SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for December 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. Commissioner Campos was Commissioner from August 22, 2003 to September 18, 2007.

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

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 10, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12902

In the Matter of **AR Associates, Inc.,** **Azel Enterprises, Inc.,** **Getgomail.Com, Inc.** **(n/k/a Getgo, Inc.),** **Success Development Group, Inc.,** **Vis Opps Marketing, Inc., and** **Worldwide 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") against Respondents AR Associates, Inc., Azel Enterprises, Inc., Getgomail.Com, Inc. (n/k/a Getgo, Inc.), Success Development Group, Inc., Vis Opps Marketing, Inc., and Worldwide Medical Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. AR Associates, Inc. ("AR") (CIK No. 1045040) is a revoked Nevada corporation located in Sumas, Washington with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). AR 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 September 8, 1999, which reported no assets, no revenue, and net losses of $7,518.

2. Azel Enterprises, Inc. ("Azel") (CIK No. 1080009) is a Nevada corporation located in Vancouver, British Columbia, Canada with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Azel is delinquent in its periodic filings with the Commission, having not filed any periodic

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reports since it filed a Form 10-SB registration statement on April 8, 1999, which reported a net loss of $94,228 for the six months ended in January 1999.

3. Getgomail.Com, Inc. (n/k/a Getgo, Inc.) ("Getgo") (CIK No. 835538) is a British Virgin Islands corporation located in Hong Kong with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Getgo is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2000, which reported a net loss of $3.1 million for that year. On November 1, 2005, Getgo was stricken from the register of British Virgin Islands companies for non-payment of its license fee. As of December 5, 2007, the company's common stock (symbol "GTGOF") was traded on the over-the-counter markets.

4. Success Development Group, Inc. ("Success Development") (CIK No. 1088359) is a permanently revoked Nevada corporation located in Reno, Nevada with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Success Development 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 16, 1999, which reported a loss since inception of $6,745.

5. Vis Opps Marketing, Inc. ("Vis Opps") (CIK No. 1077997) is a revoked Nevada corporation located in Vancouver, British Columbia, Canada with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Vis Opps is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended April 30, 1999. A Form 10-SB amendment filed August 5, 1999 reported the company had no revenue and a net loss of $6,894 since inception.

6. Worldwide Medical Corp. ("Worldwide Medical") (CIK No. 1159544) is a Delaware corporation located in Lake Forest, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Worldwide Medical is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2002, which reported a net loss of $473,854 for the prior three quarters. As of December 5, 2007, the company's common stock (symbol "WWMCQ") was traded on the over-the-counter markets.

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, 10-KSB, or 20-F), and Rule 13a-13 requires domestic issuers to file quarterly reports (Forms 10-Q or 10-QSB). Rule 13a-16 requires foreign private issuers to furnish quarterly and other reports to the Commission under cover of Form 6-K if they make or are required to make the information public under the laws of the jurisdiction of their domicile or in which they are incorporated or organized; if they file or are required to file information with a stock exchange on which their securities are traded and the information was made public by the exchange; or if they distribute or are required to distribute information to their security holders.

9. As a result of the foregoing, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 or 13a-16 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

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Attachment

<u>Appendix 1</u>

Chart of Delinquent Filings
In the Matter of AR Associates, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
AR Associates, Inc.					
	10-QSB	09/30/99	11/15/99	Not filed	97
	10-KSB	12/31/99	03/30/00	Not filed	93
	10-QSB	03/31/00	05/15/00	Not filed	91
	10-QSB	06/30/00	08/14/00	Not filed	88
	10-QSB	09/30/00	11/14/00	Not filed	85
	10-KSB	12/31/00	04/02/01	Not filed	80
	10-QSB	03/31/01	05/15/01	Not filed	79
	10-QSB	06/30/01	08/14/01	Not filed	76
	10-QSB	09/30/01	11/14/01	Not filed	73
	10-KSB	12/31/01	04/01/02	Not filed	68
	10-QSB	03/31/02	05/15/02	Not filed	67
	10-QSB	06/30/02	08/14/02	Not filed	64
	10-QSB	09/30/02	11/14/02	Not filed	61
	10-KSB	12/31/02	03/31/03	Not filed	57
	10-QSB	03/31/03	05/15/03	Not filed	55
	10-QSB	06/30/03	08/14/03	Not filed	52
	10-QSB	09/30/03	11/14/03	Not filed	49
	10-KSB	12/31/03	03/30/04	Not filed	45
	10-QSB	03/31/04	05/17/04	Not filed	43
	10-QSB	06/30/04	08/16/04	Not filed	40
	10-QSB	09/30/04	11/15/04	Not filed	37
	10-KSB	12/31/04	03/31/05	Not filed	33
	10-QSB	03/31/05	05/16/05	Not filed	31
	10-QSB	06/30/05	08/15/05	Not filed	28
	10-QSB	09/30/05	11/14/05	Not filed	25
	10-KSB	12/31/05	03/31/06	Not filed	21
	10-QSB	03/31/06	05/15/06	Not filed	19
	10-QSB	06/30/06	08/14/06	Not filed	16
	10-QSB	09/30/06	11/14/06	Not filed	13
	10-KSB	12/31/06	04/02/07	Not filed	8
	10-QSB	03/31/07	05/15/07	Not filed	7
	10-QSB	06/30/07	08/14/07	Not filed	4
	10-QSB	09/30/07	11/14/07	Not filed	1

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
AR Associates, Inc.					
Total Filings Delinquent	33				
Azel Enterprises, Inc.					
	10-QSB	03/31/99	05/17/99	Not filed	103
	10-KSB	06/30/99	09/28/99	Not filed	99
	10-QSB	09/30/99	11/15/99	Not filed	97
	10-QSB	12/31/99	02/14/00	Not filed	94
	10-QSB	03/31/00	05/15/00	Not filed	91
	10-KSB	06/30/00	09/28/00	Not filed	87
	10-QSB	09/30/00	11/14/00	Not filed	85
	10-QSB	12/31/00	02/14/01	Not filed	82
	10-QSB	03/31/01	05/15/01	Not filed	79
	10-KSB	06/30/01	09/28/01	Not filed	75
	10-QSB	09/30/01	11/14/01	Not filed	73
	10-QSB	12/31/01	02/14/02	Not filed	70
	10-QSB	03/31/02	05/15/02	Not filed	67
	10-KSB	06/30/02	09/30/02	Not filed	63
	10-QSB	09/30/02	11/14/02	Not filed	61
	10-QSB	12/31/02	02/14/03	Not filed	58
	10-QSB	03/31/03	05/15/03	Not filed	55
	10-KSB	06/30/03	09/29/03	Not filed	51
	10-QSB	09/30/03	11/14/03	Not filed	49
	10-QSB	12/31/03	02/17/04	Not filed	46
	10-QSB	03/31/04	05/17/04	Not filed	43
	10-KSB	06/30/04	09/28/04	Not filed	39
	10-QSB	09/30/04	11/15/04	Not filed	37
	10-QSB	12/31/04	02/14/05	Not filed	34
	10-QSB	03/31/05	05/16/05	Not filed	31
	10-KSB	06/30/05	09/28/05	Not filed	27
	10-QSB	09/30/05	11/14/05	Not filed	25
	10-QSB	12/31/05	02/14/06	Not filed	22
	10-QSB	03/31/06	05/15/06	Not filed	19
	10-KSB	06/30/06	09/28/06	Not filed	15
	10-QSB	09/30/06	11/14/06	Not filed	13
	10-QSB	12/31/06	02/14/07	Not filed	10

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Azel Enterprises, Inc.					
	10-QSB	03/31/07	05/15/07	Not filed	7
	10-KSB	06/30/07	09/28/07	Not filed	3
	10-QSB	09/30/07	11/14/07	Not filed	1
Total Filings Delinquent	35				
Getgomail.Com, Inc. (n/k/a Getgo, Inc.)					
	20-F	12/31/01	06/30/02	Not filed	66
	20-F	12/31/02	06/30/03	Not filed	54
	20-F	12/31/03	06/30/04	Not filed	42
	20-F	12/31/04	06/30/05	Not filed	30
	20-F	12/31/05	06/30/06	Not filed	18
Total Filings Delinquent	5				
Success Development Group, Inc.					
	10-QSB	06/30/99	08/16/99	Not filed	100
	10-QSB	09/30/99	11/15/99	Not filed	97
	10-KSB	12/31/99	03/30/00	Not filed	93
	10-QSB	03/31/00	05/15/00	Not filed	91
	10-QSB	06/30/00	08/14/00	Not filed	88
	10-QSB	09/30/00	11/14/00	Not filed	85
	10-KSB	12/31/00	04/02/01	Not filed	80
	10-QSB	03/31/01	05/15/01	Not filed	79
	10-QSB	06/30/01	08/14/01	Not filed	76
	10-QSB	09/30/01	11/14/01	Not filed	73
	10-KSB	12/31/01	04/01/02	Not filed	68
	10-QSB	03/31/02	05/15/02	Not filed	67
	10-QSB	06/30/02	08/14/02	Not filed	64
	10-QSB	09/30/02	11/14/02	Not filed	61
	10-KSB	12/31/02	03/31/03	Not filed	57
	10-QSB	03/31/03	05/15/03	Not filed	55
	10-QSB	06/30/03	08/14/03	Not filed	52
	10-QSB	09/30/03	11/14/03	Not filed	49
	10-KSB	12/31/03	03/30/04	Not filed	45
	10-QSB	03/31/04	05/17/04	Not filed	43

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Success Development Group, Inc.					
	10-QSB	06/30/04	08/16/04	Not filed	40
	10-QSB	09/30/04	11/15/04	Not filed	37
	10-KSB	12/31/04	03/31/05	Not filed	33
	10-QSB	03/31/05	05/16/05	Not filed	31
	10-QSB	06/30/05	08/15/05	Not filed	28
	10-QSB	09/30/05	11/14/05	Not filed	25
	10-KSB	12/31/05	03/31/06	Not filed	21
	10-QSB	03/31/06	05/15/06	Not filed	19
	10-QSB	06/30/06	08/14/06	Not filed	16
	10-QSB	09/30/06	11/14/06	Not filed	13
	10-KSB	12/31/06	04/02/07	Not filed	8
	10-QSB	03/31/07	05/16/07	Not filed	7
	10-QSB	06/30/07	08/15/07	Not filed	4
	10-QSB	09/30/07	11/14/07	Not filed	1
Total Filings Delinquent	34				
Vis Opps Marketing, Inc.					
	10-QSB	07/31/99	09/14/99	Not filed	99
	10-KSB	10/31/99	01/31/00	Not filed	95
	10-QSB	01/31/00	03/16/00	Not filed	93
	10-QSB	04/30/00	06/14/00	Not filed	90
	10-QSB	07/31/00	09/14/00	Not filed	87
	10-KSB	10/31/00	01/29/01	Not filed	83
	10-QSB	01/31/01	03/19/01	Not filed	81
	10-QSB	04/30/01	06/14/01	Not filed	78
	10-QSB	07/31/01	09/14/01	Not filed	75
	10-KSB	10/31/01	01/29/02	Not filed	71
	10-QSB	01/31/02	03/18/02	Not filed	69
	10-QSB	04/30/02	06/14/02	Not filed	66
	10-QSB	07/31/02	09/16/02	Not filed	63
	10-KSB	10/31/02	01/29/03	Not filed	59
	10-QSB	01/31/03	03/17/03	Not filed	57
	10-QSB	04/30/03	06/16/03	Not filed	54
	10-QSB	07/31/03	09/15/03	Not filed	51
	10-KSB	10/31/03	01/29/04	Not filed	47

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Vis Opps Marketing, Inc.					
	10-QSB	01/31/04	03/16/04	Not filed	45
	10-QSB	04/30/04	06/14/04	Not filed	42
	10-QSB	07/31/04	09/14/04	Not filed	39
	10-KSB	10/31/04	01/31/05	Not filed	35
	10-QSB	01/31/05	03/17/05	Not filed	33
	10-QSB	04/30/05	06/14/05	Not filed	30
	10-QSB	07/31/05	09/14/05	Not filed	27
	10-KSB	10/31/05	01/30/06	Not filed	23
	10-QSB	01/31/06	03/17/06	Not filed	21
	10-QSB	04/30/06	06/14/06	Not filed	18
	10-QSB	07/31/06	09/14/06	Not filed	15
	10-KSB	10/31/06	01/29/07	Not filed	11
	10-QSB	01/31/07	03/19/07	Not filed	9
	10-QSB	04/30/07	06/14/07	Not filed	6
	10-QSB	07/31/07	09/14/07	Not filed	3
Total Filings Delinquent	33				
Worldwide Medical Corp.					
	10-KSB	12/31/02	03/31/03	Not filed	57
	10-QSB	03/31/03	05/15/03	Not filed	55
	10-QSB	06/30/03	08/14/03	Not filed	52
	10-QSB	09/30/03	11/14/03	Not filed	49
	10-KSB	12/31/03	03/30/04	Not filed	45
	10-QSB	03/31/04	05/17/04	Not filed	43
	10-QSB	06/30/04	08/16/04	Not filed	40
	10-QSB	09/30/04	11/15/04	Not filed	37
	10-KSB	12/31/04	03/31/05	Not filed	33
	10-QSB	03/31/05	05/16/05	Not filed	31
	10-QSB	06/30/05	08/15/05	Not filed	28
	10-QSB	09/30/05	11/14/05	Not filed	25
	10-KSB	12/31/05	03/31/06	Not filed	21
	10-QSB	03/31/06	05/15/06	Not filed	19
	10-QSB	06/30/06	08/14/06	Not filed	16
	10-QSB	09/30/06	11/14/06	Not filed	13

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Worldwide Medical Corp.					
	10-KSB	12/31/06	04/02/07	Not filed	8
	10-QSB	03/31/07	05/15/07	Not filed	7
	10-QSB	06/30/07	08/14/07	Not filed	4
	10-QSB	09/30/07	11/14/07	Not filed	1

Total Filings Delinquent 20

SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for December 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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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-56887; International Series Release No. 1305;

File No. S7-14-07

RIN 3235-AJ91

EXEMPTION OF COMPENSATORY EMPLOYEE STOCK OPTIONS FROM REGISTRATION UNDER SECTION 12(g) OF THE SECURITIES EXCHANGE ACT OF 1934

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting two exemptions from the registration requirements of the Securities Exchange Act of 1934 for compensatory employee stock options. The first exemption will be available to issuers that are not required to file periodic reports under the Exchange Act. The second exemption will be available to issuers that are required to file those reports because they have registered under Exchange Act Section 12 a class of security or are required to file reports pursuant to Exchange Act Section 15(d). The exemptions will apply only to the issuer's compensatory employee stock options and will not extend to the class of securities underlying those options.

EFFECTIVE DATE: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Amy M. Starr, Senior Special Counsel to the Director, at (202) 551-3115, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

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SUPPLEMENTARY INFORMATION: We are amending rule 12h-1[1] under the Securities Exchange Act of 1934.[2]

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1 17 CFR 240.12h-1.

2 15 U.S.C. 78a et. seq.

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I. INTRODUCTION AND BACKGROUND

A. Proposing Release and Public Comment Letters

On July 5, 2007, we proposed amendments to Exchange Act Rule 12h-1 to provide two exemptions from Exchange Act Section 12(g)[3] registration for compensatory employee stock options.[4] The first proposed exemption applied to compensatory employee stock options of an issuer that did not have a class of security registered under Exchange Act Section 12[5] and was not subject to the reporting requirements of Exchange Act Section 15(d),[6] provided certain conditions were met. The proposed exemption built on a line of no-action letters issued by the staff of the Division of Corporation Finance that granted relief from Exchange Act Section 12(g) registration to private, non-reporting issuers for their compensatory employee stock options.[7] The second proposed exemption applied to compensatory employee stock options of issuers that were required to file periodic reports under the Exchange Act because they had registered under Section 12 the class of equity security underlying those options.

In response to our request for comment on the Proposing Release, we received twelve comment letters from various persons, all of whom expressed support for the need

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3 15 U.S.C. 78l(g).

4 Exemption of Compensatory Employee Stock Options from Registration Under Section 12(g) of the Securities Exchange Act of 1934, Release No. 34-56010 (Jul. 10, 2007) [72 FR 37608] ("Proposing Release").

5 15 U.S.C. 78l.

6 15 U.S.C. 78o(d).

7 See, e.g., no-action letters to Starbucks Corporation (available Apr. 2, 1992); Kinko's, Inc. (available Nov. 30, 1999); Mitchell International Holding, Inc. (available Dec. 27, 2000) ("Mitchell International"); AMIS Holdings, Inc. (available Jul. 30, 2001) ("AMIS Holdings"); Headstrong Corporation (available Feb. 28, 2003); and VG Holding Corporation (available Oct. 31, 2006) ("VG Holding").

for the proposed exemptions.[8] Commenters expressed differing concerns about the scope of the exemptions, and the transferability restrictions and information conditions of the proposed exemption for private, non-reporting issuers. After considering commenters' views, we are adopting amendments to Exchange Act Rule 12h-1, substantially as proposed, with some modifications including:

- Exemption for private, non-reporting issuers:
  - Elimination of transferability and ownership restrictions on holders of shares issued on exercise of compensatory employee stock options; and
  - Elimination of an issuer's obligation to provide certain required information to holders of shares received on exercise of compensatory employee stock options.
- Exemption for public reporting issuers:
  - Expansion of the category of issuers eligible to rely on the exemption to include any issuer required to file periodic reports under Exchange Act Section 13[9] or Section 15(d).

B. Employee Stock Options and Exchange Act Section 12(g)

In the 1980s, private, non-reporting issuers began using compensatory employee stock options[10] to compensate a broader range of employees, including executive, middle,

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8 See letters from American Bar Association, Committee on Federal Regulation of Securities ("ABA"); America's Community Bankers ("ACB"); Center for Audit Quality ("CAQ"); Deloitte & Touche LLP ("D&T"); Drinker Biddle & Reath LLP ("Drinker"); Ernst & Young LLP ("E&Y"); Freescale Semiconductor ("Freescale"); KPMG LLP ("KPMG"); Andrew Ross, Partner, Loeb & Loeb ("Ross"); New York State Society of Certified Public Accountants ("NYSSCPA"); Pink Sheets LLC ("Pink Sheets"); and Simpson Thacher & Bartlett LLP ("Simpson").

9 15 U.S.C. 78m.

10 Throughout this release, for purposes of the exemption for private, non-reporting issuers, we use the term "compensatory employee stock options" to refer to stock options issued to employees,

and lower-level employees, directors, and consultants.[11] Compensatory employee stock options provide a method to use non-cash compensation to attract, retain, and motivate company employees, directors, and consultants.[12] Since the 1990s, a number of private, non-reporting issuers have granted compensatory employee stock options to 500 or more employees, directors, and consultants.[13]

Under Exchange Act Section 12(g), an issuer with 500 or more holders of record of a class of equity security and assets in excess of $10 million at the end of its most recently ended fiscal year must register that class of equity security, unless there is an available exemption from registration.[14] Stock options, including stock options issued to

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directors, consultants, and advisors (to the extent permitted under Securities Act Rule 701 [17 CFR 230.701]). For reporting issuers, the phrase also refers to those persons described in General Instruction A.1(a) to Form S-8 [17 CFR 239.16b].

11 The National Center for Employee Ownership surveyed 275 venture capital-backed private businesses in the technology and telecommunications businesses. Of these firms, 77% provided options to all employees while 23% provided them only to select employees. "New Data Show Venture-Backed Companies Still Issue Options Broadly," http://www.nceo.org/library/option_venturebacked.html; see also J. Hand, 2005 "Give Everyone a Prize? Employee Stock Options in Private Venture-Backed Firms," Working Paper, Kenan-Flagler Business School, UNC Chapel Hill, available at http://ssrn.com/abstracts=599904 ("Hand Paper") (study investigating the impacts on the equity values of private venture-backed firms of the organizational depth to which they grant employee stock options).

Securities Act Rule 701, which provides an exemption from Securities Act registration for non-reporting issuers for offerings of securities to employees, directors, consultants and advisors, and specified others, pursuant to written compensatory benefit plans or agreements, has given private issuers great flexibility in granting compensatory employee stock options to employees (and other eligible persons) at all levels. See Rule 701(c) [17 CFR 230.701(c)]; and Rule 701 Exempt Offerings Pursuant to Compensatory Arrangements, Release No. 33-7645 (Mar. 8, 1999) [64 FR 11095] ("Rule 701 Release"). See also Compensatory Benefit Plans and Contracts, Release No. 33-6768 (Apr. 14, 1988) [53 FR 12918].

12 See Hand Paper, note 11 supra.

13 See no-action letters cited at note 7 supra.

14 The asset threshold was set originally at $1 million in Section 12(g). Pursuant to its authority under Section 12(h) of the Exchange Act, the Commission has increased the amount three times; from $1 million to $3 million in 1982 (System of Classification for Purposes of Exempting Smaller Issuers From Certain Reporting and Other Requirements, Release No. 34-18647 (Apr. 13, 1982)[47 FR 17046]), from $3 million to $5 million in 1986 (Reporting by Small Issuers, Release

employees under stock option plans, are a separate class of equity security for purposes of the Exchange Act.[15] Accordingly, an issuer with 500 or more optionholders and more than $10 million in assets is required to register that class of options under the Exchange Act, absent an available exemption. While there is an exemption from Exchange Act Section 12(g) registration for interests and participations in certain other types of employee compensation plans involving securities,[16] currently there is no exemption for compensatory employee stock options.

The addition of Section 12(g) to the Exchange Act in 1964 was intended "to extend to investors in certain over-the-counter securities the same protection now afforded to those in listed securities by providing that the issuers of certain securities now traded over the counter shall be subject to the same requirements that now apply to issuers of securities listed on an exchange."[17] Further, Exchange Act Section 12(g)

No. 34-23406 (Jul. 8, 1986) [51 FR 253601]), and from $5 million to $10 million in 1996 (Relief from Reporting by Small Issuers, Release No. 34-37157 (May 1, 1996) [61 FR 21353]).

15 Exchange Act Section 3(a)(11) [15 U.S.C. 78c(a)(11)] defines equity security to include any right to purchase a security (such as options) and Exchange Act Rule 3a11-1 [17 CFR 240.3a11-1] explicitly includes options in the definition of equity security for purposes of Exchange Act Sections 12(g) and 16 [15 U.S.C. 78l(g) and 78p]. Exchange Act Section 12(g)(5) [15 U.S.C. 78l(g)(5)] defines class to include "all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges."

16 The exemption from registration under Exchange Act Section 12(g) which is contained in Exchange Act Rule 12h-1(a), was adopted in 1965, for "[a]ny interest or participation in an employee stock bonus, stock purchase, profit sharing, pension, retirement, incentive, thrift, savings or similar plan which is not transferable by the holder except in the event of death or mental incompetency, or any security issued solely to fund such plans." Rule 12h-1 is intended to exempt from Section 12(g) registration the same types of employee benefit plan interests as Section 3(a)(2) [15 U.S.C. 77c(a)(2)] of the Securities Act of 1933 [15 U.S.C. 77a et. seq.] exempts from Securities Act registration and, thus, does not cover stock options. See, e.g., L. Loss and J. Seligman, Securities Regulations, 3d., at §6-A-4.

17 House of Representatives Report No. 1418 (1964), 88th Cong., 2d Sess., HR 679, p.1. See also Section 3(c) of the Securities Act Amendments of 1964, Pub.L. 88-467; 78 Stat. 565.

extended the disclosure and other Exchange Act safeguards to unlisted securities as a means to prevent fraud.[18]

A number of private, non-reporting issuers faced with registration under Exchange Act Section 12(g) due solely to their compensatory employee stock options being held by 500 or more holders of record (as well as having more than $10 million in assets) at the end of their fiscal year have requested registration relief from our Division of Corporation Finance.[19] Since 1992, the Division has provided relief through no-action letters[20] to these private issuers when specified conditions were present. More recently, the Advisory Committee on Smaller Public Companies, in its Final Report, recommended that we provide Exchange Act Section 12(g) registration relief for compensatory employee stock options.[21]

As we discussed further in the Proposing Release, we believe that it is appropriate at this time to adopt two new exemptions from the registration provisions of Exchange Act Section 12(g) for compensatory employee stock options issued under employee stock option plans that are limited to employees, directors, consultants, and advisors of the issuer, its parents, and majority-owned subsidiaries of the issuer or its parents.[22]

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18 Senate Committee Report, No. 379 (1963), 88th Cong., 1st Sess., p. 63.

19 The Division has delegated authority to grant (but not deny) applications for exemption under Exchange Act Section 12(h). See Rule 200.30-1(e)(7) [17 CFR 200.30-1(e)(7)].

20 For the conditions necessary to receive relief under these letters and orders see, e.g., the no-action letter to Mitchell International, note 7 supra (for the pre-2001 relief) and the no-action letters to AMIS Holdings, note 7 supra; ISE Labs, Inc. (available Jun. 2, 2003); Jazz Semiconductor, Inc. (available Nov. 21, 2005) ("Jazz Semiconductor"); and VG Holding, note 7 supra (for the expanded relief beginning in 2001).

21 Final Report of the Advisory Committee on Smaller Public Companies to the Securities and Exchange Commission, Apr. 23, 2006 at 87 ("Final Report of the Advisory Committee").

22 The exemption for private, non-reporting issuers allows compensatory employee stock options to be held only by those persons described in Securities Act Rule 701(c) [17 CFR 230.701(c)]

II. DISCUSSION OF EXEMPTIONS

We are adopting two amendments to Exchange Act Rule 12h-1 as proposed, with some modifications. These amendments will:

- provide an exemption for private, non-reporting issuers from Exchange Act Section 12(g) registration for compensatory employee stock options issued under employee stock option plans; and
- provide an exemption from Exchange Act Section 12(g) registration for compensatory employee stock options of issuers that have registered under Exchange Act Section 12 a class of security or are required to file reports pursuant to Exchange Act Section 15(d).

Given the differences between issuers that are required to file periodic reports under the Exchange Act and those issuers that do not have such an obligation, including the nature of the trading markets and the amount of publicly available information, we believe that it is appropriate to adopt separate exemptions for these different types of issuers.

(including permitted transferees), while the exemption for reporting issuers also allows options to be held by those persons described in General Instruction A.1(a) to Form S-8. Securities Act Rule 701(c) lists the categories of persons to whom offers and sales of securities under written compensatory benefit plans or contracts may be made in reliance on Securities Act Rule 701 by an issuer, its parents, and majority-owned subsidiaries of the issuer or its parents. The categories of persons are: employees (including specified insurance agents); directors; general partners; trustees (where the issuer is a business trust); officers; consultants and advisors (under certain conditions); family members who acquire their securities from such persons through gifts or domestic relations orders; and former employees, directors, general partners, trustees, officers, consultants and advisors only if such persons were employed by or providing services to the issuer at the time the securities were offered. The exemption also allows options to be transferred to (and held by) family members (as described in Securities Act Rule 701) through gifts or domestic relations orders, or to an executor or guardian of the optionholder upon the death or disability of the optionholder. For ease of discussion, in this release we use the phrase "employees, directors, consultants and advisors of the issuer" to refer to those persons described in Securities Act Rule 701(c) and transferees permitted by the exemption. For reporting issuers, the exemption will cover grants of options made prior to and after the issuer becomes subject to the Exchange Act reporting requirements.

A. Exemption For Compensatory Employee Stock Options of Issuers That Are Not Exchange Act Reporting Issuers

We believe it is appropriate to provide an exemption from Exchange Act registration, based on the factors identified in Exchange Act Section 12(h),[23] for compensatory employee stock options of issuers that are not required to file reports under the Exchange Act.[24] We believe that an exemption from Exchange Act registration of compensatory employee stock options for private, non-reporting issuers will provide useful certainty to those issuers in their compensation decisions and will help them avoid becoming subject to the registration and reporting requirements of the Exchange Act prior to the time they have public shareholders. The availability of this exemption is subject to specified limitations, including limitations concerning permitted optionholders, transferability, and provision of information. We believe that the conditions to the exemption and the existing statutory provisions and rules provide holders of compensatory employee stock options in private, non-reporting issuers appropriate disclosure and investor protections under the federal securities laws, given the

23 Exchange Act Section 12(h) provides for exemptive authority with regard to certain provisions of the Exchange Act. Included in Exchange Act Section 12(h) is the authority to create appropriate exemptions from the Exchange Act registration requirements. Under Exchange Act Section 12(h), the Commission may exempt a class of securities by rules and regulations or by order if it "finds, by reason of the number of public investors, amount of trading interest in the securities, the number and extent of the activities of the issuer, income or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors." Exchange Act Section 12(h) [15 U.S.C. 78l(h)].

24 We believe that the exemption is consistent with the exemption provided for other employee benefit plans in Exchange Act Rule 12h-1, which is not available for stock option plans, the compensatory employee stock options issued pursuant to such plans, or the securities issued on exercise of such compensatory employee stock options. We believe that the characteristics of many employee benefit plans, which are by their own terms limited to employees, not available to the general public, and subject to transfer restrictions, obviate the need for applicability of all the rules and regulations aimed at public trading markets. In addition, because many of the conditions in the exemption refer to certain Securities Act Rule 701 definitions and requirements, we believe that the exemption from Exchange Act Section 12(g) registration will allow non-reporting issuers to continue to rely on Securities Act Rule 701 in offering and selling compensatory employee stock options and the shares issued on exercise of those options.

compensatory circumstances of the securities issuance and the restrictions on transferability of the compensatory employee stock options. As such, we believe that the exemption is in the public interest, in that it would clarify and routinize the basis for an exemption from Exchange Act Section 12(g) registration for compensatory employee stock options so private, non-reporting issuers would be able to continue to use compensatory employee stock options and would provide appropriate investor protections for optionholders.

1. Eligible Issuers

The amendment we are adopting today will provide an exemption from Exchange Act Section 12(g) registration for compensatory employee stock options of the following types of issuers:

- Issuers that do not have a class of securities registered under Exchange Act Section 12; and
- Issuers that are not subject to the reporting requirements of Exchange Act Section 15(d).[25]

The exemption will be available only to those issuers that are not required to report under the Exchange Act. As such, the exemption will terminate once the issuer becomes subject to the reporting requirements of the Exchange Act. The exemption also will terminate if the issuer no longer satisfies the conditions to the exemption.[26]

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25 Under Exchange Act Section 15(d), an issuer's "duty to file [reports under Section 15(d) is] automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 12 of this title."[15 U.S.C. 78o(d)].

26 The exemption under Exchange Act Section 12 will allow issuers 120 calendar days to register the class of options once an issuer no longer is able to rely on the exemption. Currently, the no-action letter relief terminates once an issuer becomes subject to the Exchange Act reporting requirements. See, e.g., no-action letter to VG Holding, note 7 supra. Moreover, the exemption will not be

2. Eligible Compensatory Employee Stock Options

The exemption for compensatory employee stock options will:

- Apply only to compensatory employee stock options that are issued under a written compensatory stock option plan[27] that is limited to employees, directors, consultants, and advisors of the issuer, its parents, or majority-owned subsidiaries of the issuer or its parents;[28]
- Apply to all compensatory employee stock options issued under all written compensatory stock option plans on a combined basis where the securities underlying the compensatory employee stock options are of the same class of securities of the issuer, with the exemptive conditions applying to the compensatory employee stock options issued under each option plan; and
- Not extend to any class of securities received or to be received on exercise of the compensatory employee stock options.

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available if the issuer was required, but failed, to register another class of equity security under the Exchange Act.

27 Securities Act Rule 701 is available only for offers and sales of compensatory employee stock options and the shares issuable upon exercise of those options that are issued under written compensatory employee benefit plans of an issuer, its parents, or majority-owned subsidiaries of the issuer or its parents. See Securities Act Rule 701(c) [17 CFR 230.701(c)]. Thus, the requirement that the options be issued under written compensatory stock option plans will not impose a new obligation on issuers relying on Securities Act Rule 701 in offering and selling compensatory employee stock options or the shares issued on exercise of those options.

28 The exemption for the compensatory employee stock options will not extend to other rights issued in connection with the compensatory employee stock options, such as stock appreciation rights. Any such other rights will be evaluated separately for purposes of Exchange Act Section 12(g) registration. Some commenters had requested that the exemption apply to all compensation arrangements involving securities, including restricted stock units, stock appreciation rights, and other rights or securities. See letters from ABA and Freescale. Consistent with the scope of the staff no-action letters granting Section 12(g) registration relief for compensatory employee stock options, at this time we believe the exemption should address only compensatory employee stock options. We, therefore, are not expanding the scope of the exemption beyond compensatory employee stock options.

The exemption covers all compensatory employee stock options meeting the conditions of the exemption, even if the compensatory employee stock options are issued under separate written option plans of the issuer, its parents, or majority-owned subsidiaries of the issuer or its parents.[29] For the purpose of the exemption, the compensatory employee stock options will be considered to belong to the same class of equity security of the issuer if the same class of securities of the issuer will be issuable on exercise of the compensatory employee stock options.[30] While one commenter requested that we allow companies to determine whether a particular group of compensatory employee stock options was the same class as other compensatory employee stock options for purposes of determining whether it had met the 500 holder threshold,[31] we are adopting the exemption as proposed in this regard.[32] We believe that, solely for purposes of determining whether the Rule 12h-1 exemption is available, it is important to establish uniformity in evaluating whether there are 500 or more holders of compensatory employee stock options and so that issuers appropriately analyze when Exchange Act Section 12(g) applies to their compensatory employee stock options.[33]

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29 In response to comment (see letter from ABA), we have clarified that the options may be granted under plans of the issuer, its parents, and majority-owned subsidiaries of the issuer or its parents.

30 See Exchange Act Section 12(g)(5) [15 U.S.C. 78l(g)(5)].

31 See letter from ABA.

32 One commenter suggested that the class of options should only include those options issued after the effective date of the exemption that satisfied the conditions of the exemption. See letter from Drinker. We are not adopting such a provision. Under the Exchange Act, the class of equity security is not determined based on when the securities are issued. The exemption provides that the class of compensatory employee stock options for purposes of the exemption includes all compensatory employee stock options on the same class of the issuer's securities regardless of whether the plan is a plan of the issuer, its parents, or majority-owned subsidiaries of the issuer or its parents. No distinction is made in the exemption as to when those options are issued.

33 This provision will not affect the separate class analysis under Exchange Act Section 12(g)(5) for other purposes.

The exemption, as adopted, applies to the compensatory employee stock options only and not to the securities issued (or to be issued) on exercise of the compensatory employee stock options. Thus, the issuer will have to apply the registration requirements of Exchange Act Section 12 to the class of equity security underlying the compensatory employee stock options without regard to the exemption.[34]

3. Eligible Option Plan Participants

The exemption is available only where the class of persons eligible to receive compensatory employee stock options under the stock option plans is limited to those persons described in the exemption. These eligible optionholders are the same as those participants permitted under Securities Act Rule 701 and include:[35]

- Employees of the issuer, its parents, or majority-owned, direct or indirect, subsidiaries of the issuer or its parents;
- Directors of the issuer, its parents, or majority-owned, direct or indirect, subsidiaries of the issuer or its parents; and
- Consultants and advisors of the issuer, its parents, or majority-owned, direct or indirect, subsidiaries of the issuer or its parents.

As adopted, the exemption is limited to those situations where compensatory employee stock options may be held only by those persons who are permitted to hold or be granted compensatory employee stock options under Securities Act Rule 701 and their

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34 For example, if an issuer had more than $10 million in assets and 500 or more holders of a class of equity security underlying the compensatory employee stock options as of the end of its fiscal year, it would have to register under Exchange Act Section 12 that class of equity security.

35 See the discussion at note 22 supra.

permitted transferees.[36] We believe that the experience of issuers and their counsels with Securities Act Rule 701 will ease compliance with and limit uncertainty regarding the exemption.[37]

Just as Securities Act Rule 701 was designed specifically not to be available for capital-raising transactions, the exemption will apply only to employee stock options issued for compensatory purposes. The restrictions on the eligible participants in the stock option plans are intended to assure that the exemption is limited to employee stock options issued solely for compensatory purposes.[38]

4. Option Terms

a. Compensatory Employee Stock Option Transferability Restrictions

The exemption is available only where there are certain restrictions on the transferability by an optionholder of those options and, prior to the exercise of the options, the shares issuable on exercise of those options.[39] Specifically, the exemption is available only if:

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36 In this regard, we note that this category of eligible optionholders is broader than the category of persons to whom employee benefit securities, including compensatory employee stock options, may be offered and sold by reporting issuers using a Form S-8 registration statement. See General Instruction A.1(a) to Form S-8. As we note below, the exemption for reporting issuers will allow eligible optionholders to satisfy the definitions contained in either Securities Act Rule 701 or Form S-8 because an issuer may grant options both prior to and after it becomes subject to the periodic reporting requirements of the Exchange Act.

37 Some commenters were concerned that the terms of outstanding options may not contain all the restrictive provisions of the exemption. (See letters from Drinker and Ross). We believe that our elimination of the restrictions on holders of shares received on exercise of an option and the modification of the transferability conditions affecting optionholders should address these concerns.

38 All option grants and exercises must, of course, comply with the requirements of the Securities Act.

39 The exemption does not impose any limitations on the ability of current or former employees, directors, consultants, or advisors of an issuer to retain or exercise their compensatory employee stock options.

- The compensatory employee stock options and, prior to exercise, the shares to be received on exercise of those options cannot be transferred except, as permitted by the exemption:[40]
  - to family members (as defined in Securities Act Rule 701) by gift or pursuant to domestic relations orders; and
  - on death or disability of the optionholder;[41]
- There can be no other permitted pledges, gifts, hypothecations, or other transfers of the compensatory employee stock options, or shares issuable on exercise of those options, prior to exercise, until the issuer becomes subject to the reporting requirements of the Exchange Act or is no longer relying on the exemption; provided that there may be:
  - transfers back to the issuer; or
  - transfers in connection with a change of control or other acquisition transactions involving the issuer if, following such transaction, the options no longer will be outstanding and the issuer no longer will be relying on the exemption;[42] and

40 The transferability restrictions are not intended to supersede other transferability restrictions imposed for other reasons, including under the Internal Revenue Code of 1986, as amended [26 U.S.C. 422(b)(5)].

41 These permitted transferees are intended to be the same as those permitted under Securities Act Rule 701(c) as well as executors or guardians of an optionholder on the death or disability of the optionholder. See note 22 supra.

42 After an issuer becomes subject to the reporting requirements of the Exchange Act, the issuer will be able to rely on the exemption for Exchange Act reporting issuers only if it becomes subject to Exchange Act reporting as a result of its Exchange Act Section 12 registration of a class of security or pursuant to Exchange Act Section 15(d).

- The compensatory employee stock options or the securities issuable upon exercise of those options cannot be the subject of a short position, a "put equivalent position"[43] or a "call equivalent position"[44] by the optionholder, prior to exercise, until the issuer becomes subject to the reporting requirements of the Exchange Act or is no longer relying on the exemption; provided that the options may be subject to repurchase rights of the issuer or the optionholder may participate in a change of control or other acquisition transaction involving the issuer.

As adopted, the conditions provide that, except with regard to the limited permitted transfers specified in the conditions, an optionholder cannot be permitted, prior to exercise, to pledge, hypothecate, or otherwise transfer the compensatory employee stock options or the shares underlying those options, including through a short position, a "put equivalent position," or a "call equivalent position," until the issuer becomes subject to the reporting requirements of the Exchange Act or is no longer relying on the exemption.[45] For the exemption to be available, these transfer restrictions will have to apply to options outstanding at the time that the issuer is relying on the exemption.

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[43] 17 CFR 240.16a-1(h). Rule 16a-1(h) defines a "put equivalent position" as a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option and a short call option position.

[44] 17 CFR 240.16a-1(b). Rule 16a-1(b) defines a "call equivalent position" as a derivative security position that increases in value as the value of the underlying equity increases, including, but not limited to, a long convertible security, a long call option, and a short put option position.

[45] The current no-action letters contain similar conditions on transferability of the options, although the rule as adopted clarifies the limitations on the ability of optionholders to engage in certain derivative transactions prior to exercise, such as restrictions on an optionholder from entering into a "put equivalent position" or "call equivalent position" until the issuer becomes subject to the reporting requirements of the Exchange Act, or is no longer relying on the exemption. See, e.g., no-action letter to VG Holding, note 7 supra. In addition, the amendment as adopted does not restrict holders of shares following exercise of compensatory employee stock options.

The restrictions on transfer of the compensatory employee stock options and the shares underlying those options, prior to exercise, are intended to limit the possibility for a trading market to develop for the compensatory employee stock options while the issuer is relying on the exemption. These restrictions also are intended to assure that an optionholder is not able to profit from the compensatory employee stock options or the securities to be received on exercise of those options (except from permitted payments or transfers as described in the exemption), until the issuer becomes subject to the reporting requirements of the Exchange Act or is no longer relying on the exemption.

In response to comments, we have modified the transferability condition to permit optionholders to receive compensation for their options from the issuer or arising from a change of control or other acquisition transaction after which the options no longer will be outstanding and the issuer no longer will be relying on the exemption.[46]

Commenters also were concerned that a requirement for an issuer to repurchase the shares or options due to state law limitations on transfer restrictions could have adverse accounting consequences to companies.[47] As a result, we have modified the transferability conditions to eliminate a requirement for an issuer to repurchase options if an express prohibition on transfer of options is not permitted under applicable state law. Instead, the condition permits the issuer to provide that it may repurchase the options in the event of an impermissible transfer. Issuers also may provide that the options terminate in such an event. We note that compensatory employee stock option plans or written stock option agreements generally restrict the persons who may exercise the

[46] See letters from ABA, Ross, and Simpson.

[47] See letters from CAQ, D&T, E&Y, and KPMG.

options, so providing for a termination of an option in the event of an impermissible transfer would, in many cases, already be contemplated by the terms of the written stock option agreement or plan.

We proposed that the transferability restrictions apply to holders of shares issued on exercise of the options. In response to comments,[48] we have not adopted this condition of the exemption. We understand from commenters that private, non-reporting issuers normally already have shareholder agreements and other mechanisms to restrict the transfer of shares received on exercise of options prior to the time the issuer becomes subject to the reporting requirements of the Exchange Act or is involved in a change of control or other acquisition transaction involving the issuer.[49] We also understand that private, non-reporting issuers do not anticipate that optionholders will exercise their options prior to a liquidity event, such as an initial public offering or sale of the company, or prior to termination of the options.[50]

We are not adopting as a condition to the exemption separate transferability restrictions on holders of the shares received on exercise of the compensatory employee stock options. While we acknowledged in the Proposing Release the existence of

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48 See letters from ABA, Drinker, Ross, and Simpson.

49 See letters from ABA, Freescale, Ross, and Simpson.

50 In expressing their views that the proposed transferability restrictions should not be expected to affect a private company's ability to value the compensatory employee stock options under Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123R (revised 2004) Share-Based Payment (FAS 123R), some commenters noted that in valuing employee stock options for purposes of FAS 123R, private, non-reporting issuers use an expected term assumption that does not anticipate early exercise of the options. See letters from CAQ, E&Y, and KPMG. These commenters noted that employees of non-public companies normally do not have an incentive to exercise a vested option early due to the lack of a market for the underlying shares. These commenters observed that non-public company employees typically hold their options until they have incentive to exercise such as at the end of their terms, termination of employment, or until a liquidity event, such as an initial public offering or sale of the company occurs.

company-imposed and securities law transferability restrictions, we are persuaded to modify the exemption in light of the additional concerns that commenters believed the proposed transferability restrictions would raise. In modifying the exemption, we have considered the treatment of compensatory employee stock options under Securities Act Rule 701 as restricted securities as defined in Securities Act Rule 144,[51] the fact that optionholders typically do not exercise their options prior to their termination or a liquidity event and the fact that, if exercised, most private companies take steps to restrict transferability of shares received on exercise of compensatory employee stock options, so that there is a limited possibility of a market developing in the securities issued on exercise of immediately exercisable compensatory employee stock options. In addition, we have considered a commenter's view that imposing separate transferability restrictions on the holders of shares received on exercise of compensatory employee stock options may affect a company's decision to use stock options for compensatory purposes.[52] We also note that the exemptions we are adopting today do not impact the continued potential applicability of Exchange Act Section 12(g) to the securities issued on exercise of the options.

We also are not adopting the proposed restriction on other shares of the same class of equity security as those underlying the options. We believe that this restriction is no longer necessary because we have not adopted transferability restrictions on holders of securities received on exercise of compensatory employee stock options. In addition, we have taken into account one commenter's concern that the transferability restrictions on

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[51] 17 CFR 230.144. <u>See</u>, <u>e.g.</u>, Securities Act Rule 701(g).

[52] <u>See</u> letter from ABA. <u>See</u> <u>also</u>, letter from Ross.

the optionholder with respect to shares of the same class as those issuable on exercise of the options would affect an optionholder's ability to dispose of other securities of the issuer that the optionholder owned.[53]

As proposed, the exemption would have provided that there could be no market, process, or methodology that would permit optionholders, prior to exercise, to receive compensation or consideration for their options, the shares issuable on exercise of the options, or shares of the same class of equity security as those underlying those options. Commenters noted that generally there is no market for the securities underlying the options while the issuer is a private, non-reporting entity.[54] Commenters were concerned that optionholders should not be disadvantaged from receiving payments from an issuer or in connection with a change of control or other corporate transaction involving an issuer, either with respect to their options or shares of the issuer they already own.[55] In light of these comments, we do not believe the exemption should impair an optionholder's ability to participate in transactions involving the issuer's securities they already own and we do not believe the exemption should restrict an issuer or other shareholders from engaging in particular transactions due to the issuer's reliance on the exemption.

b. Permitted Exercisability of Compensatory Employee Stock Options

The exemption will not require that there be any restriction on the timing of the exercise of the compensatory employee stock options:

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53 See letter from Ross.

54 See letters from ABA, Freescale, Ross, and Simpson.

55 See letters from ABA, Freescale, Ross, and Simpson.

- by the optionholder (regardless of whether the optionholder continues to be an employee, director, consultant or advisor of the issuer);
- in the event of the death or disability of the optionholder, by the estate or guardian of the optionholder; or
- by a family member (as defined in Securities Act Rule 701) who acquired the options through a gift or domestic relations order.

5. Required Information

We are adopting the proposed requirement that the issuer provide information to optionholders with certain modifications. In response to comment, we are not adopting a requirement for issuers to provide information to holders of shares received on exercise of compensatory employee stock options after exercise or for issuers to provide optionholders access to their books and records.[56]

As adopted, the information condition will require the issuer, for purposes of the exemption, to periodically provide the following information to optionholders:[57]

- The same risk and financial information that would be required to be provided under Securities Act Rule 701 if securities sold in reliance on Securities Act Rule 701 in a 12-month period exceeded $5 million (as such provision may be modified[58]), with the optionholders being provided every six months required information, including financial statements that are not more than 180 days old.[59]

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56 See letter from ABA.

57 In response to comment (see letters from ABA and Ross), we are clarifying that the information conditions may commence once a company has 500 or more optionholders and may terminate once the company becomes subject to the reporting requirements of the Exchange Act or is no longer relying on the exemption.

58 One commenter suggested that the exemption take into account changes in the dollar threshold in Securities Act Rule 701. See letter from ABA. The rule text, as proposed and adopted, refers

The issuer will be permitted to provide the required information to the optionholders either by:

- Physical or electronic[60] delivery of the information; or
- Notice to the optionholders of:
  - the availability of the information on an Internet site that may be password-protected;[61] and
  - any password needed to access the information.

In Securities Act Rule 701, we established the type of information that employees holding compensatory employee stock options must be provided before the exercise of those options.[62] The Securities Act Rule 701 information provisions provide

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only to the relevant paragraph of Securities Act Rule 701 and does not include a separate dollar threshold. Therefore, any change in the dollar threshold in Securities Act Rule 701 would apply to the exemption.

59 See Securities Act Rule 701(e) [17 CFR 230.701(e)] for a description of the risk factor and financial statement requirements. The required information will have to be provided under the terms of the exemption, once an issuer is relying on the exemption regardless of whether the issuer would be required to provide the information under Securities Act Rule 701 (for example, because the issuer did not sell $5 million in securities in a 12-month period in reliance on Securities Act Rule 701). The financial statement requirements under Securities Act Rule 701 refers to financial statements of Part F/S of Form 1-A [17 CFR 239.90]. Part F/S of Form 1-A does not require audited financial statements unless an issuer has prepared them for other purposes. Otherwise, Part F/S of Form 1-A permits an issuer to provide two years of unaudited financial statements.

60 Electronic delivery of such information will have to be made in compliance with the Commission's interpretations regarding the electronic delivery of information. See, e.g., "Use of Electronic Media," Release No. 34-42728 (Apr. 28, 2000) [65 FR 25843].

61 A password-protected closed-system intranet site accessible to employees also would be a permitted method to provide the required information to those persons having access to such site.

62 See Rule 701 Release, note 11 supra. "The type and amount of disclosure needed in a compensatory securities transaction differs from that needed in a capital-raising transaction. In a bona fide compensatory arrangement, the issuer is concerned primarily with compensating the employee-investor rather than maximizing its proceeds from the sale. Because the compensated individual has some business relationship, perhaps extending over a long period of time, with the securities issuer, that person will have acquired some, and in many cases, a substantial amount of knowledge about the enterprise. The amount and type of disclosure required for this person is not the same as for the typical investor with no particular connection with the issuer." Id.

optionholders and other persons who purchase securities without registration under Securities Act Rule 701 with important information. While one commenter objected to the provision of information condition,[63] we believe that the ongoing provision of the same information is necessary and appropriate for purposes of the exemption from Exchange Act registration.[64] While requiring private, non-reporting issuers to provide information, as adopted, the exemption will allow flexibility in the means of providing the information by permitting physical, electronic, or Internet-based delivery.

Securities Act Rule 701 provides that the required information must be provided to an optionholder a reasonable period of time before the date of exercise of the compensatory employee stock options. Securities Act Rule 701 also requires that the required financial statements be as of a date no more than 180 days before the sale of the securities (which in the case of compensatory employee stock options is the date of exercise of the options). We believe that the exemption from Exchange Act registration presents the need for ongoing information to be provided to optionholders. As such, the exemption requires that, once an issuer has 500 or more optionholders, the optionholders must be provided every six months the required information, including financial statements that are not more than 180 days old.

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63 See letter from ABA.

64 As the Commission reminded issuers when it adopted the amendments to Securities Act Rule 701 in 1999, issuers should be aware that compliance with the minimum disclosure standards for Securities Act Rule 701 may not necessarily satisfy the antifraud standards of the securities laws. See Rule 701 Release, note 11 supra. (Preliminary Note 1 to Rule 701 states that issuers and other persons acting on their behalf have an obligation to provide investors with disclosure adequate to satisfy the antifraud provisions of the federal securities laws.) We recognize that the Advisory Committee has recommended modifications to Securities Act Rule 701 that would affect the thresholds that would trigger the disclosure provisions of that rule. Our amendments do not address the Advisory Committee's recommendations regarding Securities Act Rule 701. See Final Report of the Advisory Committee, note 21 supra, at p. 92-93.

We believe that our experience with Securities Act Rule 701 and the combined conditions of the exemption, including the eligibility and transferability provisions, make it appropriate to require the same risk and financial information as required under Securities Act Rule 701, as noted above, rather than essentially the same Exchange Act information and reports as if it was subject to the Exchange Act reporting requirements in the context of an ongoing reporting exemption relating to compensatory employee stock options.[65] As such, we believe that the scope of information that the optionholders will be provided under the exemption is not inconsistent with investor protection and the public interest.[66]

One commenter objected to the proposed condition that the issuer make its books and records available for inspection by the optionholder and holders of shares received on exercise of compensatory employee stock options to the same extent that they are

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65 As the Commission also recognized when it adopted the Securities Act Rule 701 amendments in 1999, and because many issuers that have 500 or more optionholders and more than $10 million in assets are likely to have received venture capital financing (see for example the data in the Hand Paper, note 11 supra), we believe that many of these issuers already have prepared the type of disclosure required in their normal course of business, either for using other exemptions, such as Regulation D, or for other purposes. As a result, the disclosure requirement generally will be less burdensome for them. In adopting the amendments to Securities Act Rule 701, we stated that a minimum level of disclosure was essential to meet even the reduced level of information needed to inform compensatory-type investors such as employees and consultants. See Rule 701 Release, note 11 supra.

66 For a private, non-reporting issuer with a significant number of optionholders (and with more than $10 million in assets at the end of its fiscal year), we believe it is likely that such issuer either already is obligated to provide the same information to optionholders due to sales of securities in reliance on Securities Act Rule 701 or already prepares and, as such, provides such information to its shareholders. One commenter also stated that many private, non-reporting issuers prepare financial statements, including audited financial statements, for other purposes. See letter from E&Y. Moreover, because of the transferability restrictions on the compensatory employee stock options and, prior to exercise, the shares to be received on exercise of those options, optionholders will have limited investment decisions to make, until the issuer becomes subject to the reporting requirements of the Exchange Act or is engaged in an acquisition transaction affecting the options. Consequently, we believe that the disclosure required under the exemption is the appropriate level of disclosure to be provided optionholders until the issuer becomes subject to the reporting requirements of the Exchange Act or is no longer relying on the exemption.

available to other shareholders of the issuer.[67] This commenter stated that such a requirement may go beyond or be inconsistent with state law requirements. We are not adopting the books and records element of the information condition. We believe that holders of such shares can exercise their state law rights to inspect corporate books and records. Moreover, because optionholders, as such, are not shareholders, we agree with the commenter that it is not necessary to extend the books and records inspection right to them if it is not already provided for under applicable state law.

To permit issuers to safeguard proprietary or confidential information that may be contained in the information to be provided, the exemption will permit provision of the disclosure to be conditioned on the optionholder agreeing to maintain the confidentiality of the information.[68] In response to a commenter,[69] we are not adopting the proposed provision that would have required an issuer to allow inspection of the documents at one of the described issuer offices if an optionholder chooses not to enter into such a confidentiality agreement. Under the exemption, as adopted, the issuer is not required to provide the information to a particular optionholder if the holder does not agree to keep the information to be provided pursuant to the exemption confidential.[70] Therefore, the exemption, as adopted, permits an issuer to take steps to protect the confidentiality of its information.

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67 See letter from ABA.

68 This provision is consistent with the related information provision under Securities Act Rule 701.

69 See letter from ABA.

70 This provision does not affect an issuer's information delivery obligation under Securities Act Rule 701.

The proposal also would have required that the issuer provide the required information to holders of shares received on exercise of options. We have revised the information condition to apply only to optionholders in light of concern regarding the potential misuse of information by non-employees or former employees of a company.[71] The amendments, as adopted, do not condition the exemption on transferability restrictions on the underlying shares similar to those applicable to the compensatory employee stock options. One commenter expressed concern that the information delivery conditions would treat these company shareholders differently than other company shareholders.[72] Since the exemption applies only to the compensatory employee stock options and not to the shares received on exercise of the compensatory employee stock options, we believe our revisions should address concerns in this regard and provide companies flexibility in addressing confidentiality and share transferability issues.

6. Issuer Obligation to Impose the Conditions to the Exemption

We are adopting essentially as proposed the requirement that, for the exemption to be available, a private, non-reporting issuer must include the necessary limitations and conditions in the written stock option plans, within the terms of the individual written option agreements, or in another enforceable written agreement. Some commenters were concerned about the need to include the conditions and obligations in option plans or option agreements and one commenter suggested that the conditions and restrictions should only have to be satisfied in practice.[73] We believe that the nature of the

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71 See letter from ABA.

72 See letter from ABA.

73 See, e.g., letters from ABA, Drinker, and Ross. While one commenter suggested eliminating any requirement for the conditions to be embodied in an agreement (see letter from ABA), we believe

exemption necessitates the inclusion of the conditions to the exemption in an enforceable written agreement or agreements between the issuer and the optionholders, or in the issuer's by-laws or certificate of incorporation. By allowing the conditions and obligations to be included in any enforceable written agreement or the in the issuer's certificate of incorporation or by-laws, we also believe that the modified condition will provide issuers necessary flexibility in where to include the conditions in their agreements with optionholders.

B. Exemption for Compensatory Employee Stock Options of Exchange Act Reporting Issuers

To provide certainty regarding the obligations of issuers that already have registered securities under the Exchange Act or are required to file reports under the Exchange Act pursuant to Exchange Act Section 15(d), we are adopting an exemption from Exchange Act registration for compensatory employee stock options of these reporting issuers.[74] While the proposed exemption would have been available only for an issuer that had registered under Exchange Act Section 12 the class of equity security underlying the compensatory employee stock options, in response to comment,[75] we are expanding the eligibility for this exemption to all issuers required to file periodic reports pursuant to Exchange Act Section 13 or Exchange Act Section 15(d). The filing of Exchange Act reports pursuant to Exchange Act Sections 13 or 15(d) will provide the appropriate information to optionholders.

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that the condition must be enforceable by the optionholder. Further, we believe the issuer must have written evidence that it satisfies this condition.

74 We believe the exemption will provide important guidance regarding, and an appropriate exemption to, eligible issuers from the Exchange Act registration requirement for compensatory employee stock options.

75 See letter from ABA.

As with the exemption for private, non-reporting issuers, the exemption for issuers subject to the reporting requirements of the Exchange Act will be available only where the options are issued pursuant to a written compensatory stock option plan. We have revised the exemption, in response to comment,[76] to provide that the class of persons eligible to receive or hold compensatory employee stock options under the stock option plans includes those participants permitted to be granted options under an issuer's Form S-8, as well as to those participants permitted under Securities Act Rule 701.[77] We have made this change to take into account the fact that, for a reporting issuer, compensatory employee stock options may have been granted before, and may be granted after, the issuer becomes subject to the Exchange Act reporting requirements.

We also have modified the optionholder eligibility condition to address the concerns of some commenters that the exemption still should be available to reporting issuers even where a small number of optionholders may not necessarily fall within the permitted categories of optionholders.[78] We are adopting a provision that will permit the exemption to continue to be available even if there is an insignificant deviation from satisfying the eligibility conditions of the exemption.[79] This provision will allow

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76 See letter from ABA.

77 This expansion will make the categories of eligible optionholders consistent under both exemptions. See the discussion under "Eligible Option Plan Participants," above, for a description of the eligible optionholders.

78 See letters from ABA, Drinker, and Ross. Commenters noted that options could be held by persons that previously had been granted options by the issuer, or by another entity acquired by the issuer. One commenter also was concerned about options held by former employees of an acquired entity who would not be considered eligible optionholders under Form S-8.

79 While we are allowing the exemption to be available to reporting issuers that have insignificant deviations from the eligibility conditions, we are not adopting a similar provision for private, non-reporting issuers. We believe this distinction is appropriate because reporting issuers are subject to all of the disclosure requirements under the periodic reporting rules of the Exchange Act and also are subject to staff review. The concept of allowing an insignificant deviation from required

reporting issuers to rely on the exemption if the number of optionholders that do not meet the eligibility condition are insignificant both as to the aggregate number of optionholders and number of outstanding options. Further, following the effective date of the exemption, to be able to rely on the exemption, including the insignificant deviation provision, the issuer must have made a good faith and reasonable attempt to comply with the conditions of the exemption.

The exemption from Section 12(g) registration for compensatory employee stock options of Exchange Act reporting issuers does not include any information conditions, other than those arising from the registration of a class of security under the Exchange Act or arising under Exchange Act Section 15(d).

We are not conditioning the availability of the exemption on the issuer being current in its Exchange Act reporting. As we noted in the proposing release, we believe it would seem inappropriate for the issuer to lose the exemption, and be required to register a class of compensatory employee stock options under Exchange Act Section 12(g), because it was late in filing a required Exchange Act report and, for the days before that report was filed, was not "current" in its Exchange Act reporting. One commenter agreed with this approach.[80]

While we had proposed that the exemption apply only where the issuers had registered the class of equity security underlying the compensatory employee stock options, which would provide optionholders the protections of Exchange Act Sections

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conditions also is included in Regulation D and Regulation A under the Securities Act [17 CFR 230.260 and 17 CFR 230.508]. We believe that issuers are familiar with the concept under the Securities Act and applying a similar concept to the exemption under the Exchange Act will assist issuers in avoiding unintentional failures to satisfy the exemption conditions.

80 See letter from ABA.

13(e)[81] and 14(e),[82] we agree with one commenter that the exemption should be available to all issuers required to file periodic reports under the Exchange Act.[83] For those issuers required to file periodic reports pursuant to Exchange Act Section 15(d), the exemption will no longer be available once their obligation to file reports under Exchange Act Section 15(d) is suspended. In that case, to maintain the exemption, the issuer would have to register a class of security under Exchange Act Section 12.

We believe that once an issuer has 500 or more optionholders it is more likely that it will have 500 or more holders of the shares underlying the options and therefore will be required to register that class under Exchange Act Section 12 if it also has more than $10 million in assets. In addition, if the issuer becomes a private, non-reporting issuer due to the suspension or termination of its reporting obligation, it may rely on the exemption for the compensatory employee stock options of private, non-reporting issuers if the conditions to that exemption are satisfied.

C. Registering When No Longer Eligible for Exemption

If a private, non-reporting issuer becomes ineligible to rely on the exemption, the issuer will be permitted up to 120 calendar days from the date it became ineligible to rely on the exemption to file a registration statement to register under Exchange Act Section 12(g) the class of compensatory employee stock options. For a reporting issuer that becomes ineligible to rely on the exemption, the issuer will be permitted up to 60 calendar days from the date it became ineligible to rely on the exemption to file a

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81 15 U.S.C. 78m(e).

82 15 U.S.C. 78n(e).

83 See letter from ABA. Exchange Act Section 14(e) would, of course, continue to apply regardless of whether the issuer had registered the class of equity security underlying the compensatory employee stock options.

registration statement to register under Exchange Act Section 12(g) the class of compensatory employee stock options or a class of security. We have revised the transition provision for private, non-reporting issuers in response to a commenter's concern that 60 days would not be sufficient for private, non-reporting issuers to prepare a Form 10 registration statement including audited financial statements.[84] We have retained the 60 day time period for reporting issuers because they already would have been required to prepare and file periodic reports under the Exchange Act, including audited financial statements.

III. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of the amendments to Exchange Act Rule 12h-1[85] contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[86] We published a notice requesting comment on the collection of information requirements in the Proposing Release and submitted these to the Office of Management and Budget ("OMB") for review and approval in accordance with the PRA.[87] OMB approved the collection and the control number is 3235-0632. 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 this information is:

- Exchange Act Rule 12h-1.

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84 See letter from ABA.

85 17 CFR 240.12h-1.

86 44 U.S.C. 3501 et. seq.

The hours and costs associated with preparation of notices, maintaining Internet sites, and preparation of information to be disclosed to optionholders for private, non-reporting issuers relying on the exemption from Exchange Act Section 12(g)[88]registration constitute cost burdens imposed by the collection of information. The exemption available to reporting issuers will not constitute new collections of information. The amendments will not affect existing collections of information.

The exemptions from Exchange Act Section 12(g) registration are being adopted pursuant to the Exchange Act. The information collection requirements related to the exemption for private, non-reporting issuers are a condition to reliance on the exemption. There is no mandatory retention period for the information disclosed and the information disclosed is not required to be filed with the Commission.

B. Summary of Collection of Information

Our amendments to Exchange Act Rule 12h-1 will provide an exemption for private, non-reporting issuers from Exchange Act Section 12(g) registration for compensatory employee stock options issued under employee stock option plans. The amendments also will provide an exemption from Exchange Act Section 12(g) registration for compensatory employee stock options of issuers that are subject to the periodic reporting requirements of the Exchange Act pursuant to Exchange Act Section 13 or Section 15(d).

The requirements regarding notice of information availability, Internet availability of information, and, for certain issuers, the preparation of information related to the

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87 44 U.S.C. 3507(d) and 5 CFR 1320.11.

88 15 U.S.C. 78l(g).

exemption from Exchange Act Section 12(g) for compensatory employee stock options of private, non-reporting issuers constitute a new collection of information under the Exchange Act. The information provision in the exemption for private, non-reporting issuers is not a new collection of information for those private, non-reporting issuers that also are required to provide such information to optionholders pursuant to Securities Act Rule 701[89] or that already prepare and provide such information to their shareholders.

The collection of information is required for those private, non-reporting issuers that rely on the exemption because they had 500 or more optionholders and more than $10 million in assets at the end of their fiscal year. The issuers likely to use the exemption are those private, non-reporting issuers that had more than $10 million in assets and had used stock options to compensate employees, directors, consultants, and advisors on a broad basis. The exemption from Section 12(g) registration for compensatory employee stock options of reporting issuers that are subject to the periodic reporting requirements of the Exchange Act pursuant to Exchange Act Section 13 or Section 15(d) does not impose any new collection of information on these reporting issuers.

C. Summary of Comments

None of the commenters addressed our request for comment on the PRA analysis and, accordingly, we have not revised our PRA estimates.

D. Paperwork Reduction Act Burden Estimates

For purposes of the PRA, we estimate that the annual burden for responding to the collection of information in the exemption will not increase significantly for most private,

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[89] 17 CFR 230.701.

non-reporting issuers, due to the current disclosure provisions of Securities Act Rule 701 and the probability that such issuers already prepare such information for other purposes. The costs may increase for those private, non-reporting issuers who are not relying on Securities Act Rule 701 when they grant compensatory employee stock options or who do not prepare the information for other purposes. The cost of providing such information may increase because of the requirement in the exemption for private, non-reporting issuers to provide the required information.

Our estimates represent the burden for private, non-reporting issuers eligible to rely on the exemption. Because the registration provisions of Exchange Act Section 12(g) apply only to an issuer with 500 or more holders of record of a class of equity security and assets in excess of $10 million at the end of its most recently ended fiscal year, only those private, non-reporting issuers satisfying those thresholds will be subject to the collection of information. The Division of Corporation Finance has granted no-action relief from registration of compensatory employee stock options to 30 private, non-reporting issuers during the period 1992 through 2006. If we assume that approximately 3 new private, non-reporting issuers will be relying on the exemption each year and that a certain number of private, non-reporting issuers will no longer be relying on the exemption because they have become reporting issuers, have been acquired, or have terminated business, we estimate that approximately 40 private, non-reporting issuers each year may be relying on the exemption. The exemption for private, non-reporting issuers would terminate once such issuer became subject to the reporting requirements of the Exchange Act or was no longer relying on the exemption. Thus, the number of private, non-reporting issuers that may rely on the exemption may vary from year to year.

For purposes of the PRA, we estimate the annual paperwork burden for private, non-reporting issuers desiring to rely on the exemption and to comply with our collection of information requirements to be approximately 20 hours of in-house issuer personnel time and to be approximately $24,000 for the services of outside professionals.[90] These estimates include the time and the cost of preparing and reviewing the information and making the information available to optionholders. We assume that the same number of private, non-reporting issuers will rely on the exemption each year.

We estimate that 25% of the burden of preparation and provision of the information required by the exemption is carried by the issuer internally and that 75% of the burden is carried by outside professionals retained by the issuer at an average cost of $400 per hour.[91] The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

IV. COST-BENEFIT ANALYSIS

A. Background

Compensatory stock options provide a method to use non-cash compensation to attract, retain, and motivate issuer employees, directors and consultants. Since the 1990s, a number of private, non-reporting issuers have granted compensatory employee stock

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90 For administrative convenience, the presentation of the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals have been rounded to the nearest hundred.

91 In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $400 as the average cost of outside professionals that assist issuers in preparing disclosures for offerings.

options to 500 or more employees, directors, and consultants. Compensatory employee stock options also are used routinely by issuers required to report under the Exchange Act.

Stock options, including stock options issued to employees under stock option plans, are a separate class of equity security for purposes of the Exchange Act. Under Exchange Act Section 12(g), an issuer with 500 or more holders of record of a class of equity security and assets in excess of $10 million at the end of its most recently ended fiscal year must register that class of equity security, unless there is an available exemption from registration. While there is an exemption from Exchange Act Section 12(g) registration for interests and participations in certain other types of employee compensation plans involving securities, currently there is no exemption for compensatory employee stock options.

B. Summary of Amendments

We are adopting two exemptions from the registration provisions of Exchange Act Section 12(g) for compensatory employee stock options issued under employee stock option plans that are limited to employees, directors, consultants, and advisors of the issuer.

One amendment to Exchange Act Rule 12h-1 will provide an exemption from Exchange Act Section 12(g) registration for compensatory employee stock options of an issuer that does not have a class of securities registered under Exchange Act Section 12 and is not subject to the reporting requirements of Exchange Act Section 15(d), where the following conditions are present:

- Eligible optionholders are limited to employees, directors, consultants, and advisors of the issuer, its parents, or majority-owned subsidiaries of the issuer or its parents and permitted transferees;
- Transferability by optionholders of compensatory employee stock options and, prior to exercise, the shares to be received on exercise of those options is restricted; and
- Risk and financial information is provided to optionholders that is of the type that would be required under Securities Act Rule 701 if securities sold in reliance on Securities Act Rule 701 exceeded $5 million in a 12-month period.

The second amendment to Exchange Act Rule 12h-1 will provide an exemption for compensatory employee stock options of issuers that are required to file reports under the Exchange Act pursuant to Exchange Act Section 13 or Exchange Act Section 15(d).

1. Expected Benefits

Benefits of the exemption for private, non-reporting issuers are likely to include the following: (1) lower costs to, and reduced uncertainty for, private, non-reporting issuers desiring relief from registration under Section 12(g) for compensatory employee stock options issued to employees, directors, consultants, and advisors for compensatory purposes; (2) benefits to private, non-reporting issuers in designing and implementing employee stock option plans without regard to concerns arising from Exchange Section 12(g) registration of the compensatory employee stock options; (3) benefits to private, non-reporting issuers arising from the use of electronic or Internet-based methods of providing the information necessary to satisfy the information requirement of the exemption; and (4) benefits to optionholders of private, non-reporting issuers arising from the required provision of information under the exemption.

Private, non-reporting issuers would benefit from cost savings as a result of the exemption from Section 12(g) registration of their compensatory employee stock options. A number of private, non-reporting issuers that have 500 or more optionholders and assets in excess of $10 million have hired attorneys and requested no-action relief from the Division of Corporation Finance with regard to the registration of the options. The conditions to no-action relief from the Division include information provision conditions that are more extensive than in the exemption. The exemption, which is available if the provisions of the exemption are satisfied, will reduce the legal and other costs to a private, non-reporting issuer arising from the no-action request and relief. Such cost savings include reduced legal and accounting fees arising from both the request for no-action relief and for preparation of reports equivalent to Exchange Act reports of a reporting issuer on an ongoing basis. Because we expect that a number of the issuers that may take advantage of the exemption may be smaller issuers, these cost savings could be significant relative to revenues.

The amendments require the same information that the issuer otherwise would be required to provide if securities sold in reliance on Securities Act Rule 701 exceeded $5 million during any consecutive 12-month period. Thus, for private, non-reporting issuers with a significant number of optionholders (and with more than $10 million in assets at the end of its fiscal year), it is likely that such issuer either already is obligated to provide the same information to optionholders due to sales of securities in reliance on Securities Act Rule 701, or already prepares and, as such, provides such information to its shareholders.[92] Further, any private, non-reporting issuer that has received no-action relief regarding registration of its compensatory employee stock options will face reduced disclosure costs under the exemption.

The amendment also will benefit private, non-reporting issuers by providing the less expensive alternative of electronic or Internet-based methods of providing the information necessary to satisfy the information requirement of the exemption.

Private, non-reporting issuers also will benefit from the certainty that the exemption will provide in designing and implementing compensation programs and employee stock option plans. The amendments identify the eligibility provisions and transfer restrictions that need to be contained in compensatory stock option plans or other written agreements, thereby lessening the need for issuers, at the time that Section 12(g) registration relief is needed for the compensatory employee stock options, to amend their stock option plans and outstanding options to include provisions that would be necessary to obtain no-action relief. The exemption will help private, non-reporting issuers avoid becoming subject to the registration and reporting requirements of the Exchange Act prior to the time they have public shareholders.

Optionholders also will benefit from the exemption. The exemption assures the provision of the information every six months, including financial information that is not more than 180 days old, to optionholders. Employees, directors, consultants, and advisors would benefit from the exemption because private, non-reporting issuers will be

92 One commenter noted that "they expect that most non-public companies with the number of compensatory optionholders necessary to benefit from the proposed exemption are likely to already be obtaining audited financial statements for other business and financial purposes." Letter from E&Y.

able to use options for compensatory purposes without concern that the option grants will subject the issuer to Exchange Act registration.

The exemption for reporting issuers also will benefit optionholders and holders of shares received on exercise of options. Optionholders and holders of shares received on exercise of options will have access to the issuer's publicly filed Exchange Act reports. Further, if the issuer has registered under Exchange Act Section 12 the class of equity security underlying the compensatory employee stock options, certain provisions of Exchange Act Sections 13 and 14 would apply to the options and the securities issuable on exercise of the options. Holders of shares issued on exercise of those options would have the same rights as other shareholders of the issuer. Thus, the exemption eliminates a possible disincentive for issuers to use certain compensatory employee stock options. This may be a benefit if this type of compensation is useful in attracting and retaining qualified employees that increase the issuer's competitiveness.

2. Expected Costs

Issuers will be required to satisfy the provisions of the amendments to avoid registering under Exchange Act Section 12(g) their compensatory employee stock options if the registration thresholds are met at the end of the issuer's fiscal year. Private, non-reporting issuers may incur certain costs to rely on the exemption including (1) costs to amend their existing employee stock option plans if the plans and option grants do not contain the restrictive and information provisions of the exemption; (2) costs arising from preparing and providing the information required by the exemption to the extent that the issuer does not already prepare or provide such information for other purposes; and (3) costs of maintaining an Internet site on which the information may be available if the issuer chooses to use that method to provide the required information to optionholders.

We believe that the provisions of the exemption are consistent in many respects with the restrictive provisions of other laws and rules governing option grants and, thus, the costs to private, non-reporting issuers should not be increased. The exemption provisions also are consistent with or are more flexible than the existing conditions for obtaining no-action relief from the Division of Corporation Finance. Therefore, the costs to private, non-reporting issuers to prepare the information required by the exemption may be the same or less than the current costs to the issuer relying on registration relief provided in a no-action letter issued by the Division of Corporation Finance.

Those private, non-reporting issuers who do not already prepare the required information will face costs if they desire to avail themselves of the exemption. In addition to the costs discussed in the Paperwork Reduction Act analysis,[93] as described below, issuers may face costs in maintaining the confidentiality of the information required to be provided, including preparation and enforcement of confidentiality agreements entered into with optionholders. It should be noted, however, that these increased costs will be borne voluntarily, as it is within the issuer's control as to the number of optionholders it may have. Issuers are able to perform their own cost-benefit analysis to determine whether to comply with the conditions to the exemption or avoid issuing options to 500 or more optionholders.

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93 See discussion under "PAPERWORK REDUCTION ACT," above.

Private, non-reporting issuers may incur costs in providing the information required under the exemption. These costs may include printing and sending the information or making the information available on an Internet site.

The Division of Corporation Finance has granted no-action relief from registration of compensatory employee stock options to 30 private, non-reporting issuers during the period 1992 through 2006. If we assume that approximately 3 new private, non-reporting issuers will be relying on the exemption each year and that a certain number of private, non-reporting issuers will no longer be relying on the exemption because they have become reporting issuers, have been acquired, or have terminated business, we estimate that approximately 40 private, non-reporting issuers each year may be relying on the exemption. The exemption for private, non-reporting issuers will terminate once such issuer becomes subject to the reporting requirements of the Exchange Act or is no longer relying on the exemption. Thus, the number of private, non-reporting issuers that may rely on the exemption may vary from year to year.

For purposes of the Paperwork Reduction Act, we have estimated that the annual paperwork burden for private, non-reporting issuers desiring to rely on the exemption and to comply with our collection of information requirements to be approximately 20 hours of in-house issuer personnel time, which is equivalent to $3,500, and to be approximately $24,000 for the services of outside professionals, for a total paperwork burden cost of $27,500.[94] These estimates include the time and the cost of preparing and reviewing the information and making the information available to optionholders. We have assumed that the same number of private, non-reporting issuers would rely on the exemption each year. We have estimated that 25% of the burden of preparation and provision of the information required by the exemption would be carried by the private, non-reporting issuer internally and that 75% of the burden would be carried by outside professionals retained by the private, non-reporting issuer at an average cost of $400 per hour.[95]

Although a private, non-reporting issuer relying on the exemption will benefit from cost savings associated with not having to register the compensatory employee stock options as a separate class of equity security under the Exchange Act, or obtaining no-action relief, by not doing so, an optionholder will not have the benefit of the disclosures contained in Exchange Act reports that the issuer otherwise would be obligated to file with us, including audited financial statements, or the disclosures required to be provided under the terms of the no-action relief.

Optionholders also will not be able to freely sell their options while the private, non-reporting issuer is relying on the exemption. Optionholders will not be able realize value from the options or, prior to exercise of the options, the shares to be issued on exercise of the options until after the private, non-reporting issuer becomes subject to the reporting requirements of the Exchange Act or is not relying on the exemption, other than as a result of certain permitted transfers. Many private, non-reporting issuers that grant options, however, currently restrict the transfer of securities held by holders of shares received on exercise of options, in most cases until after the issuer becomes subject to the

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94 For administrative convenience, the presentation of the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals have been rounded to the nearest hundred.

95 In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $400 as the average cost of outside professionals that assist issuers in preparing disclosures and conducting registered offerings. Consistent with recent rulemaking releases, we estimate the value of work performed by the company internally at a cost of $175 per hour.

reporting requirements of the Exchange Act or unless the issuer is acquired by another entity. In some cases, private, non-reporting issuers retain the right to repurchase options or shares received on exercise of an option. Any exercise of such repurchase right by the issuer would be a cost to such issuer.

V. CONSIDERATION OF BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION ANALYSIS

Section 23(a)(2)[96] of the Exchange Act requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. We are adopting an exemption for private, non-reporting issuers from Exchange Act Section 12(g) registration for compensatory employee stock options issued under employee stock option plans. We also are adopting an exemption from Exchange Act Section 12(g) registration for compensatory employee stock options of issuers that are subject to the reporting requirements of the Exchange Act pursuant to Exchange Act Section 13 or Exchange Act Section 15(d).

We expect that the exemption for private, non-reporting issuers from Exchange Act registration of compensatory employee stock options will provide necessary certainty to those issuers in their compensation decisions and will help them avoid becoming subject to the registration and reporting requirements of the Exchange Act prior to the time they have public shareholders. We anticipate that the exemption would save such private, non-reporting issuers costs and will not require that companies make their

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96 15 U.S.C. 78w(a)(2).

confidential issuer information public prior to the issuer voluntarily determining to become a public reporting issuer or being required to register a class of equity security under the Exchange Act. Further, we anticipate that the exemption will continue to provide private, non-reporting issuers freedom to determine appropriate methods of compensating their employees, directors, consultants, and advisors without concern that they will be required to register their compensatory employee stock options as a class of equity security under Exchange Act Section 12. Thus, the exemption eliminates a possible disincentive for issuers to use certain compensatory employee stock options. This may be a benefit if this type of compensation is useful in attracting and retaining qualified employees that increase the private, non-reporting issuer's competitiveness.

The exemption for reporting issuers will provide certainty regarding the obligations of issuers that already are subject to the reporting requirements of the Exchange Act pursuant to Exchange Act Section 13 or Exchange Act Section 15(d) to register their compensatory employee stock options under the Exchange Act. In addition, in the case of these reporting issuers, the optionholders would have access to the issuer's publicly filed Exchange Act reports and, if the issuer has registered under Exchange Act Section 12 the class of equity security underlying the options, the appropriate provisions of Sections 13 and 14 would apply to the compensatory employee stock options and the equity securities issuable on exercise of those options.

Section 3(f)[97] of the Exchange Act requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the

[97] 15 U.S.C. 78c(f).

public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We believe that the exemption from Exchange Act registration for the compensatory stock options may beneficially affect the issuer's ability to compete for employees because it will allow such issuers to continue to use employee stock options in their compensation programs, thus enabling them to compete for such employees with both private, non-reporting issuers and public reporting issuers. The exemption also will provide an eligible issuer a more efficient, available exemption from Exchange Act Section 12(g) registration of compensatory employee stock options, instead of such issuer having to seek no-action relief or an exemptive order under Exchange Act Section 12(h).

The exemptions do not relate to or affect capital formation, as the compensatory employee stock options covered by the exemptions are issued for compensatory and not capital raising purposes.

The exemptions will allow eligible issuers to continue to have freedom to determine appropriate methods of compensating their employees, directors, consultants, and advisors. For private, non-reporting issuers, these compensation decisions could be made without concern that the issuer will become subject to the Exchange Act reporting requirements before they have public shareholders.

VI. REGULATORY FLEXIBILITY ACT CERTIFICATION

The Commission hereby certifies pursuant to 5 U.S.C. 605(b) that the two exemptions from the registration provisions of Exchange Act Section 12(g) for compensatory employee stock options issued under employee stock option plans that are limited to employees, directors, consultants, and advisors of the issuer, its parents, and the majority-owned subsidiaries of the issuer or its parents will not have a significant economic impact on a substantial number of small entities. We prepared an Initial Regulatory Flexibility Act Analysis in which we stated that the proposed exemption would not affect issuers that are small entities because small entities do not satisfy the asset threshold of Section 12(g) and therefore the exemptions would not be needed by such entities until their asset size increased to more than $10 million at the end of a fiscal year. We stated, therefore, that there may not be a large number of small entities that may be impacted. Because we received no comment disagreeing with that conclusion we are certifying that the two exemptions will not have a significant economic impact on a substantial number of small entities.

VII. ADMINISTRATIVE PROCEDURE ACT

Section 553(d) of the Administrative Procedure Act generally provides that, unless an exception applies, a substantive rule may not be made effective less than 30 days after notice of the rule has been published in the Federal Register. One exception to the 30-day requirement is if such rule grants or recognizes an exemption or relieves a restriction. We are adopting two exemptions designed to relieve issuers from the registration requirements of Section 12(g) for compensatory employee stock options. The rules only affect issuers that issue stock options as compensation to their employees, directors, consultants, and advisors. Even after the rules are effective, issuers may still register the compensatory employee stock options under Exchange Act Section 12(g) as before; however, the new amendments to Exchange Act Rule 12h-1 grant exemptions to the requirement, relieving eligible issuers of the Exchange Act registration obligations, subject to certain conditions. Immediate effectiveness will provide certainty to issuers that provide compensatory employee stock options to their current or future employees, directors, consultants, and advisors as a form of compensation. Eligible issuers that satisfy the conditions to the exemptions can make compensation decisions without having to register under Exchange Act Section 12(g) the compensatory employee stock options or seek a no-action letter from the staff of the Commission or an exemption under Section 12(h) from the Commission for such registration relief.

VIII. STATUTORY BASIS AND TEXT OF RULE AMENDMENTS

We are amending Exchange Act Rule 12h-1 under the authority in Sections 12, 23, and 36 of the Exchange Act, as amended.

List of Subjects

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

TEXT OF RULE

For the reasons set out in the preamble, we are amending 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. Amend §240.12h-1 to remove "and" at the end of paragraph (d).

3. Amend §240.12h-1 to add paragraphs (f) and (g) to read as follows:

§240.12h-1 Exemptions from registration under section 12(g) of the Act.

* * * * *

(f)(1) Stock options issued under written compensatory stock option plans under the following conditions:

(i) The issuer of the equity security underlying the stock options does not have a class of security registered under section 12 of the Act and is not required to file reports pursuant to section 15(d) of the Act;

(ii) The stock options have been issued pursuant to one or more written compensatory stock option plans established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parents;

Note to paragraph (f)(1)(ii): All stock options issued under all written compensatory stock option plans on the same class of equity security of the issuer will be considered part of the same class of equity security for purposes of the provisions of paragraph (f) of this section.

(iii) The stock options are held only by those persons described in Rule 701(c) under the Securities Act (17 CFR 230.701(c)) or their permitted transferees as provided in paragraph (f)(1)(iv) of this section;

(iv) The stock options and, prior to exercise, the shares to be issued on exercise of the stock options are restricted as to transfer by the optionholder other than to persons who are family members (as defined in Rule 701(c)(3) under the Securities Act (17 CFR 230.701(c)(3)) through gifts or domestic relations orders, or to an executor or guardian of the optionholder upon the death or disability of the optionholder until the issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Act or is no longer relying on the exemption pursuant to this section; provided that the optionholder may transfer the stock options to the issuer, or in connection with a change of control or other acquisition transaction involving the issuer, if after such transaction the stock options no longer will be outstanding and the issuer no longer will be relying on the exemption pursuant to this section;

Note to paragraph (f)(1)(iv): For purposes of this section, optionholders may include any permitted transferee under paragraph (f)(1)(iv) of this section; provided that such permitted transferees may not further transfer the stock options;

(v) The stock options and the shares issuable upon exercise of such stock options are restricted as to any pledge, hypothecation, or other transfer, including any short position, any "put equivalent position" (as defined in §240.16a-1(h) of this chapter), or any "call equivalent position" (as defined in §240.16a-1(b) of this chapter) by the optionholder prior to exercise of an option, except in the circumstances permitted in paragraph (f)(1)(iv) of this section, until the issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Act or is no longer relying on the exemption pursuant paragraph (f)(1) of this section;

Note to paragraphs (f)(1)(iv) and (f)(1)(v): The transferability restrictions in paragraphs (f)(1)(iv) and (f)(1)(v) of this section must be contained in a written compensatory stock option plan, individual written compensatory stock option agreement, other stock purchase or stockholder agreement to which the issuer and the optionholder are a signatory or party, other enforceable agreement by or against the issuer and the optionholder, or in the issuer's by-laws or certificate or articles of incorporation; and

(vi) The issuer has agreed in the written compensatory stock option plan, the individual written compensatory stock option agreement, or another agreement enforceable against the issuer to provide the following information to optionholders once the issuer is relying on the exemption pursuant to paragraph (f)(1) of this section until the issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Act or is no longer relying on the exemption pursuant paragraph (f)(1) of this section:

The information described in Rules 701(e)(3), (4), and (5) under the Securities Act (17 CFR 230.701(e)(3), (4), and (5)), every six months with the financial statements being not more than 180 days old and with such information provided either by physical or electronic delivery to the optionholders or by written notice to the optionholders of the availability of the information on an Internet site that may be password-protected and of any password needed to access the information.

<u>Note to paragraph (f)(1)(vi)</u>: The issuer may request that the optionholder agree to keep the information to be provided pursuant to this section confidential. If an optionholder does not agree to keep the information to be provided pursuant to this section confidential, then the issuer is not required to provide the information.

(2) If the exemption provided by paragraph (f)(1) of this section ceases to be available, the issuer of the stock options that is relying on the exemption provided by this section must file a registration statement to register the class of stock options under section 12 of the Act within 120 calendar days after the exemption provided by paragraph (f)(1) of this section ceases to be available; and

(g) (1) Stock options issued under written compensatory stock option plans under the following conditions:

(i) The issuer of the equity security underlying the stock options has registered a class of security under section 12 of the Act or is required to file periodic reports pursuant to section 15(d) of the Act;

(ii) The stock options have been issued pursuant to one or more written compensatory stock option plans established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parents;

Note to paragraph (g)(1)(ii): All stock options issued under all of the written compensatory stock option plans on the same class of equity security of the issuer will be considered part of the same class of equity security of the issuer for purposes of the provisions of paragraph (g) of this section; and

(iii) The stock options are held only by those persons described in Rule 701(c) under the Securities Act (17 CFR 230.701(c)) or those persons specified in General Instruction A.1(a) of Form S-8 (17 CFR 239.16b); provided that an issuer can still rely on this exemption if there is an insignificant deviation from satisfaction of the condition in this paragraph (g)(1)(iii) and after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] the issuer has made a good faith and reasonable attempt to comply with the conditions of this paragraph (g)(1)(iii). For purposes of this paragraph (g)(1)(iii), an insignificant deviation exists if the number of optionholders that do not meet the condition in this paragraph (g)(1)(iii) are insignificant both as to the aggregate number of optionholders and number of outstanding stock options.

(2) If the exemption provided by paragraph (g)(1) of this section ceases to be available, the issuer of the stock options that is relying on the exemption provided by this section must file a registration statement to register the class of stock options or a class of

security under section 12 of the Act within 60 calendar days after the exemption provided in paragraph (g)(1) of this section ceases to be available.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

December 3, 2007

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56886 / December 3, 2007

SECURITIES INVESTOR PROTECTION ACT OF 1970
Rel. No. 167 / December 3, 2007

Admin. Proc. File No. 3-12156

In the Matter of

STEPHEN J. HORNING

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Failure to Supervise

Causing Violations of Net Capital, Customer Reserve, and Books and Records Requirements

Appointment of SIPC Trustee

President, director, registered financial and operations principal, and compliance officer of registered broker-dealer failed to exercise reasonable supervision over firm's head trader and its operations manager with a view to preventing their violations of the antifraud provisions and caused broker-dealer's violations of the net capital, customer reserve, and books and records requirements. A SIPC trustee was appointed to liquidate firm. Held, it is in the public interest to bar president, director, registered financial and operations principal, and compliance officer from association with any broker or dealer in a supervisory capacity and to suspend him for twelve months from association with any broker or dealer.

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APPEARANCES:

Thomas D. Birge and Carla B. Minckley, of Birge & Minckley, P.C., for Stephen J. Horning.

Jennifer A. Ostrom and Amy J. Norwood, for the Division of Enforcement.

Appeal filed: October 10, 2006
Last brief received: January 26, 2007
Oral argument: October 1, 2007

I.

Stephen J. Horning appeals from the decision of an administrative law judge. Horning was a director and senior officer of Rocky Mountain Securities & Investments, Inc. ("Rocky Mountain"), a registered broker-dealer formerly located in Denver, Colorado. The law judge found that Horning failed reasonably to supervise two former employees of Rocky Mountain with a view to preventing their violations of Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5. 1/ The law judge also found that Horning was a cause of Rocky Mountain's inaccurate books and records and its filing of materially false reports with regulatory agencies in violation of Exchange Act Sections 15(c)(3), 17(a), and 17(e) and rules thereunder. 2/ The law judge barred Horning from association with any broker or dealer in a supervisory capacity and suspended him from association with any broker or dealer in any capacity for twelve months. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. 3/

II.

A. Background

From 1981 until February 2003, when Rocky Mountain ceased operations, Horning was a director, president, registered financial and operations principal ("FINOP"), compliance director, and a registered representative at the firm. Horning directed the management, policies, and daily operations of Rocky Mountain. He had authority to hire and fire employees. He established

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1/ 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5.

2/ 15 U.S.C. §§ 78*o*(c)(3) and 78q(a), (e).

3/ Rule of Practice 451(d), 17 C.F.R. § 201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of a proceeding if that member has reviewed the oral argument transcript prior to such participation. Commissioners Atkins and Casey conducted the required review.

Rocky Mountain's supervisory procedures and was responsible for assuring that they were implemented.

Horning was solely responsible for supervision of the Operations Department at the firm. Horning supervised Leslie Andrade, who became head of Rocky Mountain's three-person Operations Department in 1991. Andrade is a high school graduate. She does not hold any securities licenses and failed the examination for a Series 7, General Securities Representative, license. Rocky Mountain's Operations Department did not have a manual that described the policies and procedures to be followed.

Andrade was responsible for keeping and maintaining Rocky Mountain's books and records. Andrade also was responsible for preparing the monthly "Financial and Operational Combined Uniform Single Report," Form X-17A-5 ("FOCUS Report"), that contained the firm's financial statements and its net capital calculation. 4/

Horning reviewed all of Rocky Mountain's net capital calculations for accuracy and reviewed and signed Rocky Mountain's FOCUS Reports. Horning testified that it took him approximately "two minutes" to review each FOCUS Report. Horning assumed that Andrade made the calculations in the FOCUS Reports correctly because "[s]he had been doing it since 1991 without ever anyone complaining about how she did it."

Rocky Mountain also filed annual FOCUS Reports signed by Horning as president. The financial statements in these annual reports were audited by Mortland & Co., P.C., a one person firm run by Herbert Mortland. Mortland had repeatedly found weaknesses in the firm's internal controls. In August 2000, Mortland reported that the firm's "plan of organization did not include adequate separation of duties related to daily cash receipt and cash disbursement activities." The audit further found that "[a]ppropriate supervisory review procedures were not instituted to provide reasonable assurance that adopted policies and prescribed procedures were adhered to." Similar warnings had appeared in all of Rocky Mountain's audited reports since 1981. Horning testified that he had discussed the weaknesses in Rocky Mountain's internal controls when Mortland had first identified the weaknesses in the early 1980s. However, Horning did not change Rocky Mountain's organization or internal structure because the firm did not have funds to hire additional personnel and "the system worked fine as it was."

Horning also was responsible for supervising Rocky Mountain's Trading Department. Judy Clarke, who had joined Rocky Mountain at its inception, was the firm's head trader. In that position, Clarke bought and sold equities in Rocky Mountain proprietary accounts and she also executed trades on behalf of the firm's customers. Clarke was supposed to record these transactions on trade tickets for Horning's approval.

4/ Broker-dealers are required to file FOCUS Reports with regulators who use them to monitor firms to ensure that they are financially sound. See Exchange Act Rule 17a-5, 17 C.F.R. § 240.17a-5.

B. 2001 Unrecorded Trading

In early 2001, Commission staff conducted a routine examination in which they discovered more than $800,000 in purchases by Clarke for Rocky Mountain accounts that were not reflected on the firm's books and records. As a result, the firm had suffered more than $600,000 in unreported trading losses. Clarke had not received Horning's approval of the trade tickets as she was required to do. Moreover, because she had not submitted her trade tickets to the accounting department, the trades never appeared on the firm's books. Andrade and Tammy Steffen, Rocky Mountain's assistant director of compliance from 2000 until May or June 2001, knew about Clark's unrecorded trades from comparing data received from the two national clearing houses, National Securities Clearing Corporation ("NSCC") and Depository Trust and Clearing Corporation ("DTC"), with Rocky Mountain's books and records. Neither Andrade nor Steffen had notified Horning of these unrecorded trades.

On March 28, 2001, as a result of the examination, Commission staff sent Rocky Mountain a letter in which they detailed numerous deficiencies including: (1) net capital computation errors and customer reserve requirement computation errors; (2) failure to maintain accurate books and records; (3) failure to file an accurate net capital computation in its FOCUS Reports and annual audited reports; and (4) inadequate written supervisory procedures.

In a letter dated April 27, 2001, Horning informed Commission staff that the deficiencies and concerns detailed in the March 28, 2001 deficiency letter had "all been remedied." In his letter, Horning disagreed that Rocky Mountain failed to detect the problem in reconciling the clearing house reports with Rocky Mountain's books and records. Rather, according to Horning, "[a]fter the differences were detected they were then ignored" in the "hope that the market would recover and help alleviate some of these problems." Horning also told NASD that he was putting in place certain unspecified procedures to ensure that Clarke's activities would not reoccur.

C. Horning's Response

Horning did not fire or fine Clarke, Andrade, or Steffen, nor did he make them repay the losses suffered by the firm. 5/ Instead, he warned them that they would be fired if they repeated their actions. Horning testified that he considered Clarke and Andrade "trusted" employees who had made a mistake and deserved a second chance, although he admitted on cross examination that their activities in 2000 and 2001 were "basically" dishonest.

Horning did implement certain additional supervisory procedures in April 2001. Although Horning continued to allow Clarke to make unlimited trades in Rocky Mountain's proprietary account, she no longer received eighty percent of the profits on those trades. Rather, sixty percent of the profits from proprietary trades went to Rocky Mountain and forty percent of the profits were divided among Clarke and the firm's two other traders, Randy Van Brocklin,

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5/ Steffen left the firm around this time.

Clarke's brother, and Jeremy Sanchez. In addition, Horning required that all proprietary trades be made under a single account number. Horning also instituted a system whereby Clarke, Andrade, Van Brocklin, and Sanchez each would be fined one hundred dollars for every trade that Horning found had not been reconciled.

Horning also required Andrade to prepare a daily handwritten reconciliation of the NSCC and DTC clearing reports with Rocky Mountain's trading records ("Reconciliation Report"). The purpose of the Reconciliation Report was to show that all trades that occurred were recorded on Rocky Mountain's books, which did not happen in 2000 and 2001. Toni Carter-Hall, who worked in the Operations Department under Andrade, was responsible for preparing the Reconciliation Report three days a week, and Andrade was responsible for preparing it the other two days of the week. However, when Carter-Hall could not balance the reconciliation numbers, Andrade sent her home and when Carter-Hall returned to the office the numbers would be balanced.

The Reconciliation Reports consisted of a one-page, handwritten summary, the clearing house daily report, and Rocky Mountain's trading records. The one-page summary contained debit and credit columns that purportedly were derived from the clearing house reports and debit and credit columns that purportedly were derived from Rocky Mountain's trading records.

Horning reviewed the Reconciliation Reports one day a week, the day chosen on a random basis. Horning testified that he spent "ten seconds" reviewing the Reconciliation Reports. He looked only to see if the bottom line numbers balanced. He did not add up the columns on the summary sheet to check that the totals were accurate or review the documents attached to the summary sheet to determine if the figures on those documents matched the figures on the summary sheet.

The record includes Reconciliation Reports initialed by Horning for twelve dates between February 20, 2002 and December 27, 2002. Each of the one-page summaries initialed by Horning contained errors. A number of the one-page summaries contain errors in adding the amounts in columns that resulted in erroneous bottom-line totals. For example, the one-page summary for November 5, 2002 that Horning initialed contains a column for NSCC/DTC debits and credits that when added should have totaled over $1 million; however, the ending balance is listed as only $563,193.94:

Rocky Mountain Reconciliation Report for November 5, 2002

	NSCC/DTC	
	Debit	Credit
Balance forward	421,864.86	
Settling Trades	502,217.00	
Subtotal	924,063.86	
NSCC/DTC Collect/Pay	144,874.08	
Miscellaneous Adjustment		5,745.33
Dividends/Interest	1.33	
Ending Balance	563,193.94	

The one-page summary for November 25, 2005 that Horning initialed purports, in the first column labeled NSCC/DTC Debit, to add amounts of $567,783.32 and $953,821.54 to a subtotal of only $521,614.86, a discrepancy of $1 million:

Rocky Mountain Reconciliation Report for November 25, 2005

	NSCC/DTC	
	Debit	Credit
Balance forward	567,783.32	
Settling Trades	953,831.54	
Subtotal	521,614.86	
NSCC/DTC Collect/Pay		37,075.40
Dividends/Interest	169.19	
Ending Balance	484,708.65	

Horning admitted that he did not notice these errors when he reviewed the one-page summaries and had he noticed the errors, he would not have initialed the summaries. Moreover, the numbers on the one-page summaries did not correspond to the information provided by the clearing house, which was attached as part of the Reconciliation Report. For example, the one-page summary for March 25, 2002 that Horning initialed shows almost a one million dollar discrepancy between the figure on the summary sheet and the attached information from NSCC.

Around this time, Horning also began to require Andrade to prepare a daily handwritten report on any trading errors or unreconciled trades. Andrade or Carter-Hall prepared the trade error reports. Andrade initialed the trade error reports, regardless of who prepared them, because she was responsible for correcting the errors. Horning reviewed the reports but did not review any underlying records or ask anyone to verify the information in the trade error reports or whether the reported errors in fact were corrected. Horning relied completely on Andrade to give him an accurate report of trading errors. He claimed that he had no reason to believe she would give him inaccurate information.

During this period, Rocky Mountain maintained a money market account, an omnibus account, at Reich & Tang Services, Inc. ("Reich & Tang"), a brokerage firm in New York City. The Reich & Tang omnibus account contained funds that had been swept from the credit balances in the accounts of Rocky Mountain customers. Each day, Reich & Tang sent a facsimile to Rocky Mountain entitled "Daily Reconciliation & Summary Sheet" that summarized the transactions in the omnibus account. Joanne Wing, an employee in the Operations Department, initially was responsible for handling all deposits to and disbursements from the omnibus account. Rocky Mountain recorded the amounts in the omnibus account on a document entitled "Rocky Mountain Securities Cash Out of Balance Report" under an entry for "Type 6" accounts. Horning did not establish procedures for Rocky Mountain to verify that information in the "Daily Reconciliation & Summary Sheet" matched Rocky Mountain's records with respect to the amounts in the omnibus account.

D. The Present Violations

From April 2002 through January 2003, Clarke incurred trading losses of approximately $6.5 million through her equities trading in Rocky Mountain's proprietary accounts. Instead of reporting the trading losses, Clarke concealed them by entering fictitious profitable trades in Rocky Mountain's computer system and omitting executed losing trades. Clarke also entered fictitious trades in the personal inventory accounts of Rocky Mountain's registered representatives.

Andrade used approximately $4.5 million of customer funds from the Reich & Tang account, as well as funds belonging to the firm, to pay for Clarke's trading losses. Although Wing had been assigned the responsibility for handling all deposits to and disbursements from the omnibus account, Andrade took this responsibility away from Wing during the summer of 2002 and did not inform Horning.

Rocky Mountain's annual audit also did not reconcile the amount in the Reich & Tang omnibus account with Rocky Mountain's records. 6/ Horning admitted that it would have been easy to compare the figures provided by Reich & Tang with those maintained by the firm. From April 2002 through January 2003, the Reich & Tang report never matched the information in Rocky Mountain's internal records. By the second half of November 2002 and continuing

6/ The Commission instituted and settled an administrative proceeding against Mortland concerning Rocky Mountain's 2002 audit in which Mortland consented to be barred from appearing or practicing before the Commission with a right to reapply after three years. Herbert J. Mortland, CPA, Securities Exchange Act Rel. No. 53162 (Jan. 20, 2006), 87 SEC Docket 552.

through January 2003, Reich & Tang reported that the omnibus account had less than $100,000, while Rocky Mountain's internal records showed a value of over $4 million.

On January 21, 2003, Rocky Mountain's bank informed Horning that the firm's account was overdrawn by $350,000. Rocky Mountain hired a forensic accounting expert who determined that the firm likely was out of net capital and that inaccuracies in the firm's books and records raised significant uncertainty as to Rocky Mountain's financial condition. Rocky Mountain ceased operations on February 3, 2003. An NASD examination in February 2003 confirmed that Rocky Mountain had executed buy transactions cleared through NSCC that were not shown on its books and records, that there were sales transactions on Rocky Mountain's books and records that had not been cleared through NSCC, and that Rocky Mountain had millions of dollars in trading losses that were not reported on its books and records.

Horning also learned, at or around the time that Rocky Mountain ceased doing business, that Andrade had taken responsibility for the Reich & Tang omnibus account away from Wing and had taken responsibility for balancing the Reconciliation Reports away from Carter-Hall. Horning subsequently discovered, in the course of testifying before Commission staff in this matter, that Clarke had entered fictitious trades in Horning's personal inventory account.

The Commission and the Securities Investor Protection Corporation ("SIPC") sued Rocky Mountain on February 5, 2003, in the United States District Court for the District of Colorado alleging that Rocky Mountain had violated the Exchange Act and that its customers needed protection. 7/ The district court appointed a trustee who initiated an action in the United States

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7/ The Commission filed an injunctive action against Clarke and Rocky Mountain in the United States District Court for the District of Colorado and obtained a default judgment against Clarke. The court found that Clarke violated Exchange Act Sections 10(b), 15(c)(3), and 17(a) and Exchange Act Rules 10b-5, 15c3-1, 15c3-3, and 17a-3. The court enjoined Clarke from violating Exchange Act Section 10(b) and Exchange Act Rule 10b-5 and from aiding or abetting violations of Exchange Act Sections 15(c)(3) and 17(a) and Exchange Act Rules 15c3-1, 15c3-3, and 17a-3. The court also ordered Clarke to disgorge $5743.38 and to pay a civil penalty of $120,000. SEC v. Clarke, 03-MK-0228 (D. Colo. 2005).

On May 18, 2006, Andrade was indicted and charged with one count of wire fraud in connection with the scheme to defraud Rocky Mountain and its customers. Andrade pleaded guilty to the wire fraud charge and, on February 20, 2007, the district court sentenced her to twenty-four months imprisonment and three years supervised release, and ordered her to make restitution in the amount of $6,922,774.00. United States v. Andrade, No. 06-CR-00196 (D. Colo. 2006).

(continued...)

Bankruptcy Court for the District of Colorado to liquidate Rocky Mountain. Horning paid the estate of Rocky Mountain $150,000 to settle a civil lawsuit by the SIPC trustee. As of February 28, 2006, SIPC had advanced $5,402,891.18 to the estate to compensate customers for their losses. The estate paid 651 customer claims resulting in a total expenditure of $5,388,273.15. The trustee expected that SIPC might have to contribute an additional $100,000 to $130,000 before the liquidation was complete.

A few days before Rocky Mountain ceased doing business, Horning made arrangements for himself and twenty-one associated persons of Rocky Mountain to become associated with Moloney Securities Co., Inc., a broker-dealer located in St. Louis, Missouri. Edward J. Moloney, the president and CEO of Moloney Securities, was Horning's college roommate. At the hearing in this matter, Horning testified that he still is employed with Moloney Securities. He is a director and a regional vice president responsible for supervising twenty-seven registered representatives, including Mark Depew and Buzz Massee, who also were registered representatives at Rocky Mountain.

About this time, Horning discovered that Depew and Massee had loaned Clarke money and that she had repaid these loans in part with funds generated by fictitious profitable trades in those representatives' inventory trading accounts. One of the fictitious trades in Massee's account was for $500,000, even though his trading limit was at most $40,000 to $50,000. Neither Depew nor Massee told Horning about the loans before February 2003. When Horning discovered the loans and fictitious trades used to repay the loans, he refused to give the representatives involved their purported trading profits that they allegedly had earned in January 2003. However, Horning initially accepted Depew and Massee's explanation that they did not realize that Clarke had repaid the loans with profits from fictitious trades.

Horning testified at the hearing that he came to believe that Clarke was paying a personal obligation with firm money because some of the fictitious trades made by Clarke to repay Depew and Massee were made at "outlandish" prices that were not related to the market price of the securities involved. For example, Depew's account listed a sale of Imclone stock in August 2002 which was purportedly made at $22.50 per share when, in fact, Imclone stock traded in the range of $6 to $8 per share during August 2002. Horning testified that he now considered the conduct of Depew and Massee in loaning money to Clarke, accepting money from fictitious trades in repayment, and not telling Horning as "probably" dishonest. Nonetheless, Horning testified that,

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7/ (...continued)
On August 21, 2006, Clarke was indicted and charged with six counts of wire fraud in connection with the scheme to defraud Rocky Mountain and its customers. Clarke pleaded guilty to one count of wire fraud and, on September 4, 2007, the district court sentenced her to fifty-four months imprisonment and three years supervised release, and ordered her to make restitution in the amount of $6,922,774.00. United States v. Clarke, No. 06-CR-00333 (D. Colo. 2006).

as of the time of the hearing, he had taken no steps to place Depew or Massee under heightened supervision at Moloney Securities in response to their conduct at Rocky Mountain.

III.

Exchange Act Sections 15(b)(4)(E) and 15(b)(6) provide that we may sanction a person associated with a broker-dealer if we find that such person failed reasonably to supervise, with a view to preventing violations of the federal securities laws and rules and regulations thereunder, another person who commits such violations if such person is subject to the individual's supervision. 8/ No person shall be deemed to have failed reasonably to supervise any other person if (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with. 9/

Exchange Act Section 10(b) makes it unlawful for any person "[t]o use or employ in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 10/ Rule 10b-5, which implements this section, prohibits any scheme, device, or artifice to defraud, misleading statements or omissions, and any act, practice, or course of business that operates as a fraud "in connection with the purchase or sale of any security." 11/

8/ 15 U.S.C. §§ 78*o*(b)(6), (b)(4)(E).

9/ Id.

10/ 15 U.S.C. § 78j(b).

11/ 17 C.F.R. § 240.10b-5; see SEC v. Zandford, 535 U.S. 813, 825 (2002) (stating that a scheme to defraud is "in connection with" with a securities transaction if it "coincides" with that transaction). Scienter is a necessary element of a violation of Exchange Act Section 10(b) and Exchange Act Rule 10b-5. See Aaron v. SEC, 446 U.S. 680, 695, 697 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976); Steadman v. SEC, 603 F.2d 1126, 1134 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Reckless behavior satisfies the scienter requirement. See, e.g., Hackbart v. Holmes, 675 F.2d 1114, 1117-18 (10th Cir. 1982) (defining recklessness as "an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known or is so obvious that the actor must have been aware of it") (quoting Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1045 (7th Cir. 1977)).

Clarke engaged in unauthorized trading. She concealed this activity by entering fictitious profitable trades and not recording losing trades. She directed others to enter false data into Rocky Mountain's books and records. Based on these facts, the United States District Court for the District of Colorado found that Clarke violated Exchange Act Section 10(b) and Rule 10b-5, among other provisions. 12/ Horning stipulated that Andrade engaged in a scheme to make unauthorized trades on Rocky Mountain's books and to conceal this activity. 13/ Andrade knowingly falsified Rocky Mountain's books and records to hide Clarke's unauthorized trades, diverted approximately $4.5 million of customer funds from Rocky Mountain's omnibus account at Reich & Tang to cover Clarke's trading losses, and withheld information from the forensic accountant hired by Rocky Mountain to investigate the missing Reich & Tang funds. We find, based on these facts and for purposes of this proceeding only, that Clarke's and Andrade's actions violated Exchange Act Section 10(b) and Rule 10b-5.

Rocky Mountain's procedures to detect these violations generally were deficient. Horning failed to institute any procedure to reconcile the account balance of the omnibus account reflected in the Reich & Tang Daily Reconciliation and Summary Sheet with Rocky Mountain's records. Horning's own expert witness agreed that the lack of a procedure to reconcile these amounts was improper. Horning also failed to implement any procedures in response to the auditor's warning that Rocky Mountain's plan of organization did not include adequate separation of duties with respect to cash receipts and cash disbursements and that Rocky Mountain's supervisory procedures were inadequate. Horning did not put in place an operations manual for the Operations Department and lacked accurate information about the duties performed by Rocky Mountain's three-person Operations Department staff.

Moreover, Horning failed reasonably to supervise Andrade and Clarke in particular. Supervision of an associated person must be "reasonable . . . under the attendant circumstances." 14/ As a result of the examination by the Commission staff and the resulting deficiency letter, Horning knew that in 2000 and 2001 Clarke had incurred more than $600,000 in trading losses in the firm's proprietary accounts and instead of reporting those losses accurately, she concealed them, with Andrade's assistance, by omitting to record executed losing trades. Horning knew that Clarke's and Andrade's conduct had resulted in inaccuracies in Rocky Mountain's net capital calculations and in its books and records.

12/ SEC v. Clarke, No. 03-MK-0228 (D. Colo. 2005).

13/ Of course, Horning's stipulation cannot bind Andrade. Our findings here with respect to Clarke and Andrade are made solely for the purpose of this proceeding.

14/ Clarence Z. Wurtz, 54 S.E.C. 1121, 1130 (2001) (quoting Arthur James Huff, 50 S.E.C. 524, 528-29 (1991)); see also Louis R. Trujillo, 49 S.E.C. 1106, 1110 (1989) (stating that supervision must be reasonable "under all the circumstances").

These facts highlighted the need for Horning's heightened supervision over Clarke and Andrade, especially regarding trading in the firm's proprietary account and maintenance of the firm's books and records. 15/ However, Horning made no personnel changes and took no meaningful disciplinary action. Horning continued to allow Clarke to execute trades in the firm's proprietary account at her discretion and he continued to allow Andrade to be responsible for Rocky Mountain's books and records, both subject to his sole supervision. Thus, Horning had a particular responsibility to ensure not only that rules and procedures were in place to supervise Andrade and Clarke properly, but also that those rules and procedures were enforced. 16/

The procedures Horning instituted in response to Andrade and Clarke's earlier misconduct and his implementation of those procedures were inadequate. The Commission staff's 2001 deficiency letter had highlighted the errors that resulted from Rocky Mountain's previous failure to accurately reconcile its clearing account records. 17/ Rather than reduce the likelihood of future misconduct, many of the procedures that Horning instituted appear counter productive. He reduced the commissions that Clarke received from her trades in Rocky Mountain's proprietary account, thereby creating an incentive for Clarke to trade more frequently, yet he took no steps to monitor her trading. He instituted a system where each of the three traders would be fined for every trade that Horning found had not been reconciled, which provided the other traders with an incentive not to report Clarke's unrecorded trades. He assigned to Andrade the responsibility to prepare handwritten Reconciliation Reports and trade error reports even though she had been responsible for concealing Clarke's previous trades. These procedures were not reasonably designed to prevent or to detect additional fraudulent conduct by Clarke or Andrade.

Horning's review of the Reconciliation Reports and trade error reports also was deficient. He spent only "ten seconds" once a week reviewing the Reconciliation Reports. He did not review the NSCC daily report or the Rocky Mountain trading records attached to the summary

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15/ See John A. Chepak, 54 S.E.C. 502, 514 (2000) (stating that "prior misconduct indicated the need for heightened supervision, particularly in areas that had resulted in previous violations"); see also Consol. Invs. Servs., Inc., 52 S.E.C. 582, 588 (1996) (stating that an employee who has previously evidenced misconduct can only be retained if he subsequently is subjected to a commensurately higher level of supervision).

16/ See Wurtz, 54 S.E.C. at 1130 (stating that supervisors who know of an employee's past disciplinary history must ensure not only that rules and procedures are in place to supervise the employee properly, but also that those rules and procedures are enforced).

17/ See Blinder, Robinson & Co., 47 S.E.C. 812, 814 (1982) (finding respondents' "cursory examination" "clearly inadequate" because a failure of supervision "connotes 'a failure to learn of improprieties when diligent application of supervisory procedures would have uncovered them'") (quoting Jerome F. Tegeler, 45 S.E.C. 512, 515 n.8 (1974) and Anthony J. Amato, 45 S.E.C. 282, 286 (1973)).

sheet to determine if the figures on the supporting documents matched those on the summary sheet. He did not add up the columns on the summary sheet to check that the totals were accurate and instead reviewed only the bottom-line numbers to see if they balanced. He failed to notice obvious discrepancies on the face of the summary sheets of the Reconciliation Reports, including a $1 million error on one of the summary sheets, or to detect obvious discrepancies between the summary sheets and the supporting documents. Although Horning assigned to Andrade the responsibility to prepare daily reports on any trading errors or unreconciled trades, he never reviewed the records on which those reports were based and he never asked anyone to verify that the information in those reports was correct.

Horning's argument that he could not have detected Clarke and Andrade's scheme because it was complicated and well concealed is unfounded. Contrary to Horning's assertion, Clarke and Andrade's scheme was not particularly well concealed. For example, the Reconciliation Reports contained numerous blatant errors that could have been uncovered had Horning engaged in more than a cursory ten-second review. Further evidence of the scheme was available had Horning taken the time to review the supporting documents attached to the Reconciliation Report and the trading error reports or to review the Reich & Tang facsimiles. 18/

As Rocky Mountain's FINOP, Horning was responsible for the firm's compliance with net capital requirements and for ensuring that the net capital calculations were made correctly. Yet, Horning signed at least nine FOCUS Reports prepared by Andrade after a review that took approximately two minutes each. Horning was the only person at Rocky Mountain to review the materials that Andrade prepared and he failed to take any steps to check for irregularities or to verify independently the information he was given. We agree with the law judge's conclusion that "his review was so superficial as to be worthless." Horning's total reliance on Andrade was unreasonable given her concealment of Clarke's misconduct in 2000 and 2001.

Horning claims that he relied on Clarke and Andrade's assurances and that no further investigation was needed. "We have repeatedly stressed that supervisors cannot rely on the unverified representations of their subordinates." 19/ This is especially true where the subordinates have committed misconduct in the past. Horning's claim that he had no reason to believe that "two of his most trusted employees" were engaged in misconduct ignores the numerous red flags that served to warn Horning that he could not rely on these employees. He

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18/ See Christopher J. Benz, 52 S.E.C. 1280, 1282 (1997) (rejecting contention that supervisor "could not have discovered" employee's violations when there were "numerous red flags" that supervisor "should not have ignored" such as employee's history of compliance problems and suspicious activities in employee's accounts).

19/ Quest Capital Strategies, 55 S.E.C. 362, 372 (2001) (citing Michael H. Hume, 52 S.E.C. 243, 248 (1995); John H. Gutfreund, 51 S.E.C. 93, 108 (1992)).

admitted that Clarke and Andrade's actions in 2000 and 2001 were "basically" dishonest, and he should have taken steps to verify the information that these employees provided to him. 20/

Horning also faults Wing and Carter-Hall for failing to inform him that their duties had changed, but this does not excuse his failure to supervise Andrade. The Operations Department consisted of three people: Andrade, Wing, and Carter-Hall. Rather than monitor the three-person Operations Department to make sure that each of the employees were performing their assigned duties, Horning relied on the representations of Andrade and, given her previous misconduct, such reliance was unreasonable.

Horning claims that the scheme implemented in 2002 and 2003 was "dramatically different" from the trading irregularities detected during the examination conduct by Commission

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20/ At oral argument, Horning's counsel admitted that Horning was responsible for supervision at the firm:

> Commissioner Nazareth: Isn't it true, though, that the – what is in the record is that the books and records of this firm were completely unreliable? The books and records of the firm did not match the reality, either as to the trading or as to the financial position of the firm.
>
> Mr. Birge: That is true. The evidence suggests that both [Andrade and Clarke] actually pled guilty and were convicted for their involvement in this scheme. And part of their guilty plea was they admitted that they dummied up the records, created false reports, plugged numbers, created fictitious transactions and created a whole series of documents to hide exactly what they were doing.
>
> Commissioner Nazareth: And doesn't the record also show that substantial amounts of customer funds which were held by the firm on behalf of customers were misappropriated by employees of this firm?
>
> Mr. Birge: At least $5 million of customer funds were stolen by Ms. Andrade and Ms. Clarke.
>
> Commissioner Nazareth: And wasn't your client the supervisor in charge of these employees?
>
> Mr. Birge: He was their supervisor. He was the president of the firm. It was his responsibility to supervise them, yes. He takes full responsibility for his supervision. He hasn't laid that off onto anyone else. He was their supervisor.

staff in 2001. 21/ However, in both instances Clarke suffered trading losses in Rocky Mountain's proprietary account and, along with Andrade, concealed those losses. The only material differences between Clarke and Andrade's previous conduct and that at issue here is that Andrade diverted $4.5 million in customer funds from the Reich & Tang omnibus account to pay for the trading losses and entered fictitious trades in Rocky Mountain's books and records. Clarke and Andrade's prior misconduct required heightened supervision not just with respect to the precise actions they took in committing that misconduct, but also in areas that had resulted in the previous violation. 22/ In both cases here, the misconduct could have been uncovered had Horning taken basic steps to ensure that the firm's records were consistent with those of its clearing agent rather than simply relying on Andrade's assurances. 23/ In addition, unlike the previous conduct, Horning could have discovered Clarke and Andrade's misconduct had he instituted a procedure to check Reich & Tang Daily Reconciliation and Summary Sheets against Rocky Mountain's records.

Horning contends that Rocky Mountain's failure to include the Reich & Tang omnibus account on its balance sheet or its FOCUS Reports was never challenged by the firm's auditors, NASD, or Commission staff. He further claims that after the Commission staff conducted its 2001 examination, it failed to conclude that a fraud had been committed or to recommend enforcement action against Clarke or Andrade. These claims are beside the point. We have held that persons in the securities industry cannot shift their responsibility for compliance with applicable requirements to NASD or to the Commission. 24/ "A regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation." 25/

21/ Horning contends that, unlike the scheme at issue here, the earlier scheme did not involve false documentation, fictitious trades, unauthorized modification of internal control provisions, trades at fictitious prices, unauthorized entries in the firm's books and records, or "plugged numbers" into the computer system.

22/ See Chepak, 54 S.E.C. at 514 (stating that "prior misconduct indicated the need for heightened supervision, particularly in areas that had resulted in previous violations").

23/ Cf. Quest Capital Strategies, 55 S.E.C. at 374 (finding that, although respondents had a comprehensive set of rules, respondents' system for applying the rules to the misconduct at issue was "woefully inadequate" because "[r]elying on a subordinate's assurances is hardly an effective method of preventing or detecting violations").

24/ See, e.g., William H. Gerhauser, 53 S.E.C. 933, 940 (1998) (finding applicants liable "even had there been an NASD audit that found no violations"); Richard R. Perkins, 51 S.E.C. 380, 384 n.20 (1993).

25/ Gerhauser, 53 S.E.C. at 940; Rita H. Malm, 52 S.E.C. 64, 75 n.40 (1994) (rejecting applicant's "contention that, because the NASD noted no markup, pricing or other

(continued...)

Horning maintains that he reasonably believed that the supervisory procedures he adopted after Commission staff discovered Clarke's unreconciled trades in 2001 would prevent further violations. Horning asserts that he adopted the supervisory procedures with "the approval of the SEC and the NASD," that the procedures were "fully vetted with the . . . regulators," and that "all parties agreed that they were reasonable under the circumstances." Horning has offered no evidence to support his assertion that NASD or the Commission approved the additional procedures or concluded that they were reasonable under the circumstances and nothing in the record supports such an assertion.

IV.

Exchange Act Section 15(c)(3) requires that broker-dealers observe Commission rules prescribed to provide safeguards for the broker-dealer's financial responsibility and related practices when effecting the purchase or sale of securities. 26/ The requirements of the Commission's net capital rule, Exchange Act Rule 15c3-1, are intended "to ensure that broker-dealers have sufficient liquid capital to protect the assets of customers and to meet their responsibilities to other broker-dealers." 27/ These requirements "involve fundamental safeguards imposed for the protection of the investing public on those who wish to engage in the securities business." 28/ Rocky Mountain's FOCUS Reports for the months ending June 30, 2002, through December 31, 2002, represented that it met its net capital requirement of $250,000 when, because of Clarke and Andrade's actions, in each of the seven months it had a net capital deficiency ranging from a deficit of $793,503 to a deficit of $3,629,434.

Exchange Act Rule 15c3-3 requires, among other things, that a broker-dealer establish and maintain a customer reserve account and sets forth a formula for calculating the required balance to be maintained in the reserve account. 29/ Rocky Mountain's Rule 15c3-3 calculations were erroneous for each month from April 2002 through December 2002, because its books and records contained inaccurate information about the value of the Reich & Tang omnibus accounts.

25/ (...continued)
'exceptions' during its audit . . . NASD was subsequently precluded from bringing markup or supervisory charges").

26/ 15 U.S.C § 78*o*(c)(3).

27/ Lowell H. Listrom, 50 S.E.C. 883, 886 (1992), aff'd, 975 F.2d 866 (8th Cir. 1992) (Table).

28/ Id. at 888.

29/ 17 C.F.R. § 240.15c3-3 and Exhibit A to Rule 15c3-3; see also Kevin Upton, 52 S.E.C. 145, 146 (1995).

During this time, Rocky Mountain's Rule 15c3-3 calculation showed no reserve deficiency when it had reserve deficiencies that ranged from a deficit of $1,725,330 to a deficit of $4,429,635.

Exchange Act Section 17(a) provides that brokers and dealers shall make, keep, furnish, and disseminate records and reports prescribed by Commission rule "as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act." 30/ The requirement that a firm maintain records and file reports encompasses the requirement that these records and reports be true and correct. 31/ Exchange Act Section 17(e) requires that a broker-dealer file with the Commission annually a balance sheet and income statement certified by an independent public accountant and provide its customers with its certified balance sheet. 32/

Rocky Mountain was required to make and keep current books and records that accurately represented its net capital. 33/ The firm also was required, as a self-clearing broker-dealer that carried customer accounts, to file monthly, quarterly, and annual FOCUS Reports containing a net capital computation. 34/ Rocky Mountain was obligated to supply audited financial statements to its customers and to file audited financial statements annually with the Commission. 35/ Rocky Mountain further was required to provide same-day notice of a net capital deficiency to the Commission. 36/

Rocky Mountain maintained insufficient net capital for the months of June 2002 through December 2002, and an insufficient balance in its reserve account. The firm's FOCUS Reports and its books and records reported that Rocky Mountain had met its net capital requirement and had no deficiency in its reserve account. Horning acknowledges and the record establishes that Rocky Mountain's books and records were inaccurate and that it filed materially false reports.

30/ 15 U.S.C § 78q(a).

31/ FundCLEAR, Inc., 51 S.E.C. 1316, 1318 n.7 (1994).

32/ 15 U.S.C § 78q(e).

33/ Exchange Act Rule 17a-3; 17 C.F.R. § 240.17a-3.

34/ Exchange Act Rule 17a-5a(2); 17 C.F.R. § 240.17a-5(a)(2).

35/ Exchange Act Rule 17a-5(c) & 17a-5(d); 17 C.F.R. § 240.17a-5(c) & 17a-5(d).

36/ Exchange Act Rule 17a-11; 17 C.F.R. § 240.17a-11(b). The rule also provides that a broker or dealer that fails to make or keep current the books and records required by Rule 17a-3 must give notice to the Commission of this fact on the same day. 17 C.F.R. § 240.17a-11(d). The broker or dealer must transmit a report to the Commission within forty-eight hours of the notice stating what it has done or is doing to correct the situation. Id.

We find, therefore, that Rocky Mountain violated Exchange Act Sections 15(c)(3), 17(a) and 17(e), and the net capital, customer reserve, and recordkeeping and reporting requirements.

A respondent can be found to have caused a broker-dealer's violations of Exchange Act Sections 15(c)(3), 17(a), and 17(e) if he was responsible for an act or omission that he knew or should have known would contribute to the violation. 37/ As FINOP, Horning was responsible for Rocky Mountain's compliance with applicable financial reporting, net capital, and customer reserve requirements. 38/ From April 2002 through January 2003, Rocky Mountain's books and records, its FOCUS Reports, and its 2002 Annual Report which Horning signed were materially false because Horning failed to discharge his duties as Rocky Mountain's president and FINOP. Among other things, Horning undertook only a cursory review of Rocky Mountain's FOCUS Reports that had been prepared by Andrade, spending less than two minutes on each report and making no attempt to verify that the information in the reports was accurate. His review of the Reconciliation Reports and the trade error reports also was unreasonable. He did not put in place an operations manual for the Operations Department. Horning failed to determine the correct amount of Rocky Mountain's holdings in the Reich & Tang omnibus account in making the calculations required by the net capital rule and the customer reserve rule. These unreasonable deficiencies contributed to Rocky Mountain's violations. Accordingly, we find that Horning was a cause of Rocky Mountain's violations of Exchange Act Sections 15(c)(3), 17(a), and 17(e) and Exchange Act Rules 15c3-1, 15c3-3, 17a-3, 17a-5(a), 17a-5(c), 17a-5(d), 17a-11, and 17a-13.

V.

Exchange Act Sections 15(b)(4)(E) and 15(b)(6)(i) authorize the Commission to censure, place limitations on, suspend, or bar a person associated with a broker, dealer, or municipal securities dealer if we find that such person failed reasonably to supervise, with a view to preventing violations of the federal securities laws and rules and regulations thereunder, another

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37/ Exchange Act Section 21C; 15 U.S.C. § 78u-3; see Rita J. McConville, Exchange Act Rel. No. 51950 (June 30, 2005), 85 SEC Docket 3127, 3145 (citing Robert M. Fuller, Exchange Act Rel. No. 48406 (Aug. 25, 2003), 80 SEC Docket 3539, 3545, petition denied, No. 03-1334 (D.C. Cir. 2004)).

38/ George L. Freeland, 51 S.E.C. 389, 392 (1993); see also Gerhauser, 53 S.E.C. at 940 n.18 (noting that the "duties of a FINOP include the 'supervision and/or performance of the member's responsibilities under all financial responsibility rules promulgated pursuant to the provisions of the [Exchange] Act' as well as the 'responsibility for the accuracy of financial reports submitted' to the NASD and [the] Commission") (citing NASD Membership and Registration Rule 1022(b), NASD Manual (CCH), at 3173); Gilad J. Gevaryahu, 51 S.E.C. 710, 712 (1993).

person who commits such violations if such person is subject to the individual's supervision. 39/ Section 14(b) of the Securities Investor Protection Act of 1970 ("SIPA") authorizes the Commission to bar or suspend for any period "any officer, director, [or] general partner . . . of any broker or dealer for whom a trustee has been appointed pursuant to [the] Act from being or becoming associated with a broker or dealer," if the Commission finds such sanctions to be in the public interest. 40/ When Congress grants an agency the responsibility to impose sanctions to achieve the purposes of a statute, "the relation of remedy to policy is peculiarly a matter for administrative competence." 41/ We have stated that, in determining an appropriate sanction in the public interest, we consider 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 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. 42/

We agree with the law judge that Horning should be barred from association with any broker-dealer in a supervisory capacity. Horning is an experienced securities professional and supervisor and should have recognized the many red flags indicating that Clarke and Andrade required heightened supervision and were engaging in fraudulent misconduct. Instead, Horning abdicated his responsibility by repeatedly failing to discharge his supervisory duties. Horning's supervisory failures allowed Andrade and Clarke to commit repeated securities law violations from April 2002 through January 2003 and were causes of Rocky Mountain's violation of the net capital, customer reserve, and books and records requirements. Horning's failure to supervise continued over a ten-month period and occurred fourteen months after Horning learned that Clarke and Andrade had engaged in similar misconduct which resulted in an $800,000 discrepancy in Rocky Mountain's books and records and a $600,000 loss to Rocky Mountain. Horning's conduct resulted in the illegal taking of $4.5 million in customer funds, the appointment of a trustee under SIPA, and SIPC's advancing more than $5 million to the estate of Rocky Mountain in order to settle customer claims.

Although scienter is not required to establish that Horning failed to exercise reasonable supervision, the record establishes that he acted recklessly by failing to implement basic

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39/ 15 U.S.C. § 78*o*(b)(4)(E), (b)(6)(i); see also Leslie A. Arouh, Exchange Act Rel. No. 50889 (Dec. 20, 2004), 84 SEC Docket 1880, 1894.

40/ 15 U.S.C. § 78jjj(b).

41/ Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185 (1973) (quoting American Power Co. v. SEC, 329 U.S. 90, 112 (1946)).

42/ Arouh, 84 SEC Docket at 1894-95; see also Sharon M. Graham, 53 S.E.C. 1072, 1090 n.48 (1998) (quoting Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981)), aff'd, 222 F.3d 994 (D.C. Cir. 2000).

supervisory procedures when confronted with previous misconduct. Moreover, Horning's conduct and his arguments reveal a fundamental misunderstanding of his supervisory duties that presents a significant likelihood that he will commit similar violations in the future. As discussed above, Horning, when confronted with misconduct by Clarke and Andrade, instituted procedures that were inadequate because they relied substantially upon Andrade. Horning undertook only a cursory review of Andrade's work and took no step to verify that what she was reporting was accurate. He ignored warnings from Rocky Mountain's auditor and Commission staff about inadequate supervision and deficient internal controls, failed to check simple math on the Reconciliation Reports prepared by Andrade, failed to examine documents used to compile the Reconciliation Reports and the trading error reports, and failed to compare Reich & Tang omnibus account balances with those of the firm. Horning blames those he supervised for not adequately performing their duties and for not informing him about their actions and the actions of other Rocky Mountain employees.

Horning contends that the record does not support a finding that he be barred from supervising sales activities, as opposed to financial and operations activities, because he has not committed any supervisory violations in the sales area. However, