b. EIMCO, EIS and ESC shall require that, at the conclusion of the review, which in no event shall be more than 180 days after the date of entry of the Order, the Independent Compliance Consultant shall submit a Report to it, the Trustees of each Evergreen fund, and the staff of the Commission. The Report shall address the issues described in the subparagraph set forth above, and shall include a description of the review performed, the conclusions reached, the Independent Compliance Consultant's recommendations for changes in or improvements to policies and procedures of EIMCO, EIS, ESC and each Evergreen fund, and a procedure for implementing the recommended changes in or improvements to those policies and procedures.

c. EIMCO, EIS and ESC shall adopt all recommendations contained in the Report of the Independent Compliance Consultant; provided, however, that, within 210 days after the date of entry of the Order, EIMCO, EIS and ESC shall, in writing, advise the Independent Compliance Consultant, the Trustees of each Evergreen fund and the staff of the Commission of any recommendations that one or more of them considers to be unnecessary or inappropriate. With respect to any such recommendation, EIMCO, EIS or ESC 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.

d. As to any recommendation with respect to EIMCO, EIS or ESC's policies and procedures on which EIMCO, EIS or ESC and the Independent Compliance Consultant do not agree, such parties shall attempt in good faith to reach an agreement within 240 days of the date of entry of the Order. In the event EIMCO, EIS or ESC and the Independent Compliance Consultant are unable to agree on an alternative proposal, EIMCO, EIS or ESC will abide by the determinations of the Independent Compliance Consultant.

e. Neither EIMCO, EIS nor ESC, either acting alone or in concert, (i) shall have the authority to terminate the Independent Compliance Consultant, without the prior written approval of the majority of the independent Trustees of each Evergreen fund and the staff of the Commission. EIMCO shall compensate the Independent Compliance Consultant, and persons engaged to assist the Independent Compliance Consultant, for services rendered pursuant to the Order at their reasonable and customary rates. Neither EIMCO, EIS nor ESC shall be in or have an attorney-client relationship with the Independent Compliance Consultant and neither EIMCO, EIS nor ESC shall seek to invoke the attorney-client or any other doctrine or privilege to prevent the Independent Compliance Consultant from transmitting any information, reports, or documents to the Trustees or to the Commission.

f. EIMCO, EIS and ESC shall require that the Independent Compliance Consultant, for the period of the engagement and for a period of two years from completion of the engagement, shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with EIMCO, EIS, ESC or any of their present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. EIMCO, EIS and ESC shall require that any firm with which the Independent Compliance Consultant is affiliated in the performance of his or her duties under the Order shall not, without prior written consent of the independent Trustees and the staff of the Commission, enter into any employment, consultant, attorney-client, auditing or other professional relationship with EIMCO, EIS or ESC 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 years after the engagement.

31. Periodic Compliance Review. In 2010 and again in 2012, EIMCO, EIS and ESC shall undergo a compliance review by a third party, who is not an interested person, as defined in the Investment Company Act, of EIMCO. At the conclusion of the review, the third party shall issue a report of its findings and recommendations concerning EIMCO, EIS and ESC's supervisory, compliance, and other policies and procedures designed to prevent and detect breaches of fiduciary duty, breaches of the Code of Ethics and federal securities law violations by EIMCO, EIS, ESC and their employees in connection with their duties and

activities on behalf of and related to any Evergreen fund. Each such report shall be promptly delivered to EIMCO's Code of Ethics Oversight Committee, its Internal Compliance Controls Committee and to the Audit Committee of the board of Trustees of each Evergreen fund.

32. Independent Distribution Consultant. EIMCO shall retain, within 30 days of the date of entry of the Order, the services of an Independent Distribution Consultant not unacceptable to the staff of the Commission or to the majority of the independent Trustees of any Evergreen fund. The Independent Distribution Consultant's compensation and expenses shall be borne exclusively by EIMCO. EIMCO, EIS and ESC shall cooperate fully with the Independent Distribution Consultant and shall comply with all of the Independent Distribution Consultant's reasonable requests for access to their files, books, records, and personnel. EIMCO shall require that the Independent Distribution Consultant develop a Distribution Plan for the distribution of all of the disgorgement and penalties ordered in paragraph IV.G.1. of this Order, and any interest or earnings thereon, as well as for the distribution of all of the disgorgement and penalties ordered in paragraph IV.G. of the Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(6) and 17A(c)(4)(C) of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company Act of 1940 in the Matter of William M. Ennis ("the Ennis Order"), and any interest or earnings thereon, according to a methodology developed in consultation with EIMCO and not unacceptable to the staff of the Commission and to a majority of the independent Trustees of each Evergreen fund.

a. EIMCO shall require that the Independent Distribution Consultant submit a Distribution Plan to it and to the staff of the Commission no more than 100 days after the date of entry of the Order.

b. The Distribution Plan developed by the Independent Distribution Consultant shall be binding unless, within 130 days after the date of entry of the Order, EIMCO or the staff of the Commission advises, in writing, the Independent Distribution Consultant of any determination or calculation from the Distribution Plan that it considers to be inappropriate and states in writing the reasons for considering such determination or calculation inappropriate.

c. With respect to any determination or calculation with which EIMCO or the staff of the Commission do not agree, such parties shall attempt in good faith to reach an agreement within 160 days of the date of entry of the Order. In the event that EIMCO and the staff of the Commission are unable to agree on an alternative determination or calculation, the determinations and calculations of the Independent Distribution Consultant shall be binding.

d. Within 175 days of the date of entry of the Order, EIMCO shall require that the Independent Distribution Consultant submit to the Commission the Distribution Plan for the administration and distribution of disgorgement and penalty funds pursuant to Rule 1101 [17 C.F.R. § 201.1101] of the Commission's Rules Regarding Fair Fund and Disgorgement Plans. Following a Commission order approving a final plan of distribution, as provided in Rule 1104 [17 C.F.R. § 201.1104] of the Commission's Rules Regarding Fair Fund and Disgorgement Plans, EIMCO shall require that the Independent Distribution Consultant, with EIMCO, take all necessary and appropriate steps to assist in the administration of the final Distribution Plan. The costs of administering this distribution, including the payment of any applicable taxes as well as the payment of the fees of any Tax Administrator, shall be borne exclusively by EIMCO.

e. EIMCO shall require that the Independent Distribution Consultant, for the period of the engagement and for a period of two years from completion of the engagement, not enter into any employment, consultant, attorney-client, auditing or other professional relationship with EIMCO, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. EIMCO shall require that any firm with which the Independent Distribution Consultant is affiliated in the performance of his or her duties under the Order not, without prior written consent of a majority of the independent Trustees of each Evergreen fund and the staff of the Commission, enter into any employment, consultant, attorney-client, auditing or other professional relationship with EIMCO, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

33. Certification. No later than twenty-four months after the date of entry of the Order, the chief executive officer of Respondents EIMCO, EIS, and ESC shall each certify to the Commission, in writing, that Respondent has fully adopted and complied in all material respects with the undertakings set forth in this section and with the recommendations of the Independent Compliance Consultant or, in the event of material non-adoption or non-compliance, shall describe such material non-adoption and non-compliance.

34. Recordkeeping. Respondents EIMCO, EIS, and ESC shall each preserve for a period 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 Respondent's compliance with the undertakings set forth above.

35. Deadlines. For good cause shown, the Commission's staff may extend any of the procedural dates set forth above.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in the Respondents' Offer. In determining to accept the Offer, the Commission considered the cooperation the Respondents have demonstrated throughout the investigation. It is hereby ORDERED that:

A. Pursuant to Section 203(e) of the Advisers Act, EIMCO is hereby censured. Pursuant to Section 15(b)(4) of the Exchange Act, EIS is hereby censured. Pursuant to Section 17A(c)(3) of the Exchange Act, ESC is hereby censured. Pursuant to Section 15(b)(4) of the Exchange Act, Wachovia Securities is hereby censured.

B. Pursuant to Section 203(k) of the Advisers Act, EIMCO shall cease and desist from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act. Pursuant to Section 9(f) of the Investment Company Act, EIMCO shall cease and desist from committing or causing any violations and any future violations of Sections 17(d) and 34(b) of the Investment Company Act and Rule 17d-1 thereunder.

C. Pursuant to Section 21C of the Exchange Act, EIS shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-4 thereunder. Pursuant to Section 203(k) of the Advisers Act, EIS shall cease and desist from causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act. Pursuant to Section 9(f) of the Investment Company Act, EIS shall cease and desist from committing or causing any violations and any future violations of Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder.

D. Pursuant to Section 203(k) of the Advisers Act, ESC shall cease and desist from causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act.

E. Pursuant to Section 9(f) of the Investment Company Act, Wachovia Securities shall cease and desist from committing or causing any violations and any future violations of Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder.

F. EIMCO, EIS and ESC shall comply with the undertakings set forth above.

G. <u>Disgorgement and Civil Money Penalties</u>

1. Within ten days of the entry of this Order, Respondent EIMCO shall pay disgorgement in the total amount of $28,503,276 and, pursuant to

Sections 203(e) and 203(i) of the Advisers Act and Sections 9(b) and 9(d) of the Investment Company Act, a civil penalty in the amount of $1,500,000, Respondent EIS shall pay disgorgement in the amount of $1 and, pursuant to Section 21B(a) of the Exchange Act and Sections 9(b) and 9(d) of the Investment Company Act, a civil penalty in the amount of $1,500,000, Respondent ESC shall pay disgorgement in the amount of $1 and, pursuant to Sections 9(b) and 9(d) of the Investment Company Act, a civil penalty in the amount of $500,000, and Respondent Wachovia Securities shall pay disgorgement in the amount of $1 and, pursuant to Sections 9(b) and 9(d) of the Investment Company Act, a civil penalty in the amount of $500,000. All of the payments referred to above shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies the Respondent making the payment, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David P. Bergers, Regional Director, Securities and Exchange Commission, 33 Arch Street, 23rd Floor, Boston, Massachusetts, 02110.

2. There shall be, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund established for the funds described in paragraph IV.G.1. Regardless of whether any distribution is made from such Fair Fund, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalties, Respondents EIMCO, EIS, ESC and Wachovia Securities agree that they shall not, after offset or reduction in any Related Investor Action based on either EIMCO, EIS, ESC or Wachovia Securities' payment of disgorgement in this action, further benefit by offset or reduction of any part of EIMCO, EIS, ESC or Wachovia Securities' payment of civil penalties in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, EIMCO, EIS, ESC and Wachovia Securities agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalties imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against EIMCO, EIS, ESC, Wachovia

Securities or their affiliates, or all of them, by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Nancy M. Morris
Nancy M. Morris
Secretary

Commissioners Atkins &
Campos
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8843 / September 19, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12805

In the Matter of **Evergreen Investment Management Company, LLC, Evergreen Investment Services, Inc. and Wachovia Securities, LLC** **Respondents.**	**ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE DISQUALIFICATION PROVISION OF RULE 602(c)(3)**

I.

Evergreen Investment Management Company, LLC ("EIMCO"), Evergreen Investment Services, Inc. ("EIS") and Wachovia Securities, LLC ("Wachovia Securities"), collectively, "Respondents", have submitted a letter, dated July 10, 2007, requesting a waiver of the Rule 602(c)(3) disqualification from the exemption under Regulation E under the Securities Act of 1933 ("Securities Act") arising from the settlement of an administrative proceeding commenced by the Commission.

II.

On September 19, 2007, pursuant to Respondents' Offer of Settlement, the Commission instituted an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b), 17A(c) and 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order") against Respondents.

The Order finds that, as a result of the conduct described therein: EIMCO willfully violated Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 34(b) of the Investment Company Act of 1940 ("Investment Company Act"); EIS willfully aided and abetted and caused EIMCO's violations of Sections 206(1) and 206(2) of the

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Advisers Act and willfully violated Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 17a-4(b)(4) thereunder; Wachovia Securities willfully violated Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder and EIMCO and EIS willfully aided and abetted and caused that violation. The Order requires, among other things, Respondents to pay a total of approximately $32 million in disgorgement and civil penalties and EIMCO and EIS to comply with certain undertakings concerning compliance oversight.

III.

Regulation E provides an exemption from registration under the Securities Act, subject to certain conditions, for securities issued by certain small business investment companies and business development companies. The Regulation E exemption is not available for the securities of an issuer if, among other things, any investment adviser or underwriter for the securities to be offered is subject to an order of the Commission entered pursuant to Section 15(b) of the Exchange Act or Section 203(e) of the Advisers Act. *See* Rule 602(c)(3) under the Securities Act. The Commission may waive the disqualification upon a showing of good cause. *See* Rule 602(e) under the Securities Act.

IV.

Based on the representations set forth in Respondents' request, the Commission has determined that, pursuant to Rule 602(e), a showing of good cause has been made and that the request for a waiver of the disqualification should be granted.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver of the disqualification provision of Rule 602(c)(3) under the Securities Act resulting from the entry of the Order is hereby granted.

By the Commission.

Nancy M. Morris
Secretary

Commissioners Atkins &
Campos Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8842 / September 19, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56463 / September 19, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12805

In the Matter of **Evergreen Investment Management Company, LLC, Evergreen Investment Services, Inc., Evergreen Service Company, LLC and Wachovia Securities, LLC** **Respondents.**	**ORDER UNDER SECTION 27A(b) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b) OF THE SECURITIES EXCHANGE ACT OF 1934, GRANTING WAIVERS OF THE DISQUALIFICATION PROVISIONS OF SECTION 27A(b)(1)(A)(ii) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b)(1)(A)(ii) OF THE SECURITIES EXCHANGE ACT OF 1934**

Evergreen Investment Management Company, LLC ("EIMCO"), Evergreen Investment Services, Inc. ("EIS"), Evergreen Service Company, LLC ("ESC") and Wachovia Securities, LLC ("Wachovia Securities"), collectively, "Respondents", have submitted a letter, dated July 10, 2007, on behalf of themselves and their affiliates, including Wachovia Corporation, whose stock is traded on the New York Stock Exchange, requesting a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 ("Securities Act") and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 ("Exchange Act") arising from the Respondents' settlement of an administrative proceeding instituted by the Commission.

On September 19, 2007, pursuant to the Respondents' Offer of Settlement, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b), 17A(c) and 21C of the Exchange Act, Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order") against Respondents. Under the Order, the Commission found that:

1. As a result of the conduct described in the Order, EIMCO willfully violated Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 34(b) of the Investment Company Act of 1940 ("Investment Company Act").

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2. As a result of the conduct described in the Order, EIS and ESC willfully aided and abetted and caused EIMCO's violations of Sections 206(1) and 206(2) of the Advisers Act. In addition, EIS willfully violated Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder.

3. As a result of the conduct described in the Order, Wachovia Securities willfully violated Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder and EIMCO and EIS willfully aided and abetted and caused that violation.

The Order requires, among other things:

1. Respondents to pay a total of approximately $32 million in disgorgement and civil penalties; and

2. EIMCO, EIS and ESC to comply with certain undertakings concerning compliance oversight.

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

Based on the representations set forth in Respondents' request, the Commission has determined that, under the circumstances, the request for a waiver of the disqualifications resulting from the entry of the Order is appropriate and should be granted.

Accordingly, IT IS ORDERED, pursuant to Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act, that a waiver from the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act as to EIMCO, EIS, ESC and Wachovia Securities and their affiliates resulting from the entry of the Order is hereby granted.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

Commissioner Campos
Not Participating

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-27978; 812-13394]

Citi Investor Services, Inc. f/n/a The BISYS Group, Inc., et al.; Notice of Application and Temporary Order

September 24, 2007

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

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

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against Citi Investor Services, Inc. f/n/a The BISYS Group, Inc. ("BISYS") on July 27, 2007 by the United States District Court for the Southern District of New York (the "Injunction"), until the Commission takes final action on an application for a permanent order. Applicants have requested a permanent order.

Applicants: BISYS, Heartland Investor Services, LLC, Mercantile Investment Services, Inc., ProFunds Distributors, Inc. and Victory Capital Advisers, Inc. (collectively, other than BISYS, the "BISYS Underwriter Applicants," and, together with BISYS, the "BISYS Applicants"); Citigroup Global Markets Inc. ("CGMI"), CEFOF GP I Corp. ("CEFOF"), CELFOF GP Corp. ("CELFOF"), Citibank, N.A. ("Citibank"), Citigroup Alternative Investments LLC ("Citigroup Alternative"), Citigroup Investment Advisory Services Inc. ("Citigroup Advisory"), SSBCP GP I Corp. ("SSBCP"), and SSBPIF GP Corp. ("SSBPIF", and, together with CGMI, CEFOF, CELFOF, Citibank, Citigroup Alternative, Citigroup Advisory, and SSBCP, the "Citigroup Applicants," and together with the BISYS

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Commissioners Atkins & Campos Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56464 / September 19, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2649 / September 19, 2007

INVESTMENT COMPANY ACT OF 1940
Release No. 27974 / September 19, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12806

In the Matter of **WILLIAM M. ENNIS,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b)(6) and 17A(c)(4)(C) OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTIONS 9(b) AND 9(f) 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 Sections 15(b)(6) and 17A(c)(4)(C) 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 Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against William M. Ennis ("Respondent" or "Ennis").

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

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Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(6) and 17A(c)(4)(C) of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order"), as set forth below.

III.

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

Summary

1. This is a proceeding against Ennis, the former president of the Evergreen Investment Company, Inc. ("EIC"), the corporate parent of Evergreen Investment Management Company, LLC ("EIMCO"), the Boston-based registered investment adviser for the Evergreen fund family, Evergreen Investment Services, Inc. ("EIS"), EIMCO's affiliated registered broker-dealer, and Evergreen Service Company, LLC ("ESC"), EIMCO's affiliated transfer agent (collectively, "Evergreen"), based on his involvement in a market timing agreement that permitted a registered representative to make, on behalf of certain of his customers, frequent trades in the Evergreen Small Company Growth Fund (now known as the Mid Cap Growth Fund) in excess of the exchange limits set forth in the fund's prospectus.

2. Market timing includes (a) frequent buying and selling of shares of the same mutual fund or (b) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not illegal per se, can harm other mutual fund shareholders because it can dilute the value of their shares, if the market timer is exploiting pricing inefficiencies, or disrupt the management of the mutual fund's investment portfolio and can cause the targeted mutual fund to incur costs borne by other shareholders to accommodate frequent buying and selling of shares by the market timer.

3. In January 2000, Ennis, then the senior vice president of EIC, agreed to permit a registered representative to market time one or more Evergreen funds on behalf of certain of his customers even though he knew that Evergreen had an anti-market timing policy, consistent with which each Evergreen fund prospectus limited exchanges to three per calendar quarter and five per calendar year, and even though he knew that market timing could disrupt fund management and harm fund performance. The registered representative subsequently made approximately 386 exchanges into and out of the Evergreen Small Company Growth Fund from approximately January 2001 through March 2003. This timing activity harmed the fund. From January 2001 through March 2003, Ennis signed several Small Company Growth Fund registration statements, each of which incorporated the fund's prospectus and the exchange limits contained therein. At no point during the

[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.

period in which the registered representative was making these exchanges did Ennis disclose the market timing arrangement to the fund's board of trustees.

Respondent

4. William M. Ennis was employed at Evergreen from 1994 to June 2003, when he resigned. In December 1996, Ennis was named a senior vice president of EIC and, in April 2000, Ennis became EIC's president. During the relevant period, Ennis served as a director of and control person for EIMCO, he supervised the president of EIS, he was the president of the Evergreen Equity Trust, a registered investment company of which the Small Company Growth Fund was a series, and he functioned as the chief executive officer of the Evergreen mutual fund complex. Ennis, age 46, is a resident of Charleston, South Carolina.

Related Entities

5. EIC is a wholly owned holding company subsidiary of Wachovia Corporation, a Charlotte, North Carolina based company whose common stock is registered with the Commission and principally trades on the New York Stock Exchange. EIC owns EIMCO, EIS, and ESC (collectively, "Evergreen"). The Evergreen fund family is one of the 20 largest fund groups in the nation. As of March 31, 2007, EIMCO had more than $312 billion in assets under management.

6. Wachovia Securities, LLC is a Richmond-based registered broker-dealer that is a majority-owned subsidiary of Wachovia Corporation.

Facts

The Market Timing Agreement

7. In January 2000, Evergreen had in place an "anti-market timing" policy through which it sought to eliminate market timing in the Evergreen funds. Consistent with this policy, each Evergreen fund prospectus contained a provision stating that: "Exchanges are limited to three per calendar quarter, but in no event more than five per calendar year." In January 2000, Ennis was familiar with the exchange limit provision set forth in each Evergreen fund prospectus, he understood that a market timer might make more than three exchanges per quarter and five per year, and he was aware that market timing could impose trading costs on a fund, disrupt fund management and harm fund performance.

8. In January 2000, the retail division of Wachovia Securities, then operating under the name First Union Securities, Inc. (which was under common control with Evergreen at the time), was the number one distributor of Evergreen funds, accounting for about $2 billion of the funds' approximately $3 billion in total annual sales. In early January 2000, Wachovia Securities' Private Client Group ("PCG"), the firm's non-bank branch based division, notified an EIS vice president that it was attempting to recruit a top-producing registered representative, who was seeking permission to

market time one or more Evergreen funds on behalf of certain of his customers. Convinced that it would otherwise be unable to hire the recruit, the PCG asked the EIS vice president if Evergreen would be willing to accommodate the recruit's market timing activity. After EIS' president and EIMCO's chief investment officer for equities denied it, the EIS vice president, at the request of the PCG's president, presented the timing request to Ennis, who was trying at that time to improve Evergreen's sales and distribution through the PCG channel. Despite being told by the EIS vice president that both the EIS president and EIMCO's chief investment officer for Equities had rejected it, Ennis granted the PCG's timing request. Noting that the PCG might not land the recruit, Ennis ordered that this arrangement be kept confidential, specifically instructing that the EIS president not be informed of it.

9. In approximately January 2001, the registered representative joined Wachovia Securities and began trading in the Small Company Growth Fund on behalf of certain of his customers. From that time through March 2003, the registered representative made approximately 386 exchanges into and out of the fund, thus greatly exceeding the three per quarter and five per year exchange limits set forth in the fund's prospectus. The dollar amounts of the registered representative's trades, which ranged from approximately $50,000 to more than $2.2 million, averaged about $500,000. During the period in which the arrangement was in place, the registered representative made a cumulative total of approximately $282.4 million worth of exchanges into and out of the fund. In approximately March 2003, after the EIS vice president had left Evergreen, the ESC vice president responsible for Evergreen's market timing monitoring operation told the registered representative that Evergreen would no longer permit him to exceed its exchange limits. The registered representative then ceased his market timing in the Small Company Growth Fund and closed out the account through which the activity had occurred. During the period in which the registered representative timed the Small Company Growth Fund, Ennis signed several registration statements on the fund's behalf, each of which incorporated the fund's prospectus and the exchange limits contained therein and each of which was filed with the Commission by EIMCO or, at EIMCO's direction, EIS. At no point during the period in which the registered representative was making these exchanges did Ennis disclose the market timing arrangement to the fund's board of trustees.

Violations

10. As a result of the above-described conduct, Ennis:

a. willfully aided and abetted and caused EIMCO's violations of Sections 206(1) and 206(2) of the Advisers Act. Specifically, by entering into a market timing agreement that he knew or was reckless in not knowing would create an undisclosed conflict of interest between EIMCO, which benefited from the advisory fees generated by the timing activity as well as from the prospects the timing arrangement created for improving its relationship with the PCG, and the Small Company Growth Fund, which suffered the dilutive effect of the timing trades and the transaction costs related thereto, Ennis provided knowing and substantial assistance to EIMCO's violations of this statute.

b. willfully violated Section 34(b) of the Investment Company Act. Specifically, by signing the Small Company Growth Fund's registration statements, which incorporated the exchange limits, Ennis made a materially misleading statement in a document filed with the Commission.

c. willfully aided and abetted and caused Wachovia Securities' violation of Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder. Specifically, by granting Wachovia Securities' market timing request, Ennis enabled Wachovia Securities, which, by virtue of its common control with EIMCO, was affiliated with the Small Company Growth Fund, to enter into a joint arrangement with that fund without first obtaining an exemptive order from the Commission with respect thereto. Ennis thus provided knowing and substantial assistance to Wachovia Securities' violation of this statute and rule.

Undertakings

11. Respondent undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings brought by the Commission relating to or arising from the matters described in the Order, and agrees:

a. To comply with any and all reasonable requests by the Commission's staff for documents or other information;

b. To be interviewed at such times as the Commission's staff reasonably may direct;

c. To appear and testify in such investigations, depositions, hearings or trials as the Commission's staff reasonably may direct; and

d. That in connection with any (i) testimony of Respondent to be conducted by testimony session, deposition, hearing or trial or (ii) requests for documents or other information, that any notice or subpoena for such may be addressed to Respondent's counsel, and be served by mail or facsimile.

IV.

On the basis of the foregoing, Respondent hereby consents to the entry of an Order by the Commission imposing the following:

A. Pursuant to Section 203(k) of the Advisers Act and Section 9(f) of the Investment Company Act, that Respondent Ennis cease and desist from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act and from committing or causing any violations and any future violations of Sections 17(d) and 34(b) of the Investment Company Act and Rule 17d-1 thereunder.

B. Pursuant to Sections 15(b)(6) and 17A(c)(4)(C) of the Exchange Act, Section 203(f) of the Advisers Act and Section 9(b) of the Investment Company Act, that Respondent Ennis be, and hereby is barred from association with any broker, dealer, transfer agent, or investment adviser, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, with a right to reapply for association after one (1) year from the date of the Order to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Any reapplication for association by Ennis 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 Ennis, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

D. Within ten days of the entry of this Order, Ennis shall pay a civil penalty in the amount of $150,000 and disgorgement in the amount of $1. Such payments shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies William M. Ennis as a Respondent in these proceedings and that sets forth the file number of these proceedings. A copy of this cover letter and money order or check shall be sent to David P. Bergers, Regional Director, Securities and Exchange Commission, 33 Arch Street, 23rd Floor, Boston, Massachusetts, 02110. The disgorgement and civil penalty payments referred to above shall be added to the Fair Fund established pursuant to Paragraph IV.G.2. of the Order Instituting Administrative and Cease-and-Desist Proceedings pursuant to Sections 15(b)(4), 17A(c)(3) and 21C 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 Evergreen Investment Management Company, LLC, Evergreen Investment Services, Inc., Evergreen Service Company, LLC and Wachovia Securities, LLC. Regardless of whether any distribution is made from such Fair Fund, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that he shall not, after offset or reduction in any Related Investor Action based on Respondent's payment of disgorgement in this action, further benefit by offset or reduction of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 20, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12754

In the Matter of **Aurora Acquisitions, Inc.,** **Can-Ex Minerals Corp.,** **HDF, Inc.,** **Inmold, Inc., and** **Piccard Medical Corp.,** **Respondents.**	**AMENDED ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Aurora Acquisitions, Inc. ("Aurora") (CIK No. 885544) is a Colorado corporation located in Denver, Colorado with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Aurora is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 1999, which reported net losses since inception of $78,447.

2. Can-Ex Minerals Corp. ("Can-Ex") (CIK No. 1074641) is a revoked Nevada corporation located in Colorado Springs, Colorado with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Can-Ex is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement amendment on September 3, 1999, which reported no significant operations.

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3. HDF, Inc. ("HDF") (CIK No. 1063261) is a Colorado corporation located in Denver, Colorado with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). HDF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended October 31, 1999, which reported no significant operations and a net loss since inception of $5,818.

4. Inmold, Inc. ("Inmold") (CIK No. 1039109) is a dissolved Indiana corporation located in Troy, Michigan with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Inmold is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on June 9, 1999. As of August 31, 2007, the company's common stock (symbol "INOI") was traded on the over-the-counter markets.

5. Piccard Medical Corp. ("Piccard") (CIK No. 1099341) is a void Delaware corporation located in Weyerhaeuser, Wisconsin with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Piccard is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed an amended Form 10-SB registration statement on April 5, 2000, which reported a net loss of $170,676 for fiscal year 1999. As of August 31, 2007, the company's common stock (symbol "PMCZ") was traded on the over-the-counter markets.

B. DELINQUENT PERIODIC FILINGS

6. As discussed in more detail above, all of the respondents are delinquent in their periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondents identified in Section II registered pursuant to Section 12 of the Exchange Act.

IV.

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

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

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against it upon consideration of this Amended 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 Amended Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means of verifiable delivery.

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

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

By the Commission.

Nancy M. Morris
Secretary

Attachment

Appendix 1

Chart of Delinquent Filings
In the Matter of Aurora Acquisitions, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Aurora Acquisitions, Inc.					
	10-KSB	12/31/99	03/30/00	Not filed	90
	10-QSB	03/31/00	05/15/00	Not filed	88
	10-QSB	06/30/00	08/14/00	Not filed	85
	10-QSB	09/30/00	11/14/00	Not filed	82
	10-KSB	12/31/00	04/02/01	Not filed	77
	10-QSB	03/31/01	05/15/01	Not filed	76
	10-QSB	06/30/01	08/14/01	Not filed	73
	10-QSB	09/30/01	11/14/01	Not filed	70
	10-KSB	12/31/01	04/01/02	Not filed	65
	10-QSB	03/31/02	05/15/02	Not filed	64
	10-QSB	06/30/02	08/14/02	Not filed	61
	10-QSB	09/30/02	11/14/02	Not filed	58
	10-KSB	12/31/02	03/31/03	Not filed	54
	10-QSB	03/31/03	05/15/03	Not filed	52
	10-QSB	06/30/03	08/14/03	Not filed	49
	10-QSB	09/30/03	11/14/03	Not filed	46
	10-KSB	12/31/03	03/30/04	Not filed	42
	10-QSB	03/31/04	05/17/04	Not filed	40
	10-QSB	06/30/04	08/16/04	Not filed	37
	10-QSB	09/30/04	11/15/04	Not filed	34
	10-KSB	12/31/04	03/31/05	Not filed	30
	10-QSB	03/31/05	05/16/05	Not filed	28
	10-QSB	06/30/05	08/15/05	Not filed	25
	10-QSB	09/30/05	11/14/05	Not filed	22
	10-KSB	12/31/05	03/31/06	Not filed	18
	10-QSB	03/31/06	05/15/06	Not filed	16
	10-QSB	06/30/06	08/14/06	Not filed	13
	10-QSB	09/30/06	11/14/06	Not filed	10
	10-KSB	12/31/06	04/02/07	Not filed	0
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1
Total Filings Delinquent	31				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Can-Ex Minerals Corp.					
	10-QSB	09/30/99	11/15/99	Not filed	94
	10-KSB	12/31/99	03/30/00	Not filed	90
	10-QSB	03/31/00	05/15/00	Not filed	88
	10-QSB	06/30/00	08/14/00	Not filed	85
	10-QSB	09/30/00	11/14/00	Not filed	82
	10-KSB	12/31/00	04/02/01	Not filed	77
	10-QSB	03/31/01	05/15/01	Not filed	76
	10-QSB	06/30/01	08/14/01	Not filed	73
	10-QSB	09/30/01	11/14/01	Not filed	70
	10-KSB	12/31/01	04/01/02	Not filed	65
	10-QSB	03/31/02	05/15/02	Not filed	64
	10-QSB	06/30/02	08/14/02	Not filed	61
	10-QSB	09/30/02	11/14/02	Not filed	58
	10-KSB	12/31/02	03/31/03	Not filed	54
	10-QSB	03/31/03	05/15/03	Not filed	52
	10-QSB	06/30/03	08/14/03	Not filed	49
	10-QSB	09/30/03	11/14/03	Not filed	46
	10-KSB	12/31/03	03/30/04	Not filed	42
	10-QSB	03/31/04	05/17/04	Not filed	40
	10-QSB	06/30/04	08/16/04	Not filed	37
	10-QSB	09/30/04	11/15/04	Not filed	34
	10-KSB	12/31/04	03/31/05	Not filed	30
	10-QSB	03/31/05	05/16/05	Not filed	28
	10-QSB	06/30/05	08/15/05	Not filed	25
	10-QSB	09/30/05	11/14/05	Not filed	22
	10-KSB	12/31/05	03/31/06	Not filed	18
	10-QSB	03/31/06	05/15/06	Not filed	16
	10-QSB	06/30/06	08/14/06	Not filed	13
	10-QSB	09/30/06	12/31/06	Not filed	9
	10-KSB	12/31/06	02/14/07	Not filed	7
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1
Total Filings Delinquent	32				
HDF, Inc.					
	10-QSB	01/31/00	03/16/00	Not filed	90
	10-KSB	04/30/00	07/31/00	Not filed	86
	10-QSB	07/31/00	09/14/00	Not filed	84
	10-QSB	01/31/01	03/19/01	Not filed	78
	10-KSB	04/30/01	07/30/01	Not filed	74
	10-QSB	07/31/01	09/14/01	Not filed	72

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
HDF, Inc.	*10-QSB*	10/31/01	12/17/01	Not filed	69
(continued)	*10-QSB*	01/31/02	03/18/02	Not filed	66
	10-KSB	04/30/02	07/29/02	Not filed	62
	10-QSB	07/31/02	09/16/02	Not filed	60
	10-QSB	10/31/02	12/16/02	Not filed	57
	10-QSB	01/31/03	03/17/03	Not filed	54
	10-KSB	04/30/03	07/29/03	Not filed	50
	10-QSB	07/31/03	09/15/03	Not filed	48
	10-QSB	10/31/03	12/15/03	Not filed	45
	10-QSB	01/31/04	03/16/04	Not filed	42
	10-KSB	04/30/04	07/29/04	Not filed	38
	10-QSB	07/31/04	09/14/04	Not filed	36
	10-QSB	10/31/04	12/15/04	Not filed	33
	10-QSB	01/31/05	03/17/05	Not filed	30
	10-KSB	04/30/05	07/29/05	Not filed	26
	10-QSB	07/31/05	09/14/05	Not filed	24
	10-QSB	10/31/05	12/15/05	Not filed	21
	10-QSB	01/31/06	03/17/06	Not filed	18
	10-KSB	04/30/06	07/31/06	Not filed	14
	10-QSB	07/31/06	09/14/06	Not filed	12
	10-QSB	10/31/06	12/15/06	Not filed	9
	10-QSB	01/31/07	03/19/07	Not filed	6
	10-KSB	04/30/07	07/31/07	Not filed	2
Total Filings Delinquent	29				
Inmold, Inc.					
	10-K	05/31/99	08/30/99	Not filed	97
	10-Q	08/31/99	10/15/99	Not filed	95
	10-Q	11/30/99	01/14/00	Not filed	92
	10-Q	02/28/00	04/13/00	Not filed	89
	10-K	05/31/00	08/29/00	Not filed	85
	10-Q	08/31/00	10/16/00	Not filed	83
	10-Q	11/30/00	01/15/01	Not filed	80
	10-Q	02/28/01	04/16/01	Not filed	77
	10-K	05/31/01	08/29/01	Not filed	73
	10-Q	08/31/01	10/15/01	Not filed	71
	10-Q	11/30/01	01/14/02	Not filed	68
	10-Q	02/28/02	04/15/02	Not filed	65
	10-K	05/31/02	08/29/02	Not filed	61
	10-Q	08/31/02	10/15/02	Not filed	59
	10-Q	11/30/02	01/14/03	Not filed	56
	10-Q	02/28/03	04/14/03	Not filed	53
	10-K	05/31/03	08/29/03	Not filed	49

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Inmold, Inc. (continued)	*10-Q*	08/31/03	10/15/03	Not filed	47
	10-Q	11/30/03	01/14/04	Not filed	44
	10-Q	02/28/04	04/13/04	Not filed	41
	10-K	05/31/04	08/30/04	Not filed	37
	10-Q	08/31/04	10/15/04	Not filed	35
	10-Q	11/30/04	01/14/05	Not filed	32
	10-Q	02/28/05	04/14/05	Not filed	29
	10-K	05/31/05	08/29/05	Not filed	25
	10-Q	08/31/05	10/17/05	Not filed	23
	10-Q	11/30/05	01/16/06	Not filed	20
	10-Q	02/28/06	04/14/06	Not filed	17
	10-K	05/31/06	08/29/06	Not filed	13
	10-Q	08/31/06	10/16/06	Not filed	11
	10-Q	11/30/06	01/15/07	Not filed	8
	10-Q	02/28/07	04/16/07	Not filed	5
	10-K	05/31/07	08/29/07	Not filed	1
Total Filings Delinquent	33				
Piccard Medical Corp.					
	10-QSB	03/31/00	05/15/00	Not filed	88
	10-QSB	06/30/00	08/14/00	Not filed	85
	10-QSB	09/30/00	11/14/00	Not filed	82
	10-KSB	12/31/00	04/02/01	Not filed	77
	10-QSB	03/31/01	05/15/01	Not filed	76
	10-QSB	06/30/01	08/14/01	Not filed	73
	10-QSB	09/30/01	11/14/01	Not filed	70
	10-KSB	12/31/01	04/01/02	Not filed	65
	10-QSB	03/31/02	05/15/02	Not filed	64
	10-QSB	06/30/02	08/14/02	Not filed	61
	10-QSB	09/30/02	11/14/02	Not filed	58
	10-KSB	12/31/02	03/31/03	Not filed	54
	10-QSB	03/31/03	05/15/03	Not filed	52
	10-QSB	06/30/03	08/14/03	Not filed	49
	10-QSB	09/30/03	11/14/03	Not filed	46
	10-KSB	12/31/03	03/30/04	Not filed	42
	10-QSB	03/31/04	05/17/04	Not filed	40
	10-QSB	06/30/04	08/16/04	Not filed	37
	10-QSB	09/30/04	11/15/04	Not filed	34
	10-KSB	12/31/04	03/31/05	Not filed	30
	10-QSB	03/31/05	05/16/05	Not filed	28
	10-QSB	06/30/05	08/15/05	Not filed	25
	10-QSB	09/30/05	11/14/05	Not filed	22
	10-KSB	12/31/05	03/31/06	Not filed	18

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Piccard Medical Corp. (continued)	*10-QSB*	03/31/06	05/15/06	Not filed	16
	10-QSB	06/30/06	08/14/06	Not filed	13
	10-QSB	09/30/06	11/14/06	Not filed	10
	10-KSB	12/31/06	04/02/07	Not filed	5
	10-QSB	03/31/07	05/15/07	Not filed	4
	10-QSB	06/30/07	08/14/07	Not filed	1
Total Filings Delinquent	28				

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56486 / September 20, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2724 / September 20, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12819

In the Matter of **JAMES M. MATERNA (CPA),** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

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

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

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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 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. Materna, age 62, is and has been a certified public accountant licensed to practice in the State of Ohio. He served as Chief Financial Officer of OM Group, Inc. ("OMG") from July 1992 until his retirement in May 2002. His CPA license went inactive thereafter.

2. OMG was, at all relevant times, a Delaware corporation with its principal place of business in Cleveland, Ohio. OMG was engaged in the production and marketing of value-added, metal based specialty chemicals and related materials produced from cobalt and nickel. At all relevant times, OMG's common stock was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the New York Stock Exchange under the symbol "OMG."

3. On July 18, 2007, the Commission filed a complaint against Materna in SEC v. James M. Materna, John R. Holtzhauser, and Paul R. Venesky, 07-CV-01274 (D.D.C.). On September 11, 2007, the court entered an order permanently enjoining Materna, by consent, from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13b2-1 and 13b2-2 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. Materna was also ordered to pay a $100,000 civil money penalty.

4. The Commission's complaint alleges, among other things, that Materna engaged in fraudulent accounting practices in May 2002 and prior, which resulted in OMG filing materially false and misleading financial statements in the company's annual report on Form 10-K for the fiscal year ended December 31, 2001 and, in part, the fiscal year ended December 31, 2002, and in the company's quarterly report on Form 10-Q for the first quarter of 2002. The complaint alleges that OMG issued a restatement in March 2005 reducing its retained earnings by $64 million as a result of fraudulent conduct. According to the complaint, Materna recorded and directed numerous erroneous and unsupported accounting entries, estimates, and top side adjustments to OMG's books and records that materially increased OMG's annual and quarterly

net income in a departure from generally accepted accounting principles. These accounting practices allegedly included, among other things, overcapitalizing overhead costs, improperly recording supplier receivables, recording inflated inventory recovery yields, recording inaccurate inventory estimates, and duplicating entries made at the operating unit level. In addition, the complaint alleges that Materna, in part, failed to provide sufficient information to OMG's independent auditor about the accounting entries, estimates, and top side adjustments.

IV.

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

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

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

B. After five (5) years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

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

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56485 / September 20, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2723 / September 20, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12818

In the Matter of **JOHN R. HOLTZHAUSER (CPA),** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

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

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

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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 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. Holtzhauser, age 50, is and has been a certified public accountant licensed to practice in the State of Ohio. He served as Controller of OM Group, Inc. ("OMG") from 1991 until his resignation in August 2003.

2. OMG was, at all relevant times, a Delaware corporation with its principal place of business in Cleveland, Ohio. OMG was engaged in the production and marketing of value-added, metal based specialty chemicals and related materials produced from cobalt and nickel. At all relevant times, OMG's common stock was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the New York Stock Exchange under the symbol "OMG."

3. On July 18, 2007, the Commission filed a complaint against Holtzhauser in SEC v. James M. Materna, John R. Holtzhauser, and Paul R. Venesky, 07-CV-01274 (D.D.C.). On September 11, 2007, the court entered an order permanently enjoining Holtzhauser, by consent, from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13b2-1 and 13b2-2 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. Holtzhauser was also ordered to pay $76,707 in disgorgement of certain past bonus payments, and a $100,000 civil money penalty.

4. The Commission's complaint alleges, among other things, that Holtzhauser engaged in fraudulent accounting practices, which resulted in OMG filing materially false and misleading financial statements in the company's annual report on Form 10-K for the fiscal years ended December 31, 2001 and December 31, 2002, and in the company's quarterly reports on Form 10-Q for all four quarters of 2002 and the first three quarters of 2003. The complaint alleges that OMG issued a restatement in March 2005 reducing its retained earnings for the relevant period by $64 million as a result of the fraudulent conduct. According to the complaint, Holtzhauser recorded and directed numerous erroneous and unsupported accounting entries, estimates, and top side adjustments to OMG's books and records that materially increased

OMG's annual and quarterly net income in a departure from generally accepted accounting principles. These accounting practices allegedly included, among other things, overcapitalizing overhead costs, improperly recording supplier receivables, recording inflated inventory recovery yields, recording inaccurate inventory estimates, and duplicating entries made at the operating unit level. In addition, the complaint alleges that Holtzhauser failed to provide sufficient information to OMG's independent auditor about the accounting entries, estimates, and top side adjustments.

IV.

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

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

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

B. After five (5) years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

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

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56484 / September 20, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2722 / September 20, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12817

In the Matter of **Paul R. Venesky (CPA),** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

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

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

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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. Venesky, age 44, is and has been a certified public accountant licensed to practice in the State of Ohio since 1986. He was Controller of OMG Americas, an OM Group subsidiary, from August 1993 to September 2001 and Director of Operations from September 2001 to October 2002. He was also Controller of the Cobalt division from October 2002 through August 2003. Venesky left the company in May 2004.

2. OM Group, Inc. ("OM Group") was, at all relevant times, a Delaware Corporation headquartered in Cleveland, Ohio. The company has over 1,400 employees in North America, Europe, Asia and Africa and annual revenues of over $1 billion. OM Group's common stock is registered pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and is listed on the New York Stock Exchange under the ticker symbol "OMG." Its fiscal year end is December 31 and its independent auditor is Ernst & Young LLP.

3. On July 18, 2007, the Commission filed a complaint against Venesky in SEC v. James M. Materna, John R. Holtzhauser, and Paul R. Venesky, 07-CV-01274 (D.D.C.). On September 11, 2007, the court entered an order permanently enjoining Venesky, by consent, from future violations of Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13b2-1, and 13b2-2 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. Venesky was also ordered to pay a $25,000 civil money penalty.

4. The Commission's Complaint alleges, among other things, that Venesky aided and abetted fraudulent accounting practices in September 2001 and prior, which resulted in OM Group filing materially false and misleading financial statements in the company's annual report on Form 10-K for the fiscal year ended December 31, 2001 and, in part, the fiscal year ended December 31, 2002. The Complaint alleges that OM Group issued a restatement in March 2005 reducing its retained earnings by $64 million as a result of fraudulent conduct. According to the Complaint, Venesky recorded numerous erroneous and unsupported accounting entries at the direction of OM Group's former Chief Financial Officer and former Controller to

OMG Americas' books and records, which were consolidated into OM Group's financial statements. These accounting practices allegedly included, among other things, recording inaccurate inventory estimates, and recording erroneous journal entries related to certain litigation involving OMG Americas. In addition, the complaint alleges that Venesky, in part, failed to provide sufficient information to OMG's independent auditor about the accounting entries and estimates.

IV.

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

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

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

B. After three (3) 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/her 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/she 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.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 34-56513/September 24, 2007

ORDER GRANTING REGISTRATION OF STANDARD & POOR'S RATINGS SERVICES AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION

Standard & Poor's Ratings Services, a credit rating agency, furnished to the Securities and Exchange Commission ("Commission") an application for registration as a nationally recognized statistical rating organization ("NRSRO") under Section 15E of the Securities Exchange Act of 1934 ("Exchange Act") for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act. The Commission finds that the application furnished by Standard & Poor's Ratings Services is in the form required by Exchange Act Section 15E, Exchange Act Rule 17g-1 (17 CFR 240.17g-1), and Form NRSRO (17 CFR 249b.300) and contains the information described in subparagraph (B) of Section 15E(a)(1) of the Exchange Act.

Based on the application, the Commission finds that the requirements of Section 15E of the Exchange Act are satisfied.

Accordingly,

IT IS ORDERED, under paragraph (a)(2)(A) of Section 15E of the Exchange Act, that the registration of Standard & Poor's Ratings Services with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act is granted.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
BEFORE THE
SECURITES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 34-56508/September 24, 2007

ORDER GRANTING REGISTRATION OF DBRS LIMITED AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION

DBRS Limited, a credit rating agency, furnished to the Securities and Exchange Commission ("Commission") an application for registration as a nationally recognized statistical rating organization ("NRSRO") under Section 15E of the Securities Exchange Act of 1934 ("Exchange Act") for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act. The Commission finds that the application furnished by DBRS Limited is in the form required by Exchange Act Section 15E, Exchange Act Rule 17g-1 (17 CFR 240.17g-1), and Form NRSRO (17 CFR 249b.300) and contains the information described in subparagraph (B) of Section 15E(a)(1) of the Exchange Act.

Based on the application, the Commission finds that the requirements of Section 15E of the Exchange Act are satisfied.

Accordingly,

IT IS ORDERED, under paragraph (a)(2)(A) of Section 15E of the Exchange Act, that the registration of DBRS Limited with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act is granted.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
BEFORE THE
SECURITES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 34-56507/September 24, 2007

ORDER GRANTING REGISTRATION OF A.M. BEST COMPANY, INC. AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION

A.M. Best Company, Inc., a credit rating agency, furnished to the Securities and Exchange Commission ("Commission") an application for registration as a nationally recognized statistical rating organization ("NRSRO") under Section 15E of the Securities Exchange Act of 1934 ("Exchange Act") for the classes of credit ratings described in clauses (i) through (iv) of Section 3(a)(62)(B) of the Exchange Act. The Commission finds that the application furnished by A.M. Best Company, Inc. is in the form required by Exchange Act Section 15E, Exchange Act Rule 17g-1 (17 CFR 240.17g-1), and Form NRSRO (17 CFR 249b.300) and contains the information described in subparagraph (B) of Section 15E(a)(1) of the Exchange Act.

Based on the application, the Commission finds that the requirements of Section 15E of the Exchange Act are satisfied.

Accordingly,

IT IS ORDERED, under paragraph (a)(2)(A) of Section 15E of the Exchange Act, that the registration of A.M. Best Company, Inc. with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (iv) of Section 3(a)(62)(B) of the Exchange Act is granted.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
BEFORE THE
SECURITES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56512/September 24, 2007

ORDER GRANTING REGISTRATION OF RATING AND INVESTMENT INFORMATION, INC. AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION

Rating and Investment Information, Inc., a credit rating agency, furnished to the Securities and Exchange Commission ("Commission") an application for registration as a nationally recognized statistical rating organization ("NRSRO") under Section 15E of the Securities Exchange Act of 1934 ("Exchange Act") for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act. The Commission finds that the application furnished by Rating and Investment Information, Inc. is in the form required by Exchange Act Section 15E, Exchange Act Rule 17g-1 (17 CFR 240.17g-1), and Form NRSRO (17 CFR 249b.300) and contains the information described in subparagraph (B) of Section 15E(a)(1) of the Exchange Act.

Based on the application, the Commission finds that the requirements of Section 15E of the Exchange Act are satisfied.

Accordingly,

IT IS ORDERED, under paragraph (a)(2)(A) of Section 15E of the Exchange Act, that the registration of Rating and Investment Information, Inc. with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act is granted.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
BEFORE THE
SECURITES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 34-56513/September 24, 2007

ORDER GRANTING REGISTRATION OF STANDARD & POOR'S RATINGS SERVICES AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION

Standard & Poor's Ratings Services, a credit rating agency, furnished to the Securities and Exchange Commission ("Commission") an application for registration as a nationally recognized statistical rating organization ("NRSRO") under Section 15E of the Securities Exchange Act of 1934 ("Exchange Act") for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act. The Commission finds that the application furnished by Standard & Poor's Ratings Services is in the form required by Exchange Act Section 15E, Exchange Act Rule 17g-1 (17 CFR 240.17g-1), and Form NRSRO (17 CFR 249b.300) and contains the information described in subparagraph (B) of Section 15E(a)(1) of the Exchange Act.

Based on the application, the Commission finds that the requirements of Section 15E of the Exchange Act are satisfied.

Accordingly,

IT IS ORDERED, under paragraph (a)(2)(A) of Section 15E of the Exchange Act, that the registration of Standard & Poor's Ratings Services with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act is granted.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
BEFORE THE
SECURITES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 34-56509/September 24, 2007

ORDER GRANTING REGISTRATION OF FITCH, INC. AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION

Fitch, Inc., a credit rating agency, furnished to the Securities and Exchange Commission ("Commission") an application for registration as a nationally recognized statistical rating organization ("NRSRO") under Section 15E of the Securities Exchange Act of 1934 ("Exchange Act") for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act. The Commission finds that the application furnished by Fitch, Inc. is in the form required by Exchange Act Section 15E, Exchange Act Rule 17g-1 (17 CFR 240.17g-1), and Form NRSRO (17 CFR 249b.300) and contains the information described in subparagraph (B) of Section 15E(a)(1) of the Exchange Act.

Based on the application, the Commission finds that the requirements of Section 15E of the Exchange Act are satisfied.

Accordingly,

IT IS ORDERED, under paragraph (a)(2)(A) of Section 15E of the Exchange Act, that the registration of Fitch, Inc. with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act is granted.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
BEFORE THE
SECURITES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56510/September 24, 2007

ORDER GRANTING REGISTRATION OF JAPAN CREDIT RATING AGENCY, LTD. AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION

Japan Credit Rating Agency, Ltd., a credit rating agency, furnished to the Securities and Exchange Commission ("Commission") an application for registration as a nationally recognized statistical rating organization ("NRSRO") under Section 15E of the Securities Exchange Act of 1934 ("Exchange Act") for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act. The Commission finds that the application furnished by Japan Credit Rating Agency, Ltd. is in the form required by Exchange Act Section 15E, Exchange Act Rule 17g-1 (17 CFR 240.17g-1), and Form NRSRO (17 CFR 249b.300) and contains the information described in subparagraph (B) of Section 15E(a)(1) of the Exchange Act.

Based on the application, the Commission finds that the requirements of Section 15E of the Exchange Act are satisfied.

Accordingly,

IT IS ORDERED, under paragraph (a)(2)(A) of Section 15E of the Exchange Act, that the registration of Japan Credit Rating Agency, Ltd. with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act is granted.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
BEFORE THE
SECURITES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56511/September 24, 2007

ORDER GRANTING REGISTRATION OF MOODY'S INVESTORS SERVICE, INC. AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION

Moody's Investors Service, Inc., a credit rating agency, furnished to the Securities and Exchange Commission ("Commission") an application for registration as a nationally recognized statistical rating organization ("NRSRO") under Section 15E of the Securities Exchange Act of 1934 ("Exchange Act") for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act. The Commission finds that the application furnished by Moody's Investors Service, Inc. is in the form required by Exchange Act Section 15E, Exchange Act Rule 17g-1 (17 CFR 240.17g-1), and Form NRSRO (17 CFR 249b.300) and contains the information described in subparagraph (B) of Section 15E(a)(1) of the Exchange Act.

Based on the application, the Commission finds that the requirements of Section 15E of the Exchange Act are satisfied.

Accordingly,

IT IS ORDERED, under paragraph (a)(2)(A) of Section 15E of the Exchange Act, that the registration of Moody's Investors Service, Inc. with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (v) of Section 3(a)(62)(B) of the Exchange Act is granted.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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Applicants, the "Applicants")[1]

Filing Date: The application was filed on June 6, 2007 and amended on September 13, 2007 and September 20, 2007.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 19, 2007, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. Applicants, BISYS, 105 Eisenhower Parkway, Roseland, New Jersey 07068, the BISYS Underwriter Applicants, 100 Summer Street, 15th Floor, Boston, Massachusetts, 02110, CGMI, 787 Seventh Ave., 32nd Floor, New York, New York 10019, CEFOF and CELFOF, 388 Greenwich Street, New York, New York 10013, Citibank, 153 East 53rd Street, 5th Floor, New York, New York 10043, Citigroup Alternative, 731 Lexington Avenue, 28th Floor, New York, NY 10022, Citigroup Advisory, 787 Seventh Ave., 15th Floor, New York, New York 10019, SSBCP and SSBPIF, 338 Greenwich Street, New York, New York 10013.

[1] Applicants request that any relief granted pursuant to the application also apply to any other company of which BISYS is or hereafter may become an affiliated person in the future (together with the Applicants, the "Covered Persons").

For Further Information Contact: Shannon Conaty, Senior Counsel, at (202) 551-6827, or Janet M. Grossnickle, Branch Chief, at (202) 551-6821, (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a temporary order and a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Desk, 100 F Street, NE, Washington, DC 20549-0102 (tel. 202-551-8090).

Applicants' Representations:

1. BISYS, a Delaware corporation, directly and through wholly-owned subsidiaries, provides products and support services to financial institutions, including insurance companies, banks and mutual funds. Each of the BISYS Underwriter Applicants is an indirect, wholly-owned subsidiary of BISYS and serves as principal underwriter for one or more registered investment companies or series thereof ("Funds").[2] Each BISYS Underwriter Applicant is registered with the Commission as a broker-dealer under section 15 of the Securities Exchange Act of 1934 ("Exchange Act").

2. On July 27, 2007, the United States District Court for the Southern District of New York entered the Injunction against BISYS in a matter brought by the Commission.[3] The Commission alleged in the complaint ("Complaint") that BISYS violated sections 13(a) and 13(b)(2)(A) and (B) of the Exchange Act and rules 12b-20, 13a-1, 13a-11 and 13a-13 thereunder when it engaged in improper accounting practices

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2 Neither BISYS nor any of the BISYS Underwriter Applicants serves as investment adviser or depositor for any Fund or as principal underwriter for any registered unit investment trust ("UIT") or registered face amount certificate company.

3 United States Securities and Exchange Commission v. The BISYS Group, Inc., 07-CIV-4010 (KMK) (S.D.N.Y. May 23, 2007).

that resulted in an overstatement of BISYS's financial results for the fiscal years ended 2001 through 2003 by about $180 million. The alleged violations involved improperly recording commissions earned by companies before they were acquired by BISYS as its own revenue, the failure to adequately reserve against an aging receivable balance, improper accounting for renewal and bonus commissions, and other improper accounting entries. The Complaint alleged that the resulting inaccurate financial results were incorporated in public filings, annual reports to shareholders, press releases and offering documents. Thus, the Complaint alleged that BISYS violated the financial reporting, books and records, and internal controls provisions of the Exchange Act. Without admitting or denying the allegations in the Complaint, except as to jurisdiction, BISYS consented to a final judgment ("Final Judgment") that includes, among other things, the entry of the Injunction and the payment of disgorgement and prejudgment interest.

3. On August 1, 2007, Citigroup Inc. ("Citigroup") acquired BISYS (the "BISYS Acquisition"). As a result of the BISYS Acquisition, BISYS is now an affiliated person of the Citigroup Applicants, which currently serve as investment advisers, depositors or principal underwriters to Funds. Certain of the Citigroup Applicants serve as investment advisers to employees' securities companies (included in the term "Funds").

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered UIT or registered face-amount

certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicants state that BISYS is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3) of the Act. Applicants state that the entry of the Injunction resulted in Applicants being subject to the disqualification provisions of section 9(a) of the Act.

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) if it is established that these provisions, as applied to the Applicants, are unduly or disproportionately severe or that the Applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting the Applicants and the other Covered Persons from the disqualification provisions of section 9(a) of the Act. On July 27, 2007, the Applicants received a temporary conditional order from the Commission exempting them from section 9(a) of the Act with respect to the Injunction until the Commission takes final action on an application for a permanent order or, if earlier, September 24, 2007.[4]

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

[4] Investment Company Act Release No. 27915 (July 27, 2007).

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

4. Applicants state that the alleged conduct giving rise to the Injunction did not involve any of the Applicants acting in the capacity of investment adviser, sub-adviser, depositor, or principal underwriter for any Fund and, with respect to the Citigroup Applicants, occurred prior to the BISYS Acquisition, when they were not affiliated with BISYS. Except as discussed in footnote 5, Applicants state that no director, officer or employee of any of the Applicants who is or was involved in providing investment advisory or underwriting services to the Funds was involved in the conduct which forms the basis of the Injunction.[5] Applicants also state that the matters underlying the Injunction are unrelated to the Applicants' investment advisory, depository and principal underwriting activities. In addition, Applicants represent that no Funds to which any BISYS Underwriter Applicant currently provides underwriting services bought or held any securities issued by BISYS during the period of misconduct alleged in the Complaint, other than with respect to index funds and routine trade errors that were promptly corrected.

5. Applicants further represent that the inability of the Applicants to continue to serve as investment adviser, depositor or principal underwriter to the Funds would result in potentially severe hardships for the Funds and their shareholders. The BISYS Underwriter Applicants have distributed, or will distribute as soon as reasonably practical,

[5] The Complaint contains general allegations relating to the conduct of former employees of the Fund Services Division of BISYS, but does not contain any specific allegations that any directors, officers or employees of any of the Applicants who is or was involved in providing underwriting services to the Funds participated in the conduct which resulted in the Injunction. To the best of the BISYS Applicants' knowledge and belief, any directors, officers or employees that allegedly participated in the conduct that

written materials, including an offer to meet in person to discuss the materials, to the board of directors or trustees of each Fund (each, a "Board") for which the BISYS Underwriter Applicants serve as principal underwriter, including the directors who are not "interested persons," as defined in section 2(a)(19) of the Act, of such Fund, and their independent legal counsel as defined in rule 0-1(a)(6) under the Act, if any. These written materials will concern the Final Judgment, any impact on the Funds, and the application. The Applicants will provide the Funds with all information concerning the Final Judgment and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also assert that, if the Applicants were barred from serving as investment adviser, depositor or principal underwriter to the Funds, the effect on their businesses and employees would be severe. The Applicants state that they have committed substantial resources to establish an expertise in providing the services covered by section 9(a) of the Act to Funds. Applicants further state that prohibiting the Applicants from serving as investment advisers, depositors or principal underwriters to the Funds would adversely affect not only the viability of their businesses, but also the livelihoods of more than 100 employees. Applicants also state that none of the BISYS Applicants has ever previously applied for an exemption pursuant to section 9(c) of the Act.

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resulted in the Injunction are either no longer employed by the Applicants or are not, and will not be, involved in providing investment advisory, depository or underwriting services to the Funds.

Applicants' Condition:

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

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

Temporary Order:

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

Accordingly,

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

By the Commission.

Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56517; File No. PCAOB-2006-03)

September 25, 2007

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Inspections

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on December 20, 2006, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "SEC" or "Commission") the proposed rule changes described in Items I and II below, which items have been prepared by the Board. On May 31, 2007, the Board amended its filing because certain of the information described in the original filing had changed. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rule

On December 19, 2006, the Board adopted amendments to its rules related to inspections. The proposed amendments include a new paragraph (d) added to existing Rule 4003 and include technical amendments to nonsubstantive points in existing rules 4006 and 4009. The text of the proposed amendments are set out below. Language added by these amendments is in italics. Deleted paragraph references are in brackets. Other text in Section 4 of the Board's Rules, including notes to the Rules, remains unchanged and is indicated by " * * * * * " in the text below.

SECTION 4. INSPECTIONS

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Rule 4003. Frequency of Inspections

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(d) Notwithstanding paragraph (b) of this Rule, with respect to any registered public accounting firm that became registered in 2003 or 2004 –

(1) this Rule does not require the first inspection of the firm sooner than the fourth calendar year following the first calendar year in which the firm, while registered, issued an audit report or played a substantial role in the preparation or furnishing of an audit report; and

(2) this Rule does not require the second inspection of the firm sooner than the fifth calendar year following the first calendar year in which the firm, while registered, issued an audit report or played a substantial role in the preparation or furnishing of an audit report.

* * * * *

Rule 4006. Duty to Cooperate with Inspectors

Every registered public accounting firm, and every associated person of a registered public accounting firm, shall cooperate with the Board in the performance of any Board inspection. Cooperation shall include, but is not limited to, cooperating and complying with any request, made in furtherance of the Board's authority and responsibilities under the Act, to –

([1]a) provide access to, and the ability to copy, any record in the possession, custody, or control of such firm or person, and

([2]b) provide information by oral interviews, written responses, or otherwise.

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Rule 4009. Firm Response to Quality Control Defects

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(d) The portions of the Board's inspection report that deal with criticisms of or potential defects in quality control systems that the firm has not addressed to the satisfaction of the Board shall be made public by the Board –

* * * * *

(2) upon the expiration of the period in which the firm may seek Commission review of any Board determination made under paragraph ([b]<u>c</u>) of this rule, if the firm does not seek Commission review of the Board determination;

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II. <u>Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule</u>

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. <u>Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule</u>

(a) Purpose

Section 104 of the Act requires the Board to conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers. The Board has adopted an amendment to its Rule 4003 to temporarily adjust minimum inspection frequency requirement applicable to certain firms. The Board has adopted technical amendments to its Rules 4006 and 4009 to correct non-substantive points. The proposed amendments are discussed below.

Section 104(b)(1)(B) of the Act requires the Board to conduct an inspection, at least once every three years, of each registered firm that regularly provides audit reports for 100 or fewer issuers, and Section 104(b)(2) of the Act authorizes the Board to adopt rules adjusting that frequency. In 2003, the Board adopted Rule 4003(b), which provides that the Board will conduct inspections, on a triennial basis, not only of each firm that regularly provides audit reports for 100 or fewer issuers, but also of any firm that issues any audit report or that play a substantial role in the preparation or furnishing of an audit report.

In the course of inspection planning, including in connection with the Board's budget process, the Board identified a way in which a temporary adjustment to Rule 4003 would, over time, maximize the Board's ability to allocate its inspection resources more evenly, consistently, and effectively year-to-year. The issue arises because the first three years of inspections, 2004 to 2006, coincided with the Board's initial growth period and, as a consequence, the resources available for and devoted to the inspections of firms with 100 or fewer issuer audit clients increased from year to year. The resources available in each year necessarily informed the extent of the inspection work performed in that year, including with respect to both the numbers of firms inspected and the size of firms inspected.[1/] This resulted in a year-to-year fluctuation that, because of the minimum

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1/ In 2004, the Board inspected 91 firms with 100 or fewer issuer audit clients. In 2005, the Board inspected 272 such firms. In 2006, the Board inspected 163 such firms. Because variations in the nature and size of firms' audit practices result in different inspection resource requirements, mere comparison of the numbers of inspected firms does not reflect fully the related resource issues.

frequency requirements of Rule 4003(b), the Board would to some extent be locked into repeating in succeeding three-year periods.

To avoid that consequence, the Board is adding to Rule 4003 a new paragraph that will temporarily adjust aspects of the inspection cycle requirement. Paragraph (d) will allow the Board to approach long-term inspection planning with the flexibility to eliminate the fluctuation generated in the start-up cycle, including the flexibility to make adjustments that will result in a relatively consistent, from year to year, mix of firms in terms of the size and nature of audit practice.[2/] Paragraph (d) accomplishes that result by providing that, with respect to firms that became registered in 2003 or 2004,[3/] (1) the Board need not conduct the firm's first inspection sooner than the fourth year after the firm, while registered, first issues an audit report or plays a substantial role, and (2) the Board need not conduct the firm's second inspection sooner than the fifth year after the firm, while registered, first issues an audit report or plays a substantial role.

Even with this adjustment, the Board expects that each U.S. firm that issued an original audit report (as distinct from a consent to use a previously issued audit report) in 2003 or 2004 after registering with the Board will have its first inspection within the

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2/ This point should not be understood to suggest that the Board envisions rigid adherence to a fixed triennial inspection schedule for each firm once a particular year-to-year mix of firms is established. For a variety of reasons – including to address specific risks or to enhance the value of the inspection process by reducing the predictability of the timing of any firm's next inspection – the Board may sometimes inspect a firm sooner than three years after the firm's previous inspection.

3/ On October 22, 2003, it became unlawful for any U.S. public accounting firm to issue, or to play a substantial role in the preparation or furnishing of, an audit report with respect to any issuer unless the firm was registered with the Board. The same registration requirement took effect for non-U.S. firms on July 19, 2004. See Section 102(a) of the Act and PCAOB Rule 2100.

three-year period after first issuing an original audit report. The flexibility provided by the adjustment would come into play principally with respect to the timing of the second inspection of some of those firms, the timing of the first two inspections of some non-U.S. firms, and the timing of inspections of firms that play a substantial role but do not issue audit reports. The adjustment would have no continuing effect on the timing of any inspections after the second inspections of firms that registered in 2003 and 2004, and would have no effect on the timing of any inspection of any firm that registered after 2004.

It is important to note that Rule 4003 does not limit the Board's authority to conduct inspections at any time, and that registered firms' own obligations are not affected by Rule 4003 or the amendment. Rule 4003 establishes a minimum inspection frequency governing how the Board carries out its inspection program. Rule 4003 does not preclude the Board from inspecting any firm more frequently than the schedule set out in the rule. A firm's obligation is to cooperate in any Board inspection at any time that the Board determines to inspect the firm, regardless of the provisions of Rule 4003.

The temporary adjustment to the inspection frequency requirement is consistent with the purposes of the Act, the public interest, and the protection of investors. The adjustment will facilitate the reduction of certain year-to-year fluctuations in the inspection program, which otherwise could interfere with the Board's ability to implement a program consistently and effectively with relatively stable resources from year to year. The adjustment will accomplish this while delaying only a relatively small portion of inspections, and delaying them only for a short period.

The Board adopted Rule 4003(d) before obtaining public comment because of the nature of the rule, which involves a temporary adjustment, for administrative and programmatic reasons, to an element of an existing rule to which the Board is not making any permanent change. Nevertheless, the Board invited public comment on Rule 4003(d), and the Board provided that Rule 4003(d) would expire on June 30, 2007 unless the Board, after considering any public comment, acted to adopt the rule for a longer period. The Board received two comment letters, each expressing general support for Rule 4003(d) and neither raising any issues concerning the rule. On May 24, 2007, the Board approved retaining Rule 4003(d) indefinitely beyond the tentative June 30, 2007 expiration date.

The Board has also adopted technical amendments to two aspects of the rules relating to inspections. In Rule 4006, the Board is revising the numbering of the paragraphs from "(1)" and "(2)" to "(a)" and "(b)" to conform to the convention in the Board's rules generally. In Rule 4009(d)(2), the Board is correcting a cross-reference. Rule 4009(d)(2)'s cross-reference to "paragraph (b) of this rule" dates to the Board's originally proposed Rule 4009. The substance of paragraph (b) in the proposed rule was moved to paragraph (c) in the final rule adopted by the Board, and the cross-reference in paragraph (d)(2) should have been revised to cross-reference paragraph (c) at that time. The Board has now corrected that cross-reference.

(b) Statutory Basis

The statutory basis for the proposed rule is Title I of the Act.

B. <u>Board's Statement on Burden on Competition</u>

The Board does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. With respect to the firms subject to an inspection requirement, the proposed rules impose no burden beyond the burdens clearly imposed and contemplated by the Act, and the proposed rules do not change the obligations of those firms as already set out in the Act and in existing Board rules.

C. Board's Statement on Comments on the Proposed Rule Received from Members, Participants or Others

The Board solicited comment on Rule 4003(d) when the Board adopted that rule on December 19, 2006. Since the filing of Form 19b-4 on December 20, 2006, the Board has received two comment letters on Rule 4003(d). Each comment letter expressed general support for Rule 4003(d), and neither comment letter raised any significant issues about the rule change. The Board did not solicit or receive comment on the other proposed rule changes described in Section I above.

III. Date of Effectiveness of the Proposed Rule and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period as (i) the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/pcaob.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number PCAOB 2006-03 on the subject line.

Paper comments:

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

All submissions should refer to File Number PCAOB 2006-03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/pcaob/shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change 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 inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and

3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number PCAOB-2006-03 and should be submitted on or before **[insert date 21 days from publication in the Federal Register]**.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56516; File No. PCAOB-2007-03)

September 25, 2007

Public Company Accounting Oversight Board; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adjusting Implementation Schedule of Rule 3523, Tax Services for Persons in Financial Reporting Oversight Roles

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on July 24, 2007, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "SEC" or "Commission") the proposed rule change described in Items I and II below, which items have been prepared by the Board. The PCAOB has designated the proposed rule change as "constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule" under Section 19(b)(3)(A)(i) of the Securities Exchange Act of 1934 (as incorporated, by reference, into Section 107(b)(4) of the Act) and Rule 19b-4(f)(1) thereunder, which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rule

The PCAOB is filing with the SEC an adjustment of the implementation schedule for Rule 3523, Tax Services for Persons in Financial Reporting Oversight Roles. Specifically the Board will not apply Rule 3523 to tax services provided on or before April 30, 2008, when those services are provided during the audit period and are completed before the professional engagement period begins. The PCAOB is not proposing any textual changes to the Rules of the PCAOB by this filing.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule and discussed any comments it received on the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

(a) Purpose

On July 26, 2005, the Board adopted certain rules related to registered public accounting firms' provision of tax services to public company audit clients. As part of this rulemaking, the Board adopted Rule 3523, which provides that a registered firm, subject to certain exceptions, is not independent of an audit client if the firm, or an affiliate of the firm, provides tax services during the audit and professional engagement period to a person in, or an immediate family member of a person in, a financial reporting oversight role at an audit client. This rule was intended to address concerns related to auditor independence when auditors provide personal tax services to individuals who play a direct role in preparing the financial statements of public company audit clients. Rule 3523 was approved by the Securities and Exchange Commission ("SEC" or "Commission") on April 19, 2006.

Consistent with the SEC's independence rules,[1/] the phrase "audit and professional engagement period" is defined to include two discrete periods of time. The "audit period" is the

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1/ 17 C.F.R. § 210.2-01(f)(5).

period covered by any financial statements being audited or reviewed.[2] The "professional engagement period" is the period beginning when the firm either signs the initial engagement letter or begins audit procedures, whichever is earlier, and ends when either the company or the firm notifies the SEC that the company is no longer that firm's audit client.[3]

On April 3, 2007, the Board issued a concept release to solicit comment about the possible effect on a firm's independence of providing tax services to a person covered by Rule 3523 during the portion of the audit period that precedes the beginning of the professional engagement period and other practical consequences of applying the restrictions imposed by Rule 3523 to that portion of the audit period.[4] The Board also adjusted the implementation schedule for Rule 3523, as it applies to tax services provided during the period subject to audit but before the professional engagement period.[5]

The Board received 13 comment letters on the concept release. Commenters included auditors, state certified public accountant societies, and one investor. The majority of the commenters recommended that the Board amend Rule 3523 to exclude the portion of the audit period that precedes the beginning of the professional engagement period. On July 24, 2007, the Board proposed an amendment to Rule 3523 to exclude the portion of the audit period that precedes the beginning of the professional engagement period, as well as a new ethics and independence rule regarding communication with audit committees.

2/ Rule 3501(a)(iii)(1).

3/ Rule 3501(a)(iii)(2).

4/ See PCAOB Release No. 2007-002 (April 3, 2007).

5/ See id., at 7. Specifically, the Board stated that Rule 3523 will not apply to tax services provided on or before July 31, 2007, when those services are provided during the audit period and are completed before the professional engagement period begins.

The Board has determined to further adjust the implementation schedule for Rule 3523 to allow sufficient time for consideration of commenters' views. Specifically, the Board will not apply Rule 3523 to tax services provided on or before April 30, 2008, when those services are provided during the audit period and are completed before the professional engagement period begins.[6/]

(b) Statutory Basis

The statutory basis for the proposed rule change is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Board's Statement on Comments on the Proposed Rule Received from Members, Participants or Others

The Board did not solicit or receive written comments on the proposed rule change.

III. <u>Date of Effectiveness of the Proposed Rule and Timing for Commission Action</u>

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Securities Exchange Act of 1934 (as incorporated, by reference, into Section 107(b)(4) of the Act) and paragraph (f) of Rule 19b-4 thereunder because of its designation by the PCAOB as "constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule." At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

6/ This will apply regardless of whether there is an engagement in process on July 31, 2007.

IV. **Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule is consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/pcaob.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number PCAOB-2007-03 on the subject line.

Paper comments:

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

All submissions should refer to File Number PCAOB-2007-03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/pcaob.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549-1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number PCAOB-2007-03 and should be submitted on or before **[insert date 21 days from publication in the Federal Register]**.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

T/ /,!

Commissioner Casey Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8847 / September 26, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56539 / September 26, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2661 / September 26, 2007

INVESTMENT COMPANY ACT OF 1940
Release No. 27996 / September 26, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12837

In the Matter of MUTUALS.COM, INC., CONNELY DOWD MANAGEMENT, INC., MTT FUNDCORP, INC., RICHARD SAPIO, ERIC MCDONALD and MICHELE LEFTWICH, Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND CEASE-AND-DESIST ORDERS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) and 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(e) AND 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTIONS 9(b) AND 9(f) 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 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Mutuals.com, Inc., Connely Dowd Management, Inc., MTT Fundcorp, Inc. (collectively, the "Corporate Respondents"), Richard Sapio, Eric McDonald and Michele Leftwich (collectively, the "Individual Respondents"); Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against the Corporate Respondents; and Section 203(f) of the Advisers Act and Section

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9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against the Individual Respondents.

II.

In anticipation of the institution of these proceedings, the 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 and the subject matter of these proceedings, which are admitted, the Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings and Imposing Remedial Sanctions and Cease-and-Desist Orders Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Sections 203(e) and 203(f) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order"), as set forth below.

III.

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

Summary

1. From at least July 2001 until September 2003 (the "relevant period"), Mutuals.com, and two affiliated broker-dealers, Connely Dowd Management, Inc. ("CDM") and MTT Fundcorp, Inc. ("MTT"), provided market timing and late trading services to at least 11 institutional clients and customers, including various hedge funds or their advisers. The Corporate Respondents, and the firms' three principals, Sapio, McDonald and Leftwich, defrauded hundreds of mutual funds and their shareholders by engaging in a series of deceptive activities designed to circumvent the restrictions on market timing imposed by those mutual funds. In addition, the Respondents defrauded some of the same mutual funds and their shareholders by systematically engaging in late trading in the mutual funds' shares.

2. The Respondents caused harm to mutual fund companies and their shareholders by diluting the value of the mutual fund shares and increasing the transaction costs associated with the management of the mutual funds. As a result, the Respondents violated and aided and abetted and caused violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; the Corporate Respondents violated and the Individual Respondents aided and abetted and caused violations of Section 15(c)(1) of the Exchange Act; and the Respondents aided and abetted and caused violations of Rule 22c-1 promulgated under the Investment Company Act.

[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.

Respondents[2]

3. **Mutuals.com, Inc.** ("Mutuals.com") of Dallas, Texas was dually registered with the Commission as a broker-dealer (since August 8, 1994) and investment adviser (since November 9, 1999). During the relevant period, Mutuals.com was wholly owned by Mutuals.com Holding Corp., Inc., a private corporation that changed its name to Mutuals Capital Alliance, Inc ("MCA"). In its role as a broker-dealer, Mutuals.com assisted hedge funds and other institutional investors in purchasing shares of unrelated, third-party mutual funds. Mutuals.com filed a Form BDW with the NASD on or about June 15, 2005.

4. **Connely Dowd Management, Inc.** ("CDM") registered with the Commission as a broker-dealer on March 31, 2003. CDM was wholly owned by MCA. During the relevant period, CDM assisted hedge funds and other institutional investors in purchasing shares of unrelated, third-party mutual funds. CDM filed a Form BDW with the NASD on or about July 6, 2004.

5. **MTT Fundcorp, Inc.** ("MTT") registered with the Commission as a broker-dealer on March 31, 2003. MTT was wholly owned by MCA. During the relevant period, MTT assisted hedge funds and other institutional investors in purchasing shares of unrelated, third-party mutual funds. MTT filed a Form BDW with the NASD on or about July 6, 2004.

6. **Richard Sapio**, age 52, was the Chief Executive Officer of Mutuals.com and its affiliated broker-dealers and a 57% shareholder of MCA. Sapio is an officer of MCA, a holding company that owns an investment adviser to two registered investment companies and is a 57% shareholder of MCA. During the relevant period, as defined below, Sapio had the following NASD licenses: General Securities Representative (Series 7), General Securities Principal (Series 24), Financial and Operations Principal (Series 27), Municipals Securities Representative (Series 52), Municipals Securities Principal (Series 53), and Registered Investment Adviser (Series 65).

7. **Eric McDonald**, age 34, was President of Mutuals.com and CDM. In that capacity, McDonald was responsible for all mutual fund trading at Mutuals.com and CDM and served as Mutuals.com's Assistant Supervisory Officer. During the relevant period, as defined below, McDonald had the following NASD licenses: General Securities Representative (Series 7), General Securities Principal (Series 24), Options Principal (Series 4), and Registered Investment Adviser (Series 65).

8. **Michele Leftwich**, age 37, was Mutuals.com's Compliance Officer and President of MTT. She also served as Mutuals.com's Chief Supervisory Officer and oversaw all trading activities at Mutuals.com. During the relevant period, as defined below, Leftwich had the

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2 The Commission filed suit against the Respondents on December 4, 2003, alleging violations of the federal securities law relating to market timing and late trading of mutual fund shares. *SEC v. Mutuals.com, Inc., et al.*, Civ. No. 303-CV-2912 (NDTX, December 4, 2003); Lit. Rel. No. 18489 (December 4, 2003). At the request of the Commission and the Respondents, the Commission's action was dismissed, and the Respondents agreed to the entry of this Order.

following NASD licenses: General Securities Representative (Series 7), General Securities Principal (Series 24), and Investment Company Products/Variable Contracts Representative (Series 6).

Background

9. "Market timing" includes: (i) frequent buying and selling of shares of the same mutual fund or (ii) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing can harm other mutual fund shareholders because it can dilute the value of their shares. Market timing, while not illegal per se, can also disrupt the management of the mutual fund's investment portfolio and cause the targeted mutual fund to incur considerable extra costs associated with excessive trading and, as a result, cause damage to other shareholders in the funds. Market timing may be illegal, for example, if deception is used to induce a mutual fund to accept trades that it otherwise would not accept under its own market timing policies.

10. "Late trading" is the practice of placing orders to buy, redeem, or exchange mutual fund shares after the time as of which mutual funds calculate their net asset value ("NAV"), typically 4 p.m., but receiving the price based on the prior NAV already determined as of 4 p.m. Rule 22c-1(a) under the Investment Company Act (the "forward pricing rule") prohibits late trading. Late trading enables the trader improperly to obtain profits from market events that occur after 4 p.m., such as earnings announcements and futures trading, that are not reflected in that day's NAV. By being able to late trade, Respondents' clients and customers obtained trading advantages over the other shareholders of the targeted mutual funds.

The Fraudulent Market-Timing Scheme

11. During the relevant period, the Corporate Respondents had at least 11 clients and customers, the majority of which were institutional investors, and several of which were hedge funds, for which it facilitated trades of third-party mutual fund shares. The Corporate Respondents maintained brokerage and investment advisory relationships with each of its clients and customers, and received a "wrap fee" between .75% and 2% of the money it managed for those clients and customers. At the direction and with the full knowledge, approval and assistance of the Individual Respondents, the Corporate Respondents' clients and customers consummated thousands of market timing trades in hundreds of mutual funds.

Mutuals.com Used Multiple Identifying Numbers

12. In response to the mutual funds' efforts to restrict Mutuals.com's market timing trading, the Respondents engaged in a scheme to circumvent market timing restrictions imposed by mutual funds through the use of: (i) multiple accounts established for the same client, (ii) multiple registered representative numbers established for the same registered representative, and (iii) multiple branch codes for the same physical location.

13. On June 19, 2001, a mutual fund company sent a letter to Mutuals.com announcing that it was blocking trading by certain accounts in two of its funds, including an

international fund. The letter stated that, the mutual fund company "recognizes the negative impact that 'timing' has on our shareholders and the Funds' performance. Therefore, we reserve the right, as stated in the prospectus, to refuse any exchange or purchase request at any time without notice." These accounts belonged to two hedge funds. Within ten days of receiving this letter, Mutuals.com opened new accounts on behalf of the hedge funds, and then used those new accounts to execute market timing trades in the above-referenced international fund. All of the shares were redeemed within one week of the purchases.

14. On September 9, 2002, Sapio and McDonald received an email from a mutual fund company stating that the mutual fund company would accept no more trades from Mutuals.com registered representative numbers 10 and 81. Four days later, on September 13, 2002, McDonald and Leftwich sent a memorandum to two clients, advising that Rep Numbers would be changed so as to "open[] access to funds like [the complaining mutual fund]." Thereafter, Mutuals.com placed trades on behalf of the two clients in funds of the complaining mutual fund using dozens of account numbers that had been assigned new registered representative numbers. These trades represented at least 850,000 shares of the complaining mutual funds, valued in excess of $12 million.

15. During the relevant period, Mutuals.com, at the direction of the Individual Respondents, placed mutual fund trades through its primary clearing brokers using two different "branch codes": 4MU and 5MU. Although branch codes are usually used by broker-dealers to identify different branch office locations, these branch codes did not represent different physical locations. Mutuals.com used these two branch codes to circumvent mutual funds' restrictions on market timing transactions. For example, a small cap growth fund prospectus provides that it "restricts excessive trading (usually defined as more than four exchanges out of the Fund within a calendar year)," and that it "reserves the right to . . . refuse any purchase or exchange request that could adversely affect [the] Fund or its operations, including those from any individual or group who, in the Fund's view, are likely to engage in excessive trading." On February 26, 2002, Sapio and McDonald received an email from its primary clearing broker containing a list of mutual funds that had complained about market timing trading through Mutuals.com. The email warned Mutuals.com to "avoid timing these funds in accordance with that notification and with the Fund's prospectus." The attached list indicated that the small cap growth fund had banned a series of accounts at Mutuals.com, all of which were associated with the branch code 4MU. In fact, Mutuals.com trading records indicate that from May 2001 through February 2002, all trading had been executed through the branch code 4MU. An internal Mutuals.com spreadsheet indicates that branch 4MU was banned from trading the family of funds affiliated with the small cap growth fund on January 16, 2003. Thereafter, all Mutuals.com transactions in the family of funds affiliated with the small cap growth fund were placed through branch code 5MU. Later, on September 10, 2003, McDonald received notice via email that the family of funds affiliated with the small cap growth fund blocked all trading by branch 5MU.

Mutuals.com Created and Used Affiliated Broker-Dealers

16. On March 31, 2003, MTT and CDM, subsidiaries of Mutuals.com Holdings Corp., Inc., were registered with the SEC as broker-dealers. Thereafter, MTT and CDM entered into clearing arrangements with two clearing broker-dealers. The Individual Respondents' used

MTT and CDM to place market timing trades at mutual funds that had prohibited such trading at Mutuals.com.

17. As noted above, Leftwich and McDonald were not only executives at Mutuals.com, but were also the Presidents of MTT and CDM, respectively. The mailing addresses for MTT and CDM were in Dallas, Texas but not at the offices of Mutuals.com, where both Leftwich and McDonald worked. Instead, MTT's "address" was a mailbox at a Mailboxes, Etc., a commercial mail receiving facility, and CDM's "address" was a mailbox at "businessuites," a mail service provider.

18. During the relevant period, approximately 47% of all trades placed by MTT and CDM were with mutual funds that had specifically complained about the short-term trading practices of Mutuals.com.

Mutuals.com Used Multiple Clearing Firms to Disguise Its Identity

19. In mid-2002, in response to demands by mutual fund companies, Mutuals.com's primary clearing broker-dealer restricted Mutuals.com's ability to trade with numerous mutual fund companies.

20. In January 2003, Mutuals.com contemplated entering into agreements to clear mutual fund trades through two additional clearing broker-dealers. In a letter dated January 17, 2003, Sapio advised Mutuals.com's primary clearing broker-dealer that "Mutuals.com is planning to enter into an additional clearing agreement . . . due to our trading limitations" at Mutuals.com's primary clearing broker-dealer. Sapio requested that Mutuals.com's primary clearing broker-dealer acknowledge that it was aware that Mutuals.com was entering into this relationship with an additional clearing broker-dealer by signing and returning the letter. The primary clearing broker-dealer did so, but acknowledged in the letter "that this agreement between Mutuals.com and [the new clearing broker-dealer] is to facilitate market-timing mutual funds trading which [the primary clearing broker-dealer] chooses not to clear for Mutuals.com (only)."

21. Mutuals.com began placing mutual fund trades through two additional clearing broker-dealers in or about March 2003 and in or about May 2003, respectively.

22. During the relevant period, approximately 51% of all trades placed by Mutuals.com through the new clearing broker-dealers were with mutual funds that had specifically complained about the short-term trading practices of Mutuals.com.

<u>The Fraudulent Late Trading Scheme</u>

23. During the relevant period, Respondents engaged in a fraudulent scheme to late trade mutual fund shares on behalf of certain of their market timing clients and customers. Respondents effected mutual fund trades for orders they received after 4:00 p.m. ET, allowing their clients and customers to receive the same-day NAV pricing on those trades (as though the orders were received prior to the close of the stock market at 4 p.m. ET, the time as of which the funds calculated their NAV). This scheme allowed Mutuals.com clients and customers to

capitalize on news events or market changes occurring after the 4 p.m. ET close of the stock market. Generally, Respondents' clients and customers sent Mutuals.com a list of their proposed trades before 2:30 p.m. each day. These proposed trades reflected only tentative trading instructions. Mutuals.com did not execute the proposed trades until the customer subsequently approved the order, orally or via e-mail or facsimile. These approvals were almost uniformly received after 4:00 p.m. ET. Respondents were aware that their clients and customers were taking advantage of post-4:00 p.m. market news in determining whether to effect transactions.

24. On May 28, 2003, McDonald confirmed in an email to one of the Corporate Respondents' customers that the broker-dealer would facilitate late trades that were placed after 4:00 p.m. ET. Similarly, on June 19, 2003, Sapio told the same customer that it had until 3:30 p.m. CT "to get all trades in." The Corporate Respondents, with the knowledge and approval of the Individual Respondents, failed to disclose to the mutual funds that they received trading instructions from customers after the 4:00 p.m. ET deadline.

Violations

25. As a result of the conduct described above, the Respondents willfully violated Section 17(a) of the Securities Act in that they, by the use of the means of instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly, in the offer or sale of securities, employed devices, schemes or artifices to defraud; obtained money or property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers or prospective purchasers of such securities, as described above. Further, the Respondents knowingly or recklessly provided substantial assistance to, and thus willfully aided and abetted and caused, the violations of Section 17(a) of the Securities Act committed by their clients and customers in connection with the market timing and late trading transactions alleged above.

26. As a result of the conduct described above, the Respondents willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that they, in connection with the purchase or sale of securities, directly or indirectly, by the use of the means or instrumentalities of interstate commerce, or of the mails, employed devices, schemes or artifices to defraud; made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit, as described above. Further, the Respondents knowingly or recklessly provided substantial assistance to, and thus willfully aided and abetted and caused, the violations of Section 10(b) of the Exchange Act and Rule 10b-5 committed by their clients and customers in connection with the market timing and late trading transactions alleged above.

27. As a result of the conduct described above, the Corporate Respondents, directly or indirectly, and by the use of the means or instrumentalities of interstate commerce or of the mails, effected transactions in, or induced or attempted to induce the purchase or sale of a security by means of a manipulative, deceptive, or other fraudulent device or contrivance. As a

result, the Corporate Respondents, acting with knowledge, willfully violated Section 15(c)(1) of the Exchange Act. The Individual Respondents knowingly or recklessly provided substantial assistance to, and thus willfully aided and abetted and caused the violations of Section 15(c)(1) of the Exchange Act committed by the Corporate Respondents.

28. The Corporate Respondents cleared transactions in fund shares through various clearing firms. The Corporate Respondents, by engaging in the conduct described above, sold, redeemed or repurchased the shares of registered investment companies at prices not based upon the current net asset value of such securities as next computed after receipt of the orders to sell, redeem, or repurchase the shares of such registered investment companies. By engaging in the conduct described above, the Respondents willfully aided and abetted and caused the funds' or certain clearing firms' violations of Rule 22c-1 promulgated under Section 22(c) of the Investment Company Act.

Disgorgement and Civil Penalties

29. Corporate Respondents have submitted sworn Statements of Financial Information dated December 8, 2006 and other evidence and have asserted their inability to pay disgorgement plus prejudgment interest and a civil penalty.

30. Respondent McDonald has submitted a sworn Statement of Financial Condition dated May 30, 2006 and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest and a civil penalty.

31. Respondent Leftwich has submitted a sworn Statement of Financial Condition dated May 30, 2006 and other evidence and has asserted her inability to pay disgorgement plus prejudgment interest and a civil penalty.

Undertakings

32. The Corporate Respondents and their successors in interest shall cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in this Order. In connection with such cooperation, the Corporate Respondents have undertaken:

a. to produce promptly, without service of a notice or subpoena, any and all documents and other information requested by the Commission's staff in their possession and control, that is (i) within the scope of an appropriate confidentiality agreement and (ii) generated in connection with the conduct described herein;

b. to use its best efforts to cause its employees to be interviewed by the Commission's staff at such times as the Commission's staff reasonably may request; and

c. to use its best efforts to cause its employees to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as the Commission's staff reasonably may request; and that in connection with any testimony of the Corporate Respondents to be conducted at deposition, hearing or trial pursuant to a notice or subpoena, the Corporate Respondents:

i. agree that any such notice or subpoena for appearance and testimony may be served by regular mail on their attorneys:

Kirkpatrick & Lockhart Preston Gates Ellis LLP
Attn: Stephen G. Topetzes
1601 K Street, N.W.
Washington, District of Columbia 20006

ii. agree that any such notice or subpoena for the Corporate Respondents' appearance and testimony in an action pending in a United States District Court may be served, and may require testimony, beyond the territorial limits imposed by the Federal Rules of Civil Procedure.

33. The Individual Respondents shall cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in this Order. In connection with such cooperation, Sapio, McDonald and Leftwich each has undertaken:

a. to produce promptly, without service of a notice or subpoena, any and all documents and other information requested by the Commission's staff in their possession and control that is (i) within the scope of an appropriate confidentiality agreement and (ii) generated in connection with the conduct described herein;

b. to use their best efforts to be interviewed by the Commission's staff at such times as the Commission's staff reasonably may request; and

c. to use their best efforts to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as the Commission's staff may reasonably request; and that in connection with any testimony to be conducted at deposition, hearing or trial pursuant to a notice or subpoena, Sapio, McDonald and Leftwich each:

d. agrees that any such notice or subpoena for his appearance and testimony may be served by regular mail on their attorneys:

Baker & McKenzie LLP
Attn: Elizabeth L. Yingling
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

e. agrees that any such notice or subpoena for his appearance and testimony in an action pending in a United State District Court may be served, and may require testimony, beyond the territorial limits imposed by the Federal Rules of Civil Procedure.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, Sections 203(e) and 203(f) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondents shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act;

B. Respondents 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;

C. Corporate Respondents shall cease and desist from committing or causing any violations and Individual Respondents shall cease and desist from causing any violations and any future violations of Section 15(c)(1) of the Exchange Act;

D. Respondents shall cease and desist from causing any violations and any future violations of Rule 22c-1 under the Investment Company Act;

E. Corporate Respondents Mutuals.com, CDM and MTT, shall pay, jointly and severally, disgorgement of $4,580,798, plus prejudgment interest of $1,042,492, but that payment of such amount is waived based upon Respondents' sworn representations in their Statement of Financial Condition dated June 30, 2006, and other documents submitted to the Commission. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and prejudgment interest. No other issue shall be considered in connection with such a petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

F. Respondent Sapio shall, within 90 days of the entry of this order, pay disgorgement of $57,674, and prejudgment interest of $11,055, for a total amount of $68,729, into the United States Treasury. Such payment shall be: (1) made by United States postal money order, certified check, bank cashier's check or bank money order; (2) made payable to the

Securities and Exchange Commission; (3) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (4) submitted under cover letter that identifies Sapio as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Rose Romero, Regional Administrator, Division of Enforcement, Securities and Exchange Commission, 801 Cherry Street, Unit 19, Fort Worth, Texas, 76102; and

G. Respondent Sapio shall, within 90 days of the entry of this Order, pay a civil money penalty in the amount of $120,000 to the United States Treasury. Such payment shall be: (1) made by United States postal money order, certified check, bank cashier's check or bank money order; (2) made payable to the Securities and Exchange Commission; (3) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (4) submitted under cover letter that identifies Sapio as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Rose Romero, Regional Administrator, Division of Enforcement, Securities and Exchange Commission, 801 Cherry Street, Unit 19, Fort Worth, Texas, 76102.

H. Respondent McDonald shall pay disgorgement of $59,322, plus prejudgment interest of $11,371, but that payment of such amount is waived based upon Respondent's sworn representations in his Statement of Financial Condition dated May 30, 2006 and other documents submitted to the Commission. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and pre-judgment interest. No other issue shall be considered in connection with such a petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

I. Respondent Leftwich shall pay disgorgement of $39,635, plus prejudgment interest of $7,597, but that payment of such amount is waived based upon Respondent's sworn representations in her Statement of Financial Condition dated May 30, 2006 and other documents submitted to the Commission. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and pre-judgment interest. No other issue shall be considered in connection with such a petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered;

or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

J. Respondent Sapio be, and hereby is barred from association with any broker, dealer or investment adviser, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, with a right to reapply to the Commission to serve or act in any such capacities after five years from the date of this Order, provided however, that Sapio may continue to serve or act as an officer and/or director of MCA provided that: (i) MCA does not, during the 5-year period commencing on the date of this Order, acquire any interest in, otherwise form, or operate any broker-dealer; (ii) Sapio does not receive any income, dividend, distribution or operating profits of any investment adviser owned by, or affiliated with MCA during the 5-year period commencing on the date of this Order; and (iii) Sapio shall not possess or exercise voting control with respect to his MCA shares concerning the operations of any investment adviser owned by, or affiliated with MCA during the pendancy of the bar. Any reapplication for association by Respondent Sapio 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 Sapio, 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 this 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 this 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 this Commission order;

K. Respondents McDonald and Leftwich be, and hereby are barred from association with any broker, dealer or investment adviser, and are 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, with a right to reapply to the Commission to serve or act in any such capacities after five years from the date of this Order. Any reapplication for association by Respondents McDonald or Leftwich will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondents, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for this 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 this 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 this Commission Order.

By the Commission.

Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 34-56534 ; IA-2658 ; File No. S7-24-07]

PUBLIC ALERT: UNREGISTERED SOLICITING ENTITIES ("PAUSE") PROGRAM

AGENCY: Securities and Exchange Commission.

ACTION: Notice; request for comment.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") is announcing a new program that will post on its Web site certain factual information about unregistered entities that are engaged in the solicitation of securities transactions.

DATES: Comments should be submitted on or before [insert date 30 days after publication in the Federal Register].

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/other.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-24-07 on the subject line.

Paper Comments:

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

All submissions should refer to File Number S7-24-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/other.shtml). Comments also are available for public inspection and copying 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: John Reed Stark, Chief of the Office of Internet Enforcement and Counselor to the Director, at (202) 551-4540, Jack Hardy, Branch Chief, Office of Investor Education and Advocacy, at (202) 551-6500, Alberto Arevalo, Acting Assistant Director, Office of International Affairs, at (202) 551-6690, at the Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-6628.

SUPPLEMENTARY INFORMATION: The Commission today is announcing a new program for informing the public about unregistered entities engaged in solicitations of securities transactions. Through this new program, "Public Alert: Unregistered Soliciting Entities" ("PAUSE"), the Commission will publish on its Web site certain factual information about unregistered soliciting entities that have been the subject of complaints forwarded by investors and others, including fellow securities regulators. By making this information readily available, the Commission expects investors to be better able to evaluate solicitations to buy and sell securities. Before the program and Web site become operational [insert date 60 days from publication in the Federal Register], the Commission is interested in receiving comments and suggestions on the PAUSE program.

1. <u>Background</u>

Generally, entities that solicit purchases or sales of securities for the accounts of other persons in the United States are required to register with the SEC. The Commission regularly receives complaints and inquiries from investors and others, including foreign securities regulators, about solicitations made by entities claiming to be registered, licensed and/or operating in the United States, and in some cases, entities soliciting US investors that are not registered in the United States. When an entity claims to be registered with the SEC, it is in effect claiming that it has made itself available for SEC regulation and oversight. For this reason, it is important for prospective investors to consider whether a soliciting entity is, in fact, registered with the SEC.

The Commission's Office of Investor Education and Advocacy ("OIEA") fields investor complaints and inquiries. The single largest number of investor complaints received by OIEA concern solicitations of investors by unregistered entities that appear to be involved in boiler room and secondary advance fee schemes.[1] In 2005 and 2006, OIEA received respectively 1,385 and 1,418 complaints from investors who were solicited by unregistered entities, many of which purported to be US-based securities firms trading in securities of US-based issuers.

Moreover, perpetrators of boiler rooms and advance fee schemes increasingly use new devices to convince investors that their solicitations are legitimate, including:

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[1] Boiler room operations use high-pressure sales tactics generally over the telephone and solicit investors with false and/or misleading information. They frequently purport to be registered broker dealers and/or operating in the United States and offer "opportunities" to invest in securities, often issued by companies organized in the United States. The schemes are disbanded and the wrongdoers disappear after investors wire their money, which is then transferred to offshore accounts. Secondary "advance fee" schemes work very similarly to boiler room operations, the difference being that an advance fee scheme generally targets investors who purchased underperforming securities, perhaps through an affiliated boiler room, offering to arrange a lucrative sale of those securities, but first requiring the payment of an "advance fee" in the form of a commission, regulatory fee or tax, or some other incidental expense. The advance fees are paid, but the promised sale of the securities is never arranged.

For more information about boiler rooms and advance fee schemes, please see the following discussions on our Web site:

- The Fleecing of Foreign Investors: Avoid Getting Burned by "Hot" U.S. Stocks (http://www.sec.gov/investor/pubs/fleecing.htm)
- Worthless Stock: How to Avoid Doubling Your Losses (http://www.sec.gov/investor/pubs/worthless.htm)
- Protect Your Money: Check Out Brokers and Investment Advisers (http://www.sec.gov/investor/brokers.htm)

- impersonating US registered securities firms by, for example, using the same or a similar name or providing an address that closely resembles that of a US registered securities firm;
- making false reference to, including false claims of endorsement by, governmental agencies and international organizations (sometimes even impersonating them); and
- claiming endorsements by, or making other reference to, governmental agencies and international organizations that sound official, but do not exist.[2]

Our staff is frequently able to determine quickly the accuracy of various claims made by the soliciting entities. For example, a claim by an entity that it is a US registered broker-dealer is easily verifiable by checking public sources, including the Central Registration Depository database administered by the Financial Industry Regulatory Authority, Inc. (formerly, the NASD).[3] Entities that use names that are the same as, or similar to, the names of US registered securities firms can also be verified by checking public sources and obtaining information from officials at the firms. In this way, our staff can also determine whether the complained-of entity has any actual affiliation with the registered firm. A claim that an entity operates from a particular location in the United States can also be established. Finally, if a soliciting entity claims that the securities it offers are approved or endorsed by a particular governmental agency, that claim can usually also be quickly confirmed.

In appropriate cases, our staff's review may lead to a referral to the Division of Enforcement, which may begin an investigation of possible securities law violations, and the

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[2] In one case, a soliciting entity impersonated the International Organization of Securities Commissions ("IOSCO"). The Securities Investor Protection Corporation ("SIPC") has also been impersonated by virtue of a "look alike" Web site and responded by posting an alert identifying the fictitious organization, the "International Brokerage Association."

[3] http://www.nasd.com/InvestorInformation/InvestorProtection/ChecktheBackgroundofYourInvestmentProfessional/index.htm

Commission may ultimately bring an enforcement action for such violations. However, in a significant number of cases there may be obstacles to effective enforcement action. Soliciting entities change names frequently, often before law enforcement action can be taken. Often the subjects of complaints purport to be based in the United States, but in fact operate from numerous jurisdictions overseas. Notwithstanding cooperation with foreign counterparts, investigations of offshore operations can be complex and time-consuming. Even if the Division of Enforcement's investigation determines that the entities involved in such activities have sufficient contacts with the United States to grant the Commission and US courts with jurisdiction over their conduct, there can be substantial obstacles to completing legal action against these foreign operators and obtaining meaningful relief, while in the meantime investors can suffer significant harm.

2. The PAUSE Program

In light of the challenges associated with taking enforcement action against such operations, the Commission believes that it is useful to devise a complementary approach that serves to empower prospective investors. The goal of the PAUSE Program is to provide prospective investors with relevant information about unregistered soliciting entities before they invest.

To implement the PAUSE Program, the Commission will post on its public Web site specific information about unregistered soliciting entities that have been the subject of complaints. For each of these entities, the Commission's staff will have determined either (1) that there is no US registered securities firm with that name, or (2) that there is a US registered securities firm with the same (or a similar) name but that solicitations appear to have been made by persons not affiliated with the US registered securities firm.

In addition, the PAUSE list will contain a "Comments" section for each entry. The Comments section will reflect certain results of the staff's investigation addressing the entity's US registration status; any use of a name that is the same or similar to that of a US registered securities firm; and any references to governmental agencies and international organizations in the solicitations. The "Comments" section may include other relevant information that may be helpful to investors, such as the use of addresses that do not appear to exist.

A second PAUSE list will name fictitious governmental agencies and international organizations referred to by complained-of entities.

3. Additional Information

The Commission's intent is to publish factual information that may be valuable to investors in connection with their investment decisions.[4] A listing on the PAUSE web page does not mean that the Commission has found violations of US federal securities laws or made a judgment about the merits of any securities offered by listed entities. As well, the PAUSE web page will not necessarily include information about all unregistered entities or entities that have been the subject of complaints. There may be various reasons, including law enforcement and policy, which may militate against including information about an entity on the PAUSE web page. The Commission intends to regularly update the PAUSE lists and archive information approximately nine months from the date of last observed activity.

4. Corrections

The Commission is committed to providing accurate information under the PAUSE Program. Before listing an entity on PAUSE, the Commission's staff will notify the entity and provide an opportunity – two calendar days from the date of the staff's notification letter – for

[4] See, e.g., Securities Exchange Act § 21(a). Cf. Kukatush Mining Corp. v. Securities and Exchange Commission, 309 F.2d 647 (D.C. Cir. 1962); and Freedom of Information Act, 5 U.S.C. 552.

the entity to respond. If, after being listed on PAUSE, an entity believes it should be removed from a list because information included about it is incorrect, or for other reasons, it should notify the Commission's staff and provide such documents and other information as reasonably necessary to support its assertion.

To notify the Commission of a factual error or to request removal from a list, please write to the following address:

U.S. Securities and Exchange Commission
Attn: PAUSE Program Administrator
100 F Street, N.E.
Washington, DC 20549-5631
enf-pauseresponse@sec.gov
FAX: 202-772-9278

Submissions will be reviewed for appropriate action by Commission staff.

* * * * *

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

Date: September 26, 2007

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56561 / September 27, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2732 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12848

In the Matter of	
ROBERT J. GAGALIS, CPA	**ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**
Respondent.	

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Robert J. Gagalis ("Gagalis") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. §200.102(e)(2)].[1]

II.

The Commission finds that:

1. From May 1981 through June 1984, Gagalis was a certified public accountant in Massachusetts.

[1] Rule 102(e)(2) provides in pertinent part: "Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

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2. On July 5, 2007, a judgment of conviction was entered against Gagalis in *United States v. Gagalis, et al*, No. 1:04-cr-00126-PB-5, in the United States District Court for the District of New Hampshire, finding him guilty of two counts of securities fraud, one count of making false statements to auditors of Enterasys Networks, Inc., a public company, two counts of wire fraud, and one count of conspiracy to commit wire and securities fraud.

3. As a result of this conviction, Gagalis was sentenced to eleven years and six months imprisonment in a federal penitentiary.

III.

In view of the foregoing, the Commission finds that Gagalis has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that Robert J. Gagalis is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

Commissioners Atkins
& Campos
Not Participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT of 1933
Release No. 8851A / September 27, 2007

SECURITIES ACT of 1934
Release No. 56553A / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12633

In the Matter of **LAWRENCE A. CAMPBELL,** **Respondent.**	**CORRECTED ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO LAWRENCE A. CAMPBELL**

I.

On May 11, 2007, the Securities and Exchange Commission (the "Commission") instituted public administrative proceedings against Lawrence A. Campbell ("Respondent") pursuant to Section 8A of the Securities Act of 1933 ("the Securities Act") and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("the Exchange Act").

II.

In connection with these proceedings, Lawrence A. Campbell ("Campbell" or "Respondent") has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and 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.

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1. Lawrence A. Campbell, age 59, resides in Santa Ana, California. Campbell has never been registered with a broker-dealer.

2. From at least November 2001 through July 2003, Campbell offered and sold securities issued by Sunrise Energy, Inc. ("Sunrise") to at least twelve investors.

3. Campbell cold called prospective investors in several states and offered them Sunrise securities using high pressure sales tactics. After Campbell spoke with investors, they received written materials detailing the investments.

4. Campbell made material misrepresentations to investors regarding the rates of return that investors would receive. For example, Campbell told investors during his telephone solicitations that they could expect to receive the returns projected in the Sunrise offering materials which ranged from 55% to 112% per year. However, Sunrise investors never received the promised returns and most Sunrise investors ultimately lost more than 95% of the principal they invested.

5. Campbell also misrepresented the risk involved in the Sunrise securities. Campbell told investors that their investments involved low risk and were safe. However, these representations were false as the investments were highly speculative.

6. Campbell did not take any steps to verify the accuracy of the claims he made to investors regarding the low risk, high return nature of the securities he was selling. Moreover, Campbell continued to make representations regarding the low risk, high return nature of the Sunrise investments even after he learned that investors were receiving returns that were far less than those he was telling them to expect.

7. Campbell received commissions from Sunrise in connection with the Sunrise investments he sold. From November 2001 to July 2003 Campbell received at least $162,000 in ill-gotten gains from bank accounts containing Sunrise investor funds.

8. Campbell acted at least recklessly in connection with his misrepresentations and omissions to investors relating to anticipated returns and risk involved.

9. No registration statement was filed with the Commission or was in effect as to the transactions in Sunrise securities. Moreover, the securities issued by Sunrise were not exempt from registration.

10. Campbell was not a registered broker-dealer nor was he associated with a registered broker-dealer while he sold the Sunrise securities. Moreover, Campbell received transaction-based compensation in connection with his sales of Sunrise securities.

11. As a result of the conduct described above, Campbell willfully violated Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 and Sections 15(a) and 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 21C of the Securities Exchange Act of 1934, it is hereby ORDERED that:

A. Respondent Campbell shall cease and desist from committing or causing any violations and any future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act and Sections 15(a) and 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent Campbell be, and hereby is barred from association with any broker, or dealer.

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

C. Respondent Campbell shall, within 20 days of the entry of this Order, pay disgorgement of $162,000, prejudgment interest of $40,530.25 and a civil money penalty in the amount of $50,000 to the Securities and Exchange Commission. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order, (B) made payable to the Securities and Exchange Commission, (C) hand delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, CA 22312, and (D) submitted under cover letter that identifies Lawrence A. Campbell as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Donald Hoerl, Associate Regional Director, Securities and Exchange Commission, 1801 California Street, Suite 1500, Denver, CO 80202.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8850 / September 27, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2729 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12842

In the Matter of **ROBERT C. DEAN** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933**

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 of 1933 ("Securities Act") against Robert C. Dean ("Dean" or "Respondent").

II.

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

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III.

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

Summary

This matter concerns Respondent's role in altering the method by which the Federal Home Loan Mortgage Corporation ("Freddie Mac" or "Company") valued certain derivatives known as swaptions at year-end for its fiscal year 2000. As a result of the change in methodology, Freddie Mac issued materially false and misleading financial statements.

Respondent

1. Robert C. Dean, age 42, was a Vice President of Freddie Mac from February 1998 through June 2000 and a Senior Vice President of the Company from June 2000 through October 2003, when he resigned from the Company. His duties included work in Freddie Mac's Market Risk Oversight department.

Other Relevant Entities

2. Freddie Mac, was chartered by Congress in 1970 by the Federal Home Loan Mortgage Corporation Act ("Act"). Its principal place of business is in McLean, Virginia. Congress created Freddie Mac to provide stability in the secondary market for residential mortgages by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing.

Background

3. In June 1998, the Financial Accounting Standards Board ("FASB") released Statement of Financial Accounting Standards No. 133 ("SFAS 133"), which related to accounting for derivative instruments and hedging activities. Derivatives are financial instruments, such as options or futures contracts, whose value depends on the value of another "underlying" security or asset. Financial companies such as Freddie Mac frequently use derivatives to manage interest rate and other risk. SFAS 133 provided generally that, commencing January 1, 2001, holders of derivatives must account for such assets at fair value. SFAS 133 also set out detailed rules concerning when a company could use hedge accounting to account for the changes in the value of a derivative as hedging the change in the fair value or future cash flows of a hedged asset or liability. The requirements of SFAS 133 represented a significant change from the accounting practices required by GAAP before SFAS 133 was issued.

4. For Freddie Mac, a major holder of derivatives subject to SFAS 133, the new standard required the Company to revalue and "mark to market" (i.e., report at actual quoted market prices or estimated market value) its portfolio of derivatives every reporting period. Changes in the fair value of certain derivatives were required by SFAS 133 to be recorded as income or loss on the Company's income statement.

5. Absent action by Freddie Mac, the adoption of SFAS 133 would have resulted in the Company reporting a large one-time gain effective January 1, 2001, because the fair value of its derivatives portfolio greatly exceeded the book value and, thereafter, it would have been required to mark to market certain derivatives, thereby introducing a new component of volatility that complicated the Company's ability to maintain steady and predictable reported earnings.

Changes in the Methodology for Valuing Swaptions

6. Consistent with the Company's general policy of reporting steady and predictable earnings growth, the Company reacted to SFAS 133 by setting a goal to minimize the transitional effects of SFAS 133 – i.e., the transition gain that would be reported effective January 1, 2001. On December 12, 2000, several days after brainstorming alternative ways to reduce the transition gain, Respondent suggested that the Company could record a lower valuation – and thus reduce its transition gain – if it altered the method by which it valued its swaptions. Beginning on or about December 22, 2000, in a series of memoranda written by or in consultation with Respondent, the Company undertook to revise its methodology for valuing its swaptions portfolio, incorporating the unproven premise that prevailing market prices were not indicative of where the Company could conduct transactions in the swaptions market.

7. On January 2, 2001, the Company formally adopted a revised methodology for valuing swaptions. The new methodology – which the Company used to calculate the fair value that was reported in its year-end financial statements – used volatility values from November 20, 2000, a date six weeks prior to January 1, 2001. This contributed to the Company's swaptions portfolio being valued approximately $731 million less than it would have been had the Company used current market implied volatilities, i.e., values from December 29, 2000, the last business day of the year. The Company premised its use of November 20 pricing data on (i) the market for swaptions purportedly being illiquid as of December 29, 2000 to a degree seen only during certain historic events, and (ii) the Company purportedly being unable to transact business in swaptions at prices derived through implied volatility reported in the then-current market.

8. Respondent and others developed a test to support the illiquidity premise. The test involved retroactively comparing the daily percentage changes in implied volatility levels of swaptions to their five-year historical standard deviation, or differences from mean values. The stated purpose of this test was to show that the frequency and magnitude of changes in implied volatilities during November and December 2000 were unprecedented versus other prior market liquidity crises. When the critical standard deviation parameter of this test failed to "prove" the requisite historic market illiquidity at three standard deviations, the test was altered until it showed the swaptions market was at historically illiquid levels. The final test used two standard deviations.

9. Respondent initiated the concept and significantly contributed to the development of the Company's revised methodology for calculating the fair value of its swaptions portfolio. It was formally approved by Respondent and others, and it was adopted in the preparation of the Company's year-end financial statements.

10. Respondent negligently approved the use of the methodology that resulted in the swaptions valuation being materially understated, despite his knowledge of certain facts that should have called into question the validity of the methodology and its suitability for determining the fair value of the Company's swaptions. Among other things, Respondent:

a. knew the Company had not previously deviated from the use of current market implied volatilies, but rather, the Company generally used for its swaptions valuation model current end-of-day market inputs from the Independent Swaptions Pricing Service.

b. was not aware of any company that had ever used historical data to price a portfolio of swaptions.

c. knew the methodology was not used in connection with the Company's risk management practices and activities throughout the period whereas the revised methodology was used for accounting purposes.

d. should have known that the methodology improperly reduced the Company's reported transition gain and therefore did not result in the swaptions being reported at a reasonable estimate of their fair value at year-end as required by GAAP, and that the circumstances surrounding the development of the valuation methodology created substantial risk that the swaptions would not be disclosed at their fair value on the balance sheet date as required by GAAP.

Effect on Reported Results

11. The changed valuation method enabled Freddie Mac to value its swaptions at a value approximately $731 million lower than would have been if current market implied volatilities (i.e., December 29, 2000 volatilities) had been used, thus offsetting approximately $731 million of the SFAS 133 transition gain and causing the following reported financial metrics to be materially misstated in Freddie Mac's Information Statement and Annual Report for 2000:

a. "Futures and Options" in Table 10 were valued at $2.008 billion; the value using year-end volatilities (the historically utilized method) was $2.739 billion – a 26.7% understatement.

b. "Total—Net Fair Value" of derivatives in the same table was negative $257 million; this figure should have been $474 million.

c. "Gross Positive Fair Value" of Futures and Options in Table 9-3 in the notes to the financial statements shows a value of $2.187 billion; using year-end volatilities, it would have been $2.918 billion – a 25.1% understatement.

d. The "Gross Positive Fair Value" of Freddie Mac's derivatives portfolio in the same table was \$6.312 billion; using year-end volatilities, it would have been \$7.033 billion – a 10.4% understatement.

These misstated financial statements were included in offerings of debt securities by Freddie Mac.

12. As a result of the conduct described above, Respondent violated Sections 17(a)(2) and (3) of the Securities Act.

IV.

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

Accordingly, it is hereby ORDERED that:

Pursuant to Section 8A of the Securities Act, Respondent Dean shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and (3) of the Securities Act.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioners Atkins & Nazareth Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56542 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12838

In the Matter of

REGIONAL BROKERS, INC. and PATRICK LUBIN,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b), 15B(c) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4), 15B(c)(2) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Regional Brokers, Inc. ("Regional" or "Firm") and Sections 15(b)(6), 15B(c)(4) and 21C of the Exchange Act against Patrick Lubin ("Lubin") (collectively "Respondents").

II.

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

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III.

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

A. OVERVIEW

This matter involves misrepresentations and other fraudulent conduct by Regional, a broker-dealer that operates as a municipal securities "broker's broker," and Lubin, one of the Firm's principals. As part of its business, Regional acts as an intermediary for other municipal securities broker-dealers to pair buy and sell orders in municipal bonds in bond auctions. In connection with these auctions, Respondents engaged in one or more of the practices described in Section III.C. below, and violated various sections and rules of the Exchange Act and MSRB Rules.

B. RESPONDENTS

Regional Brokers, Inc., headquartered in Philadelphia, Pennsylvania, is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act and is a municipal securities dealer pursuant to Section 15B of the Exchange Act. Regional is also a member of the NASD. Regional's operations consist mostly of matched book trades as a broker's-broker in municipal securities.

Patrick Lubin, a resident of Moorestown, New Jersey, was Regional's President and Chief Compliance Officer from May 1999 until November 2006, and an associated person with Regional from August 1992 until November 2006. Lubin was also one of three Directors at Regional. At all relevant times, Lubin held a Series 7 general securities license as well as a Series 24, 27, 53, and 63 license.

C. FACTS

1. <u>Background</u>

a. Municipal Securities Broker's-Brokers

A municipal securities broker's-broker is a securities firm that acts as an agent exclusively for other municipal securities broker-dealers. The role of the municipal securities broker's-broker is to pair buy and sell orders in municipal bonds. The broker's-brokers normally do not take any positions in municipal issues, and therefore, all transactions by a broker's-broker are effectively riskless-principal transactions, and are only executed when both sides of the transaction have agreed to the trade. In this way, the broker's-broker never holds any securities in inventory.

b. Bids-Wanted Auctions

One method used by a broker's-broker to sell a bond is called the "bids-wanted" auction. In this method, the selling broker-dealer asks the broker's-broker to auction the bond, in an effort to obtain the best price available. Potential bidders are notified of the auction via phone, email, or the broker's-broker's website. Bidders typically phone in bids, although they can also bid directly through the broker's-broker's website, facsimile or via email and instant messages. When the auction closes, the bid with the highest price wins the auction. Regional allows bidders to change or cancel their bids as long as the bidding process remains open. Bidders are not, however, allowed to know their position relative to other bidders. The losing bidders are not told the value of the winning bid or the number of bids received during the auction process.

Following the bidding process, it is common for broker's-brokers to tell the buyer and/or seller the value of the second highest bid. The second highest bid is called the "cover bid" and the spread between the winning bid and the cover bid is called the "cover." Besides the cover, the amount of additional information that is revealed to the buyers and sellers varies from customer to customer within and among broker's-brokers.

A typical bids-wanted auction is called a "Sharp Time" auction. In this kind of auction, the closing time of the bidding is quoted in the form "by X, firm until Y." The first time (X), called the *sharp time*, tells the bidding broker-dealers when the bidding closes, and the second time (Y), called the *firm time*, tells them how long they are obligated to honor their bids. For example, a "by 12:00 p.m., firm until 2:00 p.m." auction would require that bidders submit bids prior to 12:00 p.m., and would obligate the winning broker-dealer to purchase the bonds at the submitted price up until 2:00 p.m., at which time the bidder has no obligation to enter into the transaction. In all situations, the selling broker-dealer has the right to accept or reject the high bidder.

2. <u>Regional's Bids-Wanted Process</u>

From December 2003 through December 2004, Regional entered bids on behalf of the Firm during bids-wanted auctions, using an account numbered "666." The "666" account number was denoted on the firm's customer list as "RBI" or "Regional Brokers," indicating that the bid was placed on behalf of the firm. The bids entered on behalf of the Firm using the "666" account were never the winning bid or highest bid, but were frequently entered as the second highest bid, known as the "cover" bid. In fact, within a five month period, the "666" account was used to denote a bid in 7% of all bids-wanted auctions conducted by Regional. Out of the 564 times the "666" account was used, 47.7% of the time it was positioned as the second highest bid or the cover bid.

Additionally, when the "666" account was the cover bid, 81.48% of the time it was entered after the winning bid had already been placed. This timing indicated that Regional knew that its bid would not win the auction. In these instances, Regional's bid had the effect of narrowing the spread between the winning bid and the next highest bid (the true cover bid).

Using the "666" account as the cover bid was advantageous to Regional for several reasons. First, the Firm was able to satisfy bidding broker-dealers, who won the bids-wanted auction, by reporting a smaller cover spread than would have existed without the intervening "666" bid. As a result, the winning bidder did not perceive the true spread between its bid and what others in the market were willing to pay. Second, by reporting the false cover to the selling broker-dealer, Regional appeared to have successfully solicited more bids on an item than it actually had been able to obtain – making the auction look more competitive. As a result, the selling broker-dealer may have been more likely to employ Regional for future bond sales because it believed that the Firm could obtain more bids, and potentially, a higher price for the bonds. By giving the appearance that Regional was conducting municipal bond auctions with tighter spreads between the winning bids and cover bids and by creating the illusion of additional interest in the bonds through the use of the "666" account, Regional deceived its customers in an attempt to obtain future business.

3. Regional Accepted Late Bids in Sharp Time Auctions

From December 2003 through December 2004, Regional consistently accepted late bids in Sharp Time auctions. In June 2004 alone, Regional conducted 163 bids-wanted auctions with a Sharp Time deadline and accepted a late bid 161 times, or 98% of the time. In those cases where a late bid was accepted, the late bid was the winning bid in 150 transactions, or 92% of the time.

During a Sharp Time auction, Regional traders allowed bidding broker-dealers to submit bids after a designated sharp time with knowledge that the bidding broker-dealers' late bid was the highest bid – and therefore the winning bid in the auction. When Regional traders accepted late bids in a Sharp Time auction, they never informed the other bidding broker-dealers of the late bid – which in most cases was the highest bid. This conduct favored the late bidder and disadvantaged other auction participants who had submitted their bids within the required sharp time.

4. Regional and Lubin Failed Reasonably to Supervise the Firm's Traders

Regional and Lubin failed reasonably to supervise the Firm's traders to prevent and detect the violative conduct described above. Lubin also condoned and participated in the conduct. The Firm only had approximately 15 traders, who worked at a single trading desk or who were in constant communication with the trading desk. Lubin was aware of everything that occurred at the Firm and, in fact, signed off on most of the conduct described above.

Additionally, Regional and Lubin failed to establish polices and procedures or a system to implement these procedures reasonably designed to prevent and detect its traders' violative conduct. Specifically, the Firm's procedures failed reasonably to describe the business of the Firm and failed to adequately describe the responsibilities and activities of the traders with respect to the Firm's municipal securities business, and, in particular, the conduct of the auctions.

5. Regional Failed to Properly Retain Certain Books and Records

a. *Failure to Maintain Facsimiles*

Regional received bids and conducted business by facsimile. However, Regional did not retain the facsimiles, and in fact, most traders discarded the facsimiles soon after their receipt. The facsimiles that were discarded contained information directly related to Regional's municipal securities business.

b. Failure to Maintain Emails

Regional utilized two different email systems - an internal one and one facilitated by an outside vendor. Regional's internal email system – through which Regional's traders could email each other and individuals outside the firm – did not archive any emails relating to its municipal securities business until November 2004. Furthermore, Regional never took steps to preserve emails relating to its business that were facilitated by the outside vendor.

IV.

As a result of the conduct described above, the Commission finds that:

Regional willfully violated (i) Section 15(c)(1)(A) of the Exchange Act as defined in Rule 15c1-2, in that it, while acting as a broker-dealer, effected transactions in the purchase and sale of securities by means of manipulative, deceptive, and other fraudulent devices or contrivances[1], (ii) Section 15B(c)(1) of the Exchange Act, in that it, while acting as a broker-dealer or municipal securities dealer, used the mails or interstate commerce "to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal securities in contravention of any rule" of the MSRB and, (iii) MSRB Rule G-17, in that it, while acting as a broker-dealer or municipal securities dealer, dealt unfairly with persons and engaged in a "deceptive, dishonest, or unfair practice." Specifically, Regional placed bids for the Firm "666" account, never intending to buy the bonds. Often, these bids were placed in the cover position, after the high bid had already been made, and right before the close of the auction. Regional did not disclose this practice to either the buyer or seller of the bonds. By giving the appearance that Regional was conducting municipal bond auctions with tighter spreads between the winning bids and cover bids and by creating the illusion of additional interest in the bonds through the use of the "666" account, Regional deceived its customers.

Regional willfully violated MSRB Rule G-17, in that it, while acting as a broker-dealer or municipal securities dealer, dealt unfairly with persons and engaged in a "deceptive, dishonest, or unfair practice." Specifically, Regional consistently accepted late bids from bidding broker-dealers in Sharp Time auctions. When Regional traders accepted late bids, they never informed the other bidding broker-dealers of the late bid – which in most cases was the highest bid. This conduct favored the late bidder and disadvantaged other auction participants who had submitted their bids within the required sharp time and who had less time to prepare their bids in accordance with the explicit terms of the auction.

Regional willfully violated MSRB Rule G-13, in that it, while acting as a broker-dealer or municipal securities dealer, caused to be distributed or published,[2] a quotation[3] relating to

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[1] Rule 15c1-2 under the Exchange Act provides that the term "manipulative, deceptive or other fraudulent device or contrivance," as used in Section 15(c)(1)(A) of the Exchange Act, is defined to include "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

[2] MSRB Rule G-13(a) defines the terms "distributed" or "published" as "the dissemination of quotations by any means of communication."

municipal securities which did not represent a bona fide bid for, or offer of, municipal securities by such broker, dealer or municipal securities dealer. MSRB Rule G-13 states that a quotation shall be deemed to represent a "bona fide bid for, or offer of, municipal securities" if the broker, dealer, or municipal securities dealer making the quotation is prepared to purchase or sell the security which is the subject of the quotation at the price stated in the quotation and under such conditions, if any, as are specified at the time the quotation is made. Specifically, Regional placed bids on municipal bonds, using the Firm's "666" account, without the intent of ever purchasing the bonds. Because the "666" bids were placed without the intent of purchasing the bond the bids were not "bona fide bids for" municipal securities, as defined by MSRB Rule G-13. Some Regional traders communicated bids that were not bona fide to both the selling broker-dealers and bidding broker-dealers, and therefore Regional willfully violated MSRB Rule G-13.

Regional willfully violated Section 17(a) of the Exchange Act, Exchange Act Rule 17a-4 and MSRB Rules G-8 and G-9, by failing to maintain originals of all communications received and copies of all communications sent by the broker-dealer relating to its business as such for a period of not less than three years. Specifically, Regional failed to retain facsimiles and e-mails relating to its business for three years as required pursuant to Exchange Act Rule 17a-4 and MSRB Rules G-8 and G-9. Regional's traders aided and abetted, and caused Regional's violations of Sections 15(c)(1)(A), 15B(c)(1), and 17(a) of the Exchange Act, Rule 17a-4 thereunder, and MSRB Rules G-8, G-9, G-13, and G-17.

Regional and Lubin failed reasonably to supervise Regional's traders pursuant to Section 15(b)(4)(E) of the Exchange Act with a view towards preventing the traders from aiding and abetting and causing Regional's violations of Sections 15(c)(1)(A), 15B(c)(1) and 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder, and MSRB Rules G-8, G-9, G-13, and G-17. Regional and Lubin failed to establish procedures or a system to implement procedures reasonably designed to prevent and detect its traders from engaging in the violative conduct. Additionally, Lubin not only failed reasonably to supervise Regional's traders to prevent and detect the violative conduct, but also condoned and participated in the conduct. Lubin was aware of the conduct that occurred at the Firm and, in fact, signed off on most of the violative conduct described above. The lack of supervisory structure and controls in place at Regional and the participation and approval by senior management created an inadequate supervisory system at Regional. Additionally, Regional failed to supervise the conduct of its traders as required by MSRB Rule G-27.

Lubin willfully aided and abetted and caused Regional's violations of Sections 15(c)(1)(A), 15B(c)(1) and 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder and MSRB Rules G-8, G-9, G-13 and G-17. As the primary supervisor of the trading desk, Lubin was aware of and approved the use of the "666" account to decrease the spread between winning bids and relatively low cover bids. He also knew that when a trader placed a bid on behalf of the Firm, there was no intent to purchase the bonds and that the trader would not disclose the true nature of the bid to the buyers and sellers of the bonds. Additionally, Lubin endorsed the Firm's practice of accepting late bids in Sharp Time auctions. Finally, Lubin was also responsible for overseeing whether the Firm maintained all communications relating to its business. However, Lubin failed to carry out this

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[3] MSRB Rule G-13(a) defines the term "quotation" as any bid for, or offer of, municipal securities, or any request for bids for or offers of municipal securities, including indications of "bid wanted" or "offer wanted."

duty by not establishing and enforcing adequate procedures for maintaining facsimiles and e-mails relating to Regional's business.

V.

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, it is hereby ORDERED that:

A. Pursuant to Sections 15(b) and 15B(c) and of the Exchange Act, Regional and Lubin are hereby censured.

B. Pursuant to Section 21C of the Exchange Act, Regional shall cease and desist from committing or causing any violations and any future violations of Sections 15(c)(1)(A) and 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.

C. Pursuant to Section 21C of the Exchange Act, Regional shall cease and desist from committing or causing any violations and any future violations of Section 15B(c)(1) of the Exchange Act, including (1) failing to deal fairly with all persons and not engage in any deceptive, dishonest or unfair practice under MSRB Rule G-17, (2) failing to make and keep current certain books and records under MSRB Rules G-8 and G-9, (3) failing to distribute or publish, a quotation relating to municipal securities which represents a bona fide bid for, or offer of, municipal securities under MSRB Rule G-13 and (4) failing to supervise the conduct of its associated persons to ensure compliance with the MSRB rules under MSRB Rule G-27.

D. Regional shall pay a civil money penalty in the amount $100,000 to the United States Treasury in four installments according to the following schedule: (1) $50,000, within 15 days of entry of this Order, (2) $15,000, within 120 days of entry of this Order, (3) $15,000, within 240 days of entry of this Order, and (4) $20,000 within 360 days of entry of this Order.

   Regional agrees that if the full amount of any payment described above is not made by the date the payment is required by this Order, the entire amount of the civil penalties, $100,000, plus any interest accrued pursuant to 31 U.S.C. § 3717 minus payments made, if any, is due and payable immediately without further application.

E. Pursuant to Section 21C of the Exchange Act, Lubin shall cease and desist from causing any violations and any future violations of Sections 15(c)(1)(A) and 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder,

F. Pursuant to Section 21C of the Exchange Act, Lubin shall cease and desist from causing any violations and any future violations of Section 15B(c)(1), including (1) failing to deal fairly with all persons and not engage in any deceptive, dishonest or unfair practice under

MSRB Rule G-17, (2) failing to make and keep current certain books and records under MSRB Rules G-8 and G-9 and (3) failing to distribute or publish, a quotation relating to municipal securities which represents a bona fide bid for, or offer of, municipal securities under MSRB Rule G-13.

G. Lubin shall pay a civil money penalty in the amount $50,000 to the United States Treasury in four installments according to the following schedule: (1) $25,000, within 15 days of entry of this Order, (2) $10,000, within 120 days of entry of this Order, (3) $10,000, within 240 days of entry of this Order, and (4) $5,000 within 360 days of entry of this Order.

Lubin agrees that if the full amount of any payment described above is not made by the date the payment is required by this Order, the entire amount of the civil penalties, $50,000, plus any interest accrued pursuant to 31 U.S.C. § 3717 minus payments made, if any, is due and payable immediately without further application.

H. Pursuant to Sections 15(b)(6) and 15B(c)(4) of the Exchange Act, Lubin be, and hereby is barred from association with any broker or dealer or municipal securities dealer with the right to reapply for association after one year to the appropriate self-regulatory organization, or if there is none, to the Commission. Any reapplication for association by Lubin 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 Lubin, 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.

I. Pursuant to Sections 15(b)(6) and 15B(c)(4) of the Exchange Act, Lubin be, and hereby is barred from association with a broker or dealer or municipal securities dealer in a supervisory capacity. Any reapplication for association by Lubin 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 Lubin, 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.

J. Payments of civil money penalties shall be : (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of

Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under a cover letter that identifies the Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Cheryl J. Scarboro, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, DC 20549.

K. Not later than 6 months after the date of this Order, unless otherwise extended by the staff of the Commission for good cause shown, Regional shall certify in writing to the staff of the Commission that it has implemented policies and procedures that are reasonably designed to prevent and detect failures by Regional as outlined in this Order.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioners Atkins
& Nazareth
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56543 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12839

In the Matter of **D.M. KECK & COMPANY, INC. d/b/a DISCOUNT MUNIBROKERS, DONALD MICHAEL KECK and PATRICIA ANN SEELAUS,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b), 15B(c) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 15B(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") against D.M. Keck & Company, Inc. d/b/a Discount Munibrokers ("Discount Munibrokers" or "the Firm") and Sections 15(b)(6), 15B(c)(4) and 21C of the Exchange Act against Donald Michael Keck ("Keck") and Exchange Act Sections 15(b)(6) and 15B(c)(4) against Patricia Ann Seelaus ("Seelaus") (collectively "Respondents").

II.

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

Order Pursuant to Sections 15(b), 15B(c) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

FINDINGS

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

A. OVERVIEW

This matter involves material misrepresentations, adjusted trading and other unlawful conduct by Discount Munibrokers, a broker-dealer that operates as a municipal securities "broker's broker," and the Firm's CEO Donald Michael Keck, as well as supervisory failures by the Firm, Keck and another supervisor at the Firm, Patricia Ann Seelaus. Until late 2006, when Discount Munibrokers ceased operating, the Firm acted as an intermediary for other municipal securities broker-dealers to pair buy and sell orders in municipal bonds in bond auctions. In connection with these auctions, the Firm and Keck engaged in one or more of the practices described in Section III.C. below, and violated various sections and rules of the Exchange Act and the Municipal Securities Rulemaking Board ("MSRB").

B. RESPONDENTS

D.M. Keck & Company, Inc. d/b/a Discount Munibrokers, formerly headquartered in Cherry Hill, New Jersey, is a broker-dealer and a municipal securities dealer. Discount Munibrokers' served as a broker's broker in municipal securities. The Firm has been registered with the Commission as a broker-dealer since 1997 pursuant to Sections 15(b) of the Exchange Act. Discount Munibrokers ceased operations in late 2006 but has maintained its registration with the Commission. It is no longer a member of the NASD.

Donald Michael Keck, a resident of Cherry Hill, New Jersey, has been Discount Munibrokers' President and Chief Executive Officer ("CEO") since March 1997. Keck owns between 50% and 60% of the Firm. At all relevant times, Keck held a Series 53 license (Municipal Securities Principal) and a Series 52 license (Municipal Securities Representative). At all relevant times, Keck supervised the traders in conjunction with Seelaus.

Patricia Ann Seelaus, a resident of Cherry Hill, New Jersey, is Discount Munibrokers' Senior Vice President and Chief Financial Officer ("CFO"). Seelaus is also the Firm's Compliance Officer. Seelaus owns approximately 10% of the Firm. At all relevant times, Seelaus held a Series 63 license (Uniform Securities Agent State Law), a Series 53 license (Municipal Securities Principal), a Series 52 license (Municipal Securities Representative), a Series 24 license (General Securities Principal), and a Series 27 license (General Financial/Operations Principal). At all relevant times, Seelaus supervised the traders, in conjunction with Keck.

C. FACTS

1. Background

A municipal securities broker's broker is a securities firm that acts as an agent exclusively for other broker-dealers in municipal securities transactions. The role of the municipal securities broker's broker is to pair buy and sell orders in municipal bonds. The broker's brokers normally do not take any positions in municipal issues; all transactions by a broker's broker are effectively riskless because they are only executed when both sides of the transaction have agreed to the trade. In this way, the broker's broker never holds any securities in inventory.

2. Discount Munibrokers and Keck Gave Fake Cover Bids To High Bidders

During the relevant time period, Discount Munibrokers' principal business was executing municipal securities trades on behalf of other municipal securities dealers through an auction-type offer and sale process called a "bid-wanted." Typically in a bid-wanted auction, a broker-dealer will ask a municipal securities broker's broker, like Discount Munibrokers, to solicit bids from other broker-dealers for a municipal bond that it wants to sell. The broker's broker will then solicit bids from potential bidders (other broker-dealers) and receive bids over a limited period of time via phone, e-mail, facsimile transmission, or the Internet. When the bid-wanted auction closes, the broker's broker submits the highest bid to the broker-dealer seeking to sell the bond, who then decides whether to sell the bond to the high bidder. Following the bidding process, the high bidder generally is told the "cover bid," i.e., the second highest bid, and the total number of bids received during the bid-wanted auction. This information is also shared with the selling broker-dealer. These rules are not set by regulation, but appear to be industry custom and were followed by Discount Munibrokers.

If the difference between the high bid and the cover bid is relatively small, which is known in the industry as a "tight cover," the disclosure of the cover bid to the high bidder often provides the high bidder comfort that it did not overbid on, or overpay for, the security. Conversely, when the difference between the high bid and the cover bid is relatively large, i.e., a "loose cover," the disclosure of the cover bid might cause the high bidder to conclude that it bid or paid too much for the security since all the other bids were considerably lower than its own. Thus, the spread between the high bid and the cover bid provides the high bidder insight into how competitive the bid-wanted auction was and whether it is paying a fair price for the bonds it bid on.

When high bidders in auctions conducted by Discount Munibrokers learned that their cover bids were "loose," they oftentimes punished Discount Munibrokers for allowing them to "overpay" for securities. This punishment usually took the form of a refusal to give business to Discount Munibrokers for some period of time. In an effort to avoid this type of punishment, Discount Munibrokers disseminated fake cover bids to high bidders to make it appear to the high bidders that the auctions they won were more competitive than they really were. Specifically, when a Discount Munibrokers trader conducted a bid-wanted auction with a large gap between the winning bid and the second highest bid, the trader alerted other traders at the Firm and, if necessary, the traders worked as a group to create a fake cover bid by making false bid entries into Discount Munibrokers' computer system with a fake customer identification number as detailed below. The trader leading the bid-wanted auction then passed off the fake cover bid as a legitimate cover bid to the winning bidder. The winning bidder was never told that the cover bid was a fake. This was all done pursuant to CEO Keck's instructions and with the knowledge and consent of Seelaus, Discount Munibrokers' CFO/Compliance Officer and a supervisor of the traders. The Discount Munibrokers trader principally handling the bid-wanted auction entered the fake bid into the Firm's trading/bidding software application, using a fake customer number of "666" instead of a legitimate customer number.

For example, on September 9, 2003, a broker-dealer, with the designated customer code 416, submitted a winning bid of $103.121 per bond for 75,000 Kershaw County, South Carolina bonds in a bid-wanted auction conducted by Discount Munibrokers. Another broker-dealer, with the designated customer code 607, submitted a second place bid of $101.804 per bond, which was $1.317 less than the winning bid. Discount Munibrokers considered this a "loose cover", so one of Discount Munibrokers' traders entered a fake cover bid of $102.868 under the customer number "666" into the Firm's electronic bid sheet, thus narrowing the gap between the winning bid and the cover bid to a mere $.25.

Discount Munibrokers used fake cover bids in at least 5,682 bid-wanted auctions conducted between January 1, 2003 and April 30, 2004. Respondent Keck participated in the fraudulent conduct, and knowingly allowed his subordinates to engage in such conduct.

3. <u>Discount Munibrokers And Keck Used Fake Bids to Meet Customer Requirements</u>

Discount Munibrokers also used fake bids to meet the requirement of certain selling broker-dealers that Discount Munibrokers receive a minimum number of bids before executing a sale to the high bidder. At certain firms, traders are not allowed to sell securities through a bid-wanted auction unless the auction generated a minimum number of bids. Keck and others at the firm admitted that fake bids were created sometimes to meet these requirements.

4. <u>Discount Munibrokers And Keck Engaged in Adjusted Trading Scheme</u>

From at least June 2003 through May 2004, Discount Munibrokers engaged in an "adjusted trading" scheme for the benefit of a municipal securities trader at another broker-dealer ("Broker-Dealer A"), and reported these fictitious prices to the market. On certain transactions brokered by Discount Munibrokers, where Broker-Dealer A was selling municipal bonds from its inventory to other broker-dealers, Discount Munibrokers paid Broker-Dealer A proceeds for the sales that were greater than the actual amount paid by the purchasers. On these transactions, Discount Munibrokers absorbed the losses that resulted from the difference between the prices received by Broker-Dealer A and the prices paid by the purchasing broker-dealers. To make up Discount Munibrokers' losses, on other sales made by Broker-Dealer A through the Firm, Broker-Dealer A received proceeds that were less than the actual amount paid by the purchasers. After Discount Munibrokers' commissions on each transaction in the scheme were excluded, the overpayments and underpayments to Broker-Dealer A more or less netted out to zero. In the aggregate, the scheme did not materially affect Broker-Dealer A's profits and losses because its artificial gains were always offset by artificial losses of roughly the same amount. Keck was aware of the scheme and often approved individual adjusted trades before they were executed.

Discount Munibrokers was able to accomplish this scheme because, as a municipal securities broker's broker, it routinely interposed itself between sellers and buyers on transactions it brokered—buying bonds from selling broker-dealers and then simultaneously selling the bonds to purchasing broker-dealers on a riskless principal basis. Given its interposition on each transaction with Broker-Dealer A, Discount Munibrokers was able to pay Broker-Dealer A prices for the bonds that were different from the prices at which those bonds were being purchased by broker-dealers on the other side of the transactions. Discount Munibrokers reported these artificial prices to the market.

For example, on July 8, 2003, in a bid-wanted auction Discount Munibrokers conducted for 90,000 Sevierville, Tennessee bonds Broker-Dealer A wanted to sell, the high bid (minus commission) that Discount Munibrokers received for Broker-Dealer A's bonds was $101.568 per bond. However, Broker-Dealer A received $104.439 per bond from Discount Munibrokers, giving Discount Munibrokers a $2,590.10 loss on the sale rather than its normal commission of $125 for a bid-wanted auction of this size. Less than two hours later, Broker-Dealer A paid Discount Munibrokers an artificially high commission of $2,881 on a sale of 100,000 Montgomery, Alabama bonds to offset Discount Munibrokers' earlier loss. The high bid (minus commission) on the second sale was $109.074 per bond, but Discount Munibrokers only paid Broker-Dealer A $106.318 per bond. The Firm's average net commission on these offsetting trades was $290.90, $165.90 above Discount Munibrokers' published bid-wanted commission schedule for bid-wanted auctions of these sizes. In the aggregate however, Discount Munibrokers' average net commission on July 8, 2003, as a result of its adjusted trading scheme with Broker-Dealer A, was only $163.53 per trade—close to the range of commissions the Firm generally charged.

5. Discount Munibrokers, Keck and Seelaus Failed Reasonably to Supervise the Firm's Traders

Discount Munibrokers, Keck and Seelaus failed reasonably to supervise the Firm's traders to prevent and detect the violative conduct by the firm's traders. Keck and Seelaus also condoned and participated in the conduct. The Firm only had approximately ten traders, who worked at a single trading desk (one trader worked from home on a part time basis). Keck and Seelaus were generally aware of everything that occurred at the Firm and, in fact, signed off on the conduct described above.

Additionally, Discount Munibrokers, Keck and Seelaus failed to establish reasonable polices and procedures or a system to implement these procedures reasonably designed to prevent and detect its traders' violative conduct. Specifically, the Firm's procedures failed reasonably to describe the responsibilities and activities of the traders with respect to the Firm's municipal securities business, and, in particular, the conduct of the auctions.

6. **Discount Munibrokers Failed to Properly Retain Certain Books and Records**

Discount Munibrokers received bids and conducted business by facsimile, but failed to retain the facsimiles. The facsimiles that were not retained contained information directly related to Discount Munibrokers' municipal securities business.

IV.

VIOLATIONS

As a result of the conduct described above, the Commission finds that:

Discount Munibrokers willfully violated (i) Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, in that it, used devices, schemes or artifice to defraud various persons and engaged in acts, practices and a course of business which operated as a fraud or deceit upon various persons by making untrue statements of material fact and omitting to state material facts "in connection with the purchase or sale of securities", (ii) Section 15(c)(1)(A) of the Exchange Act as defined in Rule 15c1-2, in that it, while acting as a broker-dealer, effected transactions in the purchase and sale of securities by means of manipulative, deceptive, and other fraudulent devices or contrivances[1], (iii) Section 15B(c)(1) of the Exchange Act, in that it, while acting as a broker-dealer or municipal securities dealer, used the mails or interstate commerce "to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal securities in contravention of any rule" of the MSRB and, (iv) MSRB Rule G-17, in that it, while acting as a broker-dealer or municipal securities dealer, dealt unfairly with persons and engaged in a "deceptive, dishonest, or unfair practice." Specifically, Discount Munibrokers disseminated fake cover bids to high bidders in auctions it conducted in an effort to convince the high bidders that the auctions they won were more competitive than they really were. Discount Munibrokers also used fake bids to meet minimum bid requirements imposed by certain broker-dealers attempting to sell securities through the bid-wanted auction process. By giving the appearance that Discount Munibrokers was conducting municipal bond auctions with tighter spreads between the winning bids and cover bids and by creating the illusion of additional interest in the bonds they were auctioning, Discount Munibrokers deceived its customers. Discount Munibrokers also reported deceptive prices to the market through its participation in an adjusted trading scheme, in violation of Section 10(b) and Rule 10b-5 promulgated thereunder.

Discount Munibrokers willfully violated MSRB Rule G-13, in that it, while acting as a broker-dealer or municipal securities dealer, caused to be distributed or published,[2] a quotation[3]

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1 Rule 15c1-2 under the Exchange Act provides that the term "manipulative, deceptive or other fraudulent device or contrivance," as used in Section 15(c)(1)(A) of the Exchange Act, is defined to include "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

2 MSRB Rule G-13(a) defines the terms "distributed" or "published" as "the dissemination of quotations by any means of communication."

3 MSRB Rule G-13(a) defines the term "quotation" as any bid for, or offer of, municipal securities, or any request for bids for or offers of municipal securities, including indications of a "bid-wanted" or "offer-wanted."

relating to municipal securities which did not represent a bona fide bid for, or offer of, municipal securities by such broker, dealer or municipal securities dealer. MSRB Rule G-13 states that a quotation shall be deemed to represent a "bona fide bid for, or offer of, municipal securities" if the broker, dealer, or municipal securities dealer making the quotation is prepared to purchase or sell the security which is the subject of the quotation at the price stated in the quotation and under such conditions, if any, as are specified at the time the quotation is made. Specifically, Discount Munibrokers placed fake bids on municipal bonds without the intent of ever purchasing the bonds. Because the fake bids were placed without the intent of purchasing the bond the bids were not "bona fide bids for" municipal securities, as defined by MSRB Rule G-13. Some Discount Munibrokers traders communicated bids that were not bona fide to both the selling broker-dealers and bidding broker-dealers, and therefore Discount Munibrokers willfully violated MSRB Rule G-13.

Discount Munibrokers willfully violated MSRB Rule G-14, in that it, while acting as a broker-dealer or municipal securities dealer, distributed or published or caused to be distributed or published,[4] fictitious reports of a purchase or sale of municipal securities in "furtherance of a fraudulent, deceptive or manipulative purpose." Specifically, Discount Munibrokers knew that the adjusted trades with Broker-Dealer A were being executed to further a fraudulent scheme. Discount Munibrokers also knew that the trades were being reported at the artificial sales prices. Because it reported the fraudulent adjusted trades at the bogus prices, Discount Munibrokers violated MSRB Rule G-14.

Discount Munibrokers willfully violated Section 17(a) of the Exchange Act, Exchange Act Rule 17a-4 and MSRB Rules G-8 and G-9, by failing to maintain originals of all communications received and copies of all communications relating to its business as such for a period of not less than three years. Specifically, Discount Munibrokers failed to retain facsimiles relating to its business for three years as required pursuant to Exchange Act Rule 17a-4 and MSRB Rules G-8 and G-9.

MSRB Rule G-27(a) requires each broker, dealer and municipal securities dealer to supervise the conduct of its municipal securities business and the municipal securities activities of its associated persons to ensure compliance with MRSB rules as well as the applicable provisions of the Exchange Act and the rules promulgated thereunder. MSRB Rule G-27(c) requires each broker, dealer and municipal securities dealer to adopt, maintain and enforce written supervisory procedures reasonably designed to ensure compliance with the same rules and Exchange Act provisions.

Discount Munibrokers, Keck and Seelaus failed reasonably to supervise Discount Munibrokers' traders pursuant to Section 15(b)(4)(E) of the Exchange Act with a view towards preventing and detecting the traders' conduct, which aided and abetted and caused Discount Munibrokers' violations of Sections 15(c)(1)(A), 15B(c)(1) and 17(a) of the Exchange Act and

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4 MSRB Rule G-14(a) defines the terms "distributed" or "published" as "the dissemination of a report by any means of communication."

Rule 17a-4(b) promulgated thereunder and MSRB Rules G-13, G-14 and G-17. In the case of Discount Munibrokers, its failure to supervise constituted a violation of MSRB Rule G-27(a). Discount Munibrokers also violated MSRB Rule G-27(c) which requires the adoption, maintenance and enforcement of written supervisory procedures reasonably designed to ensure compliance with the applicable rules. Keck and Seelaus, on behalf of Discount Munibrokers, failed to establish reasonable procedures for ensuring that the Firm's bid-wanted auctions were being conducted in compliance with the federal securities laws. Rather, Keck and Seelaus both knowingly allowed violations of the antifraud, trade reporting and books and records provisions of the federal securities laws and the MSRB's rules. Nor did Keck or Seelaus establish procedures, written or otherwise, to prevent fraudulent adjusted trading. Again, Keck and Seelaus allowed such conduct to go on at their Firm. By his complicity in the Firm's misconduct, Keck aided and abetted and caused the Firm's violations of MSRB Rule G-27.

Keck willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. Moreover, Keck willfully aided and abetted and caused Discount Munibrokers' violations of Sections 15(c)(1)(A), 15(B)(c)(1) and 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder and MSRB Rules G-8, G-9, G-13, G-14, and G-17. As the primary supervisor of the trading desk, Keck was aware of and approved the use of fake bids to decrease the spread between winning bids and relatively low cover bids. He also knew that when a trader placed a bid on behalf of the Firm, there was no intent to purchase the bonds and that the trader would not disclose the true nature of the bid to the buyers and sellers of the bonds. Keck also endorsed and encouraged the Firm's practice of engaging in adjusted trades with Broker-Dealer A. Finally, Keck was responsible for overseeing whether the Firm maintained all communications relating to its business. Keck, however, failed to carry out this duty by not establishing and enforcing adequate procedures for maintaining facsimiles relating to Discount Munibrokers' business.

In determining to accept the Offer, the Commission considered cooperation afforded the Commission staff.

V.

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, it is hereby ORDERED that:

A. Pursuant to Sections 15(b) and 15B(c) and of the Exchange Act, Discount Munibrokers' broker-dealer registration be, and hereby is, revoked.

B. Pursuant to Section 21C of the Exchange Act, Keck 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 promulgated thereunder.

C. Pursuant to Section 21C of the Exchange Act, Keck shall cease and desist from causing any violations and any future violations of Sections 15(c)(1)(A) and 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.

D. Pursuant to Section 21C of the Exchange Act, Keck shall cease and desist from causing any violations and any future violations of Section 15B(c)(1) of the Exchange Act, including (1) failing to deal fairly with all persons and not engage in any deceptive, dishonest or unfair practice under MSRB Rule G-17, (2) failing to make and keep current certain books and records under MSRB Rules G-8 and G-9, (3) failing to distribute or publish, a quotation relating to municipal securities which represents a bona fide bid for, or offer of, municipal securities under MSRB G-13, (4) failing to distribute or publish, accurate reports relating to municipal securities under MSRB G-14 and (5) failing to supervise the conduct of the Firm's associated persons to ensure compliance with the MSRB rules under MSRB G-27.

E. Keck shall pay a civil money penalty in the amount $15,000 within 15 days of entry of this Order. Payments of civil money penalty shall be : (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under a cover letter that identifies the Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Fredric D. Firestone, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, DC 20549.

F. Pursuant to Sections 15(b)(6) and 15B(c)(4) of the Exchange Act, Keck be, and hereby is barred from association with any broker or dealer or municipal securities dealer with the right to reapply for association after one year to the appropriate self-regulatory organization, or if there is none, to the Commission. Any reapplication for association by Keck 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 Keck, 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.

G. Pursuant to Sections 15(b)(6) and 15B(c)(4) of the Exchange Act, Keck be, and hereby is barred from association with a broker or dealer or municipal securities dealer in a supervisory capacity with the right to reapply for association after five years to the appropriate self-regulatory organization, or if there is none, to the Commission. Any reapplication for association by Keck 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 Keck, 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.

H. Pursuant to Sections 15(b)(6) and 15B(c)(4) of the Exchange Act, Seelaus be, and hereby is barred from association with a broker or dealer or municipal securities dealer in a supervisory capacity with the right to reapply for association after five years to the appropriate self-regulatory organization, or if there is none, to the Commission. Any reapplication for association by Seelaus 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 Seelaus, 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.

Nancy M. Morris
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. 56574 / September 28, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2734 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-10516

In the Matter of Walter Cercavschi, CPA	ORDER GRANTING APPLICATION FOR REINSTATEMENT TO APPEAR AND PRACTICE BEFORE THE COMMISSION AS AN INDEPENDENT ACCOUNTANT

On June 19, 2001, Walter Cercavschi ("Cercavschi") was suspended from appearing or practicing as an accountant before the Commission as a result of settled public administrative proceedings instituted by the Commission against Cercavschi pursuant to Rule 102(e)(3) of the Commission's Rules of Practice.[1] On May 12, 2005, Cercavschi was reinstated to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.[2] This order is issued in response to Cercavschi's application for reinstatement to practice before the Commission as an independent accountant.

For each of the years 1994 through 1996, Cercavschi was a partner at Arthur Andersen and a member of the Waste Management, Inc. engagement team. The Commission's complaint alleged that Cercavschi knew of Waste Management's quantified misstatements and of accounting practices that gave rise to further possible misstatements. Still, he approved the issuance of an unqualified audit report. Furthermore, the complaint alleged that Cercavschi knew, or was reckless in not knowing, that the unqualified audit reports for the years 1994 through 1996 were materially false and misleading. Finally, it was alleged that Cercavschi knew that these unqualified audit reports would be incorporated into one or more registration

[1] *See* Accounting and Auditing Enforcement Release No. 1408 dated June 19, 2001. Cercavschi was permitted, pursuant to the order, to apply for reinstatement after three years upon making certain showings.

[2] *See* Accounting and Auditing Enforcement Release No. 2244 dated May 12, 2005.

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statements filed with the Commission. He consented to the entry of an order of permanent injunction and a Rule 102(e) suspension order.

Cercavschi has met all of the conditions set forth in his suspension order and, in his capacity as an independent accountant, has stated that he will comply with all requirements of the Commission and the Public Company Accounting Oversight Board, including, but not limited to all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

Rule 102(e)(5) of the Commission's Rules of Practice governs applications for reinstatement, and provides that the Commission may reinstate the privilege to appear and practice before the Commission "for good cause shown."[3] This "good cause" determination is necessarily highly fact specific.

On the basis of information supplied, representations made, and undertakings agreed to by Cercavschi, it appears that he has complied with the terms of the June 19, 2001 order suspending him from practice before the Commission as an accountant, that no information has come to the attention of the Commission relating to his character, integrity, professional conduct or qualifications to practice before the Commission that would be a basis for adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice, and that Cercavschi, by undertaking to comply with all requirements of the Commission and the Public Company Accounting Oversight Board, including, but not limited to all requirements relating to registration, inspections, concurring partner reviews and quality control standards in his practice before the Commission as an independent accountant, has shown good cause for reinstatement. Therefore, it is accordingly,

ORDERED pursuant to Rule 102(e)(5)(i) of the Commission's Rules of Practice that Walter Cercavschi, CPA is hereby reinstated to appear and practice before the Commission as an independent accountant.

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

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[3] Rule 102(e)(5)(i) provides:

"An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown." 17 C.F.R. § 201.102(e)(5)(i).

Commissioners Atkins + Campos Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8855 / September 28, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56576 / September 28, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2736 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12857

In the Matter of ROBERT D. DOTY, JR., Respondent	ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE

I.

The Securities and Exchange Commission ("SEC" or "Commission") deems it appropriate that (i) cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (the "Securities Act") and Section 21C of the Securities Exchange Act of 1934 (the "Exchange Act") against Robert D. Doty, Jr. ("Doty") ("Respondent"), and (ii) public administrative proceedings be, and hereby are, instituted against Doty pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice.[1]

[1] Rule 102(e)(1)(iii) provides, in pertinent part, that: The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

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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 Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Section 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, the Commission finds[2] that:

A. RESPONDENT

Robert D. Doty, Jr., 49, of Houston, Texas, was Dynegy Inc.'s ("Dynegy") Executive Vice-President and Chief Financial Officer during the relevant period. Doty joined Dynegy in 1991 after ten years as a tax practitioner in a public accounting firm and advanced through Dynegy's tax and finance departments before ascending to CFO in 2000. Doty permitted his CPA license to lapse after joining Dynegy and is no longer a CPA. Doty resigned from Dynegy in August 2002 and is now employed by a private company.

B. OTHER RELEVANT ENTITY

Dynegy is an Illinois corporation headquartered in Houston, Texas. Dynegy's shares are registered with the Commission under Section 12(b) of the Exchange Act and trade on the New York Stock Exchange under the symbol DYN. During the relevant period, Dynegy's business consisted of production and delivery of energy, including natural gas, electricity, natural gas liquids and coal, to customers in North America, the United Kingdom and Continental Europe. In addition to energy production and delivery, energy trading was a key component of Dynegy's business during the relevant period.

C. FACTS

1. <u>Summary</u>

These proceedings arise out of Respondent's role in Dynegy's materially misleading use

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

of a structured-finance transaction called Project Alpha ("Alpha"). In 2001, Dynegy implemented Alpha to enhance cash flow from operations by approximately $300 million and to realize an associated tax benefit of $79 million. Over approximately six months, Dynegy's accounting and tax adviser worked closely with the Respondent and other members of the Dynegy deal team to structure Alpha in a manner consistent with generally accepted accounting principles ("GAAP"). In particular, the accounting and tax adviser warned Dynegy that certain forms of risk-hedging in the transaction would undermine Dynegy's intended accounting for Alpha and require Dynegy to record the cash flow from Alpha as a financing activity, rather than as cash from operations. Dynegy's failure to follow this advice would also eliminate the tax benefit.

In April 2002, it became clear that Alpha did not conform to the explicit guidelines that Dynegy's accounting and tax adviser had established. As a result, Dynegy's accounting and tax adviser withdrew its opinion letters previously issued regarding Alpha, and in November 2002, Dynegy restated its 2001 financial statements to eliminate $290 million, or 37%, of operating cash flow, and to eliminate the previously reported tax savings of $79 million, reducing Dynegy's net income by 12%.

2. Project Alpha Overview

Alpha was essentially a $300 million loan to Dynegy, disguised as cash from operations through the purchase and sale of natural gas. Dynegy received loan proceeds in 2001 in the form of contractually assured natural gas trading profits. The loan was to be repaid over Alpha's remaining term through contractually assured trading losses.[3] While structured as a complex sale of natural gas, Alpha had no business purpose aside from minimizing Dynegy's taxes and narrowing the gap between Dynegy's net income and operating cash flow.

For Dynegy to report Alpha's cash flow as deriving from operating activity, rather than a loan, Dynegy's outside accounting and tax adviser required that Alpha exhibit characteristics of a commercial transaction. For instance, Dynegy and ABG Supply (the parties to the gas supply contract) were required to bear some amount of risk. To assure that such risk was present, the purchase price under the gas contract was partly fixed, exposing the buyer and seller to fluctuations in the market price of natural gas.[4]

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[3] More specifically, in the initial nine months of Alpha's five-year term, a Dynegy affiliate purchased gas from a Dynegy-sponsored SPE, ABG Supply, at below-market prices and then sold the gas in the market for a $300 million profit. Dynegy is repaying the loan, with interest, over the remaining four years and three months, by purchasing gas from ABG Supply at above-market prices. The losses generated by this non-commercial pricing structure were the source of Alpha's tax benefit; Dynegy used the losses in 2001 as an offset against its taxable income, giving rise to a $79 million increase in Dynegy's net income.

[4] The purchase price is 86% variable and 14% fixed. In Alpha's first nine months, the 86% variable component was at market price, minus a pre-determined discount (i.e., NYMEX settlement price less a Base Period Price Adjustment). Over Alpha's remaining 51 months, the 86% variable component was at market prices, plus a pre-determined premium (i.e., NYMEX settlement price plus a Term Period Price Adjustment). For all 60 months, the remaining 14% was at a fixed price.

The parties to the gas contract planned to hedge this commodity price risk by entering into certain derivatives – fixed-for-floating swaps – to substitute the market price of natural gas for the fixed price. Similarly, the parties planned to hedge against fluctuating interest rates by executing interest rate swaps. Such hedging was necessary to guarantee the lenders' return. Although the reduction of risk was acceptable to a point, Dynegy's accounting and tax adviser warned that certain hedging activities would invalidate Alpha's accounting benefits.

3. Issues Relating to Hedging

Dynegy's accounting and tax adviser notified Dynegy that, for Alpha to qualify for the desired accounting treatment, Alpha's commodity price swaps and interest rate swaps (and other derivatives) would have to be conducted in the ordinary course of business. Specifically, the swaps could not be linked to the gas contract or to each other. Any provision in one swap, such as a default provision, that would also have an effect on another swap, such as triggering an automatic termination or a right of termination, would require Dynegy to treat Alpha as a financing.[5] Contrary to this advice, Dynegy entered into commodity price and interest rate swaps with contractual linkage in the form of cross-termination or "tear-up" provisions.[6] Moreover, the impermissible tear-up provisions were documented in amendments to the swap confirmations, executed simultaneously with the confirmations they purported to amend.

The equity investors in ABG Supply and the other Alpha SPEs were required to be independent of Dynegy and contribute at least 3% (approximately $10 million) of the SPE's total capitalization. The 3% equity investment had to remain at risk throughout Alpha's term, including exposure to the most significant risk in a gas purchase arrangement: commodity price

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5 As articulated in the technical memorandum in support of the April 6, 2001 tax opinion by Dynegy's outside tax adviser (signed in conjunction with Alpha's closing): "ABG (i) will not hedge its entire risk under the Natural Gas Purchase Agreement and (ii) to the extent its risks are hedged, they will not be directly hedged with [Dynegy], an affiliate of [Dynegy], or any other entities that are a party to the transaction other than in the ordinary course of business as a typical counterparty."

6 Hedging of fixed-price exposure with Dynegy and ABG Supply as direct swap counter-parties was clearly prohibited. Instead, Dynegy and ABG Supply entered into back-to-back swaps with Citigroup Inc., placing Citigroup in the middle of mirror-image swaps. The tear-up provisions protected Citigroup by granting it the right to terminate one swap if the back-to-back swap was terminated. For example, were Dynegy to default on its swap, Citigroup would have the right to terminate (or "tear up") its swap with ABG Supply, thereby relieving it of its obligation to make a swap payment. The tear-up provisions rendered the back-to-back swaps economically indistinguishable from direct hedges between Dynegy and ABG Supply and impermissibly linked the swaps together. On July 28, 2003, the Commission issued a settled cease-and-desist order against Citigroup, *In the Matter of Citigroup, Inc.*, Securities Exchange Act of 1934, Rel. No. 48230, and filed a settled civil suit against Citigroup in the Southern District of Texas, Houston Division, *SEC v. Dynegy Inc.* (H-02-3623). The Commission made findings in the cease-and-desist order (and alleged in the civil complaint) that Citigroup caused violations of Section 10(b) and Exchange Act Rule 10b-5, relating to its involvement in Project Alpha. Citigroup, without admitting or denying the Commission's findings, agreed to the issuance of the cease-and-desist order and paid a civil penalty in the related civil suit.

risk.

On or about April 6, 2001, Dynegy's accounting and tax adviser issued Dynegy a letter under Statement on Auditing Standards 50 (the "SAS 50 letter"). The SAS 50 letter instructed that any hedging of commodity price risk could not extend to the minimum 3% equity investment in the SPE ABG Supply. The SAS 50 letter also rested on representations that, aside from certain specified derivative transactions, there would be "no residual insurance, residual guarantee, or any other type of investment or instrument . . . that would ensure ABG's equity investors' recovery of their portion of the ABG required minimum equity investment." The SAS 50 opinion also was based on an assumption that the "equity contributed will be ... at risk for the life of ABG [Supply]" and "will not be guaranteed in recovery or return through financial hedges or other mechanisms." The 97% debt capitalization could, however, be hedged, and face no commodity price risk.[7]

Contrary to these principles, Dynegy and certain of its employees facilitated the equity investors' hedging of all price and interest rate risk – at Dynegy expense – and even funded a swap that ensured the equity investors would have a claim functionally equivalent to Dynegy senior unsecured credit. In particular, the equity investors established a holding company – ABG Holdings LLC – as ABG Supply's parent. ABG Holdings housed the equity investments and executed the hedges that protected the equity. Because of the ABG Holdings hedges, the equity was not at risk under GAAP.

Further, according to the April 6, 2001 opinion issued by Dynegy's accounting and tax adviser, the Internal Revenue Service requires that structured tax transactions, at a minimum, have some non-tax business justification. According to the tax opinion, Dynegy's desired *accounting treatment* of the Alpha cash flow – as flowing from operations, as opposed to financing – constituted the primary non-tax business justification for Alpha. Consequently, when Dynegy publicly disclosed that it would restate its 2001 cash flow statement to reflect the Alpha cash flow as financing, rather than operating cash flow, the accounting and tax adviser withdrew the tax opinion.

4. <u>The Restatement</u>

On April 3, 2002, the Wall Street Journal published an article reporting that Dynegy used Alpha to enhance its financial presentation and minimize its tax liabilities. The SEC then contacted Dynegy to inquire about the transaction. After learning of the equity investors' hedging and the contractual linkage among the swaps and underlying gas contract, Dynegy's tax and accounting adviser withdrew the tax opinion and SAS 50 opinion in April 2002.

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7 Under GAAP, were the equity not at risk, ABG Supply would have to be consolidated in Dynegy's financial statements. If ABG Supply were consolidated, its borrowing from the lending syndicate to cover its losses in making the below-market sales of gas to Dynegy in Alpha's initial nine months (i.e., the $300 million loan to Dynegy) would appear on Dynegy's Statement of Cash Flow as cash flow from financing (i.e., debt), rather than operating, activities.

On September 24, 2002, the Commission entered a settled cease-and-desist order against Dynegy making findings that Dynegy engaged in securities fraud in connection with its disclosures and accounting for Alpha. The Commission ordered Dynegy to cease and desist from violating, committing or causing violations of Sections 17(a) of the Securities Act, and Sections 10(b), 13(a) and 13(b)(2) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1, 13a-13 and 13b2-1 thereunder. On September 30, 2002, the U.S. District Court for the Southern District of Texas entered a Final Judgment by consent in which Dynegy was ordered to pay a $3 million civil penalty for its violations of the federal securities laws described above.

On November 15, 2002, Dynegy filed a Form 8-K restating its 2001 financial results by reporting approximately $290 million of Alpha-related cash flow as deriving from a financing activity rather than operations; eliminating the $79 million Alpha-related income tax benefit; and consolidating the assets, liabilities and results of operations of the SPE ABG Gas Supply into Dynegy's financial statements, increasing Dynegy's reported indebtedness by approximately $280 million. The increased debt reflects ABG Supply's borrowing to cover the losses it sustained during the first year of Alpha.

5. Doty's Role

Doty, Dynegy's then-CFO, was involved in the decision to proceed with Alpha in order to minimize the gap between Dynegy's reported net income and operating cash flow, and to realize a related tax benefit. In addition, Doty was involved in the decision not to make any separate disclosure of Alpha's unique, non-commercial pricing characteristics, or that 37% of Dynegy's 2001 operating cash flow originated from a syndicate of off-balance-sheet lenders, or that 12% of Dynegy's net income derived from a tax shelter that had never been tested in court or approved by the IRS. Doty knew or was reckless in not knowing that these and other characteristics of Alpha rendered Dynegy's financial presentation inaccurate and required separate disclosure of Alpha.

Further, Doty took no steps to prohibit or monitor hedging of risks by the sophisticated financial institutions serving as equity investors. Finally, Doty knew that Alpha's primary business purposes were minimizing taxes and manufacturing operating cash flow. Nonetheless, when Alpha's existence was exposed in an April 3, 2002 newspaper article, Doty emphasized the "substantial source of physical gas supply" provided by Alpha, while downplaying Alpha's cash-flow effects.

D. LEGAL ANALYSIS

Section 17(a) of the Securities Act prohibits employing a fraudulent scheme or making material misrepresentations and omissions in the offer or sale of a security. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit the same conduct, if committed in connection with the purchase or sale of securities. To violate these provisions, the alleged misrepresentations or omitted facts must be material. Information is deemed material upon a showing of a substantial likelihood that the omitted facts would have assumed significance in the investment deliberations of a reasonable investor. *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). Establishing violations of

Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder requires a showing of *scienter*. *Aaron v. SEC*, 446 U.S. 680 (1980). However, actions pursuant to Sections 17(a)(2) and 17(a)(3) of the Securities Act do not require such a showing. *Id.* *Scienter* is the "mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). *Scienter* is established by a showing that the defendants acted intentionally or with severe recklessness. *See Broad v. Rockwell International Corp.*, 642 F.2d 929 (5th Cir.) (*en banc*), *cert. denied*, 454 U.S. 965 (1981).

Respondent willfully violated the antifraud provisions of the Securities Act and the Exchange Act.[8] Respondent was one of Dynegy's senior reporting officials. Alpha was an undisclosed, highly complex transaction that incorrectly reported the source of Dynegy's cash flow and dramatically overstated Dynegy's cash flow from operations. Doty signed Dynegy's 2001 Form 10-K, which misstated Alpha's impact on Dynegy's financial statements. Because of Respondent's failure to ensure appropriate accounting treatment and failure to disclose the financing transactions underlying Alpha, Dynegy's financial performance was materially misstated. There is a substantial likelihood that these false representations and associated omissions would have assumed actual significance in the investment deliberations of a reasonable investor. As a result of the conduct stated herein, Respondent violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Section 13(a) of the Exchange Act requires issuers such as Dynegy to file periodic reports with the Commission containing such information as the Commission prescribes by rule. Exchange Act Rule 13a-1 requires issuers to file annual reports, and Exchange Act Rule 13a-13 requires issuers to file quarterly reports. Under Exchange Act Rule 12b-20, the reports must contain, in addition to disclosures expressly required by statute and rules, such other information as is necessary to ensure that the statements made are not, under the circumstances, materially misleading. The obligation to file reports includes the requirement that the reports be true and correct. *United States v. Bilzerian,* 926 F.2d 1285, 1298 (2d Cir.), *cert. denied*, 502 U.S. 813 (1991). The reporting provisions are violated if false and misleading reports are filed. *SEC v. Falstaff Brewing Corp.,* 629 F.2d 62, 67 (D.C. Cir. 1980). *Scienter* is not an element of a violation of Section 13(a) or Rules 13a-1, 13a-13 or 12b-20 of the Exchange Act. *See SEC v. Savoy Indus., Inc.,* 587 F.2d 1149, 1167 (D.C. Cir. 1978).

Dynegy violated these provisions by filing second and third quarter 2001 Forms 10-Q and a 2001 Form 10-K that were false and misleading. Dynegy's false accounting treatment of Alpha, and the absence of any clarifying disclosure of Alpha's true purpose and effect, caused the violations. Dynegy should have treated the cash flow from Alpha as a loan and ABG Supply

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[8] Respondent's misrepresentations and omissions relating to Alpha were committed in connection with purchases and sales of Dynegy securities on the secondary market, and violated, therefore, Section 10(b) of the Exchange Act and Rule 10b-5, thereunder. Because Dynegy's Alpha-related misrepresentations and omissions were contained in Dynegy's second and third quarter 2001 Forms 10-Q and its 2001 Form 10-K, which are incorporated by reference in the registered securities offerings Dynegy was conducting during the period, and in the Dynegy financial statements distributed in connection with those offerings, those Alpha-related misrepresentations and omissions also violated Sections 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act.

should have been consolidated in Dynegy's financial statements, which would have had numerous material effects on Dynegy's financial statements. If consolidated, ABG Supply's $300 million borrowing to fund the losses during the first nine months of the Gas Contract would have been reflected as cash flow from financing activities, rather than operations, on Dynegy's Statement of Cash Flow; the liability associated with Alpha would have appeared as debt on Dynegy's Balance Sheet, rather than risk-management liability; and the tax benefit would not have been available to Dynegy, meaning that Dynegy's net income would have been reduced by $79 million on Dynegy's Income Statement. By the conduct described herein, Respondent aided and abetted or caused Dynegy's violations of Exchange Act Section 13(a) and Rules 13a-1, 13a-13 and 12b-20 thereunder.

Section 13(b)(2)(A) of the Exchange Act requires all issuers to make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets. Section 13(b)(2)(B) of the Exchange Act requires issuers to devise and maintain an adequate system of internal accounting controls. *Scienter* and materiality are not elements of a violation of these provisions. *SEC v. World-Wide Coin Inv., Ltd.*, 567 F. Supp. 724, 749-50 (N.D. Ga. 1983). Section 13(b)(5) of the Exchange Act provides that "no person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described [in Section 13(b)(2)]."

Dynegy, through its treatment of Alpha, violated Section 13(b)(2)(A) by failing to keep books, records and accounts that accurately and fairly reflected its assets and financial results. Dynegy violated Section 13(b)(2)(B) by failing to devise and maintain a system of internal controls sufficient to provide reasonable assurances that structured transactions involving special purpose entities are recorded as necessary to permit preparation of financial statements in conformity with GAAP. Respondent aided and abetted or caused these violations by the conduct described herein. Through the same conduct, Doty also violated Section 13(b)(5) of the Exchange Act.

Exchange Act Rule 13b2-1 (promulgated under Section 13(b)(2) of the Exchange Act) prohibits any person from falsifying or causing to be falsified any accounting books and records of reporting public companies. *Scienter* is not an element of a violation of Rule 13b2-1. *SEC v. McNulty*, 137 F.3d 732 (2d Cir. 1998). Respondent's falsification of Dynegy's books in connection with Alpha effectively disguised a loan as operating cash flow in violation of Exchange Act Rule 13b2-1.

IV.

Based on the foregoing, the Commission finds that:

Doty willfully violated Section 17(a) of the Securities Act, Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5 and 13b2-1 thereunder; and willfully aided and abetted and caused Dynegy's violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, and Rules 12b-20, 13a-1 and 13a-13 promulgated thereunder.

V.

In determining whether to accept the Offer, the Commission has considered the following undertakings:

A. Doty undertakes and agrees to pay a civil penalty of $120,000, which shall be available for allocation in accordance with Section 308 of the Sarbanes-Oxley Act of 2002. Doty consents to pay the civil penalty in a separately filed civil action.

B. Doty undertakes and agrees that, for a period of five years, he will not act as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78(l)] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)]. Doty consents to the imposition of the officer and director bar in a separately filed civil action.

C. Doty undertakes and agrees to cooperate with the Commission and its staff in any further investigation of this matter.

VI.

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

Accordingly, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, and Rule 102(e)(1)(iii) of the Commission's Rules of Practice, it is hereby ORDERED, effective immediately, that:

A. Respondent Doty 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) and 13(b)(5) of the Exchange Act and Rules 10b-5 and 13b2-1 thereunder, and cease and desist from aiding and abetting or causing violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13 thereunder.

B. Within thirty days of the entry of this Order, Doty shall pay disgorgement of $200,000, plus prejudgment interest of $56,560, which shall be delivered into the Registry of the Court for the United States District Court for the Southern District of Texas by wire transfer or certified check made payable to Clerk, United States District Court. Such funds shall thereafter be distributed in the course of litigation pending in the United States District Court for the Southern District of Texas, captioned *Securities and Exchange Commission v. Dynegy Inc.*, Civil Action No. H-02-3623 (S.D. Tex. 2002). Simultaneously, Respondent shall transmit by facsimile or hand delivery to Andy Gould, Clerk's Office, United States District Court for the Southern District of Texas, a letter that describes the fact and purpose of the wire transfer or certified check, identifies the Respondent, and identifies the case name and number of the Dynegy litigation. A copy documentary proof of the wire transfer or certified check and a copy of the letter to the Clerk shall be simultaneously transmitted by facsimile to Rose L. Romero, Fort Worth Regional Director, Securities and Exchange Commission, 801 Cherry Street, 19th Floor, Fort Worth, Texas 76102, (817) 978-2700 (facsimile).

C. Doty is denied the privilege of appearing or practicing before the Commission as an accountant.

D. After five years from the date of this Order, Doty may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

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

(a) Doty, 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) Doty, 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 adequate supervision;

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

E. The Commission will consider an application by Doty 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 dependant 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 Doty's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

F. There shall be, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund established for the funds described in this Order.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

FYI Commissioners Atkins & Campos Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56578 / September 28, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2738 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12859

In the Matter of **JAMIE OLIS, CPA,** **Respondent.**	**ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Jamie Olis ("Olis") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. § 200.102(e)(2)].[1]

II.

The Commission finds that:

1. Olis was a certified public accountant in Texas until December 2003.

2. On September 25, 2006, an amended judgment of conviction was entered against Olis in *United States v. Olis, et al*, No. 4:03CR00217-001, in the United States District Court for the Southern District of Texas, finding him guilty of six felony counts: one count of conspiracy

[1] Rule 102(e)(2) provides in pertinent part: "Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

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mail fraud; and three counts of wire fraud. This judgment of conviction arose from Olis's role in a fraudulent transaction code-named "Project Alpha" at Dynegy Inc.

3. As a result of this conviction, Olis was sentenced to 72 months imprisonment in a federal penitentiary and ordered to pay a fine of $25,000.

III.

In view of the foregoing, the Commission finds that Olis has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that Jamie Olis is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Commissioners Atkins & Campos Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56577 / September 28, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2737 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12858

In the Matter of **Gene S. Foster,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

II.

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

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

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

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to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

A. Foster, age 48, was a certified public accountant in the State of Texas. During the relevant time period, Foster was employed as Vice President of Taxation of Dynegy Inc. ("Dynegy"), and substantially participated in a Dynegy financing transaction known as Project Alpha.

B. Dynegy is an Illinois corporation headquartered in Houston, Texas. Dynegy's shares are registered with the Commission under Section 12(b) of the Securities Exchange Act of 1934 and trade on the New York Stock Exchange.

C. On September 24, 2002, the Commission entered an order by consent against Dynegy resulting from the company's improper accounting and misleading disclosures relating to Project Alpha. Dynegy used Project Alpha to enhance cash flow from operations by $300 million in 2001 and to achieve a related $79 million tax benefit. Dynegy failed to disclose properly the financing transactions underlying Project Alpha, and failed to clarify that the cash flow reported on its 2001 Statement of Cash Flows derived from financing activities, not operations. *See* Order Instituting 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, Admin. File 3-10897 (Sept. 24, 2002). Dynegy further consented to pay a $3 million civil penalty. SEC v. Dynegy Inc., Civil Action H-02-3623 (S.D. Tex. Sept. 30, 2002).

D. On June 11, 2003, the Commission filed a complaint against Foster in SEC v. Foster et al., (Civil Action H-03-2044), in the United States District Court for the Southern District of Texas. The Commission's complaint alleged that Foster willfully disregarded accounting advice from Dynegy's outside auditor on Project Alpha and concealed critical transaction details from the auditor in violation of the federal securities laws.

E. On September 7, 2007, the court entered an order permanently enjoining Foster from future violations of Section 17(a) of the Securities Act of 1933, and Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 and Rules 10b-5 and 13b2-1 thereunder.

IV.

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

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

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

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Chairman Cox &
Commissioner Campos
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56580 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12861

In the Matter of **MICHAEL B. UPTON,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Michael B. Upton ("Upton" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Sections III.2. and III.3. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

Document 103 of 105

III.

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

1. Upton, age 60, resides in Santa Ana, California. Upton worked as a registered representative with MCL Financial Group, Inc. from July 2003 until his retirement in February 2006. Upton holds Series 6, 7, 22, 63, and 65 licenses.

2. On September 26, 2007, a final judgment was entered by consent against Respondent permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Michael B. Upton, Civil Action Number 07-06180 (CAS) (AGRx), in the United States District Court for the Central District of California.

3. The Commission's complaint alleges that, from August 2003 through March 2005, Upton made materially false and misleading statements and omitted to disclose material information to investors in connection with 27 securities offerings. The complaint further alleges that Upton misrepresented to investors the investment risks and also that certain shares would soon be publicly traded despite his knowledge that his representations were false. Additionally, the complaint alleges that Upton failed to disclose to investors that he earned override commissions in addition to sales commissions on the sale of the securities. Upton profited from such misrepresentations by way of undisclosed commissions of $287,496.

IV.

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

Accordingly, it is hereby ORDERED:

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

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

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

; C I A

Chairman Cox & Commissioner Campos Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56579 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12860

In the Matter of **MCL FINANCIAL GROUP, INC., and GARY L. FLATER,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, 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.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against MCL Financial Group, Inc. ("MCL") and Gary L. Flater ("Flater") (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer 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, 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.

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III.

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

Summary

1. MCL and Flater failed reasonably to supervise Michael B. Upton ("Upton"), a registered representative with a view to preventing and/or detecting Upton's violations within the meaning of Sections 15(b)(4) and 15(b)(6) of the Exchange Act. From August 2003 through March 2005, at the time of his actions, Upton, a registered representative at MCL's office in Santa Ana, California, made materially false and misleading statements to investors and received $287,496 in undisclosed commissions in connection with 27 securities offerings sponsored by Triple Net Properties, LLC ("Triple Net"). Upton's conduct violated the antifraud provisions of the federal securities laws. Among other things, Flater and MCL failed to develop a reasonable system to implement firm procedures for review of Upton's correspondence, which contained the materially false and misleading statement sent to his customers, and Flater failed to follow-up or investigate whether Upton was disclosing the commissions to his customers. In addition, Flater and MCL failed to establish special supervisory procedures and related systems to monitor Upton's conduct, despite knowing that Upton had a previous disciplinary history for committing similar violations of the federal securities laws.

2. Until August 2004, MCL failed to preserve, and Flater did not ensure that MCL preserved, copies of the majority of the electronic mail communications ("e-mails") related to its business as such for its Colorado offices. Accordingly, MCL willfully violated, and Flater caused MCL's violation of, Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder.[2]

Respondents

3. MCL Financial Group, Inc. is a registered broker-dealer (File No. 8-49325) based in Littleton, Colorado, and a wholly-owned subsidiary of MCL Holding, Inc.

4. Gary L. Flater, age 49, resides in Littleton, Colorado. Flater is the CEO and president of MCL and 50% owner of MCL through his ownership in MCL Holding, Inc. Flater currently holds Series 3, 7, 24, 27, 63, and 65 licenses. In 1993, the NASD censured and fined Flater $3,500 for violations regarding net capital requirements. In 1997, the North Dakota Securities Commissioner ordered Flater and other respondents to pay $80,000 in restitution for

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

[2] "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

selling securities without a valid securities registration in the state, for making false statements in connection with sales of securities, and for his lack of cooperation in the state's investigation.

Other Relevant Parties

5. Michael B. Upton[3] age 60, resides in Santa Ana, California. Upton worked at MCL as a registered representative from July 2003 until his retirement in February 2006. Upton holds Series 6, 7, 22, 63, and 65 licenses. In 1999, the NASD censured Upton and assessed a $5,000 fine against him for using, without his supervisor's approval, marketing materials containing false and misleading claims in a private placement of securities.

6. Triple Net Properties, LLC is a privately-held company based in Santa Ana, California. It is the promoter and property manager (through its subsidiary) of over 100 companies. MCL sells securities sponsored by Triple Net.

7. G REIT, Inc. is a real estate investment trust promoted and managed by Triple Net. From 2002 to 2004, G REIT conducted two public offerings of common stock through a Form S-11 registration statement, raising $470 million. G REIT is a reporting company; however, its shares are not traded on an exchange or through an over-the-counter market. MCL sold shares of G REIT to its retail customers. G REIT is currently in the process of liquidation.

8. NNN 2003 Value Fund, LLC was formed as a vehicle to invest in commercial real estate. In 2003 and 2004, the Value Fund conducted a private placement offering of its units, raising $50 million. The Value Fund is a reporting company; however, its shares are not traded on an exchange or through an over-the-counter market. MCL sold shares of Value Fund to its retail customers.

Facts

Background

9. In July 2003, MCL contracted with Upton to open MCL's Santa Ana office. Flater supervised Upton and the Santa Ana office from approximately 1,000 miles away in Littleton, Colorado. Flater was responsible for the day-to-day supervision of Upton. Further, Flater knew that in 1999, Upton had been censured and fined $5,000 by the NASD for providing to customers sales materials in connection with a private placement of securities that made exaggerated and unwarranted claims and were not approved by a principal of the broker-dealer.

10. From August 2003 through March 2005, MCL and Upton sold securities in Triple Net-sponsored offerings, including G REIT, the Value Fund, and 25 other limited liability companies. During 2004, Upton was in the top 10% of all registered representatives at MCL

[3] The Commission is filing an injunctive action against Upton and an administrative proceeding against him.

selling G REIT's securities, as measured by gross sales. In 2003 and 2004, Upton was the top selling registered representative of the Value Fund's securities.

Upton's Violations of the Federal Securities Laws

11. In connection with the Triple Net related offerings, Upton violated the antifraud provisions of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by making materially false and misleading statements to investors.

12. In March and April 2004, Upton sent letters to hundreds of prospective investors that misrepresented that the G REIT shares would soon be publicly traded. These letters stated, in part:

- The Board of Directors [of G REIT] plans [to list G REIT's shares on a national securities exchange] soon thereafter. . . . The attach[ed newspaper article] supports that similar IPOs have enjoyed a 30% 'pop.'

- "I sent you a notice that G REIT is *closing* to new funds on April 30, 2004 to prepare for [listing on an exchange] later this year . . . I gave this opportunity my highest recommendation . . . It is rare that individual investors get a shot at pre-[exchange listed] shares." (emphasis in original)
- I give G REIT my highest recommendation . . . with the lowest real estate risk and, after the [exchange listing], liquidity."

Upton made these fraudulent statements even though he knew from G REIT's prospectus, and from having been specifically advised by G REIT's officers, that it was uncertain if or when G REIT shares would become publicly traded. Upton never provided the letters to Flater for his review and approval. Nor did Flater seek to review Upton's correspondence file.

13. From August 2003 through April 2004, Upton sent letters to up to a thousand prospective investors that misrepresented the risks of an investment in G REIT and Value Fund securities. These letters stated, in part:

- Whether for an IRA or conservative, hard-asset investment for both income and growth, I know of nothing better.

- Risk of '3' . . . on a scale of 1 = low to 10 = high.

- On a risk scale from 1 (low) to 10 (high) G REIT is viewed as being a '3'.

- GREIT IS IDEAL FOR RETIREMENT PLANS. It is also attractive for investors looking for low-risk [investments]. (emphasis in original)

- GREIT IS IDEAL FOR IRAS, ETC. (emphasis in original)

- I give GREIT my highest recommendation . . . with the lowest real estate risk.
- On a scale of 1 (low risk)-to-10, I regard . . . the Value Fund a '4'.
- Risk of '4' = Value Fund, LLC.

Upton made these fraudulent statements despite knowing from G REIT's prospectus and the Value Fund's private placement memorandum that G REIT and Value Fund were risky investments. Upton never provided the letters to Flater for his review and approval. Nor did Flater review or approve the letters before they were sent to the customers.

14. From August 2003 through March 2005, Upton failed to disclose to investors that he would receive an additional .8% override commission on sales in the G REIT offering, Value Fund offering, and 25 other Triple Net sponsored offerings. As a result, Upton received $287,496 in undisclosed commissions in connection with 27 securities offerings sponsored by Triple Net.

MCL's and Flater's Supervision of Upton

15. Flater, as MCL's CEO and President, was responsible for ensuring that MCL established supervisory procedures and a system for applying such procedures that reasonably could detect and prevent violations of the federal securities laws. Flater did not delegate the responsibility for establishing such procedures and system; rather, he retained that authority.

16. During the relevant period, MCL and Flater had established a written supervisory procedure that required Flater to review and approve any sales materials or correspondence to more than 25 addressees before the sales materials were used or the correspondence was sent to investors. MCL and Flater, however, had not established a reasonable system to implement this procedure. Moreover, despite knowing that Upton had been previously sanctioned for sending false and misleading sales materials that had not been approved by a supervisor, MCL and Flater did not establish special supervisory procedures and systems to monitor Upton's preparation and distribution of sales materials and correspondence.

17. Flater also failed to discharge his supervisory duties in that he failed to follow the firm procedure that did exist; he never requested that Upton provide him with Upton's correspondence file for his review. Flater knew that Upton's correspondence file was readily accessible at MCL's Santa Ana office. Additionally, Flater spent very little time in the Santa Ana office on supervisory matters and, in his absence, improperly delegated to Upton supervision of all registered representatives at the office, including supervision of Upton himself.

18. Flater also knew that Upton was receiving additional and undisclosed compensation. Yet, Flater never investigated whether Upton was otherwise disclosing the override commissions to his customers.

19. Flater also failed to respond adequately to "red flags" or indications of irregularities. Flater reviewed and approved correspondence sent by other Santa Ana office

registered representatives. Yet, Flater never questioned Upton whether he was sending correspondence or why Upton had not submitted it for his review.

Failure to Preserve E-mails

20. MCL's policy requires that it maintain copies of inter-office communications, including e-mails, for a period of three years. Until August 2004, MCL did not maintain copies of the majority of its e-mails related to its business as such for the Colorado offices. Flater was aware that MCL was required to maintain copies of all e-mails related to its business as such and, as MCL's President and CEO, was primarily responsible for ensuring compliance with the federal securities laws.

Legal Discussion

21. Sections 15(b)(4) and 15(b)(6) of the Exchange Act authorize the Commission to impose sanctions on broker-dealers and their supervisory personnel who fail reasonably to supervise with a view to preventing violations of the federal securities laws by a person subject to their supervision. A defense exists under Sections 15(b)(4) and 15(b)(6) of the Exchange Act, which precludes a finding of failing reasonably to supervise if (1) procedures, and a system for applying such procedures, have been established that would be reasonably expected to prevent and detect, insofar as practicable, violations by such other persons; and (2) the supervisor has reasonably discharged his or her duties without reasonable cause to believe that the system and procedures were not being complied with.

22. Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder require every broker-dealer to preserve, for a period of not less than three years, copies of all communications relating to its business as such. Rule 17a-4 is not by its terms limited to physical documents. The Commission has stated that electronic mail communications fall within the purview of Rule 17a-4 and that for the purposes of Rule 17a-4, "the content of the electronic communication is determinative" as to whether that communication is required to be retained and accessible.

23. As a result of the conduct described above, MCL and Flater failed reasonably to supervise Upton with a view to detecting and/or preventing Upton's violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

24. As a result of the conduct described above, MCL willfully violated, and Flater caused MCL's violation of, Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder.

Undertakings

25. MCL has undertaken to retain an Independent Consultant as follows:

a. MCL shall retain, within 30 days of the date of entry of this Order, at its expense, the services of an Independent Consultant not unacceptable to the staff of the Commission to conduct a review of MCL's supervisory, compliance, and other policies and procedures designed to detect and prevent violations of the federal securities laws related to (1) sales material; (2) correspondence to customers; (3) payments of undisclosed compensation to registered representatives; and (4) preservation of e-mail. MCL shall cooperate fully with the Independent Consultant and shall provide the Independent Consultant access to its files, books, records, and personnel as reasonably requested for review.

b. At the end of that review, which shall be no more than three months after the date of the issuance of this Order, MCL shall require the Independent Consultant to submit to MCL and to the Commission's Los Angeles Regional Office an Initial Report. The Initial Report shall include a description of the review performed, the conclusions reached, any recommendations deemed necessary to make the policies and procedures adequate.

c. Within 6 months of the date of this Order, MCL shall, in writing, advise the Independent Consultant and the Commission's Los Angeles Regional Office of the recommendations it is adopting. MCL may suggest an alternative procedure designed to achieve the same objective or purpose as that of the recommendation of the Independent Consultant. The Independent Consultant shall evaluate MCL's proposed alternative procedure. MCL, however, shall abide by the Independent Consultant's final recommendation.

d. Within 12 months of the date of this Order, MCL shall require that the Independent Consultant submit a final written report of its findings to it and the Commission's Los Angeles Regional Office. The Final Report shall include a description of the review performed and the conclusions and recommendations made; and a description of how MCL is implementing those recommendations.

e. MCL shall take all necessary and appropriate steps to adopt and implement all recommendations contained in the Independent Consultant's Final Report.

f. Within 15 months after the date of this Order, MCL shall submit to the Commission's Los Angeles Regional Office an affidavit setting forth the details of its efforts to implement the Independent Consultant's recommendations as set forth in the Final Report and its compliance with them.

g. For good cause shown and upon timely application by the Independent Consultant or MCL, the Commission's staff may extend any of the deadlines set forth above.

h. Require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with MCL, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Commission's Los Angeles Regional Office, enter into any employment, consultant, attorney-client, auditing or other professional relationship with MCL, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

IV.

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

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

A. MCL and Flater are hereby censured.

B. MCL shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $60,000 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies MCL as a Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Michele Wein Layne, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., 11th Fl., Los Angeles, CA 90036.

C. Flater shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $60,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Flater as a Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Michele Wein Layne, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., 11th Fl., Los Angeles, CA 90036.

D. Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Flater be, and hereby is, barred from association in a supervisory capacity with any broker or dealer for a period of three (3) years with the right to reapply for association in a supervisory capacity after three years to the appropriate self-regulatory organization, or if there is none, to the Commission.

E. Any reapplication for association by Respondent Flater 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.

F. MCL shall cease and desist from committing or causing, and Flater shall cease and desist from causing, any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder.

G. Respondent MCL shall comply with the undertakings enumerated in Paragraph 25 above.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Commissioners Atkins & Campos Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56575 / September 28, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2735 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12856

In the Matter of **Helen C. Sharkey, CPA,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

II.

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

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

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

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to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

A. Sharkey, age 34, was a certified public accountant in the State of Texas. During the relevant time period, Sharkey was a member of the deal structure group of Dynegy Inc. ("Dynegy"), and substantially participated in a Dynegy financing transaction known as Project Alpha.

B. Dynegy is an Illinois corporation headquartered in Houston, Texas. Dynegy's shares are registered with the Commission under Section 12(b) of the Securities Exchange Act of 1934 and trade on the New York Stock Exchange.

C. On September 24, 2002, the Commission entered an order by consent against Dynegy, on a neither-admit-nor-deny basis, resulting from the company's improper accounting and misleading disclosures relating to Project Alpha. The Order found that Dynegy used Project Alpha to enhance cash flow from operations by $300 million in 2001 and to achieve a related $79 million tax benefit. The Order found that Dynegy failed to disclose properly the financing transactions underlying Project Alpha, and failed to clarify that the cash flow reported on its 2001 Statement of Cash Flows derived from financing activities, not operations. *See* Order Instituting 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, Admin. File 3-10897 (Sept. 24, 2002). Dynegy further consented to pay a $3 million civil penalty. SEC v. Dynegy Inc., Civil Action H-02-3623 (S.D. Tex. Sept. 30, 2002).

D. On June 11, 2003, the Commission filed a complaint against Sharkey in SEC v. Foster et al., (Civil Action H-03-2044), in the United States District Court for the Southern District of Texas. The Commission's complaint alleged that Sharkey willfully disregarded accounting advice from Dynegy's outside auditor on Project Alpha and concealed critical transaction details from the auditor in violation of the federal securities laws.

E. On September 7, 2007, the court entered an order permanently enjoining Sharkey from future violations of Section 17(a) of the Securities Act of 1933, and Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 and Rules 10b-5 and 13b2-1 thereunder.

IV.

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

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

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

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for September 2007, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

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

CHRISTOPHER COX, CHAIRMAN

PAUL S. ATKINS, COMMISSIONER

ANNETTE L. NAZARETH, COMMISSIONER

KATHLEEN L. CASEY, COMMISSIONER

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 21, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12820

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

Respondent

1. **Plasticon International Inc.** ("Plasticon") was incorporated in Delaware in 1981 and re-domiciled in Wyoming in 2004. Its headquarters are in Lexington, Kentucky. Plasticon's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and is quoted in the Pink Sheets.

Delinquent Filings

2. Plasticon is delinquent on most of its required filings since November 1997. Plasticon did not file any of its required periodic filings between November 1997 and May 2006. On May 4, 2006, Plasticon filed a Form 10-KSB for the year ended December 31, 2004. In July 2006, Plasticon filed three Forms 10-QSB for the quarters ended March 31, 2005, June 30, 2005, and September 30, 2005. On September 8, 2006, Plasticon filed a Form 10-KSB for the year ended December 31, 2005. Since September 2006, Plasticon filed three Forms 10-QSB (for the quarters ended March 31, 2006, June 30, 2006 and September 30, 2006), but has failed to file a Form 10-KSB for the year ended December 31, 2006 or Forms 10-QSB for the quarters ended March 31, 2007 and June 30, 2007. A chart detailing Plasticon's filing history is attached as an Appendix.

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Violations

3. As a result of the foregoing, Plasticon failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder while its common stock was registered with the Commission, which require issuers with classes of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports (Forms 10-K or 10-KSB) and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months or revoke the registration of each class of securities of the Respondent registered pursuant to Section 12 of the Exchange Act.

IV.

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

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

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

This Order shall be served forthwith upon Respondent personally, or by certified, registered, or express mail, or any other means of verifiable delivery.

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

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

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Appendix

Chart of Delinquent Filings
Plasticon International Inc.

Form	Period Ended	Due Date	Date Received	Months Delinquent (Rounded Down)
10-QSB	6/30/2007	8/14/2007	Not Received	1
10-QSB	3/31/2007	5/15/2007	Not Received	4
10-KSB	12/31/2006	3/31/2007	Not Received	6
10-QSB	9/30/2006	11/14/2006	3/15/2007	4
10-QSB	6/30/2006	8/14/2006	3/6/2007	7
10-QSB	3/31/2006	5/15/2006	1/24/2007	8
10-KSB	12/31/2005	3/31/2006	9/8/2006	5
10-QSB	9/30/2005	11/14/2005	7/31/2006	9
10-QSB	6/30/2005	8/14/2005	7/27/2006	12
10-QSB	3/31/2005	5/15/2005	7/27/2006	15
10-KSB	12/31/2004	3/31/2005	5/4/2006	13
10-QSB	9/30/2004	11/14/2004	Not Received	35
10-QSB	6/30/2004	8/14/2004	Not Received	38
10-QSB	3/31/2004	5/15/2004	Not Received	41
10-KSB	12/31/2003	3/30/2004	Not Received	42
10-QSB	9/30/2003	11/14/2003	Not Received	47
10-QSB	6/30/2003	8/14/2003	Not Received	50
10-QSB	3/31/2003	5/15/2003	Not Received	53
10-KSB	12/31/2002	3/31/2003	Not Received	54
10-QSB	9/30/2002	11/14/2002	Not Received	59
10-QSB	6/30/2002	8/14/2002	Not Received	62
10-QSB	3/31/2002	5/15/2002	Not Received	65
10-KSB	12/31/2001	3/31/2002	Not Received	67
10-QSB	9/30/2001	11/14/2001	Not Received	71
10-QSB	6/30/2001	8/14/2001	Not Received	74
10-QSB	3/31/2001	5/15/2001	Not Received	77
10-KSB	12/31/2000	3/31/2001	Not Received	79
10-QSB	9/30/2000	11/14/2000	Not Received	83
10-QSB	6/30/2000	8/14/2000	Not Received	86
10-QSB	3/31/2000	5/15/2000	Not Received	89
10-KSB	12/31/1999	3/30/2000	Not Received	91
10-QSB	9/30/1999	11/14/1999	Not Received	96
10-QSB	6/30/1999	8/14/1999	Not Received	99
10-QSB	3/31/1999	5/15/1999	Not Received	102
10-KSB	12/31/1998	3/31/1999	Not Received	103
10-QSB	9/30/1998	11/14/1998	Not Received	108
10-QSB	6/30/1998	8/14/1998	Not Received	111

10-QSB	3/31/1998	5/15/1998	Not Received	114
10-KSB	12/31/1997	3/31/1998	Not Received	115
10-QSB	9/30/1997	11/14/1997	Not Received	120

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

September 21, 2007

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of **Plasticon International Inc.** ("Plasticon") because Plasticon is delinquent on most of its required filings since November 1997.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period from 9:30 a.m. EDT on September 21, 2007, through 11:59 p.m. EDT on October 4, 2007.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA-2652; File No. S7-22-07]

RIN 3235-AJ97

Interpretive Rule Under the Advisers Act Affecting Broker-Dealers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is publishing for comment an interpretive rule that would address the application of the Investment Advisers Act of 1940 to certain activities of broker-dealers. The proposal would reinstate three interpretive provisions of a rule that was vacated by a recent court opinion. The first provision would clarify that a broker-dealer that exercises investment discretion with respect to an account or charges a separate fee, or separately contracts, for advisory services provides investment advice that is not "solely incidental to" its business as a broker-dealer. The second provision would clarify that a broker-dealer does not receive special compensation within the meaning of section 202(a)(11)(C) of the Advisers Act solely because it charges a commission for discount brokerage services that is less than it charges for full-service brokerage. The third provision would clarify that a registered broker-dealer is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subjects it to the Advisers Act.

DATES: Comments should be received on or before November 2, 2007.

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-22-07 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

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

All submissions should refer to File Number S7-22-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days from 10:00 am to 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: David W. Blass, Assistant Director, or Vincent M. Meehan, Senior Counsel, at (202) 551-6787 or IArules@sec.gov, Office of

Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission" or "SEC") is proposing to amend rule 202(a)(11)-1 [17 CFR 275.202(a)(11)-1] under the Investment Advisers Act of 1940.

I. INTRODUCTION

The Investment Advisers Act of 1940 ("Advisers Act" or "Act")[1] regulates the activities of certain "investment advisers," who are defined in section 202(a)(11) of the Act as persons who receive compensation for providing advice about securities as part of a regular business. Section 202(a)(11)(C) excepts from the definition of "investment adviser" a broker or dealer "whose performance of [advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor."

In 2005, we adopted the original rule 202(a)(11)-1 under the Advisers Act, the principal purpose of which was to deem broker-dealers offering "fee-based brokerage accounts" as not subject to the Advisers Act.[2] The rule also included several interpretations of section 202(a)(11)(C). On March 30, 2007, the Court of Appeals for

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1 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, where the Advisers Act is codified.

2 See Certain Broker-Dealers Deemed Not to be Investment Advisers, Investment Advisers Act Release No. 2376 (Apr. 12, 2005) [70 FR 20424 (Apr. 19, 2005)] ("2005 Adopting Release"). Fee-based brokerage accounts are similar to traditional full-service brokerage accounts, which provide a package of services, including execution, incidental investment advice, and custody. The primary difference between the two types of accounts is that a customer in a fee-based brokerage account pays a fee based upon the amount of assets on account (an asset-based fee) and a customer in a traditional full-service brokerage account pays a commission (or a mark-up or mark-down) for each transaction.

the District of Columbia Circuit (the "Court"), in Financial Planning Association v. SEC (the "FPA decision"), vacated the original rule 202(a)(11)-1 on the grounds that the Commission did not have the authority to except broker-dealers offering fee-based brokerage accounts from the definition of "investment adviser."[3] Though the Court did not question the validity of our interpretive positions, it vacated the entire rule, leaving our interpretations potentially in doubt.

We have received requests from broker-dealers that we clarify the status of our interpretive positions.[4] Because of the significance of the interpretations, and in order to provide the public with an opportunity for meaningful comment on them in light of the FPA decision, we are re-proposing the interpretive positions.[5] Proposed rule 202(a)(11)-1 would clarify that (i) a broker-dealer provides investment advice that is not "solely incidental to" the conduct of its business as a broker-dealer if it exercises investment discretion (other than on a temporary or limited basis) with respect to an account or charges a separate fee, or separately contracts, for advisory services, (ii) a broker-dealer does not receive "special compensation" solely because it charges different rates for its full-service brokerage services and discount brokerage services, and (iii) a registered

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3 482 F.3d 481 (D.C. Cir. 2007).

4 See, e.g., Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association, to Robert E. Plaze, Associate Director, Division of Investment Management and Catherine McGuire, Chief Counsel, Division of Market Regulation (June 27, 2007). This letter and the comment letters cited in this Release are available for viewing and downloading at http://www.sec.gov/rules/proposed/s72599.shtml.

5 As a separate part of our response to the FPA decision, we have adopted a temporary rule on an interim final basis that establishes an alternative means for investment advisers who are registered with us as broker-dealers to meet the requirements of section 206(3) of the Advisers Act when they act, directly or indirectly, in a principal capacity with respect to transactions with certain of their advisory clients. See Temporary Rule Regarding Principal Trades with Certain Advisory Clients, Investment Advisers Act Release No. 2653 (Sept. 24, 2007).

broker-dealer is an investment adviser solely with respect to accounts for which it provides services that subject it to the Advisers Act. We discuss these proposed interpretive positions below.

II. DISCUSSION

A. "Solely Incidental"

Section 202(a)(11)(C) of the Advisers Act, as discussed above, provides an exception from the Act for a broker-dealer "whose performance of [advisory services] is solely incidental to his business as a broker-dealer and who receives no special compensation therefor." This exception amounts to a recognition that broker-dealers commonly give a certain amount of advice to their customers in the course of their regular business as broker-dealers and that "it would be inappropriate to bring them within the scope of the [Advisers Act] merely because of this aspect of their business."[6]

In the 2005 Proposing Release, we explained our understanding that investment advice is "solely incidental to" the conduct of a broker-dealer's business within the meaning of section 202(a)(11)(C) when the advisory services rendered to an account are in connection with and reasonably related to the brokerage services provided to that account.[7] We further explained that our understanding is consistent with the legislative history of the Advisers Act, which indicates Congress' intent to exclude broker-dealers providing advice as part of traditional brokerage services. We also explained that it is consistent with the Commission's contemporaneous construction of the Advisers Act as

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6 Opinion of General Counsel Relating to Section 202(a)(11)(C) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 2 (Oct. 28, 1940) [11 FR 10996 (Sept. 27, 1946)] ("Advisers Act Release No. 2").

7 Certain Broker-Dealers Deemed Not to be Investment Advisers, Investment Advisers Act Release No. 2340 (Jan. 6, 2005) [70 FR 2716 (Jan. 14, 2005)] ("2005 Proposing Release").

excepting broker-dealers whose investment advice is given "solely as an incident of their regular business."[8]

Many commenters responding to the 2005 Proposing Release urged us to clarify that certain practices are not solely incidental to brokerage services. Proposed rule 202(a)(11)-1(a) would re-codify two of the interpretations we announced in 2005 regarding activity that is not "solely incidental" to brokerage services for purposes of section 202(a)(11)(C). The situations addressed by these interpretations are not the only ones in which a broker-dealer provides advice that is not solely incidental to its business as a broker-dealer.[9] Commenters are invited to suggest other situations that should be addressed by the rule.

1. Separate Contract or Fee for Advisory Services. Proposed rule 202(a)(11)-1(a)(1) would provide that a broker-dealer that separately contracts with a customer for, or separately charges a fee for, investment advisory services cannot be considered to be providing advice that is solely incidental to its brokerage. We view a separate contract specifically providing for the provision of investment advisory services to reflect a recognition that the advisory services are provided independent of brokerage services and, therefore, cannot be considered solely incidental to the brokerage services.[10] Similarly, we have long held the view that when a broker-dealer charges its customers a separate fee for investment advice, it clearly is providing advisory services and is subject

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8 Id.

9 We have removed the text "(among other things, and without limitation)" from the introductory paragraph to proposed rule 202(a)(11)-1(a), though we included that text in 2005. We believe it is clear that the rule as we propose it today does not address all the situations in which a broker-dealer can provide advice that is not "solely incidental" to its business as a broker-dealer for purposes of section 202(a)(11)(C).

10 2005 Adopting Release, supra note 2 at n.145, and accompanying text.

to the Advisers Act.[11] In light of the FPA decision, brokerage firms and other interested parties may be unsure about whether we continue to hold these views. In order to provide certainty to those parties, the proposed rule would codify our interpretations.

We request comment on our interpretation. In the 2005 Adopting Release, we explained our understanding that many broker-dealers already use the payment of a separate fee as a bright line test to distinguish their brokerage activities from their advisory activities and we have received no information since 2005 that would change our understanding. Are we correct? Do broker-dealers also already consider advisory services that are the subject of a separate contract not to be solely incidental to the brokerage services they provide? Commenters are invited to explain to us any situation in which a broker-dealer could charge a separate fee for, or separately contract for, advisory services in a manner that, consistent with the intent of the Advisers Act, is "solely incidental" to the brokerage services provided. For example, could a broker-dealer separately contract for advisory services, but receive no "special compensation" therefore, for purposes of section 202(a)(11)(C) of the Act?

2. Discretionary Investment Advice. We have long acknowledged that a broker-dealer's exercise of investment discretion over customer accounts raises serious questions about whether those accounts must be treated as subject to the Advisers Act –

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11 Final Extension of Temporary Rules, Investment Advisers Act Release No. 626 (Apr. 27, 1978) [43 FR 19224 (May 4, 1978)] ("Advisers Act Release No. 626"). See also Advisers Act Release No. 2, supra note 6 ("a broker or dealer who is specially compensated for the rendition of advice should be considered an investment adviser and not be excluded from the purview of the [Advisers] Act merely because he is also engaged in effecting market transactions in securities").

even where no special compensation is received.[12] In 2005, we adopted, and today we are re-proposing, a rule that would clarify that any account over which a broker-dealer exercises investment discretion is subject to the Advisers Act. Specifically, rule 202(a)(11)-1(a) would clarify that discretionary investment advice is not "solely incidental to" the business of a broker-dealer within the meaning of section 202(a)(11)(C) and, accordingly, brokers and dealers are not excepted from the Act for any accounts over which they exercise investment discretion as that term is defined in section 3(a)(35) of the Exchange Act (except that investment discretion granted by a customer on a temporary or limited basis is excluded).[13]

We believe that a broker-dealer's authority to effect a trade without first consulting a customer is qualitatively distinct from simply providing advice as part of a package of brokerage services. When a broker-dealer exercises investment discretion, it is not only the source of investment advice, it also has the authority to make the investment decision relating to the purchase or sale of securities on behalf of its client. This, in our view, warrants the protection of the Advisers Act because of the "special

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[12] Advisers Act Release No. 626, supra note 11 (brokerage relationships "which include discretionary authority to act on a client's behalf have many of the characteristics of the relationships to which the protections of the Advisers Act are important.").

[13] We would view a broker-dealer's discretion to be temporary or limited within the meaning of rule 202(a)(11)-1(d) when the broker-dealer is given discretion: (i) as to the price at which or the time to execute an order given by a customer for the purchase or sale of a definite amount or quantity of a specified security; (ii) on an isolated or infrequent basis, to purchase or sell a security or type of security when a customer is unavailable for a limited period of time not to exceed a few months; (iii) as to cash management, such as to exchange a position in a money market fund for another money market fund or cash equivalent; (iv) to purchase or sell securities to satisfy margin requirements; (v) to sell specific bonds and purchase similar bonds in order to permit a customer to take a tax loss on the original position; (vi) to purchase a bond with a specified credit rating and maturity; and (vii) to purchase or sell a security or type of security limited by specific parameters established by the customer.

trust and confidence inherent" in such a relationship.[14] Most commenters who addressed this aspect of our 2005 proposal, including those representing investors, advisers, and broker-dealers, generally agreed with us.

Under the proposed rule, the exception provided by section 202(a)(11)(C) of the Act is unavailable for any account over which a broker-dealer exercises investment discretion, regardless of the form of compensation and without regard to how the broker-dealer handles other accounts. We believe our interpretation is appropriate for several reasons.[15] First, we believe it would apply the Advisers Act to the sort of relationship with a broker-dealer that the Act was intended to reach. Second, we believe the proposed rule is consistent with the interpretation that a broker-dealer is an investment adviser only with respect to those accounts for which the broker-dealer provides services or receives compensation that subject the broker-dealer to the Advisers Act. Finally, we believe the proposed rule would provide a workable, bright-line test for the availability of the section 202(a)(11)(C) exception.

We request comment on our proposed interpretive provision. Do commenters agree with us that it addresses the sort of relationship that the Advisers Act should reach? One commenter to our 2005 proposal asserted it does not.[16] This commenter argued that Congress, when it adopted the Advisers Act, must have been aware that broker-dealers

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14 See Amendment and Extension of Temporary Exemption From the Investment Advisers Act for Certain Brokers and Dealers, Investment Advisers Act Release No. 471 (Aug. 20, 1975) [40 FR 38156 (Aug. 27, 1975)].

15 2005 Adopting Release, supra note 2, at n.165 and accompanying text. In that release, we described our position as a change to the staff's prior approach under which a discretionary account is subject to the Act only if the broker-dealer has enough other discretionary accounts to trigger the Act. For the reasons discussed in this Release and in the 2005 Adopting Release, we believe that the interpretation we are proposing today and adopted in 2005 better effectuates the purposes of the Act.

16 Comment Letter of Morgan, Lewis & Bockius LLP (Feb. 7, 2005).

exercised discretionary authority and, by not expressly stating that brokers offering such accounts were subject to the Act, Congress indicated its intent to except such broker-dealers from the Act. We disagree. As we explained in 2005, the Advisers Act does not address directly whether a broker-dealer exercising investment discretion over a commission-based account must comply with the Act. The Act applies unless the advisory services are "solely incidental to" the broker-dealer's business and no "special compensation" is received. We remain unable to conclude that in 1940 Congress would have understood investment discretion to be part of the traditional package of services broker-dealers offered for commissions. We are aware of nothing in the legislative history of section 202(a)(11)(C) (or of the Act as a whole) or in the brokerage practices in 1940 that would preclude our interpretation of that section as being unavailable for all accounts over which broker-dealers exercise investment discretion. Do commenters agree?

We also are interested in understanding the impact on investors of these distinctions. We also request comment on our reference in the proposed rule to the definition of "investment discretion" in section 3(a)(35) of the Exchange Act. Is a different definition more appropriate? If so, what definition should we use? Are we correct in excluding investment discretion given on a temporary or limited basis? Have we correctly identified the circumstances in which a broker-dealer exercises temporary or limited discretion?

3. Financial Planning. The rule we adopted in 2005 also contained a provision stating that when a broker-dealer provides advice as part of a financial plan or in connection with providing financial planning services, a broker-dealer provides advice

that is not solely incidental if it (i) holds itself out to the public as a financial planner or as providing financial planning services, (ii) delivers to its customer a financial plan, or (iii) represents to the customer that the advice is provided as part of a financial plan or financial planning services.[17]

We have decided not to propose this provision as part of this rule, which many financial services firms found difficult to apply.[18] Instead, we plan to consider issues relating to financial planning in light of the results of a study we commissioned by the RAND Corporation ("RAND Study") comparing the levels of protection afforded customers of broker-dealers and investment advisers under the federal securities laws. The RAND Study is expected to be delivered to us no later than December 2007, several months ahead of schedule.[19]

B. Full-Service and Discount Brokerage Programs

As part of our 2005 rulemaking, we adopted an interpretive provision which clarified that a broker-dealer will not be considered to have received "special compensation" for purposes of section 202(a)(11)(C) of the Advisers Act (and therefore will not be subject to the Act) solely because the broker-dealer charges a commission, mark-up, mark-down or similar fee for brokerage services that is greater or less than one

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17 2005 Adopting Release, supra note 2, at Section III(E).

18 Our staff attempted to address some of the interpretive issues that were raised by this provision in a staff interpretive letter. Securities Industry Association, SEC Staff Letter (Dec. 16, 2005), available at http://www.sec.gov/divisions/investment/guidance.shtml. That letter is terminated.

19 See Commission Seeks Time for Investors and Brokers to Respond to Court Decision on Fee-Based Accounts, SEC Press Release No. 2007-95 (May 14, 2007). The results of the RAND Study are expected to provide an important empirical foundation for the Commission to consider what action to take to improve the way investment advisers and broker-dealers provide financial services to customers. One option that will be available to the Commission will be making the RAND Study results available to the public and seeking comments on them.

it charges another customer.[20] We are re-proposing that interpretive position today as proposed rule 202(a)(11)-1(b).[21]

This interpretive position reflects the longstanding view that, with respect to brokerage commissions or other transaction-based compensation, broker-dealers receive "special compensation" where there is a clearly definable charge for investment advice.[22] But, if a firm negotiates different fees with its customers for similar transactions, the Commission would not conclude that the customer being charged the higher fee is paying "special compensation" for investment advice based solely on differences in charges, because whether the pricing difference is based on the presence or absence of investment advice is "too hypothetical."[23] Similarly, if, for example, a broker-dealer had a general fee schedule for full service brokerage that included access to brokerage personnel, and

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20 Discount brokerage programs, including electronic trading programs, give customers who do not want or need all the services that traditionally are provided in a full-service brokerage account the ability to trade securities at a reduced commission rate. Electronic trading programs provide customers the ability to trade on-line, typically without the assistance of a broker-dealer's registered representative. Customers trading electronically may devise their own investment or trading strategies, or may seek advice separately from investment advisers.

21 We have, however, modified the text of the rule to clarify that it is an interpretation of the phrase "special compensation." In addition, in the 2005 rulemaking, we stated that the interpretive position was necessary to supersede past staff interpretations that would lead to a full-service broker-dealer being subject to the Advisers Act "with respect to accounts for which it provides advice incidental to its brokerage business merely because it offers electronic trading or other forms of discount brokerage." 2005 Proposing Release at n.88 and accompanying text. Having revisited those past staff interpretations, we conclude that they do not necessarily lead to the conclusion that a broker-dealer's full-service accounts are advisory accounts subject to the Advisers Act merely because the broker-dealer also offers some form of discount brokerage.

22 See Advisers Act Release No. 626 supra note 11. As the Commission's general counsel opined in a 1940 letter responding to questions about "special compensation," where the only difference in the services provided to two brokerage customers is that one receives advice and the other does not, and the firm always charges a higher amount to the customer that receives the advice, the customer paying the higher transaction amount is paying "special compensation." Advisers Act Release No. 2, supra note 6.

23 This view is consistent with the staff position announced in Advisers Act Release No. 626, supra note 11.

had a separate fee schedule for automated transactions using an Internet Web site, we would not, absent other factors, view the difference as "special compensation." As one commenter to our 2005 proposal noted, electronic brokerage programs offer "lower expenses and less overhead, [and it is] entirely appropriate, and necessarily competitive, for firms to have reduced their fees for such services, and this reduction is obviously in clients' best interests."[24]

The Commission would not look outside the fee structure of a given firm to determine whether special compensation exists. That is, just because a "discount" firm offered lower rates than a "full-service" firm, we would not consider the "full-service" firm's charges "special compensation."[25] We request comment on this interpretation. Do commenters support it? Should we consider any modifications and, if so, which ones?

C. Dual Registrants

Finally, we adopted in 2005, and are re-proposing today, a rule providing that a broker-dealer that is registered under both the Exchange Act and the Advisers Act is an investment adviser solely with respect to those accounts for which it provides advice or receives compensation that subject the broker-dealer to the Advisers Act.[26] We received few comments regarding this provision of the original rule, and we are proposing it as adopted. The provision would codify a long-standing interpretation of the Act that permits a broker-dealer also registered under the Act to distinguish its brokerage customers from its advisory clients.[27]

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24 See Comment Letter of Merrill, Lynch, Pierce, Fenner & Smith (Feb. 7, 2005), at p. 7.

25 Id.

26 Proposed rule 202(a)(11)-1(c).

27 2005 Adopting Release, supra note 2. See also Advisers Act Release No. 626, supra note 11.

III. GENERAL REQUEST FOR COMMENT

The Commission is proposing the interpretive provisions described above and we welcome your comments. We solicit comment, both specific and general, on each component of the proposals. We request and encourage any interested person to submit comments regarding:

- the proposals that are the subject of this release;
- additional or different revisions; and
- other matters that may have an effect on the proposals contained in this release.

Comment is also solicited from the point of view of broker-dealers and investment advisers, their customers and clients, other regulatory bodies (such as state securities regulators), and other interested persons. Any person wishing to submit written comments on any aspect of the proposal is requested to do so.

IV. COST-BENEFIT ANALYSIS

The Commission is sensitive to the costs and benefits imposed by its rules, and is considering the costs and benefits of proposed rule 202(a)(11)-1. Proposed rule 202(a)(11)-1 would clarify that if a broker-dealer exercises investment discretion over customer accounts or contracts with a customer for, or charges a separate fee for, advisory services it is not providing advice that is "solely incidental" to its business as a broker-dealer. The proposed rule also would clarify that a broker-dealer does not receive "special compensation" solely because it charges a commission rate to one customer that is greater or less than one it charges another customer. Finally, proposed rule 202(a)(11)-1 would clarify that broker-dealers that also are registered as investment advisers are subject to the Advisers Act solely with respect to accounts for which they provide services or receive compensation that subject them to the Act.

As discussed above, in 2005 we adopted the original rule 202(a)(11)-1 under the Advisers Act. The original rule included, among other things, the interpretive rules we are proposing today. On March 30, 2007, the Court vacated original rule 202(a)(11)-1, though the Court did not question the validity of our interpretive positions. The rules we are proposing today are substantially identical to those interpretive positions. As requested by the Commission, the Court has stayed the issuance of its mandate until October 1, 2007, and thus the interpretive positions contained in original rule 202(a)(11)-1 remain in effect. Accordingly, we would expect that advisers' conduct would have conformed to the interpretive positions contained in original rule 202(a)(11)-1 and therefore the proposed rules, if adopted, would have no effect on advisers' conduct.

The principal benefit of the proposed rule would be to clarify the validity of these interpretations in light of the FPA decision.[28] We believe that broker-dealers that currently rely on the interpretation that a broker-dealer would not be deemed to be an investment adviser solely because the broker-dealer charges a commission, mark-up, mark-down, or similar fee for brokerage services that is greater or less than one it charges another customer would benefit because it will be clear that they can continue to offer the same services under the same regulatory regime. Similarly, we believe that broker-dealers relying on the interpretation that permits dually-registered broker-dealers to distinguish their brokerage accounts from their advisory accounts would benefit because

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28 The Commission previously solicited comment on the benefits of these interpretations. 2005 Proposing Release, supra note 7. See also 2005 Adopting Release, supra note 2, for a discussion of the benefits of each of these proposed interpretations.

it will be clear that they can continue to make these distinctions among their accounts.

We do not believe that the proposed rule would require broker-dealers or investment advisers to incur new or additional costs.[29] As noted, proposed rule 202(a)(11)-1 would re-codify substantially identical interpretations of section 202(a)(11)(C) that were contained in the rule vacated by the FPA decision. Prior to that decision, broker-dealers operated with the understanding that contracting with a customer for, or charging a separate fee for, advisory services or exercising investment discretion (other than on a temporary or limited basis) would not be considered "solely incidental" to the brokerage services they provide for purposes of section 202(a)(11)(C) of the Advisers Act. Similarly, broker-dealers operated full-service and discount brokerage programs relying on the interpretation that they were not subject to the Act solely because they offered different rate structures for those services. Furthermore, dually-registered broker-dealers already distinguish their brokerage customers from their advisory clients in reliance on our previous interpretation contained in the vacated rule. We, therefore, believe the proposed rule would not change existing obligations or relationships. Accordingly, we do not believe that broker-dealers or investment advisers would need to take steps or alter their business practices in such a way that would require them to incur new or additional costs as a result of the adoption of the proposed rule.

We request comment on the assumptions on which we base our preliminary conclusion that broker-dealers and investment advisers would not incur new or additional costs if we determined to adopt the rule as proposed. We encourage commenters to

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29 The Commission previously solicited comment on the costs of these interpretations. 2005 Proposing Release, supra note 7. See also 2005 Adopting Release, supra note 2, for a discussion of the costs associated with each of these proposed interpretations.

discuss any costs and benefits that we did not consider in our discussion above. We request commenters to provide analysis and empirical data to support their statements regarding any costs or benefits associated with proposed rule 202(a)(11)-1.

V. PAPERWORK REDUCTION ACT

Proposed rule 202(a)(11)-1 would not impose any new "collections of information" within the meaning of the Paperwork Reduction Act of 1995.[30] The proposed rule would not create any new filing, reporting, recordkeeping, or disclosure reporting requirements for broker-dealers or investment advisers. The proposed rule would re-codify three interpretive provisions. First, the rule would clarify that a broker-dealer that exercises investment discretion with respect to an account or contracts with a customer for, or charges a separate fee for, advisory services provides investment advice that is not "solely incidental to" its business as a broker-dealer. Second, the rule would clarify that a broker-dealer does not receive "special compensation" solely because it charges a commission rate to one customer that is greater or less than one it charges another customer. Third, the rule would clarify that a registered broker-dealer is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subject it to the Advisers Act. We believe the proposed rule contains no new "collections of information" under the Paperwork Reduction Act that requires the approval of the Office of Management and Budget under 44 U.S.C. 3501. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

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[30] 44 U.S.C. 3501 to 3520.

In our 2005 releases, we estimated that the interpretive provisions we adopted then in the original rule 202(a)(11)-1, and which we are re-proposing today as revised rule 202(a)(11)-1, would have the effect of requiring certain broker-dealers that contract with customers for, or charge a separate fee for, advisory services or provide discretionary brokerage to register under the Advisers Act.[31] We estimated that the rule, which we are proposing today as rule 202(a)(11)-1(a), therefore increased the number of respondents under several existing collections of information, and, correspondingly, increased the annual aggregate burden under those existing collections of information.[32] Accordingly, we submitted to the Office of Management and Budget ("OMB"), in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, and the OMB approved, amending these collections of information for which we estimated the annual aggregate burden likely increased as a result of the 2005 adoption of rule 202(a)(11)-1. The titles of the affected collections of information are: "Form ADV," "Form ADV-W and Rule 203-2," "Rule 203-3 and Form ADV-H," "Form ADV-NR," "Rule 204-2," "Rule 204-3," "Rule 204A-1," "Rule 206(4)-3," "Rule 206(4)-4," "Rule 206(4)-6," and "Rule 206(4)-7," all under the Advisers Act. The approved collections of information numbers appear under OMB control numbers 3235-0049, 3235-0313, 3235-0538, 3235-0240, 3235-0278, 3235-0047, 3235-0596, 3235-0242, 3235-0345, 3235-0571, and 3235-0585, respectively.

We have determined not to modify these burden estimates because we continue to believe they were appropriate and, with respect to the proposals in this release, that there

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31 See 2005 Proposing Release, supra note 7, at Section VII; 2005 Adopting Release, supra note 2, at Section VIII.

32 In 2005, as today, we estimated that the provisions now contained in proposed rule 202(a)(11)-1(b) and 202(a)(11)-1(c) did not contain any collections of information within the meaning of the Paperwork Reduction Act.

is no additional paperwork burden.

We request comment on whether our assumption that there is no additional paperwork burden is correct.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

Section 3(a) of the Regulatory Flexibility Act requires the Commission to undertake an Initial Regulatory Flexibility Analysis of the proposed rule on small entities unless the Commission certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.[33] Pursuant to section 605(b) of the Regulatory Flexibility Act, the Commission hereby certifies that proposed rule 202(a)(11)-1 would not, if adopted, have a significant impact on a substantial number of small entities.[34]

Proposed rule 202(a)(11)-1 would re-codify three interpretive provisions. First, the rule would clarify that a broker-dealer that exercises investment discretion with respect to an account or contracts with customers for, or charges a separate fee for, advisory services provides investment advice that is not "solely incidental to" its business as a broker-dealer. Second, the rule would clarify that a broker-dealer does not receive "special compensation" solely because it charges a commission rate to one customer that is greater or less than one it charges another customer. Third, the rule would clarify that a registered broker-dealer is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subject it to the Advisers Act. Proposed rule 202(a)(11)-1 would re-codify substantially identical interpretations of section 202(a)(11)(C) of the Advisers Act that we adopted in 2005. Therefore, we do not

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33 5 U.S.C. 603(a).

34 5 U.S.C. 605(b).

believe that the proposed rule would have an economic impact on broker-dealers or investment advisers, regardless of whether these broker-dealers or investment advisers are small entities, because these entities would likely have conformed to the interpretive positions previously adopted. Accordingly, the Commission certifies that proposed rule 202(a)(11)-1 would not have a significant economic impact on a substantial number of small entities.

The Commission encourages written comments regarding this certification. We request that commenters describe the nature of any impact on small businesses and provide empirical data to support the extent of the impact.

VII. STATUTORY AUTHORITY

The Commission is proposing to amend Rule 202(a)(11)-1 pursuant to section 211(a) of the Advisers Act.

TEXT OF RULE

List of Subjects in 17 CFR Part 275

Investment advisers, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 275 -- RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The general authority citation for Part 275 is revised to read as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

2. Section 275.202(a)(11)-1 is revised to read as follows:

§ 275.202(a)(11)-1 Certain broker-dealers.

(a) Solely incidental. A broker or dealer provides advice that is not solely incidental to the conduct of its business as a broker or dealer within the meaning of section 202(a)(11)(C) of the Advisers Act (15 U.S.C. 80b-2(a)(11)(C)) if the broker or dealer:

(1) Charges a separate fee, or separately contracts, for advisory services; or

(2) Exercises investment discretion (as that term is defined in section 3(a)(35) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78c(a)(35))), except investment discretion granted by a customer on a temporary or limited basis, over such account.

(b) Special compensation. A broker or dealer registered pursuant to section 15 of the Exchange Act (15 U.S.C. 78o) does not receive special compensation within the meaning of section 202(a)(11)(C) of the Advisers Act solely because the broker or dealer charges a commission, mark-up, mark-down, or similar fee for brokerage services that is greater than or less than one it charges another customer.

(c) Special rule. A broker or dealer registered with the Commission under Section 15 of the Exchange Act is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subject the broker-dealer to the Advisers Act.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

September 24, 2007

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-56502; File No. S7-23-06

RIN 3235-AJ77

Exemptions for Banks Under Section 3(a)(5) of the Securities Exchange Act of 1934 and Related Rules

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting rules and rule amendments regarding exemptions from the definitions of "broker" and "dealer" under the Securities Exchange Act of 1934 ("Exchange Act") for banks' securities activities. In particular, the Commission is adopting a conditional exemption that will allow banks to effect riskless principal transactions with non-U.S. persons pursuant to Regulation S under the Securities Act of 1933 ("Securities Act"). The Commission also is amending and redesignating an existing exemption from the definition of "dealer" for banks' securities lending activities as a conduit lender. In addition, the Commission is conforming a rule that grants a limited exemption from U.S. broker-dealer registration for foreign broker-dealers to the amended definitions of "broker" and "dealer" under the Exchange Act. Finally, the Commission is withdrawing three rules under the Exchange Act: a rule defining the term "bank" for purposes of the Exchange Act's definitions of "broker" and "dealer," due to judicial invalidation; a time-limited exemption for banks' securities activities, due to the passage of time; and an exemption from the definitions of "broker" and "dealer" for savings associations and savings banks, as the exemption no longer necessary in light of subsequent legislation.

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Effective Date: The final rules are effective on [INSERT 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

For Further Information Contact: Catherine McGuire, Chief Counsel, Linda Stamp Sundberg, Senior Special Counsel, Joshua Kans, Senior Special Counsel, John Fahey, Branch Chief, or Elizabeth K. MacDonald, Special Counsel, at (202) 551-5550, Office of Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

Supplementary Information: The Commission is adopting new Rules 3a5-2 [17 CFR 240.3a5-2] and 3a5-3 [17 CFR 3a5-3], amending Rule 15a-6 [17 CFR 240.15a-6], and withdrawing Rules 3b-9 [17 CFR 240.3b-9], 15a-8 [17 CFR 240.15a-8], 15a-9 [17 CFR 240.15a-9] and 15a-11 [17 CFR 15a-11] under the Exchange Act.

Table of Contents:

I. Introduction and Background

The rules and rule amendments discussed below complement Regulation R, which we are adopting jointly with the Board of Governors of the Federal Reserve System ("Board").[1] These rules and rule amendments in large part reflect changes that the Gramm-Leach-Bliley Act ("GLBA") made to the Exchange Act with respect to the status of banks as "dealers."[2]

As discussed below, we are adopting Exchange Act Rule 3a5-2 to provide a conditional exemption from the definition of "dealer" to allow banks to engage in certain transactions involving securities exempted from registration by Regulation S.[3] We also are adopting a clarifying amendment to Exchange Act Rule 15a-6,[4] which provides a conditional exemption from U.S. broker-dealer registration for certain foreign broker-dealers. In addition, we are redesignating, as new Exchange Act Rule 3a5-3, the dealer provisions of current Exchange Act Rule 15a-11[5] pertaining to banks' securities lending activities.

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1 Exchange Act Release No. 56501 (Sept. 24, 2007).

2 See Exchange Act Release No. 54947 (Dec. 18, 2006), 71 FR 77550 (Dec. 26, 2006) ("Proposing Release").

3 17 CFR 230.901 et seq.

4 17 CFR 240.15a-6.

5 17 CFR 240.15a-11.

Finally, we are withdrawing three rules under the Exchange Act: Rule 3b-9,[6] which defined the term "bank" for purposes of the Exchange Act definitions of "broker" and "dealer," due to judicial invalidation; Rule 15a-8,[7] which provided a time-limited exemption for banks' securities activities, due to the passage of time; and Rule 15a-9,[8] which provided an exemption from the Exchange Act definitions of "broker" and "dealer" for savings associations and savings banks, as this no longer is necessary given the passage of the Financial Services Regulatory Relief Act of 2006 ("Regulatory Relief Act").

II. Adopted Rules and Rule Amendments

A. Regulation S Transactions with Non-U.S. Persons

We are adopting Rule 3a5-2, which exempts banks from the definition of "dealer" under Section 3(a)(5) of the Exchange Act for certain principal transactions involving Regulation S securities. As with Rule 771 of Regulation R, which will permit banks to engage in certain Regulation S transactions on an agency basis without being "brokers," this rule recognizes that non-U.S. persons generally will not rely on the protections of the U.S. securities laws when purchasing Regulation S securities from U.S. banks, and that non-U.S. persons can purchase the same securities from banks located outside of the U.S.[9] Commenters generally supported the

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6 17 CFR 240.3b-9.

7 17 CFR 240.15a-8.

8 17 CFR 240.15a-9.

9 See Proposing Release, 71 FR at 77552. When we proposed an earlier version of this rule as part of Regulation B, we explained that these securities are not intended to be sold within the U.S. See Exchange Act Release No. 49879 (June 17, 2004), 69 FR 39682, 39720 (June 30, 2004) (explaining that although we generally believe that U.S. broker-dealers should be subject to the same standards of conduct when dealing with non-U.S. persons, this principle is less compelling when the foreign person has chosen to deal with a U.S. bank with respect to Regulation S securities that are designed to be sold to non-U.S. persons offshore).

proposal while suggesting certain modifications and clarifications.[10] The rule, as adopted, incorporates changes that respond to some of these comments.

The exemption will apply only to purchases and sales of "eligible securities" – securities that are not in the inventory of the bank or an affiliate, and that are not underwritten by the bank or an affiliate on a firm commitment basis (apart from securities acquired from an unaffiliated distributor).[11] In addition, this dealer exemption will apply only to Regulation S transactions that a bank makes on a "riskless principal" basis.[12] This focus will permit U.S. banks to sell, overseas, securities that foreign banks also sell, thus helping to avoid placing U.S. banks at a competitive disadvantage with respect to eligible securities, while also helping to safeguard against investor protection risks associated with unregistered entities distributing eligible securities.

The exemption is available when a bank purchases a newly-issued eligible security from an issuer or a broker-dealer and sells that security in compliance with the requirements of Rule 903 of Regulation S[13] to a purchaser who is not in the U.S.[14] The exemption also is available

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10 See Institute of Int'l Bankers Letter ("IIB Letter"); American Bankers Ass'n Letter ("ABA Letter"); The Clearing House Association Letter ("Clearing House Ass'n Letter").

11 Rule 3a5-2(b)(2) specifically defines an "eligible security" as a security that is not being sold from the inventory of the bank or an affiliate of the bank, and not being underwritten by the bank or an affiliate of the bank on a firm-commitment basis unless the bank acquired the security from an unaffiliated distributor that did not purchase the security from the bank or an affiliate of the bank.

Rule 3a5-2(b)(i) defines the term "distributor" to have the same meaning as in 17 CFR 230.902(d). That provision of Regulation S defines "distributor" to mean any underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on Regulation S.

12 Rule 3a5-2(b)(4) defines a "riskless principle transaction" as a transaction in which, after receiving an order to buy from a customer, the bank purchased the security from another person to offset a contemporaneous sale to such customer or, having received and order to sell from a customer, the bank sold the security to another person to offset a contemporaneous purchase from such customer.

13 17 CFR 230.903. Rule 903 of Regulation S provides that an offer or sale of securities by the issuer, a distributor, or an affiliate or a person acting on their behalf shall be deemed to occur outside the U.S. within the meaning of Rule 901 if the offer or sale is made in an offshore transaction, and no

when a bank purchases, from a person who is not a U.S. person under Rule 902(k) of Regulation S,[15] an eligible security after its initial sale with a reasonable belief that the eligible security was initially sold outside of the U.S. within the meaning of and in compliance with the requirements of Rule 903, and resells that security to a purchaser who is not in the U.S. or to a registered broker-dealer.[16] If that resale is made prior to any applicable distribution compliance period specified in Rules 903(b)(2) or (b)(3) of Regulation S,[17] the resale must be made in compliance with the requirements of Rule 904 of Regulation S.[18]

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directed selling efforts are made in the U.S. by the issuer, a distributor, affiliate, or person acting on their behalf. Other conditions may also apply depending on the place of incorporation and reporting status of the issuer, and the amount of U.S. market interest in the securities. (Rule 901 of Regulation S generally provides that for the purposes of Section 5 of the Securities Act, the terms "offer," "offer to sell," "sell," "sale" and "offer to buy" include offers and sales that occur within the U.S., but not those that occur outside the U.S.)

14 Rule 3a5-2(a)(1).

15 Rule 902(k) of Regulation S defines the term "U.S. person" to mean: (i) any natural person resident in the U.S.; (ii) any partnership or corporation organized or incorporated under the laws of the U.S.; (iii) any estate of which any executor or administrator is a U.S. person; (iv) any trust of which any trustee is a U.S. person; (v) any agency or branch of a foreign entity located in the U.S.; (vi) any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person; and (vii) any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the U.S., and (viii) any partnership or corporation if (A) organized or incorporated under the laws of any foreign jurisdiction, and (B) formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in Rule 501(a)) who are not natural persons, estates or trusts.

16 Rule 3a5-2(a)(2).

17 Under Rule 903 of Regulation S, Category 1 encompasses certain securities: (i) issued by a foreign issuer, for which there is no substantial U.S. market interest, (ii) that are offered and sold in an overseas directed offering, (iii) that are backed by the full faith and credit of a foreign government, or (iv) that are offered and sold to employees of the issuer or its affiliates pursuant to certain foreign employee benefit plans. Category 2 encompasses securities, not eligible for Category 1, that are equity securities of a reporting foreign issuer, or debt securities of a reporting issuer or of a non-reporting foreign issuer. Category 3 applies to all offerings of securities that do not fall within Category 1 or 2.

Rules 903(b)(2) and (b)(3) of Regulation S subject Category 2 securities and Category 3 debt securities to a 40-day distribution compliance period, and subject Category 3 equity securities to a one-year distribution compliance period.

18 Rule 904 of Regulation S provides that an offer or sale of securities by any person other than the issuer, a distributor, an affiliate (except an officer or director who is an affiliate solely by virtue of that position) or person acting on their behalf will be deemed to occur outside the U.S. within the meaning of

Finally, the exemption is available when a bank purchases, from a registered broker-dealer, an eligible security after its initial sale with a reasonable belief that the eligible security was initially sold outside of the U.S. within the meaning of and in compliance with the requirements of Rule 903, and resells that security to a purchaser who is not in the U.S.[19] This provision also requires compliance with Rule 904 if the resale is made prior to the expiration of the security's distribution compliance period.

In adopting Rule 3a5-2, we have modified the proposed rule to address concerns raised by commenters and to clarify the exemption. As revised, each section of Rule 3a5-2 specifically addresses a bank's purchase of a Regulation S security and the bank's subsequent sale or resale of the security – a structure that reflects the nature of banks' riskless principal transactions involving Regulation S securities[20] and helps Rule 3a5-2 better parallel the equivalent provisions of Rule 771 of Regulation R regarding banks' Regulation S transactions as agent.[21]

In adopting Rule 3a5-2, we have modified the proposal to provide that when the bank purchases an eligible security from a broker-dealer after the security's initial sale (for resale to a

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Rule 901 if the offer or sale are made in an offshore transaction, and no directed selling efforts are made in the U.S. by the seller, an affiliate or person acting on their behalf. Additional conditions apply in the case of resales of Category 2 or 3 securities by dealers and persons receiving selling concessions, and in the case of resales by certain affiliates of the issuer or a distributor.

19 Rule 3a5-2(a)(3).

20 Paragraph (a)(1) addresses a bank's sale of newly issued Regulation S securities, paragraph (a)(2) addresses a bank's riskless principal transaction with a customer who wants to reduce or unwind a position in a Regulation S security, and paragraph (a)(3) addresses a riskless principal transaction with a customer who wants to increase or establish a position in a Regulation S security.

21 As proposed, paragraph (a)(1) of the rule would have addressed a bank's sale of an eligible security, paragraph (a)(2) would have addressed a bank's purchase of an eligible security from a non-U.S. person, and paragraph (a)(3) would have addressed a bank's purchase of an eligible security from a broker-dealer together with the bank's subsequent resale.

One commenter requested that we clarify the relationship between provisions of proposed Rule 3a5-2 and proposed Rule 771. See IIB Letter (suggesting that there may be a discrepancy between Rule 771(a)(2) and Rule 3a5-2(a)(2) and asking for clarification as to whether paragraph (a)(2) of Rule 3a5-2 was intended to apply to resales).

non-U.S. person), the bank may rely on its reasonable belief that the eligible security was initially sold outside of the U.S. consistent with Rule 903. The proposed rule would have allowed a bank to rely on its reasonable belief only when it purchases a security from a non-U.S. person, but not when it purchases a security from a broker-dealer. We have made this change in light of comments we have received, as we are persuaded that the process of determining whether a security initially was issued in compliance with Regulation S would require banks to obtain the same information whether the purchase is from a broker-dealer or a non-U.S. person.[22]

As revised, the provisions of Rule 3a5-2 that apply to a bank's resale of previously issued Regulation S securities (but not the provision related to a bank's sale of a newly issued security) require compliance with Rule 904 of Regulation S if the resale is made prior to the expiration of the security's distribution compliance period.[23] We also have revised the rule to enhance its clarity and to better conform it to Regulation S.[24]

Commenters requested that we state that this exemption would continue to be available after the expiration of the applicable Regulation S distribution compliance period.[25] Commenters also questioned whether it is necessary for the rule to condition the exemption on a bank's

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22 See IIB Letter ("In both cases . . . a Bank is required to make a determination regarding the manner in which the eligible security that is the subject of the transaction was initially issued."); Clearing House Ass'n Letter. Those comments also addressed the agency provisions of Rule 771, which has been revised in a similar way.

23 Specifically, the condition requiring compliance with Rule 904 is included in paragraphs (a)(2) and (a)(3) of the rule, related to a bank's resale of previously issued securities. While the condition is not included in paragraph (a)(1), related to a bank's sale of newly issued securities, because the requirements of Rule 904 are targeted to resales of Regulation S securities, a bank's sale of a newly issued security would still have to comply with Rule 903 of Regulation S.

24 We are replacing the phrase "purchaser who is outside of the United States within the meaning of 17 CFR 230.903" with "purchaser who is not in the United States" to better conform to Regulation S. We also are making other technical changes, such as removing references to "broker" and Section 3(a)(4) under the Exchange Act, together with conforming changes.

25 See IIB Letter (stating that the Proposing Release contained language suggesting that would not be the case); Clearing House Ass'n Letter.

compliance with Rule 904 of Regulation S if the resale is made prior to the end of the Rule 903 distribution period.[26] We can clarify that this rule (like Rule 771) requires the bank to meet the conditions of Rule 904 during, but not after, the distribution compliance period. During the distribution compliance period, a bank thus will have to comply with Regulation S to take advantage of the exception. Even after the end of the distribution compliance period, however, a bank may rely on this exemption from the dealer definition so long as it satisfies the other requirements of Rule 3a5-2. After the expiration of the applicable distribution compliance period, although the securities may be offered and sold in the U.S. pursuant to registration of the securities under the Securities Act or pursuant to an available exemption from the registration requirements of that Act, the bank will not be permitted to sell them to persons other than a broker-dealer or a person who is not in the United States.

One commenter stated that Rule 3a5-2 (as well as Rule 771) simply should refer to sales to a "purchaser," rather than, as proposed, being specifically limited to sales to a purchaser who is outside the U.S.[27] We decline, however, to expand the exemption beyond offshore sales or sales to registered broker-dealers. Consistent with Regulation S, which permits the offshore resale of securities, the purpose of the exemption is to permit U.S. banks to sell Regulation S securities to their foreign customers. It does not permit banks to sell those securities domestically.

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26 See IIB Letter (stating that it assumed this provision merely required compliance with Regulation S to the extent applicable, and requested that we confirm that understanding, or delete the provision as unnecessary and potentially confusing).

27 See IIB Letter (maintaining that the provision would be unduly restrictive by "supporting the erroneous view that the Regulation S Exemption expires once an eligible security has been seasoned," and that the provision is unnecessary given that Rule 904 of Regulation S specifically imposes an offshore transaction requirement on resales effected prior to expiration of the applicable seasoning period).

Commenters also requested that we clarify that the definition of "eligible security" in Rule 3a5-2 (as well as in Rule 771) – which excludes any security sold from the inventory of an affiliate or that is underwritten by an affiliate on a firm-commitment basis – would not prohibit a bank from effecting Regulation S exempt transactions in securities that have been issued by an affiliate.[28] The "eligible security" definition in general does not exclude proprietary products such as structured notes and mutual funds that are issued by affiliates but not underwritten on a firm commitment basis. The exclusion of inventory securities and securities underwritten on a firm-commitment basis is intended to prevent banks from dumping third-party securities overseas. It is not intended to extend to all proprietary products issued by a bank affiliate. Proprietary products are sold by foreign banks, and permitting U.S. banks to sell comparable products will avoid placing U.S. banks at a competitive disadvantage with respect to those foreign banks.[29]

B. Amendment to Exchange Act Rule 15a-6

We are adopting, without change, a clarifying amendment to Exchange Act Rule 15a-6(a)(4)(i).[30] This amendment conforms Rule 15a-6 – which in general permits foreign broker-dealers to engage in certain transactions involving U.S. persons without having to register as broker-dealers – to revisions to the Exchange Act and its underlying regulations resulting from GLBA. We received no comment on the proposed amendment.

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28 See IIB Letter ("Thus, for example, a Bank could sell a structured note or other investment product (whether or not customized for the particular customer) that is issued by the Bank or an affiliate of the Bank, or shares in an offshore mutual fund controlled by the Bank or an affiliate of the Bank."); ABA Letter.

29 Although there could be higher fees associated with proprietary securities than with independent investment company securities, this also is true with respect to proprietary securities sold by foreign banks. Accordingly, we do not believe that these potentially higher fees provide a sufficient reason to exclude proprietary securities from these exemptions.

30 17 CFR 240.15a-6(a)(4)(i).

This amendment updates Rule 15a-6 to reflect the current Exchange Act definitions of "broker" and "dealer"[31] and their underlying rules. While the "broker" and "dealer" definitions completely excluded banks prior to GLBA, now they provide that banks engaging in the activities permitted by the conditional exceptions in those definitions "shall not be considered to be" brokers or dealers. Currently, paragraph (a)(4)(i) of Rule 15a-6 permits a foreign broker-dealer to engage in certain securities activities with a registered broker-dealer or with "a bank acting in a broker or dealer capacity as permitted by U.S. law." As amended, that paragraph will refer to "a bank acting pursuant to an exception or exemption from the definition of 'broker' or 'dealer' in sections 3(a)(4)(B), 3(a)(4)(E) or 3(a)(5)(C) of the Act . . . or the rules thereunder."[32] This amendment does not change the substance of Rule 15a-6.[33]

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31 Exchange Act Sections 3(a)(4) and 3(a)(5), 15 U.S.C. 78c(a)(4) and (a)(5).

32 Sections 3(a)(4)(B) of the Exchange Act provide exceptions from the "broker" definition for certain bank activities, while Section 3(a)(4)(E) provides an exception from that definition for banks that, prior to the enactment of GLBA, were subject to Exchange Act Section 15(e), 15 U.S.C. 78o(e), which requires certain non broker-dealer members of national security exchanges to comply with the rules that govern broker-dealers. Section 3(a)(5)(C) provides exceptions from the "dealer" definition for certain bank activities.

33 A U.S. bank's foreign affiliate could rely on Rule 15a-6(a)(4)(i) for transactions with the bank, and the bank could rely on the statutory exception regarding affiliate transactions (Exchange Act 3(a)(4)(B)(vi), 15 U.S.C. 78c(a)(4)(B)(vi)) for transactions with the foreign affiliate. Exchange Act Rule 15a-6(a)(4)(i), however, does not permit a foreign broker-dealer or bank to have direct contact with customers of the U.S. bank. Exchange Act Release No. 44291 (May 11, 2001) 66 FR 27760 (May 18, 2001). Of course, the exemptions for transactions in Regulation S securities we are adopting today (Exchange Act Rule 3a5-2 and Rule 771 of Regulation R) will permit a bank to sell Regulation S securities to non-U.S. persons, including customers of a foreign affiliate, as long as it meets the conditions of that exemption.

Nothing in this release should be construed as modifying the Exchange Act Section 3(a)(6) definition of "bank" as it applies to foreign banks. Generally, foreign banks doing business with U.S. customers will not meet this definition and would be considered broker-dealers under the U.S. securities laws. As such, foreign banks generally will be required to register as U.S. broker-dealers unless they qualify for an exemption from registration under Exchange Act Rule 15a-6.

C. Securities Lending by Bank Dealers

We are adopting, as proposed, Rule 3a5-3 under the Exchange Act to provide banks engaged in certain securities lending transactions with a conditional exemption from the definition of "dealer." Rule 3a5-3 incorporates the dealer provisions of Exchange Act Rule 15a-11, which we are withdrawing.[34]

The rule provides that a bank is exempt from the dealer definition to the extent that, as a "conduit lender,"[35] it engages in or effects certain "securities lending transactions"[36] and "securities lending services"[37] in connection with such transactions.[38] The exemption applies only to securities lending activities with or on behalf of a person that the bank reasonably

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34 In 2003, the Commission adopted Exchange Act Rule 15a-11 to provide an exemption from the definitions of both "broker" and "dealer" for banks engaging in securities lending transactions. See Exchange Act Release No. 47364 (Feb.13, 2003), 68 FR 8686 (Feb. 24, 2003) (http://www.sec.gov/rules/final/34-47364.htm). As applicable to banks' broker activities, the Rule 15a–11 exemption was never operable because of the temporary exemptions applicable to all bank broker activities. The Regulatory Relief Act required the Commission and the Federal Reserve Board to jointly propose rules governing banks' broker activities, and we are adopting Rule 772 of Regulation R jointly with the Federal Reserve Board to exempt banks from the "broker" definition for certain securities lending activities. Exchange Act Release No. 56501 (Sept. 24, 2007). The Regulatory Relief Act does not directly affect the operation of the rules the Commission adopted concerning banks' dealer activities.

35 Rule 3a5-3(d) defines the term "conduit lender" to mean a bank that borrows or loans securities, as principal, for its own account, and contemporaneously loans or borrows the same securities, as principal, for its own account. The rule further states that a bank that qualifies under this definition as a conduit lender at the commencement of a transaction will continue to qualify, notwithstanding whether: (1) the lending or borrowing transaction terminates and so long as the transaction is replaced within one business day by another lending or borrowing transaction involving the same securities; and (2) any substitutions of collateral occur. Rule 3a5-3(d).

36 Rule 3a5-3(b) defines the term "securities lending transaction" to mean a transaction in which the owner of a security lends the security temporarily to another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such securities, and has the right to terminate the transaction and to recall the loaned securities on terms agreed by the parties.

37 Rule 3a5-3(c) defines the term "securities lending services" to mean: (1) selecting and negotiating with a borrower and executing, or directing the execution of the loan with the borrower; (2) receiving, delivering, or directing the receipt or delivery of loaned securities; (3) receiving, delivering, or directing the receipt or delivery of collateral; (4) providing mark-to-market, corporate action, recordkeeping or other services incidental to the administration of the securities lending transaction; (5) investing, or directing the investment of, cash collateral; or (6) indemnifying the lender of securities with respect to various matters.

38 Rule 3a5-3(a).

believes to be: (1) a qualified investor as defined in Section 3(a)(54)(A) of the Exchange Act;[39] or (2) any employee benefit plan that owns and invests, on a discretionary basis, not less than $25 million in investments.

We are adopting the rule as proposed to permit banks to continue to engage in securities lending as conduit lenders, under the conditions they have followed since Rule 15a-11 became effective in 2003.[40] One commenter took the position – in the parallel context of banks' agency activities – that banks should be able to engage in securities lending services for institutional customers that have less than $25 million in investments.[41] We have, however, not expanded the group of persons with or on behalf of which a bank may rely on the securities lending exemption, inasmuch as we believe that the parameters of the exemption reflect banks' existing securities lending businesses.[42]

Some commenters suggested exempting banks involved in securities repurchase and reverse repurchase transactions for non-exempt securities from the "dealer" definition, based on the view that repurchase and reverse repurchase activities constitute the functional equivalent of

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39 15 U.S.C. 78c(a)(54)(A). In part, this definition encompasses corporations and partnerships with at least $25 million in investments.

40 One commenter specifically emphasized the need for a securities lending exemption to continue to apply to a bank's conduit lending activity. See America's Community Bankers Letter.

41 See Union Bank of California Letter.

42 Broker-dealers are the most frequent borrowers of securities. In this context, we note that borrowers of securities who are not qualified investors do not directly borrow securities from noncustodial banks, but instead generally borrow securities through intermediaries that would be qualified investors. The rule, however, permits banks to lend securities to employee benefit plans with at least $25 million in investments, even though those plans do not meet all of the requirements of the "qualified investor" definition, yet are sophisticated market participants. That latter provision in part addresses industry concerns. See Letter from Edward J. Rosen, Cleary, Gottlieb, Stein & Hamilton, to Annette Nazareth, Director, Division of Market Regulation, Commission, dated Oct. 9, 2002 (requesting that the exemption encompass banks' securities lending activity involving any entity that owns and invests on a discretionary basis at least $25 million in investments).

financing or securities lending activities.[43] We and the Federal Reserve Board are soliciting comments about banks' involvement in repurchase and reverse repurchase transactions, as discussed more fully in the Joint Adopting Release. The information we receive through this process should help inform any future actions the Commission may take in this area.

D. Withdrawal of Exchange Act Rule 3b-9, Rule 15a-8, and Rule 15a-9

Finally, we are withdrawing three outdated rules under the Exchange Act. No commenters addressed the proposed withdrawal of these rules.

We are withdrawing Exchange Act Rule 3b-9, in which the Commission defined the term "bank" for purposes of the Exchange Act definitions of "broker" and "dealer," because the rule was invalidated by the U.S. Court of Appeals for the District of Columbia Circuit.[44] We also are withdrawing Exchange Act Rule 15a-8, which provided a temporary exemption – that has since expired – from Exchange Act Section 29 liability for banks' securities activities. In addition, we are withdrawing Exchange Act Rule 15a-9, which provides an exemption from the definitions of

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43 See ABA Letter (specifically addressing repurchase transactions involving non-exempt corporate debt; stating that while banks could provide similar financing services by converting repurchases into secured loans, they would have weaker creditor rights in bankruptcy; also stating that some investors may be permitted by governing documents to enter into repurchases, but not secured loans); Clearing House Ass'n Letter ("We note that providing financing and liquidity to customers via repurchase and reverse repurchase transactions is a traditional banking activity, and permitting banks to engage in such transactions with respect to non-exempt securities will benefit customers that do not have exempt securities against which to borrow."); Citigroup Letter ("Given the economic equivalence between repurchase and reverse repurchase transactions and the traditional bank activity of secured lending, it is unclear why the exemption from dealer registration has been limited to transactions involving only exempted securities."); IIB Letter (stating that repurchase transactions are the functional equivalent of securities lending, and also questioning whether these transactions actually constitute securities transactions for purposes of the GLBA push-out provisions). One commenter also urged the Commission to consider an exemption for banks engaged in repurchase transactions in an agency capacity. See Clearing House Ass'n Letter.

Banks are permitted by statutory exception to engage in purchase and sale activities with respect to exempt securities such as government securities. Exchange Act Section 3(a)(5)(C)(i)(II).

44 American Bankers Association v. SEC, 804 F.2d 739 (D.C. Cir. 1986).

"broker" and "dealer" for savings associations and savings banks. The Regulatory Relief Act made Rule 15a-9 unnecessary by causing savings associations and savings banks to be treated as "banks," thus eliminating the need to differentiate between these entities for the purposes of the Exchange Act.

III. Administrative Law Matters

A. Paperwork Reduction Act Analysis

These rules and rule amendments do not impose recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under 44 U.S.C. 3501, et. seq. Accordingly, the Paperwork Reduction Act does not apply.[45] We received no comments on this issue.

B. Consideration of Benefits and Costs

We believe the rules and rule amendments that we are adopting are consistent with Congress's intent in enacting the GLBA, and will facilitate banks' compliance with the federal securities laws and provide banks with greater legal certainty regarding their conduct with respect to securities transactions. These changes are very limited in scope. Specifically, we are: (1) adopting Exchange Act Rule 3a5-2 to permit banks to purchase from and sell to non-U.S. persons and registered broker-dealers securities exempt under Regulation S; (2) adopting a clarifying amendment to Exchange Act Rule 15a-6 to conform the rule to the revised statutory definition of "broker" and "dealer" under the Exchange Act as well as to the rules adopted thereunder, without changing the substance of the exemption; (3) amending Exchange Act Rule

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45 We note that, as a practical matter, banks likely already keep records that could be used to show they meet the terms of the exemption. We also note that Section 203 of the GLBA specifically requires the bank regulators to promulgate recordkeeping requirements.

15a-11 to eliminate its reference to banks' "broker" activities and clarify its continued availability for banks' "dealer" activities, and redesignating it as Rule 3a5-3; and (4) withdrawing three outdated rules under the Exchange Act – Rule 3b-9 because of its invalidation by the U.S. Court of Appeals for the District of Columbia Circuit; Rule 15a-8(b) because that exemption expired on March 31, 2005; and Rule 15a-9, which is no longer necessary after passage of the Regulatory Relief Act. In light of comments received, we are adopting Rule 3a5-2 with changes to make the rule more flexible and to address technical matters. We are adopting the other rule changes as proposed. We received no comments on the costs and benefits of these rule changes.[46]

Rule 3a5-2, by permitting banks to purchase from and sell to non-U.S. persons and registered broker-dealers securities that are exempt under Regulation S, provides the benefit of allowing U.S. banks to engage in overseas Regulation S transactions on the same basis as foreign banks, subject to terms that are reasonably crafted to maintain appropriate standards of functional regulation and investor protection. In adopting this rule, we have liberalized the proposal to permit banks to rely on their "reasonable belief" that the securities initially were sold in compliance with Regulation S when purchasing from a broker-dealer, as well as when purchasing from a non-U.S. person. This change is intended to prevent banks from losing the exemption due to inadvertent errors in identifying the source of securities sold under the exemption. We believe that permitting banks to engage in these Regulation S transactions on a

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[46] As discussed in the release adopting Regulation R, two commenters stated that the start-up and ongoing costs of complying with Regulation R will be significant, that the Agencies underestimated the amount of time associated with compliance, and that the Agencies should modify Regulation R to reduce the cost burden. See Ass'n of Colorado Trust Companies letter; Fiserv Trust Company letter. Those comments, which were general in nature, did not discuss the Exchange Act "dealer" amendments addressed here.

riskless principal basis will provide banks with competitive benefits, without imposing significant costs.[47]

The revisions to Rules 15a-6 and 15a-11, and the redesignation of Rule 15a-11 as Rule 3a5-3, are technical in nature to bring those rules up-to-date in light of the GLBA and the Regulatory Relief Act without changing their substance in the context of banks' dealer activities. Moreover, the withdrawal of the three outdated Rules 3b-9, 15a-8(b), and 15a-9 under the Exchange Act is administrative in effect. These changes will impose no costs and will provide administrative certainty and clarity.

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

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation.[48] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[49] Exchange Act Section 23(a)(2) prohibits the Commission from

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47 Under their current blanket exemption from broker registration, banks have been able to engage in economically equivalent transactions in an agency capacity. This exemption will permit banks to engage in such activities in a riskless principal capacity, without substantially changing either the costs of the activities or the benefits provided. Further, Exchange Act Rule 3a5-1 already exempts banks from acting as "dealers" for engaging in riskless principal transactions, provided that they engage in fewer than 500 such transactions per year in the aggregate under the exemption and the de minimis broker exception in Exchange Act Section 3(a)(4)(b)(vi).

48 15 U.S.C. 78w(a)(2).

49 15 U.S.C. 78c(f).

adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. We received no comment on these issues.

We do not believe that the rules and rule amendments addressed here will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The rules and rule amendments will provide exemptions for banks that are consistent with the exceptions added to the Exchange Act by Congress in the GLBA. They will not impose any additional competitive burdens on banks engaging in a securities business, other than those imposed by Congress through functional regulation in the GLBA. The revisions to Rules 15a-6 and 15a-11, and the redesignation of Rule 15a-11 as Rule 3a5-3, are technical in nature to bring those rules up-to-date in light of the GLBA and the Regulatory Relief Act without changing their substance in the context of banks' dealer activities. Further, the withdrawal of Rules 3b-9, 15a-8(b), and 15a-9 is administrative in nature, and will not have any impact on efficiency, competition or capital formation.

As we noted in the proposing release, the types of dealer activities that are the subject of these rules and rule amendments generally are not the types of activities in which small banks or small broker-dealers directly participate, and accordingly there will likely be little, if any, competitive costs to small banks.

We do not believe that the rules and rule amendments impose any effects on efficiency, competition, or capital formation that are not a consequence of the GLBA statutory provisions. Rule 3a5-2 and Rule 3a5-3 in particular make it easier for banks to conduct sales of Regulation S securities to persons located abroad and securities lending activities, respectively, after the GLBA changes to the federal securities laws. More generally, the rules and rule amendments also give banks enhanced legal certainty for these securities activities. Nothing in the rules and rule amendments will adversely affect capital formation. In enacting the GLBA, Congress adopted functional regulation for bank securities activities, with certain exceptions from Commission oversight for specified activities. These rules and rule amendments are consistent with Congress' intent and make it easier for banks to comply with the requirements of the GLBA.

D. Regulatory Flexibility Certification

Pursuant to Section 605(b) of the Regulatory Flexibility Act ("RFA"),[50] the Commission certifies that the rules and rule amendments will not have a significant economic impact on a substantial number of small entities.

In the proposing release, the Commission requested written comments on matters discussed in the initial regulatory flexibility analysis ("IRFA"), particularly on (a) the number of small entities that would be affected by the amendments; (b) the nature of any impact the amendments would have on small entities and empirical data supporting the extent of the impact; and (c) how to quantify the number of small entities that would be affected by and/or how to quantify the impact of the amendments. We received no comments and believe that the rules and rule amendments will not have a significant economic impact on a substantial number of small entities.

IV. Statutory Authority

Pursuant to authority set forth in the Exchange Act and particularly Sections 3(a)(4), 3(b), 15, 17, 23(a), and 36 thereof (15 U.S.C. 78c(a)(4), 78c(b), 78o, 78q, 78w(a), and 78mm, respectively) the Commission is repealing current Rules 3b-9, 15a-8(b), and 15a-9 (§§ 240.3b-9, 240.15a-8(b), and 240.15a-9, respectively). Pursuant to the same authority, the Commission also

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[50] 5 U.S.C. 603.

is adopting Exchange Act Rule 3a5-2 (§ 240.3a5-2) adopting the amendments to Exchange Act Rule 15a-6 (§ 240.15a-6), and adopting amendments to and redesignating Exchange Act Rule 15a-11 as Rule 3a5-3 (§ 240.15a-11 and §240.3a5-3, respectively).

V. Text of Final Rules and Rule Amendments

List of Subjects in 17 CFR Part 240

Broker-dealers, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 240 — GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

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2. Sections 240.3a5-2 and 240.3a5-3 are added to read as follows:

§ 240.3a5-2 Exemption from the definition of "dealer" for banks effecting transactions in securities issued pursuant to Regulation S.

(a) A bank is exempt from the definition of the term "dealer" under section 3(a)(5) of the Act (15 U.S.C. 78c(a)(5)), to the extent that, in a riskless principal transaction, the bank:

(1) Purchases an eligible security from an issuer or a broker-dealer and sells that security in compliance with the requirements of 17 CFR 230.903 to a purchaser who is not in the United States;

(2) Purchases from a person who is not a U.S. person under 17 CFR 230.902(k) an eligible security after its initial sale with a reasonable belief that the eligible security was initially sold outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903, and resells that security to a purchaser who is not in the United States or to a registered broker or dealer, provided that if the resale is made prior to the expiration of any applicable distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the resale is made in compliance with the requirements of 17 CFR 230.904; or

(3) Purchases from a registered broker or dealer an eligible security after its initial sale with a reasonable belief that the eligible security was initially sold outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903, and resells that security to a purchaser who is not in the United States, provided that if the resale is made prior to the expiration of any applicable distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the resale is made in compliance with the requirements of 17 CFR 230.904.

(b) Definitions. For purposes of this section:

(1) <u>Distributor</u> has the same meaning as in 17 CFR 230.902(d).

(2) <u>Eligible security</u> means a security that:

(i) Is not being sold from the inventory of the bank or an affiliate of the bank; and

(ii) Is not being underwritten by the bank or an affiliate of the bank on a firm-commitment basis, unless the bank acquired the security from an unaffiliated distributor that did not purchase the security from the bank or an affiliate of the bank.

(3) Purchaser means a person who purchases an eligible security and who is not a U.S. person under 17 CFR 230.902(k).

(4) Riskless principal transaction means a transaction in which, after having received an order to buy from a customer, the bank purchased the security from another person to offset a contemporaneous sale to such customer or, after having received an order to sell from a customer, the bank sold the security to another person to offset a contemporaneous purchase from such customer.

§ 240.3a5-3 Exemption from the definition of "dealer" for banks engaging in securities lending transactions.

(a) A bank is exempt from the definition of the term "dealer" under section 3(a)(5) of the Act (15 U.S.C. 78c(a)(5)), to the extent that, as a conduit lender, it engages in or effects securities lending transactions, and any securities lending services in connection with such transactions, with or on behalf of a person the bank reasonably believes to be:

(1) A qualified investor as defined in section 3(a)(54)(A) of the Act (15 U.S.C. 78c(a)(54)(A)); or

(2) Any employee benefit plan that owns and invests, on a discretionary basis, not less than $25,000,000 in investments.

(b) Securities lending transaction means a transaction in which the owner of a security lends the security temporarily to another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such securities, and has the right to terminate the transaction and to recall the loaned securities on terms agreed by the parties.

(c) Securities lending services means:

(1) Selecting and negotiating with a borrower and executing, or directing the execution of the loan with the borrower;

(2) Receiving, delivering, or directing the receipt or delivery of loaned securities;

(3) Receiving, delivering, or directing the receipt or delivery of collateral;

(4) Providing mark-to-market, corporate action, recordkeeping or other services incidental to the administration of the securities lending transaction;

(5) Investing, or directing the investment of, cash collateral; or

(6) Indemnifying the lender of securities with respect to various matters.

(d) For the purposes of this section, the term conduit lender means a bank that borrows or loans securities, as principal, for its own account, and contemporaneously loans or borrows the same securities, as principal, for its own account. A bank that qualifies under this definition as a conduit lender at the commencement of a transaction will continue to qualify, notwithstanding whether:

(1) The lending or borrowing transaction terminates and so long as the transaction is replaced within one business day by another lending or borrowing transaction involving the same securities; and

(2) Any substitutions of collateral occur.

3. Section 240.3b-9 is removed and reserved.

4. Section 240.15a-6 is amended by revising paragraph (a)(4)(i) to read as follows:

§ 240.15a-6 – Exemption of certain foreign brokers or dealers.

(a) * * *

(4) * * *

(i) A registered broker or dealer, whether the registered broker or dealer is acting as principal for its own account or as agent for others, or a bank acting pursuant to an exception or exemption from the definition of "broker" or "dealer" in sections 3(a)(4)(B), 3(a)(4)(E), or 3(a)(5)(C) of the Act (15 U.S.C. 78c(a)(4)(B), 15 U.S.C. 78c(a)(4)(E), or 15 U.S.C. 78c(a)(5)(C)) or the rules thereunder;

* * * * *

5. Section 240.15a-8 is removed and reserved.
6. Section 240.15a-9 is removed and reserved.
7. Section 240.15a-11 is removed and reserved.

* * * * *

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

Date: September 24, 2007

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA-2653; File No. S7-23-07]

RIN 3235-AJ96

Temporary Rule Regarding Principal Trades with Certain Advisory Clients

AGENCY: Securities and Exchange Commission.

ACTION: Interim final temporary rule; Request for comments.

SUMMARY: The Commission is adopting a temporary rule under the Investment Advisers Act of 1940 that establishes an alternative means for investment advisers who are registered with the Commission as broker-dealers to meet the requirements of section 206(3) of the Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients. The Commission is adopting the temporary rule on an interim final basis as part of its response to a recent court decision invalidating a rule under the Advisers Act, which provided that fee-based brokerage accounts were not advisory accounts and were thus not subject to the Advisers Act. As a result of the Court's decision, which takes effect on October 1, fee-based brokerage customers must decide whether they will convert their accounts to fee-based accounts that are subject to the Advisers Act or to commission-based brokerage accounts. We are adopting the temporary rule to enable investors to make an informed choice between those accounts and to continue to have access to certain securities held in the principal accounts of certain advisory firms while remaining protected from certain conflicts of interest. The temporary rule will expire and no longer be effective on December 31, 2009.

Document 4 of 34

DATES: Effective Date: September 30, 2007, except for 17 CFR 275.206(3)-3T will be effective from September 30, 2007 until December 31, 2009.

Comment Date: Comments on the interim final rule should be received on or before November 30, 2007.

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/final.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-23-07 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

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

All submissions should refer to File Number S7-23-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/final.shtml). Comments are also available for public inspection and copying 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: David W. Blass, Assistant Director, Daniel S. Kahl, Branch Chief, or Matthew N. Goldin, Attorney-Adviser, at (202) 551-6787 or IArules@sec.gov, Office of Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission") is adopting temporary rule 206(3)-3T [17 CFR 275.206(3)-3T] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] as an interim final rule.

We are soliciting comments on all aspects of the rule. We will carefully consider the comments that we receive and respond to them in a subsequent release.

I. BACKGROUND

A. The FPA Decision

On March 30, 2007, the Court of Appeals for the District of Columbia Circuit (the "Court"), in Financial Planning Association v. SEC ("FPA decision"), vacated rule 202(a)(11)-1 under the Investment Advisers Act of 1940 ("Advisers Act" or "Act").[1] Rule 202(a)(11)-1 provided, among other things, that fee-based brokerage accounts were not advisory accounts and were thus not subject to the Advisers Act.[2] As a consequence

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1 482 F.3d 481 (D.C. Cir. 2007).

2 Fee-based brokerage accounts are similar to traditional full-service brokerage accounts, which provide a package of services, including execution, incidental investment advice, and custody. The primary difference between the two types of accounts is that a customer in a fee-based brokerage account pays a fee based upon the amount of assets on account (an asset-based fee) and a customer in a traditional full-service brokerage account pays a commission (or a mark-up or mark-down) for each transaction.

of the FPA decision, broker-dealers offering fee-based brokerage accounts became subject to the Advisers Act with respect to those accounts, and the client relationship became fully subject to the Advisers Act. Broker-dealers would need to register as investment advisers, if they had not done so already, act as fiduciaries with respect to those clients, disclose all potential material conflicts of interest, and otherwise fully comply with the Advisers Act, including the Act's restrictions on principal trading.

We filed a motion with the Court on May 17, 2007 requesting that the Court temporarily withhold the issuance of its mandate and thereby stay the effectiveness of the FPA decision.[3] We estimated at the time that customers of broker-dealers held $300 billion in one million fee-based brokerage accounts.[4] We sought the stay to protect the interests of those customers and to provide sufficient time for them and their brokers to discuss, make, and implement informed decisions about the assets in the affected accounts. We also informed the Court that we would use the period of the stay to consider whether further rulemaking or interpretations were necessary regarding the application of the Act to fee-based brokerage accounts and other issues arising from the Court's decision. On June 27, 2007, the Court granted our motion and stayed the issuance of its mandate until October 1, 2007.[5]

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3 May 17, 2007, Motion for the Stay of Mandate, in FPA v. SEC.

4 Id.

5 See June 27, 2007, Order of the U.S. Court of Appeals for the District of Columbia Circuit, in FPA v. SEC.

B. Section 206(3) of the Advisers Act and the Issue of Principal Trading

We and our staff received several letters regarding the FPA decision and about particular consequences to customers who hold fee-based brokerage accounts.[6] Our staff followed up with, and has been engaged in an ongoing dialogue with, representatives of investors, financial planners, and broker-dealers regarding the implications of the FPA decision. During that process, firms that offered fee-based brokerage accounts informed us that, unless the Commission acts before October 1, 2007, one group of fee-based

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[6] See, e.g., Letter from Barbara Roper, Director of Investor Protection, Consumer Federation of America, et al., to Christopher Cox, Chairman, U.S. Securities and Exchange Commission, dated April 24, 2007; E-mail from Timothy J. Sagehorn, Senior Vice President – Investments, UBS Financial Services Inc., to Christopher Cox, Chairman, U.S. Securities and Exchange Commission, dated May 15, 2007; Letter from Kurt Schacht, Managing Director, CFA Institute Centre for Financial Market Integrity, to Christopher Cox, Chairman, U.S. Securities and Exchange Commission, dated May 23, 2007; Letter from Joseph P. Borg, President, North American Securities Administrators Association, Inc., to Christopher Cox, Chairman, U.S. Securities and Exchange Commission, dated June 18, 2007; Letter from Daniel P. Tully, Chairman Emeritus, Merrill Lynch & Co., Inc., to Christopher Cox, Chairman, U.S. Securities and Exchange Commission, dated June 21, 2007; Letter, with Exhibit, from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association, to Robert E. Plaze, Associate Director, Division of Investment Management, U.S. Securities and Exchange Commission, and Catherine McGuire, Chief Counsel, Division of Market Regulation, U.S. Securities and Exchange Commission, dated June 27, 2007 ("SIFMA Letter"); Letter from Raymond A. "Chip" Mason, Chairman and CEO, Legg Mason, Inc., to Christopher Cox, Chairman, U.S. Securities and Exchange Commission, dated July 10, 2007; Letter from Robert J. McCann, Vice Chairman and President – Global Private Client, Merrill Lynch, to Christopher Cox, Chairman, U.S. Securities and Exchange Commission, dated July 11, 2007; Letter from Samuel L. Hayes, III, Jacob Schiff Professor of Investment Banking Emeritus, Harvard Business School, to Christopher Cox, Chairman, U.S. Securities and Exchange Commission, dated July 12, 2007; Letter from Duane Thompson, Managing Director, Washington Office, Financial Planning Association, to Robert E. Plaze, Associate Director, Division of Investment Management, U.S. Securities and Exchange Commission, dated July 27, 2007 ("FPA Letter"); Letter from Richard Bellmer, Chair, and Ellen Turf, CEO, National Association of Personal Financial Advisors, to Robert E. Plaze, Associate Director, Division of Investment Management, U.S. Securities and Exchange Commission, dated August 14, 2007 ("NAPFA Letter"); Letter from Congressman Dennis Moore, et al., to Christopher Cox, Chairman, U.S. Securities and Exchange Commission, dated July 13, 2007; and Letter from Congressman Spencer Bachus, Ranking Member, Committee on Financial Services, to Christopher Cox, Chairman, U.S. Securities and Exchange Commission,

brokerage customers is particularly likely to be harmed by the consequences of the FPA decision: customers who depend both on access to principal transactions with their brokerage firms and on the protections associated with a fee-based (rather than transaction-based) compensation structure. Firms explained that section 206(3) of the Advisers Act, the principal trading provision, poses a significant practical impediment to continuing to meet the needs of those customers.

Section 206(3) of the Advisers Act makes it unlawful for any investment adviser, directly or indirectly "acting as principal for his own account, knowingly to sell any security to or purchase any security from a client ..., without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction."[7] Section 206(3) requires an adviser entering into a principal transaction with a client to satisfy these disclosure and consent requirements on a transaction-by-transaction basis.[8] An adviser may provide the

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dated July 10, 2007. Each of these letters is available at: www.sec.gov/comments/s7-23-07.

7 15 U.S.C. 80b-6(3). Section 206(3) also addresses "agency cross transactions," imposing the same procedural requirements regarding prior disclosure and consent on those transactions as it imposes on principal transactions. Agency cross transactions are transactions for which an investment adviser provides advice and the adviser, or a person controlling, controlled by, or under common control with the adviser, acts as a broker for that advisory client and for the person on the other side of the transaction. See Method for Compliance with Section 206(3) of the Investment Advisers Act of 1940 with Respect to Certain Transactions, Investment Advisers Act Release No. 557 (Dec. 2, 1976) [41 FR 53808] ("Rule 206(3)-2 Proposing Release").

8 See Commission Interpretation of Section 206(3) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1732 (July 17, 1998) [63 FR 39505 (July 23, 1998)] ("Section 206(3) Release") ("[A]n adviser may comply with Section 206(3) either by obtaining client consent prior to execution of a principal or agency transaction, or after execution but prior to settlement of the transaction."). See also Investment Advisers Act Release No. 40 (Jan. 5, 1945) [11 FR 10997] ("[T]he requirements of written disclosure and of consent contained in this clause must be satisfied before the completion of each separate transaction. A blanket disclosure and consent in a general agreement between investment adviser and client would not suffice.").

written disclosure to a client and obtain the client's consent at or prior to the completion of the transaction.[9]

During our discussions, firms informed our staff that the written disclosure and the client consent requirements of section 206(3) act as an operational barrier to their ability to engage in principal trades with their clients. Firms that are registered both as broker-dealers and investment advisers generally do not offer principal trading to current advisory clients (or do so on a very limited basis), and the rule vacated in the FPA decision had allowed broker-dealers to offer fee-based accounts without complying with the Advisers Act, including the requirements of section 206(3). Most informed us that they plan to discontinue fee-based brokerage accounts as a result of the FPA decision because of the application of the Advisers Act. They also informed us of their view that, unless they are provided an exemption from, or an alternative means of complying with, section 206(3) of the Advisers Act, they would be unable to provide the same range of services to those fee-based brokerage customers who elect to become advisory clients and would expect few to elect to do so.[10]

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9 Section 206(3) Release ("Implicit in the phrase 'before the completion of such transaction' is the recognition that a securities transaction involves various stages before it is 'complete.' The phrase 'completion of such transaction' on its face would appear to be the point at which all aspects of a securities transaction have come to an end. That ending point of a transaction is when the actual exchange of securities and payment occurs, which is known as 'settlement.'").

10 The firms explained that they plan to consult with their customers and obtain customers' consent to convert the fee-based accounts to one or more other types of accounts already operating on pre-existing business platforms. We understand that in most cases customers will be able to choose among different types of brokerage accounts, paying commissions for securities, and advisory accounts, paying asset-based fees. Firms indicated to us that, if we provide an alternative means of complying with section 206(3), they believe a significant number of their fee-based brokerage customers will elect to convert their accounts to non-discretionary advisory accounts. Those accounts operate in many respects like fee-based brokerage accounts, but fiduciary duties apply to the adviser, and the other obligations of the Advisers Act also apply. Firms offering these

Several broker-dealers and the Securities Industry and Financial Markets Association ("SIFMA") contended that providing written disclosure before completion of each securities transaction, as required by section 206(3) of the Advisers Act, makes it not feasible for an adviser to offer customers principal transactions for several reasons. Firms explained that there are timing and mechanical impediments to complying with section 206(3)'s written disclosure requirement. SIFMA explained that, for example, the combination of rapid electronic trading systems and the limited availability of many of the securities traded in principal markets means that an adviser may be unable to provide written disclosure and obtain consent in sufficient time to obtain such securities at the best price or, in some cases, at all.[11] Similarly, SIFMA contended that trade-by-trade written disclosure prior to execution is not practicable because "discussions between investment advisers and non-discretionary clients about a trade or strategy may occur before a particular transaction is effected, but at the time that discussion occurs the representative may not know whether the transaction will be effected on an agency or a principal basis."[12]

Firms also explained that they engage in thousands – in many cases, tens of thousands – of principal trades a day and that, due to the sheer volume of transactions, providing a written notice to all the clients with whom they conduct trades in a principal

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accounts provide investment advice, but clients retain decision making authority over their investment selections.

11 SIFMA Letter, at 21 ("Many fixed income securities, including municipal securities, that have limited availability are quoted, purchased and sold quickly through electronic communications networks utilized by bond dealers. . . . In today's principal markets, investment advisers do not necessarily have 'sufficient opportunity to secure the client's specific prior consent' and provide trade-by-trade disclosure, and opportunities to achieve best execution may be lost if the adviser does not act immediately on current market prices.") (quoting Rule 206(3)-2 Proposing Release).

capacity may only be done using automated systems.[13] One such automated system is the system broker-dealers use to provide customers with transaction-specific written notifications, or trade confirmations, that include the information required by rule 10b-10 under the Exchange Act.[14] Under rule 10b-10, a broker-dealer must disclose on its confirmation if it acts as principal for its own account with respect to a transaction.[15] However, confirmations are provided to customers too late to satisfy the requirements of section 206(3). This is because trade confirmations are sent, rather than delivered, at completion of a transaction and much of the information required to be disclosed by rule 10b-10 may only be available at completion of a transaction, not before. Thus, even if firms were to rely on the Commission's 1998 interpretation of section 206(3), under which disclosure and consent may be obtained after execution but before settlement of a transaction,[16] no automated system currently exists that could ensure compliance.[17]

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12 Id.

13 Firms asserted that, while possible, providing written notifications by fax or email prior to a transaction is impractical. Clients may not have ready access to either at the time they wish to conduct a trade and delaying the trade in order to provide the written notification likely would not be in the client's best interest, in particular as market prices may change rapidly.

14 17 CFR 240.10b-10. Rule 10b-10 under the Exchange Act requires a broker-dealer, at or before completion of a transaction, to give or send to its customer a written confirmation containing specified information about the transaction.

15 Rule 10b-10(a)(2) under the Exchange Act [17 CFR 240.10b-10(a)(2)].

16 See Section 206(3) Release.

17 It may be possible for firms to upgrade their confirmation delivery systems to provide an additional written disclosure that satisfies the content and chronological requirements of section 206(3) of the Act. Based on our experience with changes to confirmation delivery systems (largely in response to our changes to Exchange Act rule 10b-10), any such upgrade could take years to accomplish and would not be available by October 1, 2007, the date the FPA decision becomes effective. Furthermore, even if an automated system were developed to provide those written disclosures at or before completion of the transaction, no such automated system exists to obtain the required consent from advisory clients. We also are mindful of the burdens associated with such a system change. SIFMA has submitted to us that "[t]rade confirmation production systems are among the

Additionally, even if an automated system existed to enable the disclosure and consent after execution of a trade but before its completion in satisfaction of section 206(3), firms indicated that they would be unlikely to trade on such a basis. The firms explained that they do not seek post-execution consent because allowing a client until settlement to consent to a trade that has already been executed creates too great a risk that intervening market changes or other factors could lead a client to withhold consent to the disadvantage of the firm.

Access to securities held in a firm's principal accounts is important to many investors. We believe, based on our discussions with industry representatives and others throughout the transition process, that many customers may wish to access the securities inventory of a diversified broker-dealer through their non-discretionary advisory accounts.[18] For example, the Financial Planning Association ("FPA") noted that principal trades in a fiduciary relationship could be beneficial to investors, stating:

> Depending on the circumstances, clients may benefit from principal trades, but only in the context of a fiduciary relationship with the best interests of the client being paramount. In favorable circumstances, advisers may obtain access to a broader range of investment opportunities, better trade execution, and more

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most expensive and most difficult to alter anywhere in the brokerage industry, because of the mass nature of confirmations, the sensitive and private nature of the information, and the extremely short deadlines for their production and mailing." Letter from Ira D. Hammerman, Senior Vice President and General Counsel, Securities Industry and Financial Markets Association, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, U.S. Securities and Exchange Commission, dated April 4, 2005, available at: www.sec.gov/rules/proposed/s70604/ihammerman040405.pdf.

18 We have previously expressed our view that some principal trades may serve clients' best interests. See Section 206(3) Release.

favorable transaction prices for the securities being bought or sold than would otherwise be available.[19]

As a result of the FPA decision, customers must elect on or before October 1, 2007, to convert their fee-based brokerage accounts to advisory accounts or to traditional commission-based brokerage accounts. Several firms emphasized to our staff that the inability of a client to access certain securities held in the firm's principal accounts – particularly municipal securities and other fixed income securities that they contend have limited availability and are dealt through a firm's account using electronic communications networks – may be a determinative factor in whether the client selects (or the firm makes available) a non-discretionary advisory account to replace the client's fee-based brokerage account. As discussed in this Release, many firms informed us that, because of the practical difficulties with complying with the trade-by-trade written disclosure requirements of section 206(3) discussed above, they simply refrain from engaging in principal trading with their advisory clients. Accordingly, customers who wish to access firms' principal inventories may, as a practical matter, have no choice but to open a traditional brokerage account in which they will pay transaction-based compensation, rather than convert their fee-based brokerage account to an advisory account.

While we do not agree with SIFMA that an exemption from section 206(3) of the Act in its entirety is appropriate, we do believe that there may be substantial benefits to many of the investors holding an estimated $300 billion in approximately one million fee-based brokerage accounts if their accounts are converted to advisory accounts instead

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19 FPA Letter, at 3.

of traditional brokerage accounts.[20] Those investors will continue to be able to avoid transaction-based compensation and the incentives such a compensation arrangement creates for a broker-dealer, a reason they may have initially opened fee-based brokerage accounts.[21] They also will enjoy, as the Court pointed out in the FPA decision, the protections of the "federal fiduciary standard [that] govern[s] the conduct of investment advisers."[22]

To address the concerns described above and to protect the interests of customers who previously held fee-based brokerage accounts, we are adopting a temporary rule, on an interim final basis, that provides an alternative method for advisers who also are registered as broker-dealers to comply with section 206(3) of the Act. We believe this rule both protects investors' choice – fee-based brokerage customers would be able to choose an account that offers a similar set of services (including access to the same securities) that were available to them in fee-based brokerage accounts – and avoids

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20 SIFMA asserted that firms should be exempt entirely from section 206(3) of the Act in order to "preserve the [fee-based brokerage] client's ability to access certain securities that are best – or only – available through trades with the adviser or an affiliate of the adviser." SIFMA Letter, at 3. SIFMA further requested that we provide broker-dealers an exemption from all of the provisions of the Advisers Act with respect to their fee-based brokerage accounts. We are not adopting such a broad exemption.

21 A brokerage industry committee formed in 1994 at the suggestion of then-Commission Chairman Arthur Levitt concluded that fee-based compensation would better align the interests of broker-dealers and their customers and allow registered representatives to focus on what the committee described as their most important role – providing investment advice to individual customers, not generating transaction revenues. See Report of the Committee on Compensation Practices (Tully Report) (Apr. 10, 1995). We already have sought and received public comment on the potential benefits to investors of fee-based accounts, see Certain Broker-Dealers Deemed Not to be Investment Advisers, Investment Advisers Act Release No. 2376 (Apr. 12, 2005) [70 FR 20424 (Apr. 19, 2005]; Certain Broker-Dealers Deemed Not to be Investment Advisers, Investment Advisers Act Release No. 2340 (Jan. 6, 2005) [70 FR 2716 (Jan. 14, 2005)]; and Certain Broker-Dealers Deemed Not to be Investment Advisers, Investment Advisers Act Release No. 1845 (Nov. 4, 1999) [64 FR 61226 (Nov. 10, 1999)].

disruption to, and confusion among, investors who may wish to access and sell securities only available through a firm acting in a principal capacity and who, as a result, may no longer be offered any fee-based account. We believe the temporary rule will allow fee-based brokerage customers to maintain their existing relationships with, and receive roughly the same services from, their broker-dealers. We believe further that making the rule temporary allows us an opportunity to observe how those firms use the alternative means of compliance provided by the rule, and whether those firms serve their clients' best interests.

II. DISCUSSION

A. Overview of Temporary Rule 206(3)-3T

Congress intended section 206(3) of the Advisers Act to address concerns that an adviser might engage in principal transactions to benefit itself or its affiliates, rather than the client.[23] In particular, Congress appears to have been concerned that advisers might use advisory accounts to "dump" unmarketable securities or those the advisers fear may decline in value.[24] Congress chose not to prohibit advisers from engaging in principal and agency transactions, but rather to prescribe a means by which an adviser must disclose and obtain the consent of its client to the conflicts of interest involved.

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22 FPA decision, at 16, citing Transamerica Mortgage Advisors Inc. v. Lewis, 444 U.S. 11, 17 (1979).

23 See Investment Trusts and Investment Companies: Hearings on S. 3580 Before the Subcomm. of the Comm. on Banking and Currency, 76th Cong., 3d Sess. 320 (1940) (statement of David Schenker, Chief Counsel, Securities and Exchange Commission Investment Trust Study) ("Senate Hearings"). As noted above, section 206(3) also addresses agency cross transactions, which raise similar concerns regarding an adviser engaging in transactions to benefit itself or its affiliates, as well as the concern that an adviser may be subject to divided loyalties.

24 See Senate Hearings at 322 ("[i]f a fellow feels he has a sour issue and finds a client to whom he can sell it, then that is not right. . . .") (statement of David Schenker, Chief Counsel, Securities and Exchange Commission Investment Trust Study).

Congress's concerns were and continue to be significant. Self-dealing by investment advisers involves serious conflicts of interest and a substantial risk that the proprietary interests of the adviser will prevail over those of its clients.[25]

In light of these concerns and the important protections provided by section 206(3) of the Advisers Act, rule 206(3)-3T provides advisers an alternative means to comply with the requirements of that section that is consistent with the purposes, and our prior interpretations, of the section. The temporary rule continues to provide the protection of transaction-by-transaction disclosure and consent, subject to several conditions.[26] Specifically, temporary rule 206(3)-3T permits an adviser, with respect to a non-discretionary advisory account, to comply with section 206(3) of the Advisers Act by, among other things: (i) providing written prospective disclosure regarding the conflicts arising from principal trades; (ii) obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal transactions; (iii) making certain disclosures, either orally or in writing, and obtaining the client's consent before each principal transaction; (iv) sending to the client confirmation statements disclosing the capacity in which the adviser has acted and disclosing that the adviser informed the client that it may act in a principal capacity and that the client authorized the transaction; and (v) delivering to the client an annual report itemizing the principal

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25 As we have stated before "where an investment adviser effects a transaction as principal with his advisory account client, the terms of the transaction are necessarily not established by arm's-length negotiation. Instead, the investment adviser is in a position to set, or to exert influence potentially affecting, the terms by which he participates in such trade. The pressures of self-interest which may be present in such principal transactions may require the prophylaxis of the disclosures [required by section 206(3).]" Rule 206(3)-2 Proposing Release.

26 We similarly provided, in a rule of analogous scope and structure to rule 206(3)-3T, an alternative means of compliance with the disclosure and consent requirements of section 206(3) relating to "agency cross transactions." <u>See</u> rule 206(3)-2 under the Advisers Act.

transactions. The rule also requires that the investment adviser be registered as a broker-dealer under section 15 of the Exchange Act and that each account for which the adviser relies on this rule be a brokerage account subject to the Exchange Act, and the rules thereunder, and the rules of the self-regulatory organization(s) of which it is a member.[27]

These conditions, discussed below, are designed to prevent overreaching by advisers by requiring an adviser to disclose to the client the conflicts of interest involved in these transactions, inform the client of the circumstances in which the adviser may effect a trade on a principal basis, and provide the client with meaningful opportunities to refuse to consent to a particular transaction or revoke the prospective general consent to these transactions. We note that we have previously stated that "Section 206(3) should be read together with Sections 206(1) and (2) to require the adviser to disclose facts necessary to alert the client to the adviser's potential conflicts of interest in a principal or agency transaction."[28] We request comment generally on the need for the rule and its potential impact on clients of the advisers. Will the advantages described above that we believe accompany rule 206(3)-3T be beneficial to investors? Have we struck an appropriate balance between investor choice and investor protection? Does the alternative means of compliance contained in rule 206(3)-3T provide all the necessary investor protections?[29]

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27 See Section II.B.7 of this Release.

28 Section 206(3) Release. For a further discussion, see Section II.B.8 of this Release.

29 In this regard, see NAPFA Letter ("express[ing] its strong reservations regarding the possible grant of principal trading relief").

B. Section-by-Section Description of Rule 206(3)-3T

Rule 206(3)-3T deems an investment adviser to be in compliance with the provisions of section 206(3) of the Advisers Act when the adviser, or a person controlling, controlled by, or under common control with the investment adviser, acting as principal for its own account, sells to or purchases from an advisory client any security, provided that certain conditions discussed below are met. The scope and structure of the rule are similar to our rule 206(3)-2 under the Advisers Act, which, as noted above, provides an alternative means of complying with the limitations on "agency cross transactions," also contained in section 206(3).

We have applied section 206(3) not only to principal transactions engaged in or effected by an adviser, but also to certain situations in which an adviser causes a client to enter into a principal transaction that is effected by a broker-dealer that controls, is controlled by, or is under common control with the adviser.[30] Accordingly, rule 206(3)-3T would be available if the adviser acts as principal by causing the client to engage in a transaction with a broker-dealer that is an affiliate of the adviser – that is, a broker-dealer that controls, is controlled by, or is under common control with the investment adviser.

1. Non-Discretionary Accounts

Rule 206(3)-3T applies to principal trades with respect to accounts over which the client has not granted "investment discretion, except investment discretion granted by the advisory client on a temporary or limited basis."[31] Availability of the rule to

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30 See Section 206(3) Release at n. 3.

31 Rule 206(3)-3T(a)(1). For purposes of the rule, the term "investment discretion" has the same meaning as in section 3(a)(35) of the Exchange Act [15 U.S.C. 78c(a)(35)], except that it excludes investment discretion granted by a customer on a temporary or limited basis. Section 3(a)(35) of the Exchange Act provides that a person exercises "investment discretion" with respect to an account if, directly or indirectly, such person: (A) is

discretionary accounts would be inconsistent with the requirement of the rule, discussed below, that the adviser obtains consent (which may be oral consent) from the client for each principal transaction.[32] In addition, we are of the view that the risk of relaxing the procedural requirements of section 206(3) of the Advisers Act when a client has ceded substantial, if not complete, control over the account raises significant risks that the client will not be, or is not in a position to be, sufficiently involved in the management of the account to protect himself or herself from overreaching by the adviser.

The rule would apply to all non-discretionary advisory accounts, not only those that were originally established as fee-based brokerage accounts.[33] As noted above, some portion of the customers converting fee-based brokerage accounts into advisory accounts will be converting those accounts into non-discretionary accounts offered by the same

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authorized to determine what securities or other property shall be purchased or sold by or for the account; (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions; or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this title and rules and regulations thereunder.

We would view a broker-dealer's discretion to be temporary or limited within the meaning of rule 206(3)-3T(a)(1) when the broker-dealer is given discretion: (i) as to the price at which or the time to execute an order given by a customer for the purchase or sale of a definite amount or quantity of a specified security; (ii) on an isolated or infrequent basis, to purchase or sell a security or type of security when a customer is unavailable for a limited period of time not to exceed a few months; (iii) as to cash management, such as to exchange a position in a money market fund for another money market fund or cash equivalent; (iv) to purchase or sell securities to satisfy margin requirements; (v) to sell specific bonds and purchase similar bonds in order to permit a customer to take a tax loss on the original position; (vi) to purchase a bond with a specified credit rating and maturity; and (vii) to purchase or sell a security or type of security limited by specific parameters established by the customer.

32 Rule 206(3)-3T(a)(4). See Section II.B.4 of this Release.

33 We have not extended the rule to advisory accounts that are held only at investment advisers, as opposed to firms that are both investment advisers and registered broker-dealers. See Section II.B.7 of this Release.

firm. We understand from our discussions with broker-dealers that maintaining principal trading distinctions between advisory accounts that were once fee-based brokerage accounts and those that were not would be very difficult. Trade execution routing for investment advisory programs often is derived through unified programs or electronic codes allowing or prohibiting certain kinds of trades uniformly for all accounts that are of the same type. As such, limiting relief to accounts that were formerly in fee-based brokerage programs would make the requested relief impractical for firms and would neither serve the best interests of clients (because the effect would be to limit their ability to continue to access the inventory of securities held by their brokerage firm) nor be administratively feasible to firms affected by the Court's ruling with respect to the transition and ongoing servicing of these and other accounts subject to the Advisers Act. We accordingly determined not to limit the availability of the temporary rule only to those non-discretionary advisory accounts that were fee-based brokerage accounts.

We welcome comment on this aspect of our interim final rule. Are we correct that the potential for abuse through self-dealing is less in non-discretionary accounts, where clients may be better able to protect themselves and monitor trading activity, than in accounts where clients have granted discretion and may not be in a position to protect themselves sufficiently? Should we further limit the availability of the rule so that it is only available for transactions with wealthy or sophisticated clients who, for other purposes under the Act, we have presumed are capable of protecting themselves? For example, should it apply only with respect to transactions with a "qualified client" as defined in Advisers Act rule 205-3?

Should we limit the relief provided by the rule to accounts that originally were fee-based brokerage accounts? Do the operational burdens and complexities identified by the broker-dealers support application of the rule to all non-discretionary advisory accounts?

2. Issuer and Underwriter Limitations

Rule 206(3)-3T is not available for principal trades of securities if the investment adviser or a person who controls, is controlled by, or is under common control with the adviser ("control person") is the issuer or is an underwriter of the security.[34] The rule includes one exception – an adviser may rely on the rule for trades in which the adviser or a control person is an underwriter of non-convertible investment-grade debt securities.

One benefit an investor may gain by establishing a brokerage account with a large broker-dealer is the ability to obtain access to potentially profitable public offerings of securities. These securities are typically purchased by the broker-dealer participating in the underwriting as part of its allotment of the offering and then sold to customers in principal transactions. As noted above, many broker-dealers have not made such offerings available to advisory clients because of the requirements of section 206(3).

A broker-dealer participating in an underwriting typically has a substantial economic interest in the success of the underwriting, which might be different from the interests of investors. When a broker-dealer acts as an underwriter with respect to a

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[34] Rule 206(3)-3T(a)(2). The term "underwriter" is defined in section 202(a)(20) of the Advisers Act to mean "any person who has purchased from an issuer with a view to, 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; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission."

security, it is compensated precisely for the service of distributing that security.[35] A successful distribution not only offers the possibility of a concession on the securities (the spread between the underwriter's purchase price from the issuer and the public offering price), but also often an over-allotment option, and potentially future business (whether as an underwriter, lender, adviser or otherwise) with the issuer. The incentives may bias the advice being provided or lead the adviser to exert undue influence on its client's decision to invest in the offering or the terms of that investment. As such, the broker-dealer's incentives to "dump" securities it is underwriting are greater for sales by a broker-dealer acting as an underwriter than for sales by a broker-dealer not acting as an underwriter of other securities from its inventory.

A broker-dealer acting as an issuer has similar, if not greater, proprietary interests that are likely to adversely affect the objectivity of its advice. We therefore are of the view that an investment adviser who (or whose affiliate) is the issuer or underwriter of a security has such a significant conflict of interest as to make such a transaction, with one exception, an inappropriate subject of the relief we are providing today.

We have, however, provided an exception for principal transactions in non-convertible investment grade debt securities underwritten by the adviser or a person who controls, is controlled by, or is under common control with the adviser.[36] Non-convertible investment grade debt securities may be less risky and therefore less likely to be "dumped" on clients. Also, it may be easier for clients to identify whether the price

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35 The act of underwriting is purchasing "with a view to . . . the distribution of any security." Section 202(a)(20) of the Advisers Act [17 CFR 275.202(a)(20)].

36 "Investment grade debt securities" are defined in the rule to mean any non-convertible debt security that is rated in one of the four highest rating categories of at least two nationally recognized statistical rating organizations (as defined in section 3(a)(62) of the Exchange Act [15 U.S.C. 78c(a)(62)]). Rule 206(3)-3T(c).

they are being quoted for a non-convertible investment grade debt security is fair given the relative comparability, and the significant size, of the non-convertible investment grade debt markets.

Moreover, as the staff has discussed the effects of the FPA decision with broker-dealers, those broker-dealers have asserted that it is in the interest of investors to permit them to conduct principal trades with their advisory clients involving these securities, even where they or their affiliates are underwriters. Those firms argue that clients may face difficulties and higher costs in obtaining these debt instruments, particularly municipal bonds, through an advisory account if the adviser is not permitted to rely on the interim final rule's alternative means of complying with section 206(3).

The limitation on issuer transactions makes the rule unavailable for principal transactions in traditional equity or debt offerings of the investment adviser or a control person of the adviser. It also makes the rule unavailable in connection with – and thus requires compliance with section 206(3)'s trade-by-trade written disclosure requirements before – non-discretionary placement by an adviser of a proprietary structured product, such as a structured note, with an advisory client.[37] We request comment on whether we

[37] There is no uniform definition of what constitutes a structured product and the term is not defined in the temporary rule. Structured products include, among other things, securitizations of pools of assets, such as asset-backed securities which are supported by a discrete pool of financial assets (e.g., mortgages or other receivables). See generally Securities Act Release No. 8518 (Dec. 22, 2004) [70 FR 1506 (Jan. 7, 2005)]. The Financial Industry Regulatory Authority, Inc. ("FINRA"), the self-regulatory organization that oversees broker-dealers, defines structured products as "securities derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance and/or a foreign currency." FINRA Notice to Members 05-59 (Sept. 2005). FINRA has notified its members that they should consider only recommending structured products to customers who have been approved for options trading. Id. at 4. See also FINRA Notice to Members 03-71 (Nov. 2003) (expressing concern that investors, particularly retail investors, may not fully understand the risks associated with non-conventional investments – such as structured securities – and cautioning members

should consider expanding the availability of the rule to apply to structured products, and if so, on what terms.

We also request comment on our exclusion for securities issued or underwritten by the adviser or its control persons. Do commenters agree with our assessment of the risks to clients and our interpretation of the purposes of section 206(3)? Should we consider making the rule available for principal transactions in all securities (including those issued or subject to an underwriting by the adviser or a control person) in light of the clients' interest in obtaining access to public offerings? Alternatively, is there an approach we might take that could distinguish types of underwriting arrangements that do not present unacceptable risks of conflicts for the adviser? In this regard, we request comment on the one exception we have provided for non-convertible investment grade debt securities. Is the exception appropriate under the circumstances? Are there other circumstances in which an adviser should be able to rely on the rule when it (or a control person) is an issuer or underwriter of securities in certain circumstances?

3. Written Prospective Consent Following Written Disclosure

An adviser may rely on rule 206(3)-3T only after having secured its client's written, revocable consent prospectively authorizing the adviser directly or indirectly acting as principal for its own account, to sell any security to or purchase any security from such client.[38] The consent must be obtained only after the adviser provides the client with written disclosure about: (i) the circumstances under which the investment adviser may engage in principal transactions with the client; (ii) the nature and

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to ensure that their sales conduct procedures fully and accurately address any of the special circumstances presented by the sale of these products).

[38] Rule 206(3)-3T(a)(3).

significance of the conflicts the investment adviser has with its clients' interests as a result of those transactions; and (iii) how the investment adviser addresses those conflicts.[39] We anticipate that this consent normally would be obtained by the adviser when the client establishes the advisory account.[40]

Rule 206(3)-3T is not exclusive. An adviser would still be able to effect principal trades with a client who either never grants the prospective consent required under paragraph (a)(3) of the rule 206(3)-3T, or subsequently revokes that consent after having granted it, so long as the adviser complies with the terms of section 206(3) of the Act.

Will the disclosure required by paragraph (a)(3) be meaningful for clients in understanding the conflicts and risks inherent in principal trading by a fiduciary counterparty? Are there alternative approaches that we could adopt to make the prospective disclosures more meaningful to clients? Should we require disclosure to be prominent or, alternatively, require disclosure in a separately executed document to assure that the client has separately given attention to the request for consent?

With each written disclosure, confirmation, and request for written prospective consent, the investment adviser must include a conspicuous, plain English statement clarifying that the prospective general consent may be revoked at any time.[41] Thus, the client must be able to revoke his or her prospective consent at any time, thereby preventing an adviser from relying on rule 206(3)-3T with respect to that account going

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39 The FPA recommended a similar condition. See FPA Letter, at 3.

40 No additional disclosure regarding the principal capacity in which the adviser may be acting need be made pursuant to rule 206(3)-3T(a)(3) at the time of the transaction, provided the disclosure required by paragraph (a)(3) of the rule has been made and is correct in all material respects.

41 Rule 206(3)-3T(a)(8). The FPA recommended a similar condition. See FPA Letter, at 4.

forward.[42] Do these provisions adequately ensure that client consent is voluntary? Will advisers make a client's consent a condition to participation in non-discretionary advisory accounts they offer? If so, should we add a provision to the rule to address this issue, such as prohibiting advisers from doing so?

The written prospective consent need only be executed once. Should we require that the client's consent be renewed periodically? What benefit would be gained by such a provision in light of the client's right to revoke his or her consent at any time?

4. Trade-by-Trade Consent Following Disclosure

The temporary rule requires an investment adviser, before the execution of each principal transaction, to: (i) inform the client of the capacity in which the adviser may act with respect to the transaction; and (ii) obtain consent from the client for the investment adviser to act as principal for its own account with respect to each such transaction.[43] The trade-by-trade disclosure and consent may be written or oral. Although representatives of the brokerage industry have requested that we eliminate the requirement for transaction-by-transaction disclosure and consent,[44] we have determined that such disclosure and consent continues to be important to alert clients to the potential for conflicted advice they may be receiving on individual transactions. In light of the conflicts inherent in these transactions, generally notifying the client that a transaction may be effected on a principal basis close in time to the carrying out of such a trade is appropriate.

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42 The right to revoke prospective consent is not intended to allow a client to rescind, after execution but prior to settlement, a particular trade to which the client provided specific consent prior to execution.

43 Rule 206(3)-3T(a)(4).

44 SIFMA Letter, at 3.

Given the frequency and speed of trading in some advisory accounts as well as the increasing complexity of securities products available in the marketplace, trade-by-trade disclosure and consent, even if oral, might be a more effective protection against misunderstanding by advisory clients of the nature of a transaction and the conflicts inherent in it as well as a meaningful safeguard for investment advisers seeking to comply with their fiduciary obligations. We understand, however, that in many instances the adviser may not know whether a particular transaction will be effected on a principal basis. Accordingly, the rule permits advisers to disclose to clients that they "may" act in a principal capacity with respect to the transaction.

We do not believe the obligation to make oral disclosure will impose a significant burden on investment advisers of non-discretionary accounts who must, in most cases, obtain consent for each transaction regardless of whether the transaction will be done on a principal basis.[45] We are interested in learning from investors whether this consent requirement is informative and helpful. We also are interested in learning from advisers whether they intend to document receipt of the oral consent and, if so, whether they will be able to do so efficiently.

We request comment regarding whether investment advisers find useful the flexibility to provide oral instead of written disclosure on a trade-by-trade basis. Or, will advisers instead view the relief as unworkable?

5. Written Confirmation

The investment adviser must send to each client with which it effects a principal trade pursuant to rule 206(3)-3T a written confirmation, at or before the completion of the

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45 See rule 206(3)-3T(a)(1) (limiting the availability of the rule to accounts over which the adviser does not exercise discretionary authority).

transaction.[46] In addition to the other information required to be in a confirmation by Exchange Act rule 10b-10,[47] the confirmation must include a conspicuous, plain English statement informing the advisory client that the adviser disclosed to the client prior to the execution of the transaction that the adviser may act in a principal capacity in connection with the transaction, that the client authorized the transaction, and that the adviser sold the security to or bought the security from the client for its own account.[48] An investment adviser need not send a duplicate confirmation. An adviser may satisfy its obligations under paragraph (a)(5) by including, or causing an affiliated broker-dealer to include, the additional required disclosure on a confirmation otherwise sent to the client with respect to a particular principal transaction.

The requirement to provide a trade-by-trade confirmation is designed to ensure that clients are given a written notice and reminder of each transaction that the investment adviser effects on a principal basis and that conflicts of interest are inherent in such transactions.[49] We request comment on our written confirmation condition. Is there additional information that should be included in the confirmation? Are there circumstances in which commenters believe it is appropriate for us to permit investment advisers to rely on rule 206(3)-3T and also deliver confirmations to clients pursuant to the alternative periodic reporting provisions of rule 10b-10(b)?

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46 For a discussion of the meaning of "completion" of the transaction, see Section 206(3) Release. The temporary rule does not permit advisers to deliver confirmations using the alternative periodic reporting provisions of rule 10b-10(b) under the Exchange Act.

47 17 CFR 240.10b-10.

48 Rule 206(3)-3T(a)(5).

49 Rule 206(3)-2 under the Advisers Act, our agency cross transaction rule, requires similar confirmation disclosure.

6. Annual Summary Statement

The investment adviser must deliver to each client, no less frequently than once a year, written disclosure containing a list of all transactions that were executed in the account in reliance on rule 206(3)-3T, including the date and price of such transactions.[50] The annual summary statement is designed to ensure that clients receive a periodic record of the principal trading activity in their accounts and are afforded an opportunity to assess the frequency with which their adviser engages in such trades. As with each other disclosure required pursuant to rule 206(3)-3T, to be able to rely on the rule the investment adviser must include a conspicuous, plain English statement that its client's written prospective consent may be revoked at any time.[51]

We request comment generally on this aspect of the interim final rule. Should a summary statement be provided more or less frequently than annually? Is there additional information that we should require to be included in each summary statement? For example, we are not requiring advisers to disclose in an annual statement the total amount of all commissions or other remuneration they receive in connection with transactions with respect to which they are relying on this rule. Although that disclosure is required with respect to agency cross transactions pursuant to rule 206(3)-2(a)(3), we are concerned that disclosure of such amounts for principal trades may not accurately reflect the actual economic benefit to the adviser with respect to those trades or the consequence to the client for consenting to those trades. Are our concerns justified? Commenters are invited to submit suggestions for possible enhancements to the

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50 Rule 206(3)-3T(a)(6). Rule 206(3)-2(a)(3) contains a similar annual report requirement with respect to agency cross transactions. In addition, the FPA recommended a similar condition. See FPA Letter, at 4.

disclosures in annual statements that could enhance the disclosure to clients of the significance of their consenting to principal trades.

7. Advisory Account Must be a Brokerage Account

Rule 206(3)-3T is only available to an investment adviser that also is registered with us as a broker-dealer. Each account for which the investment adviser relies on this section must be a brokerage account subject to the Exchange Act, the rules thereunder, and the rules of applicable self-regulatory organizations (e.g., FINRA).[52] The rule therefore requires that the protections of both the Advisers Act and the Exchange Act apply when advisers enter into principal transactions with clients in reliance on the rule.

The temporary rule permits, subject to compliance with the rule's conditions, an adviser that also is registered as a broker-dealer to execute a principal trade directly (out of its own account) or indirectly (out of an account of another person who is a control person of the adviser). Because we have decided to apply the rule only to advisers who also are registered as broker-dealers, an adviser who is not also a registered broker-dealer would be unable to rely on rule 206(3)-3T if it causes a client to enter into a principal trade with a control person, even if that control person is a registered broker-dealer.

Our decision not to extend the rule to advisory accounts that are held only at investment advisers, as opposed to entities that are both investment advisers and broker dealers, is based on several considerations. First, firms that are both broker-dealers and investment advisers and their employees must comply with the comprehensive set of Commission and self-regulatory organization sales practice and best execution rules that apply to the relationship between a broker-dealer and its customer in addition to the

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[51] Rule 206(3)-3T(a)(8).

fiduciary duties an adviser owes a client. We believe that it is important to maintain the application of the laws and rules regarding broker-dealers to these accounts.[53] Second, as a practical matter, advisory clients most frequently need and desire principal trading services from firms that are dually registered as an adviser and a broker-dealer because they generally carry large inventories of securities. Providing a variation in the method of complying with section 206(3) of the Advisers Act for advisers that also are registered as broker-dealers thus addresses a large category of the situations in which clients are likely to benefit from access to the inventory of the adviser/broker-dealer without sacrificing pricing or other sales practice protections.

We request comment on this aspect of the interim final rule. What will be the benefit to customers of maintaining the sales practice rules of self-regulatory organizations? What will be the impact of the rule on advisers that are not themselves registered as broker-dealers? Would they choose to register as a broker-dealer in order to take advantage of the new rule? Are there particular requirements of broker-dealer regulation that are clearly duplicative or clearly inapplicable to the regulation of investment advisers and so are unnecessary in this context?

8. Other Obligations Unaffected

Rule 206(3)-3T(b) clarifies that the temporary rule does not relieve in any way an investment adviser from its obligation to act in the best interests of each of its advisory clients, including fulfilling the duty with respect to the best price and execution for a

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52 Rule 206(3)-3T(a)(7).

53 We note that fee-based brokerage accounts have been subject to Commission and self-regulatory organization sales practice and best execution rules since their inception.

particular transaction.[54] Compliance with rule 206(3)-3T also does not relieve an investment adviser from its fiduciary obligation imposed by sections 206(1) or (2) of the Advisers Act or by other applicable provisions of federal law.[55]

We note specifically that an adviser engaging in principal transactions is subject to rule 206(4)-7, which, among other things, requires an investment adviser registered with us to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act (and the rules thereunder) by the adviser or any of its supervised persons.[56] Thus, an adviser relying on rule 206(3)-3T as an alternative means of complying with section 206(3) must have adopted and implemented written policies and procedures reasonably designed to comply with the requirements of the rule. In addition, rule 204-2,[57] as well as Exchange Act rules 17a-3[58] and 17a-4,[59] requires the adviser to make, keep, and retain records relating to the principal trades the adviser effects.

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[54] Rule 206(3)-2(e) contains a similar provision.

[55] Section 206(3) Release. See also SIFMA Memo at Exhibit page 23 (noting that, in connection with any relief provided under section 206(3), "[t]he adviser will continue to act in the best interests of the client, including a duty to provide best execution, and will be required to meet all disclosure obligations imposed by Sections 206(1) and (2) of the Advisers Act and by other applicable provisions of the federal securities laws and rules of SROs"); section 406 of the Employee Retirement Income Security Act of 1974 ("ERISA") (describing "prohibited transactions" of fiduciaries subject to ERISA); section 4975(c)(1) of the Internal Revenue Code (the "Code") (describing "prohibited transactions" of fiduciaries governed by the Code).

[56] Rule 206(4)-7(a) [17 CFR 275.206(4)-7(a)].

[57] 17 CFR 275.204-2.

[58] 17 CFR 240.17a-3.

[59] 17 CFR 240.17a-4.

9. Limited Duration of Relief

Rule 206(3)-3T(d) contains a sunset provision. Absent further action by the Commission, the temporary rule will expire on December 31, 2009, which is about 27 months from its effective date.[60] Setting a termination date for the rule will necessitate further Commission action no later than the end of that period if the Commission intends to continue the same or similar relief.

We believe limiting the duration of the rule will give us an opportunity to observe how firms comply with their disclosure obligations under the rule, and whether, when they conduct principal trades with their clients, they put their clients' interests first. A significantly shorter period than the one we have established, however, may have disadvantaged former fee-based brokerage customers because of the uncertainty about the continuation of access through their advisory accounts to the securities in the inventory of their brokerage firm. Those customers also could have faced renewed disruption and confusion if the rule on principal trades were abolished or substantially modified in the short term. Similarly, broker-dealers would have faced the same uncertainty about the continuation of the rule, which could have caused some broker-dealers to decide not to make the necessary expenditures and investments to offer advisory accounts with access to principal trades.

We request comment on whether the 27-month time frame is appropriate. We also welcome comment on any other aspects of the rule that commenters believe should be modified.

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60 The FPA recommended a similar condition. See FPA Letter, at 2.

10. Other Matters

This rulemaking action must be: (i) necessary or appropriate in the public interest; (ii) consistent with the protection of investors; and (iii) consistent with the purposes fairly intended by the policy and provisions of the Advisers Act.[61] We also need to consider the effect of the rule on competition, efficiency, and capital formation, which we address below in Section VII of this Release. For the reasons described in this Release, we believe that the rule is necessary or appropriate in the public interest and consistent with the protection of investors. We also believe that the temporary rule is consistent with the purposes fairly intended by the policy and provisions of the Advisers Act.

In the FPA decision, the Court described the purposes of the Act, emphasizing that the "overall statutory scheme of the [Advisers Act] addresses the problems identified to Congress in two principal ways: First, by establishing a federal fiduciary standard to govern the conduct of investment advisers, broadly defined, . . . and second, by requiring full disclosure of all conflicts of interest."[62] The Congressional intent was to eliminate or expose all conflicts of interest that might incline an investment adviser, consciously or unconsciously, to render advice that was not disinterested.[63] The Court further noted that Congress's purpose in enacting the Advisers Act was to establish fiduciary standards and require full disclosure of all conflicts of interests of investment advisers.[64]

The temporary rule adopted today meets those purposes and adheres closely to the text of section 206(3), which reflects the basic conflict disclosure purposes of the Act.

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61 See 15 U.S.C. 80b-6a.

62 FPA decision, at 490.

63 Id.

64 Id.

That section provides that an adviser, before engaging in a principal trade with an advisory client, must disclose to the client in writing before completion of the transaction the capacity in which the adviser is acting and must obtain the consent of the client to the transaction. As we have stated before, "[i]n adopting Section 206(3), Congress recognized the potential for [abuses such as price manipulation or the placing of unwanted securities into client accounts], but did not prohibit advisers entirely from engaging in all principal and agency transactions with clients. Rather, Congress chose to address these particular conflicts of interest by imposing a disclosure and client consent requirement in Section 206(3) of the Advisers Act."[65]

The temporary rule complies with Congressional intent. It provides an alternative procedural means of complying with section 206(3) that retains transaction-by-transaction disclosure and consent (as required by section 206(3) of the Act), but adds additional investor protections measures by requiring an adviser:

- at the outset of the relationship with the client, to disclose in writing the circumstances under which the investment adviser directly or indirectly may engage in principal transactions, the nature and significance of conflicts with its client's interests as a result of the transactions, and how the investment adviser addresses those conflicts;
- to obtain prospective written consent of the client in response to that initial disclosure;
- before each transaction, to inform the advisory client, orally or in writing, that the adviser may act in a principal capacity with respect to the transaction and

65 Section 206(3) Release at text accompanying note 5.

to obtain the consent from the advisory client, orally or in writing, for the transaction;

- to send to the client, at or before completion of the transaction, a written trade confirmation that, in addition to the information required by rule 10b-10 under the Exchange Act, discloses that the adviser informed the client prior to the execution of the transaction that the adviser may be acting in a principal capacity in connection with the transaction, that the client authorized the transaction, and that the adviser sold the security to, or bought the security from, the client for its own account;
- to send to the advisory client an annual statement listing each principal transaction during the preceding year and the date and price of each such transaction; and
- to acknowledge explicitly in each required disclosure the right of the client to revoke his or her prospective consent at any time.

We believe that these transaction-specific steps, taken together, fulfill the Congressional purpose behind section 206(3) of the Act.

Another significant protection is that, as we discuss in Section II.B.7 above, to benefit from the rule, the investment adviser must also be a broker-dealer registered with us. Therefore, the firm must comply with the comprehensive set of Commission and self-regulatory organization sales practice and best execution rules that apply to the relationship between a broker-dealer and customer in addition to the fiduciary duties an adviser owes a client.

We further believe that the temporary nature of the rule will give us an opportunity to observe how firms comply with their obligations, and whether, when they conduct principal trades with their clients, they put their clients' interests first. The rule therefore employs a range of features to achieve the transaction-by-transaction conflict disclosure and consent purposes and policies of the Advisers Act. The rule additionally enables the adviser to discharge its fiduciary duties by bolstering them with broker-dealer responsibilities.

11. Effective Date

This temporary rule takes effect on September 30, 2007. For several reasons, including those discussed above, we have acted on an interim final basis.

In the time since the FPA decision, the Commission staff has had numerous communications with affected customers, broker-dealers, and investment advisers about areas in which Commission action or relief might be required to protect the interests of investors as a result of the Court's decision. One area of significance identified as our deliberative process continued was the area of principal trades. Under the rule vacated in the FPA decision, principal trades in fee-based brokerage accounts were not subject to section 206(3) of the Act. Through the process of discussions with interested parties, it was brought to our attention that a large number of fee-based brokerage customers favor having the choice of advisory accounts with access to the inventory of a diversified broker-dealer and that for certain customers the access to such securities – many of which would otherwise be unavailable – was a critical component of their investment strategy. We also learned that, as discussed above, the traditional method for complying with the principal trading restrictions on an adviser in section 206(3) – written disclosure and consent before completion of each securities transaction – made it not feasible for an adviser to engage in principal trading with its clients. The Commission received requests for principal trading relief from firms and the staff engaged in discussions with representatives of investors, financial planners, and broker-dealers about the terms of relief, considered their specific comments, and took those comments into account in developing the temporary rule we are adopting today.

Because of the FPA decision and the October 1, 2007 expiration of the stay of the issuance of the Court's mandate to vacate the former rule, investors with fee-based brokerage accounts must now consider whether they should convert their accounts to advisory accounts or to traditional commission-based brokerage accounts. It is not possible for those customers to make a meaningful, well-informed decision if they do not know what services will be offered in advisory accounts. For example, it would be critical to a customer who invests primarily in fixed income securities (which generally are traded by firms on a principal basis) to know whether he or she could continue to access a firm's inventory of those securities (or sell those securities to the firm) in an advisory account. But firms informed us that they would not permit that kind of trading without a rule that is effective and that provides an alternative means of complying with section 206(3) of the Act. Until we could publish a rule for comment, receive and analyze those comments, and adopt a final rule, that customer would be left with the choice between a traditional brokerage account without the ability to pay a fee based on assets – presumably the customer's preferred manner of payment – or a fee-based advisory account without the ability to invest in fixed income products.

Changing accounts and methods of payments can be highly disruptive and confusing to many investors, requiring a series of communications between the investor and one or more firms about the options available to give the investor the information he or she needs to make informed decisions about the services available in each type of account. We believe that it serves such investors' interests best to adopt the rule on an interim final basis, which permits them to continue the same kind of account, with similar services, that they had when they were fee-based brokerage customers.

We are aware that, as a result of the FPA decision, the process for converting as many as one million fee-based brokerage accounts to non-discretionary advisory or other accounts requires a great deal of time and imposes significant conversion costs on firms. For example, in order to comply with the October 1 deadline, those firms needed to draft or revise agreements, policies, and other documents, hire and train employees, and make changes to data and record keeping, order entry, billing, and other systems. The firms offering fee-based brokerage accounts urged us to reduce the burdens that apply to them by adopting a rule that is effective on or before October 1 and that permits an alternative method of complying with section 206(3) of the Act (or, alternatively, to exempt them from section 206(3) altogether). They informed us that this would simplify the process of communicating with their customers and reduce investor confusion. This is mostly because the services and manner of payments would be substantially similar in non-discretionary advisory accounts as they were in fee-based brokerage accounts – the firms would not have to explain why the services a customer has become accustomed to are changing, or why the manner of payment is changing.

The firms also were concerned that, without a rule that is effective by the date the FPA decision takes effect, fee-based brokerage customers may elect (or the firm may recommend) a commission-based brokerage account in order to have access to their firm's inventory of securities, then elect an advisory account only after a rule subject to notice and comment is finalized. This type of serial account change is costly to firms for the same reasons it is costly for them to convert accounts pursuant to the FPA decision. Moreover, such switching of account types can be confusing to customers if it is the firm that is recommending the changes.

Those factors led to this rule and similarly explain why the rule needs to be available at the same time the broker-dealers complete the transition from fee-based brokerage to advisory or other accounts. Otherwise, the risk of disrupting services to the investors, depriving them of the choice of an advisory account with a broker-dealer, and confusing them with a series of changes to the services available to them would have been substantial. Obtaining a further postponement of the stay of the mandate to allow advance notice and comment rulemaking did not appear feasible. For these reasons, issuance of an immediately effective rule is necessary to ameliorate the likely harm to investors.

Furthermore, we emphasize that we are requesting comments on the rule and will carefully consider and respond to them in a subsequent release. Moreover, this is a temporary rule. Setting a 27-month termination date for the rule will necessitate further Commission action no later than the end of that period if the Commission intends to continue the same or similar relief. The sunset provision will result in the Commission assessing the operation of the rule and intervening developments, as well public comment letters, and considering whether to continue the rule with or without modification or not at all.

A significantly shorter period than the 27-month period we have established could have disadvantaged investors. They would have faced uncertainty about the continuation of having access through their advisory accounts to the securities in the inventory of their brokerage firm and could have faced renewed disruption and confusion if the rule on principal trades were abolished or substantially modified in the short term. Similarly, broker-dealers would have faced the same uncertainty about the continuation of the rule, which could have caused some broker-dealers to decide not to make the necessary expenditures and investments to offer advisory accounts with access to principal trades.

As a result, the Commission finds that it has good cause to have the rule take effect on September 30, 2007, and that notice and public procedure in advance of the effectiveness of the rule are impracticable, unnecessary, and contrary to the public interest. In addition, the rule in part has interpretive aspects and is a rule that recognizes an exemption and relieves a restriction.

III. REQUEST FOR COMMENTS

The Commission is requesting comments from all members of the public during the next 60 days. We will carefully consider the comments that we receive and respond to them in a subsequent release.

In addition, we are awaiting a report being prepared by RAND Corporation comparing how the different regulatory systems that apply to broker-dealers and advisers affect investors (the "RAND Study"). As we have previously announced, the Commission commissioned a study comparing the levels of protection afforded customers of broker-dealers and investment advisers under the federal securities laws.[66] The Commission will have another opportunity to assess the operation and terms of the rule when it receives the results of the RAND Study comparing how the different regulatory systems that apply to broker-dealers and advisers affect investors. The RAND Study is expected to be delivered to the Commission no later than December 2007, several months ahead of schedule. The results of the RAND Study are expected to provide an important empirical foundation for the Commission to consider what action to take to improve the way investment advisers and broker-dealers provide financial services to customers. One option then available to the Commission will be making the RAND Study results available to the public and seeking comments on them and their bearing on the terms of this rule.

IV. TRANSITION GUIDANCE

We are today providing guidance to assist broker-dealers who have offered fee-based brokerage accounts and are seeking the consent of their clients to convert those accounts to advisory accounts and meet the requirements of this rule by October 1, 2007.

A. Client Consent

Broker-dealers have asked whether they must, before October 1, 2007, obtain written consent from each of their fee-based brokerage customers to enter into an advisory agreement that meets the requirements of the Advisers Act, in particular section 205 of the Act. Broker-dealers have informed us that, as a practical matter, it is not feasible for them to do so and, if written consent is required, many fee-based brokerage

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66 Commission Seeks Time for Investors and Brokers to Respond to Court Decision on Fee-Based Accounts, SEC Press Release No. 2007-95 (May 14, 2007).

customers will experience interrupted service or will be placed in traditional commission-based brokerage accounts, which may not be best for them.

Interim final rule 206(3)-3T(a)(3) requires an adviser wishing to rely on the rule's alternative means for complying with section 206(3) of the Act to obtain a written prospective consent from each client authorizing the investment adviser to engage in principal transactions with the client. We understand that it likely will be impossible for advisers to obtain these written consents from fee-based brokerage customers who convert their accounts to non-discretionary advisory accounts prior to October 1, 2007. To make the alternative means provided in the interim final rule useful immediately upon its effective date to those customers, we will not object if an adviser obtains the required written consent no later than January 1, 2008 from each fee-based customer who converts his or her account to a non-discretionary advisory account. During this transitional period, investment advisers must comply with the other conditions of rule 206(3)-3T, including the condition in paragraph (a)(4) of the rule, which requires that the adviser make certain disclosures and obtain client consent before effecting a principal trade with the client. They also must provide a client with the written disclosure required by paragraph (a)(3) of the temporary rule prior to effecting the first trade with that client in reliance on this rule.

B. Client Brochures

Advisers Act rule 204-3 requires an investment adviser to furnish its advisory clients with a disclosure statement, or brochure, containing at least the information required to be in Part II of Form ADV at the time of, or prior to, entering into an advisory contract.[67] In light of the time constraints firms face in complying with the October 1st deadline, we will not object if, with respect to the fee-based brokerage customers that convert to non-discretionary advisory accounts, advisers deliver this statement no later than January 1, 2008.

V. PAPERWORK REDUCTION ACT

A. Background

Rule 206(3)-3T contains "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[68] The collection of information is new. We submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13. Separately, we have submitted the collection of information to OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The OMB has approved the collection of information on an emergency basis with an expiration date of March 31 , 2008. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The title for the collection of information is: "Temporary rule for principal trades with certain advisory clients, rule 206(3)-3T" and the OMB control number for the collection of information is 3235-0630.

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67 The Advisers Act does not specify any means by which a client must execute a new advisory contract or agree to changes in an existing one. For purposes of transitioning clients from fee-based brokerage accounts, advisers presumably must look to the terms of the contracts they have in place, as well as applicable contract law, to determine the manner in which they need to enter into new contract or amend existing contracts in order to come into compliance with the Act.

68 44 U.S.C. 3501 et seq.

Rule 206(3)-3T provides an alternative method for investment advisers that are registered with us as broker-dealers to meet the requirements of section 206(3) when they act in a principal capacity with respect to transactions with certain of their advisory clients. In the absence of this rule, an adviser must provide a written disclosure and obtain consent for each transaction in which the adviser acts in a principal capacity. Rule 206(3)-3T permits an adviser, with respect to a non-discretionary advisory account, to comply with section 206(3) by: (i) making certain written disclosures; (ii) obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal trades; (iii) making oral or written disclosure that the adviser may act in a principal capacity and obtaining the client's consent orally or in writing prior to the execution of each principal transaction; (iv) sending to the client confirmation statements disclosing the capacity in which the adviser has acted and indicating that the adviser disclosed to the client that it may act in a principal capacity and that the client authorized the transaction; and (v) delivering to the client an annual report itemizing the principal transactions.

B. Collections of Information and Associated Burdens

Under rule 206(3)-3T, there are four distinct collection burdens. Our estimate of the burden of each of the collections reflects the fact that the alternative means of compliance provided by the rule is substantially similar to the approach advisers currently employ to comply with the disclosure and consent obligations of section 206(3) of the Advisers Act and the approach that broker-dealers employ to comply with the confirmation requirements of rule 10b-10 under the Exchange Act. Thus, as discussed below, we estimate that rule 206(3)-3T will impose only small additional burdens.

Providing the information required by rule 206(3)-3T is necessary to obtain the benefit of the alternative means of complying with section 206(3) of the Advisers Act. The rule contains two types of collections of information: information provided by an adviser to its advisory clients and information collected from advisory clients by an adviser. With respect to each type of collection, the information would be maintained by the adviser. Under Advisers Act rule 204-2(e), an adviser must preserve for five years the records required by the collection of information pursuant to rule 206(3)-3T. Although the rule does not call for any of the information collected to be provided to us, to the extent advisers include any of the information required by the rule in a filing, such as Form ADV, the information will not be kept confidential. The collection of information delivered by investment advisers pursuant to rule 206(3)-3T would be provided to clients and also would be maintained by investment advisers. The collection of information delivered by clients to advisers would be subject to the confidentiality strictures that govern those relationships, and we would expect them to be confidential communications.

Collections of Information

Prospective Disclosure and Consent: Pursuant to paragraph (a)(3) of the rule, an investment adviser must provide written, prospective disclosure to the client explaining: (i) the circumstances under which the investment adviser directly or indirectly may engage in principal transactions; (ii) the nature and significance of conflicts with its client's interests as a result of the transactions; and (iii) how the investment adviser addresses those conflicts. Pursuant to paragraph (a)(8) of the rule, the written, prospective disclosure must include a conspicuous, plain English statement that a client's written, prospective consent may be revoked without penalty at any time by written notice to the investment adviser from the client. And, for the adviser to be able to rely on rule 206(3)-3T with respect to an account, the client must have executed a written, revocable consent after receiving such written, prospective disclosure.

The first part of this collection of information involves the preparation and distribution of a written disclosure statement, which we anticipate will be largely uniform for clients in non-discretionary advisory accounts with a particular firm. This collection of information is necessary to explain to investors how their interests might be different from the interests of their investment adviser when the adviser engages in principal trades with them. It is designed to provide investors with sufficient information to be able to decide whether to consent to such trades.

We anticipate that the cost of this collection will mostly be borne upfront as advisers develop and deliver the required disclosure. This will require drafting and distributing the required disclosure to clients with respect to the accounts for which the investment adviser seeks to rely on the rule.[69] Once the disclosure has been developed and is integrated into materials provided upon opening a non-discretionary advisory account, the ongoing burden will be minimal.

We estimate that the average burden for drafting the required prospective disclosure for each eligible adviser, taking into account both those advisers that previously engaged in principal trades with their non-discretionary advisory clients, will be approximately 5 hours on average. We expect that some advisers, particularly the

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[69] We note that disclosure about the conflicts of interest for an adviser that engages in principal trades already is required to be disclosed by investment advisers in Form ADV. See Item 8 of Part 1A of Form ADV; Item 9 of Part II of Form ADV; Item 7(l) of Schedule H to Part II of Form ADV.

large financial services firms, may take significantly longer to draft the required disclosure because they may have more principal trading practices, and potentially more conflicts, to describe.[70] Other advisers may take significantly less time and some eligible advisers may choose not to rely on rule 206(3)-3T. Further, we expect the drafting burden will be uniform with respect to each eligible adviser regardless of how many individual non-discretionary advisory accounts that adviser administers or seeks to engage with in principal trading. As of August 1, 2007, there were 634 advisers that were eligible to rely on the temporary rule (i.e., also registered as broker-dealers), 395 of which indicate that they have non-discretionary advisory accounts.[71] We estimate that 90 percent of those 395 advisers, or a total of 356 of those advisers, will rely on this rule.[72] Of the 239 eligible advisers that do not currently provide non-discretionary advisory services, we estimate that 10 percent of these advisers, or 24 advisers, will create non-discretionary advisory programs and rely on the alternative means of compliance provided by this rule.[73] Thus, the total number of advisers we anticipate will rely on the

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70 The opportunities to engage in principal trades with advisory clients will vary greatly among eligible investment advisers. We believe many of these advisers are registered as broker-dealers for limited purposes and do not engage in market-making activities or otherwise carry extensive inventories of securities. These firms likely would limit their principal trading operations significantly. For example, they may choose to engage only in riskless principal trades, which may pose limited conflicts of interest resulting in brief disclosures. Investment advisers with large inventories of securities and multi-faceted operations, however, likely will have much more extensive disclosure.

71 IARD data as of August 1, 2007, for Items 6.A(1) and 5.F(2)(e) of Part 1A of Form ADV.

72 We anticipate that most dually-registered advisers will make use of the rule to engage in, at a minimum, riskless principal transactions to limit the need for these advisers to process trades for their advisory clients with other broker-dealers. We estimate that 10% of these firms will determine that the costs involved to comply with the rule are too significant in relation to the benefits that the adviser, and their clients, will enjoy.

73 We estimate that 10% of the dually-registered advisers that do not currently have non-discretionary advisory programs will create them due to a combination of market forces

rule is 380.[74] Accordingly, we estimate that the total drafting burden for the prospective disclosure statement for the estimated 380 advisers that will rely on the rule will be 1,900 hours.[75]

The prospective disclosure will need to be distributed to all clients who have non-discretionary advisory accounts for which an adviser seeks to rely on rule 206(3)-3T. Registration data indicates that there are approximately 3,270,000 existing non-discretionary advisory accounts held with eligible advisers.[76] Discussions with eligible advisers indicate that approximately: (i) 90 percent of these non-discretionary advisory accounts administered by them, or 2,943,000 accounts, are in programs to which the rule will not apply, such as mutual fund asset allocation programs; and (ii) 40 percent of the remaining 327,000 non-discretionary advisory accounts administered by them, or 130,800 accounts, are retirement accounts, and thus unlikely to participate in principal trading,[77] leaving 196,200 existing non-retirement non-discretionary advisory accounts administered by eligible advisers.[78]

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and the ability to enter into principal trades more efficiently as a result of the rule. We base this estimate on discussions with industry representatives.

74 356 dually-registered advisers that currently have non-discretionary advisory account programs + 24 dually-registered advisers that do not currently have non-discretionary advisory programs, but we expect will initiate them = 380 eligible advisers that will have non-discretionary advisory programs.

75 5 hours per adviser x 380 eligible advisers that will rely on the rule = 1,900 total hours.

76 IARD data as of August 1, 2007, for Item 5.F(2)(e) of Part 1A of Form ADV.

77 We have based this estimate on discussions with industry representatives. The Code and ERISA impose restrictions on certain types of transactions involving certain retirement accounts. We do not take a position on whether the Code or ERISA limits the availability of rule 206(3)-3T.

78 3,270,000 existing non-discretionary advisory accounts among eligible advisers – 2,943,000 accounts in wrap fee and other programs to which the rule will not apply – 130,800 retirement accounts = 196,200 non-retirement, non-discretionary advisory accounts among eligible advisers.

As noted in Section I.B of this Release and confirmed by discussions with several firms, we anticipate that most fee-based brokerage accounts will be converted to non-discretionary advisory accounts. For purposes of our analysis, we have assumed that all of the estimated 1 million fee-based brokerage accounts will be converted to non-discretionary advisory accounts.[79] Of those accounts, we estimate that substantially all of them are held at investment advisers that also are registered as broker-dealers.[80] Discussion with broker-dealers that have fee-based brokerage programs have informed us that approximately 40 percent of the existing fee-based brokerage accounts are retirement accounts, and are unlikely to engage in principal trading. We anticipate that all eligible advisers that are converting fee-based brokerage accounts to non-discretionary advisory accounts will conduct principal trading in reliance on the rule. Thus, we estimate that eligible investment advisers will distribute the prospective disclosure to approximately 600,000 former fee-based brokerage customers. When aggregated with the 196,200 existing non-retirement, non-discretionary advisory accounts we believe likely will receive the prospective disclosure, we estimate the total number of accounts for which clients will receive prospective disclosure to be 796,200.[81]

We estimate that the burden for administering the distribution of the prospective disclosure will be approximately 0.1 hours (six minutes) for every account. Based on the

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79 This assumption may result in the estimated paperwork burdens and costs of proposed rule 206(3)-3T being overstated.

80 Industry representatives have informed us that substantially all fee-based brokerage accounts are held with twelve broker-dealers, all of which also are registered as investment advisers according to IARD data as of August 1, 2007.

81 196,200 existing non-retirement, non-discretionary advisory accounts we estimate are likely to receive prospective disclosures + 600,000 fee-based brokerage accounts we estimate will be converted to non-discretionary advisory accounts = 796,200 total

discussion above, we estimate that the prospective disclosure will be distributed to a total of approximately 796,200 eligible existing non-discretionary advisory accounts and eligible former fee-based brokerage accounts. We estimate the total hour burden under paragraph (a)(3) of rule 206(3)-3T for distribution of the prospective written disclosure to be 79,620 hours.[82]

We estimate an average one-time cost of preparation of the prospective disclosure to include outside legal fees for approximately three hours of review to total $1,200 per eligible adviser on average,[83] for a total of $456,000.[84] As we discuss above, advisers that rely on the rule will face widely varying numbers and severity of conflicts of interest with their clients. We believe that those advisers that engage in riskless principal trading, are unlikely to seek outside legal services in drafting the prospective disclosure. On the other hand, advisers with more significant conflicts are likely to engage outside legal services to assist in preparation of the prospective written disclosure. We also estimate a one-time average cost for printing and physical distribution of the various disclosure documents, including a disclosure and consent form and, if necessary, a revised account agreement, to be approximately $1.50 per account,[85] for a total of $1,194,300.[86]

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accounts we expect to receive the prospective disclosure addressed in paragraph (a)(3) of rule 206(3)-3T.

82 0.1 hours (six minutes) per account x 796,200 accounts = 79,620 hours.

83 Outside legal fees are in addition to the projected 5 hour per adviser burden discussed in note 75 and accompanying text.

84 $400 per hour for legal services x 3 hours per adviser x 380 eligible advisers that we expect to rely on the rule = $456,000. The hourly cost estimate is based on our consultation with advisers and law firms who regularly assist them in compliance matters.

85 This estimate is based on discussions with firms. It represents our estimate of the average cost for printing and distribution, which we expect will include distribution of hard copies for approximately 85% of accounts and distribution of electronic copies for approximately 15% of accounts.

The second part of this burden is that the adviser must receive from each client an executed written, revocable consent prospectively authorizing the investment adviser, or a broker-dealer affiliate of the adviser, to act as principal for its own account, to sell any security to or purchase any security from the advisory client. This collection of information is necessary to verify that a client has provided the required prospective consent. It is designed to ensure that advisers that wish to engage in principal trades with their clients in reliance on the rule inform their clients that they have a right not to consent to such transactions.

Compliance with this part of the temporary rule will require advisers to collect executed written, prospective consent from advisory clients. We anticipate that the bulk of the burden of this collection will be borne upfront. We expect that the consent solicitation for existing non-discretionary advisory accounts and fee-based brokerage accounts being converted to non-discretionary advisory accounts will be integrated into the prospective written disclosure. For new clients, we anticipate that the consent solicitation provision will be included in the account agreement signed by a client upon opening a non-discretionary advisory account. Once the consent solicitation has been integrated into the account-opening paperwork, the ongoing burden will be minimal.

We believe that the burden and costs to advisers of soliciting consent is included in the burdens and costs of drafting and distributing the notices described above. This is because we expect the consent solicitation to be integrated into the firm's prospective written disclosure. We estimate an average burden per accountholder of 0.05 hours (three minutes) in connection with reviewing the consent solicitation, asking questions,

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86 $1.50 per account x 796,200 accounts = $1,194,300.

providing consent, and, for those that so wish, revoking that consent at a later date. Assuming that there are 796,200 accountholders who receive prospective disclosure and a prospective consent solicitation we estimate a total burden of 39,810 hours on accountholders for reviewing and/or returning consents.[87] We further estimate that 90 percent of these accountholders, or 716,580 accountholders, will execute and return the consent.[88]

Finally, we estimate that the burden of updating the disclosure, maintaining records on prospective consents provided, and processing consent revocations and prospective consents granted subsequent to the initial solicitation will be approximately 100 hours per eligible adviser per year. We estimate that the total burden for all advisers to keep prospective consent information up to date will be 38,000 hours.[89]

Trade-By-Trade Disclosure and Consent: Pursuant to paragraph (a)(4) of the rule, an investment adviser, prior to the execution of each principal transaction, must inform the advisory client, orally or in writing, of the capacity in which it may act with respect to such transaction. Also pursuant to paragraph (a)(4) of the rule, an investment adviser, prior to the execution of each principal transaction, must obtain oral or written consent from the advisory client to act as principal for its own account with respect to such transaction. This collection of information is necessary to alert an advisory client that a

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87 0.05 hours (three minutes) per accountholder x 796,200 accountholders executing and returning the consent = 39,810 total burden hours on accountholders with respect to returning consents.

88 796,200 eligible accountholders x 90 percent = 716,580 accountholders who will return their prospective consents. We refer herein to these 716,580 accountholders who return their consents, and whose advisers are therefore eligible to rely on the rule with respect to them, as "eligible accountholders."

specific trade may be executed as principal and provide the client with the opportunity to withhold its authorization for the trade to be executed on a principal basis.

We note that section 206(3) of the Advisers Act requires written trade-by-trade disclosure in connection with principal trades. We believe that complying with this part of rule 206(3)-3T provides an alternative method of compliance that is likely to be less costly than compliance with section 206(3) in many situations. However, to the extent that advisers are not currently engaging in principal trades with non-discretionary advisory accountholders (and thus are not preparing and providing written disclosure regarding conflicts of interest associated with principal trading in particular securities), advisers electing to rely on the rule will need to begin to prepare such disclosure and communicate it to clients. Based on discussions with industry and their experience with fee-based brokerage accounts and existing non-discretionary advisory programs, we estimate conservatively that non-discretionary advisory accountholders at eligible advisers engage in an average of approximately 50 trades per year and that, for purposes of this analysis, all those trades are principal trades for which the investment adviser seeks to rely on rule 206(3)-3T.[90] We estimate, based on our discussions with broker-dealers, a burden of 0.0083 hours (approximately 30 seconds) per trade on average for preparation and communication of the requisite disclosure to a client, and for the client to consent, for an estimated total burden of approximately 297,381 hours per year.[91]

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89 100 hours per eligible adviser x 380 eligible advisers that will rely on the rule = a total burden of 38,000 hours for updating disclosure, maintaining records, and processing new consents and revocations.

90 These assumptions may result in the estimated paperwork burdens and costs of proposed rule 206(3)-3T being overstated.

91 50 trades per account per year x 716,580 accountholders that will provide prospective consent and therefore enable their advisers to rely on the rule with respect to them x

Trade-By-Trade Confirmations: Pursuant to paragraph (a)(5) of the rule, an investment adviser must deliver to its client a written confirmation at or before completion of each principal transaction that includes, in addition to the information required by rule 10b-10 under the Exchange Act [17 CFR 240.10b-10], a conspicuous, plain English statement that the investment adviser: (i) informed the advisory client that it may be acting in a principal capacity in connection with the transaction and the client authorized the transaction; and (ii) owned the security sold to the advisory client (or bought the security from the client for its own account). Pursuant to paragraph (a)(8) of the rule, each confirmation must include a conspicuous, plain English statement that the written, prospective consent described above may be revoked without penalty at any time by written notice to the investment adviser from the client. This collection of information is necessary to ensure that an advisory client is reminded that a particular trade was made on a principal basis and is given the opportunity to revoke prospective consent to such trades.

The majority of the information required in this collection of information is already required to be assembled and communicated to clients pursuant to requirements under the Exchange Act. As such, we do not believe that there will be an ongoing hour burden associated with this requirement. We estimate a one-time cost burden for reprogramming computer systems that generate confirmations to ensure that all the

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0.0083 hours (approximately 30 seconds) per trade for disclosure = a burden of 297,381 hours per year.

information required for purposes of paragraphs (a)(5) and (a)(8) of rule 206(3)-3T is included in such confirmations of $20,000 per eligible adviser for a total of $7,600,000.[92]

Principal Transactions Report: Pursuant to paragraph (a)(6) of the rule, the investment adviser must deliver to each client, no less frequently than annually, written disclosure containing a list of all transactions that were executed in the account in reliance upon the rule, and the date and price of such transactions. This report will require a collection of information that should already be available to the adviser or its broker-dealer affiliate executing the client's transactions. Pursuant to paragraph (a)(8) of the rule, each principal transactions report must include a conspicuous, plain English statement that the written, prospective consent described above may be revoked without penalty at any time by written notice to the investment adviser from the client. This collection of information is necessary to ensure that clients receive a periodic record of the principal trading activity in their accounts and are afforded an opportunity to assess the frequency with which their adviser engages in such trades.

We estimate that other than the actual aggregation and delivery of this statement, the burden of this collection will not be substantial because the information required to be contained in the statement is already maintained by investment advisers and/or broker-dealers executing trades for their clients. Advisers and broker-dealers already send periodic or annual statements to clients.[93] Thus, to comply, advisers will need to add

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92 $20,000 to program system generating confirmations per adviser x 380 eligible advisers that will rely on the rule = $7,600,000 total programming costs for confirmations. Our estimate for the cost to program the confirmation system was derived from discussions with broker-dealers.

93 For example, investment advisers that are qualified custodians for purposes of rule 206(4)-2 under the Advisers Act and that maintain custody of their advisory clients' assets must, at a minimum, send quarterly account statements to their clients pursuant to rule 206(4)-2(a)(3).

information they already maintain to documents they already prepare and send. We expect that there will be a one-time burden associated with this requirement relating to programming computer systems to generate the report, aggregating information that is already available and maintained by advisers or their broker-dealer affiliates. We estimate this burden to be on average approximately 5 hours per eligible firm for a total of 1,900 hours.[94] We also estimate that in addition to the hour burden, firms may have costs associated with retaining outside professionals to assist in programming. We estimate these costs to average $10,000 per adviser for a total upfront cost of $3,800,000.[95] Once computer systems enable these reports to be generated electronically, we estimate that the average ongoing burden of generating the reports and delivering them to clients will be 0.05 hours (three minutes) per eligible non-discretionary advisory account, or a total of 35,829 hours per year.[96]

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94 5 hours per eligible adviser for programming relating to the principal trade report x 380 advisers = a total programming burden relating to the principal trade report of 1,900 hours. Advisers that use proprietary systems will likely devote considerably more time to programming reports. However, these advisers are also likely to have already programmed systems to meet the requirements of rule 206(3)-2(a)(3), which contains a similar annual report requirement with respect to agency cross transactions. Other advisers may be using commercial software to track and report trades in accounts. These software packages should take little time for an adviser to implement, and consequently should impose significantly less than a 5 hour burden.

95 $10,000 for retaining outside professionals to assist in programming in connection with the principal transactions report per adviser x 380 advisers = $3,800,000 in outside programming costs in connection with the principal transactions report. We based our outside programming cost estimate on a rate of $250 per hour for 40 hours of programming consultant time. We anticipate that the advisers that rely on commercial software solutions, many of which will be components to trading software they already have acquired, will not have to retain outside programming consultants.

96 0.05 hours (three minutes) per eligible accountholder to generate and deliver reports x 716,580 eligible accountholder = 35,829 hours total burden for generating and delivering reports to accountholders. Because, as we note above, the information required by the rule will be added to documents advisers already send to clients, we estimate that there is no added cost associated with delivering the reports to clients (e.g., postage costs).

C. Summary of Estimated Paperwork Burden

For purposes of the Paperwork Reduction Act, we estimate an annual incremental increase in the burden for investment advisers and their affiliated broker-dealers to comply with the alternative means for compliance with section 206(3) of the Advisers Act contained in rule 206(3)-3T. As discussed above, our estimates reflect the fact that the alternative means of compliance is similar to the approach advisers currently employ to comply with the disclosure and consent obligations of section 206(3) of the Advisers Act and also is similar to the approach broker-dealers employ to comply with certain of the requirements of rule 10b-10 under the Exchange Act.

Some amount of training of personnel on compliance with the rule and developing, acquiring, installing, and using technology and systems for the purpose of collecting, validating and verifying information may be necessary. In addition, as discussed above, some amount of time, effort and expense may be required in connection with processing and maintaining information. We estimate that the total amount of costs, including capital and start-up costs, for compliance with the rule is approximately $13,050,300.[97] We estimate that the hour burden will be 494,440 hours.[98]

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97 $456,000 for outside professional fees associated with preparation of the prospective disclosure + $1,194,300 for printing and physical distribution costs associated with the prospective disclosure + $7,600,000 for programming costs for outside professionals for rendering trade confirmations compliant with the rule + $3,800,000 for programming costs for outside professionals to create principal trading reports = a total of $13,050,300.

98 1,900 hours for drafting prospective disclosure + 79,620 hours for administering distribution of prospective disclosure to accountholders + 39,810 hours for review by accountholders of the consent solicitation and returning consents + 38,000 hours for advisers maintaining and updating consent information + 297,381 hours for preparation and communication of trade-by-trade disclosure and consent + 1,900 hours for programming to create principal trading reports + 35,829 hours for ongoing generation of principal trading reports = a total of 494,440 hours.

D. Request for Comment

We invite comment on each of these estimates and the underlying assumptions. Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment with respect to the collections described in this section of this Release in order to: (i) evaluate whether the collections of information are necessary for the proper performance of our functions, including whether the information will have practical utility; (ii) evaluate the accuracy of our estimate of the burden of the collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology.[99]

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-23-07. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-23-07, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, Washington, DC 20549. The OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release.

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99 Comments are requested pursuant to 44 U.S.C. 3506(c)(2)(B).

Consequently, a comment to OMB is assured of having its full effect if OMB receives it within 30 days of publication.

VI. COST-BENEFIT ANALYSIS

A. Background

We are adopting, as an interim final temporary rule, rule 206(3)-3T under the Advisers Act, which provides an alternative means for investment advisers that are registered with us as broker-dealers to meet the requirements of section 206(3) when they act in a principal capacity with respect to transactions with certain of their advisory clients. We are adopting this rule as part of our response to a recent court decision invalidating rule 202(a)(11)-1, which provided that fee-based brokerage accounts were not advisory accounts and were thus not subject to the Advisers Act. As a result of the court's decision, these fee-based accounts are advisory accounts subject to the fiduciary duty and other requirements of the Advisers Act, unless converted to commission-based brokerage accounts. To maintain investor choice and protect the interests of investors holding an estimated $300 billion in approximately one million fee-based brokerage accounts, we are adopting rule 206(3)-3T.

B. Summary of Temporary Rule

Rule 206(3)-3T permits an adviser, with respect to a non-discretionary advisory account, to comply with section 206(3) by: (i) making certain written disclosures; (ii) obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal trades; (iii) making oral or written disclosure of the capacity in which the adviser may act and obtaining the client's consent orally or in writing prior to the execution of each principal transaction; (iv) sending to the client confirmation statements disclosing the capacity in which the adviser has acted and indicating that the adviser disclosed to the client that it may act in a principal capacity and that the client authorized the transaction; and (v) delivering to the client an annual report itemizing the principal transactions. These conditions are designed to require an adviser to fully apprise the client of the conflicts of interest involved in these transactions, inform the client of the circumstances in which the adviser may effect a trade on a principal basis, and provide the client with meaningful opportunities to revoke prospective consent or refuse to authorize a particular transaction.

To avoid disruption that would otherwise occur to customers who currently hold fee-based brokerage accounts, we are adopting rule 206(3)-3T on an interim final basis so that it will be available when the Court's decision takes effect on October 1, 2007.[100] For reasons explained below, we are adopting the rule on a temporary basis so that it will expire on December 31, 2009.

C. Benefits

As discussed above, the principal benefit of rule 206(3)-3T is that it maintains investor choice and protects the interests of investors holding an estimated $300 billion in one million fee-based brokerage accounts. It is our understanding that investors favor having the choice of advisory accounts with access to the inventory of a diversified broker-dealer but that meeting the requirements set out in section 206(3) is not feasible for advisers affiliated with broker-dealers or advisers that also are registered as broker-dealers. By complying with what we believe to be relatively straightforward procedural requirements, investment advisers can avoid what they have indicated to us is a critical impediment to their providing access to certain securities which they hold in their own

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[100] See supra note 5 and accompanying text.

accounts—namely, written trade-by-trade disclosure. These advisers have communicated to us that the trade-by-trade written disclosure requirement is so impracticable in today's markets that it effectively stands in the way of their being able to give clients access to certain securities that might most cheaply or quickly be traded with a client on a principal basis. In fact, with respect to some securities, for which the risks might be relatively low (such as investment-grade debt securities), absent principal trading, clients may not have access to them at all. For other securities, execution may be improved where the adviser or affiliated broker-dealer can provide the best execution of the transaction.

A resulting second benefit of the rule is that non-discretionary advisory clients of dually registered firms will have easier access to a wider range of securities. This in turn will likely increase liquidity in the markets for these securities and promote capital formation in these areas.

A third benefit of the rule is that it provides the protections of the sales practice rules of the Exchange Act and the relevant self-regulatory organizations because an adviser relying on the rule must also be a registered broker-dealer. As a result, clients will have the benefit of the fiduciary duties imposed on the investment adviser by the Advisers Act and of the Commission's rules and regulations under the Exchange Act as well as those of the SROs.

Another benefit of Rule 206(3)-3T is that it provides a lower cost alternative for an adviser to engage in principal transactions. As discussed above, in the absence of this rule our view has been that an adviser must provide written disclosure and obtain consent for each specific principal transaction. Rule 206(3)-3T permits an adviser to comply with section 206(3) by, among other things, providing oral disclosure prior to the execution of each principal transaction. As discussed above, we understand traditional compliance is difficult and costly. This alternative means of compliance should be, consistent with the protection of investors, less costly and less burdensome.

D. Costs

Prospective Disclosure and Consent: Pursuant to paragraph (a)(3) of the rule, an investment adviser must provide written, prospective disclosure to the client explaining: (i) the circumstances under which the investment adviser directly or indirectly may engage in principal transactions; (ii) the nature and significance of conflicts with its client's interests as a result of the transactions; and (iii) how the investment adviser addresses those conflicts. Pursuant to paragraph (a)(8) of the rule, the written, prospective disclosure must include a conspicuous, plain English statement that a client's written, prospective consent may be revoked without penalty at any time by written notice to the investment adviser from the client. And, for the adviser to be able to rely on rule 206(3)-3T with respect to an account, the client must have executed a written, revocable consent after receiving such written, prospective disclosure. The principal costs associated with this requirement include: (i) preparation of the prospective disclosure and consent solicitation; (ii) distribution of the disclosure and consent solicitation to clients; and (iii) ongoing management of information, including revocations of consent and grants of consent that occur subsequent to the account opening process.

We estimate that the costs of preparing the prospective disclosure and consent solicitation will be borne upfront. Once these items have been generated by eligible advisers, such advisers will be able to include them in other materials already required to be delivered to clients. For purposes of the Paperwork Reduction Act, we have estimated the number of hours and costs the average adviser would spend in the initial preparation of their prospective disclosure and consent solicitation.[101] Based on those estimates, we estimate that advisers would incur costs of approximately $1,480 on average per adviser, including a conflicts review process, drafting efforts and consultation with clients, and legal consultation.[102] Assuming there are 380 eligible advisers (i.e., advisers that also are registered broker-dealers) that will prepare the prospective disclosure and consent solicitation, we estimate that the total costs will be $562,400.[103]

For purposes of the Paperwork Reduction Act, we have estimated the number of hours and costs the average adviser would spend on the distribution of their prospective disclosure and consent solicitation as 210 hours and $3,143.[104] We expect that the costs of distribution of the prospective disclosure and solicitation consent to existing non-

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101 See section V.B of this Release. We estimate the following burdens and/or costs: (i) for drafting the required prospective disclosure, approximately 5 hours on average per eligible adviser, of which we estimate there are 380, for a total of 1,900 hours; and (ii) for utilizing outside legal professionals in the preparation of the prospective disclosure, approximately $1,200 on average per eligible adviser, for a total of $456,000.

102 We expect that the internal preparation function will most likely be performed by compliance professionals. Data from the SIFMA's Report on Office Salaries in the Securities Industry 2006 ("Industry's Salary Report"), modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that the cost for a Compliance Clerk is approximately $56 per hour. $56 per hour x 5 hours on average per adviser = $280 on average per adviser of internal costs for preparation of the prospective disclosure. $280 on average per adviser of internal costs + $1,200 on average per adviser of costs for external consultants = $1,480 on average per adviser.

103 $1,480 on average per adviser in costs for preparation of the prospective disclosure x 380 advisers = $562,400 in total costs for preparation of the prospective disclosure.

104 See section V.B of this Release. We estimate the following burdens and/or costs: (i) for printing the prospective disclosure (including a disclosure and consent form and, if necessary, a revised Form ADV brochure and account agreement), approximately $1.50 on average per eligible account, of which we estimate there are approximately 796,200, for a total of $1,194,300 (which, if divided by the estimated 380 eligible advisers, equals a total cost for printing of approximately $3,143 on average per adviser); (ii) for distributing the prospective disclosure, approximately 0.1 hours on average per eligible

discretionary advisory clients and fee-based brokerage accountholders converting their accounts to non-discretionary advisory accounts will include duplication charges, postage and other mailing related expenses. We estimate that these costs will be approximately $5.60 on average per client, for a total of $4,458,720.[105]

For purposes of the Paperwork Reduction Act, we have estimated the number of hours the average accountholder would spend on reviewing the written disclosure document and, if it wishes, returning an executed consent.[106] We estimate that the costs corresponding to this hour burden will be approximately $0.50 on average per eligible accountholder. Assuming that there are 796,200 eligible accountholders who will receive the written disclosure document and 716,580 that will provide consent during the transitional solicitation, we estimate that the total cost to clients will be $398,100.[107]

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account, for a total of 79,620 hours (which, if divided by the estimated 380 eligible advisers, equals a total burden of 210 hours on average per adviser).

105 We expect that the distribution function for the prospective written disclosure and consent solicitation will most likely be performed by a general clerk. Data from the Industry's Salary Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that cost for a General Clerk is approximately $41 per hour. $41 per hour x 0.1 hours on average for distribution per account = approximately $4.10 on average per account for distribution. $1.50 on average printing cost per account + $4.10 on average distribution cost per account = $5.60 on average per account. $5.60 on average per account x 796,200 accounts to which we expect the disclosure to be distributed = a total printing and distribution cost for the prospective disclosure and consent solicitation of $4,458,720 (which, if divided by the estimated 380 eligible advisers, equals a total cost for distribution of approximately $11,733 on average per eligible adviser).

106 See section V.B of this Release. We estimate that the burden per client account that will return an executed consent (eligible accountholder), of which we estimate that there will be approximately 716,580, will be 0.05 hours (3 minutes) on average, for a total burden of 35,829 hours. We do not believe there will be a significant difference in burden between those clients that consent and those that do not.

107 $0.50 on average for each accountholder who receives a written prospective disclosure document x 796,200 eligible accountholders = $398,100. We do not believe there will be a significant difference in burden between those accountholders that consent and those that do not.

For purposes of the Paperwork Reduction Act, we have estimated the number of hours the average adviser would spend in ongoing maintenance of prospective disclosure and consent solicitation efforts.[108] Based on those estimates, we estimate that the average cost of updating the written prospective disclosure, maintaining records on prospective consents provided, and processing consent revocations and consents granted subsequent to the initial solicitation will be approximately $5,600 on average per eligible adviser per year.[109] We estimate that the annual cost for all eligible advisers to keep consent information up to date will be $2,128,000.[110]

Based on the discussion above, we estimate the costs relating to paragraph (a)(3) of rule 206(3)-3T to be on average approximately: (i) $13,213 per adviser in one-time costs;[111] (ii) $5,600 per adviser in ongoing costs; and (iii) $0.50 per client account in costs. As such, we estimate the total costs associated with the prospective written disclosure and consent requirement of the rule to be $7,547,040.[112]

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108 See section V.B of this Release. We estimate that the burden per eligible adviser of ongoing maintenance of the prospective disclosure and consent solicitation efforts will be approximately 100 hours on average per year, for a total of 38,000 hours.

109 We expect that this function will most likely be performed by compliance professionals at $56 per hour. See Industry's Salary Report. 100 hours on average per adviser per year x $56 per hour = $5,600 on average per adviser per year.

110 $5,600 on average per adviser per year x 380 eligible advisers = $2,128,000.

111 $1,480 on average per adviser in costs for preparation of the prospective disclosure and consent solicitation + $11,733 on average per adviser in costs for printing and distributing the prospective disclosure and consent solicitation = total one-time costs for preparation, printing and distribution of the prospective disclosure and consent solicitation of $13,213 on average per adviser.

112 ($13,213 average one time cost per adviser x 380 eligible advisers) + ($5,600 average ongoing costs per adviser x 380 eligible advisers) + ($0.50 average costs per accountholder x 796,200 accountholders who will review the written disclosure) = $5,020,940 + $2,128,000 + $398,100 = $7,547,040 total cost of compliance with paragraph (a)(3) of rule 206(3)-3T.

Trade-by-Trade Disclosure and Consent: Pursuant to paragraph (a)(4) of the rule, an investment adviser, prior to the execution of each principal transaction, must inform the advisory client, orally or in writing, of the capacity in which it may act with respect to such transaction. Also pursuant to paragraph (a)(4) of the rule, an investment adviser, prior to the execution of each principal transaction, must obtain oral or written consent from the advisory client to act as principal for its own account with respect to such transaction. Further, investment advisers likely will want to document for their own evidentiary purposes the receipt of trade-by-trade consent by their representatives.

As noted in our Paperwork Reduction Act analysis, section 206(3) of the Advisers Act already requires written trade-by-trade disclosure in connection with principal trades. We believe that complying with this requirement of rule 206(3)-3T provides an alternative method of compliance that is likely to be less costly than compliance with section 206(3). To the extent that advisers are not currently engaging in principal trades with non-discretionary advisory accountholders (and thus are not preparing and providing written disclosure regarding conflicts of interest associated with principal trading in particular securities), advisers electing to rely on the rule will need to begin to prepare such tailored disclosure and communicate it to clients.

We estimate that the costs of preparing and communicating trade-by-trade disclosures to clients and obtaining their consents could include: (i) preparing disclosure relating to the conflicts associated with executing that transaction on a principal basis; and (ii) communicating that disclosure to clients. For purposes of the Paperwork Reduction Act, we have estimated the number of hours advisers would spend on providing trade-by-trade disclosure and consent solicitation.[113] Based on those estimates, we estimate that the cost of preparing each trade-by-trade disclosure will be approximately $0.47 on average.[114] For purposes of the Paperwork Reduction Act analysis, we have estimated that eligible clients engage in an average of approximately 50 trades per year, all of which we have conservatively assumed are principal trades. We further estimate that communicating the disclosure to clients orally will be at most a minimal cost (note that system programming costs are discussed separately under the subsection entitled "Related Costs" below). As such, we estimate the total annual cost for compliance with paragraph (a)(4) of rule 206(3)-3T to be approximately $16,662,240.[115]

Trade-by-Trade Confirmations: Pursuant to paragraph (a)(5) of the rule, an investment adviser must deliver to its client a written confirmation at or before completion of each principal transaction that includes, in addition to the information required by rule 10b-10 under the Exchange Act [17 CFR 240.10b-10], a conspicuous, plain English statement that the investment adviser: (i) informed the advisory client that it may be acting in a principal capacity in connection with the transaction and the client

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113 See section V.B of this Release. We estimate that based on discussions with industry representatives that there will be approximately 50 trades (which we conservatively assume will be principal trades) on average made per year per eligible account. We estimate a burden of 0.0083 hours (30 seconds) on average per trade for communication of the requisite disclosure to an eligible accountholder, of which we estimate there will be 716,580, for an estimated total burden of approximately 297,381 hours per year. The burden for the average adviser would thus be 297,381 total hours per year ÷ 380 eligible advisers = approximately 783 hours on average per adviser per year.

114 We expect that this function will most likely be performed by compliance professionals at $56 per hour (see Industry's Salary Report) and that the preparation and communication of trade-by-trade disclosure will comprise an average burden of approximately 0.0083 hours (30 seconds) per trade. 0.0083 hours on average per trade x $56 per hour = approximately $0.47 on average per trade.

115 783 hours on average per adviser per year x $56 per hour = $43,848 on average per adviser per year. $43,848 on average per eligible adviser per year x 380 eligible advisers = $16,662,240 total costs per year.

authorized the transaction; and (ii) owned the security sold to the advisory client (or bought the security from the client for its own account). As noted above in the Paperwork Reduction Act section of this Release, the majority of the information that this provision requires to be delivered to clients is already required to be assembled and communicated to clients pursuant to requirements under the Exchange Act. We expect that the costs associated with conforming trade confirmations to the requirements of paragraph (a)(5) of rule 206(3)-3T will stem principally from programming computer systems that generate confirmations to ensure that all the required information is contained in the confirmations. Costs associated with programming are described under the subsection entitled "Related Costs" below.

Principal Transactions Report: Pursuant to paragraph (a)(6) of the rule, the investment adviser must deliver to each client, no less frequently than annually, written disclosure containing a list of all transactions that were executed in the account in reliance upon the rule, and the date and price of such transactions. This report will require advisers to aggregate and distribute information that should already be available to the adviser or its broker-dealer affiliate executing the client's transactions.

As noted in the Paperwork Reduction Act section of this Release, we estimate that other than the actual aggregation and delivery of this statement, the burden of this collection will not be substantial because the information required to be contained in the statement is already collected and maintained by investment advisers and/or broker-dealers executing trades for their clients. Advisers and broker-dealers already send periodic or annual statements to clients. Thus, to comply, advisers will need to add information they already maintain to documents they already prepare and send. We expect that there will be a one-time cost associated with this requirement relating to programming computer systems to generate the report, aggregating information that is already available and maintained by advisers or their broker-dealer affiliates. Costs associated with programming are described under the subsection entitled "Related Costs" below.

Related Costs: We expect that the bulk of the costs of compliance with rule 206(3)-3T relate to: (i) the initial distribution of prospective disclosure and collection of consents (described above); (ii) systems programming costs to ensure that trade confirmations contain all of the information required by paragraph (a)(4) of the rule; and (iii) systems programming costs to aggregate already-collected information to generate compliant principal transactions reports. For purposes of the Paperwork Reduction Act, we have estimated the cost an average adviser would incur on programming their computer systems, regardless of the size of their non-discretionary advisory account programs, to prepare compliant confirmations and principal transaction reports and to be able to track both prospective and trade-by-trade consents. For purposes of the Paperwork Reduction Act analysis, we have estimated the number of hours the average adviser would spend on programming computer systems to facilitate compliance with the rule.[116] Based on those estimates, we estimate the costs of programming, generating and

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[116] See section V.B of this Release. We estimate the following burdens and costs: (i) for programming computer systems to generate trade confirmations compliant with rule 206(3)-3T, approximately $20,000 on average per eligible adviser, of which we estimate there are approximately 380, for a total of $7,600,000; (ii) for the internal burden associated with programming computer systems relating to principal trade reports compliant with rule 206(3)-3T, approximately five hours on average per eligible adviser, for a total of 1,900 hours; (iii) for assistance of outside professionals to assist in programming computer systems to generate principal trade reports, approximately $10,000 on average per eligible adviser, for a total of $3,800,000; and (iv) for generation and delivery of annual principal trade reports each year, approximately 0.05 hours (three

delivering compliant confirmations and principal trade reports to be approximately $34,201 on average per eligible adviser,[117] for a total of $12,996,289.[118]

For those advisers that are converting fee-based brokerage accounts to non-discretionary advisory accounts, we are providing transition relief, described in section IV of this Release, that is designed, among other things, to avoid disruptions to clients and minimize costs to advisers.

Total Costs: The total overall costs, including estimated costs for all eligible advisers and eligible accounts, relating to compliance with rule 206(3)-3T are $37,205,569.[119]

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minutes) on average per eligible account, of which we estimate there are approximately 716,580, for a total of 35,829 hours total per year.

117 We expect that the internal programming function most likely will be performed by computer programmers. Data from the Industry's Salary Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that cost for a Sr. Computer Operator is approximately $67 per hour. Five hours on average per adviser x $67 per hour = $335 on average per adviser (or, across all 380 eligible advisers, $127,300). We expect that the generation and delivery of annual principal trade reports will most likely be performed by general clerks at $41 per hour. $41 per hour x 35,829 total hours per year = $1,468,989 (or, if divided among all 380 eligible advisers, approximately $3,866 on average per adviser per year). $20,000 on average per adviser for programming to generate compliant trade confirmations + $335 on average per adviser for internal programming costs in connection with developing an annual principal trades report + $10,000 on average per adviser for outside computing assistance in developing the annual principal trade report + $3,866 on average per adviser for generation and delivery of annual principal trade reports per year = approximately $34,201 on average per adviser in connection with compliance with the confirmation and principal trade report requirements.

118 $7,600,000 for programming to generate compliant trade confirmations + $127,300 for internal programming costs in connection with developing an annual principal trades report + $3,800,000 for outside computing assistance in developing the annual principal trade report + $1,468,989 for generation and delivery of annual principal trade reports per year = $12,996,289 total costs in connection with compliance with the confirmation and principal trade report requirements.

119 $7,547,040 total costs in connection with compliance with the prospective disclosure and consent requirements of the rule + $16,662,240 total costs in connection with compliance with the trade-by-trade disclosure and consent requirements of the rule + $12,996,289 total costs in connection with compliance with the confirmation and principal trade report

E. Request for Comment

- We solicit quantitative data to assist with our assessment of the benefits and costs of rule 206(3)-3T.
- What, if any, additional costs are involved in complying with the rule? What are the types of costs, and what are the amounts? Should the rule be modified in any way to mitigate costs? If so, how?
- Does the rule's requirement that a report be provided to each client, at least annually, of the transactions undertaken with the client in reliance on the rule result in a meaningful identification of an adviser's trading patterns with its clients that will enable the client to evaluate more effectively than it would simply with prospective disclosure and trade-by-trade disclosure prior to the execution of a principal transaction whether it should continue to consent, or revoke its consent, to principal trading in reliance on the rule?
- What will the effect of the rule be on the availability of account services and securities to clients who do not consent to principal transactions?
- Have we accurately estimated the costs of compliance with the rule?
- We assumed that firms already collect much of the information that the rule would require for the principal trading reports. Are we correct? We solicit comments on the extent to which firms already aggregate the information that the rule will require to be disclosed in the principal trading reports?

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requirements of the rule = $37,205,569 total costs in connection with compliance with the rule.

VII. PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 202(c) of the Advisers Act mandates that the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[120]

Rule 206(3)-3T permits an investment adviser, with respect to a non-discretionary advisory account, to comply with section 206(3) by: (i) making certain written disclosures; (ii) obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal trades; (iii) making oral or written disclosure and obtaining the client's consent orally or in writing prior to the execution of each principal transaction; (iv) sending to the client confirmation statements for each principal trade that disclose the capacity in which the adviser has acted and indicating that the client consented to the transaction; and (v) delivering to the client an annual report itemizing the principal transactions.

Rule 206(3)-3T may increase efficiency by providing an alternative means of compliance with section 206(3) of the Advisers Act that we believe will be less costly and less burdensome. As discussed above, by permitting oral trade-by-trade disclosure, advisers may be more willing to engage in principal trades with advisory clients. As a result, advisers may provide access to certain securities the adviser or its affiliate has in inventory. Clients might want access to securities an adviser, or an affiliated broker-dealer, has in inventory, despite the conflicts inherent in principal trading, if those

[120] 15 U.S.C. 80b-2(c).

securities are scarce or hard to acquire. Firms have argued that purchasing such securities from, or selling them to, an adviser could lead to faster or less expensive execution, advantages a client may deem to outweigh the risks presented by principal trading with an adviser.[121]

We expect that rule 206(3)-3T will promote competition because it preserves investor choice for different types of advisory accounts. As a practical matter, advisers did not frequently engage in principal trades. By relying on the rule, advisers that are also are registered broker-dealers will be able to offer advisory clients access to their (and their affiliates') inventory. Advisers that are not also registered as broker-dealers may seek to market their services without principal trades and their associated costs and benefits. We are not able to predict with certainty the effect of the rule on them, but it is possible that some advisers may elect to register as broker-dealers in order to rely on rule 206(3)-3T.

We believe that if rule 206(3)-3T has any effect on capital formation it is likely to be positive, although indirect. We understand that most investment advisers will not trade with non-discretionary advisory client accounts on a principal basis so long as they must provide trade-by-trade written disclosure. Providing an alternative to the traditional requirements of trade-by-trade written disclosure might serve to broaden the potential universe of purchasers of securities, in particular investment grade debt securities for the reasons described above, opening the door to greater investor participation in the securities markets with a potential positive effect on capital formation.

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[121] See, e.g., SIFMA Letter.

The Commission requests comment on whether the proposed amendments are likely to promote efficiency, competition, and capital formation.

VIII. FINAL REGULATORY FLEXIBILITY ANALYSIS

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with 5 U.S.C. 604. It relates to rule 206(3)-3T, which we are adopting in this Release.[122]

A. Need for and Objectives of the Rule

Sections I and II of this Release describe the reasons for and objectives of rule 206(3)-3T. As we discuss in detail above, our reasons include the need to facilitate the transition of customers in fee-based brokerage accounts in the wake of the FPA decision and to address the stated inability of the sponsors of those accounts to offer clients some of the services the clients desire in the non-discretionary advisory accounts to which they will be transitioned.

B. Small Entities Affected by the Rule

Rule 206(3)-3T is an alternative method of complying with Advisers Act section 206(3) and is available to all investment advisers that: (i) are registered as broker-dealers under the Exchange Act; and (ii) effect trades with clients directly or indirectly through a broker-dealer controlling, controlled by or under common control with the investment adviser, including small entities. Under Advisers Act rule 0-7, for purposes of the Regulatory Flexibility Act an investment adviser generally is a small entity if it: (i) has assets under management having a total value of less than $25 million; (ii) did not have

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122 Although the requirements of the Regulatory Flexibility Act are not applicable to rules adopted under the Administrative Procedure Act's "good cause" exception, see 5 U.S.C. 601(2) (defining "rule" and notice requirements under the Administrative Procedures Act), we nevertheless prepared a FRFA.

total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had $5 million or more on the last day of its most recent fiscal year.[123]

We have opted not to make the relief available to all investment advisers, but have instead restricted it to investment advisers that are dually registered as broker-dealers under the Exchange Act. We have taken this approach because, as more fully discussed above, in the context of principal trades which implicate potentially significant conflicts of interest, and which are executed through broker-dealers, we believe it is important that the protections of both the Advisers Act and the Exchange Act, which includes well developed sales practice rules, apply to advisers entering into principal transactions with clients.

The Commission estimates that as of August 1, 2007, 597 investment advisers were small entities.[124] The Commission assumes for purposes of this FRFA that 29 of these small entities (those that are both as investment advisers and broker-dealers) could rely on rule 206(3)-3T, and that all of these small entities would rely on the new rule.[125] We welcome comment on the availability of the rule to small entities. Do small investment advisers believe an alternative means of compliance with section 206(3) of the Advisers Act should be available to more of them? Do they believe that the dual registration requirement of the rule is too onerous for small advisers despite the

[123] See 17 CFR 275.0-7.

[124] IARD Data as of August 1, 2007.

[125] Id.

discussion in subsection F below? If so, how do they propose replicating the additional protections afforded to clients by the broker-dealer regulations?

C. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The provisions of rule 206(3)-3T would impose certain new reporting or recordkeeping requirements, but are not expected to materially alter the time required for investment advisers that also are registered as broker-dealers to engage in transactions with their clients on a principal basis. Rule 206(3)-3T is designed to provide an alternative means of compliance with the requirements of section 206(3) of the Advisers Act. Investment advisers taking advantage of the rule with respect to non-discretionary advisory accounts would be required to make certain disclosures to clients on a prospective, trade-by-trade and annual basis. Specifically, rule 206(3)-3T permits an adviser, with respect to a non-discretionary advisory account, to comply with section 206(3) of the Advisers Act by, among other things: (i) making certain written disclosures; (ii) obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal trades; (iii) making oral or written disclosure and obtaining the client's consent orally or in writing prior to the execution of each principal transaction; (iv) sending to the client confirmation statements for each principal trade that disclose the capacity in which the adviser has acted and indicating that the client consented to the transaction; and (v) delivering to the client an annual report itemizing the principal transactions. Advisers are already required to communicate the content of many of the disclosures pursuant to their fiduciary obligations to clients. Other disclosures are already required by rules applicable to broker-dealers.

D. Agency Action to Minimize Effect on Small Entities

Small entities registered with the Commission as investment advisers seeking to rely on the rule would be subject to the same disclosure requirements as larger entities. In each case, however, an investment adviser, whether large or small, would only be able to rely on the rule if it also is registered with us as a broker-dealer. As noted above, we estimate that 25 small entities are registered as both advisers and broker-dealers and therefore those small entities are eligible to rely on the rule. In developing the requirements of the rule, we considered the extent to which they would have a significant impact on a substantial number of small entities, and included flexibility where possible, calling for disclosures that are already generated by the relevant firms in one form or another wherever possible in light of the objectives of the rule, to reduce the corresponding burdens imposed.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate or conflict with rule 206(3)-3T, which presents an alternative means of compliance with the procedural requirements of section 206(3) of the Advisers Act that relate to principal transactions.

The Commission notes, however, that rule 10b-10 under the Exchange Act is a separate confirmation rule that requires broker-dealers to provide certain information to their customers regarding the transactions they effect. Furthermore, FINRA Rule 2230 requires broker-dealers that are members of FINRA to deliver a written notification containing certain information, including whether the member is acting as a broker for the customer or is working as a dealer for its own account. Brokers and dealers typically deliver this information in confirmations that fulfill the requirements of rule 10b-10 under the Exchange Act. Rule G-15 of the Municipal Securities Rulemaking Board also contains a separate confirmation rule that governs member transactions in municipal securities, including municipal fund securities. In addition, investment advisers that are qualified custodians for purposes of rule 206(4)-2 under the Advisers Act and that maintain custody of their advisory clients' assets must send quarterly account statements to their clients pursuant to rule 206(4)-2(a)(3) under the Advisers Act.

These rules overlap with certain elements of rule 206(3)-3T, but the Commission has designed the temporary rule to work efficiently together with existing rules by permitting firms to incorporate the required disclosure into one confirmation statement.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small entities.[126] Alternatives in this category would include: (i) establishing different compliance or reporting standards or timetables that take into account the resources available to small entities; (ii) clarifying, consolidating, or simplifying compliance requirements under the rule for small entities; (iii) using performance rather than design standards; and (iv) exempting small entities from coverage of the rule, or any part of the rule.

The Commission believes that special compliance or reporting requirements or timetables for small entities, or an exemption from coverage for small entities, may create the risk that the investors who are advised by and effect securities transactions through such small entities would not receive adequate disclosure. Moreover, different disclosure

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126 See 5 U.S.C. 603(c).

requirements could create investor confusion if it creates the impression that small investment advisers have different conflicts of interest with their advisory clients in connection with principal trading than larger investment advisers. We believe, therefore, that it is important for the disclosure protections required by the rule to be provided to advisory clients by all advisers, not just those that are not considered small entities. Further consolidation or simplification of the proposals for investment advisers that are small entities would be inconsistent with the Commission's goals of fostering investor protection.

We have endeavored through rule 206(3)-3T to minimize the regulatory burden on all investment advisers eligible to rely on the rule, including small entities, while meeting our regulatory objectives. It was our goal to ensure that eligible small entities may benefit from the Commission's approach to the new rule to the same degree as other eligible advisers. The condition that advisers seeking to rely on the rule must also be registered as broker-dealers and that each account with respect to which a dually-registered adviser seeks to rely on the rule must be a brokerage account subject to the Exchange Act, and the rules thereunder, and the rules of the self-regulatory organization(s) of which it is a member, reflect what we believe is an important element of our balancing between easing regulatory burdens (by affording advisers an alternative means of compliance with section 206(3) of the Act) and meeting our investor protection objectives.[127] Finally, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection in the present context.

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127 See Section II.B.7 of this Release.

G. General Request for Comments

We solicit written comments regarding our analysis. We request comment on whether the rule will have any effects that we have not discussed. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

IX. STATUTORY AUTHORITY

The Commission is adopting Rule 206(3)-3T pursuant to sections 206A and 211(a) of the Advisers Act.

TEXT OF RULE

List of Subjects in 17 CFR Part 275

Investment advisers, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 275 -- RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The general authority citation for Part 275 is revised to read as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

2. Section 275.206(3)-3T is added to read as follows:

§ 275.206(3)-3T Temporary rule for principal trades with certain advisory clients.

(a) An investment adviser shall be deemed in compliance with the provisions of section 206(3) of the Advisers Act (15 U.S.C. 80b-6(3)) when the adviser directly or indirectly, acting as principal for its own account, sells to or purchases from an advisory client any security if:

(1) The investment adviser exercises no "investment discretion" (as such term is defined in section 3(a)(35) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78c(a)(35))), except investment discretion granted by the advisory client on a temporary or limited basis, with respect to the client's account;

(2) Neither the investment adviser nor any person controlling, controlled by, or under common control with the investment adviser is the issuer of, or, at the time of the sale, an underwriter (as defined in section 202(a)(20) of the Advisers Act (15 U.S.C. 80b-2(a)(20))) of, the security; except that the investment adviser or a person controlling, controlled by, or under common control with the investment adviser may be an underwriter of an investment grade debt security (as defined in paragraph (c) of this section);

(3) The advisory client has executed a written, revocable consent prospectively authorizing the investment adviser directly or indirectly to act as principal for its own account in selling any security to or purchasing any security from the advisory client, so long as such written consent is obtained after written disclosure to the advisory client explaining:

(i) The circumstances under which the investment adviser directly or indirectly may engage in principal transactions;

(ii) The nature and significance of conflicts with its client's interests as a result of the transactions; and

(iii) How the investment adviser addresses those conflicts;

(4) The investment adviser, prior to the execution of each principal transaction:

(i) Informs the advisory client, orally or in writing, of the capacity in which it may act with respect to such transaction; and

(ii) Obtains consent from the advisory client, orally or in writing, to act as principal for its own account with respect to such transaction;

(5) The investment adviser sends a written confirmation at or before completion of each such transaction that includes, in addition to the information required by 17 CFR 240.10b-10, a conspicuous, plain English statement informing the advisory client that the investment adviser:

(i) Disclosed to the client prior to the execution of the transaction that the adviser may be acting in a principal capacity in connection with the transaction and the client authorized the transaction; and

(ii) Sold the security to, or bought the security from, the client for its own account;

(6) The investment adviser sends to the client, no less frequently than annually, written disclosure containing a list of all transactions that were executed in the client's account in reliance upon this section, and the date and price of such transactions;

(7) The investment adviser is a broker-dealer registered under section 15 of the Exchange Act (15 U.S.C. 78o) and each account for which the investment adviser relies on this section is a brokerage account subject to the Exchange Act, and the rules thereunder, and the rules of the self-regulatory organization(s) of which it is a member; and

(8) Each written disclosure required by this section includes a conspicuous, plain English statement that the client may revoke the written consent referred to in paragraph (a)(3) of this section without penalty at any time by written notice to the investment adviser.

(b) This section shall not be construed as relieving in any way an investment adviser from acting in the best interests of an advisory client, including fulfilling the duty with respect to the best price and execution for the particular transaction for the advisory client; nor shall it relieve such person or persons from any obligation that may be imposed by sections 206(1) or (2) of the Advisers Act or by other applicable provisions of the federal securities laws.

(c) For purposes of paragraph (a)(2) of this section, an investment grade debt security means a non-convertible debt security that, at the time of sale, is rated in one of the four highest rating categories of at least two nationally recognized statistical rating organizations (as defined in section 3(a)(62) of the Exchange Act (15 U.S.C. 78c(a)(62))).

(d) This section will expire and no longer be effective on December 31, 2009.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

September 24, 2007

FEDERAL RESERVE SYSTEM

12 CFR Part 218

[Regulation R; Docket No. R-1274]

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 247

Release No. 34-56501; File No. S7-22-06

RIN 3235-AJ74

DEFINITIONS OF TERMS AND EXEMPTIONS RELATING TO THE "BROKER" EXCEPTIONS FOR BANKS

AGENCIES: Board of Governors of the Federal Reserve System ("Board") and Securities and Exchange Commission ("SEC" or "Commission") (collectively, the Agencies).

ACTION: Final rule.

SUMMARY: The Board and the Commission jointly are adopting a single set of final rules that implement certain of the exceptions for banks from the definition of the term "broker" under Section 3(a)(4) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended by the Gramm-Leach-Bliley Act ("GLBA"). The rules define terms used in these statutory exceptions and include certain related exemptions. In developing these rules, the Agencies have consulted with, and sought the concurrence of, the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC") and the Office of Thrift Supervision ("OTS"), and have taken into consideration all comments received on the proposed rules issued in December 2006.

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The rules are intended, among other things, to facilitate banks' compliance with the Exchange Act and the GLBA.

DATES: Rule 781 is effective on September 28, 2007. The other final rules are effective on [INSERT 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]; however, pursuant to final Rule 781 banks are exempt from complying with the rules and the "broker" exceptions in Section 3(a)(4)(B) of the Exchange Act until the first day of their first fiscal year that commences after September 30, 2008.

FOR FURTHER INFORMATION CONTACT:

BOARD: Kieran J. Fallon, Assistant General Counsel, (202) 452-5270, Andrea Tokheim, Counsel, (202) 452-2300, or Brian Knestout, Attorney, (202) 452-2249, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW, Washington, DC 20551. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263-4869.

SEC: Catherine McGuire, Chief Counsel, Linda Stamp Sundberg, Senior Special Counsel, Joshua Kans, Senior Special Counsel, John J. Fahey, Branch Chief, or Elizabeth MacDonald, Special Counsel, at (202) 551-5550, Office of the Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

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I. Introduction

A. Background

The GLBA amended several federal statutes governing the activities and supervision of banks, bank holding companies, and their affiliates.[1] Among other things, it lowered barriers between the banking and securities industries erected by the Banking Act of 1933 ("Glass-Steagall Act").[2] It also altered the way in which the supervisory responsibilities over the banking, securities, and insurance industries are allocated among financial regulators. Among other things, the GLBA repealed most of the separation of investment and commercial banking imposed by the Glass-Steagall Act. The GLBA also revised the provisions of the Exchange Act that had completely excluded banks from broker-dealer registration requirements.

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1 Pub. L. No. 106-102, 113 Stat. 1338 (1999).

2 Pub. L. No. 73-66, ch. 89, 48 Stat. 162 (1933) (as codified in various Sections of 12 U.S.C.).

In enacting the GLBA, Congress adopted functional regulation for bank securities activities, with certain exceptions from Commission oversight for specified securities activities. With respect to the definition of "broker," the GLBA amended the Exchange Act to provide eleven specific exceptions for banks.[3] Each of these exceptions permits a bank to act as a broker or agent in securities transactions that meet specific statutory conditions.

In particular, Section 3(a)(4)(B) of the Exchange Act as amended by the GLBA provides conditional exceptions from the definition of broker for banks that engage in certain securities activities in connection with third-party brokerage arrangements;[4] trust and fiduciary activities;[5] permissible securities transactions;[6] certain stock purchase plans;[7] sweep accounts;[8] affiliate transactions;[9] private securities offerings;[10] safekeeping

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3 15 U.S.C. 78c(a)(4).

4 Exchange Act Section 3(a)(4)(B)(i). This exception permits banks to enter into third-party brokerage, or "networking" arrangements with brokers under specific conditions.

5 Exchange Act Section 3(a)(4)(B)(ii). This exception permits banks to effect transactions as trustees or fiduciaries for securities customers under specific conditions.

6 Exchange Act Section 3(a)(4)(B)(iii). This exception permits banks to buy and sell commercial paper, bankers' acceptances, commercial bills, exempted securities, certain Canadian government obligations, and Brady bonds.

7 Exchange Act Section 3(a)(4)(B)(iv). This exception permits banks, as part of their transfer agency activities, to effect transactions for certain issuer plans.

8 Exchange Act Section 3(a)(4)(B)(v). This exception permits banks to sweep funds into no-load money market funds.

9 Exchange Act Section 3(a)(4)(B)(vi). This exception permits banks to effect transactions for affiliates, other than broker-dealers.

and custody activities;[11] identified banking products;[12] municipal securities;[13] and a de minimis number of other securities transactions.[14]

In October 2006, the Financial Services Regulatory Relief Act of 2006 ("Regulatory Relief Act") became effective.[15] Among other things, the Regulatory Relief Act requires that the SEC and the Board jointly adopt a single set of rules to implement the bank broker exceptions in Section 3(a)(4) of the Exchange Act.[16] In addition, it required that the Agencies issue a single set of proposed rules to implement these exceptions not later than 180 days after enactment of the Regulatory Relief Act (April 11, 2007).

In December 2006, the Agencies jointly issued, and requested public comment on, a single set of proposed rules to implement the broker exceptions for banks relating to third-party networking arrangements, trust and fiduciary activities, sweep activities, and

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10 Exchange Act Section 3(a)(4)(B)(vii). This exception permits certain banks to effect transactions in certain privately placed securities, under certain conditions.

11 Exchange Act Section 3(a)(4)(B)(viii). This exception permits banks to engage in certain enumerated safekeeping or custody activities, including stock lending as custodian.

12 Exchange Act Section 3(a)(4)(B)(ix). This exception permits banks to buy and sell certain "identified banking products," as defined in Section 206 of the GLBA.

13 Exchange Act Section 3(a)(4)(B)(x). This exception permits banks to effect transactions in municipal securities.

14 Exchange Act Section 3(a)(4)(B)(xi). This exception permits banks to effect up to 500 transactions in securities in any calendar year in addition to transactions referred to in the other exceptions.

15 Pub. L. No. 109-351, 120 Stat. 1966 (2006).

16 See Exchange Act Section 3(a)(4)(F), as added by Section 101 of the Regulatory Relief Act.

safekeeping and custody activities.[17] The proposed rules included certain exemptions related to these activities, as well as exemptions related to foreign securities transactions, securities lending transactions conducted in an agency capacity, the execution of transactions involving mutual fund shares, and the potential liability of banks under Section 29 of the Exchange Act. In developing the proposed rules, the Agencies considered, among other things, the language and legislative history of the "broker" exceptions for banks adopted in the GLBA, the rules previously issued or proposed by the Commission relating to these exceptions, and the comments received in connection with those prior rulemakings.

The Agencies requested comment on all aspects of the proposed rules. In addition, the Agencies requested comment on whether it would be useful or appropriate for the Agencies to adopt rules implementing the other bank "broker" exceptions in Section 3(a)(4)(B) of the Exchange Act that were not addressed in the proposal.

B. Overview of Comments

The Agencies received comments from 58 organizations and individuals on the proposed rules. Commenters included 22 trade associations, 20 banking organizations, 7 other organizations in the financial services industry, 3 community and nonprofit groups, two credit unions, one state government, one self-regulatory organization, one association of state securities administrators, and one individual. Many commenters supported the proposed rules as a general matter. For example, commenters asserted that the proposed rules would provide banks considerable flexibility in providing securities services to their customers, would avoid disrupting bank activities and customer

[17] <u>See</u> 71 FR 77522, December 26, 2006.

relationships, or were a significant improvement over earlier proposals.[18] In addition, many commenters supported the general approaches (including related exemptions) taken by the proposed rules to implement the networking, trust and fiduciary, sweep, and safekeeping and custody exceptions. Several commenters, however, contended that the proposed rules did not adequately protect investors, and particularly retail investors.[19] Some of these commenters argued that that the Agencies should withdraw the proposed rules and issue new rules based on those issued in 2001[20] or 2004.[21]

Most commenters also recommended that the Agencies modify specific provisions of the proposed rules to, among other things, reduce administrative burden, better protect bank customers or investors, or clarify the scope or effect of the rules. The comments received on the proposed rules are discussed in greater detail in the following sections of this **Supplementary Information**.

C. Final Rules and Related Matters

After carefully considering the comments, the Agencies have adopted final rules to implement the broker exceptions for banks relating to third-party networking arrangements, trust and fiduciary activities, sweep activities, and custody and safekeeping

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18 See, e.g., Citigroup Letter, Independent Community Bankers Ass'n ("ICBA") Letter, American Bankers Ass'n ("ABA") Letter, JPMorgan Chase & Co. ("JP Morgan") Letter, Financial Services Roundtable ("Roundtable") Letter.

19 See, e.g., Massachusetts Securities Division Letter, Pace Investors Rights Project ("Pace Project") Letter, Boyd Financial Letter.

20 Exchange Act Release No. 44291 (May 11, 2001), 66 FR 27760 (May 18, 2001).

21 Exchange Act Release No. 49879 (June 17, 2004), 69 FR 39682 (June 30, 2004). See, e.g., North American Securities Administrators Association ("NASAA") Letter.

activities.[22] The Board and SEC have consulted extensively with, and sought the concurrence of, the OCC, FDIC and OTS in developing these final rules.

Like the proposal, the final rules include certain exemptions related to these activities, as well as exemptions related to foreign securities transactions, securities lending transactions conducted in an agency capacity, the execution of transactions other than through a broker-dealer, the potential liability of banks under Section 29 of the Exchange Act, and the date on which the GLB Act's "broker" exceptions for banks will go into effect.

As discussed in the following sections, the Agencies have modified the rules in numerous respects in light of the comments received. These changes include, among other things, modifications to the examples of "relationship compensation" in Rule 721 to clarify the scope of the term for purposes of the rules relating to trust and fiduciary activities; the custody exemption in Rule 760 to permit banks acting as a directed trustee to accept orders under the exemption; and Rule 781 to extend the compliance date for a bank until the first day of its first fiscal year commencing after September 30, 2008. The Agencies also have adopted new exemptions relating to trust or fiduciary accounts held in a foreign branch of a bank,[23] and to permit a bank to effect, under certain conditions and

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22 Commenters generally did not request that that the Agencies adopt rules to implement the other broker exceptions for banks at this time or stated that no additional guidance was needed at this time with respect to these exceptions. See ABA Letter.

23 See Rule 723(c).

without using a broker-dealer, transactions in a fiduciary or custodial capacity for an employee benefit plan in the stock of the plan's sponsor.[24]

The final rules are designed to accommodate the business practices of banks and protect investors. If more than one broker exception or exemption is available to a bank under the statute or rules for a securities transaction, the bank may choose the exception or exemption on which it relies to effect the transaction without registering as a broker-dealer. For example, if the bank effects a transaction in a security sold in an offshore transaction for a custody account that is permissible under either the Regulation S exemption in Rule 771 or the custody exemption in Rule 760, the bank may choose which exemption to rely on and comply with in effecting the transaction. Similarly, if a bank effects no more than 500 securities transactions as agent for its customers in a calendar year, the bank may rely on the de minimis exception in Section 3(a)(4)(B)(xi) of the Exchange Act in lieu of any other available exception or exemption for such transactions. The bank, of course, must comply with all of the requirements contained in the exception or exemption on which it relies.[25]

Section 401 of the Regulatory Relief Act amended the definition of "bank" in Section 3(a)(6) of the Exchange Act to include any Federal savings association or other savings association the deposits of which are insured by the FDIC. Accordingly, as used

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24 See Rule 776.

25 An employee of a bank that operates in accordance with the exceptions in Section 3(a)(4)(B) of the Exchange Act and, where applicable, the rules is not required to register as a "broker" to the extent that the employee's activities are covered by the relevant exception or rule.

in the final rules, the term "bank" includes any savings association that qualifies as a "bank" under Section 3(a)(6) of the Exchange Act, as amended.[26]

Identical sets of the final rules are being adopted by the Board and SEC and will be published by the Board in Title 12 of the Code of Federal Regulations and by the SEC in Title 17 of the Code of Federal Regulations.[27] Pursuant to the Regulatory Relief Act, this single set of final rules supersedes any and all other proposed or final rules issued by the Commission on or after the date of enactment of the GLBA with regard to the definition of "broker" under Section 3(a)(4) of the Exchange Act.[28]

Any additions or changes to these rules that may be appropriate to implement Section 3(a)(4)(B) of the Exchange Act will be adopted jointly by the SEC and Board in accordance with the consultation provisions in Section 101(b) of the Regulatory Relief

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26 Several commenters asked the Agencies, or the Commission independently, to adopt rules that would extend to federal or state-chartered credit unions some or all of the "broker" exceptions or exemptions provided banks under Section 3(a)(4)(B) of the Exchange Act or the final rules. See, e.g., Credit Union Nat'l Ass'n Letter, Nat'l Ass'n of Credit Union Service Organizations Letter, Nat'l Ass'n of Fed. Credit Unions Letter, Navy Fed. Credit Union Letter, and XCU Corp. Letter. While the GLBA's "bank" exceptions do not by their terms apply to credit unions, these requests are under consideration by the Commission, which is the agency with authority to address these matters. The Commission notes the existence of SEC staff positions with regard to networking relationships between a credit union and a broker-dealer and is not addressing this issue at this time. See, e.g., Chubb Securities Corp., 1993 SEC No-Act. LEXIS 1204 (Nov. 24, 1993).

27 The final rules adopted by the Board and the SEC within their respective titles of the Code of Federal Regulation (12 CFR Part 218 for the Board and 17 CFR Part 247 for the SEC) are identically numbered from § ___.100 to § ___.781. For ease of reference, the single set of final rules adopted by each Agency are referred to in this release as Rule ___, excluding title and part designations. A similar format is used to refer to the single set of proposed rules issued by the Agencies.

28 Pub. L. No. 109-351, § 101(a)(3), 120 Stat. 1966, 1968 (2006).

Act. In addition, if any rules (including exemptions) are proposed or adopted in the future related to the other bank "broker" exceptions in Section 3(a)(4)(B) of the Exchange Act that are not addressed in the final rules now being adopted by the SEC and the Board, they would be proposed and adopted jointly by the SEC and Board.[29]

As required by the GLBA, the Board, OCC, FDIC, and OTS (collectively, the Banking Agencies) will develop, and request public comment on, recordkeeping rules for banks that operate under the "broker" exceptions in Section 3(a)(4) of the Exchange Act.[30] These rules, which will be developed in consultation with the SEC, will establish recordkeeping requirements to enable banks to demonstrate compliance with the terms of the statutory exceptions and the final rules and will be designed to facilitate compliance with the statutory exceptions and the rules.

Several commenters urged the Agencies also to cooperate in providing interpretations or guidance (such as staff no-action letters) concerning the final rules or the broker exceptions for banks in Section 3(a)(4)(B) of the Exchange Act or in taking

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29 A few commenters requested that the Commission delegate authority to act on future exemptive requests from banks to the Director of its Division of Market Regulation. See America Community Bankers Ass'n ("ACB") Letter, Roma Bank Letter. Because particular banks may have individual situations that may be appropriate for additional relief, the Commission delegated authority to the Director of the Division of Market Regulation to consider, on a case-by-case basis, individual requests for exemptive relief from banks. To facilitate the processing of these requests, the Commission delegated this exemptive authority within its Rules of Organization and Program Management in Rule 30-3(a)(70) (17 CFR 200.30-3(a)(70)). The Commission continues to expect the staff to submit novel and complex requests for exemptions to the Commission.

30 See 12 U.S.C. 1828(t)(1).

enforcement action to enforce compliance with these rules or exceptions.[31] In addition, a number of commenters urged the Agencies to work with the Financial Industry Regulatory Authority ("FINRA")[32] to modify promptly its Rule 3040 as it applies to persons that are employees of both a bank and a broker-dealer (so-called "dual employees").[33]

In light of the joint nature of the final rules and the Agencies' joint rule-writing authority for the bank broker exceptions in Section 3(a)(4)(B),[34] the Agencies will jointly issue any interpretations and responses to requests for no-action letters or other interpretive guidance concerning the scope or terms of the exceptions and rules, and will consult and, to the extent appropriate, coordinate with each other and the appropriate

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31 See, e.g., ABA Letter, Clearing House Ass'n Letter, Citigroup Letter, The PNC Financial Services Group, Inc. ("PNC") Letter. One commenter, however, expressed concern that coordination among the Agencies might result in slower responses to requests for guidance. See American Bar Ass'n Section of Business Law Letter ("Business Law Section Letter").

32 On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Release No. 56146 (July 26, 2007). FINRA's Rules currently consist of the rules adopted by the NASD and effective on the date of the consolidation (which include NASD Rule 3040), as well as certain rules of the NYSE that FINRA has incorporated into its own rules.

33 See, e.g., ABA Letter , Clearing House Ass'n Letter, Harris Bank Letter, HSBC Bank, N.A. ("HSBC Bank") Letter, HSBC Securities (USA) Inc. ("HSBC Securities") Letter, Roundtable Letter. These commenters asserted that it was important for the requested modifications to FINRA's Rule 3040 to be made prior to the date on which banks would first have to comply with the new "broker" exceptions in the GLBA.

34 Rapaport v. U.S. Department of Treasury, 59 F. 3d 212, 216-217 (D.C. Cir. 1995), cert. denied 116 S.Ct. 775 (1996).

federal banking agency for a bank concerning any formal enforcement actions proposed to be taken against a bank for violations of the exceptions or rules.

The Agencies already consult with and coordinate with each other and the other federal banking agencies in a variety of areas, and the Agencies and the other federal banking agencies are in the process of supplementing their existing policies and procedures to facilitate coordination with respect to the broker exceptions and rules. Banks or others that seek an interpretation of, or a no-action letter or other staff guidance concerning, the rules or the exceptions should submit their request to both Agencies. The Agencies also expect to continue their dialogue with FINRA concerning potential modifications to that authority's Rule 3040.

II. Networking Arrangements

The third-party brokerage exception ("networking exception") in Section 3(a)(4)(B)(i) of the Exchange Act permits a bank to avoid being considered a broker if, under certain conditions, it enters into a contractual or other written arrangement with a registered broker-dealer under which the broker-dealer offers brokerage services to bank customers.[35] The networking exception does not address the type or amount of compensation that a bank may receive from its broker-dealer partner under a networking arrangement. However, the networking exception provides that a bank may not pay its unregistered employees[36] incentive compensation for brokerage transactions. Nevertheless, the statutory exception does permit a bank employee to receive a "nominal

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35 15 U.S.C. 78c(a)(4)(B)(i).

36 An unregistered bank employee is an employee that is not registered or approved, or otherwise required to be registered or approved, in accordance with the qualification standards established by the rules of any self-regulatory organization.

one-time cash fee of a fixed dollar amount" for referring bank customers to the broker-dealer if payment of the referral fee is not "contingent on whether the referral results in a transaction."[37] Congress included this general prohibition on, and limited exception to, incentive compensation to reduce concerns regarding the securities sales practice of unregistered bank employees.

A. Overview of Proposed Rules and Comments

Proposed Rule 700 defined certain key terms related to referral fees and incentive compensation used in the networking exception. For example, the proposed rule provided that a referral fee would be considered "nominal" if it met any of four standards included in the rule. The proposed rule also defined when a referral fee would be "contingent on whether a referral results in a transaction," what constitutes "incentive compensation," and what types of bank bonus plans would not be considered incentive compensation under the networking exception. Proposed Rule 701 included an exemption that permitted bank employees, subject to certain conditions, to receive higher-than-nominal, contingent referral fees for referring institutional customers and high net worth customers to a broker-dealer.

Many commenters supported the general approach of Proposed Rules 700 and 701, including the range of alternatives provided for determining if a referral fee is nominal and the adoption of an exemption for referrals involving high net worth or institutional customers.[38] Some commenters, however. suggested that the proposed rules

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37 15 U.S.C. 78c(a)(4)(B)(i)(VI).

38 See, e.g. ABA Letter, Roundtable Letter, Citigroup Letter, Union Bank of California ("Union Bank") Letter.

would harm investors by giving bank employees undue incentives to direct unsophisticated customers into potentially unsuitable investment products.[39]

B. Rule 700: Definition of Terms Used in Networking Exception

1. Definition of "Nominal One-Time Cash Fee of a Fixed Dollar Amount"

Proposed Rule 700 defined the term "nominal one-time cash fee of a fixed dollar amount" to mean a cash payment for a referral in an amount that meets any one of four alternative standards: the first based on twice the average hourly base wage established by the bank for the employee's job family; the second based on 1/1000th of the average annual base salary established by the bank for the employee's job family; the third based on twice the employee's actual base hourly wage; and the fourth based on a specified dollar amount ($25), indexed for inflation.[40]

Many commenters generally supported the flexibility that this range of alternatives would afford in determining whether a referral fee is "nominal."[41] Some commenters expressed concern that the proposed rule placed greater limits on permissible payments under networking arrangements than exist currently under applicable federal banking agency guidance or questioned the need for a definition of "nominal" to be established by rule at all.[42] A few commenters contended that the specific dollar amount

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39 See, e.g., Pace Project Letter.

40 Proposed Rule 700(c).

41 See, e.g., Roundtable Letter, ACB Letter.

42 See, e.g., Bank Insurance & Securities Ass'n ("BISA") Letter, Wisconsin Bankers Ass'n ("WBA") Letter.

in the proposed rule ($25) was too low.[43] A number of commenters, however, believed that the alternatives would result in the payment of fees that are higher than nominal and would create incentives for bank employees to make securities referrals even when not appropriate for the customer. These commenters questioned, for example, whether twice an employee's hourly wage was truly nominal and whether the Agencies had sufficient basis for selecting that measure of "nominal."[44]

After carefully reviewing the comments, the Agencies have determined to adopt the "nominal" definition substantially as proposed. Including a definition of "nominal" in the rule will provide banks with certainty as to the Agencies' interpretation of that standard and should facilitate compliance. The Agencies believe that each of the alternatives for defining "nominal" is consistent with the statutory networking exception, which provides that a bank employee may receive compensation for each referral if the compensation for that referral is "nominal" and meets the other requirements of the statute. Under each of the alternatives established, the amount of compensation a bank employee may receive for each referral will be small in relation to the employee's overall compensation and therefore unlikely to create undue incentives for the bank employee to engage in activities, such as "pre-selling" specific securities to the customer involved in violation of the networking exception,[45] which would raise sales practice concerns. As discussed below, the multiple alternatives are designed to provide flexibility for banks of all sizes and locations to use different business models and to take into account economic

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43 See, e.g., Clearing House Ass'n Letter and ICBA Letter.

44 See, e.g., Boyd Financial Letter, NASAA Letter, Pace Project Letter, and University of Cincinnati Corp. Law Ctr. Letter.

45 See Exchange Act Section 3(a)(4)(B)(i)(V).

differences around the country and among their employees in assessing how best to structure their program(s) for paying "nominal" cash referral fees under the networking exception. The alternatives also were designed to allow for roughly equivalent treatment of bank employees at different base or hourly compensation levels within a bank.

Rule 700(c) provides that a referral fee paid to any bank employee will be considered "nominal" if it does not exceed $25.[46] This dollar amount will be adjusted for inflation on April 1, 2012, and every five years thereafter, to reflect any changes in the value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index thereto), as published by the Bureau of Labor Statistics, from December 31, 2006.[47] The Agencies selected this index because it is a widely used and broad indicator of increases in the wages of private industry workers, which includes bank employees. Available data indicate that the $25 amount is consistent with the level of referral fees generally paid to tellers and other bank employees engaged in making referrals of retail customers under existing Banking Agency guidance, which also includes a "nominal" standard.[48]

As under the proposal, a referral fee also will be considered "nominal" under Rule 700(c) if the payment does not exceed (1) twice the employee's actual base hourly wage; (2) twice the average of the minimum and maximum hourly wage established by the bank for the current or prior year for the job family that includes the employee; or

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46 Rule 700(c)(3).

47 Each adjustment would be rounded to the nearest multiple of $1. Rule 700(f).

48 See ABA Securities Ass'n., 2003/2004 National Survey of Bank Retail Investment Services, Vol. I, at 60 (survey data demonstrate that 20 percent of banks pay retail referral fees of $20 or more); Banking Agencies' Interagency Statement on Retail Sales of Nondeposit Investment Products (Feb. 15, 1994).

(3) 1/1000th of the average of the minimum and maximum annual base salary established by the bank for the current or prior year for the job family that includes the employee.[49]

In developing these alternatives to the fixed $25 fee, the Agencies considered data on the average hourly wages of bank tellers, which are the class of bank employees most typically engaged in making referrals of retail customers. These data indicate that the national mean hourly wage in 2005 for tellers was $10.59.[50] Accordingly, the $25 amount is slightly more than twice the national mean hourly wage for tellers in 2005, and slightly more than 1/1000th of the annualized salary of an employee that makes $12.50 per hour (or $25 every two hours) based on a 40 hour work week.[51] Thus, the alternatives based on twice the employee's hourly base wage or 1/1000th of the employee's base annual salary, at current pay rates, are designed to allow bank employees to receive referral fees that are roughly equivalent to those that may be received by bank tellers under the flat dollar option.

The options based on the employee's job family use these same measurements but allow comparisons to the average of the minimum and maximum hourly base wage or base salary of the employee's job family. These options are designed to reduce administrative burden while also ensuring that referral fees remain nominal in amount. To provide comparability between the alternative based on an employee's actual compensation and those based on the compensation established for the employee's job

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49 Rule 700(c)(1) and (2).

50 Occupational Employment and Wages, May 2005, (Tellers), U.S. Department of Labor, Bureau of Statistics.

51 Specifically, twice the hourly wage for an employee who earns an annual base salary of $25,000 (1,000 x $25) would be $24.04, based on a 40 hour per week (or 1080 hours per year) work schedule.

family, the Agencies have modified the final rule to provide that a referral fee also will be considered nominal if it does not exceed 1/1000th of the employee's actual base annual salary.[52] Under the final rules, a bank may use a different "nominal" methodology in its different business lines or operating units and may alter the methodology it uses within a given year.

One commenter suggested that the term "job family" was ambiguous and could allow banks to include all employees in a single job family, which would result in payments to employees with salaries at the lower end of the job family that may be well in excess of twice their hourly wage.[53] Rule 700 defines a "job family" as a group of jobs or positions involving similar responsibilities, or requiring similar skills, education or training, that a bank, or a separate unit, branch or department of a bank, has established and uses in the ordinary course of its business to distinguish among its employees for purposes of hiring, promotion, and compensation.[54] The requirements that a job family include jobs or positions with similar responsibilities, or that require similar skills, education and training, and be used by the bank in the ordinary course of its business for hiring, promotion and compensation purposes are designed to prevent a bank from establishing special job family classifications to evade the "nominal" standard. A bank may not deviate from its ordinary classification of jobs for purposes of determining whether a referral fee is nominal under this standard, and the Banking Agencies will monitor the job family classifications used by banks for "nominal" determination as part

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[52] Rule 700(c)(2).

[53] See Pace Project Letter.

[54] Proposed Rule 700(d).

of the risk-focused examination process. Depending on a bank's internal employee classification system, examples of a job family may include tellers, loan officers, or branch managers. The Agencies note, moreover, that other provisions of the networking exception also provide significant protection to customers. For example, the networking exception provides that unregistered bank employees may perform only clerical or ministerial functions in connection with brokerage transactions.[55] Accordingly, bank employees referring a customer to a broker-dealer under the exception may not provide investment advice concerning securities or make specific securities recommendations to the customer.[56]

A few commenters suggested that, by defining "nominal" by reference to hourly wages and annual base salary, the rule treats unfairly employees who receive a considerable portion of their compensation through bonuses tied to sales of non-securities products.[57] Because the five alternatives included in the final rule are based on a set dollar amount or the hourly wage or annual base salary established by a bank for the employee or the employee's job family, the alternatives help ensure that a referral fee will be nominal in relation to the employee's compensation in the year it is paid. Bonuses, however, typically are discretionary, vary significantly from year-to-year and, as noted by commenters, may constitute a significant portion of the compensation of

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55 See 15 U.S.C. 78c(a)(4)(B)(i)(V).

56 A bank employee, however, may describe in general terms the types of investment vehicles available from the bank and the broker-dealer under the arrangement. See id.

57 See, e.g., ABA Letter, BISA Letter, Clearing House Ass'n Letter, Harris Bank Letter, Roundtable Letter, PNC Letter, U.S. Trust Company, N.A. ("U.S. Trust") Letter, and WBA Letter.

certain types of bank employees in particular years. Permitting referral fees to be based in part on the size of a bonus paid in a previous year (or projected to be paid in the current year) could allow bank employees to receive a referral fee that is not nominal in relation to the employee's compensation, or the average compensation paid to employees within the relevant job family, in the year in which the fee is paid and, thus, could increase the potential for sales practice concerns.

Commenters also asserted that more than one employee should be able to receive a fee for a single referral and also requested clarification as to whether officers and directors of a bank may receive referral fees under the exception.[58] The Agencies believe that the networking exception permits a bank employee who personally participated in a referral to receive a referral fee for the referral.[59] Accordingly, the Agencies have modified Rule 700(c) to clarify this position. Thus, for example, a supervisory employee may receive a separate, nominal one-time cash fee for a referral made by another individual supervised by the employee only if the supervisory employee personally participated in the referral. A supervisory employee may not, however, receive a referral fee merely for supervising the employee making the referral or administering the referral process. An officer or director of a bank who makes or personally participates in making a referral may receive a nominal fee for the referral as a bank employee.

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58 See, e.g., Consumer Bankers Ass'n ("CBA") Letter, BISA Letter.

59 See Section 3(a)(4)(B)(i)(VI) of the Exchange Act (permitting "the bank employee [to] receive compensation for the referral of any customer" in accordance with the exception).

The proposed rule permitted a nominal referral fee to be paid only in cash. Many commenters requested that banks be given the flexibility to pay referral fees in non-cash forms.[60] The terms of the networking exception, however, provide for a "nominal, one-time cash fee of a fixed dollar amount"[61] and, accordingly, the final rule continues to require that referral fees paid under the exception be paid in cash. A bank, therefore, may not pay referral fees in non-cash forms, such as vacation packages, stock grants, annual leave, or consumer goods. The final rules do not, however, prevent a bank from paying an employee on a quarterly or more frequent periodic basis the total amount of nominal, fixed cash fees the employee earned during the period. For example, if a bank employee is entitled to receive a $25 referral fee for each securities referral and the employee makes three qualifying referrals in a given quarter, the bank may pay the employee $75 at the end of the quarter instead of three individual payments of $25. A bank also may use a "points" system to keep track of the number of qualifying securities referrals made by the employee during a quarterly or more frequent period and the total amount of nominal, fixed cash fees that the employee is entitled to receive at the end of the period. In all cases, however, points must translate into cash payments on a uniform basis and the cash amount that an employee will receive for a qualifying securities referral (e.g., twice the employee's actual base hourly wage) must be fixed before the referral is made and may

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60 See, e.g., ABA Letter, BISA Letter, Clearing House Ass'n Letter, and JPMorgan Letter.

61 See Exchange Act Section 3(a)(4)(B)(i)(VI).

not be contingent or vary based on whether an employee makes a specified number or type of securities referrals during a quarterly or more frequent period.[62]

2. Definition of "Referral"

The statutory networking exception permits bank employees to receive a nominal one-time cash fee of a fixed dollar amount for the "referral" of a customer to a broker-dealer. Rule 700(e) defines a referral as an action taken by one or more bank employees to direct a customer of the bank to a broker-dealer for the purchase or sale of securities for the customer's account.[63] For purposes of the networking exception and Rules 700 and 701, the term "customer" includes both existing and potential customers of the bank.

As proposed, a bank employee may receive a referral fee under the networking exception and Rule 700 for each referral made to a broker-dealer, including separate referrals of the same individual or entity. In addition, nothing in the statutory networking exception or the final rules limits or restricts the ability of a bank employee to refer customers to other departments or divisions of the bank itself, including, for example, the bank's trust, fiduciary or custodial department. Likewise, the networking exception and the rules do not apply to referrals of retail, institutional or high net worth customers to a broker-dealer or other third party solely for transactions not involving securities, such as

62 The exception and the final rules also do not prohibit a bank from providing its employees non-cash items, such as pizza or coffee mugs, in connection with programs to familiarize bank employees with new types of investment vehicles offered by the bank or the broker-dealer through the arrangement, provided that the programs or items given to employees do not reward or compensate an employee for making a referral to a broker-dealer. Thus, for example, a "pizza party" that is made available only to those employees that have made one or more referrals to a broker-dealer would not be permissible.

63 Rule 700(e).

loans, futures contracts (other than a security future), foreign currency, or over-the-counter commodities, or solely for transactions in securities (such as U.S. Government obligations) that would not require the other party to register under section 15 of the Exchange Act.[64]

3. Definition of ''Contingent on Whether the Referral Results in a Transaction''

Under the statutory networking exception, a nominal fee paid to an unregistered bank employee for referring a customer to a broker-dealer may not be contingent on whether the referral results in a transaction. This limitation is designed to allow banks to reward bank employees for introducing customers to a broker-dealer without giving unregistered bank employees a direct financial interest in any resulting securities transaction at the broker-dealer.

The final rule, like the proposed rule, provides that a referral fee will be considered "contingent on whether the referral results in a transaction" if payment of the fee is dependent on whether the referral results in a purchase or sale of a security; whether an account is opened with a broker-dealer; whether the referral results in a transaction involving a particular type of security; or whether the referral results in multiple securities transactions.[65] The final rule expressly provides that a referral fee may be contingent on whether a customer (1) contacts or keeps an appointment with a broker-dealer as a result of the referral; or (2) meets any objective, base-line qualification

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64 A bank that acts as a government securities broker (as defined in Section 3(a)(43) of the Exchange Act) is not exempt from and must comply with the notification and other applicable requirements of section 15C of the Exchange Act.

65 Rule 700(a).

criteria established by the bank or broker-dealer for customer referrals, including such criteria as minimum assets, net worth, income, or marginal federal or state income tax rate, or any requirement for citizenship or residency that the broker-dealer, or the bank, may have established generally for referrals for securities brokerage accounts.[66] A bank or broker-dealer may establish and use different objective, base-line qualification criteria (including citizenship or residency requirements) for different classes of customers or for different business lines, divisions or units of the bank or broker-dealer.

Commenters generally supported these permissible contingencies. Some commenters contended that the rule also should allow payment of a nominal referral fee to be contingent on other events, such as the opening of an account at the broker-dealer or on the opening of an account that may be used to conduct only securities transactions that the bank itself could effect without registering as a broker under the exceptions for banks in Sections 3(a)(4)(B) of the Exchange Act.[67] Opening a securities account at the broker-dealer, however, is a necessary first step to executing securities transactions and one that a customer is unlikely to take unless the customer anticipates engaging in securities transactions with the broker-dealer. In light of this close link between opening an account and executing securities transactions, the Agencies have not modified the rule as requested and the final rule continues to provide that payment of a referral fee may not be contingent on whether the customer opens an account (other than the types of accounts described in Part B.2 supra.) at the broker-dealer. Other contingencies not specified in

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66 Rule 700(a).

67 See, e.g., BISA Letter, Clearing House Ass'n Letter, and U.S. Trust Letter.

the rule may be permissible if they are not based on whether the referral results in a securities transaction at the broker-dealer.

In addition, the "broker" exceptions in Sections 3(a)(4)(B) of the Exchange Act are available only to banks. Accordingly, a referral to a broker-dealer for a securities transaction within the scope of section 15 of the Exchange Act still involves a "broker" transaction at the broker-dealer even if a bank could conduct the transaction itself without registering as a broker, and a referral fee may not be contingent on the occurrence of such a transaction (or the opening of an account to engage in such transactions).[68]

4. Definition of "Incentive Compensation"

The networking exception prohibits an unregistered employee of a bank that refers a customer to a broker-dealer under the exception from receiving "incentive compensation" for the referral or any securities transaction conducted by the customer at the broker-dealer other than a nominal, non-contingent referral fee. To provide banks and their employees additional guidance in this area, Proposed Rule 700(b) defined "incentive compensation" as compensation that is intended to encourage a bank employee to refer potential customers to a broker-dealer or give a bank employee an interest in the success of a securities transaction at a broker-dealer.

The proposed rule also excluded certain types of bonus compensation from the definition of "incentive compensation." Proposed Rule 700(b)(1) excluded compensation paid by a bank under a bonus or similar plan if such compensation is paid on a discretionary basis; based on multiple factors or variables; such factors or variables include significant factors or variables that are not related to securities transactions at the

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[68] For similar reasons, a referral to a broker-dealer for such a transaction is a "referral" for purposes of the networking exception and Rule 700.

broker-dealer; and a referral made by the employee or any other person is not a factor or variable in determining the employee's compensation under the plan.

In addition, Proposed Rule 700(b)(2) provided that the definition of incentive compensation did not prevent a bank from compensating its employees on the basis of any measure of the overall profitability of (1) the bank, either on a stand-alone or consolidated basis; (2) any of the bank's affiliates (other than a broker-dealer) or operating units; or (3) a broker-dealer if such profitability is only one of multiple factors or variables used to determine the compensation of the officer, director, or employee and those factors or variables include significant factors or variables that are not related to the profitability of the broker-dealer. The Agencies specifically requested comment on whether existing bank bonus programs would fit, or could easily be adjusted to fit, within these proposed exclusions.

Many commenters indicated that the proposed bonus provisions worked well and would not interfere with bank bonus plans generally. One commenter, however, opposed the proposed bonus provisions arguing that permitting bonuses to be based even in part on revenues generated by activity conducted at a broker-dealer would encourage bank employees to make referrals regardless of the appropriateness of the referral in order to increase their compensation under the bonus plan.[69] In addition, a number of commenters, requested that the Agencies either confirm that bonus programs structured in particular ways identified by the commenter would not fall within the definition of "incentive compensation" or modify the terms of the exclusions to encompass plans with these features. For example, several commenters asked the Agencies to confirm that the

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69 See NASAA Letter.

rules would not prohibit a bank from basing an employee's bonus on the assets, revenues or profits brought to the bank and its partner broker-dealer by that employee. Other commenters asked that the Agencies provide that all "traditional" bank bonus programs are protected under the rule.

A number of commenters also raised specific issues with one or more aspects of the exception in Rule 700(b)(1) for discretionary, multi-factor bonus plans or the safe harbor in Rule 700(b)(2) for plans based on overall profitability. For example, some commenters requested clarification of the "discretionary" requirement in paragraph (b)(1) and asserted that a bonus plan should be considered "discretionary" if employees do not have an enforceable right to compensation under the plan until it is paid.[70] One commenter also argued that Proposed Rule 700(b)(1) should not prohibit the number of referrals made by an employee from playing a role in the employee's compensation under a bonus plan.[71]

Several commenters also asserted that the safe harbor in paragraph (b)(2) should be clarified or expanded to cover bonus programs based on any measure of the financial performance, and not just the "overall profitability," of a bank, affiliate, operating unit or broker-dealer.[72] Commenters indicated that bank bonus programs may be based on a wide variety of measures or metrics related to the operations or performance of the bank, an affiliate or operating unit.[73] Some commenters also requested that the safe harbor be

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[70] See, e.g., U.S. Trust Letter and Union Bank Letter.

[71] See TD Banknorth, N.A. ("TD Banknorth") Letter.

[72] See, e.g., ABA Letter, Clearing House Ass'n Letter.

[73] See, e.g., Clearing House Ass'n Letter, Harris Bank Letter, U.S. Trust Letter.

revised to clarify that a bonus program may be based on the overall profitability of an operating unit of an affiliate of a bank (other than a broker-dealer), or be expanded to allow bonus programs to be based on the financial performance of a branch, division, or geographical or operational unit of a broker-dealer.[74]

The purpose of the exception and exclusion in paragraph (b) is to recognize that certain types of bonus plans are not likely to give unregistered bank employees a promotional interest in the brokerage services offered by the broker-dealers with which the bank networks and to avoid affecting bonus plans of banks generally. As described below, the Agencies have made several revisions to the exception and exclusion to help clarify the types of bonus plans that fall outside of the scope of "incentive compensation" and to ensure that excepted or excluded plans are not likely to give bank employees an impermissible promotional interest in the broker-dealer's activities. These exceptions and exclusions are crafted to accommodate existing types of bank bonus programs in general. Nevertheless, a plan's longevity or the number of banks that utilize similar plans are not factors in determining whether a plan constitutes "incentive compensation" under this definition. Accordingly, banks that have networking arrangements with a broker-dealer should review their existing bonus programs in light of the standards set forth in the rule to evaluate whether they may constitute impermissible incentive compensation.

a. Exception for Discretionary, Multi-Factor Bonus Plans

Under Rule 700(b)(1) of the final rules, compensation paid by a bank under a bonus or similar plan is specifically excepted from "incentive compensation" if it is paid on a discretionary basis and based on multiple factors or variables, provided that (1) those

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74 See, e.g., ABA Letter, Clearing House Ass'n Letter, HSBC Bank Letter, PNC Letter, and Union Bank Letter.

factors or variables include multiple, significant factors or variables that are not related to securities transactions at the broker-dealer; (2) a referral made by the employee is not a factor or variable in determining the employee's compensation under the plan; and (3) the employee's compensation under the plan is not determined by reference to referrals made by any other person.[75] The Agencies have modified the rule to make clear that, to be excluded under Rule 700(b)(1), a multi-factor plan must include multiple, significant factors or variables that are not related to securities transactions at the broker-dealer.[76] The proposed rule already required that there be "significant factors or variables" and the addition of "multiple" highlights the plural nature of these terms.

Each factor or variable unrelated to securities transactions at the broker-dealer will be considered "significant" for purpose of Rule 700(b) if it plays a material role in determining an employee's compensation under the bonus or similar plan, i.e., the amount of the employee's bonus could be reduced or increased by a material amount based on the non-securities factor or variable. This clarification will give banks greater certainty and will allow them to more readily identify the types of factors or variables not related to securities transactions that must be included within a discretionary, multi-factor bonus plan under paragraph (b)(1) of the Rule. Thus, under paragraph (b)(1), a bank's bonus program may take account of the full range of banking, securities or other business of one or more customers brought to the bank and its partner broker-dealer by an

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[75] Rule 700(b)(1). The requirement that an employee's compensation not be based on a "referral" made by the employee or another person means that the employee's compensation under the bonus or similar plan may not vary based on the fact that the employee or other person made a referral to a broker-dealer or the number of securities referrals made by the employee or other person to a broker-dealer.

[76] A similar change has been made to the corresponding language in Rule 700(b)(2).

employee so long as the bonus is paid on a discretionary basis, the banking and other factors or variables not related to securities transactions at the broker-dealer are significant factors or variables under the bonus program, and a referral or number of referrals made by the employee or others is not a factor or variable under the program. In this way, the rule is designed to accommodate discretionary bank bonus programs that are based on general measures of the business or performance of a bank or a particular customer, branch or other unit of the bank, that are not based on referrals made by one or more bank employees and that include some inputs based on securities transactions at a broker-dealer as well as multiple significant factors or variables that are unrelated to securities transactions at the broker-dealer.

A bank may not establish or maintain one or more "sham" non-securities factors or variables in its bonus or similar plan for the purpose of evading the restrictions in Rule 700(b) and the Banking Agencies will continue to review the bonus and similar plans of banks participating in networking arrangements as part of the risk-focused supervisory process. In considering if a bonus program at a bank contains sufficient banking or other factors unrelated to securities transactions at a broker-dealer, the agencies will consider, among other things, whether such factors or variables relate to banking or other non-broker-dealer business(es) actually being conducted by the bank or its employees, the resources devoted by the bank to such business(es), and whether such business(es) materially contributes to the payments made under the plan over time. It is not expected that the actual payments made under a bank's bonus or similar plan would, over time, be based predominantly on securities transactions conducted at a broker-dealer. If such a situation were to occur, the bank would be expected to make appropriate modifications to its bonus or similar plan going forward.

A bonus or similar plan will be considered "discretionary" under the final rule if the amount an employee may receive under the plan is not fixed in advance and the employee does not have an enforceable right to payments under the plan until the amount of any payments are established and declared by the bank. A plan may, however, include targets or metrics that must be met in order for any bonus to be paid, provided the plan is otherwise a "discretionary" plan.

The Agencies have not modified the rule to allow a bonus plan to be based on the fact of a referral or the number of referrals made by one or more bank employees. The Agencies believe that doing so would allow a direct linkage between a referral and an employee's bonus compensation and be contrary to the purposes of the exception.

b. Safe Harbor for Plans Based on Overall Profitability or Revenue

The safe harbor provisions of Rule 700(b)(2) are designed to allow banks to avoid having to analyze whether a particular bonus program meets the requirements of the exception in paragraph (b)(1) in circumstances where the general structure of the program clearly reduces the potential for sales practice concerns in connection with a referral to a broker-dealer. The Agencies have made several changes to the safe harbor to address the issues raised by commenters and to ensure that the safe harbor achieves its purpose. In particular, the Agencies have modified paragraph (b)(2) of the rule to cover any bonus or similar plan that is based on the overall profitability or revenue of:

(i) The bank, either on a stand-alone or consolidated basis;

(ii) Any affiliate of the bank (other than a broker-dealer), or any operating unit of the bank or an affiliate (other than a broker-dealer), if the affiliate or operating unit does not over time predominately engage in the business of making referrals to a broker-dealer; or

(iii) A broker-dealer if:

(A) Such measure of overall profitability or revenue is only one of multiple factors or variables used to determine the compensation of the officer, director or employee;

(B) The factors or variables used to determine the compensation of the officer, director or employee include multiple significant factors or variables that are not related to the profitability or revenue of the broker-dealer;

(C) A referral made by the employee is not a factor or variable in determining the employee's compensation under the plan; and

(D) The employee's compensation under the plan is not determined by reference to referrals made by any other person.

When a bonus program is based on the overall profitability of a bank, an affiliate of a bank (other than a broker-dealer), or an operating unit of the bank or an affiliate (other than a broker-dealer), any relationship between a referral made by an employee and the amount of payments that the employee may receive under the plan are likely to be attenuated. In these circumstances, for example, any potential connection between the revenue received by a bank from its partner broker-dealer as a result of a referral and the payments made to the referring bank employee under the plan likely would be tenuous and largely speculative given the number of other employees, business and actions that contribute to the overall profitability of the bank, affiliate or most operating units. The Agencies believe this attenuation effectively addresses any potential that payments under the plan would give an employee an undue promotional interest in any securities transactions that may occur at the broker-dealer as a result of a referral. A bonus plan based on the overall revenue of a bank or qualifying affiliate or operating unit would be similarly attenuated and, for this reason, the Agencies have modified the safe harbor to cover plans based on either the "overall profitability or revenue" of a bank or a qualifying affiliate or operating unit. This would include plans based on an entity's earnings per share or stock price, both of which are directly related to the entity's overall profitability or revenue. Because other, more granular measures of the financial performance of a bank, affiliate or operating unit could create an unduly close connection between the employee's expected payment under the bonus plan and referrals made to the broker-dealer or the securities transactions that result from those referrals, the rules provide for plans structured in more granular ways to be analyzed under the multi-factor, discretionary criteria in Rule 700(b)(1).

The potential connection between a referral made by a bank employee and the payments made to the employee under a bonus plan may be particularly strong if payments under the plan are based on the profitability or revenue of (i) the partner broker-dealer itself or a specific branch or operating unit of the broker-dealer (such as the branch or operating unit responsible for handling customers referred by the bank), or (ii) an operating unit of the bank or a non-broker-dealer affiliate that is predominantly engaged over time in referring customers to the broker-dealer. To address the potential for improper incentives in these situations, the Agencies have modified

Rule 700(b)(2)(iii) to allow a bonus program to be based on the overall profitability or revenue of a broker-dealer only if the program meets the conditions specified in (A)-(D) above. These conditions are similar to those that would apply to a discretionary bonus or similar plan under paragraph (b)(1) and are designed to ensure that the profitability or revenue of the broker-dealer is only one of multiple significant factors or variables in determining the employee's compensation and that a referral or number of referrals made by the employee is not a factor or variable under the program.[77] Like the proposal, the safe harbor in paragraph (b)(2) is not available to bonus plans based on the profitability or revenue of a particular branch, division or operating unit of the partner broker-dealer.

In addition, the Agencies have modified paragraph (b)(2)(ii) of the rule to exclude bonus plans based on the profitability or revenue of an operating unit of a bank or non-broker-dealer affiliate that over time predominantly engages in the business of making referrals to a broker-dealer. This exclusion is intended to prevent a bank from basing a bonus plan on the overall profitability or revenue of a bank unit that is focused solely or predominately on making referrals to a broker-dealer. This restriction, however, is not intended to prevent a bonus plan from being based on the overall profitability or revenue of a bank unit, such as a call center, that in fact markets, sells or supports a range of bank products in addition to making referrals to a broker-dealer and which is not, over time, predominantly engaged in the business of making referrals to a broker-dealer.

C. Rule 701: Exemption for Referrals Involving Institutional Customers and High Net Worth Customers

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77 As with a multi-factor bonus plan under paragraph (b)(1) of the Rule, a non-securities factor or variable will be considered "significant" under paragraph (b)(2)(iii) if it plays a material role in determining an employee's compensation under the bonus or similar plan.

The proposed rules included an exemption that would permit a bank, subject to certain conditions, to pay an employee a contingent referral fee of more than a nominal amount for referring an "institutional customer" or "high net worth customer" to a broker-dealer with which the bank has a contractual or other written networking arrangement.[78] Among the conditions included in the proposed rule were conditions that—

- Established the financial thresholds at which a customer would be considered an "institutional customer" or "high net worth customer";
- Limited the types of bank employees that may receive a higher-than-nominal referral fee under the exemption and the manner in which these fees may be structured;[79]
- Required the bank to provide certain disclosures to the customer regarding the referral arrangement;[80] and
- Required that the agreement between the bank and the broker-dealer include certain provisions, including a provision obligating the broker-dealer to perform a suitability analysis of certain securities transactions that may result from the referral or a sophistication analysis of the customer referred.[81]

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78 Proposed Rule 701.

79 See Proposed Rule 701(a)(1) and (d)(4).

80 See id. at 701(a)(2)(i).

81 See id. at 701(a)(3)(ii).

Many commenters supported providing an exemption for referrals involving sophisticated individuals and entities.[82] These commenters, for example, asserted that the exemption was appropriate in light of the required sophistication of the customer involved.[83] Other commenters, however, argued that providing an exemption to the "nominal" requirement would not be in the interest of investors or the public. These commenters asserted that the exemption as proposed would allow bank employees to have a significant salesman's stake in securities transactions and encourage bank employees to act as finders or salespeople for a broker-dealer.[84]

Many commenters, including a number that supported the exemption, also asked that the Agencies modify the exemption to, among other things, lower or alter the thresholds at which a person would be considered an "institutional customer" or "high net worth customer" under the rule; eliminate the provisions of the rule requiring the broker-dealer to perform a suitability or sophistication analysis in connection with a referral; or eliminate the limitations on the manner in which a higher-than-nominal referral fee may be structured. In addition, many commenters requested that the Agencies modify the rule in several respects to reduce administrative burden and complexity. For example, several commenters asked that the Agencies provide a bank and its partner broker-dealer greater flexibility to assign between themselves the responsibility for fulfilling the disclosure and other obligations included in the rule.

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82 See, e.g., BISA Letter, CBA Letter, Citigroup Letter, ICBA Letter, Roundtable Letter, Securities Industry and Futures Markets Ass'n ("SIFMA") Letter, State Street Corp. Letter, U.S. Trust Letter, Union Bank Letter.

83 See CBA Letter.

84 See, e.g., Massachusetts Securities Division Letter, NASAA Letter.

After carefully considering the comments, the Agencies have decided to retain the exemption. The Agencies continue to believe that it is appropriate to provide an exemption from the nominal and contingency limitations in the networking exception for referrals that both involve institutions and individuals that meet certain financial criteria and that occur under other conditions designed for investor protection. When provided appropriate information, such institutions and individuals are more likely to be able to understand and evaluate the relationship between a bank and its employees and the bank's broker-dealer partner and the impact of that relationship on any resulting securities transaction with the broker-dealer. The conditions in the final exemption are designed to help ensure that, among other things, institutional and high net worth customers, as defined in the rule, receive appropriate investor protections and information that enables the customer to understand the financial interest of the bank employee so the customer can make informed choices. Moreover, as the exemption itself provides, a bank operating under the exemption also must comply with the terms and conditions in the statutory networking exception (other than the compensation restrictions in Section 3(a)(4)(B)(i)(VI) of the Exchange Act's networking exception), including the terms and conditions that require the disclosure of the uninsured nature of securities and that limit the role that a bank employee may have in a brokerage transaction.[85] These conditions provide additional protections to institutional and high net worth customers that may be referred to a broker-dealer under Rule 701.

The Agencies have modified the final rule in several respects to, among other things, provide banks and broker-dealers greater flexibility in complying with the rule's

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[85] See Exchange Act Section 3(a)(4)(B)(i)(V) and (IX).

disclosure requirements and to make the exemption more workable in practice. In light of the protections retained in the rule, the Agencies also have modified the thresholds at which a non-natural person will be considered an "institutional customer" for purposes of the rule. These modifications are discussed further below.

Banks that pay their employees only nominal, non-contingent fees in accordance with Rule 700 for referring customers—including institutional or high net worth customers—to a broker-dealer do not need to rely on, or comply with, the exemption provided in Rule 701. As under the proposal, the final rule requires that the written agreement between a bank operating under the exemption and its partner broker-dealer include terms that obligate the broker-dealer to take certain actions. Banks and broker-dealers are expected to comply with the terms of their written networking arrangements. If a bank or broker-dealer does not comply with the terms of the agreement, however, the bank would not become a "broker" under Section 3(a)(4) of the Exchange Act or lose its ability to operate under the proposed exemption.

1. Definitions of "Institutional Customer" and "High Net Worth Customer"

Proposed Rule 701(d)(2) defined an "institutional customer" to mean any corporation, partnership, limited liability company, trust, or other non-natural person that has at least $10 million in investments <u>or</u> $40 million in assets. Under the proposal, a non-natural person also would qualify as an "institutional customer" with respect to a referral if the customer has $25 million in assets <u>and</u> the bank employee refers the customer to the broker-dealer for investment banking services. Proposed Rule 701(d)(1) defined a "high net worth customer" to mean any natural person who, either individually or jointly with his or her spouse, has at least $5 million in net worth excluding the primary residence and associated liabilities of the person and, if applicable, his or her spouse. Proposed Rule 701 also included provisions governing the allocation of assets held by a natural person jointly with his or her spouse and provided for the dollar thresholds in the rule to be adjusted for inflation every five years.

A number of commenters argued that the proposed dollar thresholds for both types of customers were too high in light of the nature of the transactions involved and the other requirements of the exemption.[86] Commenters asserted that customers with lower levels of net worth, assets or investments are sophisticated enough to understand and evaluate the implications of a higher-than-nominal or contingent referral fee. Commenters suggested a wide variety of alternative thresholds, with many recommending that the Agencies use an existing standard established under the federal securities laws for assessing a customer's investment sophistication. For example, commenters recommended that the Agencies use the "accredited investor" definition in the Commission's Regulation D, or the definition of that term proposed for use in connection with investments in certain private investment vehicles, for purposes of defining an institutional or high net worth customer;[87] treat all corporate and non-natural persons as an institutional customer; consider all persons advised by a bank or a registered investment adviser to be sophisticated; or lower the asset threshold for municipalities or charitable organizations.[88] Several commenters also asked that the

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86 See, e.g., HSBC Bank Letter, U.S. Trust Letter, SIFMA Letter, Roundtable Letter.

87 See 17 CFR 230.501(a)(3), (5) and (6); Securities Act Rel. No. 33-8766, 72 FR 400, Jan. 4, 2007.

88 See, e.g., ABA Letter, Clearing House Ass'n Letter, State Street Corp. Letter.

Agencies allow banks to use a business customer's revenues for purposes of determining if the customer is an institutional customer.

After carefully reviewing the comments, the Agencies have modified the definition of an "institutional customer" in the final rule to mean any corporation, partnership, limited liability company, trust, or other non-natural person that has, or is controlled by a non-natural person that has, at least: (i) $10 million in investments; or (ii) $20 million in revenues; or (iii) $15 million in revenues if the bank employee refers the customer to the broker-dealer for investment banking services.[89] When converted to an equivalent asset number, the $20 million and $15 million revenue thresholds in the final rule are somewhat lower than $40 million and $25 million asset thresholds in the proposed rule.[90] The Agencies believe that these lower thresholds are appropriate for corporate and other non-natural customers in light of the other protections retained in the final rule, including the provisions requiring a suitability or sophistication determination, and the greater internal and external resources that business entities typically have as compared to individuals. The Agencies have modified the thresholds to be based on

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[89] Rule 701(d)(2).

[90] To develop comparable asset and revenue thresholds for an institutional customer, the Agencies used a dataset composed of all publicly traded, U.S.-incorporated, non-financial companies with a market capitalization of greater than $0 and for which asset and sales data were available in the 2005 CompuStat Universe of North American companies published by Standard & Poor's Corporation. For more information on the CompuStat Universe, see http://www2.standardandpoors.com/spf/pdf/products/Compustat2006.pdf. A company with $40 million in assets and a company with $25 million in assets would rank at approximately the 27.5th percentile and the 21.9th percentile, respectively, of all companies within this dataset when ranked according to assets. When the companies within this dataset are ranked according to sales, the companies at approximately the 27.5th percentile and the 21.9th percentile have approximately $27.7 million and $15.7 million in sales.

revenues (rather than assets) to eliminate the potential for borrowings to influence the status of a corporate customer and to promote the equivalent treatment of non-financial companies and financial companies. In addition, the Agencies have amended the rule to provide that a company controlled by an institutional customer will itself be considered an institutional customer. A company controlled by another company should generally have access to the resources and sophistication of the controlling company.

The lower revenue threshold for referrals involving investment banking services is designed to facilitate access to the capital markets by smaller companies. Like the proposal, the final rule defines "investment banking services" to include, without limitation, acting as an underwriter in an offering for an issuer, acting as a financial adviser in a merger, acquisition, tender-offer or similar transaction, providing venture capital, equity lines of credit, private investment-private equity transactions or similar investments, serving as placement agent for an issuer, and engaging in similar activities.[91] The phrase "other similar services" would include, for example, acting as an underwriter in a secondary offering of securities and acting as a financial adviser in a divestiture. These examples are not exhaustive and are provided solely for illustrative purposes.[92]

The final rule continues to define a "high net worth customer" as a natural person who, either individually or with his or her spouse, has at least $5 million in net worth

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91 See Rule 701(d)(3).

92 When used in this rule, the term "include, without limitation" means a non-exhaustive list. This usage is not intended to suggest that the term "including" as used in the Exchange Act and the rules under that Act means an exhaustive list. The use of the term "including, but not limited to" in Exchange Act Rules 10b-10 and 15b7-1 is also not intended to create a negative implication regarding the use of "including" without the term "but not limited to" in other Exchange Act rules. See Exchange Act Release No. 49879, 69 FR 39682 (June 30, 2004), at footnote 76.

excluding the primary residence and associated liabilities of the person and, if applicable, his or her spouse. In response to comments,[93] the Agencies have modified this definition to include any revocable, inter vivos or living trust the settlor of which is a natural person who, either individually or jointly with his or her spouse, meets the $5 million in net worth test.[94] This change is designed to reflect the fact that otherwise sophisticated individuals may hold assets through such trusts for estate planning or other purposes.

The Agencies believe that customers that meet the net worth, investment and revenue thresholds included in the final rule should have the ability to understand and evaluate the financial interest of the bank employee making a referral to a broker-dealer under the exemption. In developing these thresholds, the Agencies took into account the limited nature of activities covered by the exemption (i.e., a referral by a bank employee to a broker-dealer). The Agencies have not modified the rule, as requested by some commenters, to treat any person advised by a bank or a registered investment adviser as an institutional or high net worth customer. The existence of such an advisory relationship generally is not, by itself, sufficient to establish the financial sophistication of an individual or corporate entity for purposes of the other similar standards in or developed under the federal securities laws.[95]

For purposes of determining whether a natural person meets the $5 million net worth test, the assets of a person include: (1) any assets held individually; (2) if the person is acting jointly with his or her spouse, any assets of the person's spouse (whether

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93 See ABA Letter, PNC Letter, Roundtable Letter.

94 Rule 701(d)(1)(i)(B).

95 See, e.g., 15 U.S.C. 80a-2(a)(51), 78c(a)(54); 17 CFR 230.501(a).

or not such assets are held jointly); and (3) if the person is not acting jointly with his or her spouse, fifty percent of any assets held jointly with such person's spouse and any assets in which such person shares with such person's spouse a community property or similar shared ownership interest. These rules are designed to ensure that the full amount of jointly owned assets are not considered in cases where one spouse acts independently of the other in contacting a broker-dealer.[96] The Agencies have re-formatted these allocation provisions in the final rule to make them easier to understand and promote compliance.

As in the proposal, the dollar threshold for both institutional customers and high net worth customers will be adjusted for inflation on April 1, 2012, and every five years thereafter, to reflect changes in the value of the Personal Consumption Expenditures Chain-Type Price Index, as published by the Department of Commerce, from December 21, 2006. The Agencies selected this index because it is a widely used and broad indicator of inflation in the U.S. economy.

2. Determining that a Customer Meets the Relevant Thresholds

The proposal required the bank to determine that the customer being referred met the standards to be a high net worth or institutional customer either (i) before the referral fee was paid to the bank employee, in the case of a non-natural person, or (ii) prior to or

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[96] One commenter asserted that the Agencies should allow a person to include assets that the person holds jointly with someone other than a spouse, such as a relative or domestic partner, for purposes of calculating whether the person meets the net worth threshold. See Roundtable Letter. The Agencies have not modified the rule in this manner to keep the scope of individuals whose assets may be considered in determining whether a natural person has the appropriate level of financial sophistication consistent with the standards used in determining whether a natural person is an accredited investor under the Commission's Regulation D. See 17 CFR 230.501(a).

at the time of the referral, in the case of a natural person.[97] In making these determinations for a natural person, the proposed rule allowed the bank to rely on a signed acknowledgment from the person that he or she met the standards to be a high net worth customer.[98] The proposed rule also required that the written agreement between the bank and the broker-dealer provide for the broker-dealer to (i) determine that the customer being referred met the standards to be a high net worth customer or institutional customer before the referral fee was paid,[99] and (ii) promptly inform the bank if the broker-dealer determined that a customer referred under the exemption did <u>not</u> meet the applicable standard.[100]

Commenters argued that either the bank or the broker-dealer, but not both, should be required to make these customer eligibility determinations and that the bank and the broker-dealer should be permitted to allocate responsibility for these determinations between themselves.[101] In addition, several commenters contended that a bank should be allowed to make the eligibility determinations for both high net worth customers and institutional customers before the referral fee is paid or before a securities transaction is

97 Proposed Rule 701(a)(2)(ii).

98 Proposed Rule 701(a)(2)(ii)(B)(2).

99 Proposed Rule 701(a)(3)(i).

100 Proposed Rule 701(a)(3)(iii)(A).

101 <u>See</u>, <u>e.g.</u>, BISA Letter, Clearing House Ass'n Letter, Citigroup Letter, and SIFMA Letter. Some commenters, for example, suggested that requiring bank employees to make these determinations might require the employee to go beyond the limited role a bank employee is permitted to play in a brokerage transaction under the statute. <u>See</u>, <u>e.g.</u>, BISA Letter, ABA Letter.

effected at the broker-dealer.[102] A few commenters also asserted that banks and broker-dealers should be permitted to rely on a signed acknowledgement from either an institutional or high net worth customer.[103]

The status of the referred customer as a high net worth or institutional customer is a fundamental aspect of the exemption and the final rule continues to provide for both the bank and the broker-dealer to determine that the customer meets the necessary qualification criteria to provide added assurance that these criteria are met.[104] In addition, less information typically is in the public domain concerning the financial resources of an individual than of a corporation or other business entity and, accordingly, there is a greater likelihood that a bank employee—without further investigation—will be able to preliminarily identify corporate or other business customers that are likely to satisfy the rule's eligibility criteria than in the case of individuals. For these reasons, the final rule continues to provide for the bank to determine that a natural person is a high net worth customer before a referral is made and before the employee potentially develops an expectation of a higher-than-nominal fee.

The Agencies, however, have modified the final rule to make it more flexible while retaining its underlying purpose by providing that a bank or a broker-dealer satisfies its customer eligibility requirements if the bank or broker-dealer "has a

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102 See, e.g., ABA Letter, BISA Letter, Clearing House Ass'n Letter, HSBC Bank Letter, and PNC Letter.

103 See, e.g., Citigroup Letter, SIFMA Letter.

104 See Rule 701(a)(2)(ii) and (3)(ii)(B). The final rule also continues to provide for the written agreement between the bank and the broker-dealer to require the broker-dealer to inform the bank if the broker-dealer determines that a referred customer does not meet the relevant eligibility thresholds. See Rule 701(a)(3)(v)(A).

reasonable basis to believe that the customer" is an institutional customer or high net worth customer before the time specified in the rule.[105] A bank or broker-dealer would have a "reasonable basis to believe" that a customer is a high net worth customer or institutional customer if, for example, the bank or broker-dealer obtains a signed acknowledgment from the customer (or, in the case of an institutional customer, from an appropriate representative of the customer) that the customer meets the applicable standards to be considered a high net worth customer or an institutional customer, respectively, and the bank employee making the referral or the broker-dealer employee dealing with the referred customer does not have information that would cause the employee to believe that the information provided by the customer (or representative) is false.

3. Conditions Relating to Disclosures

The proposed exemption required that the bank provide a high net worth customer or institutional customer being referred to the bank's broker-dealer partner certain written disclosures about the bank employee's potential interest in the referral prior to or at the time of the referral.[106] Commenters generally believed that providing these types of disclosures to a high net worth or institutional customer would help ensure that the customer received appropriate information concerning the relationship between the bank and the broker-dealer,[107] although a few questioned whether sophisticated customers required any disclosures at all or suggested that more simplified disclosures be

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105 Rule 701(a)(2)(ii).

106 Proposed Rule 701(a)(2)(i).

107 See, e.g., ABA Letter, JP Morgan Letter, Roundtable Letter, BISA Letter.

permitted.[108] A number of commenters also asserted that the requirement that the bank provide these disclosures "prior to or at the time of the referral" was impractical or burdensome.[109] Commenters instead asserted that the rule should allow the disclosures to be provided before the referral fee is paid or before a securities transaction is effected at the broker-dealer, or allow the bank and the broker-dealer to determine which entity would make the disclosures.[110]

The final rule continues to require that a high net worth or institutional customer referred to a broker-dealer under the exception receive disclosures that clearly and conspicuously disclose (i) the name of the broker-dealer; and (ii) that the bank employee participates in an incentive compensation program under which the bank employee may receive a fee of more than a nominal amount for referring the customer to the broker-dealer and that payment of this fee may be contingent on whether the referral results in a transaction with the broker-dealer.[111] This requirement ensures that high net worth or

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108 See, e.g., Bank of America Corp. ("BofA") Letter and WBA Letter.

109 For example, some commenters noted that some referrals may occur only by telephone or asserted that it may be unclear to an employee when a referral actually occurs.

110 See, e.g., ABA Letter, BISA Letter, Clearing House Ass'n Letter, HSBC Bank Letter, and WBA Letter. In addition, some commenters contended that banks should be required to provide similar conflict-of-interest disclosures to customers referred to a broker-dealer under the statutory networking exception. See, e.g., Boyd Financial Letter, Pace Project Letter, University of Cincinatti Corp. Law Center Letter. The statutory networking exception itself sets certain disclosures that the bank or broker-dealer must provide a customer in situations where the bank employee making the referral may receive only a "nominal" referral fee. 15 U.S.C. 78c(a)(4)(i)(IX).

111 Rule 701(b).

institutional customers receive notice of the financial interest the referring employee may have in the transaction so they can make informed choices.

In light of the comments, the Agencies have modified the provisions of the rule governing how and when these disclosures must be provided to make the rule more workable and less burdensome while also requiring that customers receive the information in time to make informed choices. Specifically, the final rule provides two options for providing the required disclosures. Under the first option, as under the proposal, the bank must provide the high net worth or institutional customer the disclosures in writing prior to or at the time of the referral.[112] The second option allows the bank to provide the disclosure to the customer orally prior to or at the time of the referral. However, if the bank provides the customer the required disclosures only orally, then either (i) the bank must provide the disclosure to the customer in writing within 3 business days of the date of the referral; or (ii) the broker-dealer must be obligated, under the terms of its written agreement with the bank, to provide the disclosures in writing to the customer.[113] If the broker-dealer is responsible for providing the written disclosures, then it must provide the disclosures to the customer prior to or at the time the customer begins the process of opening an account at the broker-dealer (if the customer does not already have an account with the broker-dealer) or prior to the time the customer places an order for a securities transaction with the broker-dealer as a result of the referral (if the

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112 Rule 700(a)(2)(i).

113 Rule 701(a)(2)(i) and (a)(3)(i).

customer already has an account at the broker-dealer).[114] In this way, the rule provides a mechanism for customers to receive the disclosures in writing when they initially are provided only orally. Whether provided orally or in writing, the required disclosures will be considered to have been made in a clear and conspicuous manner if they are provided in a manner designed to call attention to the nature and significance of the information.

4. Suitability or Sophistication Analysis by Broker-Dealer

The proposed exemption required that the written agreement between the bank and the broker-dealer provide for the broker-dealer to perform a suitability or sophistication analysis of a securities transaction or the customer being referred, respectively. The type and timing of the analysis needed to be conducted by the broker-dealer depended on whether the referral fee was contingent on the completion of a securities transaction at the broker-dealer.[115] The proposed rule also required that the written agreement between the bank and its partner broker-dealer obligate the broker-dealer to inform the bank if it determined that a customer referred under the exemption, or a transaction to be conducted by the customer, did not meet the relevant suitability or sophistication standard.[116]

Several commenters objected to this suitability/sophistication requirement arguing that the broker-dealer should be required to conduct a suitability/sophistication analysis only when such an analysis would otherwise be required under the rules of the broker-

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114 Rule 701(a)(3)(i). As a general matter, a customer begins the account-opening process when the customer fills out the appropriate forms provided by the broker-dealer to establish an account.

115 Proposed Rule 701(a)(3)(ii).

116 Proposed Rule 701(a)(3)(iii)(C).

dealer's self-regulatory organization ("SRO") (i.e., in those cases where the broker-dealer makes a recommendation to the customer concerning securities).[117] Commenters also argued that the suitability/sophistication requirement was unworkable or unnecessary given that the transaction may involve only a referral (without a securities transaction occurring) of a sophisticated customer.[118] In addition, some commenters expressed concern that the proposed standards would increase the potential liability of broker-dealers or delay the ability of a broker-dealer to respond to a customer's instructions.

After carefully considering the comments, the Agencies have retained the requirement that the parties' written agreement provide for the broker-dealer to perform a suitability analysis when a referral fee is contingent on a transaction and a suitability or sophistication analysis for other referrals. These requirements provide additional investor protections in those circumstances where the bank employee making the referral may receive a higher-than-nominal referral fee. The suitability and sophistication standards included in the final rule are based on the standards that broker-dealers currently must apply and use under applicable SRO rules and, thus, should be familiar to those broker-dealers that partner with banks operating under the exemption.[119] In addition, the

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117 See, e.g., ABA Letter, Clearing House Ass'n Letter, Citigroup Letter, and PNC Letter. See also FINRA Rule 2310 and FINRA IM-2310-3 (discussing suitability obligations of member broker-dealers). One commenter also asserted that any expansion of a broker-dealer's suitability obligations should be processed and approved through the normal market regulation and SRO process. See SIFMA Letter.

118 See, e.g., Clearing House Ass'n Letter, SIFMA Letter. Commenters also asserted that a broker-dealer may not be able to perform the proposed "sophistication" analysis if the customer does not open an account or refuses to provide the broker-dealer the information necessary to perform the analysis.

119 One commenter expressed concern that the suitability/sophistication requirements of the rule may discourage low-cost, execution-only brokers from establishing

exemption gives a broker-dealer the flexibility to perform a suitability analysis, if one is otherwise required by the rule, in connection with all referrals made under the exemption if the broker-dealer determines that such an approach is appropriate for business, compliance or other reasons.

Specifically, for contingent referral fees payable under the exemption, the written agreement between the bank and the broker-dealer must provide for the broker-dealer to conduct a suitability analysis of each securities transaction that triggers any portion of the contingency fee in accordance with the rules of the broker-dealer's applicable SRO as if the broker-dealer had recommended the securities transaction.[120] This analysis must be performed by the broker-dealer before each securities transaction on which the referral fee is contingent is conducted.

For non-contingent referral fees payable under the exemption, the written agreement must provide for the broker-dealer to conduct, before the referral fee is paid, either (1) a sophistication analysis of the customer being referred; or (2) a suitability analysis with respect to all securities transactions requested by the customer

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relationships with banks under the exemption. See Business Law Section Letter. The Agencies are mindful of the need to keep appropriate investment options, including low-cost options, available to investors. However, given the cost structure of low-cost brokers, the Agencies expect that few such brokers would participate in referral arrangements under the exemption that provides for higher-than-nominal referral fees. Broker-dealers that do not wish to become obligated to perform the suitability/sophistication analyzes required by the rule also may continue to establish and maintain networking arrangements pursuant to the statutory networking exception.

120 Rule 701(a)(3)(ii)(A). Because the exemption provides for a broker-dealer to conduct its suitability analysis in accordance with the rules of its applicable SRO, the broker-dealer may follow and take advantage of any applicable SRO rules or interpretations that allow the broker-dealer to make an alternative suitability evaluation. See, e.g., FINRA IM-2310-3 (discussing a member's suitability obligations with respect to certain institutional investors).

contemporaneously with the referral in accordance with the rules of the broker-dealer's applicable SRO as if the broker-dealer had recommended the securities transaction.[121] Under the sophistication analysis option, the broker-dealer must determine that the customer has the capability to evaluate investment risk and make independent decisions, and determine that the customer is exercising independent judgment based on the customer's own independent assessment of the opportunities and risks presented by a potential investment, market factors, and other investment considerations.[122] This sophistication analysis is based on elements of FINRA IM-2310-3 (Suitability Obligations to Institutional Customers).

The Agencies have modified the final rule to provide for the broker-dealer to notify the customer, rather than the bank, if the broker-dealer determines that a high net worth or institutional customer, or a securities transaction to be conducted by such a customer, does not meet the applicable sophistication or suitability standard.[123] Providing such notification to the customer should assist the customer in deciding whether or not to conduct the transaction.

5. Conditions Relating to Bank Employees

Paragraph (b)(1) of the Proposed Rule included certain limitations on the types of bank employees that may receive a higher-than-nominal referral fee under the rule. In particular, the Proposed Rule provided that the bank employee: be predominantly engaged in banking activities, other than making referrals to a broker-dealer; encounter

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121 Rule 701(a)(3)(iii)(B).

122 Rule 701(a)(3)(ii)(B)(1).

123 Rule 701(a)(3)(iv).

the high net worth or institutional customer in the ordinary course of the employee's assigned business for the bank; not be qualified or required to be qualified under the rules of a SRO; and not be subject to statutory disqualification under Section 3(a)(39) of the Exchange Act (other than subparagraph (E) of that Section) ("statutory disqualification").[124]

The proposed exemption also included other provisions related to the SRO and statutory disqualification conditions. First, it required that the written agreement between the bank and the broker-dealer must provide for the bank <u>and</u> the broker-dealer to affirmatively determine, before a referral fee is paid to a bank employee under the exemption, that the employee is not subject to statutory disqualification.[125] Second, it required that the bank provide the broker-dealer the name of the employee and such other identifying information that may be necessary for the broker-dealer to determine whether the bank employee is subject to statutory disqualification or associated with a broker-dealer.[126] And third, it required that the parties' written agreement obligate the broker-dealer to promptly inform the bank if it determined the bank employee was subject to statutory disqualification.[127]

The final rule retains these provisions with the following modifications.[128] In response to comments,[129] the Agencies have modified the SRO condition in paragraph

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124 <u>See</u> Proposed Rule 701(a)(1).

125 Proposed Rule 701(a)(3)(i)(A).

126 Proposed Rule 701(a)(2)(iii).

127 Proposed Rule 701(a)(3)(iii)(B).

128 <u>See</u> Rule 701(a)(1), (a)(2)(iii), (a)(3)(ii)(A), and (a)(3)(v)(B).

(a)(1)(A) of the Rule to provide that the employee receiving the referral fee must not be "registered or approved, or otherwise required to be registered or approved, in accordance with the qualification standards established by the rules of any self-regulatory organization." The Agencies have modified the related language in paragraph (a)(2)(iii) of the rule in a similar manner.

Several commenters argued that the requirement that a bank employee encounter the high net worth or institutional customer "in the ordinary course of the bank employee's assigned duties" was unnecessary and ambiguous.[130] The Agencies have retained the requirement to help ensure that a bank employee making a referral under the rule does so as part of the employee's duties as a bank employee and not as a sales representative of the broker-dealer. However, the Agencies recognize that in the ordinary course of his or her assigned duties for the bank, a bank employee may encounter customers or potential customers outside the employee's regular business hours or at locations outside of the bank, such as at social or civic functions or gatherings.

A number of commenters contended that the bank and the broker-dealer should not both be required to verify that the bank employee is not subject to statutory disqualification and suggested that the bank and broker-dealer be permitted to allocate

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129 See Business Law Section Letter.

130 See, e.g., ABA Letter, BISA Letter, Clearing House Ass'n Letter, Comerica Bank Letter, and U.S. Trust Letter. For example, some asserted that bank employees may be expected to identify and develop client relationships at social or other events and expressed concern that the language might prevent a bank employee from receiving a referral fee for institutional or high net worth customers encountered in these ways.

this responsibility between themselves.[131] The Agencies have modified the rule to provide for these determinations to be made by the broker-dealer under the terms of the parties' written agreement.[132] The Agencies believe that broker-dealers are better suited to make this determination given their familiarity with the Exchange Act's statutory disqualification standards, provided that they receive the necessary information concerning the employee from the bank. A broker-dealer fulfills its responsibilities under paragraph (a)(3)(ii)(A) of Rule 701 if the broker-dealer determines that a bank employee is not subject to statutory disqualification before the employee first receives a referral fee under Rule 701 and at least once each year thereafter as long as the employee remains eligible to receive referral fees under the rule.

As a means designed to ensure that the broker-dealer has the appropriate information to make these determinations, the rule continues to require that, before a higher-than-nominal referral fee is paid to a bank employee under the exemption, the bank provide the broker-dealer the name of the employee and such other identifying information that the broker-dealer may need to determine whether the employee is subject to statutory disqualification.[133] Once the information for a particular employee is conveyed to the broker-dealer, the bank should provide at least annually its broker-dealer partner any changes to the identifying information initially provided under paragraph (a)(2)(iii) of Rule 701 for an employee who continues to make referrals and receive

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131 See, e.g., ABA Letter, BISA Letter, Clearing House Ass'n Letter, Citigroup Letter, PNC Letter, and SIFMA Letter.

132 Rule 701(a)(3)(ii)(A).

133 Rule 700(a)(2)(iii).

referral fees under the exemption so that the broker-dealer may perform its periodic review of the employee's qualifications under paragraph (a)(3)(ii)(A).

6. Good Faith Compliance and Corrections by Banks

As in the proposal, the final exemption provides that a bank that acts in good faith and that has reasonable policies and procedures in place to comply with the requirements of the exemption will not be considered a "broker" under Section 3(a)(4) of the Exchange Act solely because the bank fails, in a particular instance, to determine that a customer is an institutional or high net worth customer, provide the customer the required disclosures, or provide the broker-dealer the required information concerning the bank employee receiving the referral fee within the time periods prescribed. If the bank is seeking to comply and takes reasonable and prompt steps to remedy the error, such as by promptly making the required determination or promptly providing the broker-dealer the required information, the bank will not lose the exemption from registration in these circumstances. Similarly, to promote compliance with the terms of the exemption, the bank must make reasonable efforts to reclaim the portion of the referral fee paid to the bank employee for a referral that does not, following any required remedial actions, meet the requirements of the exemption and that exceeds the amount the bank otherwise would be permitted to pay under the statutory networking exception and Rule 700.[134]

A few commenters suggested that the Agencies strike the requirement that the bank seek to reclaim the higher-than-nominal portion of a referral fee. The Agencies

[134] Rule 701(a)(2)(iv).

have retained this requirement as it helps provide employees an incentive to comply with the rule.[135]

7. Referral Fees Permitted under the Exemption

Proposed Rule 701 placed certain limits on how a higher-than-nominal referral fee paid under the exemption may be structured.[136] Some commenters argued that these restrictions are unnecessary in light of the other protections included in the exemption, or that the rule should allow a higher-than-nominal referral fee to be based on a percentage of any type of securities transaction conducted at a broker-dealer (rather than just investment banking transactions).[137] On the other hand, one commenter asserted that, by allowing a referral fee to be based on the total amount of assets maintained in an account with the broker-dealer, the rule would provide an incentive for bank employees to provide ongoing investment advice to customers.[138]

The final rule continues to place limits on the types of referral fees a bank employee may receive under the exemption. These limitations are designed to reduce the potential "salesman's stake" of the bank employee in securities transactions conducted at the broker-dealer. Specifically, the exemption provides that a referral fee paid under the

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135 One commenter requested that the rule provide a similar safe harbor for broker-dealers. See SIFMA Letter. Any obligations of a broker-dealer that arise by reason of Rule 701 run only to its bank partner under the terms of their agreement and the Agencies believe the issue of contractual liability between the parties is best addressed by the parties themselves. As stated in the proposal, the Commission anticipates that it may be necessary for either FINRA or the Commission to propose a rule that would require broker-dealers to comply with the written agreements entered into pursuant to Rule 701.

136 Proposed Rule 701(d)(4).

137 See, e.g., Clearing House Ass'n Letter and JPMorgan Letter.

138 See NASAA Letter.

exemption may be a dollar amount based on a fixed percentage of the revenues received by the broker-dealer for investment banking services provided to the customer.[139] Alternatively, the referral fee may be a predetermined dollar amount, or a dollar amount determined in accordance with a predetermined formula, so long as the amount does not vary based on (1) the revenue generated by, or the profitability of, securities transactions conducted by the customer with the broker-dealer; (2) the quantity, price, or identity of securities purchased or sold over time by the customer with the broker-dealer; or (3) the number of customer referrals made.[140] For these purposes, "predetermined" means established or fixed before the referral is made. The requirement that the amount of the referral fee not vary based on the number of customer referrals made does not prohibit an employee from receiving a referral fee for each referral made by the employee under the exemption.

As the exemption provides, these restrictions do not prevent a referral fee from being paid in multiple installments or from being based on a fixed percentage of the total dollar amount of assets placed in an account with the broker-dealer. Additionally, these restrictions do not prevent a referral fee from being based on a fixed percentage of the total dollar amount of assets (including securities and non-securities assets) maintained by the customer with the broker-dealer. Fees structured in this manner and consistent with the limitations in paragraph (d)(4)(i) of the Rule do not provide a bank employee an incentive to recommend the purchase or sale of particular securities. In fact, the bank

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139 Rule 701(d)(4)(ii).

140 Rule 701(d)(4)(i). A referral fee paid under the exemption may be contingent on whether the customer opens an account with the broker-dealer or executes one or more transactions in the account during the initial phases of the account.

employee would have no special incentive to recommend the purchase of any security, as the addition of cash or other non-security instruments to the account would count equally towards the employee's compensation as any addition of securities to the account.

8. Permissible Bonus Compensation Not Restricted

The exemption for high net worth and institutional customers expressly provides that nothing in the exemption prevents or prohibits a bank from paying, or a bank employee from receiving, any type of compensation under a bonus or similar plan that would not be considered incentive compensation under paragraph (b)(1), or that is described in paragraph (b)(2), of Rule 700 (implementing the networking exception).[141] As explained above, these types of bonus arrangements do not tend to create the kind of financial incentives for bank employees that the statute was designed to address.

III. Trust and Fiduciary Activities

A. Trust and Fiduciary Exception and Proposed Rules

Section 3(a)(4)(B)(ii) of the Exchange Act (the "trust and fiduciary exception") permits a bank, under certain conditions, to effect securities transactions in a trustee or fiduciary capacity without being registered as a broker.[142] A bank must effect such transactions in its trust department, or other department that is regularly examined by bank examiners for compliance with fiduciary principles and standards.[143] In addition the bank must be "chiefly compensated" for such transactions, consistent with fiduciary principles and standards, on the basis of: (1) an administration or annual fee; (2) a

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141 Rule 701(c).

142 15 U.S.C. 78c(a)(4)(B)(ii).

143 Id.

percentage of assets under management; (3) a flat or capped per order processing fee that does not exceed the cost the bank incurs in executing such securities transactions; or (4) any combination of such fees.[144]

Banks relying on this exception may not publicly solicit brokerage business, other than by advertising that they effect transactions in securities in conjunction with advertising their other trust activities.[145] In addition, a bank that effects a transaction in the United States of a publicly traded security under the exception must execute the transaction in accordance with Exchange Act Section 3(a)(4)(C).[146] This Section requires that the bank direct the trade to a registered broker-dealer for execution, effect the trade through a cross trade or substantially similar trade either within the bank or between the bank and an affiliated fiduciary in a manner that is not in contravention of fiduciary principles established under applicable federal or state law, or effect the trade in some other manner that the Commission permits.[147] The trust and fiduciary exception recognizes the traditional securities role banks have performed for trust and fiduciary customers and includes conditions to help ensure that a bank does not operate a securities broker in the trust department.

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144 15 U.S.C. 78c(a)(4)(B)(ii)(I).

145 15 U.S.C. 78c(a)(4)(B)(ii)(II).

146 15 U.S.C. 78c(a)(4)(C).

147 15 U.S.C. 78c(a)(4)(C)(i) - (iii). As discussed infra at Part VI.C, the Agencies have adopted Rule 775 that permits banks, subject to certain conditions, to effect trades in securities issued by an open-end company and certain variable insurance contracts without sending the trade to a registered broker-dealer. Trades effected by a bank in accordance with Rule 775 are conducted in accordance with Section 3(a)(4)(C) of the Exchange Act.

The proposed rules provided that a bank would meet the "chiefly compensated" condition in the trust and fiduciary exception if the bank's relationship compensation attributable to each trust or fiduciary account exceeded 50 percent of the total compensation attributable to the relevant account.[148] The proposed rules also included an exemption that would permit a bank to use a bank-wide approach to the "chiefly compensated" condition as an alternative to the account-by-account approach. A bank using this proposed alternative would be able to use the aggregate relationship and total compensation that the bank received from its trust and fiduciary business as a whole to monitor its compliance with the chiefly compensated test. The proposed rule allowed a bank to use this bank-wide alternative if, among other things, the bank's aggregate relationship compensation attributable to its trust or fiduciary business as a whole equaled or exceeded 70 percent of the total compensation attributable to its trust or fiduciary business. This bank-wide alternative was designed to simplify compliance, alleviate concerns about inadvertent noncompliance, and reduce the costs and disruptions banks likely would incur under the account-by-account approach.

The proposal defined the term "relationship compensation" to mean the types of trust and fiduciary compensation specifically identified in the trust and fiduciary exception. The proposed rules also provided examples of fees that would be considered an administration fee or a fee based on a percentage of assets under management for these purposes. For example, the proposed rules provided that fees paid by an investment company pursuant to a plan under 17 CFR 270.12b-1 ("12b-1 fees") or for personal service or the maintenance of shareholder accounts ("service fees") would be considered

[148] Proposed Rule 721.

relationship compensation under the rules. The proposed rules also implemented the statute's advertising restriction and provided certain other conditional exemptions.

B. Joint Final Rules

1. "Chiefly Compensated" Test and Bank-Wide Exemption Based on Two-Year Rolling Averages

A majority of commenters supported the general approach taken in the proposed rules implementing the trust and fiduciary exception, including the proposed bank-wide alternative for the chiefly compensated test. For example, a number of commenters stated that the proposed bank-wide approach would provide banks an improved, workable and flexible method of complying with the statutory exception.[149] Some commenters, however, opposed either the account-by-account or bank-wide alternative to the "chiefly compensated" requirement. For example, some commenters argued that the account-by-account approach was inconsistent with the terms and purposes of the trust and fiduciary exception.[150] Another commenter argued that an account-by-account approach to the chiefly compensated test is the only way to help ensure that a bank does not operate a brokerage business out of its trust or fiduciary departments and, for this reason, recommended that the Agencies eliminate the bank-wide alternative.[151] Some commenters also requested that the Agencies lower the 70 percent relationship compensation/total compensation percentage required by the bank-wide exemption to 60

149 See, e.g., ABA Letter, Roundtable Letter, U.S. Trust Letter, WBA Letter.

150 See, e.g., Clearing House Ass'n Letter.

151 See NASAA Letter.

percent or 50 percent to make it more consistent with the percentage required by the account-by-account approach.[152]

After carefully considering the comments, the Agencies have retained the two alternative approaches in substantially the same form as proposed. Specifically, Rule 721 provides that a bank meets the "chiefly compensated" condition in the trust and fiduciary exception if the "relationship-total compensation percentage" for each trust or fiduciary account of the bank is greater than 50 percent.[153] The "relationship-total compensation percentage" for a trust or fiduciary account is calculated by (1) dividing the relationship compensation attributable to the account during each of the immediately preceding two years by the total compensation attributable to the account during the relevant year; (2) translating the quotient obtained for each of the two years into a percentage; and (3) then averaging the percentages obtained for each of the two immediately preceding years.[154]

The final rules (Rule 722) also allow a bank to use a bank-wide approach to the "chiefly compensated" condition as an alternative to the account-by-account approach. To use this bank-wide methodology, the bank must meet two conditions. First, the "aggregate relationship-total compensation percentage" for the bank's trust and fiduciary business as a whole must be at least 70 percent.[155] The "aggregate relationship-total

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152 See ACB Letter, CBA Letter.

153 Rule 721(a)(1).

154 The rule provides for this process to be accomplished by calculating the "yearly compensation percentage" and the "relationship-total compensation percentage" for the account. See Rule 721(a)(2) and (3).

155 Rule 722(a)(2).

compensation percentage" of a bank operating under the bank-wide approach is calculated in a similar manner as the "relationship-total compensation percentage" of an account under the account-by-account, except that the calculations would be based on the aggregate relationship compensation and total compensation received by the bank from its trust and fiduciary business as a whole during each of the two immediately preceding years. In other words, the percentage would be determined by (1) dividing the relationship compensation attributable to the bank's trust and fiduciary business as a whole during each of the immediately preceding two years by the total compensation attributable to the bank's trust and fiduciary business as a whole during the relevant year; (2) translating the quotient obtained for each of the two years into a percentage; and (3) then averaging the percentages obtained for each of the two immediately preceding years.[156] Second, the bank must comply with the conditions in the trust and fiduciary exception (other than the compensation test in Section 3(a)(4)(B)(ii)(I))[157] and comply with Section 3(a)(4)(C) (relating to trade execution) of the Exchange Act.[158]

The Agencies believe that providing banks these two alternatives is consistent with the purposes of the trust and fiduciary exception. In this regard, the availability of these two alternatives is designed to avoid disrupting the trust and fiduciary operations of

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[156] The rule provides for this process to be accomplished by calculating the "yearly bank-wide compensation percentage" and the "aggregate relationship-total compensation percentage" for the bank's trust and fiduciary business as a whole. See Rule 722(b) and (c).

[157] The Agencies have modified the bank-wide exemption to clarify that these conditions include the advertising restrictions contained in the trust and fiduciary exception as implemented by Rule 721(b). See Rule 722(a)(1).

[158] Rule 722(a)(1).

banks. The compensation tests in both the account-by-account and bank-wide approaches are designed to ensure that a bank's trust department is not unduly dependent on the types of securities-related compensation not permitted by the statute. The 70 percent compensation threshold in the bank-wide exemption is higher than that required under the account-by-account approach in order to compensate for the loss of particularity when the chiefly compensated test is implemented and monitored on a bank-wide basis, rather than on an account-by-account basis. The Agencies note that several commenters also asserted that the proposed aggregate relationship compensation-total compensation percentage required by the bank-wide alternative (70 percent) would not disrupt the trust and fiduciary operations or customer relationships of banks in light of the proposal's definition of "relationship compensation."

Some commenters asked that the Agencies modify how the bank-wide exemption could be applied in several ways. For example, some asserted that a bank should be allowed to apply the 70 percent compensation threshold separately to each individual fiduciary business line, operating unit or geographic region of the bank, rather than only on an aggregate bank-wide basis. Others asked that the Agencies allow a bank to use an aggregate compensation approach only for some trust or fiduciary business lines and use the account-by-account approach for the bank's trust or fiduciary accounts in its remaining business lines.[159] In addition, some asked that a bank be permitted to monitor compliance with the 70 percent compensation test on a combined basis with its affiliated entities engaged in trust or fiduciary activities (such as an affiliated bank or a subsidiary

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159 See Clearing House Ass'n Letter.

or affiliate registered as an investment adviser).[160] Some commenters also asked the Agencies to modify the bank-wide approach to provide for a bank's relationship compensation-total compensation percentage to be calculated based on the compensation attributable to all of the bank's trust and fiduciary accounts rather than the compensation from the bank's "trust and fiduciary business."[161]

The Agencies believe that the bank-wide alternative as structured provides banks appropriate and adequate flexibility in conducting their trust and fiduciary operations while meeting the statute's goals. The bank-wide approach is designed to reflect both the relationship compensation and total compensation received by a bank through the conduct of its full range of trust or fiduciary services, and, thus, allow banks to avoid tracking their trust or fiduciary revenue back to one or more specific accounts. At the same time, the use of two uniform methodologies (account-by-account or bank-wide) should facilitate the review of bank compliance during the bank supervisory process and aid the development of software and related systems by banks and their service providers for compliance purposes. Furthermore, because the broker exceptions for a bank in Section 3(a)(4)(B), including the trust and fiduciary exception, apply to each bank individually and are not available to a nonbank entity, including a nonbank subsidiary or affiliate of a bank, the Agencies have not modified the rules to allow a bank to monitor its compliance with the compensation limit in Rule 721 on a combined basis with one or more affiliated banks, subsidiaries or affiliates. The Agencies also do not believe that

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160 See Citigroup Letter, Clearing House Ass'n Letter, Mellon Bank, N.A. ("Mellon") Letter, PNC Letter, ABA Letter.

161 See, e.g., ABA Letter, Joint ABA/ABASA/Clearing House Ass'n Letter of July 16, 2007, BISA Letter, Clearing House Ass'n Letter, Comerica Bank Letter.

requiring banks to monitor their compliance with the 70 percent compensation test on a bank-wide basis, rather than on an individual business line or operating unit basis, will impose significant additional burdens on banks.[162]

A bank has the flexibility to elect to use a calendar year or the bank's fiscal year for purposes of complying with the compensation provisions of either the account-by-account or bank-wide approach.[163] In addition, whether a bank decides to use the account-by-account approach or the bank-wide approach, the bank's compliance with the relevant compensation restriction is based on a two-year rolling average of the compensation attributable to the trust or fiduciary account or the bank's trust or fiduciary business, respectively. This two-year averaging is designed to allow for short-term fluctuations that otherwise could lead a bank to fall out of compliance with the exception or exemption from year-to-year.

Some commenters asked that the Agencies clarify when a bank must commence monitoring its compliance with the two-year rolling compensation test. As discussed <u>infra</u> in Part VI.F, a bank must comply with the exceptions in Section 3(a)(4)(B) of the Exchange Act and the final rules starting the first day of the bank's first fiscal year commencing after September 30, 2008. Thus, a bank that operates on a calendar-year basis must start monitoring its compliance with the compensation requirements on either an account-by-account or bank-wide basis beginning January 1, 2009, and would first

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162 The Agencies note, for example, that a bank that operates under the bank-wide approach may use different systems across its trust or fiduciary business lines, units or regions to monitor its compensation within those business lines, units or regions, provided that such information is then aggregated on a bank-wide basis as provided in Rule 722.

163 Proposed Rule 721(a)(6).

have to meet the applicable compensation restriction after the conclusion of 2010 (based on the average of the bank's year-end compensation ratios for 2009 and 2010).[164] To allow banks sufficient time to obtain and verify the relevant compensation data, the Agencies have modified both the account-by-account approach and the bank-wide approach to provide banks up to 60 days after the end of a year to calculate their compliance with the relevant compensation restriction.[165] While the rules provide for a bank's compliance with the compensation tests to be determined based solely on calculations as of year-end, banks are encouraged to monitor their trust and fiduciary compensation on a regular basis as appropriate to identify and address potential compliance issues before the end of the relevant two-year period.

2. "Relationship Compensation"

Both the account-by-account and bank-wide approaches are based on the ratio of the relationship compensation attributable to a trust or fiduciary account or a bank's trust and fiduciary business to the total compensation attributable to the account or business. The proposal defined the term "relationship compensation" to mean the types of trust and fiduciary compensation identified in the statute: an administration fee; an annual fee (payable on a monthly, quarterly or other basis); a fee based on a percentage of assets

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164 This same schedule also would apply to a bank that operates on an October 1st to September 30th fiscal year, but that elects to use the calendar year for purposes of monitoring its compliance with the chiefly compensated test. The Agencies believe the delay and phased-in nature of the compensation tests should provide banks as a general matter sufficient notice and time to address potential compensation issues across the full range of their trust and fiduciary accounts, including personal and charitable accounts and estates. See Business Law Section Letter.

165 See Rule 721(a)(3)(ii) and Rule 722(c)(2).

under management; a flat or capped per order processing fee that is equal to not more than the cost incurred by the bank in connection with executing securities transactions for trust or fiduciary accounts; or any combination of these fees.[166] The proposed rules also provided examples of fees that would be considered an administration fee or a fee based on a percentage of assets under management for these purposes. For example, the proposed rules provided that 12b-1 fees,[167] service fees,[168] and fees for certain sub-transfer agent, sub-accounting or related services[169] paid by an investment company on the basis of assets under management would be considered relationship compensation under the rules.

The Agencies received numerous comments on the definition of relationship compensation. A number of commenters supported the definition including, in particular, the examples recognizing 12b-1 and service fees as relationship compensation. For example, some commenters stated that treating these fees as relationship compensation is

166 Proposed Rule 721(a)(4).

167 Proposed Rule 721(a)(4)(iii)(A).

168 Proposed Rule 721(a)(4)(iii)(B).

169 See Proposed Rule 721(a)(4)(i) and (iii)(C). Specifically, these fees, which are hereinafter referred to as "sub-transfer agent and related fees" are paid for (1) providing transfer agent or sub-transfer agent services for the beneficial owners of investment company shares; (2) aggregating and processing purchase and redemption orders for investment company shares; (3) providing the beneficial owners with account statements showing their purchases, sales, and positions in the investment company; (4) processing dividend payments to the account for the investment company; (5) providing sub-accounting services to the investment company for shares held beneficially in the account; (6) forwarding communications from the investment company to the beneficial owners, including proxies, shareholder reports, dividend and tax notices, and updated prospectuses; or (7) receiving, tabulating, and transmitting proxies executed by the beneficial owners of investment company shares in the account.

consistent with the terms and purposes of the trust and fiduciary exception and "critical" to ensuring that the rules do not disrupt the trust and fiduciary operations and customer relationships of banks.[170] Other commenters, however, argued that all 12b-1 fees, or the portion of such fees paid for distribution expenses, should be excluded from relationship compensation.[171] These commenters asserted that treating 12b-1 fees as relationship compensation would allow banks to have a "salesman's stake" in their customers' securities transactions in contravention of the purposes of the statute, result in the disparate treatment of banks and registered investment advisers, and create confusion as to how 12b-1 fees should be treated under other aspects of the federal securities laws and rules of the NASD (now FINRA).

In addition, many commenters asked that the Agencies clarify whether additional types of fees not mentioned in the proposed rules would qualify as relationship compensation. For example, commenters asked the Agencies to confirm that fees separately charged a trust or fiduciary customer for custodial services and fees charged or earned in connection with securities lending and borrowing transactions conducted for a trust or fiduciary customer are relationship compensation.

After carefully considering the comments, the Agencies have retained, consistent with the statute, the definition of relationship compensation as any compensation that a bank receives that is attributable to a trust or fiduciary account and that consists of (1) an administration fee, (2) an annual fee (payable on a monthly, quarterly or other basis), (3) a fee based on a percentage of assets under management (an "AUM fee"), (4) a flat or

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170 See Joint ABA/ABASA/Clearing House Ass'n Letter of June 7, 2007.

171 See NASD Letter, NASAA Letter.

capped per order processing fee, paid by or on behalf of a customer or beneficiary, that is equal to not more than the cost incurred by the bank in connection with executing securities transactions for trust or fiduciary accounts; or (5) any combination of these fees.[172]

The final rules also continue to list all 12b-1 fees that are paid on the basis of assets under management and attributable to a trust or fiduciary account (under the account-by-account test) or the bank's trust and fiduciary business as a whole (under the bank-wide test) as examples of AUM fees that are relationship compensation. The Agencies believe that treating 12b-1 fees in this manner is consistent with both the language and purposes of the trust and fiduciary exception. When paid on the basis of a percentage of assets under management these fees fall within the types of fees expressly permitted by the trust and fiduciary exception. 12b-1 fees that are paid on the basis of assets under management also are distinguishable from the types of non-relationship compensation, such as front-end or back-end sales loads[173] or per-order transaction fees that exceed a bank's costs, that are limited by the statute's chiefly compensated test.

Treating 12b-1 fees in this manner also will avoid significant disruptions to the trust and fiduciary operations of banks and, when viewed in light of other provisions and

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172 Rule 721(a)(4). For banks operating under the bank-wide alternative, fees of these types are relationship compensation if they are attributable to the bank's trust or fiduciary business as a whole. See Rule 722(c)(1).

173 A front-end sales charge is a charge that is used to finance sales or sales promotion expenses and that is included in the public offering price of the shares of an investment company. A deferred sales charge is an amount properly chargeable to sales or promotional expenses that is paid by a shareholder of an investment company after purchase of the company's shares but before or upon redemption. See FINRA Rule 2830(b)(8)(B) and (c); 17 CFR 270.6c-10.

protections, is consistent with investor protection. Many bank trust and fiduciary departments, particularly those that act as a corporate trustee or as a trustee or fiduciary for employee benefit plans, receive a significant portion of their trust and fiduciary compensation through payments made under a 12b-1 plan.

Importantly, as provided in the trust and fiduciary exception, all 12b-1 fees received by a bank must be consistent with the fiduciary principles and standards governing the bank-customer relationship,[174] and the bank's compliance with these principles and standards will continue to be regularly examined by bank examiners during the bank supervisory and examination process. In addition, the treatment of 12b-1 fees that are paid on the basis of assets under management and service fees as "relationship compensation" for purposes of the trust and fiduciary exception and related rules does not affect the treatment of such fees under other provisions of the federal securities laws, the federal banking laws, applicable trust or fiduciary principles and standards, or the rules of an SRO. Thus, for example, the treatment of 12b-1 fees that are paid on the basis of assets under management and service fees as relationship

[174] Section 802(f) of the Uniform Trust Code, for example, provides that a trustee may receive compensation from an investment company in which the trustee has invested trust funds and receipt of such compensation will not be presumed to represent a conflict of interest if the investment otherwise complies with the jurisdiction's prudent investor rule. See Uniform Trust Code, § 902(f) and related comment (2005). In addition, a bank's receipt of 12b-1 fees from an employee benefit plan for which the bank acts as a fiduciary is governed by the Employee Retirement Income Security Act ("ERISA") and the regulations and guidance issued by the Department of Labor thereunder. See 29 U.S.C. 1001 et seq.; DOL Advisory Opinion 2003-09A (June 25, 2003) (discussing conditions under which a directed trustee may receive 12b-1 fees under ERISA).

compensation for purposes of these rules does not alter or affect the treatment of, or limitations imposed on, these fees under FINRA Rule 2830.[175]

In light of the comments received, the Agencies have modified Rule 721 to provide additional examples of the types of fees that qualify as relationship compensation under the statute and the rules. For example, the Agencies have modified the rule to include, as additional examples of an administration fee, compensation received by a bank (1) for disbursing funds from, or for recording payments to, a trust or fiduciary account; (2) in connection with securities lending and borrowing transactions conducted for a trust or fiduciary account; and (3) for custody services provided to a trust or fiduciary account (whether or not separately charged).[176] In addition, the Agencies have included (1) as an example of an annual fee, an annual fee paid for assessing the investment performance of a trust or fiduciary account or for reviewing such an account's compliance with applicable investment guidelines or restrictions, and (2) as an example of an assets under management fee, a fee based on the financial performance, such as capital gains or capital appreciation, of trust or fiduciary assets under management. The Agencies believe the characterization of these fees comports with the manner in which

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175 The rules also do not alter or affect the ability of a nonbank registered investment adviser to receive 12b-1 fees under the federal securities laws or the rules of an SRO. The "broker" exceptions for banks in Section 3(a)(4)(B) of the Exchange Act, including the trust and fiduciary exception, are not available to nonbank entities such as nonbank investment advisers.

176 Rule 721(a)(4)(i)(B), (C) and (D). Because securities lending/borrowing fees and custody fees may be charged on an assets under management basis, the rule also provides that these fees are relationship compensation when charged in this manner. Rule 721(a)(4)(iii)(E). As with other types of relationship compensation, the fees that a bank receives for effecting securities lending/borrowing transactions for a trust or fiduciary account must be consistent with applicable fiduciary principles and standards.

banks generally receive compensation for these services. Several commenters noted that banks currently may receive 12b-1 fees, service fees or sub-transfer agent and related fees either directly from a mutual fund or from the fund's distributor, transfer agent, administrator or adviser.[177] In light of these comments, the Agencies have eliminated the language in the proposed rules that required that these types of fees be "paid by an investment company."

The examples of an administration fee, annual fee and an asset under management fee included in Rule 721(b) are provided only for illustrative purposes. Other types of fees or fees for other types of services could be an administration fee, annual fee or an AUM fee. In addition, an administration fee, annual fee or assets under management fee attributable to a trust or fiduciary account or a bank's trust or fiduciary business is considered relationship compensation regardless of what entity or person pays the fee, and regardless of whether the fee is related to only securities assets, to a combination of securities and non-securities assets, or to only non-securities assets. These fees are part of the compensation for acting as a trustee or fiduciary.

Some commenters asserted that a bank should be permitted to include within its relationship compensation any per-transaction securities processing fee it charges as a directed trustee or in another fiduciary capacity even if the fee exceeds the bank's costs in processing the transaction.[178] The statute, however, expressly provides that a per-order securities processing fee may be counted towards the statute's chiefly compensated

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177 See Investment Company Institute ("ICI") Letter, Federated Investors, Inc. ("Federated Investors") Letter.

178 See, e.g., Wells Fargo & Company ("Wells Fargo") Letter, State Street Corp. Letter, Mellon Letter.

requirement only if the fee is "equal to not more than the cost incurred by the bank in connection with executing securities transactions" for its trust or fiduciary customers. For this reason, the Agencies have not modified the rule in the manner requested.

However, as discussed further in Part V, the Agencies have modified the custody exemption (Rule 760) to permit banks that accept securities orders as a directed trustee to do so under that exemption in lieu of the trust and fiduciary exception and related rules. In addition, as the Agencies explained in the proposal, a per order processing fee included in relationship compensation may include the fee charged by the executing broker-dealer as well as any additional fixed or variable costs incurred by the bank in processing the transaction. If a bank includes any such additional fixed or variable costs in the per order processing fees it includes in its relationship compensation, the bank should maintain appropriate policies and procedures governing the allocation of these costs to the orders processed for trust or fiduciary customers. This should help ensure that profits derived from per trade charges are not masked as costs of processing the trades and thereby included in relationship compensation.

3. Excluded Compensation

A number of commenters asserted that the revenues derived from securities transactions conducted by a bank for a trust or fiduciary customer under a different exception or exemption (such as the exemption provided in Rule 771 for transactions in Regulation S securities) should be excluded from the account-by-account or bank-wide compensation test completely.[179] Others asked that certain other types of fees, such as internal credits from other areas of the bank, credits received from broker-dealers for

[179] See, e.g., Institute of Int'l Bankers ("IIB") Letter, Clearing House Ass'n Letter.

brokerage or research services in accordance with Section 28(e) of the Exchange Act, or revenues earned from providing trust or fiduciary services to mutual funds, be excluded from the chiefly compensated calculation as well.

As discussed in Part I.C supra, if more than one "broker" exception or exemption is available for a securities transaction effected by a bank for a customer, the bank may choose the exception or exemption on which it relies in effecting the transaction. In light of the comments received, the Agencies have modified Rules 721 and 722 to explicitly provide that, if a bank effects a securities transaction for a trust or fiduciary customer in accordance with the terms of an exception or exemption other than Rule 721 or Rule 722, the bank may, at its election, exclude the revenues associated with those transactions from the applicable relationship-total compensation calculation in Rule 721 or Rule 722.[180] As the rules provide, if a bank elects to exclude the revenues associated with transactions conducted under another exception or exemption, the bank must exclude such revenue from both the bank's relationship compensation (if the compensation would otherwise qualify as relationship compensation) and total compensation. Of course, the bank also must comply with the conditions applicable to the other available exception or exemption on which the bank chooses to rely.[181]

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180 Rule 721(b) and Rule 722(d).

181 Some commenters asserted that a bank should be allowed to include in its relationship compensation all of the revenue from securities transactions conducted for a trust or fiduciary account under another exception or exemption, regardless of whether that revenue otherwise qualifies as relationship compensation. The Agencies have not amended the rule in this manner as it is inconsistent with the terms of the trust and fiduciary exception which sets forth the types of fees that are included in relationship compensation.

In addition, compensation that is not derived from the provision of trust or fiduciary services should not be included in a bank's relationship or total compensation under either the account-by-account or bank-wide alternative. Such compensation includes, for example, (1) revenue earned by a trust or fiduciary department from providing back-office services to an affiliated or unaffiliated party,[182] (2) revenue from the sale of an office or assets of the trust department, or from the provision on a stand-alone basis of other services (such as custody services or the sale of portfolio management software to a third party that independently operates and uses the software in connection with its own business) that do not involve trust or fiduciary services as defined in section 3(a)(4)(D) of the Act; and (3) internal payments or credits allocated to a bank's trust or fiduciary department or unit from another department or unit of the bank for deposits and other similar services not involving a security. Credits received by a bank from a broker-dealer for brokerage and research services provided by a broker-dealer in accordance with section 28(e) of the Act (15 U.S.C. 78bb(e)) and the regulations issued thereunder also should be excluded from the compensation tests. The Agencies do not believe these credits constitute compensation to the bank for purposes of the exception and rules because these credits must be reasonable in relation to the value of the brokerage and research provided by the broker-dealer in connection with the bank's exercise of investment discretion for its fiduciary accounts.

4. Trust or Fiduciary Accounts

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182 On the other hand, the revenue derived from providing fiduciary services to investment companies or companies affiliated with the bank should be included in the relevant chiefly compensated calculation.

The final rules, like the proposal, define a trust or fiduciary account as an account for which the bank acts in a trustee or "fiduciary capacity" as that term is defined in Section 3(a)(4)(D) of the Exchange Act.[183] This definition is based on the definition of "fiduciary capacity" in part 9 of the OCC's regulations, which relates to the trust and fiduciary activities of national banks, in effect at the time of enactment of the GLB Act.

Section 3(a)(4)(D) identifies a number of particular situations where a bank serves in a fiduciary capacity.[184] The definition also provides that a bank acts in a "fiduciary capacity" if it acts "in any other similar capacity" to those specifically identified. Accordingly, the scope of the term "fiduciary capacity" is not fixed in time.

The Agencies recognize, moreover, that different nomenclature may be used to identify a fiduciary capacity in the relevant governing documents or state laws. For example, the Uniform Probate Code uses the term "Personal representative" and similar successor titles in place of the terms "executor" or "administrator" to identify the representative of a decedent; the Uniform Custodial Trust Act uses the terms "Conservator" and "Custodial trustee" to refer to persons that act as a fiduciary for another person who has become incapacitated; and the Uniform Transfers to Minors Act uses both the terms "Conservator" and "Custodian" to refer to fiduciaries that act on behalf of a minor.[185]

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183 Rule 721(a)(5).

184 Section 3(a)(4)(D) of the Exchange Act provides that a bank acts in a "fiduciary capacity" if, among other situations, the bank has investment discretion on behalf of another. Thus, for example, if a bank has investment discretion over an escrow account on behalf of another, the bank would be acting in a "fiduciary capacity" with respect to the account.

185 The text of and additional information on these Uniform Codes and Acts, which are developed under the auspices of the National Conference of Commissioners of

Some commenters asked whether a bank that engages in trust or fiduciary activities may conduct securities transactions under the trust and fiduciary exception and related rules even if the bank does not maintain a separate trust department or has not had to obtain formal trust powers from its appropriate federal banking agency.[186] The trust and fiduciary exception and related rules do not require that a bank effecting securities transactions for a customer in a trust or fiduciary capacity do so through a separate trust department or have obtained formal trust powers from its appropriate federal banking agency. However, securities transactions conducted for a trust or fiduciary customer under the exception and related rules must be effected in a department of the bank "that is regularly examined for compliance with fiduciary principles and standards" by the bank's appropriate federal or state banking supervisor.[187] As stated in the proposal, the Agencies

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Uniform State Laws ("NCCUSL"), may be found on NCCUSL's website at http://www.nccusl.org.

186 See, e.g., ACB Letter, Roundtable Letter. Federal savings associations, for example, are not required to obtain approval from their appropriate federal banking agency to act as a trustee for an individual retirement account under section 408(a) of the Internal Revenue Code. See 12 CFR 550.580.

187 15 U.S.C. 78c(a)(4)(B)(ii); Rule 722(a)(1). A bank effecting transactions for trust or fiduciary customers through a department examined for compliance with trust or fiduciary principles may use other divisions or departments of the bank, or other affiliated or unaffiliated third parties, to handle aspects of these transactions. The bank must continue to act in a trustee or fiduciary capacity with respect to the account and, accordingly, should exercise appropriate diligence in selecting persons to provide services to the bank's trust or fiduciary customers and in overseeing the services provided in accordance with the bank's fiduciary obligations. No party, other than the bank (including, without limitation, a transfer agent or investment adviser), working in conjunction with the bank may rely on the bank's exception or exemption from "broker" status. To the extent that any such third party performs activities that would make that entity a broker under Section 3(a)(4) of the Exchange Act that entity would be required to register as a broker (in the absence of an applicable exemption or regulatory relief) notwithstanding any written or unwritten agreement the third party may have with the bank.

will rely on the appropriate federal banking agency for a bank to determine whether the bank's activities are conducted in the bank's trust department or other department regularly examined by the agency's examiners for compliance with fiduciary principles and standards.[188]

5. Exemptions for Special Accounts, Foreign Branches, Transferred Accounts, and a De Minimis Number of Accounts

The Agencies also proposed a rule (Proposed Rule 723) that would permit a bank to exclude certain types of accounts for purposes of determining its compliance with the account-by-account or bank-wide compensation tests. As proposed, Rule 723 allowed a bank, in calculating its compensation under either approach, to exclude compensation received from any trust or fiduciary account open only for a short period of time (less than 3 months) or acquired within the past 12 months as part of a merger or similar transaction. In addition, the Proposed Rule allowed a bank using the account-by-account approach, subject to certain conditions, to (1) exclude the lesser of 1 percent or 500 of its trust or fiduciary accounts in a year from the chiefly compensated test, and (2) transfer any trust or fiduciary account ultimately determined to be non-conforming to a registered broker-dealer or an unaffiliated entity exempt from registration within 3 months of the end of the relevant year.

Commenters generally favored these exemptions. One commenter, however, argued that these exemptions should be eliminated because they would allow banks to

188 The OTS, for example, is in the process of revising its examination procedures to provide for the regular examination of individual retirement accounts held by a federal savings association as trustee for compliance with fiduciary principles and standards.

manipulate the chiefly compensated test.[189] Several commenters also requested that the Agencies adopt an additional exemption permitting banks to exclude trust and fiduciary accounts held at a foreign branch of a bank from the chiefly compensated tests.[190] These commenters contended that few, if any, of the trust and fiduciary accounts of a foreign branch (other than an offshore "shell" branch servicing U.S. branches of the bank) likely are to be held by or on behalf of a U.S. person and, accordingly, the costs of applying the chiefly compensated test to the foreign branches of a U.S. bank would significantly outweigh any potential benefits to U.S. persons. After carefully considering these comments, the Agencies have adopted, without change, the exemptions included in Proposed Rule 723. In addition, the Agencies have adopted a new conditional exemption (Rule 723(c)) for trust and fiduciary accounts held at a foreign branch of a bank.

Rule 723(a) permits a bank that uses either the account-by-account or bank-wide compensation test to exclude any trust or fiduciary account that was open for a period of less than 3 months during the relevant year.[191] Rule 723(b) permits a bank to exclude, for purposes of determining its compliance with either compensation test, any trust or fiduciary account that the bank acquired from another person as part of a merger, consolidation, acquisition, purchase of assets or similar transaction by the bank for 12 months after the date the bank acquired the account from the other person.[192] A bank that elects to use Rule 723(a) or (b) for one or more accounts must exclude both the

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189 NASAA Letter.

190 See ABA Letter, Clearing House Ass'n Letter, Joint ABA/ABASA/Clearing House Ass'n Letter of July 16, 2007.

191 Rule 723(a).

192 Rule 723(b).

relationship compensation and total compensation attributable to such accounts for purposes of the applicable compensation test.

Rule 723(c) provides a new exemption under which a bank using the bank-wide approach may exclude for purposes of the chiefly compensated test the trust or fiduciary accounts held at a "non-shell" foreign branch of the bank, provided that the bank has reasonable cause to believe that the trust or fiduciary accounts of the foreign branch held by or for the benefit of a U.S. person constitute less than 10 percent of the total trust or fiduciary accounts of the foreign branch.[193] The rule provides that a bank will be deemed to have reasonable cause to believe that less than 10 percent of the total number of trust or fiduciary accounts of the foreign branch are held by or for the benefit of a U.S. person if the principal mailing address for the accountholder(s) and beneficiary(ies) of the account is not in the United States, or the records of the foreign branch indicate that the accountholder(s) and beneficiary(ies) of the account is not a U.S. person as defined in 17 CFR 230.902(k).

The rule defines a "non-shell foreign branch" of a bank to mean a branch of the bank that is located outside the United States and provides banking services to residents of the foreign jurisdiction in which the branch is located, and for which the decisions relating to day-to-day operations and business of the branch are not made by an office of the bank located in the United States.[194] The Agencies believe this exemption provides

193 The Agencies expect that few, if any banks, that use the account-by-account approach to the chiefly compensated test will have foreign branches engaged in trust or fiduciary services and, accordingly, have limited the exemption to banks that use the bank-wide approach.

194 This definition is designed to exclude branches that are established in certain offshore jurisdictions primarily to provide services to U.S. customers and, for this reason, are managed on a day-to-day basis from the United States.

appropriate relief to banks with respect to foreign branches where the records of the bank indicate that it is not significantly engaged in providing trust or fiduciary services to U.S. customers.

Rule 723(e) permits a bank using the account-by-account approach to exclude, for purposes of the chiefly compensated test, the lesser of (1) 1 percent of the total number of trust or fiduciary accounts held by the bank; or (2) 500 accounts.[195] To rely on this exemption with respect to an account, the bank must not have relied on this exemption for such account during the immediately preceding year.[196] In addition, the bank must maintain records demonstrating that the securities transactions conducted by or on behalf of the excluded account were undertaken by the bank in the exercise of its trust or fiduciary responsibilities with respect to the account.[197]

The Agencies believe these exclusions reduce administrative burdens and facilitate compliance. A bank, consistent with its fiduciary duties, may need to conduct a higher level of securities transactions for a trust or fiduciary account at certain times, such as shortly after the account is established or acquired from another person or shortly before the account is closed.[198] The exclusions in Rule 723(a), (b) and (d) are designed to

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195 Rule 723(d). Under the rule, if a bank has less than 100 trust or fiduciary accounts in the aggregate, the bank may exclude 1 account under the exemption in any given year.

196 Rule 723(d)(3).

197 Rule 723(d)(1).

198 For example, after a trust or fiduciary account is acquired or established, the bank may need to conduct a number of securities transactions to invest or rebalance the account's holdings in accordance with the terms of the agreement establishing the account or, in cases where the bank has investment discretion, to implement the bank's investment strategy for the account.

help prevent such short-term fluctuations in the amount of securities transactions conducted for a trust or fiduciary account from distorting, or causing a bank to fail, the relevant compensation test. At the same time, these exclusions promote compliance by requiring that the bank bring the relevant accounts into compliance within a short and prescribed period of time. For this reason, the Agencies do not believe it would be appropriate to expand the Rule 723(d) to allow a bank to exclude an account from the chiefly compensated test in consecutive years as requested by some commenters. Some commenters also asked the Agencies to raise the 500 account maximum in Rule 723(d) to avoid discriminating against large banks.[199] The Agencies expect that most banks that have more than 50,000 trust and fiduciary accounts, and thus would be subject to the 500 account cap in Rule 723(d), will operate under the bank-wide test and for this reason have not made the requested change.

Rule 723(c) also provides that a bank that uses the account-by-account approach will not be considered a broker for purposes of Section 3(a)(4) of the Exchange Act solely because a particular trust or fiduciary account does not meet the "chiefly compensated" test if, within 3 months of the end of the year in which the account fails to meet such standard, the bank transfers the account or the securities held by or on behalf of the account to a registered broker-dealer or another unaffiliated entity (such as an unaffiliated bank) that is not required to be registered as a broker-dealer.[200]

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[199] See, e.g., ACB Letter; Clearing House Ass'n Letter.

[200] Rule 723(c).

6. Advertising Restrictions

Proposed Rule 721(b) implemented the advertising restrictions in Section 3(a)(4)(B)(ii)(II) of the Act applicable to banks conducting securities transactions under the trust and fiduciary exception. No commenters opposed the advertising restrictions of the rule and the Agencies have adopted these restrictions as proposed. The final rules provide that a bank complies with the advertising restriction applicable under either Rule 721 or 722 if advertisements by or on behalf of the bank do not advertise that the bank provides securities brokerage services for trust or fiduciary accounts except as part of advertising the bank's broader trust or fiduciary services, and do not advertise the securities brokerage services provided by the bank to trust or fiduciary accounts more prominently than the other aspects of the trust or fiduciary services provided to such accounts.[201]

An "advertisement" for these purposes means any material that is published or used in any electronic or other public media, including any Web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, blast e-mail, or telephone directories (other than routine listings).[202] Other types of material or information that is not distributed through public media, such as mailings or e-mails to a bank's own customers, are not considered an advertisement. In addition, in considering whether an advertisement advertises the securities brokerage services provided to trust or fiduciary customers more prominently than the bank's other trust or fiduciary services, the nature, context and

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201 Rule 721(b).

202 Rule 721(b)(2) (referencing Rule 760(g)(2)).

prominence of the information presented—and not simply the length of text or information devoted to a particular subject—should be considered.

IV. Sweep Accounts and Transactions in Money Market Funds

Exchange Act Section 3(a)(4)(B)(v) ("sweep exception") excepts a bank from the definition of "broker" to the extent it "effects transactions as part of a program for the investment or re-investment of deposit funds into any no-load, open-end management investment company registered under the Investment Company Act that holds itself out as a money market fund."[203] To provide banks with guidance on the sweep exception, Proposed Rule 740 defined several terms used in the exception, including the terms "money market fund" and "no-load."[204] The Agencies also requested comment on a separate exemption (Proposed Rule 741) that would permit banks, without registering as a broker, to effect transactions in securities issued by a money market fund on behalf of a customer in a broader set of circumstances, subject to certain conditions.[205]

Most commenters that addressed Proposed Rules 740 and 741 supported the rules and Rule 741 in particular.[206] One commenter objected to the exemption in Rule 741 on the basis that it would permit banks to effect transactions in money market funds that did not meet the "no-load" requirements of the sweep exception.[207] Another commenter

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203 See Exchange Act Section 3(a)(4)(B)(v) (15 U.S.C. 78c(a)(4)(B)(v)).

204 Proposed Rule 740(b) and (c).

205 Proposed Rule 741.

206 See, e.g., Federated Investors Letter, ICBA Letter, Clearing House Ass'n Letter, ABA Letter.

207 See, e.g., NASAA Letter.

asked that the Agencies clarify whether a bank may effect transactions under the rules for deposits held by another bank.

A. Rule 740: Definition of Terms Used in Sweep Exception

As under the proposal, the final rule defines a "money market fund" for purposes of the sweep exception to mean an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) that is regulated as a money market fund pursuant to 17 CFR 270.2a-7.[208] In addition, consistent with FINRA rules, the final rule provides that a class or series of securities of an investment company will be considered "no-load" if (1) the class or series is not subject to a sales charge or a deferred sales charge; and (2) total charges against net assets of the class or series of securities for sales or sales promotion expenses, personal service, or the maintenance of shareholder accounts do not exceed 0.0025 of average net assets annually.[209] A bank may effect

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208 Rule 740(b). One commenter requested that Rule 740(b) be modified to allow banks to sweep deposits into an unregistered investment company that operates pursuant to Rule 12d1-1 under the Investment Company Act (17 CFR 270.12d1-1). See State Street Corp. Letter. The statutory sweep exception, however, provides only for deposit funds to be swept into an investment company "registered under the Investment Company Act of 1940." Exchange Act Section 3(a)(4)(B)(v).

209 See Rule 740(c); FINRA Rule 2830. Consistent with FINRA Rule 2830, charges for the following are not be considered charges against net assets of a class or series of an investment company's securities for sales or sales promotion expenses, personal service, or the maintenance of shareholder accounts: (1) Providing transfer agent or sub-transfer agent services for beneficial owners of investment company shares; (2) Aggregating and processing purchase and redemption orders for investment company shares; (3) Providing beneficial owners with account statements showing their purchases, sales, and positions in the investment company; (4) Processing dividend payments for the investment company; (5) Providing sub-accounting services to the investment company for shares held beneficially; (6) Forwarding communications from the investment company to the beneficial owners, including proxies, shareholder reports, dividend and tax notices, and updated prospectuses; or (7) Receiving, tabulating,

transactions under the sweep exception and Rule 740 as part of a program to sweep deposit funds of, or collected by, another bank into a no-load money market fund in accordance with the exception and the Rule.

B. Exemption Regarding Money Market Fund Transactions

After carefully considering the comments, the Agencies have adopted Rule 741, which permits banks, without registering as a broker, to effect transactions on behalf of a customer in securities issued by a money market fund under certain conditions.[210] To qualify for this exemption, the bank must provide the customer, directly or indirectly, some other product or service, the provision of which would not, in and of itself, require the bank to register as a broker-dealer under Section 15(a) of the Exchange Act.[211] Examples of other products or services that may be a qualifying "other" product or service include an escrow, trust, fiduciary or custody account, a deposit account or a loan or other extension of credit. The Agencies have modified the rule to also permit a bank to effect transactions under the exemption on behalf of another bank as part of a program for the investment or reinvestment of the deposit funds of, or collected by, the other bank.[212] This change is designed to allow banks to provide sweep services to other banks under the exemption, as they may do under the sweep exception itself.

The final exemption continues to allow banks to effect transactions only in securities of a registered money market fund. In addition, the rule continues to provide

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and transmitting proxies executed by beneficial owners of investment company shares.

210 Rule 741.

211 Rule 741(a)(1)(A).

212 Rule 741(a)(1)(B).

that, if the class or series of money market fund securities is not no-load (as defined in Rule 740), the bank may not characterize or refer to the class or series of securities as no-load and the bank must provide the customer, not later than at the time the customer authorizes the bank to effect the transactions, a prospectus for the securities.[213] The Agencies believe these conditions and limitations provide bank customers adequate protections in light of the limited nature of the transactions permitted under the exemption.[214] In addition, the exemption recognizes that banks have long offered sweeps and other services that invest customer funds in money market funds that do not qualify as "no-load" funds under Commission and FINRA rules.

V. Safekeeping and Custody

A. Background

Section 3(a)(4)(B)(viii) of the Exchange Act provides banks with an exception from the "broker" definition for certain bank custody and safekeeping activities ("custody

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213 Rule 741(a)(2)(ii). If a bank relies on the exemption to sweep the deposits of another bank into a money market fund that is not "no-load," then neither the deposit-holding bank nor the sweeping bank may characterize the fund as a "no-load" fund, and either the deposit-taking bank or the sweeping bank must provide the customer with a prospectus for the fund within the time prescribed by the rule. See Rule 741(a)(2)(ii)(A) and (B).

214 Some commenters requested that the prospectus-delivery requirement be eliminated or modified so that delivery is required before a transaction is effected rather than before the customer authorizes the transaction. See, e.g., ABA Letter, Clearing House Ass'n Letter, and HSBC Bank Letter. The final rule retains this requirement to ensure that a customer receives notice that its funds are to be invested in a fund that is not "no-load" before the customer authorizes the transaction(s). If a customer's funds are invested in a no-load fund and the bank is authorized, under the terms of its agreement with the customer to alter the specific fund into which the customer's balances are invested, the bank should provide the customer a prospectus for any money market fund that is not a "no-load" fund prior to the date on which the bank first invests the customer's balances in the fund.

and safekeeping exception"). In particular, this exception allows a bank to perform the following activities as part of its customary banking activities without registering as a "broker":

- Providing safekeeping or custody services with respect to securities, including the exercise of warrants and other rights on behalf of customers;
- Facilitating the transfer of funds or securities, as a custodian or a clearing agency, in connection with the clearance and settlement of its customers' transactions in securities;
- Effecting securities lending or borrowing transactions with or on behalf of customers as part of the above described custodial services or investing cash collateral pledged in connection with such transactions;
- Holding securities pledged by a customer to another person or securities subject to purchase or resale agreements involving a customer, or facilitating the pledging or transfer of such securities by book entry or as otherwise provided under applicable law, if the bank maintains records separately identifying the securities and the customer; and
- Serving as a custodian or provider of other related administrative services to any individual retirement account, pension, retirement, profit sharing, bonus, thrift savings, incentive, or other similar benefit plan.[215]

The proposed rules included an exemption to allow banks, subject to certain conditions, to accept orders for securities transactions from employee benefit plan accounts and individual retirement and similar accounts for which the bank acts as

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215 15 U.S.C. 78c(a)(4)(B)(viii).

custodian.[216] In addition, the proposed exemption allowed banks, subject to certain conditions, to accept orders for securities transactions on an accommodation basis from other types of custody accounts.[217]

Some commenters contended that an exemption for custodial order-taking activity is unnecessary because, they argued, order-taking activity is permitted directly under the statutory exception.[218] Other commenters stated that the exemption was important because it would allow banks to continue to provide order-taking services to employee benefit plans and individual retirement accounts and similar accounts, or that the restrictions in the exemption were reasonable.[219] Another commenter, however, objected to the proposed exemption arguing that permitting custodial banks to take orders for securities is inconsistent with functional regulation.[220]

B. Rule 760: Custody Exemption

After carefully considering the comments, the Agencies have adopted Rule 760. The Agencies have crafted the exemption to allow banks to continue to accept securities orders in a custodial capacity and to permit bank customers to take advantage of those order-taking services subject to important conditions designed to limit the scope of the activity and provide appropriate investor protections. In this way, the Agencies believe the exemption is consistent with functional regulation and the purposes of the GLBA.

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216 Proposed Rule 760(a).

217 Proposed Rule 760(b).

218 See, e.g., Union Bank Letter, Harris Bank Letter, Clearing House Ass'n Letter, ABA Letter.

219 See, e.g., The Charles Schwab Corp. ("Schwab") Letter, ICBA Letter.

220 See NASAA Letter.

Rule 760 and the other final rules do not implement the statutory custody and safekeeping exception.[221] A bank does not need to rely on the custody exemption in Rule 760 to the extent the bank conducts other custodial activities permitted by Section 3(a)(4)(B)(viii)(I)(aa)-(ee) (e.g., exercising warrants or other rights with respect to securities or effecting securities lending or borrowing transactions on behalf of custodial customers) or another of the final rules (e.g., Rule 772, which permits banks to effect securities lending or borrowing transactions on behalf of certain non-custodial customers).[222] In addition, a bank would not have to rely on Rule 760 to the extent the bank holds securities in custody for a customer and provides clearance and settlement services to the account in connection with such securities, but the bank does not accept orders for securities transactions for the account or engage in other activities with respect to the account that would require the bank to be registered as a broker.

The following discusses the scope and terms of the custody exemption.

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221 The Agencies asked for comment on whether the Agencies should adopt rules to implement the statutory custody and safekeeping exception. No commenters requested that the Agencies do so at this time.

222 One commenter asserted that a bank would not "accept" a securities order if it received the order from a custodial customer and at the customer's request transmitted the order to a broker-dealer selected by the customer. See Union Bank Letter. Such activities, however, constitute "accepting" a securities order for purposes of Rule 760 and a bank engaged in such activities for a custodial customer must comply with Rule 760 unless some other exception or exemption is available for the transaction (e.g., Section 3(a)(4)(B)(x) of the Act if the transaction involves municipal securities).

1. Order-Taking for Employee Benefit Plan Accounts and Individual Retirement or Similar Accounts

We are adopting, largely as proposed, the sections of Rule 760 providing that a bank will not be considered a broker to the extent that, as part of its customary banking activities, the bank accepts orders to effect transactions in securities in an "employee benefit plan account" or an "individual retirement account or similar account" for which the bank acts as a custodian.[223] The rule defines an "employee benefit plan account" as a pension plan, retirement plan, profit sharing plan, bonus plan, thrift savings plan, incentive plan, or other similar plan, and provides a number of non-exclusive examples of plans that meet this definition.[224] The rule defines an "individual retirement account or similar account" to mean an individual retirement account as defined in Section 408 of the Internal Revenue Code (26 U.S.C. 408), a Roth IRA as defined in Section 408A of the Internal Revenue Code (26 U.S.C. 408A), a health savings account as defined in Section 223(d) of the Internal Revenue Code (26 U.S.C. 223(d)), an Archer medical savings account as defined in Section 220(d) of the Internal Revenue Code (26 U.S.C.

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223 See Rule 760(a).

224 Rule 760(h)(4). The rule provides that the term "employee benefit plan account" includes, without limitation, an employer-sponsored plan qualified under Section 401(a) of the Internal Revenue Code (26 U.S.C. 401(a)), a governmental or other plan described in Section 457 of the Internal Revenue Code (26 U.S.C. 457), a tax-deferred plan described in Section 403(b) of the Internal Revenue Code (26 U.S.C. 403(b)), a church plan, governmental, multiemployer or other plan described in Section 414(d), (e) or (f) of the Internal Revenue Code (26 U.S.C. 414(d), (e) or (f)), an incentive stock option plan described in Section 422 of the Internal Revenue Code (26 U.S.C. 422); a Voluntary Employee Beneficiary Association Plan described in Section 501(c)(9) of the Internal Revenue Code (26 U.S.C. 501(c)(9)), a non-qualified deferred compensation plan (including a rabbi or secular trust), a supplemental or mirror plan, and a supplemental unemployment benefit plan.

220(d)), a Coverdell education savings account as defined in Section 530 of the Internal Revenue Code (26 U.S.C. 530), or other similar account.[225]

A number of commenters supported these definitions of "employee benefit plan account" and "individual retirement account or similar account."[226] The Agencies note that both definitions, by their terms, encompass "other similar" plans or accounts. So, for example, similar plans or accounts, such as "lifetime savings accounts," that are established under the Internal Revenue Code in the future would be employee benefit plan accounts or individual retirement accounts or similar accounts for purposes of the rule. In addition, the term "employee benefit plan account" includes a non-U.S. plan that meets the definition of an employee benefit plan account.

Under the final rules, a bank relying on the employee benefit plan and individual retirement and similar account provisions must comply with the advertising and sales literature limitations in paragraphs (a)(2) and (3), the employee compensation limitations in paragraph (c), and the other conditions in the paragraph (d) of the rule. These conditions are discussed below.

Some commenters asked that the Agencies permit a bank to accept securities orders for other types of accounts that may involve custody of securities, such as accounts for which the bank acts as escrow agent, issuing and paying agent, tender agent, or disbursement agent, subject to the conditions applicable to employee benefit plan accounts and individual retirement and similar accounts, rather than the expanded set of conditions applicable to accommodation orders accepted for other types of custody

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225 Rule 760(h)(5).

226 See, e.g., ABA Letter, Clearing House Ass'n Letter, WBA Letter.

accounts. The provisions in Rule 760(a) for employee benefit plan accounts and individual retirement and similar accounts are designed to reflect the extent and manner in which banks provide order-taking services for these types of accounts. In addition, these provisions take account of the special mention of these accounts in the custody and safekeeping exception[227] and the additional protections to which these accounts typically are subject under the ERISA, the Internal Revenue Code, and other applicable law. For these reasons, the Agencies have not expanded Rule 760(a) to cover accounts other than employee benefit plan accounts and individual retirement and other similar accounts. Banks may continue to accept orders from other types of accounts for which the bank acts as a custodian under the accommodation provisions of the rule.

a. Employee Compensation Restrictions

We are adopting the employee compensation restrictions in Rule 760(c) as proposed. These restrictions apply when a bank, acting in a custodial capacity, accepts a securities order for an employee benefit plan account or an individual retirement account or similar account under paragraph (a) of the rule, and when a bank accepts a securities order for another type of custodial account under paragraph (b) of the rule. Under these restrictions, if a bank accepts securities orders pursuant to Rule 760, then no employee of the bank may receive compensation (including a fee paid pursuant to a 12b–1 plan) from the bank, the executing broker-dealer, or any other person that is based on: (1) whether a securities transaction is executed for the account; or (2) the quantity, price, or identity of the securities purchased or sold by the account. These restrictions are designed to be consistent with banking practices and reduce the financial incentives a bank employee

227 See Section 3(a)(4)(B)(viii)(I)(ee) of the Exchange Act.

might have to encourage a customer to submit securities orders to the bank and use a custody account as the functional equivalent of a securities brokerage account.

Only a few commenters addressed the employee compensation restrictions of the rule. For example, one commenter asserted that the rule should permit a bank to compensate its employees based on the potential revenues associated with a custodial account, including revenues received from processing securities transactions or from a mutual fund in which the account is invested.[228] In addition, a commenter expressed concern that the restrictions would prohibit employees from receiving bonuses based on the total revenues derived from the custodial accounts for which the employee is responsible.

As the Agencies noted in the proposal, the employee compensation restrictions in Rule 760(c) do not prohibit a bank employee from receiving compensation that is based on whether a customer establishes a custodial account with the bank, or that is based on the total amount of assets in a custodial account at account opening or at any other time. Moreover the rule expressly provides that the employee compensation restrictions do not prevent a bank employee from receiving payments under a bonus or similar plan that are permissible under the exception in Rule 700(b)(1) as if a referral had been made by the bank employee, or from receiving any compensation described in Rule 700(b)(2) of the networking rules.[229]

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228 See, e.g., Wells Fargo Letter.

229 Because the employee compensation restrictions relate to securities transactions conducted in the relevant custody account, they would not prevent a bank employee from receiving a referral fee for referring the customer to a broker-dealer to engage in securities transactions at the broker-dealer that are unrelated to the custody account in accordance with the networking exception or the

Thus, for example, the rule does prohibit a bank from directly passing on to an employee a portion or percentage of the 12b-1 fees received by the bank from a custody account's investment in a mutual fund, or a portion of a fee that is charged only when, or that varies based on whether, a securities transaction is executed for the account. A bank employee may receive payments under a bonus or similar plan rule that includes within its allocation pool the revenues generated by one or more custodial accounts if the plan meets the criteria for a discretionary, multi-factor bonus program in Rule 700(b)(1), or the bonus program is based on the overall profitability or revenues of the bank, an affiliate, or operating unit and the program complies with the requirements of the safe harbor in Rule 700(b)(2). If a bank's compensation practices are inconsistent with these limitations, the bank may not rely on the exemption to take securities orders in a custodial capacity.

b. Advertisements and Sales Literature

As under the proposed rule, final Rule 760(a)(2) provides that a bank relying on the exemption may not advertise that it accepts orders for securities transactions for employee benefit plan accounts or individual retirement accounts or similar accounts for which the bank acts as custodian, except as part of advertising the other custodial or safekeeping services the bank provides to these accounts.[230] The bank also may not advertise that such accounts are securities brokerage accounts or that the bank's

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institutional customer and high net worth customer exemption (Rule 701) for networking arrangements.

230 Rule 760(h)(2) defines an "advertisement" to mean material that is published or used in any electronic or other public media, including any Web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

safekeeping and custody services substitute for a securities brokerage account.[231] Moreover, advertisements and sales literature for individual retirement or similar accounts that are issued by or on behalf of the bank may not describe the securities order-taking services provided by the bank to these accounts more prominently than the other aspects of the custody or safekeeping services the bank provides.[232]

One commenter indicated that these advertising restrictions were reasonable.[233] Another commenter suggested that these advertising limitations should not apply to certain advertisements for which a broker-dealer takes compliance responsibility.[234] The advertising and sales literature restrictions are designed to help prevent a bank from operating a brokerage business out of its custody department and, for this reason, apply to all advertisements and sales literature issued by or on behalf of a bank, whether or not a broker-dealer has some compliance responsibility with respect to the advertisement or sales literature. These limitations would not, however, apply to the advertisements or sales literature that a registered broker-dealer may make to inform the public or others about the availability of brokerage services from the broker-dealer.

c. Other Conditions

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231 Rule 760(a)(2)(i) and (ii).

232 Rule 760(a)(3). Rule 760(h)(6) defines "sales literature" to mean any written or electronic communication, other than an advertisement, that is generally distributed or made generally available to customers of the bank or the public, including circulars, form letters, brochures, telemarketing scripts, seminar texts, published articles, and press releases concerning the bank's products or services.

233 <u>See</u> ICBA Letter.

234 <u>See</u> UMB Bank, N.A. Letter.

A bank that accepts orders for a securities transaction for an employee benefit plan account or individual retirement account or similar account also must comply with the conditions set forth in paragraph (d) of the Rule.[235] These conditions are discussed below in Part V.B.3.[236]

2. Order-Taking as an Accommodation for Other Types of Accounts

The proposed rule also permitted banks to continue to accept securities orders for custodial accounts other than employee benefit plan and individual retirement and similar accounts as an accommodation to the customer, subject to certain conditions designed to help ensure that these services continue to be provided only as an accommodation to customers and that a bank does not operate as a securities broker out of its custody department. While commenters generally supported permitting banks to accept securities orders for other custodial accounts on an accommodation basis, several commenters asked the Agencies to modify or clarify the scope or terms of the exemption, including the meaning of "accommodation" and the prohibition on providing investment advice, research, and recommendations.

The Agencies are adopting, largely as proposed, the provisions of the rule permitting banks to accept orders as an accommodation for these other custodial

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235 Rule 760(a)(1).

236 The Agencies have made a technical change from the proposal to make clear that a bank operating under Rule 760(a) must comply with the conditions set forth in paragraph (d) as well as with the employee compensation limitations of paragraph (c). See Rule 760(a)(1). This should better clarify banks' responsibilities under these provisions, and the Agencies have made a conforming change to the text of Rule 760(b) relating to accommodation trades.

accounts.[237] A bank relying on this part of the exemption must comply with the conditions discussed below.

a. Accommodation Basis

For the reasons stated in the proposing release, the final rule, like the proposal, permits a bank to accept securities orders for other types of custodial accounts only as an accommodation to the customer.[238] Some commenters suggested that the Agencies define the term "accommodation" in the rule to mean any trade that is effected solely on the request of the customer or on an unsolicited basis.[239] As noted in the proposal, the Banking Agencies will develop guidance to assist Banking Agency examiners in reviewing, as part of the agencies' ongoing risk-focused supervisory and examination process, the order-taking services provided to these custodial accounts. The guidance will describe the types of policies, procedures and systems that a bank should have in place to help ensure that the bank accepts securities orders for these custodial accounts only as an accommodation to the customer and in a manner consistent with the custody exemption.[240] As part of these reviews, Banking Agency examiners also will, consistent with the rule, consider the form and substance of the relevant accounts, transactions, and activities to prevent evasions of the requirements of the rule.[241] The Agencies believe this approach, rather than adopting by rule a definition of "accommodation," is

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[237] Rule 760(b).

[238] Rule 760(b)(1).

[239] See Fiserv Trust Company Letter; Ass'n of Colorado Trust Companies Letter.

[240] See 71 FR at 77532-33.

[241] See Rule 760(f).

appropriate given the disparity in the types, characteristics and uses of other custody accounts, the size and operations of banks that provide these services and the manner in which they do so.

b. Employee Compensation Restrictions

For the reasons stated in the proposing release, final Rule 760(b)(2) continues to provide that a bank that accepts orders for other custody accounts must comply with the employee compensation limitations in paragraph (c) of the rule. These limitations were previously discussed in Part V.B.I.a., supra. [242]

c. Limitations on Bank Fees

The rule prohibits a bank that accepts accommodation orders for a custody account from charging or receiving any fee that varies based on (1) whether the bank accepted the order for the transaction or (2) the quantity or price of the securities to be bought or sold.[243] These restrictions do not prevent a bank from charging or receiving a fee that is based on the type of security purchased or sold by the account (e.g., a foreign security), provided the fee complies with the conditions set forth in Rule 760(b)(3). Commenters did not raise concerns with these restrictions.

d. Advertising and Sales Literature Restrictions

Under the final rule, the bank's advertisements may not state that the bank accepts orders for securities transactions for a custodial account (other than an employee benefit plan or individual retirement account or similar account). In addition, the bank's sales literature: (1) may state that the bank accepts securities orders for such an account only

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242 Rule 760(b)(2).

243 Rule 760(b)(3).

as part of describing the other custodial or safekeeping services the bank provides to the account, and (2) may not describe the securities order-taking services provided to such an account more prominently than the other aspects of the custody or safekeeping services provided by the bank to the account.[244]

e. Investment Advice or Recommendations

The proposed rule imposed certain restrictions on the ability of a bank to provide investment advice or research concerning securities to an account for which it accepts accommodations orders, make recommendations concerning securities to the account, or otherwise solicit securities transactions from the account.[245]

Several commenters, expressed concerns with the proposed limitations on investment advice, research and recommendations. For example, commenters expressed concern that the restrictions would negatively affect a bank's ability to cross-market its trust, fiduciary or other services to custody customers.[246] Some expressed concern that the limitations would interfere with a bank's ability to share research with custody

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244 Rule 760(b)(5). One commenter urged the Agencies to abandon the prohibitions on advertising order-taking as an accommodation to other custodial accounts, arguing that the prohibition violates a bank's constitutional free speech rights. See CBA Letter. The Agencies believe these restrictions are appropriate to effectuate the purposes of the exemption and have tailored the restrictions to comply with the customary practices of banks and minimize potential disruptions. The Agencies specifically requested comments on the conditions of the rule, and no commenter indicated that the advertising restrictions on accommodation trade would materially disrupt their business or operations.

245 Rule 760(b)(6).

246 See, e.g., Harris Bank Letter; U.S. Trust Letter.

customers or make the bank's views concerning securities or markets available to the public through websites, mailings, interviews or other means.[247]

After carefully considering the comments received, the Agencies believe that no change is necessary to accommodate the cross-marketing of other bank services. Accordingly, we are adopting the provisions related to investment advice, research and recommendations without change. The Agencies note that the prohibitions do not prevent a bank from cross-marketing its trust, fiduciary or other services to its custody customers. A bank's marketing to custody account customers may – without violating the rule's general prohibition against providing advice, research or recommendations – include non-account specific information provided in media such as newsletters and websites. In addition, the advice, research, recommendation and solicitation prohibition does not prohibit a bank from providing samples of research, including stock-specific research, to custody customers that the bank provides to other persons for marketing purposes. Thus, the Agencies believe that banks will continue to be able to cross-market their products and services to their custody customers. A custody account, however, is not a fiduciary account, and a bank operating under Rule 760(b) with respect to a custodial account may not provide such samples in such a way or with such a frequency as to provide the custody account securities services that only are permissible for a trust or fiduciary customer. The bank, moreover, may not provide personalized investment

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[247] See, e.g., PNC Letter; National City Corp. Letter.

advice, research or recommendations regarding particular securities to the custodial account for any reason.[248]

Some commenters questioned whether providing custody customers with a choice of investments from which to select would constitute providing investment advice.[249] Banks may use menus or other lists to make custodial customers aware of the securities available to them through the custodial account. For example, the restrictions in paragraph (b)(6) of the rule do not prevent a bank from providing its customers with an online menu of the mutual funds that the customer is able to purchase through the custody account.

The limitations and restrictions in Rule 760(b), including those relating to investment advice and recommendations, relate only to those custodial accounts for which the bank accepts securities orders on an accommodation basis. Thus, for example, these limitations would not apply to (1) an employee benefit plan account or an individual retirement account or similar account; or (2) a trust or fiduciary account maintained by a customer with a bank even if that customer also maintains a custodial account with the bank.

Commenters asked how the limitations on investment advice and research would apply when a customer has both a custody account and a separate trust or fiduciary account with a bank, and asked the Agencies to clarify that a bank would not violate the restrictions if the bank provides a trust or fiduciary customer with research or advice that

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248 This would include providing personalized advice, research or recommendations concerning securities to the account in an effort to convert the account to another type of account, for goodwill or to obtain referrals.

249 See Harris Bank Letter; PNC Letter.

the customer then uses to make orders through its custody accounts.[250] Rule 760(b)(6) prohibits banks from providing investment advice, research or recommendations concerning securities to, or soliciting securities transactions from, a custody account for which the bank accepts orders under the accommodation trade authority. The rule does not limit the types of research or other services a bank may provide to a customer's trust or fiduciary account, and the Agencies recognize that a bank may have no control over which account the customer uses to place any orders that result from such research or other services.

The final rule, like the proposal, continues to provide that, in order to prevent evasions of the custody exemption, the Agencies will consider both the form and substance of the relevant account(s), transaction(s) and activities (including advertising activities) in considering whether a bank meets the terms of the exemption.[251] For example, the Agencies will consider the content, format and frequency of any investment research provided to an accommodation custodial account in considering if such research in purpose or effect evades the restrictions in the rule or provides a custody account securities services that only are permissible for a trust or fiduciary customer. Similarly, a bank may not evade the rule's restrictions by providing an accommodation customer that has both a custody account and a trust or fiduciary account with investment advice, recommendations or research that is targeted to the securities held in the customer's custody account. For example, if a customer's custody account has a large position in a particular security and that security is not held in the customer's trust or fiduciary

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250 See ABA Letter; Harris Bank Letter.

251 Rule 760(e).

account, a bank may not routinely provide the customer with research focused on that security. Banks should have and maintain policies and procedures to abide by these limitations and bank examiners will review bank compliance with these limits in accordance with the risk-based supervisory and examination process, considering both the form and substance of the cross-marketing activities in applying the anti-evasion provisions of the rule.

The restrictions in Rule 760(b)(6) do not prohibit the bank from advertising its custodial services and disseminating sales literature that meets the conditions in the exemption.[252] These restrictions also will not prevent a bank employee from responding to customer inquiries regarding the bank's safekeeping and custody services by providing advertisements or sales literature describing the safekeeping, custody and related services the bank offers (provided those advertisements and sales literature comply with the restrictions in the proposed exemption), a prospectus prepared by a registered investment company, sales literature prepared by a registered investment company or by the broker-dealer that is the principal underwriter of the registered investment company pertaining to the registered investment company's products, or information based on any of those materials.[253] The exemption allows a bank's employees to respond to customer inquiries concerning the bank's safekeeping, custodial or other services, such as inquiries concerning the customer's account or the availability of sweep or other services, so long

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252 Rule 760(b)(6)(i).

253 Rule 760(b)(6)(ii). "Principal underwriter" has the same meaning as in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29)). Rule 760(h)(7).

as the bank does not provide investment advice or research concerning securities to the account or make a recommendation to the account concerning securities.[254]

3. Other Conditions Applicable to Order-Taking for All Custody Accounts

The proposed exemption provided that a bank may accept orders for a securities transaction for a custody account under the exemption only if the bank (1) does not act in a trustee or fiduciary capacity (as defined in section 3(a)(4)(D) of the Exchange Act) with respect to the account; (2) complies with section 3(a)(4)(C) of the Act in handling any order for a securities transaction for the account; and (3) complies with section 3(a)(4)(B)(viii)(II) of the Act regarding carrying broker activities.

a. Directed Trustees

Some commenters requested that the Agencies modify the exemption to allow a bank that acts as a directed trustee for an account to accept orders and effect transactions for the account under the custody exemption in Rule 760 in lieu of relying on the trust and fiduciary rules (Rule 721 to 723) for the transaction.[255] In light of the comments and the protections included in Rule 760, the Agencies have modified the final rule to provide that a bank that acts as a directed trustee for an account may rely on the custody exception to accept orders for, and effect transactions in, securities for the account.[256] If a bank acting as directed trustee relies on the rule to effect transactions for an employee

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254 Rule 760(b)(6)(iii).

255 See Teachers Insurance and Annuity Association of America and College Retirement Equities Fund ("TIAA-CREF") Letter; ACB Letter; Roma Bank Letter. Commenters asserted, for example, that a bank acting as a directed trustee provides services that are functionally similar to those provided as a custodian and in either case does not have investment discretion with respect to the account.

256 See Rule 760(d)(1). Alternatively, the bank may continue to effect transactions for the account under the rules relating to trust or fiduciary accounts.

benefit plan account or an individual retirement account or similar account, the bank must comply with the conditions in Rule 760(a). If a bank acting as directed trustee relies on the rule to effect transactions for another type of account, the bank must comply with the conditions governing accommodation accounts in Rule 760(b).

The rule defines a directed trustee as "a trustee that does not exercise investment discretion with respect to the account."[257] The Agencies also have modified the definition of "an account for which the bank acts as a custodian" to include an account for which a bank acts as a directed trustee.[258] Although a bank acting as directed trustee for an account may effect transactions under the custody exemption, the bank's trustee relationship with the account remains a trust and fiduciary relationship and, as such, the bank must continue to comply with applicable fiduciary principles and standards in its relationships with the account.

b. Broker Execution Requirement

Consistent with the requirements of the custody and safekeeping exception, Rule 760(d)(2) requires a bank that accepts orders for a custody account under the rule to comply with Section 3(a)(4)(C) of the Exchange Act[259] in handling any order for a securities transaction for the account.[260] Under this provision, (i) the bank must direct the trade to a registered broker-dealer for execution, or (ii) the trade must be a cross trade or other substantially similar trade of a security that is made by the bank or between the

257 Rule 760(h)(3).

258 <u>See</u> Rule 760(h)(1).

259 15 U.S.C. 78c(a)(4)(C).

260 <u>See</u> Rule 760(d)(2).

bank and an affiliated fiduciary and is not in contravention of fiduciary principles established under applicable Federal or State law, or (iii) the trade must be conducted in some other manner permitted under rules, regulations, or orders as the Commission may prescribe or issue.

c. Carrying Broker Provisions

A number of commenters addressed the proposed provision limiting the availability of the custody exemption to banks that comply with Section 3(a)(4)(B)(viii)(II) of the Exchange Act[261] relating to carrying broker activities.[262] Some stated that the Agencies should define the term "carrying broker" by rule rather than by interpretation.[263] One commenter requested that we interpret the term based on the view that the essence of a carrying broker relationship is "complete dependence" of a broker-dealer on another entity for back office functions and execution.[264] Another commenter took the position that a custodian bank should not be deemed a carrying broker so long as "it is not enabling" broker-dealers to avoid the net capital requirements applicable to carrying brokers.[265] One commenter generally suggested that we either eliminate the

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261 15 U.S.C. 78c(a)(4)(B)(viii)(II). This provision prohibits a custodian bank from acting as a carrying broker (as such term, and different formulations thereof, are used in Exchange Act Section 15(c)(3) and the rules and regulations under that Section) for any broker-dealer, unless such carrying broker activities are engaged in with respect to government securities.

262 Rule 760(d)(3).

263 See ABA Letter; State Street Corp. Letter; PNC Letter.

264 See Clearing House Ass'n Letter.

265 See U.S. Trust Letter.

carrying broker limitation from the proposed rules, or amend it to avoid affecting the ability of banks to undertake traditional banking activities.[266]

Section 3(a)(4)(B)(viii)(II) of the Exchange Act provides that a bank relying on the custody exception may not act as a "carrying broker," as that term and different formulations of the term are used in Section 15(c)(3) of the Act and the underlying rules and regulations, for a broker-dealer other than with respect to government securities. Section 15(c)(3) of the Act in relevant part requires broker-dealers to comply with the Commission's regulations with respect to financial responsibility and related customer protection practices of broker-dealers.[267] The Commission's financial responsibility and customer protection rules expand on what it means to carry customer securities.[268] In general, broker-dealers establish carrying arrangements in which other broker-dealers

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266 See HSBC Bank Letter. In addition, a few commenters asserted that the description of potential carrying broker activity in prior rulemakings under the GLB Act would, if adopted, be highly problematic and disruptive for banks and broker-dealers. See Clearing House Ass'n Letter; ABA Letter.

267 Exchange Act Section 15(c)(3)(A), 15 U.S.C. 78o(c)(3)(A).

268 The Commission's net capital rule specifies that a broker-dealer shall be deemed to carry customer or broker-dealer accounts "if, in connection with its activities as a broker or dealer, it receives checks, drafts, or other evidences of indebtedness made payable to itself or persons other than the requisite registered broker or dealer carrying the account of a customer, escrow agent, issuer, underwriter, sponsor, or other distributor of securities" or "if it does not promptly forward or promptly deliver all of the securities of customers or of other brokers or dealers received by the firm in connection with its activities as a broker or dealer." Exchange Act Rule 15c3-1(a)(2)(i)

The Commission's customer protection rule governing reserves and custody of securities defines the term "securities carried for the account of a customer" to mean "securities received by or on behalf of a broker or dealer for the account of any customer and securities carried long by a broker or dealer for the account of any customer," as well as securities sold to, or bought for, a customer by a broker-dealer. Exchange Act Rule 15c3-3(a)(2).

carry their accounts to permit the non-carrying broker-dealer to be subject to lesser financial responsibility requirements under the Exchange Act. A broker-dealer entering into such an agreement with a carrying entity that is not a registered broker-dealer, however, may not take advantage of those lesser requirements.[269]

After carefully considering the comments, the Agencies have retained this limitation as a condition of the custody exemption without change as it is a term of the statutory custody exception. Banks may look to certain key factors to help distinguish permissible custodial activity from impermissible carrying broker activity. In particular, key factors in considering whether the existence of shared customers between a broker-dealer and a bank may entail impermissible carrying broker activity by the bank are the broker-dealer's own regulatory obligations and whether the broker-dealer either makes formal or informal arrangements with the bank or structures its operations or offerings to cause the broker-dealer's customers generally (or one or more broad segments of the broker-dealer's customers) to use the bank's custody accounts instead of maintaining funds and securities in accounts at the broker-dealer (thereby avoiding the broker-dealer's financial and related responsibilities). The existence of a substantial number of common customers between a broker-dealer and a bank's custody department in the absence of

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269 Within common securities industry usage, the terms "carrying broker" and "clearing broker" are virtually identical and often are used interchangeably. In certain instances, the terms mean a broker that, as part of an arrangement with a second broker (an "introducing" or "corresponding" broker), allows the second broker to be subject to lesser regulatory requirements (e.g., under the net capital provisions of Exchange Act Rule 15c3-1 and the customer protection provisions of Exchange Act Rule 15c3-3). Technically, however, a "carrying broker" is a broker that holds funds and securities on behalf of customers, whether its own customers or customers introduced by another broker-dealer, and a "clearing broker" is a member of a registered clearing agency.

such an arrangement or structure would not cause the bank to act as a carrying broker for the broker-dealer.

Similarly, a bank may perform or share systems that perform limited back-office functions on behalf of a broker-dealer without becoming a carrying broker for the broker-dealer. A broker-dealer, for example, may contract with an unregistered party such as a bank to send out transaction confirmations on behalf of the broker-dealer or have an arrangement with an affiliated bank to provide customers with combined statements, with the broker-dealer remaining responsible for the accuracy and completeness of those confirmations and the broker-dealer aspects of the statements. A bank and an affiliated broker-dealer also may share or coordinate risk management systems such as, for example, those relating to Bank Secrecy Act and anti-money laundering compliance.[270] A broker-dealer, however, may not delegate core functions to a bank or other unregistered entity or functions that would require an individual to pass a qualification examination or register with an SRO.[271] A broker-dealer also must maintain possession or control over the broker-dealer's proprietary cash or securities and its customers' cash or securities in

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270 Other examples of current permissible coordination arrangements between banks and broker-dealers include legal and compliance functions, accounting and finance functions (such as payroll and expense account reporting), information technology, operations functions (such as disaster recovery services), and administration functions (such as human resources and internal audits). See NASD Notice to Members 05-48 (July 2005) at 2.

271 NASD Notice to Members 05-48 (July 2005), "Outsourcing," provides guidance to member firms regarding the outsourcing activities and functions that, if performed directly by members, would be required to be the subject of a supervisory system and written supervisory procedures pursuant to NASD Rule 3010.

accordance with the Commission's financial responsibility rules.[272] Of course, a bank may serve as custodian for proprietary or customer cash or securities of the broker-dealer and may accept and use in the ordinary course of its banking business cash deposited with the bank by the broker-dealer or its customers.[273]

4. Custodians, Subcustodians and Administrators/Recordkeepers

a. "Account for which a bank acts as a custodian"

As a general matter, the exemption in Rule 760 is available only for an "account for which the bank acts as a custodian." The proposed rule defined this term to mean an account that is: (i) an employee benefit plan account for which the bank acts as a custodian; (ii) an individual retirement account or similar account for which the bank acts as a custodian; or (iii) an account established by a written agreement between the bank and the customer that sets forth the terms that will govern the fees payable to, and rights and obligations of, the bank regarding the safekeeping or custody of securities.[274] As discussed in Part V.B.3.a supra, the Agencies have amended this definition in the final rule also to include an account for which a bank acts as a directed trustee.

A few commenters asked whether a bank performing custodial functions in a non-trustee and non-fiduciary capacity (such as escrow agent, fiscal agent or paying agent) may use the custody exemption even if it is not formally designated as "custodian" by the

272 See e.g., Rules 15c3-1 and 15c3-3 [17 CFR 240.15c3-1, 15c3-3]. This is true even if the broker-dealer is not "completely dependent" on the bank for all back office functions and execution.

273 See Rule 15c3-3(c)(5).

274 Proposed Rule 760(g)(1).

bank-customer agreement.[275] Whether a bank serves as custodian for the securities or other assets of an account depends on the services the bank provides to the account with respect to such securities or assets, not the label used to identify the account or the bank's services in the agreement between the bank and the customer. Thus, for example, a bank that acts as an escrow agent, fiscal agent or paying agent with respect to an account, and that provides safekeeping or custody services for the securities or other assets in the account, is considered to be a custodian for the account for purpose of the rule regardless of whether the account agreement uses the term "custodian" or any other particular language.

b. Administrators/Recordkeepers and Subcustodians

The proposed exemption permitted a bank acting as a non-fiduciary and non-custodial administrator or recordkeeper for an employee benefit plan to accept securities orders for the plan on behalf of a custodian bank.[276] Under the proposed exemption, both the administrator/recordkeeper bank and the custodial bank had to comply with the requirements relating to employee benefit plan accounts.[277] In addition, the proposed rule prohibited an administrator/recordkeeper bank from executing a cross-trade with or for the employee benefit plan or from netting orders for securities for the plan, other than orders for shares of open-end investment companies not traded on an exchange.[278]

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275 See Union Bank Letter, Wells Fargo Letter.

276 Proposed Rule 760(e).

277 Proposed Rule 760(e)(1).

278 Proposed Rule 760(e)(2).

A few commenters supported these provisions, but opposed the restrictions on cross-trading and netting.[279] One commenter maintained that the administrator/recordkeeper provisions should also be available to banks providing administrative services to individual retirement accounts.[280]

Some commenters also questioned whether or how the proposed exemption would apply to a bank that acts as a subcustodian for the trust or fiduciary or custody accounts of another bank. For example, some commenters asserted that a bank acting as a subcustodian for another bank's trust or fiduciary accounts should be permitted to accept orders for those accounts under the less restrictive conditions in Rule 760(a) regardless of the type of accounts actually involved.[281] Other commenters suggested that a subcustodian bank be permitted to effect trades for the accounts of the other bank with a direct custodial relationship with the customer under the same rules (e.g., trust and fiduciary or custody), and subject to the same conditions, that would apply to the other bank if it conducted the transactions directly.[282] Commenters also noted that banks, and particularly smaller banks, at times use subcustodian arrangements with other banks to provide their customers custodial services more efficiently and at lower cost than they may be able to do on their own.

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279 See ABA Letter; Clearing House Ass'n Letter; CBA Letter. The commenters asserted that the cross-trading and netting restrictions were too restrictive and noted that section 3(a)(4)(C) of the Exchange Act permits bank custodians to engage in a broader range of cross-trade and netting activities.

280 See CBA Letter.

281 See, e.g., ABA Letter, CBA Letter, PNC Letter, Schwab Letter.

282 See TIAA-CREF Letter.

After carefully considering the comments, the Agencies have adopted Rule 760(e), which permits a bank that acts as a non-fiduciary and non-custodial administrator or recordkeeper for an employee benefit plan for which another bank acts as a custodian to accept orders for the account under Rule 760.[283] In addition, the Agencies have adopted a new paragraph (f) of the rule that permits a bank that acts as a subcustodian for any type of account for which another bank acts as custodian to accept orders for the account under Rule 760. This change was made in response to comments that greater flexibility and clarity was needed for banks that use, and banks that provide, subcustodial services. Under these provisions of the final rule, the administrator/recordkeeper bank or subcustodian bank, as well as the initial custodian bank for the account, must comply with the provisions of Rule 760 applicable to the type of account involved (i.e. employee benefit plan account, individual retirement account or similar account, or other types of accounts).[284]

The final rule generally prohibits a recordkeeper/administrator bank or subcustodian bank relying on the exemption from executing a cross-trade or netting orders with or for the relevant account.[285] However, the Agencies have expanded the exceptions to this general prohibition in light of the comments received. In particular, the

283 The Agencies understand that the type of administrator/recordkeeper arrangements described in Rule 760(e) are not typically used with respect to accounts other than employee benefit plan accounts and, for this reason, have not expanded the paragraph to cover other types of accounts.

284 See Rule 760(e)(1) and (f)(1) and (2). The Agencies made a technical change to Rule 760(e) to clarify that the administrator/recordkeeper bank and the custodial bank for employee benefit accounts need to comply only with the requirements in the rule applicable to employee benefit plan accounts and do not need to comply with the conditions applicable to accommodation trades.

285 Rule 760(e)(2) and (f)(3).

final rule permits the administrator/recordkeeper bank or subcustodian bank to cross or net orders for shares of open-end investment companies not traded on an exchange.[286] In addition, the final rule permits the administrator/recordkeeper bank or subcustodian bank to cross orders between or net orders for accounts of the custodian bank that contracted with the administrator/recordkeeper bank or subcustodian bank for services.[287] Permitting this additional type of cross-trade and netting activity is consistent with the exceptions to broker execution requirement in section 3(a)(4)(C) of the Exchange Act and should allow cost-savings for the customer by eliminating the need for a broker intermediary. At the same time, by prohibiting an administrator/recordkeeper bank or subcustodian bank operating under the rule from executing cross-trades or netting orders among the accounts of <u>different</u> custodian banks to which it provides services will help prevent banks from establishing a market for securities under the exemption.

The Agencies note that these provisions do not apply to a bank that provides custody and order-taking services to the <u>trust</u> <u>or</u> <u>fiduciary</u> accounts of another bank. In these circumstances, the bank providing custodial services is treated as a custodian, and not a subcustodian, for purposes of the rule and may provide order-taking services to the account in accordance with the provisions of Rule 760(a) or (b) applicable to the type of account involved.

5. Evasions

The Agencies are adopting, as proposed, the provision that states the Agencies will consider both the form and substance of the relevant accounts, transactions and

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286 <u>See</u> Rule 760(e)(2)(i) and (f)(3)(i).

287 <u>See</u> Rule 760(e)(2)(ii) and (f)(3)(ii).

activities (including advertising activities) in considering whether a bank meets the terms of the exemption, to prevent evasions of the exemption.[288] We received no comments on this anti-evasion provision. As part of the regular risk-focused examination process, the Banking Agencies will monitor the securities transactions in custodial accounts. If the appropriate Banking Agency were to find that a bank is evading the terms of the custody exemption to run a brokerage business out of its custody department, the agency would take appropriate action to address the problem.

VI. Other Exemptions

The Agencies also are adopting certain other exemptions relating to the securities "broker" activities of banks. These are discussed below.

A. Exemption for Regulation S Transactions with Non-U.S. Persons and Broker-Dealers

We are adopting Rule 771 of Regulation R to exempt banks from the definition of "broker" under the Exchange Act for certain agency transactions involving Regulation S securities.[289] As with Rule 3a5-2 under the Exchange Act, which the Commission

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288 Rule 760(g).

289 The Commission's Regulation S (17 CFR 230.901 et seq.) provides that offers and sales of securities conducted in accordance with the terms of the regulation will be not be deemed to constitute an offer, offer to sell, sale or offer to buy within the United States for purposes of the securities registration requirements of Section 5 of the Securities Act. See 17 CFR 230.901. Specifically, Rule 903 of Regulation S provides that an offer or sale of securities by the issuer, a distributor, or an affiliate or a person acting on their behalf shall be deemed to occur outside the U.S. within the meaning of Rule 901 if the offer or sale is made in an offshore transaction (as defined in Rule 901), and no directed selling efforts are made in the U.S. by the issuer, a distributor, affiliate, or person acting on their behalf. Other conditions may also apply depending on the place of incorporation and reporting status of the issuer, and the amount of U.S. market interest in the securities.

separately is adopting to permit banks to engage in certain Regulation S transactions on a riskless principal basis without being "dealers," Rule 771 recognizes that non-U.S. persons located outside the United States generally will not rely on the protections of the U.S. securities laws when purchasing Regulation S securities from U.S. banks, and that those persons may purchase the same securities from foreign banks located outside the U.S. without subjecting the foreign bank to U.S. broker-dealer registration.

Commenters generally supported the proposal while suggesting certain modifications and clarifications.[290] For example, commenters requested that the Agencies clarify that the exemption is available to banks both during and after any applicable distribution compliance period for the securities required by Regulation S, and allow banks to conduct resales of eligible securities for either non-U.S. persons or registered broker-dealers if the bank has a reasonable belief that the securities were initially sold in compliance with Regulation S.[291] In addition, some commenters argued

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Rule 904 of Regulation S provides that an offer or sale of securities by any person other than the issuer, a distributor, an affiliate (except an officer or director who is an affiliate solely by virtue of that position) or person acting on their behalf will be deemed to occur outside the U.S. within the meaning of Rule 901 if the offer or sale is made in an offshore transaction (as defined in Rule 901), and no directed selling efforts are made in the U.S. by the seller, an affiliate or person acting on their behalf. Additional conditions apply in the case of resales of certain types of securities by dealers and persons receiving selling concessions, and in the case of resales by certain affiliates of the issuer or a distributor.

290 See IIB Letter; ABA Letter; Clearing House Ass'n Letter.

291 See IIB Letter; Clearing House Ass'n Letter. Rules 903(b)(2) and (b)(3) of Regulation S subject Category 2 securities and Category 3 debt securities to a 40-day distribution compliance period, and subject Category 3 equity securities to a one-year distribution compliance period, during which certain restrictions apply to offers or sales of the securities in order to preserve the foreign nature of the transactions. Under Rule 903 of Regulation S, Category 1 encompasses certain securities: (i) issued by a foreign issuer, for which there is no substantial U.S. market interest, (ii) that are offered and sold in an overseas directed offering, (iii)

that the exemption should not require a bank to comply with the resale restrictions in Rule 904 of Regulation S if the bank effects a resale of an eligible security in accordance with Rule 903 of Regulation S prior to the end of any applicable distribution compliance period for the security.[292] Commenters also urged the Agencies to make the proposed "broker" exemption in Regulation R and the "dealer" exemption proposed by the Commission as consistent as possible and to make both exemptions as consistent as possible with Regulation S.

The Agencies have modified the rule in several respects in light of the comments, to enhance its clarity and to better conform it to Regulation S. The final rule, like the proposed rule, continues to have three parts. The first part permits a bank to effect a sale of an eligible security in compliance with the requirements of Rule 903 of Regulation S to a purchaser who is not in the United States.[293] The term "purchaser" is defined to mean a person who purchases an eligible security and who is not a U.S. person under Rule 902(k) of Regulation S.[294]

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that are backed by the full faith and credit of a foreign government, or (iv) that are offered and sold to employees of the issuer or its affiliates pursuant to certain foreign employee benefit plans. Category 2 encompasses securities, not eligible for Category 1, that are equity securities of a reporting foreign issuer, or debt securities of a reporting issuer or of a non-reporting foreign issuer. Category 3 applies to all offerings of securities that do not fall within Category 1 or 2.

292 See IIB Letter.

293 Rule 771(a)(1).

294 Rule 771(b)(3). Rule 902(k) of Regulation S defines the term "U.S. person" to mean: (i) any natural person resident in the U.S.; (ii) any partnership or corporation organized or incorporated under the laws of the U.S.; (iii) any estate of which any executor or administrator is a U.S. person; (iv) any trust of which any trustee is a U.S. person; (v) any agency or branch of a foreign entity located in the U.S.; (vi) any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a

The second part permits a bank to effect, by or on behalf of a person who is not a U.S. person under Rule 902(k) of Regulation S, a resale of an eligible security after its initial sale to a purchaser who is not in the United States or to a registered broker-dealer.[295] To take advantage of this second exemption, the bank (1) must have a reasonable belief that the eligible security was initially sold outside of the United States within the meaning of and in compliance with Rule 903 of Regulation S, and (2) if the resale is made prior to any applicable distribution compliance period specified in Rules 903(b)(2) or (b)(3) of Regulation S, the resale must be made in compliance with the requirements of Rule 904 of Regulation S.[296]

The third part of the exemption permits a bank to effect, by or on behalf of a registered broker-dealer, a resale of an eligible security after its initial sale to a purchaser who is not in the United States.[297] As under the second part, the bank must have a reasonable belief that the eligible security was initially sold outside of the United States within the meaning of and in compliance with Rule 903 of Regulation S and, if the resale is made prior to the expiration of any applicable distribution compliance period in Rules 903(b)(2) or (b)(3) of Regulation S, the bank must effect the resale in compliance with

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U.S. person; and (vii) any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the U.S., and (viii) any partnership or corporation if (A) organized or incorporated under the laws of any foreign jurisdiction, and (B) formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in Rule 501(a) under the Securities Act) who are not natural persons, estates or trusts.

295 Rule 771(a)(2).

296 Rule 771(a)(2).

297 Rule 771(a)(3).

the requirements of Rule 904 of Regulation S. The proposed rule would have allowed a bank to rely on a reasonable belief that the security was sold in compliance with Regulation S only when it purchases a security from a non-U.S. person but not when it purchases a security from a broker-dealer. In light of comments received, the reasonable belief standard is also available under the final rule for a bank's transactions with a broker-dealer because the process of determining whether a security initially was issued in compliance with Regulation S should be similar whether the purchase is from a broker-dealer or a non-U.S. person.[298] As the rule makes clear, a bank effecting a resale of an eligible security under the exemption must effect the transaction in accordance with the conditions of Rule 904 if the transaction occurs during, but not after, any applicable distribution compliance period for the security under Rule 903(b)(2) or (b)(3) of Regulation S.

The final rule continues to require, however, that any sale effected under paragraph (b)(1) of the Rule, or resale effected under paragraphs (b)(2) or (b)(3) of the Rule (other than one to a registered broker-dealer), be to a "purchaser who is not in the United States." This is true even if the applicable distribution compliance period for the overseas offering of the security under Regulation S has expired. Consistent with Regulation S, which permits the offshore resale of securities, the purpose of the exemption in Rule 771 is to permit U.S. banks to sell Regulation S securities to customers outside the United States. It does not permit banks to sell those securities domestically (other than to a registered broker-dealer).[299]

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298 See IIB Letter and Clearing House Ass'n Letter.

299 The Agencies recognize that the "offshore transaction" condition in Rules 903 and 904 of Regulation S also require that the offer not be made to a person in the

For purposes of the exemption, an "eligible security" means any security other than a security that is being sold from the inventory of the bank or an affiliate of the bank or that is being underwritten by the bank or an affiliate of the bank on a firm-commitment basis unless the bank acquired the security from an unaffiliated distributor that did not purchase the security from the bank or an affiliate of the bank.[300] Commenters requested that the Agencies clarify that the definition of "eligible security" would not prohibit a bank from effecting transactions under the exemption in securities that have been issued by the bank or an affiliate.[301] A security that is issued by a bank or an affiliate of a bank, such as a structured note or share in a pooled investment vehicle, may be an eligible security if it otherwise meets the terms of paragraph (b)(2) of Rule 771.

B. Exemption for Non-Custodial Securities Lending Transactions

The Agencies are adopting, as proposed, Rule 772 of Regulation R to provide banks engaged in certain securities lending transactions with a conditional exemption from the definition of "broker." The exemption allows a bank to engage in securities lending transactions as agent in circumstances where the bank does not have custody of the securities or has custody of such securities for less than the entire period of the

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United States. <u>See</u> 17 CFR 230.902(h), 230.903(a)(1) and 230.904(a)(1). For this reason, one commenter stated that the rule simply should refer to sales to a "purchaser," rather than to a purchaser who is outside the United States. <u>See</u> IIB Letter. The Agencies have retained the "purchaser who is not in the United States" language in the final rule, even for those transactions that must be conducted in accordance with Rule 903 or 904 of Regulation S, to highlight and reaffirm that these transactions must be with persons outside the United States.

300 Rule 771(b)(1). For purposes of the rule, the term "distributor" has the same meaning as in Rule 902(k) of Regulation S (17 CFR 230.902(k)).

301 <u>See</u> IIB Letter, ABA Letter.

transaction. This exemption reinstates, without modification, an exemption that the Commission adopted previously.[302]

Most commenters that addressed the exemption supported its adoption.[303] One commenter opposed the exemption, arguing that securities lending and borrowing transactions should be conducted only by broker-dealers or, alternatively, banks providing such services should be subject to additional disclosure and customer approval requirements.[304] The Agencies continue to believe that the exemption is appropriate and necessary. The exemption enables sizable and sophisticated customers to divide custody and securities lending management between two expert entities when the customer decides such actions are in the customer's interest, and permits banks to continue to provide the types of non-custodial securities lending services that they currently provide without disruption. The Agencies note, moreover, that the statutory custody and safekeeping exception permits banks to effect securities lending transactions (and provide related securities lending services) when the bank has custody of the securities. A bank

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302 See Exchange Act Release No. 47364 (Feb. 13, 2003), 68 FR 8686 (Feb. 24, 2003) (adopting Exchange Act Rule 15a-11 to provide an exemption from the definitions of both "broker" and "dealer" for banks engaging in securities lending transactions). The broker provisions of the Rule 15a–11 exemption, which never became operable due to the temporary exemption applicable to all bank broker activities, will become void under the Regulatory Relief Act with the Agencies' adoption of a single set of final "broker" rules. See Pub. L. No.109-351, § 101(a)(3), 120 Stat. 1968 (1999). In light of this, the Commission separately has amended Rule 15a-11 to remove the "broker" aspects of that rule. As discussed in the accompanying release, the Commission is re-adopting, without modification, the "dealer" portions of Rule 15a-11, as Exchange Act Rule 3a5-3. See Exchange Act Release No. 56502 (Sept. 24, 2007).

303 See, e.g., State Street Corp. Letter, PNC Letter, Mellon Letter, and ABA Letter.

304 See NASAA Letter.

need not rely on the exemption in Rule 772 to engage in securities lending transactions when acting in this capacity.

Rule 772 provides that a bank is exempt from the broker definition to the extent that, as agent, it engages in or effects certain "securities lending transactions"[305] and "securities lending services"[306] in connection with such transactions.[307] The exemption applies only to securities lending activities with or on behalf of a person that the bank reasonably believes to be: (1) a qualified investor as defined in Section 3(a)(54)(A) of the Exchange Act;[308] or (2) any employee benefit plan that owns and invests, on a discretionary basis, not less than $25 million in investments. One commenter requested that the Agencies modify the rule to allow banks to engage in securities lending transactions under the exemption as agent for institutional customers that have less than $25 million in investments.[309] We have not amended the investment requirements,

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305 Rule 772(b) defines the term "securities lending transaction" to mean a transaction in which the owner of a security lends the security temporarily to another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such securities, and has the right to terminate the transaction and to recall the loaned securities on terms agreed by the parties.

306 Rule 772(c) defines the term "securities lending services" to mean: (1) selecting and negotiating with a borrower and executing, or directing the execution of the loan with the borrower; (2) receiving, delivering, or directing the receipt or delivery of loaned securities; (3) receiving, delivering, or directing the receipt or delivery of collateral; (4) providing mark-to-market, corporate action, recordkeeping or other services incidental to the administration of the securities lending transaction; (5) investing, or directing the investment of, cash collateral; or (6) indemnifying the lender of securities with respect to various matters.

307 Rule 772(a).

308 15 U.S.C. 78c(a)(54)(A). In part, this definition encompasses corporations and partnerships with at least $25 million in investments.

309 See Union Bank Letter.

however, as we believe they are consistent with the nature of customers that utilize banks for non-custodial securities lending transactions.[310]

Another commenter suggested that the Agencies exempt banks involved, as agent, in securities repurchase and reverse repurchase transactions in non-exempt securities from the "broker" definition, stating that repurchase and reverse repurchase activities are functionally equivalent to securities lending.[311] As discussed in the accompanying release, moreover, a number of commenters also requested that banks be exempted from the "dealer" definition for repurchase and reverse repurchase agreement activities involving non-exempt securities they undertake in a principal capacity.[312] The Agencies have not acted on these requests at this time because we believe additional information from banks and other interested parties would be helpful in understanding the issues raised by these requests. For this reason, we invite comment on the following matters, as well as any other matters that interested parties believe may be relevant to the Agencies' consideration of the issues posed by the requests: (1) the nature, structure (including term and type of security involved), and purpose of repurchase and reverse repurchase agreements currently conducted with respect to non-exempt securities; (2) the types of customers and financial institutions currently involved in repurchase and reverse

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310 See, e.g. Letter from Edward J. Rosen, Cleary, Gottlieb, Stein & Hamilton, to Annette Nazareth, Director, Division of Market Regulation, Commission, dated Oct. 9, 2002 (requesting that the exemption encompass banks' securities lending activity involving any entity that owns and invests on a discretionary basis at least $25 million in investments).

311 See Clearing House Ass'n Letter. Banks are permitted by statutory exception to engage in repurchase and reverse repurchase activities with respect to exempt securities such as government securities. Exchange Act Section 3(a)(5)(C)(i)(II).

312 See Exchange Act Release No. 56502 (Sept. 24, 2007).

repurchase agreements with respect to non-exempt securities; (3) the extent to and manner in which banks currently engage, as agent or principal, in repurchase and reverse repurchase agreements with respect to non-exempt securities; (4) recent developments or trends in the market for repurchase and reverse repurchase agreements with respect to non-exempt securities; (5) any material similarities or differences in the use, structure, customer base, or legal, regulatory, tax or accounting treatment of repurchase and reverse repurchase agreements with respect to non-exempt securities, on the one hand, and repurchase or reverse repurchase agreements with respect to exempt securities or securities lending transactions involving exempt or non-exempt securities. The information we receive through this process should help inform any future actions the Agencies may take in this area.

C. Exemption for Banks Effecting Certain Excepted or Exempted Transactions in Investment Company Securities and Variable Insurance Products

The Agencies are adopting Rule 775 of Regulation R to allow banks to take advantage of certain exceptions and exemptions to the broker definition for transactions involving mutual funds, variable annuity contracts and variable life insurance policies without having to comply with the broker-execution requirement of Exchange Act Section 3(a)(4)(C)(i).[313] The rule as proposed permitted banks to effect transactions in

313 As discussed above, Section 3(a)(4)(C) generally provides that a bank effecting a transaction in any "publicly traded security" in the United States under the trust and fiduciary, stock purchase plan, or custody and safekeeping exception must direct the resulting trade to a broker-dealer for execution unless the trade is a cross trade or similar trade or the trade otherwise is permitted by Commission rule, regulation or order. 15 U.S.C. 78c(a)(4)(C). Rule 760, the exemption for order-taking by banks acting as custodians, also requires banks to comply with Section 3(a)(4)(C). See Rule 760(d)(2).

open-end mutual funds through the National Securities Clearing Corporation ("NSCC") or the fund's transfer agent, rather than through a broker-dealer.

A number of commenters stated, however, that the exemption should be broadened to also encompass variable annuities and variable life insurance, with some commenters noting that only variable annuities and mutual funds are permissible investments for 403(b) plans.[314] Commenters noted that transactions in variable annuity and variable life products typically are effected directly with the relevant insurance company.[315]

In light of these comments, the Agencies have expanded the rule to cover transactions involving variable annuities and variable life insurance policies, as well as transactions involving mutual funds. Applying the exemption to transactions in variable insurance products, as well as to transactions involving mutual funds, will avoid needless disruptions and costs with respect to banks' transactions with customers in which interposing an executing broker-dealer would be inefficient, inconsistent with market practice and unnecessary for investor protection.

Specifically, Rule 775 as modified is available for transactions involving securities issued by an open-end company, as defined by Section 5(a)(1) of the Investment Company Act,[316] that is registered under that Act,[317] as well as variable

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314 See ABA Letter; TIAA-CREF Letter; American Council of Life Insurers Letters of March 26 ("ACLI March 26 Letter") and August 2, 2007, Roundtable Letter, Business Law Section Letter, The Depository Trust & Clearing Corp. ("DTCC") Letter.

315 See ACLI March 26 Letter, DTCC Letter.

316 Rule 775(b)(1). We note that banks may effect transactions in securities that meet the conditions to be an "exempted security" under Exchange Act Section 3(a)(12)(A)(iv) without complying with the exemption provided by Rule 775.

insurance contracts funded by any separate account, as defined by Section 2(a)(37) of the Investment Company Act, that is registered under that Act. To take advantage of the exemption, the security must not be traded on a national securities exchange or traded through the facilities of a national securities association or an interdealer quotation system.[318] In addition, the securities must be distributed by a registered broker-dealer, or the sales charge must be no more than the amount permissible for a security sold by a registered broker-dealer pursuant to any applicable rules of a registered securities association.[319] Finally, the transaction must be effected through the NSCC, or directly with a transfer agent or with an insurance company or a separate account that is excluded from the definition of transfer agent in Section 3(a)(25) of the Exchange Act.[320]

D. Exemption for Certain Transactions involving a Company's Securities for its Employee Benefit Plans and Participants

In response to issues raised by a commenter, the Agencies are adopting an additional exemption (Rule 776) to permit banks that rely on certain exceptions and

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Exchange Act Section 3(a)(4)(B)(iii)(II) permits banks to effect transactions involving "exempted securities" without registering as a broker and without effecting the transaction through a registered broker-dealer.

317 Rule 775(b)(2).

318 Rule 775(a)(1).

319 Rule 775(a)(2). FINRA currently is the only registered securities association. FINRA Rule 2830 limits the sales charges associated with open-end mutual funds. Currently, there are no FINRA rules limiting the sales charges associated with the insurance securities subject to Rule 775. Therefore currently, in all cases, these insurance securities would satisfy the condition under Rule 775(a)(2) that the sales charge be no more than the amount permissible under applicable registered securities association rules.

320 Rule 775(a)(3).

exemptions to effect certain transactions involving the securities of a company for the company's employee benefit plans and participants without complying with the broker-execution requirements of Exchange Act Section 3(a)(4)(C)(i).[321] The commenter stated that banks that act as trustee or custodian for the defined benefit or defined contribution plans of a company at times effect in-kind contributions, purchases and sales, and distribution transactions for the plan involving the securities of the company without the involvement of a broker-dealer. The commenter indicated that these transactions are effected through the company's transfer agent and that no commission is charged in connection with the transaction.[322]

In light of these comments, Rule 776 permits a bank utilizing particular exceptions and exemptions to effect a transaction in the securities of a company to do so directly with a transfer agent acting for the company, subject to four conditions. First, no commission may be charged with respect to the transaction.[323] Second, the transaction must be conducted solely for the benefit of an employee benefit plan.[324] Third, the security must be obtained directly from the company or an employee benefit plan of the

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321 See note 313 supra for a listing of the relevant exceptions and exemptions.

322 See The Northern Trust Company Letter. The commenter further stated that ERISA effectively prohibits a commission from being charged in connection with in-kind contributions by a company of its stock to the company's benefit plans and direct purchases and sales by the company of its stock with the company's plans.

323 Rule 776(a)(1).

324 Rule 776(a)(2). For these purposes, an "employee benefit plan" is defined to mean any pension plan, retirement plan, profit sharing plan, bonus plan, thrift savings plan, incentive plan, or other similar plan. Rule 776(b)

company.[325] And fourth, the security must be transferred only to the company or an employee benefit plan of the company.[326] Securities obtained from, or transferred to, a participant in an employee benefit plan on behalf of the plan are considered to be obtained from, or transferred to, the plan.

We are adopting this rule because we believe that requiring banks to send these types of transactions to a broker-dealer for execution – as would be required to comply with Section 3(a)(4)(C)(i) of the Exchange Act – at times would preclude plans from engaging in these transactions, would disrupt existing practices and otherwise would introduce cost and complexity to those transactions without materially promoting functional regulation and investor protection.[327]

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325 Rule 776(a)(3).

326 Rule 776(d).

327 The commenter also stated that banks acting as trustees and custodians at times directly effect transactions with and for different employee benefit plans involved in a corporate spin-off transaction with respect to company stock of both companies involved in the spin-off transaction. See Northern Trust letter. We understand that the same bank typically is the trustee or custodian for the different plans in such transactions and conducts such transactions through cross-trades within the bank. Accordingly, no additional exemption is required for these transactions.

E. Temporary and Permanent Exemption for Contracts Entered Into by Banks from Being Considered Void or Voidable

The Agencies are adopting as proposed Rule 780, which grants one temporary and one permanent exemption from section 29(b) of the Exchange Act, which addresses inadvertent failures by banks that could trigger rescission of contracts between a bank and a customer.[328] Under the temporary exemption, no contract entered into before 18 months after the effective date of the exemption would be void or considered voidable by reason of Section 29 of the Exchange Act because any bank that is a party to the contract violated the registration requirements of Section 15(a) of the Exchange Act, any other applicable provision of that Act, or the rules and regulations adopted under the Exchange Act based solely on the bank's status as a broker when the contract was created.[329]

Under the permanent exemption, no contract entered into is void or considered voidable by reason of Section 29(b) of the Exchange Act because any bank that is a party to the contract violated the registration requirements of Section 15(a) of the Exchange Act or the rules and regulations adopted thereunder based solely on the bank's status as a broker when the contract was created if two conditions are met. First, at the time the contract was created, the bank must have acted in good faith and had reasonable policies and procedures in place to comply with Section 3(a)(4)(B) of the Exchange Act, and the rules and regulations, thereunder. Second, any violation of the registration requirements by the bank must not have resulted in any significant harm, financial loss or cost to the

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328 15 U.S.C. 78cc(b). Exchange Act Section 29(b) provides, in pertinent part, that every contract made in violation of the Exchange Act or of any rule or regulation adopted under the Exchange Act (with certain exceptions) shall be void.

329 Rule 780(a).

person seeking to void the contract. This exemption is provided because a bank that is acting in good faith and has reasonable policies and procedures in effect at the time a securities contract is created should not be subject to rescission claims as a result of an inadvertent failure to comply with the requirements under Section 3(c)(4) of the Exchange Act if customers are not significantly harmed. One commenter supported the exemptions,[330] and no commenters objected to their adoption.

F. Extension of Time and Transition Period

The Agencies are further extending the time that banks have to come into compliance with the Exchange Act provisions relating to the definition of "broker." Under the final rule, a bank is exempt from the definition of "broker" under Section 3(a)(4) of the Exchange Act until the first day of its first fiscal year commencing after September 30, 2008. This is an additional calendar quarter beyond the date (June 30, 2008) provided in the proposed rule. A bank that has a fiscal year based on the calendar year, for example, must comply with the new exceptions for banks and these rules beginning on January 1, 2009. Some commenters noted that banks and broker-dealers would need sufficient time to make the changes necessary to come into compliance with the statute and these rules.[331] The Agencies believe that the extension granted by the rule, which is a minimum of one year, should provide banks a reasonable period of time to come into compliance with these provisions.

The Administrative Procedure Act ("APA") permits an agency to issue a rule without delaying its effective date for 30 days from the date of publication if, among

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[330] ICBA Letter.

[331] See, e.g., HSBC Securities Letter.

other reasons, the rule is a substantive rule which grants or recognizes an exemption or relieves a restriction, or if the agency finds good cause and publishes its finding with the rule.[332] The Agencies find that this Rule 781 grants or recognizes an exemption or relieves a restriction and also that there is good cause for adopting Rule 781 without a delayed effective date because it is in the public interest that banks not unnecessarily incur costs to comply with the statutory exceptions and related rules before such exceptions and rules would become effective in accordance with Rule 781.[333]

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332 The APA provides that publication of a substantive rule must be made not less than 30 days prior to its effective date, except "(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d).

333 This finding also satisfies the requirements of 5 U.S.C. Section 808(2), which allows a rule to become effective immediately notwithstanding the requirements of 5 U.S.C. Section 801 if an agency "for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

VII. Finding that the Exemptions are Appropriate in the Public Interest and Consistent with the Protection of Investors

Section 36(a)(1) of the Exchange Act generally provides that the Commission may conditionally or unconditionally exempt any person or class of persons from any provision of the Exchange Act to the extent that an exemption is necessary or appropriate in the public interest and consistent with the protection of investors.[334] Taken as a whole, the exemptions will implement the bank broker provisions of the GLBA while providing banks with flexibility to structure their business models under conditions designed to preserve key investor protections, and therefore, as discussed above more fully, are appropriate in the public interest and consistent with the protection of investors.

VIII. Withdrawal of Proposed Regulation B and Removal of Exchange Act Rules 3a4-2 – 3a4-6, and 3b-17

Under the Regulatory Relief Act, a final single set of rules or regulations jointly adopted by the Board and Commission in accordance with that Act shall supersede any other proposed or final rule issued by the Commission on or after the date of enactment of Section 201 of the GLBA with regard to the definition of "broker" under Exchange Act Section 3(a)(4).[335] Moreover, the law states that "[n]o such other rule, whether or not issued in final form, shall have any force or effect on or after that date of enactment."

In 2001, the Commission adopted Interim Rules discussing the way in which the Commission would interpret the GLBA.[336] The rules that address the definition of "broker" under Section 3(a)(4) of the Exchange Act (and applicable exemptions) are

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334 15 U.S.C. 78mm(a)(1).

335 President Clinton signed the GLBA into law on November 12, 1999.

336 Exchange Act Release No. 44291 (May 11, 2001), 66 FR 27760 (May 18, 2001).

Exchange Act Rules 3a4-2 through 3a4-6 and Rule 3b-17.[337] In 2004, the Commission proposed to revise and restructure the "broker" provisions of the Interim Rules and codify them in a new regulation, proposed Regulation B, which would consist of proposed new Exchange Act Rules 710 through 781.[338] By operation of the Regulatory Relief Act, the joint adoption of these final rules by the Board and the Commission supersedes Exchange Act Rules 3a4-2 through 3a4-6, 3b-17, and proposed Rules 710 through 781. Any discussion or interpretation of these prior rules in their accompanying releases does not apply to this single set of rules adopted by the Agencies.

IX. Administrative Law Matters

A. Paperwork Reduction Act Analysis

Certain provisions of Rules 701, 723, and 741, contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[339] The Commission has submitted these information collections to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Board has reviewed the rules under authority delegated by OMB.[340]

The collections of information under Rules 701, 723, and 741 are new. The Commission's title for the new collection of information under Rule 701 is "Rule 701: Exemption from the definition of 'broker' for certain institutional referrals." The Commission's title for the new collection of information under Rule 723 is "Rule 723:

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337 17 CFR 240.3a4-2 through 3a4-6 and 17 CFR 240.3b-17.

338 17 CFR 242.710 through 781. See Exchange Act Release No. 49879 (June 17, 2004), 69 FR 39682 (June 30, 2004).

339 44 U.S.C. 3501, et seq.

340 5 CFR 1320.16; Appendix A.1.

Exemptions for special accounts, foreign branches, transferred accounts, and a de minimis number of accounts." The Commission's title for the new collection of information under Rule 741 is "Rule 741: Exemption for banks effecting transactions in money market funds." The Commission's OMB control number for the three rules is 3235-0624. The Board's title for the new collection of information under Rules 701, 723, and 741 is "Recordkeeping and Disclosure Requirements Associated with Regulation R" (FR 4025). The Board's OMB control number will be 7100-0316. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.[341] We received no comments on the paperwork reduction analysis in the proposal.

1. Rule 701

Rule 701 provides a conditional exemption from the requirements under the networking exception under the Exchange Act. This exemption permits bank employees to receive payment of more than a nominal amount for referring institutional customers and high net worth customers to a broker-dealer and permits such payments to be contingent on whether the customer effects a securities transaction with the broker-dealer.

a. Collection of Information

Rules 701(a)(2)(i), (a)(3)(i) and (b) require banks or their broker-dealer partners that utilize the exemption provided in this rule to make certain disclosures to high net worth or institutional customers. Specifically, these disclosures must clearly and conspicuously disclose (1) the name of the broker-dealer; and (2) that the bank employee participates in an incentive compensation program under which the bank employee may

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[341] 44 U.S.C. 3512.

receive a fee of more than a nominal amount for referring the customer to the broker-dealer and payment of this fee may be contingent on whether the referral results in a transaction with the broker-dealer.[342] These requirements were modified from the proposal to permit timely oral disclosure of this information, followed by written disclosure, to better accommodate the variety of circumstances in which referrals may occur.

In addition, one of the conditions of the exemption is that the broker-dealer and the bank need to have a contractual or other written arrangement containing certain elements, including notification and information requirements.[343] Rule 701(a)(3)(v) requires the written agreement to obligate a broker-dealer to notify its bank partner if the broker-dealer determines that (1) the customer referred under the exemption is not a high net worth or institutional customer, as applicable; or (2) the bank employee making the referral is subject to statutory disqualification (as defined in Section 3(a)(39) of the Exchange Act).[344] In addition, Rule 701(a)(3)(iv) requires the written agreement to obligate the broker-dealer to notify the customer if the securities transaction(s) to be conducted by the customer or the customer do not meet the applicable suitability or sophistication determination standards set forth in the rule.[345] Similarly, the bank is

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342 See Rules 701(a)(2)(i), (a)(3)(i) and (b).

343 See Rule 701(a) and (a)(3).

344 See Rule 701(a)(3)(v). The latter requirement does not apply to subparagraph (E) of Section 3(a)(39) of the Exchange Act ((15 U.S.C. 78c(a)(39)).

345 See Rule 701(a)(3)(iv).

required to provide its broker-dealer partner with the name of the bank employee receiving the referral fee and certain other identifying information.[346]

b. Use of Information

The purpose of the collection of information in Rules 701(a)(2)(i), (a)(3)(i) and (b) is to provide a customer of a bank relying on the exemption with information to assist the customer in identifying and assessing any conflict of interest on the part of the bank employee making a referral to a broker-dealer and for which the bank employee may receive a higher-than-nominal and/or contingent referral fee. The collection of information in Rule 701(a)(2)(iii) and (a)(3)(v) is designed to help a bank determine whether it is acting in compliance with the exemption. The collection of information in Rule 701(a)(3)(iv) is designed to provide the customer with information that may be helpful to the customer in deciding whether to engage in a securities transaction with the broker-dealer.

c. Respondents

The collections of information in Rule 701 will apply to banks that wish to utilize the exemption provided in this rule and broker-dealers with which those banks enter into networking arrangements.

d. Disclosure Burden

The Agencies estimate that approximately 1,000 banks annually will use the exemption in Rule 701 and that each bank, individually or working with its partner broker-dealer, will on average make the required referral fee disclosures to 200 customers annually. In addition, we estimate that each bank will provide one notice annually to its

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346 See Rule 701(a)(2)(iii).

broker-dealer partner regarding names and other identifying information about bank employees. The Agencies also estimate that broker-dealers will, on average, notify each of the 1,000 banks approximately twice a year about a determination regarding a customer's high net worth or institutional status as well as a bank employee's statutory disqualification status. The Agencies further estimate that each broker-dealer will notify three customers of each partner bank per year concerning transaction suitability or the customer's financial sophistication.

Based on these estimates, the Agencies anticipate that Rule 701 will result in approximately 200,000 disclosures to customers, 1,000 notices to broker-dealers about bank employees, 2,000 notices to banks about customer status, and 3,000 notices to customers per year about suitability or sophistication. The Agencies further estimate (based on the level of difficulty and complexity of the applicable activities) that a bank or broker-dealer will spend approximately 5 minutes per customer to comply with the disclosure requirement, and that a bank will spend approximately 15 minutes per notice to a broker-dealer. The Agencies also estimate that a broker-dealer will spend approximately 15 minutes per notice to a bank or customer. Thus, the estimated total annual disclosure burden for these requirements in Rule 701 are approximately 8,583 hours for banks and approximately 9,583 hours for broker-dealers.[347]

e. Collection of Information Is Mandatory

This collection of information is mandatory for banks relying on Rule 701 and their broker-dealer partners.

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347 Because banks and broker-dealers will share the disclosure obligation under the final rule, these estimates attribute 50 percent of that disclosure burden to banks and 50 percent to broker-dealers.

f. Confidentiality

A bank relying on the exemption provided in Rule 701 or its partner broker-dealer is required to provide certain referral fee disclosures to the customers referred by the bank under this rule. Banks relying on the exemption provided in Rule 701 are required also to enter into agreements with a broker-dealer obligating the broker-dealer to notify the bank upon becoming aware of certain information with respect to the customer or the bank employee, and to notify the customer upon becoming aware of certain information concerning the customer or the nature of a securities transaction.[348] Similarly, a bank is required to notify a broker-dealer about the name of the bank employee receiving a referral fee and certain other identifying information.

g. Record Retention Period

Rule 701 does not include a specific record retention requirement. Banks, however, are required to retain the records in compliance with any existing or future recordkeeping or disclosure requirements established by the Banking Agencies. Broker-dealers are also required to retain records in compliance with existing or future recordkeeping or disclosure requirements established by the Commission or any self-regulatory organization.

2. Rule 723

a. Collection of Information

Rule 723(e)(1) requires a bank that desires to exclude a trust or fiduciary account in determining its compliance with the chiefly compensated test, pursuant to a de minimis

348 These requirements are discussed in more detail in section 1.d (Rule 701, Disclosure Burden), supra.

exclusion,[349] to maintain records demonstrating that the securities transactions conducted by or on behalf of the account were undertaken by the bank in the exercise of its trust or fiduciary responsibilities with respect to the account.[350]

b. Use of Information

The collection of information in Rule 723 is designed to help ensure that a bank relying on the de minimis exclusion is able to demonstrate that it was acting in a trust or fiduciary capacity with respect to an account excluded from the chiefly compensated test in Rule 721(a)(1).

c. Respondents

The collection of information in Rule 723 will apply to banks relying on the de minimis exclusion from the chiefly compensated test.

d. Recordkeeping Burden

Because the Agencies expect a small number of banks may use the account-by-account approach in monitoring their compliance with the chiefly compensated test, the Agencies estimate that approximately 50 banks annually will use the de minimis exclusion in Rule 723 and each such bank will, on average, need to maintain records with respect to 10 trust or fiduciary accounts annually conducted in the exercise of the banks' trust or fiduciary responsibilities. Therefore, the Agencies estimate that Rule 723 will result in approximately 500 accounts annually for which records are required to be

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349 See Rule 723(e)(2), which requires that the total number of accounts excluded by the bank, under the exclusion from the chiefly compensated test in Rule 721(a)(1), do not exceed the lesser of 1 percent of the total number of trust or fiduciary accounts held by the bank (if the number so obtained is less than 1, the amount will be rounded up to 1) or 500.

350 See Rule 723(e)(1).

maintained. The Agencies anticipate that these records will consist of records that are generally created as part of the securities transaction and the account relationship and minimal additional time will be required in maintaining these records. Based on this analysis, the Agencies estimate that a bank will spend approximately 15 minutes per account to comply with the record maintenance requirement of Rule 723. Thus, the estimated total annual recordkeeping burden for Rule 723 is 125 hours.

e. Collection of Information Is Mandatory

This collection of information is mandatory for banks desiring to rely on de minimis exclusion contained in Rule 723.

f. Confidentiality

Rule 723 does not address or restrict the confidentiality of the documentation prepared by banks under the rule. Accordingly, banks will have to make the information available to regulatory authorities or other persons to the extent otherwise provided by law.

g. Record Retention Period

Rule 723 will include a requirement to maintain records related to certain securities transactions. Banks will be required to retain these records in compliance with any existing or future recordkeeping requirements established by the Banking Agencies.

3. Rule 741

a. Collection of Information

Rule 741(a)(2)(ii)(A) requires a bank relying on this exemption (i.e., the exemption from the definition of the term "broker" under Section 3(a)(4) of the Exchange Act for effecting transactions on behalf of a customer in securities issued by a money market fund) to provide customers with a prospectus of the money market fund securities, not later than the time the customer authorizes the bank to effect the transaction in such securities, if they are not no-load. In situations where a bank effects transactions under the exemption as part of a program for the investment or reinvestment of deposits funds of, or collected by, another bank, the rule permits either the effecting bank or deposit-taking bank to provide the customer a prospectus for the money market fund securities.

b. Use of Information

The purpose of the collection of information in Rule 741 is to help ensure that a customer of a bank whose funds or deposits are invested into a money market fund that is not a no-load fund under the exemption will have sufficient information upon which to make an informed investment decision, in particular, regarding the fees the customer will pay with respect to the securities.

c. Respondents

The collection of information in Rule 741 applies to banks that directly or indirectly rely on the exemption provided in the rule in the manner described above.

d. Disclosure Burden

The Agencies believe that banks generally sweep or invest their customer funds into no-load money market funds. Accordingly, the Agencies estimate that approximately 500 banks annually will use the exemption in Rule 741 and each bank (or its partner bank), on average, will deliver the prospectus required by the rule to approximately 1,000 customers annually. Therefore, the Agencies estimate that Rule 741 will result in approximately 500,000 disclosures per year. The Agencies estimate further that a bank will spend approximately 5 minutes per response to comply with the delivery requirement of Rule 741. Thus, the estimated total annual disclosure burden for Rule 741 is 41,667 hours.

e. Collection of Information Is Mandatory

This collection of information is mandatory for banks relying on the exemption.

f. Confidentiality

The collection of information delivered pursuant to Rule 741 must be provided by banks relying on the exemption in this rule (or in the case of programs involving deposits of another bank, the other bank) to customers that are engaging in transactions in securities issued by a money market fund that is not a no-load fund.

g. Record Retention Period

Rule 741 does not include a record retention requirement.

B. Consideration of Benefits and Costs

1. Introduction

Prior to enactment of the GLBA, banks were exempted from the definition of "broker" in Section 3(a)(4) of the Exchange Act. Therefore, notwithstanding the fact that banks may have conducted activities that will have brought them within the scope of the broker definition, they were not required by the Exchange Act to register as such. The GLBA replaced banks' historic exemption from the definition of "broker" with eleven exceptions.[351]

While banks' efforts to comply with the GLBA and the exemptions will result in certain costs, the Agencies have sought to minimize these burdens to the extent possible consistent with the language and purposes of the GLBA. For example, the Agencies are

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351 See Exchange Act Section 3(a)(4)(B)(i) – (xi).

adopting exemptions and interpretations that are expected to provide banks with increased options and flexibility and help to reduce overall costs. Some commenters noted that the rules as proposed will give banks flexibility in structuring their operations, and one bank trade association stated that small banks will be able to comply with the proposed rules without significantly altering their activities.[352] Two commenters stated that the Agencies had underestimated the costs associated with coming into compliance with Regulation R and also provided estimates of ongoing compliance costs.[353]

2. Discussion of Rule Interpretations and Exemptions

The benefits and costs of the principal exemptions and interpretations in the rules are discussed below.

a. Networking Exception

Exchange Act Section 3(a)(4)(B)(i) excepts banks from the definition of "broker" if they enter into a contractual or other written arrangement with a registered broker-dealer under which the broker-dealer offers brokerage services to bank customers. This networking exception is subject to several conditions. The Section also prohibits banks from paying unregistered bank employees – such as tellers, loan officers, and private bankers – "incentive compensation" for any brokerage transaction, except that bank employees may receive a "nominal" referral fee for referring bank customers to their broker-dealer networking partners.[354]

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352 See Citigroup Letter, ACB Letter, ICBA Letter.

353 See Fiserv Letter, Colorado Trust Letter.

354 Exchange Act Section 3(a)(4)(B)(i)(VI) limits such referral fees to a "nominal one-time cash fee of a fixed dollar amount" and requires that the payment of the fees not be contingent on whether the referral results in a transaction.

Under the rule, a "nominal" referral fee is defined as a fee that does not exceed any of the following standards: (1) twice the average of the minimum and maximum hourly wage established by the bank for the current or prior year for the job family that includes the employee or 1/1000th of the average of the minimum and maximum annual base salary established by the bank for the current or prior year for the job family that includes the employee; (2) twice the employee's actual base hourly wage or 1/1000th of the employee's actual annual base salary; or (3) twenty-five dollars ($25), as adjusted for inflation pursuant to Rule 700(f).

The Agencies believe these alternatives likely will provide banks appropriate flexibility while being consistent with the statute. For example, some banks, and particularly small banks, may find it most useful to establish a flat fee or inflation-adjusted fee for securities referrals as this method is easy to understand and requires no complicated calculations. In addition, permitting banks to pay referral fees based on either an employee's base hourly or annual rate of pay or the average hourly or annual rate of pay for a job family gives banks objective and easily calculable approaches to paying their employees referrals while remaining consistent with the requirements of the GLBA that such fees be "nominal" in relation to the overall compensation of the referring employees. While some start-up costs may be incurred by banks in the process of developing a fee structure in line with the requirements of the GLBA, the ability to choose among alternative methods (as reflected in the rules) is expected to enable banks to minimize their overall costs based on their individual referral programs and cost structures. Several commenters supported these alternatives, or stated that the rules implementing the networking exception as a whole struck an appropriate balance.[355]

In light of the statutory provision allowing banks to pay a "nominal one-time cash fee," the rule requires that all referral fees paid under the exception be paid in cash. At the same time, the Agencies have clarified that banks have the flexibility to use cash-equivalent points, paid no less often than quarterly, in paying nominal referral fees under the exception.

Rule 700(b) also contains a definition of "incentive compensation" and excludes from this definition compensation paid by a bank under a bonus or similar plan that meets certain criteria. The bonus or similar program must be paid on a discretionary basis and based on multiple factors or variables. These factors or variables must include multiple, significant factors or variables that are not related to securities transactions at the broker-dealer. Moreover, a referral made by the employee may not be a factor or variable in determining the employee's compensation under the plan and the employee's compensation under the plan may not be determined by reference to referrals made by any other person. Rule 700(b) also provides a conditional safe harbor from the definition of "incentive compensation" for certain bonus or similar plans that are based on any measure of the overall profitability of a bank; an affiliate of a bank (other than a broker-dealer); an operating unit of a bank or of an affiliate of a bank (other than a broker-dealer); or a broker-dealer (if the bonus plan meets certain criteria designed to ensure, among other things, that the plan includes other factors or variables). The final definition

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355 See ABA Letter, Roundtable Letter, ACB Letter.

has been revised from the proposal to give banks more flexibility in using their existing bonus plans within the framework required by the GLBA.

The rules also include a conditional exemption to permit a bank to pay an employee a contingent referral fee of more than a nominal amount for referring an institutional customer or high net worth customer to a broker-dealer with which the bank has a contractual or other written networking arrangement. This exemption provides a benefit to banks by expanding the types of referral fees that banks may utilize with respect to institutional customers and high net worth customers. A number of commenters supported granting an exemption for such referrals.[356] There likely will be costs associated with complying with the conditions in the exemption (such as the requirement for banks to make certain disclosures to high net worth or institutional customers and the requirement for broker-dealers to make certain determinations and provide certain notifications to banks or a customer)[357] as well as the other terms and conditions in the statutory networking exception. These costs, however, will be either a result of the statutory requirements or costs voluntarily incurred by banks because they want to take advantage of the exemption.

b. Trust and Fiduciary Activities Exception

Exchange Act Section 3(a)(4)(B)(ii) permits a bank, under certain conditions, to effect transactions in a trustee or fiduciary capacity in its trust department or other department that is regularly examined by bank examiners for compliance with fiduciary principles and standards without registering as a broker. To qualify for the trust and

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356 See State Street Letter, SIMFA Letter, U.S. Trust Letter, BISA Letter.

357 Rule 701(a)(2)(i), (a)(3)(iii)-(v), and 701(b).

fiduciary activities exception, Exchange Act Section 3(a)(4)(B)(ii) requires that the bank be "chiefly compensated" for such transactions on the basis of the types of fees specified in the GLBA and comply with certain advertising restrictions set forth in the statute.

The Agencies believe that the rules dealing with the trust and fiduciary activities exception will provide a number of benefits to banks and their customers without imposing significant costs on either group.[358] The provisions regarding the "chiefly compensated" condition and related exemptions, while imposing some costs related to systems necessary to perform the calculations and track compensation, are expected to reduce banks' compliance costs and make the trust and fiduciary activities exception more useful. For example, the rules permit a bank to follow an alternate test to the account-by-account approach to the "chiefly compensated" condition. Under this exemption, a bank may calculate the compensation it receives from its trust and fiduciary business as a whole on a bank-wide basis, subject to certain conditions.[359] This alternative is designed to provide banks with a potentially less costly approach for determining compliance with the trust and fiduciary activities exception. Some commenters noted that this alternative approach was workable.[360] Similarly, the Agencies' exemptions from the "chiefly compensated" condition for certain short-term accounts, accounts acquired as part of a business combination or asset acquisition, accounts held at a non-shell foreign branch, accounts transferred to a broker-dealer or other unaffiliated entity, and a de minimis number of accounts are expected also to

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358 The trust and fiduciary exception is addressed in Rules 721-723.

359 See Rule 722.

360 See e.g., ABA Letter, WBA Letter, U.S. Trust Letter, PNC Letter.

reduce banks' compliance costs by facilitating banks' ability to comply with the "chiefly compensated" condition.[361] While compliance with the conditions in these exemptions likely will result in some costs, such as the recordkeeping requirement associated with the de minimis exclusion, these costs are likely more than justified by the benefits associated with the exemptions given that banks could individually determine whether they wish to utilize the exemptions.

As previously noted, banks are likely to incur some costs to comply with the GLBA. The rules, however, include a number of exemptions which are intended to help to reduce overall costs. As a result, the Agencies do not believe that banks will incur significant additional costs to comply with the liberalized exemptions of Rules 722 through 723 or the definitional guidance of Rule 721.

c. Sweep Accounts and Transactions in Money Market Funds

Section 3(a)(4)(B)(v) of the Exchange Act provides a bank with an exception from the definition of "broker" to the extent it effects transactions as part of a program for the investment or re-investment of deposit funds for a customer or on behalf of another bank into any no-load, open-end management investment company registered under the Investment Company Act that holds itself out as a money market fund. The rules provide guidance, consistent with FINRA rules,[362] regarding the definition of "no-load" as used in the exception. This guidance likely will benefit banks by clarifying the types of charges that are permissible and by providing greater legal certainty.

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361 See Rule 723.

362 See FINRA Rule 2830.

The rules also contain an exemption that permits banks to effect transactions on behalf of a customer, or for the deposit funds of another bank, in securities issued by a money market fund, subject to certain conditions.[363] While compliance with the conditions associated with this exemption, such as the prospectus delivery requirement in certain circumstances, may require banks to incur some costs, these costs are likely to be more than justified by the investor protection benefits enjoyed by the banks' customers and the enhanced flexibility granted banks by the exemption. Furthermore, because banks are free to determine whether to incur these costs, the exemption is expected to provide a net benefit for banks that wish to utilize the exemption.

d. Safekeeping and Custody Exception

Section 3(a)(4)(B)(viii) of the Exchange Act provides banks with an exception from the definition of "broker" for certain bank custody and safekeeping activities. The rules contain an exemption that permits a bank, subject to certain conditions, to accept orders to effect transactions in securities for accounts for which the bank acts as a custodian (including an account for which a bank acts as directed trustee), or, in some cases, for which the bank acts as a subcustodian or a non-fiduciary administrator or recordkeeper. Specifically, this custody exemption (Rule 760) allows banks, subject to certain conditions, to accept orders for securities transactions from employee benefit plan accounts and individual retirement and similar accounts for which the bank acts as a custodian. In addition, the exemption allows banks, subject to certain conditions, to accept orders for securities transactions on an accommodation basis from other types of custodial accounts. This exemption allows banks to accept orders from custody accounts

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[363] See Rule 741.

while imposing conditions designed to prevent a bank from operating a brokerage business out of its custody department.

The exemption is designed to benefit banks by permitting certain order-taking activities for securities transactions. While banks may incur some costs in complying with the conditions contained in the exemption, such as developing systems for making determinations regarding compliance with advertising and compensation restrictions, the Agencies believe the conditions contained in the rules are consistent with the practices of banks and any costs will only be imposed on banks that choose to utilize the exemption.

e. Other Rules

The Agencies are also adopting certain special purpose exemptions. Specifically, we are adopting an exemption that permits banks to effect transactions in Regulation S securities with non-U.S. persons or registered broker-dealers.[364] Another exemption also allows, under certain conditions, a bank to effect transactions in investment company securities and variable life insurance and variable annuities through the National Securities Clearing Corporation or directly with a transfer agent or insurance company or separate account that is excluded from the definition of transfer agent, instead of through a broker-dealer.[365] In addition, an exemption permits banks that rely on certain exceptions and exemptions to effect certain transactions involving the securities of a company for the company's employee benefit plans and participants through the National Securities Clearing Corporation or directly with a transfer agent or insurance company or separate account that is excluded from the definition of transfer agent, instead of through

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364 See Rule 771.

365 See Rule 775.

a broker-dealer. An additional exemption permits a bank, as agent, to effect securities lending transactions (and engage in related securities lending services) for securities that they do not hold in custody with or on behalf of a person the bank reasonably believes is a qualified investor (as defined in Section 3(a)(54)(A) of the Exchange Act) or any employee benefit plan that owns and invests on a discretionary basis at least $25 million in investments.[366] We also are extending the exemption from rescission liability under Exchange Act Section 29 to contracts entered into by banks acting in a broker capacity until a date that is 18 months after the effective date of the final rule.[367] This exemption also provides, under certain circumstances, protections from rescission liability under Exchange Act Section 29 resulting solely from a bank's status as a broker, if the bank has acted in good faith, adopted reasonable policies and procedures, and any violation of broker registration requirements did not result in significant harm or financial loss to the person seeking to void the contract.[368] Finally, we are issuing a temporary general exemption from the definition of "broker" under Section 3(a)(4) of the Exchange Act until the first day of a bank's first fiscal year commencing after September 30, 2008.[369]

The Agencies believe these provisions offer a number of benefits to banks and their customers. In particular, the Regulation S exemption helps ensure that U.S. banks that effect transactions in Regulation S securities with non-U.S. customers will be more competitive with foreign banks or other entities that offer those services without being

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366 See Rule 772.

367 See Rule 780.

368 Id.

369 See Rule 781.

registered as broker-dealers. The exemption from rescission liability under Exchange Act Section 29 also provides banks some legal certainty, both temporarily and on a permanent basis, as they conduct their securities activities. The exemption related to securities lending services enables banks to engage in the types of services in which they currently engage thereby minimizing compliance costs, while providing the banks' customers with continuity of service. The temporary general exemption from the definition of "broker" also benefits banks by providing them with an adequate period of time to transition to the requirements under the statute and the rules.

The Agencies estimate that the costs of these exemptions will be minimal and are justified by the benefits the exemptions offer. For example, the Regulation S exemption may impose certain costs on banks that are designed to ensure that they remain in compliance with the conditions under the exemption. In particular, the exemption permits banks to rely on the exemption only for transactions in "eligible securities" and with either broker-dealers or purchasers who are not U.S. persons within the meaning of Section 903 of Regulation S. Banks may incur certain administrative costs to ensure that a transaction meets these requirements. Nevertheless, the exemption is an accommodation to banks that wish to effect transactions in Regulation S securities and, as a result, the compliance costs will be imposed only on those banks that believe that it is in their best business interests to take advantage of the exemption.

Given that Exchange Act Section 29 is rarely used as a remedy, we do not anticipate that this exemption will impose significant costs on the industry or on investors.

3. General Costs and Benefits

Based on the burden hours discussed in the Paperwork Reduction Act Analysis section, supra, the Agencies expect the ongoing requirements of the rules to result in a total of 50,375 annual burden hours for banks and 9583 annual burden hours for broker-dealers, for a grand total of 59,958 annual burden hours.[370] The Agencies estimate that the hourly costs for these burden hours will be approximately $68 per hour.[371] Therefore, the annual total costs will be approximately $4,077,144.

In addition to the costs associated with burden hours discussed in the Paperwork Reduction Act Analysis section, supra, the Agencies expect that many banks also could incur start-up costs for legal and other professional services.[372] Many banks will utilize their in-house counsel, accountants, compliance officers, and programmers in an effort to achieve compliance with the rules. Industry sources indicate the following hourly labor costs: attorneys - $324 per hour, intermediate accountants - $162 per hour, compliance manager - $205 per hour, and senior programmer - $268.[373] Taking an average of these

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370 See infra at VIII.A.1.d., VIII.A.2.d., and VIII.A.3.d.

371 $68/hour figure for a clerk (e.g. compliance clerk) is from the Securities Industry Association (now SIFMA) Report on Office Salaries in the Securities Industry 2005, modified to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

372 For example, banks may incur start-up costs in the process of reviewing or developing their networking arrangements in line with the requirements of the rules. See supra at VIII.B.2.a. In addition, there likely will be costs for developing systems for making determinations regarding compliance with advertising and compensation restrictions pursuant to the rules regarding safekeeping and custody. See supra at VIII.B.2.d.

373 The hourly figures for an attorney, intermediate account, and compliance manager is from the SIA Report on Management & Professional Earnings in the Securities Industry 2005, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

professional costs, the Agencies estimate a general hourly in-house labor cost of $240 per hour for professional services.

Based on our expectation that most start-up costs will involve bringing systems into compliance and that many banks will be able to do so either using existing systems or by slightly modifying existing systems, the Agencies estimate that the rules will require banks to utilize an average of 30 hours of professional services. The Agencies expect that most banks affected by the rules will either use in-house counsel or employees resulting in an average total cost of $7,200 per affected bank.[374] The Agencies estimate that the rules will apply to approximately 9,475 banks and approximately 25 percent of these banks will incur more than a de minimis cost. Using these values, the Agencies estimate total start-up costs of $17,055,000 (9,475 X .25 X $7,200). As previously discussed, the Agencies have sought to minimize these costs to the extent possible consistent with the language and purposes of the GLBA.

Two commenters stated that the Agencies' estimates of hourly rates in the proposal were fair, but that the estimates of the time requirements were too low. These commenters estimated startup costs of between $43,000 and $55,000.[375] In addition, these commenters estimated ongoing costs to be between $60,000 and $95,000 per year. Based on these commenters' estimates, startup costs would range from $101.9 million (9475 banks x 0.25 affected x $43,000) to $130.3 million (9475 x 0.25 x $55,000), and a

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374 Some banks may choose to utilize outside counsel, either exclusively or as a supplement to in-house resources. The Agencies estimate these costs as being similar to the in-house costs (Industry sources indicate the following hourly costs for hiring external workers: Attorneys - $400, accountant - $250, auditor - $250, and programmer - $160.).

375 See Fiserv Letter, Colorado Trust Letter.

range of annual ongoing costs of $142.1 million (9475 x 0.25 x $60,000) to $225 million (9475 x 0.25 x $95,000). The Agencies, however, believe that these cost estimates are not representative of the costs for the majority of banks affected by Regulation R. The Agencies received approximately 60 comments, primarily from banks and banking industry groups, and the comments generally were favorable. Only these two commenters stated that the Agencies had underestimated start-up and continuing compliance costs. The Agencies therefore believe that the estimates in the proposal reflect the costs that the majority of the banks affected by the rules are likely, on average, to incur, and are appropriately used to estimate the overall compliance costs of Regulation R.

The Agencies believe that the rules will provide greater legal certainty for banks in connection with their determination of whether they meet the terms and conditions for an exception to the definition of broker under the Exchange Act as well as provide additional relief through the exemptions. Without the rules, banks may have difficulty planning their businesses and determining whether their operations are in compliance with the GLBA. This, in turn, could hamper their business. The Agencies anticipate these benefits will be useful to banks in a number of ways.

The Agencies expect that one component of the benefits to banks will be savings in legal fees, given that difficulties in interpreting the GBLA absent any regulatory guidance could result in the need for greater input from outside counsel. Based on the number of interpretive issues raised by the GBLA, the Agencies estimate that, absent any regulatory guidance, banks on average will use the services of outside counsel for approximately 25 more hours for the initial year and 5 more hours per year thereafter, than with the existence of the rules. Industry sources indicate that the hourly costs for hiring outside counsel are approximately $400 per hour. The rules will therefore result in an average total cost savings of approximately $10,000 per affected bank per year during the initial year and $2,000 per affected bank per year thereafter. The Agencies estimate that the rules will apply to approximately 9,475 banks and approximately 25 percent of these banks will enjoy more than a de minimis cost savings benefit. Using these values, the Agencies estimate a cost savings related to reduced legal fees of $23,687,500 (9,475 X 0.25 X $10,000) for the initial year and $4,737,500 (9,475 X 0.25 X $2,000) per year thereafter.

The Agencies believe that the benefits of Regulation R justify the costs.

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

Exchange Act Section 3(f) requires the Commission, whenever it engages in rulemaking and is required to consider or determine if an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation.[376] Exchange Act Section 23(a)(2) requires the Commission, in adopting rules under that Act, to consider the impact that any such rule will have on competition. This Section also prohibits the Commission from adopting any rule that will impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[377]

The Agencies have designed the interpretations, definitions, and exemptions to minimize any burden on competition. Indeed, the Agencies believe that by providing

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376 15 U.S.C. 78c(f).

377 15 U.S.C. 78w(a)(2).

legal certainty to banks that conduct securities activities, by clarifying the GLBA requirements, and by exempting a number of activities from those requirements, the rules allow banks to continue to conduct securities activities consistent with the GLBA.

The rules define terms in the statutory exceptions to the definition of broker added to the Exchange Act by Congress in the GLBA, and provide guidance to banks as to the appropriate scope of those exceptions. In addition, the rules contain a number of exemptions that provide banks flexibility in conducting their securities activities, which will promote competition and reduce costs.

D. Final Regulatory Flexibility Analysis

The Agencies have prepared a Final Regulatory Flexibility Analysis ("FRFA"), in accordance with the provisions of the Regulatory Flexibility Act ("RFA"),[378] regarding the rules.

1. Reasons for the Action

Section 201 of the GLBA amended the definition of "broker" in Section 3(a)(4) of the Exchange Act to replace a blanket exemption from that term for "banks," as defined in Section 3(a)(6) of the Exchange Act. Congress replaced this blanket exemption with eleven specific exceptions for securities activities conducted by banks.[379] On October 13, 2006, President Bush signed into law the Regulatory Relief Act.[380] Section 101 of that Act, among other things, requires the Agencies jointly to issue a single set of rules

[378] 5 U.S.C. 604.

[379] 15 U.S.C. 78c(a)(4).

[380] Pub. L. No. 109-351, 120 Stat. 1966 (2006).

implementing the bank broker exceptions in Section 3(a)(4) of the Exchange Act.[381] These rules are being adopted by the Agencies to fulfill this requirement. The rules are designed generally to provide guidance on the GLBA's bank exceptions from the definition of broker in Exchange Act Section 3(a)(4) and to provide conditional exemptions from the broker definition consistent with the purposes of the Exchange Act and the GLBA.

2. Objectives

The rules provide guidance to the industry with respect to the GLBA requirements. The rules also provide certain conditional exemptions from the broker definition to allow banks to perform certain securities activities. The Supplementary Information section, supra, contains more detailed information on the objectives of the rules.

3. Legal Basis

Pursuant to Section 101 of the Regulatory Relief Act, the Agencies are issuing the rules.

4. Small Entities Subject to the Rule

The rules apply to "banks," which is defined in Section 3(a)(6) of the Exchange Act to include banking institutions organized in the United States, including members of the Federal Reserve System, Federal savings associations, as defined in Section 2(5) of the Home Owners' Loan Act, and other commercial banks, savings associations, and

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381 See Exchange Act Section 3(a)(4)(F), as added by Section 101 of the Regulatory Relief Act. The Regulatory Relief Act also requires that the Board and SEC consult with, and seek the concurrence of, the OCC, FDIC and OTS prior to jointly adopting final rules. As noted above, the Board and the SEC also have consulted extensively with the OCC, FDIC and OTS in developing these joint rules.

nondepository trust companies that are organized under the laws of a state or the United States and subject to supervision and examination by state or federal authorities having supervision over banks and savings associations.[382] Congress did not exempt small entity banks from the application of the GLBA. Moreover, because the rules are intended to provide guidance to, and exemptions for, all banks that are subject to the GBLA, the Agencies determined that it would not be appropriate or necessary to exempt small entity banks from the operation of the rules. The rules generally apply to all banks, including banks that would be considered small entities (i.e., banks with total assets of $165 million or less) for purposes of the RFA.[383] The Agencies, however, have adopted several interpretations or exceptions that likely will be particularly useful for small banks such as, for example, the fixed inflation-adjusted dollar alternative to the "nominal" requirement in the networking exception and the exception in Rule 723 from the chiefly compensated test for a de minimis number of trust or fiduciary accounts.

The Agencies estimate that the rules will apply to approximately 9,475 banks, approximately 5,816 of which could be considered small banks with assets of $165 million or less. Moreover, we do not anticipate any significant costs to small entity banks as a result of the rules. We note that a trade association whose membership consists primarily of small banking organizations indicated that small banks would be able to comply with the rules as proposed without significantly altering their activities.[384]

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382 See 15 U.S.C. 78c(a)(6); Pub. L. No. 109-351, 120 Stat. 1966 (2006).

383 Small Business Administration regulations define "small entities" to include banks and savings associations with total assets of $165 million or less. 13 CFR 121.201.

384 See ICBA Letter.

5. Reporting, Recordkeeping and Other Compliance Requirements

The rules will not impose any significant reporting, recordkeeping, or other compliance requirements on banks that are small entities.[385]

6. Duplicative, Overlapping, or Conflicting Federal Rules

The Agencies believe that no other rules duplicate, overlap, or conflict with the final rules.

7. Significant Alternatives

Pursuant to Section 3(a) of the RFA,[386] the Agencies must consider the following types of alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rules, or any part thereof, for small entities.

As discussed above, the GLBA does not exempt small entity banks from the Exchange Act broker registration requirements and because the rules are intended to provide guidance to, and exemptions for, all banks that are subject to the GLBA and are designed to accommodate the business practices of all banks (including small entity banks), the Agencies determined that it would not be appropriate or necessary to exempt small entity banks from the operation of the rules. Moreover, providing one or more

[385] The Agencies' estimates related to recordkeeping and disclosure are detailed in the "Paperwork Reduction Act Analysis" Section of this Release.

[386] 5 U.S.C. 604(a).

special exemptions for small banks could place broker-dealers, including small broker-dealers, or larger banks at a competitive disadvantage versus small banks.

The rules are intended to clarify and simplify compliance with the GLBA by providing guidance with respect to exceptions and by providing additional exemptions. As such, the rules are expected to facilitate compliance by banks of all sizes, including small entity banks.

The Agencies do not believe that it is necessary to consider whether small entity banks should be permitted to use performance rather than design standards to comply with the rules because the rules already use performance standards. Moreover, the rules do not dictate for entities of any size any particular design standards (e.g., technology) that must be employed to achieve the objectives of the rules.

E. Plain Language

Section 722 of the GLBA (12 U.S.C. 4809) requires the Board to use plain language in all proposed and final rules published by the Board after January 1, 2000. The Board believes the rules, to the maximum extent possible, are presented in a simple and straightforward manner.

X. Statutory Authority

Pursuant to authority set forth in the Exchange Act and particularly Sections 3(a)(4), 3(b), 15, 17, 23(a), and 36 thereof (15 U.S.C. 78c(a)(4), 78c(b), 78o, 78q, 78w(a), and 78mm, respectively) the Commission is repealing by operation of statute current Rules 3a4-2, 3a4-3, 3a4-4, 3a4-5, 3a4-6, and 3b-17 (§§ 240.3a4-2, 240.3a4-3, 240.3a4-4, 240.3a4-5, 240.3a4-6, and 240.3b-17, respectively). The Commission is repealing Exchange Act Rules 15a-7 and 15a-8 (§ 240.15a-7 and §240.15a-8, respectively). The Commission, jointly with the Board of Governors of the Federal Reserve System, is also adopting new Rules 700, 701, 721, 722, 723, 740, 741, 760, 771, 772, 775, 776, 780, and 781 under the Exchange Act (§§ 247.700, 247.701, 247.721, 247.722, 247.723, 247.740, 247.741, 247.760, 247.771, 247.772, 247.775, 247.776, 247.780, and 247.881, respectively).

XI. Text of Rules and Rule Amendment

List of Subjects

12 CFR Part 218

Banks, Brokers, Securities.

17 CFR Part 240

Broker-dealers, Reporting and recordkeeping requirements, Securities.

17 CFR Part 247

Banks, Brokers, Securities.

Federal Reserve System

Authority and Issuance

For the reasons set forth in the preamble, the Board amends Title 12, Chapter II of the Code of Federal Regulations by adding a new Part 218 as set forth under Common Rules at the end of this document:

PART 218— EXCEPTIONS FOR BANKS FROM THE DEFINITION OF BROKER IN THE SECURITIES EXCHANGE ACT OF 1934 (REGULATION R)

Sec.

Authority: 15 U.S.C. 78c(a)(4)(F).

Securities and Exchange Commission

Authority and Issuance

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

PART 240 — GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

2. Sections 240.3a4-2 through 240.3a4-6, 240.3b-17, 240.15a-7, and 240.15a-8 are removed and reserved.

3. Part 247 is added as set forth under Common Rules at the end of this document:

PART 247— REGULATION R – EXEMPTIONS AND DEFINITIONS RELATED TO THE EXCEPTIONS FOR BANKS FROM THE DEFINITION OF BROKER

Sec.

247.741	Exemption for banks effecting transactions in money market funds.
247.760	Exemption from definition of "broker" for banks accepting orders to effect transactions in securities from or on behalf of custody accounts.
247.771	Exemption from the definition of "broker" for banks effecting transactions in securities issued pursuant to Regulation S.
247.772	Exemption from the definition of "broker" for banks engaging in securities lending transactions.
247.775	Exemption from the definition of "broker" for the way banks effect excepted or exempted transactions in investment company securities.
247.776	Exemption from the definition of "broker" for banks effecting certain excepted or exempted transactions in a company's securities for its employee benefit plans.
247.780	Exemption for banks from liability under section 29 of the Securities Exchange Act of 1934.
247.781	Exemption from the definition of "broker" for banks for a limited period of time.

Authority: 15 U.S.C. 78c, 78o, 78q, 78w, and 78mm.

Common Rules

The common rules that are adopted by the Commission as Part 247 of Title 17, Chapter II of the Code of Federal Regulations and by the Board as Part 218 of Title 12, Chapter II of the Code of Federal Regulations follow:

§ ___.100 Definition.

For purposes of this part the following definition shall apply: Act means the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).

§ ___.700 Defined terms relating to the networking exception from the definition of "broker."

When used with respect to the Third Party Brokerage Arrangements ("Networking") Exception from the definition of the term "broker" in section 3(a)(4)(B)(i) of the Act (15 U.S.C. 78c(a)(4)(B)(i)) in the context of transactions with a customer, the following terms shall have the meaning provided:

(a) Contingent on whether the referral results in a transaction means dependent on whether the referral results in a purchase or sale of a security; whether an account is opened with a broker or dealer; whether the referral results in a transaction involving a particular type of security; or whether it results in multiple securities transactions; provided, however, that a referral fee may be contingent on whether a customer:

(1) Contacts or keeps an appointment with a broker or dealer as a result of the referral; or

(2) Meets any objective, base-line qualification criteria established by the bank or broker or dealer for customer referrals, including such criteria as minimum assets, net worth, income, or marginal federal or state income tax rate, or any requirement for citizenship or residency that the broker or dealer, or the bank, may have established generally for referrals for securities brokerage accounts.

(b) (1) Incentive compensation means compensation that is intended to encourage a bank employee to refer customers to a broker or dealer or give a bank employee an interest in the success of a securities transaction at a broker or dealer. The term does not include compensation paid by a bank under a bonus or similar plan that is:

(i) Paid on a discretionary basis; and

(ii) Based on multiple factors or variables and:

(A) Those factors or variables include multiple significant factors or variables that are not related to securities transactions at the broker or dealer;

(B) A referral made by the employee is not a factor or variable in determining the employee's compensation under the plan; and

(C) The employee's compensation under the plan is not determined by reference to referrals made by any other person.

(2) Nothing in this paragraph (b) shall be construed to prevent a bank from compensating an officer, director or employee under a bonus or similar plan on the basis of any measure of the overall profitability or revenue of:

(i) The bank, either on a stand-alone or consolidated basis;

(ii) Any affiliate of the bank (other than a broker or dealer), or any operating unit of the bank or an affiliate (other than a broker or dealer), if the affiliate or operating unit does not over time predominately engage in the business of making referrals to a broker or dealer; or

(iii) A broker or dealer if:

(A) Such measure of overall profitability or revenue is only one of multiple factors or variables used to determine the compensation of the officer, director or employee;

(B) The factors or variables used to determine the compensation of the officer, director or employee include multiple significant factors or variables that are not related to the profitability or revenue of the broker or dealer;

(C) A referral made by the employee is not a factor or variable in determining the employee's compensation under the plan; and

(D) The employee's compensation under the plan is not determined by reference to referrals made by any other person.

(c) Nominal one-time cash fee of a fixed dollar amount means a cash payment for a referral, to a bank employee who was personally involved in referring the customer to the broker or dealer, in an amount that meets any of the following standards:

(1) The payment does not exceed:

(i) Twice the average of the minimum and maximum hourly wage established by the bank for the current or prior year for the job family that includes the employee; or

(ii) 1/1000th of the average of the minimum and maximum annual base salary established by the bank for the current or prior year for the job family that includes the employee; or

(2) The payment does not exceed twice the employee's actual base hourly wage or $1/1000^{th}$ of the employee's actual annual base salary; or

(3) The payment does not exceed twenty-five dollars ($25), as adjusted in accordance with paragraph (f) of this section.

(d) Job family means a group of jobs or positions involving similar responsibilities, or requiring similar skills, education or training, that a bank, or a separate unit, branch or department of a bank, has established and uses in the ordinary course of its business to distinguish among its employees for purposes of hiring, promotion, and compensation.

(e) Referral means the action taken by one or more bank employees to direct a customer of the bank to a broker or dealer for the purchase or sale of securities for the customer's account.

(f) Inflation adjustment - (1) In general. On April 1, 2012, and on the 1st day of each subsequent 5-year period, the dollar amount referred to in paragraph (c)(3) of this section shall be adjusted by:

(i) Dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index thereto), as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2006; and

(ii) Multiplying the dollar amount by the quotient obtained in paragraph (f)(1)(i) of this section.

(2) Rounding. If the adjusted dollar amount determined under paragraph (f)(1) of this section for any period is not a multiple of $1, the amount so determined shall be rounded to the nearest multiple of $1.

§ ____.701 Exemption from the definition of "broker" for certain institutional referrals.

(a) General. A bank that meets the requirements for the exception from the definition of "broker" under section 3(a)(4)(B)(i) of the Act (15 U.S.C. 78c(a)(4)(B)(i)), other than section 3(a)(4)(B)(i)(VI) of the Act (15 U.S.C. 78c(a)(4)(B)(i)(VI)), is exempt from the conditions of section 3(a)(4)(B)(i)(VI) of the Act solely to the extent that a bank employee receives a referral fee for referring a high net worth customer or institutional customer to a broker or dealer with which the bank has a contractual or other written arrangement of the type specified in section 3(a)(4)(B)(i) of the Act, if:

(1) Bank employee.

(i) The bank employee is:

(A) Not registered or approved, or otherwise required to be registered or approved, in accordance with the qualification standards established by the rules of any self-regulatory organization;

(B) Predominantly engaged in banking activities other than making referrals to a broker or dealer; and

(C) Not subject to statutory disqualification, as that term is defined in section 3(a)(39) of the Act (15 U.S.C. 78c(a)(39)), except subparagraph (E) of that section; and

(ii) The high net worth customer or institutional customer is encountered by the bank employee in the ordinary course of the employee's assigned duties for the bank.

(2) Bank determinations and obligations.

(i) Disclosures. The bank provides the high net worth customer or institutional customer the information set forth in paragraph (b) of this section

(A) In writing prior to or at the time of the referral; or

(B) Orally prior to or at the time of the referral and

(1) The bank provides such information to the customer in writing within 3 business days of the date on which the bank employee refers the customer to the broker or dealer; or

(2) The written agreement between the bank and the broker or dealer provides for the broker or dealer to provide such information to the customer in writing in accordance with paragraph (a)(3)(i) of this section.

(ii) Customer qualification. (A) In the case of a customer that is a not a natural person, the bank has a reasonable basis to believe that the customer is an institutional customer before the referral fee is paid to the bank employee.

(B) In the case of a customer that is a natural person, the bank has a reasonable basis to believe that the customer is a high net worth customer prior to or at the time of the referral.

(iii) Employee qualification information. Before a referral fee is paid to a bank employee under this section, the bank provides the broker or dealer the name of the employee and such other identifying information that may be necessary for the broker or dealer to determine whether the bank employee is registered or approved, or otherwise required to be registered or approved, in accordance with the qualification standards established by the rules of any self-regulatory organization or is subject to statutory disqualification, as that term is defined in section 3(a)(39) of the Act (15 U.S.C. 78c(a)(39)), except subparagraph (E) of that section.

(iv) Good faith compliance and corrections. A bank that acts in good faith and that has reasonable policies and procedures in place to comply with the requirements of this section shall not be considered a "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) solely because the bank fails to comply with the provisions of this paragraph (a)(2) with respect to a particular customer if the bank:

(A) Takes reasonable and prompt steps to remedy the error (such as, for example, by promptly making the required determination or promptly providing the broker or dealer the required information); and

(B) Makes reasonable efforts to reclaim the portion of the referral fee paid to the bank employee for the referral that does not, following any required remedial action, meet the requirements of this section and that exceeds the amount otherwise permitted under section 3(a)(4)(B)(i)(VI) of the Act (15 U.S.C. 78c(a)(4)(B)(i)(VI)) and § ___.700.

(3) Provisions of written agreement. The written agreement between the bank and the broker or dealer shall require that:

(i) Broker-dealer written disclosures. If, pursuant to paragraph (a)(2)(i)(B)(2) of this section, the broker or dealer is to provide the customer in writing the disclosures set forth in paragraph (b) of this section, the broker or dealer provides such information to the customer in writing:

(A) Prior to or at the time the customer begins the process of opening an account at the broker or dealer, if the customer does not have an account with the broker or dealer; or

(B) Prior to the time the customer places an order for a securities transaction with the broker or dealer as a result of the referral, if the customer already has an account at the broker or dealer.

(ii) Customer and employee qualifications. Before the referral fee is paid to the bank employee:

(A) The broker or dealer determine that the bank employee is not subject to statutory disqualification, as that term is defined in section 3(a)(39) of the Act (15 U.S.C. 78c(a)(39)), except subparagraph (E) of that section; and

(B) The broker or dealer has a reasonable basis to believe that the customer is a high net worth customer or an institutional customer.

(iii) Suitability or sophistication determination by broker or dealer.

(A) Contingent referral fees. In any case in which payment of the referral fee is contingent on completion of a securities transaction at the broker or dealer, the broker or dealer, before such securities transaction is conducted, perform a suitability analysis of the securities transaction in accordance with the rules of the broker or dealer's applicable self-regulatory organization as if the broker or dealer had recommended the securities transaction.

(B) Non-contingent referral fees. In any case in which payment of the referral fee is not contingent on the completion of a securities transaction at the broker or dealer, the broker or dealer, before the referral fee is paid, either:

(1) Determine that the customer:

(i) Has the capability to evaluate investment risk and make independent decisions; and

(ii) Is exercising independent judgment based on the customer's own independent assessment of the opportunities and risks presented by a potential investment, market factors and other investment considerations; or

(2) Perform a suitability analysis of all securities transactions requested by the customer contemporaneously with the referral in accordance with the rules of the broker

or dealer's applicable self-regulatory organization as if the broker or dealer had recommended the securities transaction.

(iv) Notice to the customer. The broker or dealer inform the customer if the broker or dealer determines that the customer or the securities transaction(s) to be conducted by the customer does not meet the applicable standard set forth in paragraph (a)(3)(iii) of this section.

(v) Notice to the bank. The broker or dealer promptly inform the bank if the broker or dealer determines that:

(A) The customer is not a high net worth customer or institutional customer, as applicable; or

(B) The bank employee is subject to statutory disqualification, as that term is defined in section 3(a)(39) of the Act (15 U.S.C. 78c(a)(39)), except subparagraph (E) of that section.

(b) Required disclosures. The disclosures provided to the high net worth customer or institutional customer pursuant to paragraphs (a)(2)(i) or (a)(3)(i) of this section shall clearly and conspicuously disclose

(1) The name of the broker or dealer; and

(2) That the bank employee participates in an incentive compensation program under which the bank employee may receive a fee of more than a nominal amount for referring the customer to the broker or dealer and payment of this fee may be contingent on whether the referral results in a transaction with the broker or dealer.

(c) Receipt of other compensation. Nothing in this section prevents or prohibits a bank from paying or a bank employee from receiving any type of compensation that would not be considered incentive compensation under § ___.700(b)(1) or that is described in § ___.700(b)(2).

(d) Definitions. When used in this section:

(1) High net worth customer.

(i) General. High net worth customer means:

(A) Any natural person who, either individually or jointly with his or her spouse, has at least $5 million in net worth excluding the primary residence and associated liabilities of the person and, if applicable, his or her spouse; and

(B) Any revocable, inter vivos or living trust the settlor of which is a natural person who, either individually or jointly with his or her spouse, meets the net worth standard set forth in paragraph (d)(1)(i)(A) of this section.

(ii) Individual and spousal assets. In determining whether any person is a high net worth customer, there may be included in the assets of such person

(A) Any assets held individually;

(B) If the person is acting jointly with his or her spouse, any assets of the person's spouse (whether or not such assets are held jointly); and

(C) If the person is not acting jointly with his or her spouse, fifty percent of any assets held jointly with such person's spouse and any assets in which such person shares with such person's spouse a community property or similar shared ownership interest.

(2) Institutional customer means any corporation, partnership, limited liability company, trust or other non-natural person that has, or is controlled by a non-natural person that has, at least:

(i) $10 million in investments; or

(ii) $20 million in revenues; or

(iii) $15 million in revenues if the bank employee refers the customer to the broker or dealer for investment banking services.

(3) <u>Investment banking services</u> includes, without limitation, acting as an underwriter in an offering for an issuer; acting as a financial adviser in a merger, acquisition, tender-offer or similar transaction; providing venture capital, equity lines of credit, private investment-private equity transactions or similar investments; serving as placement agent for an issuer; and engaging in similar activities.

(4) <u>Referral fee</u> means a fee (paid in one or more installments) for the referral of a customer to a broker or dealer that is:

(i) A predetermined dollar amount, or a dollar amount determined in accordance with a predetermined formula (such as a fixed percentage of the dollar amount of total assets placed in an account with the broker or dealer), that does not vary based on:

(A) The revenue generated by or the profitability of securities transactions conducted by the customer with the broker or dealer; or

(B) The quantity, price, or identity of securities transactions conducted over time by the customer with the broker or dealer; or

(C) The number of customer referrals made; or

(ii) A dollar amount based on a fixed percentage of the revenues received by the broker or dealer for investment banking services provided to the customer.

(e) <u>Inflation adjustments</u>.

(1) In general. On April 1, 2012, and on the 1st day of each subsequent 5-year period, each dollar amount in paragraphs (d)(1) and (d)(2) of this section shall be adjusted by:

(i) Dividing the annual value of the Personal Consumption Expenditures Chain-Type Price Index (or any successor index thereto), as published by the Department of Commerce, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2006; and

(ii) Multiplying the dollar amount by the quotient obtained in paragraph (e)(1)(i) of this section.

(2) Rounding. If the adjusted dollar amount determined under paragraph (e)(1) of this section for any period is not a multiple of $100,000, the amount so determined shall be rounded to the nearest multiple of $100,000.

§ ___.721 Defined terms relating to the trust and fiduciary activities exception from the definition of "broker."

(a) Defined terms for chiefly compensated test. For purposes of this part and section 3(a)(4)(B)(ii) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)), the following terms shall have the meaning provided:

(1) Chiefly compensated—account-by-account test. Chiefly compensated shall mean the relationship-total compensation percentage for each trust or fiduciary account of the bank is greater than 50 percent.

(2) The relationship-total compensation percentage for a trust or fiduciary account shall be the mean of the yearly compensation percentage for the account for the

immediately preceding year and the yearly compensation percentage for the account for the year immediately preceding that year.

(3) The yearly compensation percentage for a trust or fiduciary account shall be

(i) Equal to the relationship compensation attributable to the trust or fiduciary account during the year divided by the total compensation attributable to the trust or fiduciary account during that year, with the quotient expressed as a percentage; and

(ii) Calculated within 60 days of the end of the year.

(4) Relationship compensation means any compensation a bank receives attributable to a trust or fiduciary account that consists of:

(i) An administration fee, including, without limitation, a fee paid—

(A) For personal services, tax preparation, or real estate settlement services;

(B) For disbursing funds from, or for recording receipt of payments to, a trust or fiduciary account;

(C) In connection with securities lending or borrowing transactions;

(D) For custody services; or

(E) In connection with an investment in shares of an investment company for personal service, the maintenance of shareholder accounts or any service described in paragraph (a)(4)(iii)(C) of this section;

(ii) An annual fee (payable on a monthly, quarterly or other basis), including, without limitation, a fee paid for assessing investment performance or for reviewing compliance with applicable investment guidelines or restrictions;

(iii) A fee based on a percentage of assets under management, including, without limitation, a fee paid

(A) Pursuant to a plan under § 270.12b-1;

(B) In connection with an investment in shares of an investment company for personal service or the maintenance of shareholder accounts;

(C) Based on a percentage of assets under management for any of the following services—

(I) Providing transfer agent or sub-transfer agent services for beneficial owners of investment company shares;

(II) Aggregating and processing purchase and redemption orders for investment company shares;

(III) Providing beneficial owners with account statements showing their purchases, sales, and positions in the investment company;

(IV) Processing dividend payments for the investment company;

(V) Providing sub-accounting services to the investment company for shares held beneficially;

(VI) Forwarding communications from the investment company to the beneficial owners, including proxies, shareholder reports, dividend and tax notices, and updated prospectuses; or

(VII) Receiving, tabulating, and transmitting proxies executed by beneficial owners of investment company shares;

(D) Based on the financial performance of the assets in an account; or

(E) For the types of services described in paragraph (a)(4)(i)(C) or (D) of this section if paid based on a percentage of assets under management;

(iv) A flat or capped per order processing fee, paid by or on behalf of a customer or beneficiary, that is equal to not more than the cost incurred by the bank in connection with executing securities transactions for trust or fiduciary accounts; or

(v) Any combination of such fees.

(6) Trust or fiduciary account means an account for which the bank acts in a trustee or fiduciary capacity as defined in section 3(a)(4)(D) of the Act (15 U.S.C. 78c(a)(4)(D)).

(7) Year means a calendar year, or fiscal year consistently used by the bank for recordkeeping and reporting purposes.

(b) Revenues derived from transactions conducted under other exceptions or exemptions. For purposes of calculating the yearly compensation percentage for a trust or fiduciary account, a bank may at its election exclude the compensation associated with any securities transaction conducted in accordance with the exceptions in section 3(a)(4)(B)(i) or sections 3(a)(4)(B)(iii) – (xi) of the Act (15 U.S.C. 78c(a)(4)(B)(i) or 78c(a)(4)(B)(iii)-(xi)) and the rules issued thereunder, including any exemption related to such exceptions jointly adopted by the Commission and the Board, provided that if the bank elects to exclude such compensation, the bank must exclude the compensation from both the relationship compensation (if applicable) and total compensation for the account.

(c) Advertising restrictions.

(1) In general. A bank complies with the advertising restriction in section 3(a)(4)(B)(ii)(II) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(II)) if advertisements by or on behalf of the bank do not advertise--

(i) That the bank provides securities brokerage services for trust or fiduciary accounts except as part of advertising the bank's broader trust or fiduciary services; and

(ii) The securities brokerage services provided by the bank to trust or fiduciary accounts more prominently than the other aspects of the trust or fiduciary services provided to such accounts.

(2) Advertisement. For purposes of this section, the term advertisement has the same meaning as in § ___.760(g)(2).

§ ___.722 Exemption allowing banks to calculate trust and fiduciary compensation on a bank-wide basis.

(a) General. A bank is exempt from meeting the "chiefly compensated" condition in section 3(a)(4)(B)(ii)(I) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(I)) to the extent that it effects transactions in securities for any account in a trustee or fiduciary capacity within the scope of section 3(a)(4)(D) of the Act (15 U.S.C. 78c(a)(4)(D)) if:

(1) The bank meets the other conditions for the exception from the definition of the term "broker" under sections 3(a)(4)(B)(ii) and 3(a)(4)(C) of the Act (15 U.S.C. 78c(a)(4)(B)(ii) and 15 U.S.C. 78c(a)(4)(C)), including the advertising restrictions in section 3(a)(4)(B)(ii)(II) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(II) as implemented by § ___.721(c); and

(2) The aggregate relationship-total compensation percentage for the bank's trust and fiduciary business is at least 70 percent.

(b) Aggregate relationship-total compensation percentage. For purposes of this section, the aggregate relationship-total compensation percentage for a bank's trust and fiduciary business shall be the mean of the bank's yearly bank-wide compensation percentage for the immediately preceding year and the bank's yearly bank-wide compensation percentage for the year immediately preceding that year.

(c) Yearly bank-wide compensation percentage. For purposes of this section, a bank's yearly bank-wide compensation percentage for a year shall be

(1) Equal to the relationship compensation attributable to the bank's trust and fiduciary business as a whole during the year divided by the total compensation attributable to the bank's trust and fiduciary business as a whole during that year, with the quotient expressed as a percentage; and

(2) Calculated within 60 days of the end of the year.

(d) Revenues derived from transactions conducted under other exceptions or exemptions. For purposes of calculating the yearly compensation percentage for a trust or fiduciary account, a bank may at its election exclude the compensation associated with any securities transaction conducted in accordance with the exceptions in section 3(a)(4)(B)(i) or sections 3(a)(4)(B)(iii) – (xi) of the Act (15 U.S.C. 78c(a)(4)(B)(i) or 78c(a)(4)(B)(iii)-(xi)) and the rules issued thereunder, including any exemption related to such sections jointly adopted by the Commission and the Board, provided that if the bank elects to exclude such compensation, the bank must exclude the compensation from both the relationship compensation (if applicable) and total compensation of the bank.

§ ___.723 Exemptions for special accounts, transferred accounts, foreign branches and a de minimis number of accounts.

(a) Short-term accounts. A bank may, in determining its compliance with the chiefly compensated test in § ___.721(a)(1) or § ___.722(a)(2), exclude any trust or fiduciary account that had been open for a period of less than 3 months during the relevant year.

(b) Accounts acquired as part of a business combination or asset acquisition. For purposes of determining compliance with the chiefly compensated test in § ___.721(a)(1) or § ___.722(a)(2), any trust or fiduciary account that a bank acquired from another person as part of a merger, consolidation, acquisition, purchase of assets or similar transaction may be excluded by the bank for 12 months after the date the bank acquired the account from the other person.

(c) Non-shell foreign branches.

(1) Exemption. For purposes of determining compliance with the chiefly compensated test in § ___.722(a)(2), a bank may exclude the trust or fiduciary accounts held at a non-shell foreign branch of the bank if the bank has reasonable cause to believe that trust or fiduciary accounts of the foreign branch held by or for the benefit of a U.S. person as defined in 17 CFR 230.902(k) constitute less than 10 percent of the total number of trust or fiduciary accounts of the foreign branch.

(2) Rules of construction. Solely for purposes of this paragraph (c), a bank will be deemed to have reasonable cause to believe that a trust or fiduciary account of a foreign branch of the bank is not held by or for the benefit of a U.S. person if

(i) The principal mailing address maintained and used by the foreign branch for the accountholder(s) and beneficiary(ies) of the account is not in the United States; or

(ii) The records of the foreign branch indicate that the accountholder(s) and beneficiary(ies) of the account is not a U.S. person as defined in 17 CFR 230.902(k).

(3) Non-shell foreign branch. Solely for purposes of this paragraph (c), a non-shell foreign branch of a bank means a branch of the bank

(i) That is located outside the United States and provides banking services to residents of the foreign jurisdiction in which the branch is located; and

(ii) For which the decisions relating to day-to-day operations and business of the branch are made at that branch and are not made by an office of the bank located in the United States.

(d) Accounts transferred to a broker or dealer or other unaffiliated entity. Notwithstanding section 3(a)(4)(B)(ii)(I) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(I)) and § ___.721(a)(1) of this part, a bank operating under § ___.721(a)(1) shall not be considered a broker for purposes of section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) solely because a trust or fiduciary account does not meet the chiefly compensated standard in § ___.721(a)(1) if, within 3 months of the end of the year in which the account fails to meet such standard, the bank transfers the account or the securities held by or on behalf of the account to a broker or dealer registered under section 15 of the Act (15 U.S.C. 78o) or another entity that is not an affiliate of the bank and is not required to be registered as a broker or dealer.

(e) De minimis exclusion. A bank may, in determining its compliance with the chiefly compensated test in § ___.721(a)(1), exclude a trust or fiduciary account if:

(1) The bank maintains records demonstrating that the securities transactions conducted by or on behalf of the account were undertaken by the bank in the exercise of its trust or fiduciary responsibilities with respect to the account;

(2) The total number of accounts excluded by the bank under this paragraph (d) does not exceed the lesser of—

(i) 1 percent of the total number of trust or fiduciary accounts held by the bank, provided that if the number so obtained is less than 1 the amount shall be rounded up to 1; or

(ii) 500; and

(3) The bank did not rely on this paragraph (d) with respect to such account during the immediately preceding year.

§ ___.740 Defined terms relating to the sweep accounts exception from the definition of "broker."

For purposes of section 3(a)(4)(B)(v) of the Act (15 U.S.C. 78c(a)(4)(B)(v)), the following terms shall have the meaning provided:

(a) Deferred sales load has the same meaning as in 17 CFR 270.6c-10.

(b) Money market fund means an open-end company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) that is regulated as a money market fund pursuant to 17 CFR 270.2a-7.

(c)(1) No-load, in the context of an investment company or the securities issued by an investment company, means, for securities of the class or series in which a bank effects transactions, that:

(i) That class or series is not subject to a sales load or a deferred sales load; and

(ii) Total charges against net assets of that class or series of the investment company's securities for sales or sales promotion expenses, for personal service, or for the maintenance of shareholder accounts do not exceed 0.25 of 1% of average net assets annually.

(2) For purposes of this definition, charges for the following will not be considered charges against net assets of a class or series of an investment company's securities for sales or sales promotion expenses, for personal service, or for the maintenance of shareholder accounts:

(i) Providing transfer agent or sub-transfer agent services for beneficial owners of investment company shares;

(ii) Aggregating and processing purchase and redemption orders for investment company shares;

(iii) Providing beneficial owners with account statements showing their purchases, sales, and positions in the investment company;

(iv) Processing dividend payments for the investment company;

(v) Providing sub-accounting services to the investment company for shares held beneficially;

(vi) Forwarding communications from the investment company to the beneficial owners, including proxies, shareholder reports, dividend and tax notices, and updated prospectuses; or

(vii) Receiving, tabulating, and transmitting proxies executed by beneficial owners of investment company shares.

(d) Open-end company has the same meaning as in section 5(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-5(a)(1)).

(e) Sales load has the same meaning as in section 2(a)(35) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(35)).

§ ___.741 Exemption for banks effecting transactions in money market funds.

(a) A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) to the extent that it effects transactions on behalf of a customer in securities issued by a money market fund, provided that:

(1) The bank either

(A) Provides the customer, directly or indirectly, any other product or service, the provision of which would not, in and of itself, require the bank to register as a broker or dealer under section 15(a) of the Act (15 U.S.C. 78o(a)); or

(B) Effects the transactions on behalf of another bank as part of a program for the investment or reinvestment of deposit funds of, or collected by, the other bank; and

(2)(i) The class or series of securities is no-load; or

(ii) If the class or series of securities is not no-load

(A) The bank or, if applicable, the other bank described in paragraph (a)(1)(B) of this section provides the customer, not later than at the time the customer authorizes the securities transactions, a prospectus for the securities; and

(B) The bank and, if applicable, the other bank described in paragraph (a)(1)(B) of this section do not characterize or refer to the class or series of securities as no-load.

(b) Definitions. For purposes of this section:

(1) Money market fund has the same meaning as in § ___.740(b).

(2) No-load has the same meaning as in § ___.740(c).

§ ___.760 Exemption from definition of "broker" for banks accepting orders to effect transactions in securities from or on behalf of custody accounts.

(a) Employee benefit plan accounts and individual retirement accounts or similar accounts. A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) to the extent that, as part of its customary banking activities, the bank accepts orders to effect transactions in securities for an employee benefit plan account or an individual retirement account or similar account for which the bank acts as a custodian if:

(1) Employee compensation restriction and additional conditions. The bank complies with the employee compensation restrictions in paragraph (c) of this section and the other conditions in paragraph (d) of this section;

(2) Advertisements. Advertisements by or on behalf of the bank do not:

(i) Advertise that the bank accepts orders for securities transactions for employee benefit plan accounts or individual retirement accounts or similar accounts, except as part of advertising the other custodial or safekeeping services the bank provides to these accounts; or

(ii) Advertise that such accounts are securities brokerage accounts or that the bank's safekeeping and custody services substitute for a securities brokerage account; and

(3) Advertisements and sales literature for individual retirement or similar accounts. Advertisements and sales literature issued by or on behalf of the bank do not describe the securities order-taking services provided by the bank to individual retirement accounts or similar accounts more prominently than the other aspects of the custody or safekeeping services provided by the bank to these accounts.

(b) Accommodation trades for other custodial accounts. A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) to the extent that, as part of its customary banking activities, the bank accepts orders to effect transactions in securities for an account for which the bank acts as custodian other than an employee benefit plan account or an individual retirement account or similar account if:

(1) Accommodation. The bank accepts orders to effect transactions in securities for the account only as an accommodation to the customer;

(2) Employee compensation restriction and additional conditions. The bank complies with the employee compensation restrictions in paragraph (c) of this section and the other conditions in paragraph (d) of this section;

(3) Bank fees. Any fee charged or received by the bank for effecting a securities transaction for the account does not vary based on:

(i) Whether the bank accepted the order for the transaction; or

(ii) The quantity or price of the securities to be bought or sold;

(4) Advertisements. Advertisements by or on behalf of the bank do not state that the bank accepts orders for securities transactions for the account;

(5) Sales literature. Sales literature issued by or on behalf of the bank:

(i) Does not state that the bank accepts orders for securities transactions for the account except as part of describing the other custodial or safekeeping services the bank provides to the account; and

(ii) Does not describe the securities order-taking services provided to the account more prominently than the other aspects of the custody or safekeeping services provided by the bank to the account; and

(6) Investment advice and recommendations. The bank does not provide investment advice or research concerning securities to the account, make recommendations to the account concerning securities or otherwise solicit securities transactions from the account; provided, however, that nothing in this paragraph (b)(6) shall prevent a bank from:

(i) Publishing, using or disseminating advertisements and sales literature in accordance with paragraphs (b)(4) and (b)(5) of this section; and

(ii) Responding to customer inquiries regarding the bank's safekeeping and custody services by providing:

(A) Advertisements or sales literature consistent with the provisions of paragraphs (b)(4) and (b)(5) of this section describing the safekeeping, custody and related services that the bank offers;

(B) A prospectus prepared by a registered investment company, or sales literature prepared by a registered investment company or by the broker or dealer that is the principal underwriter of the registered investment company pertaining to the registered investment company's products;

(C) Information based on the materials described in paragraphs (b)(6)(ii)(A) and (B) of this section; or

(iii) Responding to inquiries regarding the bank's safekeeping, custody or other services, such as inquiries concerning the customer's account or the availability of sweep or other services, so long as the bank does not provide investment advice or research concerning securities to the account or make a recommendation to the account concerning securities.

(c) Employee compensation restriction. A bank may accept orders pursuant to this section for a securities transaction for an account described in paragraph (a) or (b) of this section only if no bank employee receives compensation, including a fee paid pursuant to a plan under 17 CFR 270.12b-1, from the bank, the executing broker or dealer, or any other person that is based on whether a securities transaction is executed for the account or that is based on the quantity, price, or identity of securities purchased or sold by such account, provided that nothing in this paragraph shall prohibit a bank employee from receiving compensation that would not be considered incentive compensation under §

___.700(b)(1) as if a referral had been made by the bank employee, or any compensation described in § ___.700(b)(2).

(d) Other conditions. A bank may accept orders for a securities transaction for an account for which the bank acts as a custodian under this section only if the bank:

(1) Does not act in a trustee or fiduciary capacity (as defined in section 3(a)(4)(D) of the Act (15 U.S.C. 78c(a)(4)(D)) with respect to the account, other than as a directed trustee;

(2) Complies with section 3(a)(4)(C) of the Act (15 U.S.C. 78c(a)(4)(C)) in handling any order for a securities transaction for the account; and

(3) Complies with section 3(a)(4)(B)(viii)(II) of the Act (15 U.S.C. 78c(a)(4)(B)(viii)(II)) regarding carrying broker activities.

(e) Non-fiduciary administrators and recordkeepers. A bank that acts as a non-fiduciary and non-custodial administrator or recordkeeper for an employee benefit plan account for which another bank acts as custodian may rely on the exemption provided in this section if:

(1) Both the custodian bank and the administrator or recordkeeper bank comply with paragraphs (a), (c) and (d) of this section; and

(2) The administrator or recordkeeper bank does not execute a cross-trade with or for the employee benefit plan account or net orders for securities for the employee benefit plan account, other than:

(i) Crossing or netting orders for shares of open-end investment companies not traded on an exchange, or

(ii) Crossing orders between or netting orders for accounts of the custodian bank that contracted with the administrator or recordkeeper bank for services.

(f) Subcustodians. A bank that acts as a subcustodian for an account for which another bank acts as custodian may rely on the exemptions provided in this section if:

(1) For employee benefit plan accounts and individual retirement accounts or similar accounts, both the custodian bank and the subcustodian bank meet the requirements of paragraphs (a), (c) and (d) of this section;

(2) For other custodial accounts, both the custodian bank and the subcustodian bank meet the requirements of paragraphs (b), (c) and (d) of this section; and

(3) The subcustodian bank does not execute a cross-trade with or for the account or net orders for securities for the account, other than:

(i) Crossing or netting orders for shares of open-end investment companies not traded on an exchange, or

(ii) Crossing orders between or netting orders for accounts of the custodian bank.

(g) Evasions. In considering whether a bank meets the terms of this section, both the form and substance of the relevant account(s), transaction(s) and activities (including advertising activities) of the bank will be considered in order to prevent evasions of the requirements of this section.

(h) Definitions. When used in this section:

(1) Account for which the bank acts as a custodian means an account that is:

(i) An employee benefit plan account for which the bank acts as a custodian;

(ii) An individual retirement account or similar account for which the bank acts as a custodian;

(iii) An account established by a written agreement between the bank and the customer that sets forth the terms that will govern the fees payable to, and rights and obligations of, the bank regarding the safekeeping or custody of securities; or

(iv) An account for which the bank acts as a directed trustee.

(2) Advertisement means any material that is published or used in any electronic or other public media, including any Web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

(3) Directed trustee means a trustee that does not exercise investment discretion with respect to the account.

(4) Employee benefit plan account means a pension plan, retirement plan, profit sharing plan, bonus plan, thrift savings plan, incentive plan, or other similar plan, including, without limitation, an employer-sponsored plan qualified under section 401(a) of the Internal Revenue Code (26 U.S.C. 401(a)), a governmental or other plan described in section 457 of the Internal Revenue Code (26 U.S.C. 457), a tax-deferred plan described in section 403(b) of the Internal Revenue Code (26 U.S.C. 403(b)), a church plan, governmental, multiemployer or other plan described in section 414(d), (e) or (f) of the Internal Revenue Code (26 U.S.C. 414(d), (e) or (f)), an incentive stock option plan described in section 422 of the Internal Revenue Code (26 U.S.C. 422); a Voluntary Employee Beneficiary Association Plan described in section 501(c)(9) of the Internal

Revenue Code (26 U.S.C. 501(c)(9)), a non-qualified deferred compensation plan (including a rabbi or secular trust), a supplemental or mirror plan, and a supplemental unemployment benefit plan.

(5) Individual retirement account or similar account means an individual retirement account as defined in section 408 of the Internal Revenue Code (26 U.S.C. 408), Roth IRA as defined in section 408A of the Internal Revenue Code (26 U.S.C. 408A), health savings account as defined in section 223(d) of the Internal Revenue Code (26 U.S.C. 223(d)), Archer medical savings account as defined in section 220(d) of the Internal Revenue Code (26 U.S.C. 220(d)), Coverdell education savings account as defined in section 530 of the Internal Revenue Code (26 U.S.C. 530), or other similar account.

(6) Sales literature means any written or electronic communication, other than an advertisement, that is generally distributed or made generally available to customers of the bank or the public, including circulars, form letters, brochures, telemarketing scripts, seminar texts, published articles, and press releases concerning the bank's products or services.

(7) Principal underwriter has the same meaning as in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29)).

§ ___.771 Exemption from the definition of "broker" for banks effecting transactions in securities issued pursuant to Regulation S.

(a) A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)), to the extent that, as agent, the bank:

(1) Effects a sale in compliance with the requirements of 17 CFR 230.903 of an eligible security to a purchaser who is not in the United States;

(2) Effects, by or on behalf of a person who is not a U.S. person under 17 CFR 230.902(k), a resale of an eligible security after its initial sale with a reasonable belief that the eligible security was initially sold outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903 to a purchaser who is not in the United States or a registered broker or dealer, provided that if the resale is made prior to the expiration of any applicable distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the resale is made in compliance with the requirements of 17 CFR 230.904; or

(3) Effects, by or on behalf of a registered broker or dealer, a resale of an eligible security after its initial sale with a reasonable belief that the eligible security was initially sold outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903 to a purchaser who is not in the United States, provided that if the resale is made prior to the expiration of any applicable distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the resale is made in compliance with the requirements of 17 CFR 230.904.

(b) <u>Definitions</u>. For purposes of this section:

(1) <u>Distributor</u> has the same meaning as in 17 CFR 230.902(d).

(2) <u>Eligible security</u> means a security that:

(i) Is not being sold from the inventory of the bank or an affiliate of the bank; and

(ii) Is not being underwritten by the bank or an affiliate of the bank on a firm-commitment basis, unless the bank acquired the security from an unaffiliated distributor that did not purchase the security from the bank or an affiliate of the bank.

(3) <u>Purchaser</u> means a person who purchases an eligible security and who is not a U.S. person under 17 CFR 230.902(k).

§ ___.772 Exemption from the definition of "broker" for banks engaging in securities lending transactions.

(a) A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)), to the extent that, as an agent, it engages in or effects securities lending transactions, and any securities lending services in connection with such transactions, with or on behalf of a person the bank reasonably believes to be:

(1) A qualified investor as defined in section 3(a)(54)(A) of the Act (15 U.S.C. 78c(a)(54)(A)); or

(2) Any employee benefit plan that owns and invests on a discretionary basis, not less than $ 25,000,000 in investments.

(b) <u>Securities lending transaction</u> means a transaction in which the owner of a security lends the security temporarily to another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such securities, and has the right to terminate the transaction and to recall the loaned securities on terms agreed by the parties.

(c) Securities lending services means:

(1) Selecting and negotiating with a borrower and executing, or directing the execution of the loan with the borrower;

(2) Receiving, delivering, or directing the receipt or delivery of loaned securities;

(3) Receiving, delivering, or directing the receipt or delivery of collateral;

(4) Providing mark-to-market, corporate action, recordkeeping or other services incidental to the administration of the securities lending transaction;

(5) Investing, or directing the investment of, cash collateral; or

(6) Indemnifying the lender of securities with respect to various matters.

§ ___.775 Exemption from the definition of "broker" for banks effecting certain excepted or exempted transactions in investment company securities.

(a) A bank that meets the conditions for an exception or exemption from the definition of the term "broker" except for the condition in section 3(a)(4)(C)(i) of the Act (15 U.S.C. 78c(a)(4)(C)(i)), is exempt from such condition to the extent that it effects a transaction in a <u>covered security</u>, if:

(1) Any such security is neither traded on a national securities exchange nor through the facilities of a national securities association or an interdealer quotation system;

(2) The security is distributed by a registered broker or dealer, or the sales charge is no more than the amount permissible for a security sold by a registered broker or dealer pursuant to any applicable rules adopted pursuant to section 22(b)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-22(b)(1)) by a securities association registered under section 15A of the Act (15 U.S.C. 78o-3); and

(3) Any such transaction is effected:

(i) Through the National Securities Clearing Corporation; or

(ii) Directly with a transfer agent or with an insurance company or separate account that is excluded from the definition of transfer agent in Section 3(a)(25) of the Act.

(b) Definitions. For purposes of this section:

(1) Covered security means:

(i) Any security issued by an open-end company, as defined by section 5(a)(1) of the Investment Company Act (15 U.S.C. 80a5(a)(1)), that is registered under that Act; and

(ii) Any variable insurance contract funded by a separate account, as defined by section 2(a)(37) of the Investment Company Act (15 U.S.C. 80a-2(a)(37)), that is registered under that Act.

(2) Interdealer quotation system has the same meaning as in 17 CFR 240.15c2-11.

(3) Insurance company has the same meaning as in 15 U.S.C. 77b(a)(13).

§ ___.776 Exemption from the definition of "broker" for banks effecting certain excepted or exempted transactions in a company's securities for its employee benefit plans.

(a) A bank that meets the conditions for an exception or exemption from the definition of the term "broker" except for the condition in section 3(a)(4)(C)(i) of the Act (15 U.S.C. 78c(a)(4)(C)(i)), is exempt from such condition to the extent that it effects a transaction in the securities of a company directly with a transfer agent acting for the company that issued the security, if:

(1) No commission is charged with respect to the transaction;

(2) The transaction is conducted by the bank solely for the benefit of an employee benefit plan account;

(3) Any such security is obtained directly from:

(i) The company; or

(ii) An employee benefit plan of the company; and

(4) Any such security is transferred only to:

(i) The company; or

(ii) An employee benefit plan of the company.

(b) For purposes of this section, the term employee benefit plan account has the same meaning as in § ___.760(h)(4).

§ ___.780 Exemption for banks from liability under section 29 of the Securities Exchange Act of 1934.

(a) No contract entered into before March 31, 2009, shall be void or considered voidable by reason of section 29(b) of the Act (15 U.S.C. 78cc(b)) because any bank that is a party to the contract violated the registration requirements of section 15(a) of the Act (15 U.S.C. 78o(a)), any other applicable provision of the Act, or the rules and regulations thereunder based solely on the bank's status as a broker when the contract was created.

(b) No contract shall be void or considered voidable by reason of section 29(b) of the Act (15 U.S.C. 78cc(b)) because any bank that is a party to the contract violated the registration requirements of section 15(a) of the Act (15 U.S.C. 78o(a)) or the rules and regulations thereunder based solely on the bank's status as a broker when the contract was created, if:

(1) At the time the contract was created, the bank acted in good faith and had reasonable policies and procedures in place to comply with section 3(a)(4)(B) of the Act (15 U.S.C. 78c(a)(4)(B)) and the rules and regulations thereunder; and

(2) At the time the contract was created, any violation of the registration requirements of section 15(a) of the Act by the bank did not result in any significant harm or financial loss or cost to the person seeking to void the contract.

§ ___.781 Exemption from the definition of "broker" for banks for a limited period of time.

A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) until the first day of its first fiscal year commencing after September 30, 2008.

[THIS SIGNATURE PAGE PERTAINS TO THE NOTICE TITLED, "DEFINITIONS OF TERMS AND EXEMPTIONS RELATING TO THE "BROKER" EXCEPTIONS FOR BANKS"]

By order of the Board of Governors of the Federal Reserve System, September 24, 2007.

Jennifer J. Johnson,
Secretary of the Board.

[THIS SIGNATURE PAGE PERTAINS TO THE NOTICE TITLED, "DEFINITIONS OF TERMS AND EXEMPTIONS RELATING TO THE "BROKER" EXCEPTIONS FOR BANKS"]

Dated: September 24, 2007

Nancy M. Morris

By the Securities and Exchange Commission
Nancy M. Morris
Secretary

Commissioner Atkins
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 24, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12822

In the Matter of **AMAROQ ASSET MANAGEMENT, LLC AND DWIGHT ANDREE SEAN ONEAL JONES,** **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**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Amaroq Asset Management, LLC ("Amaroq") and pursuant to Sections 203(f) and 203(k) against Dwight Andree Sean Oneal Jones ("Jones") (collectively, "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. NATURE OF PROCEEDING

1. These proceedings involve the failure of Amaroq, a registered investment adviser catering to athlete clients, to maintain records and make them available for review by the Commission's staff as required by law. Respondent Dwight "Sean" Jones, a former NFL player and the sole principal of Amaroq, repeatedly ignored requests by the Commission's examination staff to produce books and records for examination. When asked to explain his failure to produce any documents whatsoever relating to his advisory business, Jones gave the Commission staff inconsistent stories, contending that Amaroq's records had been destroyed in a fire, were on a moving truck, or had been sold by the storage company where they had been maintained.

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2. Although Jones has represented to the Commission staff that Amaroq discontinued its advisory business in 2004, Amaroq never notified the Commission of its purported discontinuation. To the contrary, Amaroq's most recent Commission filings continue to claim it is managing $44 million in client assets. Amaroq continued to maintain a website until mid-2007 touting its wealth management programs and that it was "subject to periodic SEC examinations."

B. RESPONDENTS

3. Amaroq Asset Management, LLC, a Delaware company formed in 1997 and declared forfeited under Delaware law in April 1999, is registered with the Commission as an investment adviser.

4. Dwight Andree Sean Oneal Jones, 44 years old, is a former professional football player who resides in Missouri City, Texas. Since Amaroq's inception, Jones has been a member of Amaroq and its sole owner. Jones has held Series 3, 7, 24, 63 and 65 securities licenses.

C. FACTS

5. Jones played professional football from 1984 to 1997. After Jones retired from professional football in 1997, he became a sports agent and advised professional football players with respect to their contracts. In 1999, Jones registered Amaroq with the Commission as an investment adviser in order to expand his business by also offering his athlete clients investment advisory services.

6. Amaroq's most recent Form ADV amendment (for the fiscal year ended December 2003) states that it maintains an office in Beverly Hills, California, and claims $44,167,852 in assets under management. Amaroq has not filed annual Form ADV amendments for its fiscal years ended December 2004, 2005 and 2006.

7. Jones represented to the Commission staff that Amaroq stopped providing investment advisory services to clients in 2004, when Jones took an office job with the Oakland Raiders. Amaroq did not file the required Form ADV-W to withdraw from registration, and it did not inform the Commission in writing of the address at which its books and records were to be maintained before it discontinued business as an investment adviser. Although Amaroq has not occupied its Beverly Hills offices for several years, at no point did Amaroq file a Form ADV amendment updating its address.

8. On or about August 29, 2006, upon being contacted by the Commission's examination staff, Jones represented that Amaroq's books and records were being shipped to Friendswood, Texas the very next day, and that Amaroq would be completing a move to Friendswood by September 15, 2006. The Commission's staff informed Jones that Amaroq was required to update its address by filing a Form ADV amendment, but to date Amaroq has not done so.

9. From September to November 2006, the Commission's staff repeatedly attempted to contact Jones. On or about November 29, 2006, the Commission's staff informed Jones that it was conducting an examination of Amaroq. The staff scheduled a meeting with Jones

to take place at the Commission's San Francisco office on December 21, 2006, a date specifically requested by Jones. The staff further sent a request for documents to a fax number provided by Jones.

10. Jones failed to attend the December 21, 2006 meeting and failed to produce records to the Commission staff. Jones also refused to return multiple voicemail messages and written communications sent by the Commission staff.

11. Jones ultimately contacted the Commission's enforcement staff after being informed of the staff's intention to pursue an enforcement action based on Jones' and Amaroq's failure to produce records for examination as required by law. Among other things, Jones contended that Amaroq's records had been destroyed in a 2001 fire and had been sold by the storage company where they had been maintained.

12. To date, Amaroq has not made any records available to the Commission's staff for examination and Jones has told the staff that no records exist.

13. Although Jones represented that Amaroq ceased its advisory business in 2004, throughout the relevant period and until at least August 2007, Amaroq maintained a website purporting to be an investment adviser registered with the Securities and Exchange Commission and "subject to periodic SEC examinations." The website touts Amaroq's private wealth management programs. Moreover, Jones informed the Commission staff of his intention to reenter the investment advisory business.

14. At all relevant times, Respondents made use of the mails or means or instrumentalities of interstate commerce in connection with the conduct described above.

D. VIOLATIONS

15. As a result of the conduct described above, Amaroq willfully violated Section 204 of the Advisers Act, which requires investment advisers that make use of the mails or of any means or instrumentalities of interstate commerce in connection with their business as investment advisers to make, keep, furnish and disseminate reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors, and provides that all records of such advisers are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission. As a result of the conduct described above, Amaroq also willfully violated Advisers Act Rules 204-1 and 204-2(f). Rule 204-1 requires investment advisers to amend their Forms ADV at least annually, within 90 days of the end of their fiscal year, or more frequently, if required by the instructions to Form ADV. Rule 204-2(f) requires investment advisers registered with the Commission, before ceasing to conduct or discontinuing business as an investment adviser, to arrange for and be responsible for the preservation of their books and records required to be maintained and preserved under Rule 204-2 for the remainder of the period specified in Rule 204-2, and to notify the Commission in writing of the exact address where such books and records will be maintained during such period.

16. As a result of the conduct described above, Jones willfully aided and abetted and caused Amaroq's violations of Section 204 of the Advisers Act and Rules 204-1 and 204-2(f) thereunder by failing to allow examination of Amaroq's books and records; failing, before Amaroq discontinued its advisory business, to arrange for the preservation of Amaroq's books and records and to inform the Commission in writing of the exact address where such books and records would be maintained; failing to file annual Form ADV amendments for Amaroq for its fiscal years ended December 2004, 2005 and 2006; and failing to file a Form ADV amendment updating Amaroq's address.

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 Amaroq pursuant to Section 203(e) of the Advisers Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act;

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

D. Whether, pursuant to Section 203(k) of the Advisers Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Section 204 of the Advisers Act and Rules 204-1 and 204-2(f) thereunder.

IV.

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

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

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

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

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

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

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

T.C.I.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 24, 2007

In the Matter of **Evolution Global Capital Partners, Inc.** **File No. 500-1**	**CORRECTED** **ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that the market for the securities of Evolution Global Capital Partners, Inc. ("Evolution," trading symbol EGCA), may be reacting to manipulative forces or deceptive practices and that there is insufficient current public information about the issuer upon which an informed investment decision may be made, particularly concerning (1) the identity of and prior securities fraud judgments against persons who appear to be involved in the offer and sale, or in connection with the purchase or sale, of Evolution shares; (2) the financial performance and business prospects of Evolution; and (3) offerings to foreign investors and any restrictions on the resale of shares.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period of 9:30 a.m. EDT, September 24, 2007 through 11:59 p.m. EDT, on October 5, 2007.

By the Commission.

Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 24, 2007

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

It appears to the Securities and Exchange Commission that the market for securities of Biomaxx Systems, Inc. ("Biomaxx," trading symbol BMXSF), may be reacting to manipulative forces or deceptive practices and that there is insufficient current public information about the issuer upon which an informed investment decision may be made, particularly concerning (1) the identity of and prior securities fraud judgments against persons who appear to be involved in the offer and sale, or in connection with the purchase or sale, of Biomaxx shares; (2) the financial performance and business prospects of Biomaxx; and (3) offerings to foreign investors and any restrictions on the resale of shares.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period of 9:30 a.m. EDT, September 24, 2007 through 11:59 p.m. EDT, on October 5, 2007.

By the Commission.

Nancy M. Morris
Secretary

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Final

Commissioner Atkins Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 24, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12821

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

Respondent

1. **Solv-Ex Corporation** ("Solv-Ex") is a New Mexico corporation located in Albuquerque, New Mexico, with a class of equity securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. As of August 15, 2007, the company's common stock (symbol "SVXC") was traded on the inter-dealer market.

2. In July 1998, the Commission filed an injunctive action in federal district court against Solv-Ex. On May 16, 2000, the court found that the company violated, among other federal securities law provisions, Section 13(a) of the Exchange Act and Rules 13a-1, and 13a-13 thereunder, and enjoined the company from further violations of these provisions.

Delinquent Filings

3. Section 13(a) of the Exchange Act and the rules promulgated thereunder require domestic issuers with classes of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in periodic reports. Specifically,

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Rule 13a-1 requires domestic issuers to file annual reports (Forms 10-K or 10-KSB), and Rule 13a-13 requires issuers to file quarterly reports (Forms 10-Q or 10-QSB).

4. Solv-Ex filed its last Form 10-K, for the year ended June 30, 1996, on September 30, 1996. Since then, Solv-Ex has filed only five Forms 10-Q (for the quarters ended September 30, 1996, December 31, 1996, March 31, 1997, December 31, 1998 and March 31, 1999) and no Forms 10-K. On November 3, 2000, Solv-Ex filed a press release, as Exhibit 99 to Form 8-K, in which it admitted it was delinquent in its filings and claimed that it lacked the personnel and financial resources to comply with filing requirements.

5. As a result of the foregoing, Solv-Ex has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months or revoke the registration of each class of securities of the Respondent registered pursuant to Section 12 of the Exchange Act.

IV.

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

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

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

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

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision not later than 120 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice [17 C.F.R. § 201.360(a)(2)].

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

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Commissioner Atkins
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56518 / September 25, 2007

INVESTMENT COMPANY ACT OF 1940
Release No. 27980 / September 25, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12824

In the Matter of **RYAN D. GOLDBERG and MICHAEL H. GRADY,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTIONS 9(b) AND 9(f) 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 Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Ryan D. Goldberg ("Goldberg") and Michael H. Grady ("Grady") (collectively, the "Respondents").

II.

In anticipation of the institution of these proceedings, each Respondent has submitted an Offer 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, each 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 Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("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 unlawful late trading of mutual fund shares by Goldberg and Grady, former registered representatives and officers of Brean Murray & Co., Inc. ("Brean Murray"), a registered broker-dealer, and principals of an investment adviser formerly registered with the state of New York ("Investment Adviser"). Between August 2001 and September 2003, Goldberg and Grady engaged in a late trading scheme on behalf of certain market timing customers, including the hedge fund Canary Capital Partners, LLC ("Canary"), and at least four other hedge funds.[2]

2. Goldberg and Grady, through Brean Murray and the Investment Adviser, negotiated market timing capacity with at least 20 mutual fund complexes, and then accepted and executed more than 4,100 trades in dozens of mutual funds after 4:00 p.m. ET, the time as of which those funds calculated their Net Asset Value ("NAV").[3] The Respondents accepted and placed nearly all of these trades after 4:30 p.m., and the overwhelming majority after 5:00 p.m., using Bear Stearns Securities Corp. ("Bear Stearns"), the clearing broker for Brean Murray and the Investment Adviser. Each of these trades improperly received the current day's NAV rather than the next trading day's NAV as required by law. In exchange for their assistance in placing late trades and negotiating timing capacity, Goldberg and Grady each received more than $2.1 million in fees. As a result of their conduct, Goldberg and Grady violated and/or aided and abetted and caused violations of the antifraud and mutual fund pricing provisions of the federal securities laws.

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

2 "Market timing" includes: (i) frequent buying and selling of shares of the same mutual fund or (ii) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing can harm other mutual fund shareholders because it can dilute the value of their shares. Market timing, while not illegal per se, can also disrupt the management of the mutual fund's investment portfolio and cause the targeted mutual fund to incur considerable extra costs associated with excessive trading and, as a result, cause damage to other shareholders in the funds.

3 Unless otherwise noted, all times refer to Eastern Time (ET).

Respondents

3. Ryan D. Goldberg, age 31, resides in New York City. At all times relevant to the conduct at issue, Goldberg was a registered representative and Executive Vice President of Brean Murray, and held Series 7 and 63 licenses with the National Association of Securities Dealers ("NASD"). He was a principal and 50 percent owner of the Investment Adviser.

4. Michael H. Grady, age 30, resides in New York City. At all times relevant to the conduct at issue, Grady was a registered representative and Executive Vice President of Brean Murray, and held Series 7 and 63 licenses with the NASD. He was a principal and 50 percent owner of the Investment Adviser.

Other Relevant Entity

5. Brean Murray & Co., Inc., located in New York City, was at all times relevant to the conduct at issue registered with the Commission as a broker-dealer. Brean Murray cleared its trades through Bear Stearns on a fully disclosed basis. Brean Murray did not have dealer agreements with the mutual funds.[4]

Background – Late Trading

6. Rule 22c-1(a) under the Investment Company Act (the "forward pricing rule") requires any registered investment company issuing redeemable securities ("fund"), its principal underwriter and dealers in the fund's shares, and any person designated in the fund's prospectus as authorized to consummate transactions in securities issued by the fund to sell and redeem fund shares at a price based on the current NAV next computed after receipt of an order to buy or redeem. Mutual funds generally determine the NAV of mutual fund shares as of 4:00 p.m. ET. In these circumstances, orders received by the entities identified in Rule 22c-1 before 4:00 p.m. must be executed at the price determined as of 4:00 p.m. that day. Orders received by these entities after 4:00 p.m. must be executed at the price determined as of 4:00 p.m. the next trading day. Mutual fund prospectuses typically identify the time as of which the NAV is determined for purposes of pricing fund shares for purchases and redemptions.

7. "Late trading" is the practice of placing orders to buy, redeem, or exchange mutual fund shares after the time as of which a mutual fund has calculated its NAV (usually as of the close of trading at 4:00 p.m. ET), but receiving the price based on the prior NAV already determined as of 4:00 p.m. Late trading enables the trader improperly to profit from market events that occur after 4:00 p.m., such as earnings announcements and futures trading, that are not reflected in that

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[4] In December 2005, Brean Murray merged with another entity to form Brean Murray, Carret & Co., LLC, a registered broker-dealer. On February 17, 2005, the Commission instituted settled administrative and cease-and-desist proceedings against Brean Murray for aiding and abetting violations of Rule 22c-1 under the Investment Company Act. See *In the Matter of Brean Murray & Co., Inc.,* Exchange Act Rel. No. 51219 (Feb. 17, 2005).

day's price. Late trading violates Rule 22c-1(a) under the Investment Company Act, defrauds innocent shareholders in those mutual funds by giving to the late trader an advantage not available to other shareholders, and harms shareholders by diluting the value of their shares.

8. Bear Stearns had dealer agreements with the mutual funds whose shares were traded late by the customers and clients of Goldberg and Grady. These agreements generally required Bear Stearns to sell and redeem mutual fund shares only in accordance with the terms and conditions of the current fund prospectus. Most if not all of the mutual funds required trades to be placed prior to 4:00 p.m. in order to receive that day's NAV. By executing orders placed after 4:00 p.m. at that day's NAV, Bear Stearns violated Rule 22c-1(a).[5]

Respondents' Late Trading

9. In July 2001, Goldberg and Grady joined Brean Murray after leaving another broker-dealer.[6] While associated with their previous employer, Goldberg and Grady facilitated market timing transactions for a Bermuda-based hedge fund ("Hedge Fund A"). Goldberg and Grady were hired by Brean Murray specifically to bring their market timing business to Brean Murray. Brean Murray appointed Goldberg and Grady co-heads of its newly formed Mutual Fund Market Timing Group ("Timing Group") and gave each the title of Executive Vice President.

10. Their primary business activity at Brean Murray was to facilitate market timing on behalf of hedge fund customers by negotiating timing capacity, or the ability to market time, directly with mutual fund complexes. Goldberg and Grady approached high-level officers of mutual fund complexes and obtained their permission to time certain funds under agreed upon conditions. They eventually negotiated more than $1.8 billion in market timing capacity with more than 20 mutual fund families. The great majority of the late trading engaged in by Goldberg and Grady took place in the shares of mutual funds with which they had negotiated timing capacity.

11. On or about July 10, 2001, almost immediately upon joining Brean Murray, Goldberg, Grady, and other representatives of Brean Murray met with representatives of Canary's investment adviser, whose principal was Edward Stern, to discuss establishing a brokerage relationship for the purpose of market timing mutual funds. Following the meeting, Canary opened several Bear Stearns accounts through Brean Murray. By the end of August 2001, Canary had deposited approximately $160 million into these accounts.

12. Before trading in these accounts began in August 2001, Canary requested from Brean Murray the ability to place its mutual fund orders after 4:00 p.m. Goldberg, Grady and

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[5] On March 16, 2006, the Commission instituted settled administrative and cease-and-desist proceedings against Bear Stearns. Among other things, the Commission found that Bear Stearns violated Rule 22c-1 under the Investment Company Act for allowing Brean Murray to submit late trades. See *In the Matter of Bear Stearns & Co., Inc., et al.*, Securities Act Rel. No. 8668 (March 16, 2006).

[6] Goldberg and Grady maintained their securities licenses with Brean Murray until November 2003. They have not been associated with Brean Murray or any other broker-dealer since that time.

others at Brean Murray were told by employees of Bear Stearns that Brean Murray could accept orders from Canary after 4:00 p.m., and as late as 5:45 p.m., for entry into Bear Stearns' electronic mutual fund order entry platform, the Mutual Fund Routing System ("MFRS"), for processing at that day's NAV. Brean Murray had Internet-based access to the MFRS and, as part of their duties, Goldberg and Grady had access to the MFRS from their computers.

13. In August 2001, Goldberg and Grady began entering mutual fund orders directly into the MFRS for Canary. Canary called in virtually all of its mutual fund trades to Goldberg and Grady after 4:00 p.m., and they then executed these trades so that Canary received that day's NAV. Most of Canary's orders were placed with Goldberg and Grady later than 5:00 p.m., and sometimes as late as 5:45 p.m. Between August 2001 and March 2003, when Canary transferred its account to the Investment Adviser, Goldberg and Grady, through Brean Murray, executed approximately 916 late trades for Canary.

14. Goldberg and Grady used Brean Murray's late trading capability as a marketing tool. For example, after developing the Canary relationship, Goldberg and Grady made a pitch for Hedge Fund A's business, using late trading as a selling point. In October 2001, Goldberg, Grady and other Brean Murray representatives met with representatives of Hedge Fund A in Bermuda. They made a marketing presentation which, among other things, highlighted Brean Murray's relationship with Bear Stearns and the ability to place mutual fund orders until 5:30 p.m. at that day's NAV. Hedge Fund A had not previously asked Goldberg or Grady for the ability to late trade.

15. In late November 2001, Hedge Fund A began placing late trades with Goldberg and Grady and developed its own market timing strategy specifically for its Brean Murray trading, which took into account post-4:00 p.m. information. Between November 2001 and March 2003, Goldberg and Grady, through Brean Murray, executed approximately 918 late trades for Hedge Fund A.

16. Goldberg and Grady also entered into market timing and late trading arrangements with two other hedge funds ("Hedge Fund B" and "Hedge Fund C"). Goldberg and Grady offered these hedge funds the ability to trade until 5:30 p.m. as a valuable service that Brean Murray could provide. As with Hedge Fund A, neither Hedge Fund B nor Hedge Fund C had asked Goldberg or Grady for the ability to late trade.

17. Goldberg and Grady began entering mutual fund orders into Bear Stearns' platform on behalf of Hedge Fund B in January 2002 and Hedge Fund C in March 2002. Between January 2002 and March 2003, when Hedge Fund B transferred its account to the Investment Adviser, Goldberg and Grady, through Brean Murray, executed approximately 1,108 late trades for Hedge Fund B. While at Brean Murray, Goldberg and Grady executed approximately 619 late trades for Hedge Fund C.

18. While at Brean Murray, Goldberg and Grady also engaged in late trading on behalf of Hedge Fund D, a hedge fund that they founded and managed, executing 22 late trades between June 2002 and November 2002.

19. Goldberg and Grady received fees pursuant to what were described as "wrap fee" agreements with both Brean Murray and, subsequently, the Investment Adviser. The fee was a percentage of the fair market value of the accounts for which Goldberg and Grady had negotiated market timing capacity.

20. While at Brean Murray, Goldberg and Grady executed 3,420 late trades and each received $1,081,963 in fees.

21. After leaving Brean Murray in April 2003, Goldberg and Grady continued to engage in late trading for their hedge fund clients through their Investment Adviser. In doing so, they executed trades through the MFRS system exactly as they had at Brean Murray, i.e., they accepted orders from their clients after 4:00 p.m., and placed them so as to receive that day's NAV.

22. They executed late trades as they had before on behalf of Canary, Hedge Fund A and Hedge Fund B. Goldberg and Grady continued to execute trades for Hedge Fund C, even though its account remained at Brean Murray.

23. Through the Investment Adviser, Goldberg and Grady developed additional market timing clients, largely investment advisers to hedge funds. Between April 2003 and September 2003, Goldberg and Grady executed a total of 740 late trades for new and existing clients.

24. The Investment Adviser charged its clients "wrap fees," similar to those at Brean Murray, which Goldberg and Grady split evenly. While at the Investment Adviser, Goldberg and Grady received fees of approximately $1,034,742 each.

25. During the course of the late trading scheme, Goldberg and Grady executed a total of 4,160 late trades and each received fees of $2,116,705.

26. As a result of the conduct described above, Goldberg and Grady each 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 securities.

27. As a result of the conduct described above, Goldberg and Grady each willfully aided and abetted and caused Bear Stearns' violations of Rule 22c-1(a) under the Investment Company Act, which provides that "[no] registered investment company issuing any redeemable security, no person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in any such security shall sell, redeem or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security."

Disgorgement and Civil Penalties

28. Respondent Goldberg has submitted a sworn Statement of Financial Condition dated February 28, 2007 and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest or a civil penalty.

29. Respondent Grady has submitted a sworn Statement of Financial Condition dated February 28, 2007 and other evidence and has asserted his inability to pay the entire amount of disgorgement plus prejudgment interest or a civil penalty.

IV.

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

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

A. Respondent Goldberg 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, and Rule 22c-1 under the Investment Company Act.

B. Respondent Grady 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, and Rule 22c-1 under the Investment Company Act.

C. Respondent Goldberg be, and hereby is barred from association with any broker or dealer, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, with a right to reapply for association after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

D. Respondent Grady be, and hereby is barred from association with any broker or dealer, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, with a right to reapply for association after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

E. Any reapplication for association by Respondent Goldberg or Respondent Grady 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 Respondent Goldberg or Respondent Grady, 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.

F. Respondent Goldberg shall pay disgorgement of $2,116,705, plus prejudgment interest in the amount of $473,282, but that payment of such amount is waived and the Commission is not imposing a penalty against Respondent Goldberg based upon Respondent Goldberg's sworn representations in his Statement of Financial Condition dated February 28, 2007 and other documents submitted to the Commission.

G. Respondent Grady shall pay disgorgement of $2,116,705, plus prejudgment interest in the amount of $473,282, but that payment of all but $25,000 of the disgorgement is waived and the Commission is not imposing a penalty against Respondent Grady based upon Respondent Grady's sworn representations in his Statement of Financial Condition dated February 28, 2007 and other documents submitted to the Commission. Respondent Grady shall pay disgorgement in the amount of $25,000 pursuant to the payment plan outlined below.

H. Respondent Grady shall pay $25,000 in four installments of $6,250 over a twelve month period to the United States Treasury. Grady's first payment of $6,250 shall be due 90 days after the date of entry of this Order and the remaining three payments of $6,250 each shall be paid no later than 180, 270 and 360 days after the date of entry of this Order. Such payments shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Respondent Grady as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Securities and Exchange Commission, Philadelphia Regional Office, Mellon Independence Center, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

I. Respondent Grady agrees that if the full amount of any payment described above is not made by the date the payment is required by this Order, all outstanding payments, plus any interest accrued pursuant to SEC Rule of Practice 600, minus payments made, if any, is due and payable immediately without further application.

J. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondents Goldberg and Grady provided accurate and complete financial information at the time such representations were made; (2) seek an order directing payment of disgorgement and prejudgment interest; and (3) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondents may not, by way of defense to any such petition; (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; (4) contest the imposition of the maximum penalty allowable under the law; or (5) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Nancy M. Morris
Secretary

Commissioner Atkins
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56519 / September 25, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2725 / September 25, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12825

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

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 Electronic Data Systems Inc. ("Respondent" or "EDS").

II.

In anticipation of the institution of these proceedings, EDS has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purposes 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, Making Findings and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Exchange Act ("Order"), as set forth below.

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III.

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

A. RESPONDENT

EDS is a Delaware corporation headquartered in Plano, Texas. EDS is in the business of providing information technology services. Its common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the New York Stock Exchange. In 1995, EDS acquired A.T. Kearney, Inc., a management consulting firm with operations in 37 countries ("ATK"). In January 2006, EDS completed the sale of ATK.

B. SUMMARY

This matter concerns reporting and books and records violations by EDS. In the first quarter of 2002, EDS failed to disclose the cost of certain derivatives contracts. In the second quarter of 2002, EDS failed to disclose adequately the cost of those contracts. In the third quarter of 2002, EDS selectively disclosed to certain analysts the cost and early settlement of the outstanding derivatives contracts. In addition, EDS failed to disclose adequately an extraordinary transaction with a major customer that increased its reported cash flow by $200 million in the second quarter of 2002. Moreover, EDS maintained inaccurate books and records by employing certain inaccurate assumptions in accounting models used to estimate revenues and expenses for one of its largest contracts. EDS also maintained inaccurate books and records between 2001 and 2003 as a result of a false invoicing scheme discovered by EDS and reported by EDS to the Commission in early 2004, by which a former employee at a former subsidiary made improper payments to officials of Indian government-owned customers.

C. FACTS

1. *EDS's Derivatives Transactions*

In December 2001, EDS began entering into derivatives contracts with a financial institution to reduce the expected cost of its employee stock option program in the event that EDS's share price increased. These transactions involved EDS buying "capped collar contracts," which obligated EDS to purchase its shares on future dates at predetermined prices, and selling put contracts, which gave the financial institution the option of selling EDS shares to the company on future dates at predetermined prices if EDS's share price fell below certain levels. The transactions included "trigger" provisions linked to EDS's share price. These provisions allowed the financial institution to force immediate settlement of a contract if EDS's share price fell below 50 percent of the exercise price of that contract.

[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 December 2001, EDS disclosed in a press release that "it may occasionally repurchase common shares in 2002 and 2003 to be held for reissuance under the company's equity based incentive and benefit plans . . . in the open market or in other transactions."

In its Form 10-K for the year ended December 31, 2001, EDS disclosed the extent of its obligations under its stock incentive plans, including the fact that options for 15.1 million shares were presently exercisable. EDS also disclosed the derivatives contracts as follows:

> During 2001, the Company initiated a program to manage the future stock issuance requirements of the stock incentive plans described in Note 10 by utilizing equity investment contracts for EDS common stock. At December 31, 2001, the Company owned equity contracts to purchase 539,000 shares of EDS common stock at a weighted-average price of $70.14. The Company also had put obligations covering 821,000 shares of EDS common stock at a weighted-average price of $70.73. All of these instruments expire in 2002. These contracts permit cash or net share settlement at the Company's option.

a. <u>The First Quarter of 2002</u>

By March 31, 2002, EDS had entered into capped collar and put contracts to buy over four million shares of its stock from the financial institution at an expected cost of over $265 million, an increase of about $170 million from the expected cost at the end of 2001. EDS did not include any mention of these derivatives transactions in its Form 10-Q for the quarter ended March 31, 2002.

b. <u>The Second Quarter of 2002</u>

During the second quarter of 2002, EDS entered into additional derivatives contracts with the financial institution. As of June 30, 2002, EDS had outstanding derivatives contracts to buy over 5.1 million shares of its stock from the financial institution at an expected cost of over $317 million.

EDS made some limited disclosures regarding these derivatives contracts in its Form 10-Q for the quarter ended June 30, 2002. The filing states that EDS "owned equity contracts to purchase" 2.6 million shares of its stock at a weighted average price of $61.58 and "had put obligations covering" 2.5 million shares at a weighted average price of $62.90. EDS intended at all times to physically settle the transactions. When EDS filed this Form 10-Q on July 26, 2002, its share price was about $32. The only disclosure regarding the timing of settlement was the phrase "all of these instruments expire in 2002."

c. <u>Selective Disclosures of the $225 Million Derivatives Settlement</u>

After announcing on September 18, 2002 that its earnings and cash flow would fall far short of prior guidance, EDS's share price fell over 50 percent, causing the trigger provisions in all of EDS's remaining derivatives contracts to go into effect. Although all of the derivatives contracts were required by their terms to be settled by year-end in the ordinary course of business, the financial institution demanded that EDS immediately settle the outstanding transactions. The settlement occurred on September 20, 2002 and cost EDS over $225 million.

EDS personnel disclosed this $225 million payment to securities analysts from one broker-dealer on September 19, 2002 and to analysts from two other broker-dealers on September 23, 2002. EDS disclosed publicly on September 24, 2002 that it had closed out its position in these obligations through the issuance of commercial paper, but did not publicly disclose the $225 million cost of settlement until November 14, 2002 when it filed its Form 10-Q for the quarter ended September 30, 2002.

2. *EDS's Failure to Disclose the Basis for Its Improving Cash Flow*

EDS did not adequately disclose the basis that led it to report a large one-time boost to its free cash flow, a financial metric that was closely followed by EDS analysts.[2]

Between April and mid-June, 2002, EDS and a major customer negotiated a $200 million prepayment by the customer in return for monthly credits against EDS invoices for services totaling approximately $221 million over 24 months. Concurrently, EDS and the customer negotiated a modification and a one-year extension of their computer outsourcing agreement.

In its Form 10-Q for the quarter ended June 30, 2002, EDS included the prepayment as deferred revenue on the statement of cash flows and included the following in the description of "Liquidity and Capital Resources" in its Management Discussion and Analysis:

> Net cash provided by operating activities increased $178 million to $759 million for the six months ended June 30, 2002 compared with $581 million during the corresponding period of the prior year. The increase in cash flow from operating activities was primarily due to increases in earnings, excluding depreciation, amortization and changes in accounting for derivatives, and changes in working capital items. The increase in the usage of cash for total receivables in 2002 as compared to 2001 was primarily due to unbilled revenue attributable to certain large government clients, somewhat offset by a decrease in trade receivables. This increase of receivables was more than offset by an increase in deferred revenue due to an increase in customer prepayments as well as lower payments on current liabilities.

The reference to "an increase in deferred revenue due to an increase in customer prepayments" was insufficient to convey the unusual nature of the $200 million prepayment. Although EDS recorded several much smaller prepayments in the period, the Form 10-Q failed to

[2] Free cash flow is a non-GAAP measure that EDS defines as operating cash flow minus capital expenditures.

disclose that a $200 million prepayment came from a single, existing customer and did not represent additional business from a new customer. The $200 million amount was unprecedented to EDS, and comprised over 90 percent of EDS's free cash flow in the second quarter of 2002, and over one-quarter of its operating cash flow during the first six months of the year. The $200 million prepayment transaction included $21 million in discounts from future sales, as well as a credit rating trigger found in no previous EDS prepayment agreement, that could require EDS to refund the prepayment if EDS's credit rating dropped by five levels. At the time that the Form 10-Q for the second quarter of 2002 was filed, EDS's credit rating was under review for possible downgrade.

3. *The NMCI Contract*

In October 2000, the U.S. Department of Defense awarded EDS a five year $6.9 billion contract to build an intranet for the Navy and the Marine Corps (the "NMCI contract"). Over the term of the NMCI contract, EDS expected to deploy over 360,000 "seats," or computer workstations. The contract required EDS to make a large up-front investment to build a secure and highly-advanced infrastructure capable of supporting the 360,000 seat intranet.

In accounting for the NMCI contract over the course of performance, Generally Accepted Accounting Principles required EDS to prepare reasonably dependable estimates of revenues and expenses over the life of the contract in order to determine whether the NMCI contract was in a loss position. EDS's internal policies and procedures required preparation of quarterly accounting models that conformed to the terms of the NMCI contract and that reflected the most likely outcome of the contract's key assumptions, such as seat deployment levels. In the first and second quarters of 2002, EDS prepared NMCI contract accounting models reflecting that it would deploy 160,000 seats during the five-year contract term.

At the time these models were employed, EDS had an insufficient basis to assume that only 160,000 seats would be deployed over the life of the contract, because that seat level assumption was inconsistent with the higher seat levels contemplated by the NMCI contract and anticipated by EDS.

4. *EDS's Recording of Payments on False Invoices at its A.T. Kearney, Inc. Subsidiary*

Beginning in September 2003, EDS discovered that the head of the ATK branch in India ("ATKI") was diverting cash by causing ATKI to pay false invoices from dummy vendors. Between 2001 and 2003, the employee used some of the cash to pay numerous bribes totaling at least $720,000 to high level employees of two Indian state-owned enterprises, who threatened to cancel their contracts with ATKI after issues arose with those contracts' implementation. These payments took the form of cash transfers, gifts and services and continued until discovered by EDS in September 2003. The Indian state-owned enterprises did not cancel the contracts, and ATKI derived revenues from those contracts. EDS investigated and reported this matter to the Commission in February 2004.

By reason of this false invoicing scheme, EDS incorrectly recorded these amounts in its accounting books and records.

D. LEGAL ANALYSIS

1. *Violations of the Reporting Provisions of the Exchange Act*

Section 13(a) of the Exchange Act and Rule 13a-13 thereunder require issuers with securities registered under Section 12 of the Exchange Act to file quarterly reports with the Commission on Form 10-Q. These reports must be complete and accurate in all material respects. *See, e.g., SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978*), cert. denied sub nom. Zimmerman v. SEC*, 440 U.S. 913 (1979). No showing of scienter is necessary to establish a violation of Section 13(a). *Savoy Indus., Inc.*, 587 F.2d at 1167.

Exchange Act Rule 12b-20 requires an issuer to include in its periodic reports any "material information . . . necessary to make the required statements, in the light of the circumstances under which they were made[,] not misleading."

Exchange Act Rule 13a-13 requires issuers' quarterly reports to comply with the disclosure requirements of Regulation S-K Item 303. Item 303 requires issuers to include a "Management's Discussion and Analysis of Financial Condition and Results of Operations" (MD&A) section in their periodic public filings. Item 303(b) requires issuers' filings to discuss material changes in the items enumerated in Item 303(a). Among other things, Item 303(a) requires issuers to discuss in the MD&A sections of their public filings their financial condition, changes in their financial condition, any known "commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in a material way" (Item 303(a)(1)) and "any known trends or uncertainties that . . . the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations" (Item 303(a)(3)). The instructions to Rule 303(a) specify that "liquidity" for purposes of the rule "refers to the ability of an enterprise to generate adequate amounts of cash to meet the enterprise's needs for cash."

To comply with the Commission's disclosure requirements, an issuer's filings must be understandable to ordinary investors. *See, e.g. Virginia Bankshare, Inc. et al. v. Sandberg*, 501 U.S. 1083, 1097 (1991) ("The point of a proxy statement, after all, should be to inform, not to challenge the reader's critical wits.") While "[c]orporations are not required to address their stockholders as if they were children in kindergarten," *Richard v. Crandall*, 262 F. Supp. 538, 554 (S.D.N.Y. 1967), "it is not sufficient that overtones might have been picked up by the sensitive antennae of investment analysts." *Gerstle v. Gamble-Skohmo, Inc.*, 478 F.2d 1281, 1297 (2nd Cir. 1973).

Exchange Act Rule 13a-13 also requires issuers to file quarterly reports that comply with the Commission's Regulation S-X. This mandates that financial statements be presented in conformity with GAAP. Consensus positions on accounting issues by the Emerging Issues Task Force ("EITF") of the FASB are GAAP. *See In the Matter of Robert D. Potts*, Release No. 34-

39126 (September 24, 1997). Financial statements not prepared in accordance with GAAP are presumed to be "misleading or inaccurate." *See* Regulation S-X, Section 4-01(a).

On March 21, 2002, the EITF issued a revised consensus position that imposes various disclosure requirements on issuers, like EDS, engaged in derivatives transactions indexed to their own stock. *Accounting for Derivative Financial Instruments Indexed to, and Potentially Settled in, a Company's Own Stock*, EITF Issue No. 00-19 ("EITF 00-19"). EITF 00-19 requires issuers to disclose, *inter alia*, the contracts' current fair values, how changes in the price of the issuer's stock affects the fair values of the contracts, and the maximum number of shares that the company may be required to issue in a net share settlement.

a. EDS's Failure to Disclose Material <u>Information Regarding Its Derivatives Contracts</u>

i. *EDS's Failure to Disclose the Status of the Derivatives Contracts in its Form 10-Q for the Quarter Ended March 31, 2002*

EDS's Form 10-Q for the quarter ended March 31, 2002 failed to comply with the disclosure requirements of Item 303(b) of Regulation S-K by failing to include any mention of the derivatives contracts. At the time that EDS filed its first quarter Form 10-Q, it expected the aggregate cost of EDS shares to be purchased under these derivatives contracts to be over $265 million. This was material to EDS's financial condition, including its liquidity, at that time. By failing to disclose the status of its derivatives contracts in this filing, EDS violated Exchange Act Section 13(a) and Rule 13a-13 thereunder.

ii. *EDS's Failure to Disclose the Status of the Derivatives Contracts in its Form 10-Q for the Quarter Ended June 30, 2002*

EDS's Form 10-Q for the quarter ended June 30, 2002 also failed to comply with the disclosure requirements of Item 303(b) of Regulation S-K. At the time that EDS filed its second quarter Form 10-Q, it expected the cost of shares to be purchased under these derivatives contracts to be $317 million. Though EDS included some disclosures regarding the derivatives contracts in that filing, they were ambiguous and incomplete in that they failed to disclose adequately EDS' $317 million obligation under the derivatives contracts; the manner in which EDS intended to settle the derivatives contracts; and that it could be accelerated due to a precipitous drop in EDS's share price. By failing to comply with Item 303(b) of Regulation S-K, EDS violated Exchange Act Section 13(a) and Rule 13a-13 thereunder.

EDS's Form 10-Q for the quarter ended June 30, 2002 also failed to comply with EITF 00-19's disclosure requirements. EDS did not disclose adequately the derivatives contracts' current fair values or the maximum number of shares it could be required to issue in a net share settlement. In addition, by failing to make any mention of the trigger provisions, EDS failed to disclose how changes in its stock price would affect its contracts' current fair values. EDS's failures to include this information as required by EITF 00-19 caused it to violate Exchange Act Section 13(a) and Rule 13a-13 thereunder.

b. EDS's Failure to Comply with Regulation FD

Regulation FD prohibits the selective disclosure of material nonpublic information to securities professionals. Issuers violate Regulation FD when they, or a person acting on their behalf, disclose material nonpublic information to securities analysts or other enumerated persons without making public disclosure of that information, simultaneously for intentional disclosures, or promptly for non-intentional disclosures. 17 C.F.R. § 243.100. *See also* Final Rule: Selective Disclosure and Insider Trading, Exchange Act Release No. 34-43154, 65 Fed. Reg. 51,716 (Aug. 15, 2000) ("Adopting Release"). An issuer's failure to make a required public disclosure pursuant to Regulation FD constitutes violations of both Regulation FD and Section 13(a) of the Exchange Act. *See* Adopting Release, 65 Fed. Reg. at 51726.

Information is nonpublic if it has not been disseminated in a manner making it available to investors generally. *See, e.g., SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 854 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). "Information becomes public when disclosed 'to achieve a broad dissemination to the investing public generally and without favoring any special person or group.'" *SEC v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997) (citations omitted).

Although the $225 million payment to settle the derivatives contracts did not directly affect EDS's earnings, it was nevertheless material to EDS at that time. EDS personnel disclosed the $225 million payment to settle the derivatives contracts to securities analysts on September 19, 2002 and September 23, 2002. EDS did not disclose publicly until September 24, 2002 that it had closed out its position in these obligations through the issuance of commercial paper, and did not publicly disclose the $225 million cost of the settlement until November 14, 2002. Consequently, EDS violated Regulation FD and Section 13(a) of the Exchange Act.

c. EDS's Failure to Disclose Material Information Regarding its Cash Flow in its Form 10-Q for the Quarter Ended June 30, 2002

In its Form 10-Q for the quarter ended June 30, 2002, EDS did not adequately disclose the basis that led it to report a large one-time boost to its free cash flow. The reference to "an increase in deferred revenue due to an increase in customer prepayments" was insufficient to convey the extraordinary nature of the $200 million prepayment. By not providing additional information regarding the terms of the advance, this disclosure suggested that EDS's improving cash flow was a consequence of ordinary business operations. EDS consequently violated Exchange Act Section 13(a) and Rules 12b-20 and 13a-13 thereunder.

2. Violations of the Books and Records Provisions of the Exchange Act

Section 13(b)(2)(A) of the Exchange Act requires every Section 12 registrant to "make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect" the issuer's transactions. The Commission need not prove *scienter* to establish violations of Exchange Act Section 13(b)(2). *See* "Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices," Exchange Act Rel.

No. 34-15570 (Feb. 15, 1979). "[A]ccurate recordkeeping is an essential ingredient in promoting management responsibility and is an affirmative requirement for publicly held American corporations to strengthen the accuracy of corporate books and records, which are 'the bedrock elements of our system of corporate disclosure and accountability.'" *SEC v. World-Wide Coin Investments, Ltd., et al.*, 567 F. Supp. 724, 746 (N.D. Ga. 1983) (citations omitted).

a. <u>EDS's Books and Records Violations Relating to the NMCI Contract</u>

In the first and second quarters of 2002, EDS prepared NMCI contract accounting models reflecting that it would deploy 160,000 seats during the five-year contract term. At the time these models were employed, EDS had an insufficient basis to assume that only 160,000 seats would be deployed over the life of the contract. For this reason, EDS's books, records and accounts did not, in reasonable detail, accurately and fairly reflect the status of the NMCI contract. Consequently, EDS violated Exhange Act Section 13(b)(2)(A).

b. <u>EDS's Books and Records Violations Relating to ATKI</u>

The false invoicing scheme described above caused ATKI to make and keep inaccurate books, records and accounts, and consequently caused EDS to violate Exchange Act Section 13(b)(2)(A).

<u>EDS's Remedial Efforts</u>

In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff in connection with its books and records violations related to ATKI.

IV.

In view of the foregoing, the Commission deems it appropriate to accept EDS's Offer.

Accordingly, it is hereby ORDERED:

Respondent EDS cease and desist from committing or causing any violations and any future violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act, and Rules 12b-20, 13a-13, and Regulation FD thereunder.

Respondent, in connection with its books and records violations related to ATKI, shall, within fifteen (15) days of the entry of this Order, pay disgorgement in the amount of $358,800, and prejudgment interest thereon in the amount of $132,102, for a total payment of $490,902 to the United States Treasury. This payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies EDS as a Respondent in these proceedings and the file number of these proceedings. A copy of the cover letter and money order or check shall be sent to Kenneth R. Lench, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, DC 20549-6041.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Cox

Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2654 / September 25, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12827

In the Matter of **FINANCIAL DESIGN ASSOCIATES, INC. and ALBERT L. COLES, JR.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 203(e), 203(f), AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Financial Design Associates, Inc. ("FDA") and Sections 203(f) and 203(k) of the Advisers Act against Albert L. Coles, Jr. ("Coles") (together, "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, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, as set forth below.

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III.

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

Summary

1. Albert Coles and his investment advisory firm, FDA, failed to disclose to FDA clients payments Coles received from a company in which he advised FDA clients to invest. Coles and FDA falsely represented in various client disclosures that FDA and Coles were compensated solely by FDA clients and received no payments for the investments recommended by the firm. Between 2002 and 2006, Coles received approximately $361,307 in undisclosed referral fees (including accrued interest on the fees) from a company in which Coles and FDA recommended clients invest. The undisclosed payments created a conflict of interest compromising the objectivity of FDA's investment recommendations to clients. Coles and FDA thus breached their fiduciary duties and willfully violated Sections 206(1), 206(2), and 207 of the Advisers Act.

Respondents

2. Respondent FDA is a Stinson Beach, California investment advisory firm which has been registered with the Commission since 1994. It currently has approximately $85 million in assets under management and 65 client relationships.

3. Respondent Coles, 50, is a resident of Stinson Beach, California. Coles is the founder, President, Chief Operating Officer, and Chief Investment Officer of FDA.

Facts

4. FDA provides investment advice to high net-worth individuals, trusts, and small businesses' retirement accounts. Coles is FDA's founder, President, and its only full-time investment adviser. FDA does not publicly advertise or otherwise promote itself, acquiring clients generally through word of mouth.

5. Coles and FDA have typically relied on oral explanations of FDA's strategy and business model when offering advisory services to prospective clients. In addition to these oral explanations, since approximately 2003 Coles has provided prospective clients with an "Executive Summary" describing FDA. The two-page document claims that FDA is a "fee-only" investment adviser – in other words, FDA charges clients annual fees based on a percentage of assets under management and according to the Executive Summary, "[W]e are compensated only by [FDA] clients and receive nothing for the investments we recommend to them. This allows us to select the best investments for you without any conflicts of interest."

6. FDA clients also received Part II of FDA's Form ADV, a disclosure form filed with the Commission, which stated that FDA received compensation from clients as a percentage of assets under management. Part I of FDA's Forms ADV, filed with the Commission annually on June 15, 2001, May 7, 2002, April 2, 2003, March 2, 2004, March 15,

2005, and June 15, 2006, and signed by Coles, falsely stated that FDA and its related persons were not paid commissions and did not recommend securities to clients in which FDA had a sales interest. In Part II of the Form ADV, filed with the Commission in August 1999 and not updated until August 2006, FDA falsely stated that neither it nor or any related person "recommend[s] purchase or sale of securities to advisory clients for which you or any related person has any other sales interest."

7. FDA's client disclosures failed to disclose that, in fact, FDA and Coles were receiving payments from a company in which Coles was placing FDA clients' investments. No later than early 2001, Coles entered into an agreement with a small mortgage finance company (the "issuer") pursuant to which Coles would receive referral fees for recommending that FDA clients invest in its securities. The referral fees were based on the size of the investments in the issuer made by Respondents' advisory clients.

8. Coles and FDA did not tell FDA clients of the agreement prior to advising them to invest in the issuer. Between 2002 and 2006, around 40 FDA clients invested a total of approximately $30 million in the issuer. Pursuant to their agreement, Coles received approximately $361,307, including accrued interest, in undisclosed referral fees from the issuer during this period.

9. The payments to Coles created a conflict of interest between FDA and its clients. By receiving compensation from the issuer, Coles compromised his ability to evaluate independently the merit of the investments he recommended to FDA clients.

10. Coles and FDA breached their fiduciary duties by failing to disclose to FDA clients the agreement with the issuer. In addition, Coles' receipt of undisclosed payments from a company in which he recommended his clients invest made FDA's representations false and misleading. Contrary to Respondents' representations in FDA's Executive Summary and Form ADV disclosures, Coles did, in fact, receive payments from an issuer whose securities he recommended to FDA clients.

Violations

11. Sections 206(1) and 206(2) of the Advisers Act establish a fiduciary duty for investment advisers to act for the benefit of their clients. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979). Section 206(1) prohibits an investment adviser from employing any device, scheme, or artifice to defraud any client or prospective client; Section 206(2) makes it unlawful for an adviser to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Section 207 of the Advisers Act makes it unlawful for any person to willfully make any untrue statement of a material fact or omit to state any material fact required to be stated in a report filed with the Commission.

12. Coles and FDA willfully violated Sections 206(1), 206(2), and 207 of the Advisers Act by receiving referral fees from an issuer in which they recommended FDA clients invest, failing to disclose the referral fee agreement to FDA clients and in FDA's Form ADV, and misstating that no such agreement existed.

Undertakings

Respondent FDA will undertake to:

13. Within thirty (30) days of entry of the Order, mail a copy of this Order, together with a cover letter in a form not unacceptable to the staff, to each of FDA's existing clients. Respondents shall also provide any new FDA client which engages FDA within one year of the date of the Order with a copy of the Order.

IV.

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

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

A. Respondents be, and hereby are, censured;

B. Respondents shall cease and desist from committing or causing any violations and any future violations of Sections 206(1), 206(2), and 207 of the Advisers Act;

C. IT IS FURTHERED ORDERED that Respondent Coles shall, within 30 days of the entry of this Order, pay an initial disgorgement payment of $260,000 and a civil money penalty in the amount of $40,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Albert L. Coles, Jr. as a Respondent in these proceedings and the file number of these proceedings. A copy of the cover letter and money order or check shall be sent to Helane L. Morrison, Esq., Regional Director, Division of Enforcement, Securities and Exchange Commission, San Francisco Regional Office, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104;

D. IT IS FURTHER ORDERED that, on a quarterly basis beginning 90 days from the date of the entry of this Order, Respondent Coles shall pay, in three equal installments, the remainder of $101,307 in disgorgement owed, plus post-judgment interest. Such payments shall be: (A) made by United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Albert L. Coles, Jr. as a Respondent in these proceedings and the file number of these proceedings. A copy of the cover letter and money order or check shall be sent to Helane L. Morrison, Esq., Regional Director, Division of Enforcement, Securities and Exchange Commission, San Francisco Regional Office, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104. Respondent Coles agrees that if the full amount of any payment described above is not made by the date the payment is required by this Order, the entire amount of disgorgement and civil penalties, plus any interest accrued pursuant to SEC Rule of Practice 600 minus payments made, if any, is due and payable immediately without further application; and

E. IT IS FURTHER ORDERED that Respondent FDA shall comply with the undertakings enumerated in Section III, above.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 25, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12829

In the Matter of GUY P. RIORDAN, 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

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 Guy P. Riordan ("Respondent" or "Riordan").

II.

After an investigation, the Division of Enforcement alleges that:

Summary

1. From 1996 through 2002, Riordan, a registered representative formerly associated with First Union Securities, Inc. ("First Union"), paid secret cash kickbacks to the former Treasurer for the State of New Mexico in exchange for obtaining securities transactions with the New Mexico State Treasurer's Office ("NMSTO").

Respondent

2. Riordan, age 57, is a resident of Albuquerque, New Mexico. From February 1997 through December 2002, Riordan was a registered representative associated with First Union, or its predecessor or successor entities, each of which was a broker-dealer registered with the Commission. From October 1993 through February 1997, Riordan was affiliated with another registered broker-dealer.

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Other Relevant Person and Entity

3. Michael M. Montoya was the elected State Treasurer for the State of New Mexico from January 1, 1995 through December 31, 2002 (the "relevant period"). Montoya, age 55, is a resident of Los Lunas, New Mexico.

4. First Union Securities, Inc., incorporated in Delaware, was a broker-dealer registered with the Commission from 1987 through 2001. First Union's principal place of business was in Charlotte, North Carolina, and it had offices throughout the country, including Albuquerque, New Mexico. In September 2001, First Union became a part of Wachovia Corporation, another broker-dealer registered with the Commission.

The NMSTO's Investment in Agency Securities

5. During the relevant period, NMSTO invested a portion of the funds under its control in a type of investment known as "agency securities." "Agency securities" are securities issued by or guaranteed by government corporations or government sponsored entities.

6. During the relevant period, the NMSTO purported to use a competitive bidding process whereby it solicited bids on each proposed transaction from three or more broker-dealers. After receiving all bids, the NMSTO was required to select the bid containing the best economic terms.

7. During the relevant period, Riordan, acting as a registered representative, frequently bid to conduct agency securities transactions on behalf of the NMSTO.

8. During the relevant period, Montoya chose which bid to accept among the bids received for agency securities transactions.

The Kickback Scheme

9. During the relevant period, Riordan made secret cash payments to Montoya in exchange for Montoya choosing Riordan's bids for the NMSTO's purchase and sale of agency securities.

10. Riordan began making these cash payments to Montoya in approximately 1996, and he continued to make cash payments through the end of Montoya's tenure as State Treasurer in December 2002.

11. In 2001 and 2002 alone, Montoya awarded the following agency securities transactions to Riordan in exchange for cash payments:

	Settlement Date of Transaction	Amount of Purchase or Sale	Purchase (P) or Sale (S)
a.	1/23/01	$20,000,000.00	P
b.	11/30/01	$20,000,000.00	S
c.	12/12/01	$25,000,000.00	S
d.	12/19/01	$30,000,000.00	S
e.	12/19/01	$25,000,000.00	S
f.	3/28/2002	$50,000,000.00	P
g.	4/1/2002	$25,000,000.00	P
h.	4/1/2002	$25,000,000.00	P
i.	5/2/2002	$50,000,000.00	P
j.	6/3/2002	$30,000,000.00	P
k.	7/18/2002	$50,000,000.00	P
l.	9/13/2002	$75,000,000.00	P
m.	9/13/2002	$55,000,000.00	P
n.	10/2/2002	$50,000,000.00	P
o.	10/2/2002	$20,000,000.00	S
p.	10/2/2002	$20,000,000.00	S
q.	10/2/2002	$35,000,000.00	S
r.	10/2/2002	$25,000,000.00	S

12. Riordan received $343,863.50 in commissions from the above-listed agency securities transactions with the NMSTO during 2001 and 2002.

13 After each of the above-listed agency securities transactions with the NMSTO, Riordan met with Montoya in private and gave him cash in varying amounts roughly equal to 10% of the commission Riordan received on each transaction. Montoya would not select Riordan's bid on subsequent agency securities transactions until Riordan had paid Montoya cash from the previously awarded transaction.

14. Riordan knowingly made these payments to Montoya in exchange for Montoya selecting Riordan's bid for agency securities transactions, and in order to influence Montoya to select Riordan's bid on future transactions.

15. In exchange for Riordan's cash payments to Montoya, Riordan received preferential treatment in bidding on the NMSTO's agency securities transactions. For example, the NMSTO sometimes obtained bids from other registered representatives first, then called Riordan and informed him of the terms of the other bids. This enabled Riordan to provide the best bid. As result of this preferential treatment, during 2001 and 2002, the NMSTO awarded Riordan more agency securities transactions than any other bidder.

16. Riordan's payment of cash kickbacks to Montoya represented a device, scheme and artifice to defraud, and a fraudulent course of business which operated as a fraud or deceit upon the State of New Mexico and other market participants in the offer or sale and in connection with the purchase or sale of securities.

Violations

17. As a result of the conduct described above, Riordan willfully 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.

III.

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

A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford Respondent 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 including, but not limited to, disgorgement, civil penalties and an accounting pursuant to Section 21B of the Exchange Act; and

C. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and whether Respondent should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act and 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 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 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.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

1 ' ' .

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8846 / September 25, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56524 / September 25, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12830

In the Matter of **TRENT L. TUCKER,** **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 Trent L. Tucker ("Tucker" or "Respondent").

II.

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

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III.

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

Summary

1. From 1998 through 2002, Tucker, a registered representative formerly associated with Southwest Securities, Inc. ("Southwest"), paid secret cash kickbacks to the former Treasurer for the State of New Mexico in exchange for obtaining securities transactions with the New Mexico State Treasurer's Office ("NMSTO").

Respondent

2. Tucker, age 54, is a resident of Orlando, Florida. From September 1996 to September 2003, Respondent was a registered representative associated with Southwest, a broker-dealer registered with the Commission.

Other Relevant Entity

3. Southwest Securities, Inc., incorporated in Delaware in 1991, is a broker-dealer registered with the Commission since September 1, 1992. Southwest's principal place of business is in Dallas, Texas, and it has offices throughout the country, including Albuquerque, New Mexico.

Facts

4. During the relevant period, the NMSTO invested a portion of state funds in agency securities, and to a lesser extent, corporate bonds. For example, during 2001 and 2002, NMSTO engaged in more than 50 agency securities transactions, purchasing more than $1 billion and selling more than $300 million in "agency securities." "Agency securities" are securities issued by or guaranteed by government corporations or government sponsored entities.

5. The NMSTO required securities purchases and sales to be made pursuant to a competitive bidding process. The NMSTO solicited bids on each proposed securities transaction from at least three broker-dealers, including the firm that won the last bid, and at least one broker-dealer with a registered representative physically located in New Mexico. After receiving all bids, the NMSTO was required to select the bid containing the best economic terms. The Treasurer decided when the NMSTO would buy or sell securities and which bid to select.

6. Beginning in 1998 and continuing through 2002, the Treasurer, with assistance from another NMSTO employee, used a number of different methods to award

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

agency securities and corporate bond business to Tucker. For example, the Treasurer sometimes obtained bids from other registered representatives first, then called Tucker and informed him of the terms of the other bids. This enabled Tucker to provide the best bid. On days when market prices were changing favorably as to the NMSTO, the Treasurer also permitted Tucker, but not other bidders, to delay submission of his bid until later in the day, which enabled Tucker to provide a superior bid. In other instances, the Treasurer awarded securities transactions to Tucker even when Tucker's bid was inferior, but created internal records which misrepresented that Tucker's bid was the best received.

7. During 2001 and 2002, the Treasurer awarded Tucker the following 17 agency securities and corporate bond transactions:

	Settlement Date of Transaction	Amount of Purchase or Sale	Purchase (P) or Sale (S)
1.	1/12/2001	$5,002,750	S
2.	1/12/2001	$5,041,350	S
3.	1/12/2001	$5,038,000	S
4.	1/12/2001	$5,058,950	S
5.	6/4/2001	$25,000,000	P
6.	5/30/2001	$45,000,000	P
7.	7/25/2001	$35,000,000	P
8.	9/13/2001	$30,000,000	P
9.	11/26/2001	$40,000,000	P
10.	11/28/2001	$45,000,000	S
11.	3/28/2002	$50,000,000	P
12.	4/5/2002	$25,000,000	P
13.	5/2/2002	$50,000,000	P
14.	7/25/2002	$50,000,000	P
15.	8/1/2002	$50,000,000	P
16.	8/26/2002	$50,000,000	P
17.	9/30/2002	$50,000,000	P

8. Tucker received at least $290,000 in commissions from the above securities transactions with the NMSTO during 2001 and 2002.

9. After each securities transaction with the NMSTO, Tucker met with the Treasurer and gave him cash in varying amounts equal to approximately 10% of the commission Tucker earned on the transaction. Tucker paid these amounts to the Treasurer in exchange for the Treasurer awarding these transactions to Tucker.

10. As a result of the conduct described above, Tucker willfully 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, offer, or sale of securities.

Disgorgement and Civil Penalties

11. Tucker has submitted a sworn Statement of Financial Condition dated July 31, 2007 and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest or a civil penalty.

IV.

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

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

A. Respondent cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent be, and hereby is barred from association with any broker or dealer.

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

D. Respondent shall pay disgorgement of $290,000 plus prejudgment interest, but that payment of such amount is waived, and the Commission is not imposing a penalty against Respondent based upon Respondent's sworn representations in his Statement of Financial Condition dated July 31, 2007 and other documents submitted to the Commission.

E. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and pre-judgment interest, and the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered, or assert that payment of a penalty should not be ordered; (3) contest the amount of disgorgement and interest to be ordered, or contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Tab: Commissioner Atkins Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 25, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12828

In the Matter of **BYRON S. RAINNER,** **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 AND NOTICE OF HEARING**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Rainner, 36, is currently incarcerated in the Federal Correctional Institution in Estill, South Carolina. From February 2000 through January 2004, Rainner was a registered representative associated with a life insurance corporation registered with the Commission as a broker-dealer and an investment adviser.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On February 9, 2006, Rainner pled guilty to one count of wire fraud in violation of Title 18 United States Code Section 1343, before the United States District Court for the Northern District of Georgia, in United States v. Byron S. Rainner, Case No. 1:05-CR-29-WBH. On November 20, 2006, a judgment in the criminal case was entered against Rainner. He was sentenced to a prison term of 30 months followed by three years of supervised probation and ordered to make restitution in the amount of $2,036,134.

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3. The count of the indictment to which Rainner pled guilty alleged, among other things, that from on or about August 2002 through on or about April 2003, Rainner knowingly and willfully devised a scheme and artifice to defraud the Sheriff's Office of Fulton County, Georgia and obtained money and property from the Sheriff's Office of Fulton County, Georgia by means of materially false and fraudulent pretenses, representations and promises, by use of a wire communication, in interstate commerce.

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 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; and

C. 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.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Cox
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 26, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12834

In the Matter of **C.R. Williams, Inc., and** **Charles Russell Williams II,** **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**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against C.R. Williams, Inc. ("CRW") and Charles Russell Williams II ("Williams").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. CRW, located in St. Louis, was incorporated in Missouri in August 1994. It has been registered with the Commission as an investment adviser since November 27, 1995.

2. CRW currently manages nearly $11 million for 11 clients, including two private investment stock funds. Excluding the stock funds, the assets of CRW's clients (approximately $8.8 million) are maintained in custodial accounts at a banking institution. CRW is the managing member and investment adviser of the two stock funds in which more than 25 participants have invested approximately $2.2 million.

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3. From at least November 2004 until January 2006, CRW had assets under management exceeding $25 million. In January 2006, CRW's assets under management dropped below $25 million, and have remained below $25 million to date.

4. Since the inception of CRW, Williams has been the majority owner of CRW and has served as its chief executive officer and president. Williams was registered with the Commission as an investment adviser from February 3, 1983 through April 29, 1996, when he voluntarily withdrew his individual registration. From February 1983 through August 1994 when he incorporated CRW, Williams conducted his investment advisory business as a sole proprietor. Williams, 68 years old, is a resident of St. Louis.

B. WILLIAMS' PRIOR BOOKS AND RECORDS AND REPORTING VIOLATIONS

5. In 1985, the Branch of Investment Management Examinations of the Midwest Regional Office ("examination staff") performed an examination of Williams' advisory business. After the completion of the examination, the examination staff issued a deficiency letter to Williams informing him, in part, that he failed to make and keep a wide variety of books and records required by the Advisers Act, including: cash receipt journals; disbursement records; general and auxiliary ledgers reflecting asset, liability, reserve, capital, income and expense accounts; and financial statements relating to Williams' investment adviser business. Additionally, the examination staff informed Williams that he failed to comply with the reporting provisions of the Advisers Act by failing to file his annual report on Form ADV-S for the fiscal years ended December 31, 1983 and December 31, 1984 (after July 8, 1997, investment advisers registered with the Commission were required to file annual reports on amended Form ADV).

6. In 1994, the examination staff performed another examination of Williams' advisory business. Again by deficiency letter, the examination staff informed Williams, in part, that he had failed to make and keep the same books and records that he had failed to make and keep in 1985. Further, the 1994 deficiency letter informed Williams that he had failed to file annual reports on Form ADV-S for the fiscal years ended December 31, 1989, 1990, 1991, 1992, 1993 and 1994.

7. As a result of the examination performed in 1994, on February 14, 1996, the Commission initiated a settled administrative and cease-and-desist proceeding against Williams and entered an order that: (1) imposed a censure on Williams; (2) directed him to cease and desist from violating, among other things, the books and records and reporting provisions of the Advisers Act (Section 204 of the Advisers Act and Rules 204-1, 204-2(a)(1), 204-2(a)(2), and 204-2(a)(6) promulgated thereunder); (3) imposed a $5,000 civil penalty; and (4) directed him to comply with certain undertakings, including a requirement to "adopt, implement and maintain new written policies and procedures...to prevent and detect" books and records violations.

8. After the 1994 examination but prior to the entry of the cease-and-desist order, Williams started to operate his investment adviser business through the newly created and registered CRW. The change from a sole proprietorship to "C.R. Williams, Inc." was in name

only, as Williams' clients and the services he provided remained the same. As a result of the name change in Williams' advisory business, the undertakings portion of the February 14, 1996 cease-and-desist order entered against Williams was expressly applied to "any successor investment adviser...including, but not limited to C.R. Williams, Inc."

9. On April 29, 1996, shortly after the entry of the cease-and-desist order, Williams voluntarily withdrew his individual registration as an investment adviser.

C. CRW'S CURRENT BOOKS AND RECORDS AND REPORTING VIOLATIONS

10. Throughout CRW's existence, Williams has been responsible for making and keeping all of CRW's books and records and filing its reports with the Commission.

11. In November 2004, the examination staff commenced a routine examination of CRW. The examination staff requested that CRW produce required books and records for inspection. For over a year, Williams offered various excuses to the staff in an attempt to justify CRW's non-production of certain required books and records. For example, Williams claimed that he could not produce financial statements for years ended December 31, 2003 and 2004 because they were in the possession of CRW's accountant. Eventually it became clear that the accountant did not have the financial records because they did not exist.

12. On February 10, 2006, CRW faxed a letter (dated January 30, 2006) to the Division of Enforcement staff asserting that statements of cash flows, cash receipt journals, disbursement records, and general and auxiliary ledgers reflecting asset, liability, reserve, capital, income, and expense accounts were "***not applicable***" to its records keeping. (Emphasis in the original).

13. From at least June 2003 through February 2006, CRW failed to make and keep the same required books and records that Williams had failed to make and keep in both 1985 and 1994.

14. From at least June 2003 through February 2006, CRW did not make and keep required:

a. Cash receipt journals;

b. Disbursement records;

c. General or auxiliary ledgers reflecting asset, liability, reserve, capital, income and expense accounts; and

d. Financial statements, including balance sheets, income statements or statements of cash flows.

15. Additionally, to date, CRW has failed to file its annual reports on amended Form ADV for the fiscal years ended December 31, 2005 and December 31, 2006.

16. Furthermore, since CRW's assets under management have remained below $25 million since January 2006 and CRW is not otherwise eligible to be registered with the Commission as an investment adviser, CRW was required to file Form ADV-W by June 29, 2007. To date, CRW has not filed a Form ADV-W.

D. <u>VIOLATIONS</u>

17. As a result of the conduct described above, CRW willfully violated Section 204 of the Advisers Act and Rules 204-1(a)(1), 204-2(a)(1), 204-2(a)(2) and 204-2(a)(6) promulgated thereunder. Rule 204-2 requires that investment advisers registered with the Commission make and keep true, accurate and current books and records. Rule 204-2(a)(1) requires investment advisers to "make and keep true, accurate and current...a journal or journals, including cash receipts and disbursements, records, and any other records of original entry forming the basis of entries in any ledger." Rule 204-2(a)(2) requires investment advisers to "make and keep true, accurate and current...general and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts." Rule 204-2(a)(6) requires investment advisers to "make and keep true, accurate and current...all trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser." Rule 204-1(a)(1) requires investment advisers to file with the Commission annual amended Forms ADV "at least annually, within 90 days" of their fiscal year end.

18. As a result of the conduct described above, CRW also willfully violated Section 203A of the Advisers Act and Rule 203A-1(b)(2) promulgated thereunder. Investment advisers that "no longer have $25 million of assets under management (or are not otherwise eligible for SEC registration)" are required to file a Form ADV-W to withdraw their "registration within 180 days of [their] fiscal year end (unless [they] then have at least $25 million of assets under management or are otherwise eligible for SEC registration)." <u>See</u> Rule 203A-1(b)(2).

19. As a result of the conduct described above, Williams willfully aided and abetted and caused CRW's violations of Sections 203A and 204 of the Advisers Act and Rules 203A-1(b)(2), 204-1(a)(1), 204-2(a)(1), 204-2(a)(2) and 204-2(a)(6) promulgated thereunder, as more fully described in paragraph 17 and 18 above.

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 CRW pursuant to Section 203(e) of the Advisers Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act;

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

D. Whether, pursuant to Section 203(k) of the Advisers Act, CRW should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 203A and 204 of the Advisers Act and Rules 203A-1(b)(2), 204-1(a)(1), 204-2(a)(1), 204-2(a)(2) and 204-2(a)(6) promulgated thereunder; and

E. Whether, pursuant to Section 203(k) of the Advisers Act, Williams should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 203A and 204 of the Advisers Act and Rules 203A-1(b)(2), 204-1(a)(1), 204-2(a)(1), 204-2(a)(2) and 204-2(a)(6) promulgated thereunder.

IV.

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

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Atkins
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 26, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12836

In the Matter of **NOVATEK INTERNATIONAL, INC.** **a/k/a MEDICAL DIAGNOSTIC PRODUCTS, INC.** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Novatek International, Inc., also known as Medical Diagnostic Products, Inc. ("Novatek" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. Novatek was a Colorado corporation that formerly had its principal place of business in Columbia, Maryland. In 1996, Novatek merged with an entity known as Medical Products, Inc. Novatek's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act and was traded in the over-the counter market and was quoted on the NASDAQ Small Cap Market until October 14, 1996, when its trading was suspended. Due to questions regarding the accuracy of publicly disseminated information, the Commission suspended trading in Novatek securities on October 15, 1996. On October 26, 1996, Novatek filed for bankruptcy reorganization and on November 1, 1998, was dissolved as a Colorado corporation. The shares of Novatek are still quoted on the Pink Sheets and traded over the counter.

B. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers with classes of securities registered pursuant to Exchange Act Section 12 to file with the Commission accurate information in periodic reports, even if the registration is voluntary under

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Section 12(g). Specifically, Exchange Act Rule 13a-1 requires issuers to file annual reports, and Exchange Act Rule 13a-13 requires issuers to file quarterly reports.

C. Respondent has not filed an Annual Report on Form 10-KSB since the fiscal period ending December 31, 1995, for which the report was filed on February 6, 1996, or periodic or quarterly reports on Form 10-QSB for any fiscal period subsequent to its fiscal quarter ending June 30, 1996, for which the report was filed on August 14, 1996.

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months or to revoke the registration of each class of securities of Novatek registered pursuant to Section 12 of the Exchange Act.

IV.

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

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within 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 it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

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

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

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.

Nancy M. Morris

Nancy M. Morris
Secretary

Commissioner Atkins Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56533 / September 26, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2727 / September 26, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12833

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

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 Bristow Group Inc. ("Bristow" 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 Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

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III.

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

Summary

From at least 2003 through approximately the end of 2004, Bristow's wholly-owned United States subsidiary, AirLog International, Ltd. ("AirLog"), through its Nigerian affiliate, Pan African Airlines Nigeria Ltd. ("PAAN"), made improper payments totaling approximately $423,000 (the "improper payments") to employees of the governments of two Nigerian states (the "tax officials") to influence them to improperly reduce the amount of expatriate employment taxes payable by PAAN to the respective Nigerian state governments. The improper payments were not properly recorded in AirLog's books and records, which were consolidated into Bristow's books and records. During the same time period, PAAN also underreported its expatriate payroll expenses in Nigeria. Those expenses were not properly recorded in AirLog's books and records, and accordingly, were not accurately reported in Bristow's books and records. Bristow's internal controls failed to detect and prevent the improper payments and underreported expatriate payroll expenses. In addition, Bristow's internal controls failed to provide reasonable assurances that the company's books and records accurately reflected the nature and purpose of the improper payments and the company's expatriate payroll expenses.[2]

Respondent

1. Bristow, a Delaware corporation with its headquarters in Houston, Texas, provides helicopter transportation services and operates oil and gas production facilities. Prior to August 22, 2005, Bristow was headquartered in Lafayette, Louisiana. Bristow's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange.

Other Relevant Entities

2. AirLog is a Delaware corporation headquartered in New Iberia, Louisiana. AirLog is a wholly-owned subsidiary of Bristow.

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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] During the same time period, another Bristow affiliate, Bristow Helicopters (International), Ltd. ("Bristow Helicopters"), also made similar improper payments to Nigerian tax officials through its Nigerian affiliate Bristow Helicopters (Nigeria), Ltd. ("Bristow Nigeria"). Neither Bristow Helicopters nor Bristow Nigeria is an issuer for purposes of Section 30A of the Exchange Act and neither company is organized under the laws of the United States. However, Bristow Helicopters' and Bristow Nigeria's financials were consolidated into Bristow Aviation Holding, Ltd.'s ("Bristow Aviation") financials, which were ultimately consolidated into Bristow's financials. Further, in addition to PAAN, Bristow Nigeria underreported its expatriate payroll expenses (collectively, "payroll expenses"). As a result, Bristow's reporting, books and records and internal controls violations are based on the improper payments of Bristow Helicopters, Bristow Nigeria, AirLog and PAAN as well as Bristow Nigeria and PAAN's underreported payroll expenses.

3. PAAN, a Bristow affiliate operating in Nigeria, was 40% owned by ALN Inc., a Delaware corporation which is a wholly-owned subsidiary of Bristow, during the relevant period.

4. Bristow Aviation, incorporated and headquartered in Redhill, England, is a Bristow affiliate. Bristow owns 49% of Bristow Aviation's common stock and 100% of Bristow Aviation's subordinated debt.

5. Bristow Helicopters, incorporated and headquartered in Redhill, England, is a Bristow affiliate and is ultimately owned by Bristow Aviation.

6. Bristow Nigeria, a Bristow affiliate operating in Nigeria, was 40% owned by Bristow Aviation during the relevant period.

Facts

An Overview of the Improper Payments

7. From at least 2003 through approximately the end of 2004, Bristow's subsidiary, AirLog, through its Nigerian affiliate, PAAN, made at least $423,000 in improper payments to tax officials employed by two Nigerian state governments. These payments had the purpose and effect of influencing the tax officials to reduce the annual amount of expatriate employment tax, referred to as the expatriate "Pay As You Earn" ("PAYE") tax, PAAN owed to the Nigerian state governments. The payments were made with the knowledge and approval of senior employees of PAAN, and the release of funds for the payments was approved by at least one former senior officer of Bristow (the "senior officer").

8. PAAN was responsible for paying an annual PAYE tax to the Nigerian state governments in each state where PAAN operated. At the end of each year, the government of each Nigerian state assessed a tax on the salaries, as determined by each Nigerian state, of PAAN employees in that state and sent PAAN a demand letter. The Nigerian state governments used their own pre-determined, or "deemed," salaries in making their demand calculations. PAAN then negotiated with the tax officials to lower the amount assessed. In each instance, the PAYE tax demand amount was lowered and a separate cash payment amount for the tax officials was negotiated. Each state government then sent a new demand letter to PAAN, reflecting only the negotiated payment to the state government, and not the separate cash payment negotiated for the tax officials. Upon payment, each state government provided PAAN with a receipt reflecting only the amount payable to the state government. The demand letters and receipts were sent to lower level accounting personnel at AirLog in the United States. That documentation was not forwarded to Bristow's corporate headquarters.

Bristow's Discovery of the Improper Payments and its Response

9. Bristow discovered the potentially improper payments at a company management meeting in October 2004 where Bristow's newly appointed chief executive officer ("CEO") heard a comment suggesting the possibility that payments had been made to government officials in

Nigeria. The CEO immediately brought the matter to the attention of the audit committee and contacted outside counsel. The audit committee hired independent counsel to conduct an internal investigation. Bristow promptly brought this matter to the Commission's staff's attention.

The Specifics of the Improper Payments

10. PAAN made the following payments for 2002 and 2003 PAYE tax to two Nigerian state governments and additional personal payments in cash:[3]

State/Year	Original Demand	Negotiated Payment	Tax Paid to State (receipted)	Personal Payment (unreceipted cash)	Bristow's Savings
Delta State – 2002	$568,000	$165,000	$54,690	$110,310	$403,000
Delta State – 2003	$660,940	$270,000	$54,870	$215,130	$390,940
Lagos State – 2002	$130,000	$50,000	$5,780	$44,220	$80,000
Lagos State – 2003	Unknown	$60,000	$6,360	$53,640	Unknown
TOTAL	$1,358,940	$545,000	$121,700	$423,300	$873,940

Improper Payments to the Nigerian Delta State

11. In 2003 the Nigerian Delta State ("Delta State") made an initial demand on PAAN for its 2002 PAYE tax of $568,000, although the demand was made in local currency. PAAN's accounting personnel in Nigeria negotiated with the tax officials and the demand was reduced to $165,000. The government then sent PAAN a new demand for $54,690. This new demand did not reflect the negotiated $165,000 amount because the balance was to be paid in cash to the tax officials. PAAN employees requested that AirLog wire transfer $165,000 to PAAN for payment of the PAYE tax. The senior officer approved the transfer of funds. PAAN paid the difference between the $165,000 negotiated and the $54,690 in the demand letter, $110,310, in cash to the tax officials. The Delta State provided PAAN with a receipt for only $54,690 for the 2002 PAYE tax. The improper payments helped Bristow avoid $403,000 in taxes.

12. Similarly, in 2004 the Delta State demanded 2003 PAYE tax of $660,940. PAAN negotiated the amount down to $270,000. The Delta State then sent PAAN a demand letter for $54,870. PAAN paid the difference between the $270,000 negotiated and the $54,870 in the demand letter, $215,130, in cash to the tax officials. After PAAN negotiated the original demand down to $270,000, in May 2004, the senior officer received an e-mail from PAAN's former general manager requesting approval to pay the negotiated amount. The senior officer approved

[3] Payment amounts are approximate and are based on a conversion rate of 139 Nigerian naira to the United States dollar.

the release of funds for the payment. The Delta State provided PAAN with a receipt for only $54,870 for the 2003 PAYE tax. The improper payments helped Bristow avoid $390,940 in taxes.

Improper Payments to the Nigerian Lagos State

13. In 2003, PAAN received an initial demand from the Nigerian Lagos State ("Lagos State") for $130,000, for its 2002 PAYE tax. PAAN accounting employees in Nigeria negotiated the amount down to $50,000. The senior officer approved the transfer of funds. PAAN paid $5,780 to the Lagos State government for PAYE tax and $44,220 in personal cash payments. The improper payments helped Bristow avoid $80,000 in taxes. Similarly, regarding the 2003 PAYE tax, PAAN paid $6,360 to the Lagos State government for taxes and $53,640 in personal cash payments.

Underreported Payroll Expenses

14. During Bristow's investigation into the improper payments, Bristow discovered that it had underreported PAAN and Bristow Nigeria's payroll expenses to certain Nigerian state governments. As a result, its periodic reports filed with the Commission did not accurately reflect certain of the company's payroll-related expenses. Bristow restated its financial statements for the fiscal years 2000 through 2004 and the first three quarters of 2005, in part, to correct inaccuracies regarding the improper payments and underreported payroll expenses in Nigeria.[4] The underreported payroll expenses in Nigeria were the primary factor that caused Bristow to restate.

Bristow Improperly Recorded the Improper Payments
and Payroll Expenses in its Books and Records

15. Bristow has conducted business through AirLog and PAAN in Nigeria since 2002 and through Bristow Helicopters and Bristow Nigeria since the acquisition of its interest in Bristow Aviation in the late 1990s. During the relevant period, the books and records of AirLog, PAAN, Bristow Helicopters and Bristow Nigeria were a component of the consolidated financial statements included in Bristow's Commission filings.

16. AirLog and Bristow Helicopters' books and records improperly reflected PAAN and Bristow Nigeria's cash payments to the tax officials as legitimate tax expenses. The PAYE tax payments were recorded in summary fashion, either broken out in a line item for "PAYE taxes" or compiled together with other expenses. AirLog and PAAN booked both the amount that was paid to the government and the cash amount that was given to the tax officials as "payroll tax expenses." Additionally, PAAN and Bristow Nigeria underreported their payroll expenses. As a result, Bristow's books, records and accounts did not, in reasonable detail, accurately and fairly reflect PAAN and Bristow Nigeria's improper payments and payroll-related expenses for the relevant time period, when AirLog and Bristow Helicopters' books and records were consolidated into Bristow's.

[4] The restatement also covered underreported payroll expenses outside of Nigeria, customer reimbursements and severance benefits.

Bristow Lacked Adequate Internal Controls to Detect and Prevent
Foreign Corrupt Practices Act Violations and Underreported Payroll Expenses

17. Prior to Bristow's internal investigation in Fall 2004, the internal controls at Bristow, AirLog, Bristow Helicopters, PAAN, and Bristow Nigeria were deficient and were not adequately designed to safeguard against Foreign Corrupt Practices Act violations. As a result, Bristow's internal controls failed to provide reasonable assurances that its affiliates' books and records accurately reflected the nature and purpose of the improper payments. Similarly, Bristow's internal controls failed to provide reasonable assurances that the company's payroll-related expenses were accurately stated in accordance with generally accepted accounting principles.

Federal Securities Laws Violations

18. As a result of the improper payments described above, Bristow violated Section 30A of the Exchange Act, which prohibits any issuer with a class of securities registered pursuant to Section 12 of the Exchange Act, in order to obtain or retain business, from giving, or authorizing the giving of, anything of value to any foreign official for purposes of influencing the official or inducing the official to act in violation of his or her lawful duties, or to secure any improper advantage; or to induce a foreign official to use his influence with a foreign government or foreign governmental instrumentality to influence any act or decision of such government or instrumentality.

19. As a result of the conduct described above, Bristow violated Section 13(a) of the Exchange Act and Rules 13a-1, 13a-13 and 12b-20 thereunder.

20. As a result of the conduct described above, Bristow violated Section 13(b)(2)(A) of the Exchange Act, which requires reporting companies to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect their transactions and disposition of their assets.

21. As a result of the conduct described above, Bristow violated Section 13(b)(2)(B) of the Exchange Act, which requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded in accordance with management's general or specific authorization; transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets; access to assets is permitted only in accordance with management's general or specific authorization; and the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Bristow's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that Respondent Bristow cease and desist from committing or causing any violations and any future violations of Sections 30A, 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.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2656 / September 26, 2007

Admin. Proc. File No. 3-12433

In the Matter of

CONRAD P. SEGHERS

c/o Charles B. Manuel, Jr. and Shira Y. Rosenfeld
Manuel & Rosenfeld, L.L.P.
One Penn Plaza, Suite 2527
New York, NY 10119

c/o Carl A. Generes
Law Office of Carl A. Generes
4358 Shady Bend Drive
Dallas, Texas 75244

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Ground for Remedial Action

Injunction

Respondent was permanently enjoined from violations of the federal securities laws. Held, it is in the public interest to bar respondent from association with any investment adviser.

APPEARANCES:

Charles B. Manuel, Jr. and Shira Y. Rosenfeld, of Manuel & Rosenfeld, L.L.P., and Carl A. Generes, of the Law Office of Carl A. Generes, for Conrad P. Seghers.

Karen Matteson, for the Division of Enforcement.

Appeal filed: March 1, 2007
Last brief received: May 17, 2007

Document 19 of 34

I.

Conrad P. Seghers, an unregistered investment adviser, appeals from the decision of an administrative law judge. 1/ The law judge found that on September 14, 2006, the United States District Court for the Northern District of Texas had permanently enjoined Seghers from violating the antifraud provisions of the federal securities laws. The law judge barred Seghers from associating with any investment adviser. We base our findings on an independent review of the record, except with respect to those findings of the law judge not challenged on appeal.

II.

On March 1, 2006, following a civil trial in the United States District Court for the Northern District of Texas, a jury returned a verdict finding that Seghers violated Section 17(a) of the Securities Act of 1933, 2/ Section 10(b) of the Securities Exchange Act of 1934, 3/ Exchange Act Rule 10b-5, 4/ and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 5/ in connection with Seghers's involvement with three hedge funds. 6/

On September 14, 2006, the District Court issued a memorandum opinion and order (the "District Court Opinion") 7/ finding the trial record sufficient to support the jury's verdict and denying Seghers's motion for a judgment as a matter of law. The District Court entered final judgment against Seghers, permanently enjoining him from violating the antifraud provisions found by the jury. Additionally, the District Court imposed a $50,000 civil penalty on Seghers and denied the Division's request for disgorgement. Both the Commission and Seghers have

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1/ Conrad P. Seghers, Initial Decision Rel. No. 326 (Feb. 5, 2007), 89 SEC Docket 3263.

2/ 15 U.S.C. § 77q(a).

3/ 15 U.S.C. § 78(b).

4/ 15 C.F.R. § 240.10b-5.

5/ 15 U.S.C. §§ 80b-6(1), (2).

6/ The jury did not find Seghers liable on a claim that he had violated the securities registration provisions of Section 5 of the Securities Act.

7/ SEC v. Seghers, Civ. 3:04-CV-1320-K, slip op. (N.D. Tex. Sept. 14, 2006). On November 20, 2006, the District Court issued an Amended Final Judgment by order of the Fifth Circuit upon a motion by the Division to correct the Final Judgment pursuant to Federal Rules of Civil Procedure 60(a) and 65(d). The Amended Final Judgment does not substantively alter the District Court's judgment and relief.

appealed the District Court's Amended Final Judgment to the United States Court of Appeals for the Fifth Circuit, cross-appeals which are pending. 8/

During the underlying injunctive proceeding, both parties stipulated that Seghers participated in the offer and sale of securities in the form of limited partnership interests in three hedge funds, Integral Hedging, L.P., Integral Arbitrage, L.P., and Integral Equity, L.P. (collectively, the "Funds"), and that Seghers acted as an investment adviser to these Funds. The District Court Opinion stated that the Funds' assets were invested in an account known as the Galileo Fund at Morgan Stanley Dean Witter, which Samer M. El Bizri, Seghers's former partner and business associate, opened in June 1999. Olympia Capital Associates, L.P., acting as the Funds' administrator, sent monthly and quarterly statements to the Funds' investors. Seghers also had personal assets invested in the funds.

According to the District Court Opinion, Seghers's participation in the Funds included furnishing Olympia Capital with information relating to the Funds' value. Seghers obtained the information from values reported by Morgan Stanley. Olympia Capital relied on the information provided by Seghers "in order to value the Funds' assets, prior to sending the [monthly and quarterly] statements to investors."

The District Court Opinion stated that, by June 6, 2001, Seghers had become aware that "the statement values for the Integral Equity [hedge fund] had been incorrect since February 2001." Seghers asked Morgan Stanley to "document the fact that Morgan Stanley agreed that the statements had been wrong." On June 6, 2001, Morgan Stanley sent Seghers a letter in response, stating that "the statement values for the Funds 'have been incorrect since February 2001 . . . [i]ncluding most recently the statements for May 31, 2001. They have not accurately reflected the actual value of the accounts during any of these periods.'" At the trial, Seghers testified that he "had known that the [Morgan Stanley] statements were incorrect."

Seghers also testified that his "concerns started to grow almost exponentially beginning approximately the 10th through the 12th of June, 2001." On June 15, 2001, Seghers sent an e-mail to Morgan Stanley stating that there were new errors "every day" and that the accounts were "continually full of multi-million dollar errors." In the e-mail, Seghers requested that Morgan Stanley "please help get this fixed, together with our web pages that are incorrect so frequently that they can never be trusted." Seghers went on to state, "Morgan Stanley's continued inaccuracies with respect to our account positions and incorrect order fills continue to materially damage our funds and the respective investors."

Despite knowing that the information provided by Morgan Stanley overstated the Funds' values, Seghers continued to provide Olympia Capital with inaccurate asset information. Seghers sent a letter on July 13, 2001 to the investors, which reported "positive developments" and stated that "amidst the volatility in the markets we have continued to post respectable

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8/ SEC v. Seghers, No. 06-11146 (5th Cir. appeal docketed Dec. 8, 2006).

returns." On August 1, 2001, Seghers informed his personal attorney that the Funds were "in the toilet." Investors ultimately incurred losses from their investments in the Funds; the District Court found that Seghers "lost over $900,000 of his own money with the investors."

Between June 6, 2001 and September 30, 2001, Seghers provided Olympia Capital with information that caused Olympia Capital to overstate to investors the Funds' value as reported on the monthly statements by 47% to 77%. During this period the Funds' actual assets ranged between $34.31 million to $49.40 million per month, and the overstatements ranged between $23.12 million to $29.58 million per month. These overstated values were reported in four monthly statements, respectively, dated as of the last calendar days of June, July, August, and September 2001. One witness testified at trial that "there were millions of dollars difference between the reported value to the investors and the ultimate--the true value, or the value put on the Morgan Stanley statement, during that period of time." According to this witness, from January 2001 to July 15, 2001, the maximum difference between the Funds' mark-to-market value and the value which investors saw was about $23 to $24 million.

The District Court concluded that the "evidence establishes that Seghers acted knowingly or recklessly with respect to the fact that he was causing the Funds to overstate the value of the Funds' assets beginning June 6, 2001." The Court found that there was sufficient evidence to support the jury's findings that "Seghers employed a scheme, or practice of business, to defraud investors" and that, in his July 13, 2001 letter to investors, "Seghers made an untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements true, in the light of the circumstances under which they were made."

On September 26, 2006, we instituted administrative proceedings against Seghers to determine whether he had been enjoined and, if so, what remedial action would be in the public interest. On February 5, 2007, the law judge granted the Division's motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, 9/ finding that "there is no genuine issue as to the . . . material facts." The law judge determined that Seghers had been enjoined within the meaning of Section 203(e)(4) of the Advisers Act. The law judge further concluded that it was in the public interest to permanently bar Seghers from associating with any investment adviser.

III.

Advisers Act Sections 203(e) and 203(f) authorize us to discipline, consistent with the public interest, investment advisers or associated individuals whom a court of competent jurisdiction has enjoined from, among other things, any conduct or practice connected with investment advisory activities or the purchase or sale of any security. 10/ We find that the United

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9/ 17 C.F.R. § 201.250.

10/ 15 U.S.C. §§ 80b-3(e)(4), 80b-3(f).

States District Court for the Northern District of Texas permanently enjoined Seghers within the meaning of Section 203(e)(4) of the Advisers Act.

In appealing the law judge's decision to impose a permanent bar, Seghers bases his objections on three grounds: 1) this proceeding should be stayed pending his appeal of the District Court's action; 2) summary disposition was inappropriate and the law judged erred in not holding an evidentiary hearing; and 3) the sanction imposed is excessive.

A.

Seghers argues that the law judge erred in denying Seghers's motion to stay the administrative proceedings pending his appeal of the District Court's underlying injunction. Seghers has acknowledged that it is an "uncontested point that there are circumstances in which the Commission may conduct its administrative proceedings prior to the conclusion of an appeal," but he argues that the Commission "usually" stays administrative proceedings pending appeals of underlying proceedings. Seghers is mistaken. 11/

It is well established that the existence of an appeal of the District Court's decision does not affect the injunction's status as a basis for administrative action. 12/ As we previously have stated, "Unless and until it is vacated, the injunction entered against [the respondent] is a valid

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11/ In support of his claim, Seghers cites only one case, Ted Harold Westerfield, 54 S.E.C. 25 (1999). In that case, however, the administrative proceeding was not stayed pending resolution of the appeal. The U.S. Supreme Court denied certiorari for Westerfield's criminal appeal on October 20, 1997, Westerfield v. United States, 522 U.S. 939 (1997), five days after the administrative hearing was held on October 15, 1997. Ted Harold Westerfield, Initial Decision Rel. No. 120 (February 9, 1998), 66 SEC Docket 1616. Furthermore, the law judge had denied Westerfield's motion to stay the hearing until Westerfield completed his incarceration. Ted Harold Westerfield, Admin. Proc. Rel. No. 550 (September 25, 1997), 65 SEC Docket 1471.

12/ See Elliott v. SEC, 36 F.3d 86, 87 (11th Cir. 1994) ("Under the statutory language, existence of the injunction provides a ground for the bar adequate in itself."); Michael T. Studer, Securities Exchange Act Rel. No. 50411 (Sept. 20, 2004), 83 SEC Docket 2853, 2859 ("[T]he fact that [a respondent] is still litigating [an injunctive] action does not affect our statutory authority to conduct this proceeding."); Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002) ("[T]he pendency of an appeal does not preclude us from acting to protect the public interest."); Ira William Scott, 53 S.E.C. 862, 865 (1998) ("The Advisers Act permits us to impose sanctions on the basis of a qualifying conviction. We need not await the outcome of any post-conviction proceeding in order to proceed.").

basis for administrative action." 13/ If an appellate court reverses the District Court's judgment, Seghers may seek to vacate any action based upon that judgment. 14/

Seghers contends that a stay is appropriate because he "has the due process right to deny that his acts or omissions constituted fraud and he has the right to complete his appeal to the Fifth Circuit without the [Division of Enforcement] accusing him of a 'lack of remorse'" in this administrative proceeding. The existence of this administrative proceeding, however, does not prevent Seghers from fully challenging the District Court's decision on appeal.

Seghers also argues that his due process rights were violated because he was, in effect, "obligated to testify against himself" 15/ in order to establish that he recognizes the wrongful nature of his conduct, one of the factors that we consider in determining the need for remedial sanctions. 16/ However, the Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive. 17/ We recognize that the fact that Seghers has not acknowledged the wrongful nature of his conduct is consistent with a vigorous defense of the charges against him. Our consideration of the public interest factors in this matter reflects this fact. 18/

13/ Studer, 83 SEC Docket at 2859. See Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1104 (D.C. Cir. 1988) ("[T]he fact that a judgment is pending on appeal ordinarily does not detract from its finality . . . for purposes of subsequent litigation."); Martin v. Malhoyt, 830 F.2d 237, 264 (D.C. Cir. 1987); William F. Lincoln, 53 S.E.C. 452, 456 (1998).

14/ See Elliott, 36 F.3d at 87; Studer, 83 SEC Docket at 2859; Charles Trento, Exchange Act Rel. No. 49296 (Feb. 23, 2004), 82 SEC Docket 785, 789-91; Lincoln, 53 S.E.C. at 456; C.R. Richmond & Co., 46 S.E.C. 412, 414 n.11 (1976). Cf. Terry Harris, Investment Advisers Act Rel. No. 2622 (July 26, 2007), __ SEC Docket __ (finding that criminal conviction that has been reversed on appeal may not serve as the basis for sanctions under Advisers Act Section 203(f)).

15/ Original emphasis.

16/ See infra note 40 and accompanying text (discussing factors in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981)).

17/ See Robert W. Armstrong, III, Exchange Act Rel. No. 51920 (June 24, 2005), 85 SEC Docket 3011, 3039 (citing KPMG Peat Maverick, 54 S.E.C. 1135, 1992 (2001), petition denied, 289 F.3d 109 (D.C. Cir. 2002)). See also Blinder, Robinson, 837 F.2d at 1112 (referencing the fact that the Commission weighs the factors relevant to a sanction in the public interest).

18/ See text accompanying note 49, infra.

B.

Seghers challenges the law judge's decision to grant the Division's motion for summary disposition under Rule of Practice 250. The rule provides that a motion for summary disposition may be granted if "there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 19/ Seghers contends that granting summary disposition in "matters of this import" conflicts with the requirement of Section 203(f) of the Advisers Act, which requires that our findings for sanctions be based "on the record after notice and opportunity for hearing." 20/ Seghers states that this "unequivocal language" indicates that he is entitled to an in-person, oral evidentiary hearing, which summary disposition cannot satisfy. 21/

Contrary to Seghers's argument, Section 203(f) of the Advisers Act does not require the Commission to hold an in-person evidentiary hearing in every administrative proceeding. The requirement that adjudicatory proceedings be on the record after notice and opportunity for hearing does not necessitate an in-person hearing. 22/ Moreover, courts have upheld summary disposition where no genuine issue of material fact is in dispute. 23/ In addition, courts have

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19/ 17 C.F.R. §201.250.

20/ 15 U.S.C. § 80b-3(f).

21/ We note that although Seghers challenges the validity of summary disposition under the Advisers Act before us, Seghers made a motion for summary disposition under Rule 250 before the law judge. The law judge denied this motion.

22/ See, e.g., Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743, 747-50 (6th Cir. 2004) (affirming the validity of the Department of Health and Human Services' internal procedure for summary judgment in a sanction proceeding, required by statute to be "on the record after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person").

23/ See, e.g., id. at 750 ("[I]t would seem strange if disputes could not be decided without an oral hearing when there are no genuine issues of material fact."); Puerto Rico Aqueduct & Sewer Auth. v. EPA, 35 F.3d 600, 606-11 (1st Cir. 1994) (affirming generally the validity of summary disposition procedures in the administrative context and stating that a grant of summary disposition is proper when there fails to be a genuine issue of material fact); cf. Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607-08 (D.C. Cir. 1987) (affirming the Agriculture Department's denial of an evidentiary hearing under its procedural rules, which allowed the Department to "dispense with a hearing when no answer is filed," because there was no material issue of fact).

sustained Commission findings that sanctions were in the public interest following administrative hearings based on summary disposition. 24/

For a follow-on proceeding, summary disposition may be inappropriate in certain rare circumstances when "a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct." 25/ Seghers had not made this showing here. According to Seghers, an in-person, oral evidentiary hearing is necessary to establish a developed record upon which the Commission can base its decision. Seghers asserts that an evidentiary hearing would permit the law judge "to hear and see the witnesses and fully evaluate the case based upon the true picture of who they are and what they say." However, Seghers fails to identify any specific evidence or additional facts to be adduced at such a hearing that would create a genuine issue of material fact. 26/

Seghers has submitted a series of affidavits and declarations that describe two general categories of facts that he suggests support denying summary disposition. The first category of facts attacks the District Court's judgment. Seghers asserts that Morgan Stanley calculated the Funds' valuations and that Olympia Capital reported the values to the Funds' investors. Seghers's cites these facts apparently in support of his assertion that he "did not disseminate misleading information," contrary to the District Court's conclusion that he "was causing the Funds to overstate the value of the Funds' assets" by providing inaccurate information to

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24/ See, e.g., Brownson v. SEC, 66 Fed. Appx. 687, 688 (9th Cir. 2003) (unpublished decision denying petition for review) (upholding the use of summary disposition under Rule of Practice 250 during sanctioning proceedings); Michael Batterman, Advisers Act Rel. No. 2334 (Dec. 3, 2004), 84 SEC Docket 1349, 1355-56, aff'd, No. 05-0404 (2d Cir. 2005) (unpublished).

25/ John S. Brownson, 55 S.E.C. 1023, 1028 n.12 (2002), aff'd, 66 Fed. Appx. 687 (9th Cir. 2003). See Blinder, Robinson, 837 F.2d at 1109-10; Jose P. Zollino, Exchange Act Rel. No. 51632 (Apr. 29, 2005), 85 SEC Docket 1292, 1296 & n.10 (discussing Brownson, 55 S.E.C. 1023 (2002), petition denied, 66 Fed. Appx. 687 (9th Cir. 2003)). Seghers must set forth specific facts establishing a genuine issue of material fact and may not rely upon mere allegations in his pleadings to the law judge to create a genuine issue. See Frank P. Quattrone, Exchange Act Rel. No. 53547 (March 24, 2006), 87 SEC Docket 2155, 2164 (noting that the respondent "did not rely on mere conclusory allegations or speculation but instead offered specific facts to support his contention"). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 256 (1986).

26/ Thus, Seghers has failed to establish that the record lacks "a full and true disclosure of the facts." See Sierra Ass'n for Env't v. FERC, 744 F.2d 661, 663 (9th Cir. 1984) (holding that "a trial-type hearing" is not always required because such a hearing was not necessary for a "full and true disclosure of the facts"); Cent. Freight Lines v. United States, 669 F.2d 1063, 1068 (5th Cir. 1982).

Olympia Capital. It is well established that Seghers is collaterally estopped from challenging in this administrative proceeding the judgment of the District Court in the injunctive proceeding. 27/ The doctrine of collateral estoppel precludes the Commission from reconsidering the injunction as well as factual issues that were actually litigated and necessary to the court's decision to issue the injunction. 28/ The appropriate forum for Seghers to challenge the validity of the injunction is through an appeal to the United States Court of Appeals, which Seghers indicates he is pursuing. 29/

The second category of facts set forth in the affidavits and declarations addresses the losses Seghers suffered from investing in the Funds, the statement that Seghers received no fees from the Funds, Seghers's plans for future employment, statements of certain investors in the Funds who support Seghers, and the offer of "tens of investors" who support Seghers and are willing to testify on his behalf. These facts were not disputed here by the Division. Moreover, in considering a motion for summary disposition, the "facts of the pleading of the party against whom the motion is made shall be taken as true . . . ." 30/ This second category of facts were before the law judge and, as discussed below, we have considered them in our determination of what sanction is in the public interest.

Seghers also suggests that he is being singled out and unfairly denied an oral evidentiary hearing because the Commission has held such hearings in past cases, which the law judged cited in the initial decision. However, four of the cases on which Seghers relies 31/ were decided prior to the adoption of Rule 250, which became effective on July 24, 1995. 32/ A Supreme Court decision reviewing one of those cases, Steadman, cites to our former Rules of Practice -- which Seghers cites in his brief to us to support his claim that an oral hearing is required -- but these

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27/ See Zollino, 89 SEC Docket at 2605 & n.20; Trento, 82 SEC Docket at 789-90; Galluzzi, 55 S.E.C. at 1115-16; Scott, 53 S.E.C. at 866; Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 (1997); Timothy Mobley, 52 S.E.C. 592, 595 n.9 (1996), C.R. Richmond & Co., 46 S.E.C. 412, 414 n.12 (1976). See also Elliot, 36 F.3d at 87.

28/ Shiva, 52 S.E.C. at 1249.

29/ Batterman, 84 SEC Docket at 1354 n.10.

30/ Rule of Practice 250(b), 17 C.F.R. § 201.250(b).

31/ Charles Phillip Elliot, 50 S.E.C. 1273 (1992), aff'd, 36 F.3d 86 (11th Cir. 1994) (per curiam); Steadman Sec. Corp., 46 S.E.C. 896 (1977), aff'd in part and vacated and remanded sub nom., Steadman v. SEC, 603 F.2d 1126 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); Leo Glassman, 46 S.E.C. 209 (1975); Mac Robbins & Co., Inc., 41 S.E.C. 116 (1962), aff'd sub nom. Berko v. SEC, 316 F.2d 137 (2d Cir. 1963).

32/ 60 Fed. Reg. 32,738 (June 23, 1995) (codified at 17 C.F.R. § 201.250).

Rules were superseded by the Rules enacted in 1995 which include the summary disposition procedure described in Rule 250. 33/ In the other two cases that Seghers cites, it does not appear that either the Division or the respondent moved for summary disposition, and, in any event, the issue of summary disposition was not before the Commission. 34/ Moreover, since we adopted Rule of Practice 250, we have upheld the use of the summary disposition procedure repeatedly in cases, like this one, where the respondent has been enjoined or convicted of a crime and the sole determination concerns the appropriate sanction. 35/

Seghers also contends that granting summary disposition was procedurally inappropriate because, in doing so, the law judge who granted summary disposition "overruled the case management plan" of the original law judge assigned to the proceeding. We find this argument to be without merit. On October 30, 2006, the law judge originally assigned to the proceeding denied the Division's request to file a motion for summary disposition. Pursuant to the Commission's delegated authority, the chief administrative law judge subsequently assigned another law judge to the proceeding on November 29, 2006. 36/ On December 7, 2006, the new law judge granted the Division leave to file a motion for summary disposition. Under Rule of Practice 111, we grant hearing officers with "the authority to do all things necessary and appropriate to discharge his or her duties," which includes "regulating the course of a proceeding and the conduct of the parties and their counsel." 37/ Rule 111 is "broadly worded" to accommodate a law judge's discretion in managing a case plan within the limits of our Rules of

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33/ Steadman, 450 U.S. at 94 n.3 (summarizing several, now-revised Rules of Practice, including 17 C.F.R. § 201.14(a) (1980)); 60 Fed. Reg. 32,738 (June 23, 1995) (codified at 17 C.F.R. § 201.250) (revising Rules of Practice).

34/ Marshall E. Melton, 56 S.E.C. 695 (2003); Westerfield, 54 S.E.C. 25 (1999). Seghers also claims that we have "shown greater solicitude toward convicted felons (see Westerfield, . . .) than to this Respondent." As noted above, however, there is no evidence that either the Division or Westerfield moved for summary disposition in that case. In addition, we have resolved through summary disposition a number of cases where the respondent had been convicted of a crime. See, e.g., Zollino, 89 SEC Docket at 2607; Stuart E. Winkler, Securities Act Rel. No. 8348 (Dec. 17, 2003), 81 SEC Docket 3217; Galluzzi, 55 S.E.C. at 1115; Brownson, 55 S.E.C. at 1028.

35/ See, e.g., Zollino, 89 SEC Docket at 2607; Galluzzi, 55 S.E.C. at 1115; Brownson, 55 S.E.C. at 1028.

36/ Pursuant to Rule of Practice 323, 17 C.F.R § 201.323, we take official notice that the initial law judge retired on January 3, 2007.

37/ 17 C.F.R. § 201.111.

Practice and governing statutes. 38/ The law judge acted within the scope of Rule 111 in granting the Division leave to file a motion for summary disposition. Moreover, as explained above, we find no error in the law judge's grant of summary disposition.

* * *

We agree with the law judge that an evidentiary hearing was not required because there was no genuine issue with regard to any material fact, and we find that the law judge's grant of the Division's motion for summary judgment was appropriate.

IV.

The Division asks that we bar Seghers from association with any investment adviser. As an initial matter, Seghers argues that the Commission is precluded from bringing this proceeding because the District Court's Amended Judgment stated, "[a]ll relief not expressly granted herein is denied." We find this argument without merit. We have held that "injunctive and administrative remedies serve different purposes; one restrains further violative activity, the other seeks to determine whether it is in the public interest to exclude somebody from the securities business or to limit his activities in it. Far from being a barrier to administrative action, an injunction is an express ground for such action." 39/

Seghers challenges the permanent bar imposed against him as "grossly excessive" and asserts that the Commission should reduce the sanction to a three-month suspension or no sanction at all. In determining whether a remedial sanction is in the public interest, we evaluate several factors: "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against

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38/ Cf. Schield Mgmt. Co., Exchange Act Rel. No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 861 (holding Rule of Practice 111 to be "broadly worded to permit a law judge to exercise discretion as to which witnesses to allow and which ones to exclude from the hearing room during the testimony of other witnesses").

39/ Samuel H. Sloan, 45 S.E.C. 734, 738-39 (1975). See Lincoln, 53 S.E.C. at 459-61 (concluding that a permanent bar from the securities industry is a civil remedy and thus does not constitute a second punishment for the same underlying activity). See also Zollino, 89 SEC Docket at 2605; Elliot, 50 S.E.C. at 1279; Walter H. T. Seager, 47 S.E.C. 1040, 1042-43 (1984).

Seghers asserts that the sanction is excessive when considered in light of the fact that the District Court "drastically scaled back the relief sought by the Enforcement Division" in rendering its judgment. However, the District Court's reasoning in imposing civil remedies is irrelevant to these proceedings, which are conducted to determine whether remedial sanctions are appropriate to protect the public interest.

future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." 40/

Seghers's conduct was egregious. The District Court found that there was sufficient evidence at trial to "support the jury's finding that Seghers knowingly or recklessly defrauded investors" and enjoined Seghers from securities fraud violations. Fraud is "especially serious and subject to the severest of sanctions under the securities laws." 41/ The securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence. 42/ The existence of an antifraud injunction, thus, "can, in the first instance, indicate the appropriateness in the public interest of revocation of registration or suspension or bar from participation in the securities industry." 43/

Moreover, Seghers acted as an investment adviser, a fiduciary role which imposes "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation to employ reasonable care to avoid misleading clients." 44/ Seghers betrayed his fiduciary duties by knowingly or recklessly causing the Funds to overstate the value of their assets. These overstatements were significant. The evidence presented in the injunctive action indicates that there were millions of dollars difference between the value reported to investors and the actual value of the Funds' assets and that the overstatements between June and

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40/ Steadman, 603 F.2d at 1140.

41/ Melton, 56 S.E.C. at 713. See also Zollino, 89 SEC Docket at 2608; Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

42/ See, e.g., Paul K. Grassi, Jr., Exchange Act Rel. No. 52858 (Nov. 30, 2005), 86 SEC Docket 2494, 2498; Frank Kufrovich, 55 S.E.C. 616, 627 (2002); Lincoln, 53 S.E.C. at 465; Adrian Antoniu, 48 S.E.C. 909, 915 (1987); Philip S. Wilson, 48 S.E.C. 511, 517 (1986); Seager, 47 S.E.C. at 1043.

43/ Batterman, 84 SEC Docket at 1359. See also Melton, 56 S.E.C. at 713 ("Based on our experience enforcing the federal securities laws, we believe that ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to revoke the registration of, or suspend or bar from participation in the securities industry . . . a respondent who is enjoined from violating the antifraud provisions.").

44/ Batterman, 84 SEC Docket at 1359 (footnotes omitted) (quoting Capital Gains Research Bureau v. SEC, 375 U.S. 180, 194 (1963)). See also SEC v. Washington Inv. Network, 475 F.3d 392, 404 (D.C. Cir. 2007) ("[W]e think the better reading of section 206 [of the Adviser's Act] is that it prohibits failures to disclose material information, not just affirmative frauds. This reading is consistent with the fiduciary status of investment advisers in relation to their clients and it is also more likely to fulfill Congress's general policy of promoting "full disclosure" in the securities industry . . . .") (citations omitted).

September 2001 ranged from 47% to 77% above the Funds' actual value. In his July 13, 2001 letter to investors, Seghers again violated his fiduciary obligations by misrepresenting the status of the Funds to investors, reporting only "positive developments" and that "amidst the volatility in the markets we have continued to post respectable returns," despite the fact that Seghers knew the Funds' assets were overstated. Seghers's conduct had serious implications for each of the Funds' investors, whom Seghers denied complete and accurate information regarding the performance of their investments. Seghers's behavior "represents a serious abuse of the trust placed in [him] by the Funds' investors and by the securities industry." 45/

Seghers's conduct was ongoing, not isolated, and committed with a high degree of scienter. After confirming on June 6, 2001 that the statement values for the Funds had been incorrect since February 2001, Seghers continued to furnish Olympia Capital with inaccurate information for the next four consecutive months. 46/ Seghers gave Olympia Capital overstated values for the August 31, 2001 and September 30, 2001 statements, even after acknowledging to his attorney on August 1, 2001 that the Funds were "in the toilet." 47/ Seghers's acts -- in furnishing Olympia Capital with information that he knew to be incorrect -- were incompatible with the affirmative fiduciary obligations of an investment adviser.

We further find that Seghers will be presented with opportunities to violate the securities laws in the future. Seghers testified in the injunctive action that, since receiving his Ph.D. in microbiology, he has exclusively devoted himself to investing, largely on behalf of others. In one of the declarations that he submitted, Seghers stated he has not been in the securities industry in any capacity since 2002 and asserted that he "will not in the future serve as an investment adviser." However, in that same declaration, Seghers also stated that he "should not be precluded from the opportunity to resume my career," and that he continues to engage with his former clients -- the Funds' investors, which "include friends and family." In an affidavit originally submitted in the injunctive action, Seghers stated that he "communicate[s] with the investors of the Funds far more than the Receiver [assigned to manage the Funds] or the SEC,

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45/ Abraham and Sons Capital, Inc., 55 S.E.C. 252, 272 (2001).

46/ Thus, subsequent to June 6, 2001, Seghers was aware not only that the investors were receiving incorrect investor statements from June through September 2001, but also that the four statements dated from June to September 2001 would perpetuate the ongoing overstated values that investors had received from June through November 2000, and from March 2001 through May 2001.

47/ In one of his declarations Seghers asserts, "I provided as much information as I could during this very uncertain time, and I sent out numerous letters to investors which the U.S. District Court is not acknowledging." However, Seghers does not assert, and nothing in the record establishes, that Seghers attempted to inform the investors that the statements were inaccurate. Seghers admitted that his "investor communications were not related to investor account statements. . . ."

even today after all of the frivolous allegations have been made against me. . ." and there are a "large number of investors who still communicate with me on a weekly basis." His occupation and current involvement with the Funds' investors present opportunities for future violations. A bar is necessary to protect the public interest because, absent a bar, there would be nothing to prevent Seghers from becoming an investment adviser to the Funds' investors or others in the future. 48/

Consistent with a vigorous defense of the District Court's injunction, Seghers denies that his conduct was wrongful in nature. 49/ However, Seghers continues to demonstrate either a misunderstanding or a lack of recognition of an investment adviser's affirmative duties and regulatory obligations. 50/ For example, Seghers attempts to minimize the gravity of his conduct by characterizing his behavior as an "alleged delay in reporting the wrongs of his Funds' brokerage firm to the Funds' investors" and an "alleged non-disclosure of the [accurate] values in monthly statements." Moreover, Seghers neglects to address his conduct in failing to notify investors of the inaccurate fund values and instead representing only positive developments in his July 13, 2001 letter. Seghers's arguments reflect a misunderstanding of the fundamental duty that an investment adviser has to provide a "full and fair disclosure of all material facts." 51/

48/ See Bradley T. Smith, Exchange Act Rel. No. 55771 (May 16, 2007), __ SEC Docket __ ("Absent a bar, there would no obstacle to Smith's associating with another investment adviser or broker dealer."); Schield Mgmt. Co., 87 SEC Docket at 865 ("[A]bsent a bar, there would be no obstacle to [the respondent] being an investment adviser at [his current investment advisory firm] or some other firm.").

49/ See also text accompanying note 18, supra .

50/ Cf. Schield Mgmt. Co., 87 SEC Docket at 866; Barr Fin. Group, Inc., 56 S.E.C. 1243, 1261-62 (2003) ("[R]espondents' misconduct [in failing to provide the Commission with truthful disclosure in filings and cooperate with Commission examinations]. . . demonstrates either that they fundamentally misunderstand the regulatory obligations to which they are subject or they hold these obligations in contempt."); C.R. Richmond & Co., 46 S.E.C. at 415 (stating that the "[r]espondents thus showed a marked insensitivity to the obligation of fair-dealing borne by professionals in the securities business" by violating securities laws involving reporting, customer-disclosure, and record-keeping; selling unregistered securities; and violating the anti-fraud provisions of the Advisers' Act by using fraudulent advisory publications "to arouse illusory hopes of substantial profits with virtually no risk").

51/ Batterman, 84 SEC Docket at 1359 (quoting Capital Gains, 375 U.S. at 194). See also SEC v. Washington Inv. Network, 475 F.3d 392, 404 (D.C. Cir. 2007) (noting the Investment Adviser's Act "prohibits failures to disclose material information, not just affirmative frauds").

Seghers also contends that, because he has "learned the securities laws well and will take every step at all times to make certain that [he] operate[s] in conformity with them," he "will absolutely not ever violate the securities laws in the future." However, we find this assurance against future violations is outweighed by Seghers's behavior in conducting his fiduciary duties as an investment adviser.

Seghers presents various mitigating circumstances to support his argument for a lesser sanction than a permanent bar. Seghers contends that he did not earn any profit or receive any gains from the Funds during the time period of June 6, 2001 to September 30, 2001. Accepting arguendo that Seghers did not profit from his violations, this fact does not negate his conduct of his fiduciary duties, and therefore does not justify a reduced sanction in the public interest. 52/

Seghers further states, "I have lost a greater percentage of my assets than any other party or investor touched by this litigation," and suggests that the Commission should consider "all of the financial circumstances and hardship suffered by Seghers and his family" in determining a remedial sanction. However, the sanctions that we impose are not intended to punish, but "to protect the public interest from future harm at his hands." 53/ A bar from association with any investment adviser will protect the public interest by deterring Seghers and others from violating the provisions of the federal securities laws and their fiduciary duties as investment advisers. 54/

Seghers also submitted the declarations and affidavits of investors who maintain that they do not personally believe that Seghers defrauded them, despite the jury's findings and the District Court injunction. We have continually held that in determining remedial sanctions in the public interest, we evaluate the "welfare of investors as a class" 55/ and not the interests of a particular set of investors. 56/ We find that the mitigating circumstances that Seghers raises do not outweigh the need to protect the public interest given Seghers's misconduct.

52/ Cf. Howard R. Perles, 55 S.E.C. 686, 707 n.31 (2002) (noting "the absence of profit from manipulative conduct does not negate that conduct").

53/ Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

54/ See Steadman, 603 F.2d at 1142 ("[T]he Commission may consider the likely deterrent effect its sanctions will have on others in the industry."). Cf. PAZ Secs., Inc. v. SEC, No. 05-1467, 2007 U.S. App. LEXIS 17412, at *18 (D.C. Cir. July 20, 2007) (stating that "[a]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry") (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

55/ Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975).

56/ See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2003).

Accordingly, we have determined that it is in the public interest to bar Seghers permanently from association with any investment adviser.

An appropriate order will issue. 57/

By the Commission (Commissioners ATKINS, NAZARETH, and CASEY); Chairman COX not participating.

Nancy M. Morris
Secretary

57/ We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISES ACT OF 1940
Rel. No. 2656 / September 26, 2007

Admin. Proc. File No. 3-12433

In the Matter of

CONRAD P. SEGHERS

c/o Charles B. Manuel, Jr. and Shira Y. Rosenfeld
Manuel & Rosenfeld, L.L.P.
One Penn Plaza, Suite 2527
New York, NY 10119

c/o Carl A. Generes
Law Office of Carl A. Generes
4358 Shady Bend Drive
Dallas, Texas 75244

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Conrad P. Seghers be, and he hereby is, barred from association with any investment adviser.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56560 / September 27, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2731 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12847

In the Matter of **HOR CHONG (DAVID) BOEY, CPA** **Respondent.**	**ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Hor Chong (David) Boey ("Boey") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. §200.102(e)(2)].[1]

[1] Rule 102(e)(2) provides in pertinent part: "Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

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II.

The Commission finds that:

1. From March 2004 through July 2, 2007, Boey was a certified public accountant in Kentucky.

2. On July 3, 2007, a judgment of conviction was entered against Boey in *United States v. Gagalis, et al*, No. 1:04-cr-00126-PB-5, in the United States District Court for the District of New Hampshire, finding him guilty of two counts of securities fraud, one count of falsifying books and records of Enterasys Networks, Inc. ("Enterasys"), a public company, one count of making false statements to auditors of Enterasys, two counts of wire fraud, and one count of conspiracy to commit wire and securities fraud.

3. As a result of this conviction, Boey was sentenced to 36 months imprisonment in a federal penitentiary.

III.

In view of the foregoing, the Commission finds that Boey has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that Hor Chong (David) Boey is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Nancy M. Morris
Secretary

J Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56558 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12846

In the Matter of **IMMUCOR, INC. and** **GIOACCHINO DE CHIRICO,** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

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 Immucor, Inc. ("Immucor") and Gioacchino De Chirico ("De Chirico") (collectively, "Respondents").

II.

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

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III.

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

1. Immucor is a Georgia corporation headquartered in Norcross, Georgia. At all relevant times, its stock was registered with the Commission under Section 12(g) of the Exchange Act and was quoted on the NASDAQ market under the symbol BLUD. Immucor is a medical equipment company specializing in the manufacture and marketing of products used in the pre-transfusion diagnostics of human blood. Among other things, the company develops, manufactures, and sells products used by hospital blood banks, clinical laboratories, and blood donor centers to detect and identify various properties of human blood prior to patient transfusion. These products include a blood analysis system, called "Galileo," and the reagents, strips and other supplies needed by Galileo to diagnose blood samples.

2. De Chirico, 53, an Italian citizen and legal resident of Georgia, was, at all relevant times, President and Chief Operating Officer of Immucor.

3. Immucor does business internationally through several wholly-owned subsidiaries that operate sales and distribution facilities in the particular countries in which they are located. Immucor Italia S.p.A. ("Immucor Italia") is Immucor's subsidiary in Italy. On or about January 8, 2002, Immucor Italia sold blood testing units of a design that preceded Galileo to Niguarda Hospital in Milan, Italy. In addition to receiving the sales price for the units, this sale and the associated contract insured that Immucor would receive a stream of revenue from Niguarda Hospital for its regular purchases of the reagents, strips, and other supplies necessary to make the units work. Although the units were subsequently replaced by Galileo units, the contract for supplies and related income remained in place.

4. In May 2003, De Chirico arranged for the director of Nirguarda Hospital's blood bank ("the hospital director") to plan and chair a medical conference related to Galileo that was held in Italy in October 2003. De Chirico agreed to compensate the hospital director for his services and reimburse him for his expenses. Although the amount of the compensation and expenses were never discussed, the hospital director did request, and De Chirico agreed, that payment would be made in a manner to enable the hospital director to avoid Italian income taxes. Following the conference, however, the hospital director did not submit to De Chirico any request for compensation or payment of his expenses and, by February 2004, no payments to the hospital director relating to the conference had been made.

5. In or about February 2004, Immucor Italia, acting through a local sales agent, offered to the hospital director, and the hospital director accepted, a payment of €13,500 (or approximately $16,119 USD) for the purpose of influencing his commercial decisions for the benefit of Immucor, including, but not limited to the hospital director's upcoming decision on whether to renew his hospital's contract for Galileo-related blood testing supplies which was due to expire in January 2005. To arrange payment of this amount to the hospital director, the local sales agent submitted a payment request to Immucor describing the €13,500 as the hospital director's

overdue compensation for the October 2003 conference and asking that it be paid to a Swiss bank account for the benefit of the hospital director.

6. Based on the local sales agent's characterization of the payment and in accordance with his earlier agreement with the hospital director's request to assist him in avoiding Italian taxes, De Chirico authorized that the €13,500 payment be made through Immucor's German subsidiary, Immucor Medizinische Diagnostik GmbH. In so doing, he approved an invoice that falsely described the €13,500 payment as a consulting fee for services in connection with Galileo opportunities in Switzerland—work that De Chirico knew the hospital director had never performed.

7. As a result of Immucor Italia's actions, Immucor violated Section 30A of the Exchange Act, which prohibits any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act from, among other things, making or authorizing payments to any person while knowing that all or a portion of such payments will be offered or given to any foreign official for the purpose of influencing the official's decision in order to obtain or retain business.

8. As a result of De Chirico's actions, Immucor failed to record properly the disbursement, falsely booked the entry as an expense for consulting services that did not occur, and filed the related false invoice among Immucor's books and records. Because Immucor improperly recorded and paid a false invoice, its books, records and accounts did not, in reasonable detail, accurately and fairly reflect its transactions and dispositions of assets.

9. In addition, Immucor failed to devise and maintain internal accounting controls which were sufficient to provide reasonable assurances that its accounts were accurately stated in accordance with generally accepted accounting principles.

10. As a result of De Chirico's conduct described above, Immucor violated Section 13(b)(2)(A) of the Exchange Act, 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.

11. As a further result of De Chirico's conduct described above, Immucor violated Section 13(b)(2)(B) of the Exchange Act, 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.

12. As a result of De Chirico's conduct described above, De Chirico violated Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder, and caused Immucor to violate Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

Immucor's Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED that, pursuant to Section 21C of the Exchange Act:

A. Respondent Immucor cease and desist from committing or causing any violations and any future violations of Sections 13(b)(2)(A), 13(b)(2)(B) and 30A of the Exchange Act.

B. Respondent De Chirico cease and desist from committing or causing any violations and any future violations of Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder, and from causing any violations and any future violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56560 / September 27, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2731 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12847

In the Matter of HOR CHONG (DAVID) BOEY, CPA Respondent.	ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Hor Chong (David) Boey ("Boey") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. §200.102(e)(2)].[1]

[1] Rule 102(e)(2) provides in pertinent part: "Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

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II.

The Commission finds that:

1. From March 2004 through July 2, 2007, Boey was a certified public accountant in Kentucky.

2. On July 3, 2007, a judgment of conviction was entered against Boey in *United States v. Gagalis, et al*, No. 1:04-cr-00126-PB-5, in the United States District Court for the District of New Hampshire, finding him guilty of two counts of securities fraud, one count of falsifying books and records of Enterasys Networks, Inc. ("Enterasys"), a public company, one count of making false statements to auditors of Enterasys, two counts of wire fraud, and one count of conspiracy to commit wire and securities fraud.

3. As a result of this conviction, Boey was sentenced to 36 months imprisonment in a federal penitentiary.

III.

In view of the foregoing, the Commission finds that Boey has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that Hor Chong (David) Boey is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

FOIA

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56562 / September 27, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2733 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12849

In the Matter of **BRUCE D. KAY, CPA** **Respondent.**	**ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Bruce D. Kay ("Kay") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. §200.102(e)(2)].[1]

II.

The Commission finds that:

1. From August 1999 through September 2000, Kay was a certified public accountant in Maine.

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[1] Rule 102(e)(2) provides in pertinent part: "Any ... person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

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2. On July 5, 2007, a judgment of conviction was entered against Kay in *United States v. Gagalis, et al*, No. 1:04-cr-00126-PB-5, in the United States District Court for the District of New Hampshire, finding him guilty of two counts of securities fraud, one count of conspiracy to commit wire and securities fraud, one count of falsifying books and records of Enterasys Networks, Inc. ("Enterasys"), a public company, one count of making false statements to auditors of Enterasys, and three counts of wire fraud.

3. As a result of this conviction, Kay was sentenced to nine years and six months imprisonment in a federal penitentiary.

III.

In view of the foregoing, the Commission finds that Kay has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that Bruce D. Kay is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

FOIA Commissioner Atkins Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12843

In the Matter of **DIATECT INTERNATIONAL CORPORATION** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Diatect International Corp. ("Respondent" or "Diatect").

II.

The Commission's public official files disclose that Diatect, a California corporation headquartered in Heber City, Utah, produces and markets insecticides made from diatomaceous earth. The common stock of Diatect has been registered with the Commission under Section 12(g) of the Exchange Act since 1993. Until October 21, 2005, Diatect's common stock was quoted on the OTC Bulletin Board. The stock is currently quoted in the "Pink Sheets", disseminated by Pink Sheets LLC.

III.

After an investigation, the Division of Enforcement alleges that Diatect has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder by failing to file any quarterly or annual reports since the May 27, 2005, filing of its Form 10-QSB for the quarter ended March 31, 2005.

IV.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of the common stock identified in Section II registered pursuant to Section 12(g) of the Exchange Act.

V.

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section IV 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(b).

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

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

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

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

By the Commission.

Nancy M. Morris
Nancy M. Morris
Secretary

For Commissioner Atkins
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8849 / September 27, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56547 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12841

In the Matter of INTERVOICE, INC., Respondent.	ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING 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

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 Intervoice, Inc., formerly known as Intervoice-Brite, Inc. ("Intervoice" 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, Making Findings, and Imposing 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 ("Order"), as set forth below.

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III.

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

Summary

From at least 2000 through at least February 2002 (the "relevant period"), Intervoice, acting through its then chief financial officer ("CFO"), improperly recognized revenue on seven transactions (the "relevant transactions") under circumstances in which revenue recognition was prohibited pursuant to generally accepted accounting principles ("GAAP") and to Respondent's own accounting policies. This conduct resulted in Intervoice's publication of materially false and misleading financial information in financial statements that Intervoice filed with the Commission. As a result, during the relevant period, Intervoice's public filings with the Commission contained quarterly and annual financial information that materially misstated its: (i) net income for the fiscal quarter ended February 29, 2000; (ii) net loss for the fiscal year ended February 29, 2000, (iii) net income for the fiscal quarter ended November 30, 2000, (iv) net income for the fiscal quarter ended May 31, 2001; and (v) net income for the fiscal quarter ended August 31, 2001.

Intervoice's recognition of revenue from these transactions did not comport with GAAP or the company's accounting policies because, among other things, the transactions involved undocumented terms, including provisions that permitted Intervoice's distributors to return the products without penalty and to forgo payment until they had sold the products to their end users. In addition, Intervoice, acting through its then CFO, agreed to reconfigure or substitute products to suit the needs of its distributors' end users.

Respondent

1. Intervoice, a Texas corporation based in Dallas, develops, sells, and supports software designed to automate and personalize access to information and services. At all relevant times, Intervoice's common stock was registered under Section 12(g) of the Exchange Act and quoted on the NASDAQ National Market. Respondent's fiscal year ends on February 28 or 29.

Facts

2. In the fourth quarter of fiscal 2000, ended February 29, 2000, Intervoice recorded in its books and records and improperly recognized revenue in a quarter-end barter transaction. Specifically, Intervoice sold hardware and software to a company, Speechworks, Inc. ("Speechworks"), which normally provided software products to Intervoice, in that company's capacity as a reseller of Intervoice products, recognizing revenue of approximately $1,196,130. However, in connection with this transaction, Intervoice's then CFO agreed in advance to reconfigure the hardware and software products, or to substitute products of commensurate

[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.

value, in order to meet the needs of the ultimate end users, thereby precluding revenue recognition under GAAP.

3. Also in the fourth quarter of fiscal 2000, ended February 29, 2000, Intervoice improperly recorded in its books and records and recognized revenue of approximately $1,106,553 related to the sale of hardware and software to another reseller of Intervoice products. Recognition of revenue on this transaction was improper in light of post-shipment obligations agreed to by Intervoice's then CFO, including the obligation to reconfigure products or substitute products of commensurate value to meet the needs of the ultimate end users. As a result of the two fourth quarter transactions described above, Intervoice overstated its net income for the quarter by 19%, and understated net loss for the fiscal year ended February 29, 2000 by 8%, which it reported in its Form 10-K filed with the Commission on May 26, 2000.

4. In the third quarter of fiscal 2001, ended November 30, 2000, Intervoice improperly recorded and reported approximately $1.4 million of revenue by arranging for the improper recognition of deferred revenue associated with hardware systems sold to Speechworks during the prior fiscal year. In the first fiscal quarter of 2001, Intervoice implemented new accounting procedures pursuant to SEC's Staff Accounting Bulletin No. 101 ("SAB 101"). As part of the SAB 101 implementation, Intervoice deferred approximately $1.4 million of previously recognized revenue associated with hardware sales to Speechworks (most of which related to the fourth quarter 2000 sale described above) for which Intervoice retained a post-shipment installation obligation. In or about October 2000, Intervoice's then CFO had Speechworks sign releases that contained a false acknowledgement that Speechworks had purportedly installed the products and released Intervoice from its installation obligation. Intervoice's then CFO knew the releases were false and misleading because he knew that the products were still in a third party warehouse and that Intervoice would still install the products. Relying on the false releases, Intervoice improperly recognized approximately $1.4 million in revenue. As a result, Intervoice overstated its net income for the quarter by 242%, which it reported in its Form 10-Q for the third fiscal quarter of 2001, filed with the Commission on January 12, 2001.

5. In the fourth quarter of fiscal 2001, pursuant to a transaction negotiated by Intervoice's then CFO, Intervoice paid $900,000 to Speechworks, which was by then a public company, in exchange for Speechworks' amendment of a warrant that it had previously issued to Intervoice. The amendment included a provision allowing cashless exercise of the warrant. If Intervoice had not compensated Speechworks for amending the warrant, Intervoice would have been able to tack the holding period of the original and amended warrant to the holding period of the underlying common shares pursuant to Rule 144(d)(3)(ii) under the Securities Act thereby satisfying the one year holding period requirement of Rule 144(d)(1). As a result, Intervoice would have been able to resell the underlying common shares in the open market immediately after exercising the warrant and without registration pursuant to the exemption provided in Section 4(1) of the Securities Act. Because of the $900,000 payment to Speechworks, however, tacking of the holding period was not allowed, a new holding period commenced upon issuance of the underlying common shares, and Intervoice's premature resales in the public market were not eligible for an exemption from securities registration pursuant to Section 4(1). Speechworks' shares should have been issued to Intervoice as restricted stock that could not be resold in the

open market until February 2002, unless such resale was registered or another exemption from registration applied. Nonetheless, Intervoice sold the shares of Speechworks' stock for gross proceeds of $21.4 million in reliance on a registration exemption that was in fact not available.

6. In the first quarter of fiscal 2002, ended May 31, 2001, Intervoice improperly recorded in its books and records and recognized revenue of approximately $999,960 when it sold hardware and software to Speechworks in its capacity as a reseller of Intervoice products. Recognition of revenue on this transaction was improper in light of post-shipment obligations agreed to by Intervoice's then CFO, including the obligation to reconfigure products or substitute products of commensurate value to meet the needs of Speechworks' ultimate end users. As a result of this conduct, Intervoice overstated its net income for the quarter by 67%, which it reported in its Form 10-Q filed with the Commission on June 29, 2001.

7. In the second quarter of fiscal 2002, ended August 31, 2001, Intervoice improperly recorded in its books and records and recognized revenue of approximately $742,751 and $1,078,738, respectively, on two transactions involving hardware and software sales to two resellers. Recognition of revenue on each of these transactions was improper in light of post-shipment obligations agreed to by Intervoice's then CFO, including the obligations to reconfigure products or substitute products of commensurate value to meet the needs of the ultimate end users. In addition, recognition of the $1,078,738 was improper because Intervoice's then CFO granted the reseller the right to return the products if the ultimate end user failed to buy the products.

8. In the second and third quarters of fiscal 2002, ended August 31, 2001 and November 30, 2001, respectively, Intervoice improperly recorded in its books and records and recognized revenue on two related transactions involving hardware and software sales to a reseller, for approximately $5.1 million and $300,000 respectively. Intervoice subsequently reversed the revenues associated with both transactions during the fourth quarter of fiscal 2002 in connection with a return of the products. Recognition of revenue on these transactions was improper in light of post-shipment obligations agreed to by Intervoice's then CFO, including the obligation to reconfigure products or substitute products of commensurate value to meet the needs of the ultimate end users. In addition, recognition of the revenue was improper because Intervoice's then CFO granted the reseller the right to return the products if the ultimate end user failed to buy the products. As a result of the $5.1 million, $1,078,738, and $742,751 second quarter transactions described above, Intervoice reported net income of $1.7 million in its fiscal quarter ended August 31, 2001 (which it included in its Form 10-Q filed with the Commission on October 9, 2001), when it should have reported a net loss of $1.5 million.

9. As a result of the conduct described above, Intervoice, acting through its then CFO, knew, or was reckless in not knowing, that its periodic reports filed with the Commission during the relevant period contained materially misstated financial information and other false and misleading statements. In addition, Intervoice republished materially misstated financial information and other false and misleading statements in certain subsequent filings with the Commission in 2002 through 2004.

10. Intervoice offered securities in 2000 and 2001 while its periodic reports filed with the Commission contained materially misstated financial information. In October 1999, Intervoice filed with the Commission a Form S-8 registering securities to be offered pursuant to an employee stock option plan. The Form S-8 incorporated by reference all Exchange Act reports subsequently filed by Intervoice until such time as the offering terminated.

11. As a result of the conduct described above, Intervoice violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

12. As a result of the conduct described above, Intervoice violated Sections 5(a) and 5(c) of the Securities Act, which prohibit the offer and sale of securities through the mails or in interstate commerce, unless a registration statement is filed or in effect as to such securities or a valid exemption from registration applies.

13. As a result of the conduct described above, Intervoice violated Section 13(a) of the Exchange Act and Rules 13a-1, 13a-13 and 12b-20 thereunder, which require issuers to file true, accurate, and complete periodic reports with the Commission.

14. As a result of the conduct described above, Intervoice violated Section 13(b)(2)(A) of the Exchange Act, which requires reporting companies to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect their transactions and disposition of their assets.

15. As a result of the conduct described above, Intervoice violated Section 13(b)(2)(B) of the Exchange Act, 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 conformity with generally accepted accounting principles and prohibits them from, directly or indirectly, falsifying or causing to be falsified, any book, record, or account.

Remedial Efforts by Intervoice

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

Undertakings

Respondent has undertaken to cooperate fully with the Commission in any and all investigations, litigations, or other proceedings brought by the Commission relating to or arising from the matters described in the Order, and undertakes:.

A. To comply with any and all reasonable requests by the Commission's staff for company documents or other information;

B. To be interviewed, and to make its officers, directors, employees, agents and other representatives available to be interviewed, by the Commission's staff at such times as the Commission's staff reasonably may direct;

C. To appear and testify, and to make its officers, directors, employees, agents and other representatives available to appear and testify in such investigations, depositions, hearings or trials as the Commission's staff reasonably may direct;

D. That in connection with any (i) testimony of Respondent or its officers, directors, employees, agents and other representatives to be conducted by testimony session, deposition, hearing or trial, or (ii) requests for documents or other information, that any notice of subpoena for such may be addressed to their counsel, and be served by mail or facsimile.

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 Intervoice's Offer.

Accordingly, it is hereby ORDERED that:

A. Respondent Intervoice cease and desist from committing or causing any violations and any future violations of Section 5(a), 5(c) and 17(a) of the Securities Act and Sections 10(b), 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1 and 13a-13 thereunder.

B. Respondent shall, within 30 days of the entry of the Order, pay disgorgement of $701,629.49 and prejudgment interest of $240,999.77 to the United States Treasury in connection with Respondent's amendment and exercise of a warrant issued by a supplier to Respondent and sale of the shares underlying such warrant, as discussed in Section III(5) above. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Mail Stop 0-3, Alexandria, Virginia 22312; and (D) submitted under a cover letter that identifies Intervoice as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Kevin Kelcourse, Branch Chief, Division of Enforcement, Boston Regional Office, 33 Arch Street, 23rd Floor, Boston, MA 02110-1424.

Respondent agrees that if the full amount of any payment described above is not made by the date the payment is required by this Order, the entire amount of disgorgement and prejudgment interest of $942,629.26, plus any interest accrued pursuant to SEC Rule of Practice 600 minus payments made, if any, is due and payable immediately without further application.

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8848 / September 27, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56544 / September 27, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2662 / September 27, 2007

INVESTMENT COMPANY ACT OF 1940
Release No. 27997 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12840

In the Matter of **STEVEN ANDREW ROBERTS,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, and SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Steven Andrew Roberts ("Roberts" or "Respondent").

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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, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Sections 21C of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940 ("Order"), as set forth below.

III.

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

Summary

This matter involves a hedge fund manager's unauthorized transfer of monies from one hedge fund to satisfy a redemption request of an investor in another affiliated hedge fund. This matter also involves material misstatements in the hedge funds' offering memoranda. In particular, in May 2006, Steven A. Roberts, while serving as a fund manager for three hedge funds headquartered in Delray Beach, Florida—the R Futures A, B and C Funds (hereinafter referred to as the "A Fund," "B Fund" and "C Fund," respectively and the "R Futures Funds," collectively)—transferred $2 million from the A Fund in order to fulfill a redemption request of an investor in the C Fund. Roberts also made material misstatements concerning his educational credentials in the A, B and C Funds' offering memoranda. As a result of this conduct, Roberts violated Advisers Act Sections 206(1) and 206(2), Securities Act Section 17(a), and Exchange Act Section 10(b) and Rule 10b-5 thereunder.

Respondent

1. Roberts, age 45, resides in Delray Beach, Florida and has at all relevant times served as one of two fund managers for the R Futures A, B and C Funds. At all relevant times, Roberts has co-owned the A, B and C Funds' managing member, Excalibur Partners, LLC, a registered investment adviser. Between 1988 and 1995, Roberts was associated with several different broker-dealer firms registered with the Commission pursuant to Section 15(a) of the Exchange Act. Roberts was not associated with a broker-dealer at the time of the misconduct. Roberts' formal education ended at the high school level, when he attained a General Equivalency Diploma, or G.E.D., in 1978.

Other Relevant Persons and Entities

2. R Futures, LLC (the "A fund") is a Florida limited liability company that was formed in July 2002. At all relevant times, Roberts was one of two joint managers who made all

investment and day-to-day operating decisions for the A Fund. As of December 2005, the A Fund had approximately twenty-six investors.

3. R Futures B, LLC (the "B fund") is a Florida limited liability company that was formed in November 2003. At all relevant times, Roberts was one of two joint managers who made all investment and day-to-day operating decisions for the B Fund. As of December 2005, the B Fund had approximately fifteen investors.

4. R Futures C, LLC (the "C fund") is a Delaware limited liability company that was formed in June 2004. At all relevant times, Roberts was one of two joint managers who made all investment and day-to-day operating decisions for the C Fund. As of December 2005, the C Fund had just one investor.

5. Excalibur Partners, LLC ("Excalibur") is a Florida limited liability company that was formed in December 2003. Excalibur is a registered investment adviser. At all relevant times, Excalibur was owned by Roberts and DiMatteo. Excalibur is headquartered in Delray Beach, Florida. Excalibur is the managing member for all three R Futures Funds.

The Material Misstatements

6. Roberts founded and co-managed the R Futures A, B and C Funds. He contributed to, edited and reviewed the Offering Memoranda for those Funds, each of which listed him as the contact. As co-founder and manager of the Funds' investment adviser, Roberts disseminated the Offering Memoranda to investors and offered and sold interest in the Funds to investors. These Offering Memoranda misstated material facts regarding Roberts' educational background. In particular, each Offering Memorandum stated that Roberts held a Masters in Business Administration. In fact, as Roberts well knew, he had merely paid a fee to an online service in exchange for a "Masters in Business Administration" certificate, the only prerequisite for which had been the payment of that fee. As Roberts further well knew, (i) he had neither completed, nor even begun, any coursework toward any actual M.B.A. degree, and (ii) his completed formal education had not extended beyond high school.

The Unauthorized Transfer of Funds

7. On June 28, 2005, a C Fund investor submitted a redemption notice, requesting withdrawal of its entire investment—the original amount of which was $5 million—based on the C Fund's December 31, 2005 valuation, which was approximately $4.7 million according to records maintained by the fund's managing members. The C Fund confirmed receipt of the redemption request on July 11, 2005. Under the terms of the C Fund's offering memorandum, the investor was eligible to receive at least 90% of its funds no later than sixty days after December 31, 2005.

8. In March 2006, after the investor confirmed that it had not and would not withdraw its redemption request, Roberts and the investor agreed that the investor's redemption would be made in early April at the C Fund's net asset value ("NAV") for March 31, 2006, provided it was

equal to or greater than the C Fund's December 31, 2005 NAV as originally requested. This resulted in an agreement that the investor would receive $4.8 million.

9. At the time Roberts agreed to fulfill the C Fund investor's redemption request, he knew that the C Fund's liquid assets were insufficient to fulfill that request, because Roberts had, in September 2005, used $2 million of the C Fund's assets to buy a derivative, the terms of which included a three-year lockup period.

10. On April 26, 2006, Roberts caused to be sent, and the investor received, two wire transfers totaling approximately $2.8 million, in partial satisfaction of the investor's redemption request. On May 2, 2006, Roberts wired the remaining $2 million to the C Fund investor—but transferred funds from the A Fund without authorization in order to do so. In particular, Roberts liquidated $2 million in A Fund money market mutual fund holdings and then used the proceeds to complete the repayment of the C Fund investor.

11. Roberts' sale of $2 million in A Fund securities and subsequent unauthorized transfer of A Fund assets was for the sole purpose of freeing himself from the uncomfortable position in which he had placed himself by pledging prompt and full redemption to the C Fund investor. Roberts lacked authority to engage in this self-serving use of A Fund assets. In this way, Roberts knowingly made an unauthorized transfer from the A Fund in order to fulfill a redemption request of an investor in the C Fund.

12. On May 17, 2006, fortuitously for Roberts, the counter-party to the derivative transaction elected to unwind it, returning most of the $2 million in C Fund assets that had been used to buy the derivative. Roberts then caused those funds to be returned to the A Fund.

Provisions Violated

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

14. As a result of the conduct described above, Roberts willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit investment advisers from employing any device, scheme or artifice to defraud any client or prospective client, or to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Roberts cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act

B. Respondent Roberts be, and hereby is barred from association with any investment adviser, with the right to reapply for association after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

C. Respondent is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

D. 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.

E. It is further ordered that Respondent Roberts shall pay $35,000 as a civil money penalty. Respondent Roberts shall satisfy this obligation by making payments according to the following schedule: (1) $14,000 within thirty (30) days of the entry of this Order, plus post-judgment interest;[1] (2) $7,000 within ninety (90) days of the entry of this Order, plus post-judgment interest; (3) $7,000 within one-hundred and eighty (180) days of the entry of this Order, plus post-judgment interest; and (4) $7,000 within two-hundred-seventy (270) days of the entry of this Order, plus post-judgment interest. Each payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Steven Andrew Roberts as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to J. Lee Buck, II, Deputy

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[1] For purposes of paragraphs IV.E. and F. of the Order, post-judgment interest shall be calculated through the date of payment at the rate of interest set forth in 31 U.S.C. § 3717. The current rate, applicable through December 31, 2007, is 4.00%. See Department of the Treasury, "Notice of Rate for Use in Federal Debt Collection and Discount and Rebate Evaluation," 71 Federal Register 61539 (Oct. 18, 2006).

Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-5631-A.

F. Respondent agrees that if the full amount of any payment described above is not made by the date the payment is required by this Order, the entire amount of civil penalties and any interest accrued pursuant to 31 U.S.C. § 3717 minus payments made, if any, is due and payable immediately without further application.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT of 1934
Release No. 56557 / September 27, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2730 / September 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12845

In the Matter of **TIDEWATER INC., and JAMES KEITH LOUSTEAU, CPA** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

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 Tidewater Inc. and James Keith Lousteau ("Lousteau") (collectively "Respondents").

II.

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

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III.

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

RESPONDENTS

1. Tidewater Inc. operates offshore service vessels designed and outfitted to support the energy industry. Tidewater is a Delaware corporation with its headquarters in New Orleans, Louisiana. Tidewater's securities are registered with the Commission under Section 12(b) of the Exchange Act and its shares are listed on the New York Stock Exchange. Tidewater's fiscal year ends on March 31.

2. James Keith Lousteau, age 59, has been Tidewater's Executive Vice President and Chief Financial Officer ("CFO") since September 2000 and has been with Tidewater in various positions since 1977.

FACTS

Background

3. Tidewater operates a worldwide fleet of vessels that provide services supporting all phases of offshore exploration, development, and production. For internal operational purposes, at all times relevant, Tidewater classified the status of its vessels as either active or withdrawn. Active vessels include vessels that are "working," "warm-stacked," or "cold-stacked." A working vessel is one that is being used actively in service. A warm-stacked vessel is a readily available vessel, although not in use, with crews assigned and current certifications that comply with Coast Guard requirements.

4. In contrast, a "cold-stacked" vessel is a vessel that has been removed from service with its crew released. Coast guard certifications necessary to operate cold-stacked vessels have frequently expired, and significant expenditures are necessary to refurbish these vessels in order to return them to certified status.

5. A "withdrawn" vessel is one that is retired from the fleet and therefore is intended only to be sold or scrapped. Tidewater withdrew from its fleet older, infrequently used vessels that were not marketable due to obsolescence or were economically prohibitive to operate due to excessive repair costs, and before 2002, placed such vessels on a list it referred to as the "Vessels For Sale List." Historically, once Tidewater placed these withdrawn vessels on the for-sale list, Tidewater would either sell the vessels or periodically scrap them. Vessels placed on this for-sale list rarely return to working status.

6. Tidewater's accounting department and its external auditors review withdrawn vessels for impairment purposes at least quarterly to ensure that the carrying value of these assets does not exceed their fair value. Moreover, Tidewater's quarterly

reports on Form 10-Q and annual reports on Form 10-K disclose the number of vessels the company has withdrawn from service.

Tidewater's Corporate Directive Prohibiting the Withdrawal of Cold-Stacked Vessels

7. In or about April 2002, which coincided with the beginning of Tidewater's fiscal year-ended March 31, 2003, Tidewater's newly-appointed Chief Executive Officer ("CEO") reaffirmed a corporate directive of his predecessor that explicitly prohibited the addition of any vessels to Tidewater's withdrawn fleet. Prior to this directive, from fiscal year 2000 through the first half of fiscal year 2002, Tidewater undertook a regular analysis of all cold-stacked vessels and withdrawn vessels. This analysis included identifying which cold-stacked vessels would not return to service, even in an improved market. As a result, during that time Tidewater withdrew from service 77 vessels.

8. Even though Tidewater's CEO's directive suspended all vessel retirements, many towing-supply vessels were becoming obsolete in terms of their age and outdated specifications. Between April 2002 and March 2004, certain of Tidewater's senior operations personnel on several occasions informed senior management, including Lousteau, that in their view a significant number of cold-stacked vessels were unlikely to, or would not, return to service. For example, in April 2002, Tidewater's Senior Vice President of Operations identified 25 cold-stacked vessels that the operations division deemed "will not return to work."

9. The senior operations personnel usually sought approval to have these vessels withdrawn from service and subsequently either sold or scrapped. This typically occurred when the costs to return the vessels to service made them economically prohibitive to operate and there was little or no chance that many of these vessels would ever return to service. In those situations, the vessels involved were usually older than Tidewater's active vessels and required high repair and recertification costs. For example, Tidewater estimated in July 2002 that the total repair and recertification cost to return to service 45 of its cold-stacked domestic towing-supply vessels was about $24 million.

10. At other times, the operations personnel recommended withdrawal of vessels that were unmarketable because they were obsolete and had been cold-stacked for several years. For instance, in April 2003, a Tidewater engineer requested approval from senior management, including Lousteau, to offer for sale 18 vessels that had been cold-stacked since at least 1999. In June 2003, that same engineer sent Tidewater's senior management an updated list that included 21 cold-stacked vessels and recommended that Tidewater attempt to sell these vessels. In recommending that these vessels be sold, the engineer stated that he believed these vessels had "almost no chance of ever coming out for service again."

11. Certain of Tidewater's senior operations personnel communicated similar recommendations to senior management on many occasions throughout the relevant

period. In addition, at the same time as Tidewater was accumulating these obsolete vessels, it initiated a fleet replacement program that involved the acquisition of newer or refurbished vessels from competitors as well as the construction of new and technologically modernized vessels, thereby decreasing even further the likelihood that its idle vessels would ever be used again.

Tidewater Accumulated Numerous Cold-Stacked Vessels
<u>That Were Unlikely to Return to Service</u>

12. Because of the corporate directive prohibiting the withdrawal of vessels, Tidewater began marketing for sale unofficially certain of the vessels that the operations personnel recommended be withdrawn. Functionally, these vessels that were marketed for sale unofficially were no different from other vessels that Tidewater had historically withdrawn from service and put on the for-sale list prior to the corporate directive closing that list. In other words, all had been identified as unlikely to return to service at Tidewater and were marketed for sale or scrapping.

13. Although functionally the same as vessels that had been withdrawn, these vessels for sale unofficially did not receive the same level of review by Tidewater's accounting department, and these vessels did not individually proceed through the formal quarterly review for potential impairment that Tidewater's accounting department and external auditors normally performed on each vessel in the withdrawn fleet. Moreover, they were not included in Tidewater's disclosures related to its withdrawn fleet.

14. Ultimately, because Tidewater did not withdraw any vessels from its cold-stacked fleet during the period from September 2001 through March 2004, by the end of its 2004 fiscal year Tidewater had accumulated a fleet of 137 cold-stacked vessels (representing almost 25% of its worldwide fleet of 575 vessels at March 2004), of which at least 70 vessels should have been classified as withdrawn. Of these more than 70 vessels, 67 vessels had not been used for over two years, and 21 vessels had been out of service for more than five years. Following eight consecutive quarters of domestic operating losses during fiscal years 2003 and 2004, the number of cold-stacked vessels escalated to almost 70% of the domestic towing-supply vessels operating in the U.S. Gulf, as disclosed in Tidewater's Form 10-K for the fiscal year-ended March 31, 2004.

15. Tidewater did not review these vessels individually for possible impairment until March 2004, and at that time the company recognized an impairment charge of $26.5 million ($17.2 million after-tax, or $.30 per share) related to 83 vessels, the majority of which had been cold-stacked for at least two years and were unlikely to return to service. The details of the write-off were disclosed in Tidewater's Form 10-K for the fiscal year-ended March 31, 2004, wherein the Company stated that it was unlikely that these vessels would ever return to service due to "average age, their outdated specifications relative to competing equipment and significant costs to repair and return these vessels to service." The $26.5 million impairment charge reduced Tidewater's net income for fiscal year 2004 by almost 30%.

Tidewater Failed to Perform the Proper
Impairment Analysis on Its Vessels

16. Generally Accepted Accounting Principles ("GAAP") requires companies such as Tidewater to assess its accounting and reporting for long-lived assets such as its cold-stacked vessels. Specifically, Statement of Financial Accounting Standards No. 144, "Accounting for the Impairment or Disposal of Long-Lived Assets" ("SFAS 144"), states that a long-lived asset (or asset group) shall be tested for recoverability whenever events or changes in circumstances indicate that its carrying amount may not be recoverable. SFAS 144 lists examples of such events or changes in circumstances, one of which is a significant adverse change in the extent or manner in which a long-lived asset (or asset group) is being used or in its physical condition.

17. When Tidewater's operations personnel identified certain cold-stacked vessels that, in their view, would not return to service, and thus were functionally withdrawn, this constituted a significant adverse change in the extent or manner in which these long-lived assets were being used. Due to their physical condition or costs to reactivate and recertify them, these vessels should have been separately reviewed for impairment in order to ascertain whether their book values were recoverable. Therefore, Tidewater, through Lousteau, should have had the cold-stacked vessels reviewed individually for impairment throughout the time period that the vessels were in idle status.

18. In addition, because Tidewater did not withdraw these vessels from service and place them on a list of withdrawn vessels, the vessels were not individually subject to the formal review for potential impairment that Tidewater's external auditors normally performed on withdrawn vessels, which would have likely led to questions concerning the carrying value of those vessels.

Tidewater Failed to Review Its Depreciation Estimates

19. As part of its impairment review, Tidewater should have also reviewed its depreciation estimates to evaluate whether they needed to be revised given the high uncertainty surrounding the remaining service life of these vessels. Specifically, pursuant to GAAP, estimates of remaining service lives and salvage values of depreciable assets should be reviewed and revised to recognize changes in conditions. In addition, SFAS 144 states that when a long-lived asset (or asset group) is tested for recoverability, it also may be necessary to review depreciation estimates and methods as required by certain provisions of GAAP. Thus, issuers must continually evaluate the appropriateness of the useful life and salvage value estimates assigned to long-lived assets as facts and circumstances change. This type of evaluation may result in depreciation of the remaining book value over a shorter period of time.

20. Between September 2001 and March 2004, Tidewater failed to review adequately depreciation for the cold-stacked vessels that were unlikely to return to service. These unused vessels instead continued to be depreciated for several years

according to their historical depreciation schedule. However, because they would not return to service, Tidewater, through Lousteau, should have reviewed the depreciation on these vessels to evaluate whether its estimates needed to be revised.

Tidewater Filed Inaccurate Periodic Reports
With the Commission

21. The vessels that should have been treated as withdrawn and marketed for sale from Tidewater's active fleet were not included in Tidewater's Form 10-K for the fiscal year-ended March 31, 2003 as vessels withdrawn from service. In fact, Tidewater's Form-10-K for fiscal year 2003 inaccurately stated that the Company "did not withdraw any vessel from active service during fiscal 2003." As mentioned previously, the vessels that had been identified as unlikely to return to service by certain operations personnel and were marketed for sale or scrapping were no different than the historically withdrawn vessels that were on the for sale list. Lousteau signed Tidewater's annual and quarterly filings with the Commission and certified the disclosures contained in those filings. Lousteau should have known that the disclosure contained in the filing was materially inaccurate given the fact that Tidewater was marketing for sale cold-stacked vessels that were unlikely to return to service.

22. Further, the fact that Tidewater had dozens of vessels that it knew required significant repair and recertification expenditures, were unlikely to return to service, may have been impaired, and could have required a revision of depreciation estimates, constituted known trends or uncertainties of the type that should have been disclosed in the Management's Discussion and Analysis ("MD&A") section of the Company's periodic filings with the Commission because it was reasonably likely to, and ultimately did, have a material impact on Tidewater's income from continuing operations. However, Tidewater's Form 10-K for fiscal year 2003 and quarterly filings on Forms 10-Q for the quarters ended June 30, 2002, September 30, 2002, December 31, 2002, June 30, 2003, September 30, 2003, and December 31, 2003 did not contain any disclosures about these known uncertainties. Lousteau should have known that this information should have been disclosed in the MD&A section of the Company's periodic filings.

Tidewater Had Inadequate Internal Controls

23. Between September 2001 and March 2004, Tidewater's internal control environment was characterized by insufficient documentation and formal processes, policies, and procedures for dealing with impairment issues for its worldwide fleet or accounting for cold-stacked vessels. Tidewater did not have an appropriate process in place at the time to ensure that the vessels that were for-sale unofficially received the same level of accounting scrutiny as officially withdrawn vessels. Because of Tidewater's inadequate internal controls, the vessels that were for-sale unofficially were not reviewed periodically for impairment and depreciation purposes, and their effectively withdrawn status was not disclosed to the public.

24. Lousteau signed certifications for Tidewater's Form 10-K for fiscal year 2003 and quarterly filings on Forms 10-Q for the quarters ended September 30, 2002, December 31, 2002, June 30, 2003, September 30, 2003, and December 31, 2003. Lousteau should have known that Tidewater's controls were inadequate as to the impairment review and disclosures related to vessels unlikely to return to operations.

25. In January 2005, Tidewater adopted new impairment testing policies in an effort to timely and more thoroughly review its vessel fleet for impairment.

VIOLATIONS

26. Section 13(a) of the Exchange Act requires issuers of registered securities, like Tidewater, to file periodic reports with the Commission containing information prescribed by specific Commission rules. Rules 13a-1 and 13a-13 require, respectively, the filing of annual and quarterly reports. Implicit in these provisions is the requirement that the reports accurately reflect the issuer's financial condition and operating results. Rule 12b-20 requires, in addition to information required in periodic reports by Commission rules, such further material information as may be necessary to make the required statements not misleading.

27. Additionally, Regulation S-K Item 303 requires registrants to disclose in the MD&A sections of required periodic filings "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material...unfavorable impact on net sales or revenues or income from continuing operations." The failure to comply with Regulation S-K constitutes a violation under Section 13(a) of the Exchange Act.

28. Section 13(b)(2)(B) of the Exchange Act requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit the preparation of financial statements in conformity with GAAP and to maintain accountability for assets.

29. Rule 13a-14 of the Exchange Act requires an issuer's CFO to certify the information contained in the issuer's quarterly and annual reports.

30. As a result of the above, Tidewater violated Sections 13(a) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder.

31. As a result of the above, Lousteau caused Tidewater's violations of Sections 13(a) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder, and violated Rule 13a-14.

REMEDIAL EFFORTS

32. In determining to accept the Offers, the Commission considered the remedial efforts that Tidewater initiated prior to and during the Commission staff's investigation.

IV.

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

Accordingly, pursuant to Section 21C of the Exchange Act, it is hereby ORDERED that:

A. Tidewater cease and desist from committing or causing any violations and any future violations of Sections 13(a) and 13(b)(2)(B) of the Exchange Act, and Rules 12b-20, 13a-1, and 13a-13 thereunder.

B. Lousteau cease and desist from causing any violations and any future violations of Sections 13(a) and 13(b)(2)(B) of the Exchange Act, and Rules 12b-20, 13a-1, and 13a-13 thereunder, and from committing or causing any violations and any future violations of Exchange Act Rule 13a-14.

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2666 / September 28, 2007

INVESTMENT COMPANY ACT OF 1940
Release No. 28005 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12855

In the Matter of

SMITH BARNEY FUND MANAGEMENT LLC,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 203(e) 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

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 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Smith Barney Fund Management LLC ("Respondent" or "Smith Barney").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 203(e) 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 ("Order"), as set forth below.

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III.

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

Summary

This matter concerns violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder by two closed-end funds, Salomon Brothers High Income Fund Inc. and Salomon Brothers High Income Fund II Inc. (collectively, the "Funds"). Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder require funds to provide shareholders with contemporaneous written statements identifying the source of distributions to shareholders if any portion of the distributions is from a source other than the fund's net income. The purpose of Section 19(a) and Rule 19a-1 is to provide shareholders adequate disclosure of the sources from which distributions are made.

This matter also concerns violations of Section 34(b) of the Investment Company Act, which makes it unlawful for any person to make an untrue statement in a report filed with the Commission, or to omit to state material facts necessary in order to prevent the statements made therein from being materially misleading.

During the period from January 1, 2001 through April 30, 2003 (the "relevant period"), Salomon Brothers High Income Fund Inc. made twenty-three distributions to shareholders from shareholder capital, while Salomon Brothers High Income Fund II Inc. made twenty-four distributions from shareholder capital. None of the distributions was accompanied by a notice that contained the information required by Rule 19a-1. The Funds therefore violated Section 19(a) and Rule 19a-1 thereunder. Pursuant to advisory and administrative agreements with the Funds, Salomon Brothers was responsible for providing Section 19(a) notices to shareholders of the Funds. Although Salomon Brothers, which regularly tracked the sources of distributions for the Funds, knew or was reckless in not knowing that the Funds' distributions were partly funded from shareholder capital during the relevant period, it failed to provide contemporaneous notices containing the information required by Rule 19a-1 to the Funds' shareholders. Salomon Brothers thus caused and willfully[2] aided and abetted the Funds' violations of Section 19(a) and Rule 19a-1 thereunder.

Salomon Brothers was also responsible for filing annual reports with the Commission for the Funds during the relevant period. Although the Financial Highlights section of the Funds' annual reports disclosed that during the relevant period the Funds' distributions included returns of shareholder capital, the Management Discussion of Fund Performance ("MDFP") section of the 2002 annual reports for both of the Funds reported an annual dividend without disclosing that a

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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] "Willfully," as used in this paragraph and in paragraph 10 of this Order means intentionally committing the act that constitutes the violation. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

portion thereof included a return of shareholder capital. Likewise, the MDFP section of the 2002 annual reports for both of the Funds provided annualized yield figures that assumed a dividend paid entirely from net income, although actual distributions were partly from shareholder capital. By failing to disclose that a portion of the reported dividends came from shareholder capital, the statements were untrue in that they implied that distributions were entirely from net investment income and thus that investments in the Funds reflected greater returns than was the case. By filing annual reports that contained material omissions or misstatements regarding these two measures of fund performance, Salomon Brothers violated Section 34(b).

Respondent

1. **Salomon Brothers**, an investment adviser registered with the Commission under Section 203(c) of the Advisers Act, provided investment management and administrative services to a number of closed-end investment companies registered under the Investment Company Act, including Salomon Brothers High Income Fund Inc. and Salomon Brothers High Income Fund II Inc. Salomon Brothers' principal place of business is New York, New York. From 2001 through 2003, Salomon Brothers was part of Citigroup's Asset Management group ("CAM"), a subsidiary of Citigroup Inc., a publicly traded company. Legg Mason, Inc. acquired CAM on December 1, 2005, and is currently in the process of winding down the activities of Salomon Brothers. The Funds are currently managed by Legg Mason Partners Fund Advisor, LLC, a wholly-owned subsidiary of Legg Mason, Inc.

Other Relevant Entities

2. Salomon Brothers High Income Fund Inc., a closed-end, diversified management investment company registered under the Investment Company Act, was incorporated under the laws of Maryland on September 14, 1992. Its shares trade on the New York Stock Exchange under the symbol HIF. Salomon Brothers High Income Fund Inc., which seeks a high level of current income with capital appreciation as a secondary objective, pays distributions monthly. Its fiscal year ends on December 31.

3. Salomon Brothers High Income Fund II Inc., a closed-end, diversified management investment company registered under the Investment Company Act, was incorporated under the laws of Maryland on March 19, 1998. Its shares trade on the New York Stock Exchange under the symbol HIX. Salomon Brothers High Income Fund II Inc., which seeks a high level of current income with capital appreciation as a secondary objective, pays distributions monthly. Its fiscal year ends on April 30.

Section 19(a) Violations

4. Section 19(a) of the Investment Company Act prohibits investment companies such as closed-end funds from paying distributions from any source other than net income unless the payments are accompanied by contemporaneous written statements to shareholders disclosing the sources of the distributions. Rule 19a-1 specifies that the written statement must be on a separate paper and clearly indicate what portion of the payment is from: 1) net income (not including capital

gains); 2) capital gains; and 3) paid-in surplus or other capital source. The purpose of Section 19(a) and Rule 19a-1 is to afford shareholders adequate disclosure of the sources from which the payments are made so shareholders will not believe that a fund portfolio is generating investment income when, in fact, distributions are paid from other sources, such as shareholder capital or capital gains.[3]

5. Salomon Brothers provided investment advisory and administrative services to the Salomon Brothers High Income Fund Inc. and the Salomon Brothers High Income Fund II Inc. Pursuant to agreements with the Funds, Salomon Brothers was responsible for the Funds' administrative operations and was required to perform its duties consistent with the requirements of the Investment Company Act, including Section 19(a).

6. During the relevant period, Salomon Brothers High Income Fund Inc. and Salomon Brothers High Income Fund II Inc. both made distributions to shareholders from shareholder capital, as shown below on a per share basis.

High Income Fund Inc.	**2001 %**	**2001 $**	**2002 %**	**2002 $**
Net Investment Income	83%	$1.08	87%	$.87
Shareholder Capital[4]	17%	$.22	13%	$.13

High Income Fund II Inc.	**2002 %**	**2002 $**	**2003 %**	**2003 $**
Net Investment Income	93%	$.1.28	86%	$1.18
Shareholder Capital[5]	7%	$.10	14%	$0.20

7. During the relevant period, Salomon Brothers failed to provide notices containing the information required by Rule 19a-1 to the Funds' shareholders, even though the Funds repeatedly made distributions from shareholder capital. In 2001 and 2002, Salomon Brothers sent written notices with distributions for the High Income Fund Inc., but the notices did not inform shareholders that the distributions were partly from shareholder capital. Likewise, in 2002 and 2003, Salomon Brothers sent written notices with distributions for the High Income Fund II Inc., but the notices also failed to inform shareholders that the distributions were partly from shareholder capital.

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[3] Rule 19a-1(g) states: "[t]he purpose of this section, in the light of which it shall be construed, is to afford security holders adequate disclosure of the sources from which dividend payments are made." See SEC Release No. 71, 1941 WL 37715 (Feb. 21, 1941) ("An important feature of the rule is the extent to which it requires explicit and affirmative disclosure whenever a dividend is being paid from a capital source.").

[4] During fiscal years 2001 and 2002, a portion of twenty-three of Salomon Brothers High Income Fund Inc.'s twenty-four monthly distributions came from shareholder capital.

[5] During fiscal years 2002 and 2003, a portion of all twenty-four of Salomon Brothers High Income Fund II Inc.'s monthly distributions came from shareholder capital.

8. By paying distributions to shareholders from sources other than net income without properly disclosing the source of those distributions in a notice that accompanied the distributions, the High Income Fund Inc. and High Income Fund II Inc. violated Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder.

9. Salomon Brothers, which closely monitored the sources of distributions for the Funds throughout the year, knew or was reckless in not knowing at the time the Funds' distributions were paid that such distributions were partly from shareholder capital. Yet Salomon Brothers failed to provide contemporaneous notices that complied with Section 19(a) in 2001, 2002, and 2003.[6]

10. As a result of the conduct described above, Salomon Brothers caused and willfully aided and abetted the Funds' violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder.

Section 34(b) Violations

11. Section 34(b) of the Investment Company Act makes it unlawful for any person to make an untrue statement of material fact, or omit material information necessary to make other statements made not misleading, in any registration statement, application, report, account, record, or other document filed with the Commission pursuant to the Investment Company Act.

12. Salomon Brothers was responsible for filing annual reports with the Commission for both of the Funds. In 2002, Salomon Brothers filed annual reports for the Funds in which the MDFP section of the report disclosed an annual dividend without indicating that the figure included returns of shareholder capital. For example, although the Financial Highlights section of Salomon Brothers High Income Fund Inc.'s 2002 annual report showed that $.14, or 14% of the $1.00 per share annual distribution was from shareholder capital on a tax basis, the MDFP section stated only that "[d]uring the year ended December 31, 2002, the Fund distributed dividends to shareholders totaling $1.00 per share." Likewise, the MDFP section of Salomon Brothers High Income Fund II Inc.'s 2002 annual report reported a per share annual dividend of $1.38 without disclosing, as the Financial Highlights showed, that $.20, or 14%, of the distribution was from shareholder capital. By failing to disclose that a portion of the reported dividends came from shareholder capital, the statements implied that distributions were entirely from fund net income.

13. Although the Financial Highlights section of the Funds' 2002 annual reports disclosed that the Funds' 2002 distributions included returns of shareholder capital on a tax basis, the yield figures in the MDFP sections of the annual reports assumed an annual dividend paid entirely from net income. For example, Salomon Brothers High Income Fund Inc.'s 2002 annual report stated that the fund had an annualized distribution rate of 10.64% of NAV, calculated based on "the Fund's current monthly income dividend rate, annualized, and then divided by the NAV or the market price noted in this report. The annualized distribution rate assumes a current monthly income dividend rate of $0.080 [per share] for 12 months." In fact, as the Financial Highlights showed, 14% of the Salomon Brothers High Income Fund Inc.'s 2002 distributions was a return of

[6] During the relevant period, the Funds provided shareholders with Internal Revenue Service Forms 1099-DIV that identified the source of the shareholders' distributions for the prior calendar year. Such notices did not comply with Section 19(a) and Rule 19a-1 because they were not made contemporaneously with each distribution.

shareholder capital on a tax basis. Likewise, although the Financial Highlights section of the Fund's annual report disclosed that the Fund's distributions included a return of shareholder capital on a tax basis, Salomon Brothers calculated the annualized distribution rate for Salomon Brothers High Income Fund II Inc.'s 2002 annual report based on the assumption that the dividend was entirely from net income, when that Fund paid 14% of its distributions from shareholder capital. By including return of shareholder capital in the calculation of annualized distribution rates, the statements implied that the current monthly distributions were entirely from fund net income, when they were not.

14. As a result of the conduct described above, Salomon Brothers willfully[7] violated Section 34(b) of the Investment Company Act.

Respondent's Cooperation and Remedial Efforts

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

IV.

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

Accordingly, it is hereby ORDERED pursuant to Sections 9(b) and 9(f) of the Investment Company Act and Section 203(e) of the Advisers Act that:

A. Salomon Brothers shall cease and desist from causing any violations and any future violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder and from committing or causing any violations and any future violations of Section 34(b) of the Investment Company Act; and

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[7] "Willfully," as used in paragraph 14 of this Order means intentionally committing the act that constitutes the violation. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he or she is violating one of the Rules or Acts.

B. Salomon Brothers shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $450,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Salomon Brothers Asset Management Inc. as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Mark Kreitman, Esq., Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549-4628.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2664 / September 28, 2007

INVESTMENT COMPANY ACT OF 1940
Release No. 28003 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12853

In the Matter of **PUTNAM INVESTMENT MANAGEMENT, LLC** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 203(e) 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**

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 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") and against Putnam Investment Management, LLC ("Respondent" or "Putnam").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 203(e) 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 ("Order"), as set forth below.

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III.

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

Summary

This matter concerns violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder by four closed-end funds: Putnam Master Intermediate Income Trust, Putnam Premier Income Trust, Putnam Master Income Trust, and Putnam Managed High Yield Trust (collectively, the "Funds"). Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder require funds to provide shareholders with contemporaneous written statements identifying the source of distributions to shareholders if any portion of the distributions is from a source other than the fund's net income. The purpose of Section 19(a) and Rule 19a-1 is to provide shareholders adequate disclosure of the sources from which distributions are made.

During the period from August 1, 2000 through May 31, 2002 (the "relevant period"), Putnam Master Intermediate Income Trust made eleven distributions to shareholders partly funded from shareholder capital, Putnam Premier Income Trust made nine distributions partly funded from shareholder capital, Putnam Master Income Trust made ten distributions partly funded from shareholder capital, and Putnam Managed High Yield Trust made twelve distributions partly funded from shareholder capital. Although Putnam sent written notices with these distributions, the notices did not contain the information required by Rule 19a-1. The Funds therefore violated Section 19(a) and Rule 19a-1 thereunder. Pursuant to advisory and administrative agreements with the Funds, Putnam was responsible for providing Section 19(a) notices to shareholders of the Funds. Although Putnam, which regularly tracked the sources of distributions for the Funds, knew or was reckless in not knowing that the Funds' distributions were partly funded from shareholder capital during the relevant period, it failed to provide the information required by Rule 19a-1 in its notices to the Funds' shareholders. Putnam thus caused and willfully[2] aided and abetted the Funds' violations of Section 19(a) and Rule 19a-1 thereunder.

Respondent

1. **Putnam**, an investment adviser registered with the Commission under Section 203(c) of the Advisers Act, provides investment management and administrative services to a number of closed-end investment companies registered under the Investment Company Act, including Putnam Master Intermediate Income Trust, Putnam Premier Income Trust, Putnam Master Income Trust, and Putnam Managed High Yield Trust. Putnam's principal place of business is Boston, Massachusetts. Putnam is a subsidiary of Marsh & McLennan Companies, Inc., a publicly traded company.

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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] "Willfully," as used in paragraph 10 of this Order means intentionally committing the act that constitutes the violation. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

Other Relevant Entities

2. Putnam Master Intermediate Income Trust, a closed-end, diversified management investment company registered under the Investment Company Act, is a Massachusetts business trust whose Agreement and Declaration of Trust was filed with the Secretary of the Commonwealth of Massachusetts on March 10, 1988. Its shares trade on the New York Stock Exchange under the symbol PIM. Putnam Master Intermediate Income Trust, which seeks high current income and relative stability of net asset value, pays distributions monthly. Its fiscal year ends on September 30.

3. Putnam Premier Income Trust, a closed-end, non-diversified management investment company registered under the Investment Company Act, is a Massachusetts business trust whose Agreement and Declaration of Trust was filed with the Secretary of the Commonwealth of Massachusetts on January 14, 1988. Its shares trade on the New York Stock Exchange under the symbol PPT. Putnam Premier Income Trust, which seeks high current income, pays distributions monthly. Its fiscal year ends on July 31.

4. Putnam Master Income Trust, a closed-end, diversified management investment company formerly registered under the Investment Company Act, was a Massachusetts business trust whose Agreement and Declaration of Trust was filed with the Secretary of the Commonwealth of Massachusetts on September 30, 1987. Until February 25, 2005, Putnam Master Income Trust's shares traded on the New York Stock Exchange under the symbol PMT.[3] Putnam Master Income Trust, which sought high current income consistent with the preservation of capital, paid distributions monthly. Its fiscal year end was on October 31.

5. Putnam Managed High Yield Trust, a closed-end, non-diversified management investment company formerly registered under the Investment Company Act, was a Massachusetts business trust whose Agreement and Declaration of Trust was filed with the Secretary of the Commonwealth of Massachusetts on April 16, 1993. Until October 16, 2006, its shares traded on the New York Stock Exchange under the symbol PTM.[4] Putnam Managed High Yield Trust, which sought high current income and, as a secondary objective, capital growth, paid distributions monthly. Its fiscal year end was on May 31.

Section 19(a) Violations

6. Section 19(a) of the Investment Company Act prohibits investment companies such as closed-end funds from paying distributions from any source other than net income unless the payments are accompanied by contemporaneous written statements to shareholders disclosing the sources of the distributions. Rule 19a-1 specifies that the written statement must be on a separate paper and clearly indicate what portion of the payment is from: 1) net income (not including capital gains); 2) capital gains; and 3) paid-in surplus or other capital source. The purpose of Section

[3] On that date, the Putnam Master Income Trust merged into Putnam Premier Income Trust.

[4] The shares ceased trading on the New York Stock Exchange on that date in anticipation of the closing of the merger of Putnam Managed High Yield Trust into Putnam High Yield Trust, which occurred on October 30, 2006.

19(a) and Rule 19a-1 is to afford shareholders adequate disclosure of the sources from which the payments are made so shareholders will not believe that a fund portfolio is generating investment income when, in fact, distributions are paid from other sources, such as shareholder capital or capital gains.[5]

7. During the relevant period, each of the Funds made distributions to shareholders from shareholder capital, as shown below on a per share basis.

Putnam Master Intermediate Income Trust	2001%	$
Net Investment Income	97%	$.58
Shareholder Capital[6]	3%	$.02

Putnam Premier Income Trust	2001%	$
Net Investment Income	98%	$.61
Shareholder Capital[7]	2%	$.01

Putnam Master Income Trust	2001 %	$
Net Investment Income	97%	$.61
Shareholder Capital[8]	3%	$.02

Putnam Managed High Yield Trust	2002%	$
Net Investment Income	87%	$.86
Shareholder Capital[9]	13%	$.13

[5] Rule 19a-1(g) states: "[t]he purpose of this section, in the light of which it shall be construed, is to afford security holders adequate disclosure of the sources from which dividend payments are made." See SEC Release No. 71, 1941 WL 37715 (Feb. 21, 1941) ("An important feature of the rule is the extent to which it requires explicit and affirmative disclosure whenever a dividend is being paid from a capital source.").

[6] During fiscal year 2001, a portion of eleven of Putnam Master Intermediate Income Trust's twelve monthly distributions came from shareholder capital.

[7] During fiscal year 2001, a portion of nine of Premier Income Trust's twelve monthly distributions came from shareholder capital.

[8] During fiscal year 2001, a portion of ten of Putnam Master Income Trust's twelve monthly distributions came from shareholder capital.

[9] During fiscal year 2002, a portion of all twelve of Putnam Managed High Yield Trust's monthly distributions came from shareholder capital.

8. Putnam provides investment advisory and administrative services to the Funds. Pursuant to agreements with the Funds, Putnam is responsible for the Funds' administrative operations and is required to perform its duties consistent with the requirements of the Investment Company Act, including Section 19(a).

9. During the relevant period, Putnam failed to provide notices containing the information required by Rule 19a-1 to shareholders of Putnam Master Intermediate Income Trust, Putnam Premier Income Trust, Putnam Master Income Trust, and Putnam Managed High Yield Trust, even though the Funds repeatedly made distributions from shareholder capital. In 2001, Putnam sent written notices with distributions for Putnam Master Intermediate Income Trust, Putnam Premier Income Trust, and Putnam Master Income Trust, but the notices did not inform shareholders that such distributions were partly from shareholder capital. Likewise, in 2002, Putnam sent written notices with distributions for Putnam Managed High Yield Trust but those notices also failed to inform shareholders that such distributions were partly from shareholder capital.

10. By paying distributions to shareholders from sources other than net income without properly disclosing the source of those distributions in the notice that accompanied the distributions, Putnam Master Intermediate Income Trust, Putnam Premier Income Trust, Putnam Master Income Trust, and Putnam Managed High Yield Trust violated Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder.

11. Because Putnam closely monitored the source of distributions for the Funds throughout the year, it knew or was reckless in not knowing at the time the Funds' distributions were paid that such distributions were partly from shareholder capital.[10] Yet Putnam failed to provide contemporaneous notices that complied with Section 19(a) in 2001 and 2002.[11]

12. As a result of the conduct described above, Putnam caused and willfully aided and abetted the Funds' violations of Section 19(a) and Rule 19a-1 thereunder.

Respondent's Cooperation and Remedial Efforts

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

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[10] Putnam's justification for not providing the required 19(a) notices was that the specific source of each distribution could not be definitely determined until the end of the fiscal year. Putnam's monthly monitoring process included projecting whether there would be a return of capital at the end of the fiscal year and adjusting the dividend rate based on those projections to prevent a return of capital. Rule 19a-1(e), however, mandates reasonable estimates of the source of each dividend at the time of payment. Therefore, notwithstanding Putnam's projections and adjustment of dividend rates, which might change the nature of the distribution by the end of the fiscal year, it was nevertheless obligated to inform shareholders of the Funds' best estimate regarding the source of that distribution at the time it was paid.

[11] During the relevant period, the Funds provided shareholders with Internal Revenue Service Forms 1099-DIV that identified the source of the shareholders' distributions for the prior calendar year. Such notices did not comply with Section 19(a) and Rule 19a-1 because they were not made contemporaneously with each distribution.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Sections 9(b) and 9(f) of the Investment Company Act and Section 203(e) of the Advisers Act that:

A. Putnam shall cease and desist from causing any violations and any future violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder; and

B. Putnam shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $350,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Putnam Investments as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Mark Kreitman, Esq., Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549-4628.

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2665 / September 28, 2007

INVESTMENT COMPANY ACT OF 1940
Release No. 28004 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12854

In the Matter of

SALOMON BROTHERS ASSET MANAGEMENT INC.,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 203(e) 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

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 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Salomon Brothers Asset Management Inc. ("Respondent" or "Salomon Brothers").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 203(e) 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 ("Order"), as set forth below.

Document 30 of 34

III.

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

Summary

This matter concerns violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder by three closed-end funds: the High Income Opportunity Fund, the Zenix Income Fund, and the Managed High Income Portfolio (collectively, the "Funds"). Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder require funds to provide shareholders with contemporaneous written statements identifying the source of distributions to shareholders if any portion of the distributions is from a source other than the fund's net income. The purpose of Section 19(a) and Rule 19a-1 is to provide shareholders adequate disclosure of the sources from which distributions are made.

This matter also concerns violations of Section 34(b) of the Investment Company Act, which makes it unlawful for any person to make an untrue statement in a report filed with the Commission, or to omit to state material facts necessary in order to prevent the statements made therein from being materially misleading.

During the period from March 1, 2001 through September 30, 2004 (the "relevant period"), the High Income Opportunity Fund made thirty-six distributions to shareholders from shareholder capital, the Zenix Income Fund made twenty-nine distributions to shareholders from shareholder capital, and the Managed High Income Portfolio made twenty-four distributions to shareholders from shareholder capital. None of the distributions was accompanied by a notice that contained the information required by Rule 19a-1. The Funds therefore violated Section 19(a) and Rule 19a-1 thereunder. Pursuant to advisory and administrative agreements with the Funds, Smith Barney was responsible for providing Section 19(a) notices to shareholders of the Funds. Although Smith Barney, which regularly tracked the sources of distributions for the Funds, knew or was reckless in not knowing that the Funds' distributions were partly funded from shareholder capital during the relevant period, it failed to provide contemporaneous notices containing the information required by Rule 19a-1 to the Funds' shareholders. Smith Barney thus caused and willfully[2] aided and abetted the Funds' violations of Section 19(a) and Rule 19a-1 thereunder.

Smith Barney was also responsible for filing annual reports with the Commission for the Funds during the relevant period. Although the Financial Highlights section of the Funds' annual reports disclosed that during the relevant period the Funds' distributions included returns of shareholder capital, the Management Discussion of Fund Performance ("MDFP") section of the 2002 annual reports for the High Income Opportunity Fund and the Zenix Income Fund reported

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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] "Willfully," as used in this paragraph and in paragraph 10 of this Order, means intentionally committing the act that constitutes the violation. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

an annual dividend without disclosing that a portion thereof included a return of shareholder capital. Likewise, the MDFP section of the 2002 annual reports for the High Income Opportunity Fund and the Zenix High Income Fund and the 2002 and 2003 annual reports for the Managed High Income Portfolio provided annualized yield figures that assumed a dividend paid entirely from net income, although actual distributions were partly from shareholder capital. By failing to disclose that a portion of the reported dividends came from shareholder capital, the statements were untrue in that they implied that distributions were entirely from net investment income and thus that investments in the Funds reflected greater returns than was the case. By filing annual reports that contained material omissions or misstatements regarding these two measures of fund performance, Smith Barney violated Section 34(b).

Respondent

1. **Smith Barney**, an investment adviser registered with the Commission under Section 203(c) of the Advisers Act, provided investment management and administrative services to a number of closed-end investment companies registered under the Investment Company Act, including the High Income Opportunity Fund, the Zenix Income Fund, and the Managed High Income Portfolio. Smith Barney's principal place of business is New York, New York. From 2001 through 2004, Smith Barney was part of Citigroup's Asset Management group ("CAM"), a subsidiary of Citigroup Inc., a publicly traded company. Legg Mason, Inc. acquired CAM on December 1, 2005, and is currently in the process of winding down the activities of Smith Barney. The Funds are currently managed by Legg Mason Partners Fund Adviser, LLC, a wholly-owned subsidiary of Legg Mason, Inc.

Other Relevant Entities

2. The High Income Opportunity Fund, a closed-end, diversified management investment company registered under the Investment Company Act, was incorporated under the laws of Maryland on July 30, 1993. Its shares trade on the New York Stock Exchange under the symbol HIO. The High Income Opportunity Fund, which seeks a high current income with capital appreciation as a second objective, pays distributions monthly. Its fiscal year ends on September 30.

3. The Zenix Income Fund, a closed-end, diversified management investment company registered under the Investment Company Act, was incorporated under the laws of Maryland on February 11, 1988. Its shares trade on the New York Stock Exchange under the symbol ZIF. The Zenix Income Fund, which seeks high current income with capital appreciation as a second objective, pays distributions monthly. Its fiscal year ends on March 31.

4. The Managed High Income Portfolio, a closed-end, diversified management investment company registered under the Investment Company Act, was incorporated under the laws of Maryland on December 24, 1992. Its shares trade on the New York Stock Exchange under the symbol MHY. The Managed High Income Portfolio, which seeks high current income with capital appreciation as a second objective, pays distributions monthly. Its fiscal year ends on February 28.

Section 19(a) Violations

5. Section 19(a) of the Investment Company Act prohibits investment companies such as closed-end funds from paying distributions from any source other than net income unless the payments are accompanied by contemporaneous written statements to shareholders disclosing the sources of the distributions. Rule 19a-1 specifies that the written statement must be on a separate paper and clearly indicate what portion of the payment is from: 1) net income (not including capital gains); 2) capital gains; and 3) paid-in surplus or other capital source. The purpose of Section 19(a) and Rule 19a-1 is to afford shareholders adequate disclosure of the sources from which the payments are made so shareholders will not believe that a fund portfolio is generating investment income when, in fact, distributions are paid from other sources, such as shareholder capital or capital gains.[3]

6. Smith Barney provided investment advisory and administrative services to the High Income Opportunity Fund, the Zenix Income Fund, and the Managed High Income Portfolio. Pursuant to agreements with the Funds, Smith Barney was responsible for the Funds' administrative operations and was required to perform its duties consistent with the requirements of the Investment Company Act, including Section 19(a).

7. During the relevant period, the High Income Opportunity Fund, the Zenix Income Fund, and the Managed High Income Portfolio each made distributions to shareholders from shareholder capital, as shown below on a per share basis.

High Income Opportunity	2002		2003		2004	
	%	$	%	$	%	$
Net Investment Income	95%	$.71	93%	$.63	93%	$.56
Shareholder Capital[4]	5%	$.04	7%	$.05	7%	$.04

Zenix Income Fund	2002		2003		2004	
	%	$	%	$	%	$
Net Investment Income	95%	$.53	93%	$.42	93%	$.39
Shareholder Capital[5]	5%	$.03	7%	$.03	7%	$.03

[3] Rule 19a-1(g) states: "[t]he purpose of this section, in the light of which it shall be construed, is to afford security holders adequate disclosure of the sources from which dividend payments are made." See SEC Release No. 71, 1941 WL 37715 (Feb. 21, 1941) ("An important feature of the rule is the extent to which it requires explicit and affirmative disclosure whenever a dividend is being paid from a capital source.").

[4] During fiscal years 2002, 2003, and 2004, a portion of all thirty-six of the High Income Opportunity Fund's monthly distributions came from shareholder capital.

[5] During fiscal years 2002, 2003, and 2004, a portion of twenty-nine of the Zenix Income Fund's thirty-six monthly distributions came from shareholder capital.

Managed High Income	2002		2004	
	%	$	%	$
Net Investment Income	94%	$.81	92%	$.59
Shareholder Capital[6]	6%	$.05	8%	$.05

8. During the relevant period, Smith Barney failed to provide notices containing the information required by Rule 19a-1 to the Funds' shareholders, even though the Funds repeatedly made distributions from shareholder capital. Between 2002 and 2004, Smith Barney sent written notices with distributions for the High Income Opportunity Fund and the Zenix Income Fund, but the notices did not inform shareholders that the distributions were partly from shareholder capital. Likewise, in 2002 and 2004, Smith Barney sent written notices with distributions for the Managed High Income Portfolio, but the notices also failed to inform shareholders that the distributions were partly from shareholder capital.

9. By paying distributions to shareholders from sources other than net income without disclosing the source of those distributions in a notice that accompanied the distributions, the High Income Opportunity Fund, the Zenix Income Fund, and the Managed High Income Portfolio violated Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder.

10. Smith Barney, which closely monitored the sources of distributions for the Funds throughout the year, knew or was reckless in not knowing at the time the Funds' distributions were paid that such distributions were partly from shareholder capital. Yet Smith Barney failed to provide contemporaneous notices that complied with Section 19(a) in 2002, 2003, and 2004.[7] As a result of the conduct described above, Smith Barney caused and willfully aided and abetted the Funds' violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder.

Section 34(b) Violations

11. Section 34(b) of the Investment Company Act makes it unlawful for any person to make an untrue statement of material fact, or omit material information necessary to make other statements made not misleading, in any registration statement, application, report, account, record, or other document filed with the Commission pursuant to the Investment Company Act.

12. Smith Barney was responsible for filing annual reports with the Commission for each of the Funds. In 2002, Smith Barney filed annual reports for the High Income Opportunity Fund and the Zenix Income Fund in which the MDFP section of the report disclosed an annual dividend

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[6] During fiscal years 2002 and 2004, a portion of all twenty-four of the High Income Opportunity Fund's monthly distributions came from shareholder capital.

[7] In response to a 1997 application by Smith Barney for exemption from Section 19(a) and 19(b) of the Investment Company Act, the Division of Investment Management declined to support the request to satisfy Section 19(a)'s disclosure requirements by making annual disclosures in shareholders' Forms 1099-DIV. Although during the relevant period, the Funds provided shareholders with Internal Revenue Service Forms 1099-DIV that identified the source of the shareholder's distributions for the prior calendar year, such notices did not comply with Section 19(a) and Rule 19a-1 because they were not made contemporaneously with each distribution.

without indicating that the figure included returns of shareholder capital. For example, although the Financial Highlights section of the High Income Opportunity Fund's 2002 annual report showed that $.08, or 11% of the $.75 per share annual distribution was from shareholder capital on a tax basis, the MDFP section stated only that "[d]uring the year ended September 30, 2002, the Fund distributed dividends to shareholders totaling $.75 per share." Likewise, the MDFP section of the Zenix Income Fund's 2002 annual report reported a per share annual dividend without disclosing, as the Financial Statements showed, that a portion thereof was from shareholder capital. By failing to disclose that a portion of the reported dividends came from shareholder capital, the statements implied that distributions were entirely from fund net income.

13. Although during the relevant period the Financial Highlights section of the Funds' annual reports disclosed that the Funds' distributions included returns of shareholder capital on a tax basis, the yield figures included in the MDFP sections of the 2002 annual report for the High Income Opportunity Fund and Managed High Income Portfolio and the 2002 and 2003 annual reports for the Zenix Income Fund assumed an annual dividend paid entirely from net income. For example, the High Income Opportunity Fund's 2002 annual report stated that the Fund had an annualized distribution rate of 11.21% of NAV, calculated based on "the Fund's current monthly income dividend rate, annualized, and then divided by the NAV or the market price noted in this report. The annualized distribution rate assumes a current monthly income dividend rate of $0.0570 [per share] for 12 months." In fact, as the Financial Highlights showed, 11% of the High Income Opportunity Fund's 2002 distributions was a return of shareholder capital on a tax basis. Likewise, although the Financial Highlights section of the Funds' annual reports disclosed that the Funds' distributions included returns of shareholder capital on a tax basis, Smith Barney calculated the annualized distribution rates for the 2002 Managed High Income Portfolio annual report and the 2002 and 2003 Zenix Income Fund annual reports based on the assumption that the dividends were entirely from net income, when those Funds also paid distributions from shareholder capital. By including return of shareholder capital in the calculation of annualized distribution rates, the statements implied that the current monthly distributions were entirely from fund net income, when they were not.

14. As a result of the conduct described above, Smith Barney willfully[8] violated Section 34(b) of the Investment Company Act.

Respondent's Cooperation and Remedial Efforts

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

[8] "Willfully," as used in paragraph 14 of this Order means intentionally committing the act that constitutes the violation. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he or she is violating one of the Rules or Acts.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Sections 9(b) and 9(f) of the Investment Company Act and Section 203(e) of the Advisers Act that:

A. Smith Barney shall cease and desist from causing any violations and any future violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder and from committing or causing any violations and any future violations of Section 34(b) of the Investment Company Act; and

B. Smith Barney shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $450,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Smith Barney Fund Management LLC as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Mark Kreitman, Esq., Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549-4628.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Chairman Cox
Not Participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2663 / September 28, 2007

INVESTMENT COMPANY ACT OF 1940
Release No. 28002 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12852

In the Matter of

ALLIANCEBERNSTEIN, L.P.,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 203(e) 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

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 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against AllianceBernstein L.P. ("Respondent" or "Alliance"), formerly known as Alliance Capital Management, L.P.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 203(e) 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 ("Order"), as set forth below.

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III.

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

Summary

This matter concerns violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder by two closed-end funds, The Spain Fund Inc. and Alliance All-Market Advantage Fund, Inc. (collectively, the "Funds"). Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder require funds to provide shareholders with contemporaneous written statements identifying the source of distributions to shareholders if any portion of the distributions is from a source other than the fund's net income. The purpose of Section 19(a) and Rule 19a-1 is to provide shareholders adequate disclosure of the sources from which distributions are made.

During the period from January 1, 2002 through July 9, 2004 (the "relevant period"), all of The Spain Fund Inc.'s and Alliance All-Market Advantage Fund, Inc.'s distributions to shareholders were entirely from shareholder capital or capital gains. None of the distributions was accompanied by a notice that contained the information required by Rule 19a-1. The Funds therefore violated Section 19(a) and Rule 19a-1 thereunder. Pursuant to advisory and administrative agreements with the Funds, Alliance was responsible for the administration of the Funds' affairs, which included providing Section 19(a) notices to shareholders of the Funds. Alliance also represented in a 1998 exemptive application to the Commission that notices that comply with Rule 19a-1 would be sent to The Spain Fund Inc.'s shareholders. Although Alliance, which regularly calculated the sources of distributions for the Funds, knew or was reckless in not knowing that both Funds' distributions were entirely from shareholder capital or capital gains during the relevant period, it failed to provide contemporaneous notices containing the information required by Rule 19a-1 to the Funds' shareholders. Alliance thus caused and willfully[2] aided and abetted the Funds' violations of Section 19(a) and Rule 19a-1 thereunder.

Respondent

1. **Alliance**, an investment adviser registered with the Commission under Section 203(c) of the Advisers Act, provides investment management and administrative services to a number of closed-end investment companies registered under the Investment Company Act, including The Spain Fund Inc. and Alliance All-Market Advantage Fund, Inc. Alliance's principal place of business is New York, New York. Alliance is an affiliate of AllianceBernstein Corporation, a publicly traded company.

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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] "Willfully," as used in this Order means intentionally committing the act that constitutes the violation. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

Other Relevant Entities

2. The Spain Fund Inc., a closed-end, non-diversified management investment company registered under the Investment Company Act, was incorporated under the laws of Maryland on June 30, 1987. Its shares trade on the New York Stock Exchange under the symbol SNF. The Spain Fund Inc., which seeks long-term capital appreciation through investment primarily in the equity securities of Spanish companies, pays distributions quarterly. Its fiscal year ends on November 30.

3. The Alliance All-Market Advantage Fund, Inc., a closed-end, non-diversified management investment company registered under the Investment Company Act, was incorporated under the laws of Maryland on August 16, 1994. Its shares trade on the New York Stock Exchange under the symbol AMO. The Alliance All-Market Advantage Fund, Inc., which seeks long-term capital appreciation, pays distributions quarterly. Its fiscal year ends on September 30.

Section 19(a) Violations

4. Section 19(a) of the Investment Company Act prohibits investment companies such as closed-end funds from paying distributions from any source other than net income unless the payments are accompanied by contemporaneous written statements to shareholders disclosing the sources of the distributions. Rule 19a-1 specifies that the written statement must be on a separate paper and clearly indicate what portion of the payment is from: 1) net income (not including capital gains); 2) capital gains; and 3) paid-in surplus or other capital source. The purpose of Section 19(a) and Rule 19a-1 is to afford shareholders adequate disclosure of the sources from which the payments are made so shareholders will not believe that a fund portfolio is generating investment income when, in fact, distributions are paid from other sources, such as shareholder capital or capital gains.[3]

5. During the relevant period, both The Spain Fund Inc. and Alliance All-Market Advantage Fund, Inc. had managed distribution policies that required the Funds to make fixed quarterly payments to shareholders equal to 2.5% of Net Assets Value, regardless of performance.[4] The Funds' managed distribution policies provided that to the extent the target distribution payment for any quarter exceeded net investment income and short-term capital gains, the shortfall would be funded with shareholder capital or long-term capital gains.

6. Alliance provides investment advisory and administrative services to the Funds. Pursuant to agreements with the Funds, Alliance is responsible for the Funds' administrative operations and must perform its duties consistent with the requirements of the Investment Company Act, including Section 19(a).

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[3] Rule 19a-1(g) states: "[t]he purpose of this section, in the light of which it shall be construed, is to afford security holders adequate disclosure of the sources from which dividend payments are made." See SEC Release No. 71, 1941 WL 37715 (Feb. 21, 1941) ("An important feature of the rule is the extent to which it requires explicit and affirmative disclosure whenever a dividend is being paid from a capital source.").

[4] The per share Net Asset Value ("NAV") of a closed-end fund is the total value of securities in its portfolio, less liabilities, divided by the number of outstanding shares.

7. In 1998, Alliance and The Spain Fund Inc. applied to the Commission for, and received, an exemption from Section 19(b) of the Investment Company Act, permitting The Spain Fund Inc. to distribute long-term capital gains throughout its fiscal year, instead of annually. In the exemptive application, Alliance and The Spain Fund Inc. acknowledged that Section 19(a) and Rule 19a-1 require funds to provide contemporaneous, written notification to shareholders when distributions are from sources other than fund net income, and jointly represented to the Commission that The Spain Fund Inc. would send information statements that comply with Rule 19a-1 to its shareholders.[5]

8. During the relevant period, both Funds made distributions to shareholders that were entirely from shareholder capital or capital gains, as shown below on a per share basis.

The Spain Fund Inc.[6]	2002		2003		2004	
	%	$	%	$	%	$
Net Investment Income	--	--	--	--	--	--
Capital Gains	--	--	--	--	100%	$.87
Shareholder Capital	100%	$.76	100%	$.63	--	--

All-Market Advantage Fund[7]	2002		2003		2004	
	%	$	%	$	%	$
Net Investment Income	--	--	--	--	--	--
Capital Gains	--	--	--	--	100%	$1.42
Shareholder Capital	100%	$1.95	100%	$1.32	--	--

9. During the relevant period, Alliance failed to provide the required written notice to The Spain Fund Inc.'s shareholders, even though the fund repeatedly made distributions from shareholder capital or capital gains. In 2002, Alliance sent written notices with The Spain Fund Inc.'s quarterly distributions, but the notices failed to inform shareholders that the distributions were completely from shareholder capital. In 2003, Alliance sent quarterly distribution notices to The Spain Fund Inc.'s shareholders that improperly stated that the distributions were from net investment income, when in fact, they were entirely from shareholder capital. In 2004, Alliance

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[5] In 1997, Alliance All-Market Advantage Fund, Inc. applied to the Commission for, and received, an exemption from Section 19(b) of the Investment Company Act, permitting it to make up to five distributions of long-term capital gains in any one taxable year. Alliance All-Market Advantage Fund, Inc. made no representations concerning Section 19(a) in its exemptive application.

[6] During fiscal years 2002 and 2003, all eight of The Spain Fund Inc.'s quarterly distributions were entirely from shareholder capital. During fiscal year 2004, all four of The Spain Fund Inc.'s quarterly distributions were entirely from capital gains.

[7] During fiscal years 2002 and 2003, all eight of Alliance All-Market Advantage Fund, Inc.'s quarterly distributions were entirely from shareholder capital. During fiscal year 2004, all four of Alliance All-Market Advantage Fund, Inc.'s quarterly distributions were entirely from capital gains and shareholder capital.

sent notices with The Spain Fund Inc.'s first three quarterly distributions that failed to indicate that such distributions consisted entirely of capital gains.[8]

10. During the relevant period, Alliance also failed to provide notices containing the information required by Rule 19a-1 to Alliance All-Market Advantage Fund, Inc. shareholders, even though the Fund repeatedly made distributions from shareholder capital and capital gains. The written notices that accompanied Alliance All-Market Advantage Fund Inc.'s 2002 and 2003 quarterly distribution payments failed to inform shareholders that their distributions were entirely from shareholder capital. Similarly, the written notices that accompanied Alliance All-Market Advantage Fund Inc.'s first three quarterly distributions for 2004 failed to inform shareholders that such distributions were entirely from capital gains.[9]

11. By paying distributions to shareholders from sources other than net income without properly disclosing the source of those distributions in a notice that accompanied the distributions, The Spain Fund Inc. and Alliance All-Market Advantage Fund Inc. violated Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder.

12. Alliance, which closely monitored the source of distributions for the Funds, knew or was reckless in not knowing that each of the Funds' quarterly distributions was entirely from shareholder capital or capital gains at the time it was paid. Yet Alliance failed to provide contemporaneous notices that complied with Section 19(a) in 2002, 2003, and the first half of 2004.[10]

13. As a result of the conduct described above, Alliance caused and willfully aided and abetted the Funds' violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder.

Respondent's Cooperation and Remedial Efforts

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

IV.

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

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[8] The Spain Fund's fourth distribution for fiscal year 2004 was accompanied by a notice that contained the requisite 19(a) disclosures.

[9] The Alliance All-Market Advantage Fund Inc.'s fourth distribution for fiscal year 2004 was accompanied by a notice that contained the requisite 19(a) disclosures.

[10] During the relevant period, both funds provided shareholders with Internal Revenue Service Forms 1099-DIV that identified the source of the shareholders' distributions for the prior calendar year. Such notices did not comply with Section 19(a) and Rule 19a-1 because they were not made contemporaneously with each distribution.

Accordingly, it is hereby ORDERED pursuant to Sections 9(b) and 9(f) of the Investment Company Act and Section 203(e) of the Advisers Act that:

A. Alliance shall cease and desist from causing any violations and any future violations of Section 19(a) of the Investment Company Act and Rule 19a-1 thereunder; and

B. Alliance shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $450,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies AllianceBernstein L.P. as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Mark Kreitman, Esq., Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-4628.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8852 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12850

In the Matter of **Anchor National Life Insurance Company, n/k/a AIG SunAmerica Life Assurance Company** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933**

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"), against Anchor National Life Insurance Company, n/k/a AIG SunAmerica Life Assurance Company ("Anchor" 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, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 ("Order"), as set forth below.

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III.

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

Summary

1. Respondent's failure to disclose certain information to the issuers of municipal bonds in Florida (the "issuers") was a cause of misleading statements or omissions made in connection with the sales of those bonds. As described in more detail below, in particular, Respondent and the bond program advisor for each offering failed to disclose an agreement in each offering ("fee agreement") that created a risk that the Internal Revenue Service ("IRS") might deem the bonds to be taxable. By not disclosing the fee agreement, the bond program advisor violated Section 17(a)(2) of the Securities Act. As a result of its own independent failure to disclose the agreement, Respondent was a cause of the bond program advisor's violations of Section 17(a)(2) of the Securities Act within the meaning of Section 8A of the Securities Act.

2. The municipal bonds were issued in three pooled bond offerings totaling $650 million that occurred between April 1999 and January 2000 (collectively, the "bond offerings" or the "bonds"). Each of the bond offerings raised a pool of funds that was intended to be loaned to a not-for-profit entity that would use the funds to finance the acquisition and rehabilitation of projects throughout Florida. The first offering was for healthcare projects while the second and third bond offerings involved housing projects. Respondent knew or should have known that the information that it failed to disclose to the issuers was relevant to the private placement memoranda ("PPMs"), Tax Exemption Certificate and Agreements ("Tax Agreements"), Payment and Standby Purchase Agreements ("Payment Agreements"), and a Certificate of Financial Advisor ("Certificate") that were used in the bond offerings.

3. As mentioned below, after the bonds were offered and sold, the IRS preliminarily took the position that the interest on the bonds was not tax exempt. Ultimately, however, the issuers and Respondent reached a resolution with the IRS and the bonds retained their tax exempt status.

Respondent and the Bond Program Advisor

4. <u>Anchor</u> is a stock life insurance company originally incorporated in California and later redomesticated in Arizona. Anchor provided credit enhancement for the bond offerings. It was paid a fee based on a percentage of the unloaned proceeds of the bonds. When a loan was made, Anchor would receive an increased fee percentage on the loaned portion of the bond proceeds.

5. <u>The bond program advisor</u> was established in 1986 as a financial services and derivatives firm and has been a registered investment adviser with the Commission since 2001.

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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

Federal Tax Law Background

6. Under the federal tax regulations, an issuer of municipal pooled bonds must satisfy certain requirements to ensure that the bonds maintain their tax-exempt status. Among other things, the issuer must have a reasonable expectation at the time these types of pooled bonds are issued that most of the net proceeds of the issue (the "required amount") will be loaned within three years of the date of issuance.

7. Pursuant to the federal tax regulations, the proceeds of these types of pooled bond offerings can be invested while they remain unloaned. However, issuers earning interest yields greater than the yields on their tax-exempt debt are considered to have generated arbitrage profit, which must be rebated to the IRS in order to maintain the tax-exempt status of the interest paid on the bonds.

8. The IRS permits issuers of tax-exempt pooled bonds, when calculating the interest yields on the bonds, to consider some types of fees to secondary parties, such as fees for credit enhancement, as payments for "qualified guarantees" if the payments meet specific IRS criteria.[2] A qualified guarantee can be treated as additional interest on the bonds, which serves to increase the yield at which the bond proceeds can be invested without generating positive arbitrage that would have to be rebated to the IRS in order to preserve the tax-exempt status of the bonds.[3] Any fee that is improperly allocated to a payment for a qualified guarantee cannot be included as additional interest on the bonds when calculating arbitrage rebate. Failure to rebate any arbitrage profit in the time and manner specified by the IRS could jeopardize the tax-exempt status of the bonds.

The Bond Offerings and the Undisclosed Information

9. The three bond offerings were offered and sold, respectively, beginning in April 1999, December 1999, and January 2000. All of the bonds were subject to a remarketing agreement as long as they remained outstanding.

10. The bond program advisor had several roles in the bond offerings. Among other things, it set up the structure of the offerings and attracted some of the participants to the deals. In addition, the bond program advisor participated in the working group for all three bond offerings

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2 A guarantee is qualified if it satisfies each of the following requirements: (1) as of the date the guarantee is obtained, the issuer must reasonably expect that the present value of the fees for the guarantee will be less than the present value of the expected interest savings on the issue as a result of the guarantee; (2) the arrangement must impose a secondary liability that shifts substantially all of the credit risk for all or part of the payments; and (3) fees for a guarantee must not exceed a reasonable, arm's-length charge for the transfer of credit risk and must not include any payment for any service other than the transfer of credit risk, unless payment for other services is separately stated, reasonable, and excluded from the guarantee fee. 26 CFR 1.148-4(f)(2)-(4).

3 Positive arbitrage, or arbitrage profit, results when the interest rate earned on the investment of tax-exempt bond proceeds is higher than the interest rate paid on the bonds.

where issues, including tax issues, were discussed. In the second and third offerings, the bond program advisor assumed the role of providing a preliminary analysis to potential borrowers of their request for loan proceeds. Documents in the Trust Indentures for the first and second offerings listed the bond program advisor as an advisor to each borrower. Based on its role in the bond offerings, the bond program advisor had a duty to disclose to the issuers the existence of a fee agreement that created a risk to the tax-exempt status of the bonds.

11. Anchor served as the credit enhancement provider for each of the bond offerings and had final approval whether to loan the bond proceeds and, if so, how much to loan on each potential project located by a borrower. Only in the third bond offering were all of the proceeds used to fund loans.

12. As the provider of credit enhancement in each deal, Anchor assumed several risks for which it was paid annually a credit enhancement fee in each bond offering amounting to .85% to 1.15% of the unloaned proceeds. When a loan was made, Anchor would receive a fee amounting to approximately 1.25% to 2% of the loaned proceeds of the bonds.

13. Each bond offering involved the same bond program advisor that brought Anchor in to serve as the credit enhancement provider. In the second bond offering, the bond program advisor assumed the role of providing preliminary "desktop" underwriting for most of the project funding proposals. In the third bond offering, the bond program advisor provided the "desktop" underwriting for all of the project funding proposals. In all three bond offerings, Anchor entered into the fee agreement with the bond program advisor, pursuant to which Anchor was to pay the bond program advisor .25% annually based on the amount of unloaned bond proceeds for having brought Anchor in as the credit enhancement provider in the three bond offerings and for additional services provided to Anchor in connection with the bond offerings, such as the "desktop" underwriting. Anchor did not disclose the existence of the fee agreement to the issuers. The bond program advisor did not disclose the existence of the fee agreement to the issuers or the borrowers.

14. The existence of the fee agreement was material to the issuers for various reasons. First, the undisclosed payment of a fee to the bond program advisor based on unloaned proceeds would have been important to the issuers because it could have conflicted with the bond offerings' purpose of originating loans. This risk was especially significant in the second and third bond offerings, where the bond program advisor's role as preliminary underwriter, although disclosed in the bond offering documents, created a potential conflict of interest, given that the bond program advisor was to be paid on unloaned proceeds. Second, the undisclosed information would have been material because the issuers had to have a reasonable expectation at the time of issuance that the required amount of bond proceeds would be loaned out within three years. Without knowledge of the fee agreement, the issuers calculated and certified as to their reasonable expectations regarding loan origination and made related disclosures without all the information material to their certifications.

15. The fee agreement also created an issue as to whether these bond offerings generated arbitrage profits on the bonds. Each fee agreement stated that Anchor would pay the

bond program advisor a fee for "introducing [Anchor] to Letter of Credit Enhancement opportunities and transactions." That reference called into question whether the bond program advisor's fee was actually part of the fee Anchor received for credit enhancement, which could disqualify part or the entire credit enhancement fee from being a qualified guarantee fee and increase the risk that the bonds could be construed as arbitrage bonds.[4]

16. Each PPM, which was drafted on behalf of and signed by the issuer for each of the three bond offerings, failed to disclose the fee agreement, which caused them to contain misleading information. Drafts of the PPMs were circulated to the bond offering participants, including Anchor and the bond program advisor before being finalized and distributed to investors.

17. Each Tax Agreement also contained misleading information. The Tax Agreements contained as an exhibit a certification by Anchor that the credit enhancement fee did not represent any payment for services other than the transfer of risk. This representation omitted to disclose the possibility that the fee agreement between Anchor and the bond program advisor could cause the bonds to be construed as arbitrage bonds. The Tax Agreements also contained a representation by each issuer that it had reviewed the facts and circumstances surrounding the bond offering as of the date of issuance of the bond offering and that these facts and circumstances were true. The issuer also represented that based on those facts, it expected that the bond proceeds would not be used in a manner that would cause the bonds to be arbitrage bonds. The issuers made these representations without knowledge of the fee agreement.

18. The Payment Agreements in the second and third bond offerings also contained misleading information. Pursuant to the Payment Agreements, Anchor had complete discretion to approve or disapprove a loan. In the second and third bond offerings, the Payment Agreements required potential borrowers to submit financial information on proposed acquisition projects to the bond program advisor for its review before applying for a loan from Anchor, and also stated that a borrower needed to receive written approval from the bond program advisor in order to submit a loan request to Anchor. The Payment Agreements in those bond offerings were misleading in that they did not disclose that Anchor was paying the bond program advisor an on-going annual fee based on the unloaned proceeds in these bond offerings and thereby contributing to the bond program advisor's potential conflict of interest.

19. In the first bond offering, the bond program advisor executed a Certificate of Financial Advisor ("Certificate"). In the Certificate, the bond program advisor made statements about the credit enhancement fee relevant to an analysis of the tax exempt status of the bonds but did not disclose the fee agreement. As a result of this omission, the Certificate was misleading.

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[4] The IRS issued preliminary adverse determination letters to the issuers, asserting that the bond interest was taxable, among other reasons, because of arbitrage rebate violations resulting from improper treatment of the credit enhancement fee in each bond offering as a payment for a qualified guarantee on the bonds. Ultimately, Anchor and the issuers reached a resolution with IRS, pursuant to which agreed amounts were paid to the IRS and, among other things, the tax-exempt status of the bonds was preserved.

Anchor's Violations

20. As a result of the conduct described above, Anchor was a cause of violations of Section 17(a)(2) of the Securities Act, which proscribes obtaining money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in the offer or sale of securities.

IV.

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

Accordingly, it is hereby ORDERED that:

Respondent Anchor cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8853 / September 28, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56570 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12850

In the Matter of **AIG SunAmerica Life Assurance Company, f/k/a Anchor National Life Insurance Company,** **Respondent.**	**ORDER UNDER SECTION 27A(b) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b) OF THE SECURITIES EXCHANGE ACT OF 1934, GRANTING WAIVERS OF THE DISQUALIFICATION PROVISIONS OF SECTION 27A(b)(1)(A)(ii) OF THE SECURITIES ACT AND SECTION 21E(b)(1)(A)(ii) OF THE EXCHANGE ACT**

I.

AIG SunAmerica Life Assurance Company, f/k/a Anchor National Life Insurance Company, ("Anchor" or "Respondent") has submitted a letter on behalf of itself, dated October 18, 2005, requesting a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 ("Securities Act") and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 ("Exchange Act") arising from the settlement of an administrative proceeding commenced by the Commission.

On 28, 2007, pursuant to Respondent's Offer of Settlement, the Commission issued an Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 ("Order") against Respondent. Under the Order, the Commission found that:

Respondent was a cause of violations of Section 17(a)(2) of the Securities Act, which proscribes 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 in the offer or sale of securities.

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The Order requires that:

Anchor cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

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

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

Accordingly, IT IS ORDERED, pursuant to Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act, that a waiver from the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act as to Anchor resulting from the entry of the Order is hereby granted.

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8854 / September 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12851

In the Matter of **CDR Financial Products, Inc., f/k/a Chambers, Dunhill, Rubin & Co.,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933**

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"), against CDR Financial Products, Inc., f/k/a Chambers, Dunhill, Rubin, & Co., ("CDR" 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, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 ("Order"), as set forth below.

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NEWS DIGEST

IN THE MATTER OF CDR FINANCIAL PRODUCTS, INC., F/K/A CHAMBERS, DUNHILL, RUBIN & CO.

The United States Securities and Exchange Commission (Commission) announced the issuance of an Order Instituting Cease-And-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 against CDR Financial Products, Inc., f/k/a Chambers, Dunhill, Rubin & Co. (CDR). The Order alleges that as a consequence of its failure to disclose certain information to the issuers of municipal bonds in Florida, CDR made material misleading statements or omissions in the offer and sale of the bonds.

In particular, the Order alleges that CDR failed to disclose in the three bond offerings that it had entered into a fee agreement with the credit enhancement provider, pursuant to which the credit enhancement provider was to pay CDR an annual fee based on the amount of unloaned bond proceeds. The Order also alleges that non-disclosure of these facts created a risk that the Internal Revenue Service might deem the interest on the bonds to be taxable.

Based on the above, the Order finds that CDR violated Sections 17(a)(2) and (3) of the Securities Act of 1933 (Securities Act) and orders CDR to cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) and (3) of the Securities Act. CDR consented to the issuance of the Order without admitting or denying the Commission's findings in the Order. (Rel. 8854; File No. 3-12851)

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III.

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

Summary

1. As a consequence of its failure to disclose certain information to the issuers of municipal bonds in Florida (the "issuers"), Respondent made material misrepresentations or omissions in the offer and sale of those municipal bonds. As described in more detail below, in particular, Respondent failed to disclose an agreement in each offering ("fee agreement") that created a risk that the Internal Revenue Service ("IRS") might deem the bonds to be taxable. As a result, Respondent violated Sections 17(a)(2) and (3) of the Securities Act.

2. The municipal bonds were issued in three bond offerings totaling $650 million that occurred between April 1999 and January 2000 (collectively, the "bond offerings" or the "bonds"). Each of the bond offerings raised a pool of funds that was intended to be loaned to a not-for-profit entity that would use the funds to finance the acquisition and rehabilitation of projects throughout Florida. The first offering was for healthcare projects, while the second and third bond offerings involved housing projects. Respondent knew or should have known that the information it failed to disclose to the issuers was relevant to the private placement memoranda ("PPMs"), Payment and Standby Purchase Agreements ("Payment Agreements"), and a Certificate of Financial Advisor ("Certificate") that were used in the bond offerings.

3. As mentioned below, after the bonds were offered and sold, the IRS preliminarily took the position that the interest on the bonds was not tax-exempt. Ultimately, however, the issuers and another participant in the bond offerings (the "credit enhancement provider") reached a resolution with the IRS and the bonds retained their tax-exempt status. As a result, investors were not harmed.

Respondent

4. CDR was established in 1986 as a financial services and derivatives firm and has been a registered investment adviser with the Commission since 2001. CDR has its principal place of business in Beverly Hills, California.

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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

Federal Tax Law Background

5. Under the federal tax regulations, an issuer of municipal pooled bonds must satisfy certain requirements to ensure that the bonds maintain their tax-exempt status. Among other things, the issuer must have a reasonable expectation at the time these types of pooled bonds are issued that most of the net proceeds of the issue (the "required amount") will be loaned within three years of the date of issuance.

6. Pursuant to the federal tax regulations, the proceeds of these types of bond offerings can be invested while they remain unloaned. However, issuers earning interest yields greater than the yields on their tax-exempt debt are considered to have generated arbitrage profit, which must be rebated to the IRS in order to maintain the tax-exempt status of the interest paid on the bonds.

7. The IRS permits issuers of tax-exempt bonds, when calculating the interest yields on the bonds, to consider some types of fees to secondary parties, such as fees for credit enhancement, as payments for "qualified guarantees" if the payments meet specific IRS criteria.[2] A qualified guarantee can be treated as additional interest on the bonds, which serves to increase the yield at which the bond proceeds can be invested without generating positive arbitrage that would have to be rebated to the IRS in order to preserve the tax-exempt status of the bonds.[3] Any fee that is improperly allocated to a payment for a qualified guarantee cannot be included as additional interest on the bonds when calculating arbitrage rebate. Failure to rebate any arbitrage profit in the time and manner specified by the IRS could jeopardize the tax-exempt status of the bonds.

The Bond Offerings and the Undisclosed Information

8. The three bond offerings were offered and sold, respectively, beginning in April 1999, December 1999, and January 2000. All of the bonds were subject to a remarketing agreement as long as they remained outstanding.

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[2] A guarantee is qualified if it satisfies each of the following requirements: (1) as of the date the guarantee is obtained, the issuer must reasonably expect that the present value of the fees for the guarantee will be less than the present value of the expected interest savings on the issue as a result of the guarantee; (2) the arrangement must impose a secondary liability that shifts substantially all of the credit risk for all or part of the payments; and (3) fees for a guarantee must not exceed a reasonable, arm's-length charge for the transfer of credit risk and must not include any payment for any service other than the transfer of credit risk, unless payment for other services is separately stated, reasonable, and excluded from the guarantee fee. 26 CFR 1.148-4(f)(2)-(4).

[3] Positive arbitrage, or arbitrage profit, results when the interest rate earned on the investment of tax-exempt bond proceeds is higher than the interest rate paid on the bonds.

9. CDR set up the structure of the offerings and attracted some of the participants, including the credit enhancement provider for the three bond offerings, to the deals. In addition, CDR participated in the working group for all three bond offerings where issues, including tax issues, were discussed. In the second and third offerings, at the credit enhancement provider's request, CDR assumed the role of providing a preliminary analysis to potential borrowers of their request for loan proceeds. Documents in the Trust Indentures for the first and second offerings listed CDR as an advisor to each borrower. CDR's role was described as "Program Advisor" in the PPMs for the second and third bond offerings. Based on its role in the bond offerings, CDR had a duty to disclose to the issuers the existence of the fee agreement.

10. In all three bond offerings, CDR entered into the fee agreement with the credit enhancement provider, pursuant to which the credit enhancement provider was to pay CDR 0.25% annually based on the amount of unloaned bond proceeds for having brought the credit enhancement provider into the three bond offerings, and for additional services provided to the credit enhancement provider in connection with the bond offerings, such as the preliminary underwriting. CDR did not disclose the existence of the fee agreement to the issuers or the borrowers.

11. Undisclosed payment of a fee to CDR based on unloaned proceeds created a potential conflict with the bond offerings' purpose of originating loans. This risk was especially significant in the second and third bond offerings, where CDR's role as preliminary underwriter, although disclosed in the bond offering documents, created a potential conflict of interest, given that CDR was to be paid on unloaned proceeds. Without knowledge of the fee agreements, the issuers calculated and certified as to their reasonable expectations regarding loan origination and made related disclosures without all the information material to their certifications.

12. The fee agreement also created an issue as to whether these bond offerings generated arbitrage bonds. Each fee agreement stated that CDR would be paid a fee for "introducing [the credit enhancement provider] to Letter of Credit Enhancement opportunities and transactions." That reference called into question whether CDR's fee was actually part of the fee the credit enhancement provider received for credit enhancement, which could disqualify all or part of the credit enhancement fee from being a qualified guarantee and increase the risk that the bonds could be construed as arbitrage bonds.[4]

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[4] The IRS issued preliminary adverse determination letters to the issuers, asserting that the bond interest was taxable, among other reasons, because of arbitrage rebate violations resulting from improper treatment of the credit enhancement fee in each bond offering as a payment for a qualified guarantee on the bonds. Ultimately, the credit enhancement provider and the issuers reached a resolution with the IRS, pursuant to which agreed amounts were paid to the IRS and, among other things, the tax-exempt status of the bonds was preserved.

13. Each PPM, which was drafted on behalf of, and signed by, the issuer for each of the three bond offerings, failed to disclose the fee agreement, which caused them to contain misleading information. Drafts of the PPMs were circulated to the bond offering participants, including CDR, before being finalized and distributed to investors.

14. The Payment Agreements in the second and third bond offerings also contained misleading statements and omissions. In those bond offerings, the Payment Agreements required potential borrowers to submit financial information on proposed acquisition projects to CDR for its review before applying for loan approval from the credit enhancement provider. The Payment Agreements also stated that borrowers needed to receive written approval from CDR in order to submit loan requests to the credit enhancement provider. CDR received drafts of the Payment Agreements as part of the bond offerings working group. The Payment Agreements were misleading in that they did not disclose that CDR was receiving an on-going annual fee from the credit enhancement provider based on the unloaned proceeds in these bond offerings and thereby creating a potential conflict of interest for CDR.

15. In the first bond offering, CDR executed a Certificate. In the Certificate, CDR made statements about the credit enhancement fee relevant to an analysis of the tax-exempt status of the bonds, but did not disclose the fee agreement. As a result of this omission, the Certificate was misleading.

16. Based on the facts set forth above, CDR had a duty to disclose the existence of the fee agreements to the issuers throughout the course of the bond offerings.

<u>CDR's Violations</u>

17. As a result of the conduct described above, CDR violated Section 17(a)(2) of the Securities Act, which proscribes obtaining money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading in the offer or sale of securities, and Section 17(a)(3) of the Securities Act, which prohibits engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IV.

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

Accordingly, it is hereby ORDERED that:

Respondent CDR cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) or 17(a)(3) of the Securities Act.

By the Commission.

Nancy M. Morris
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary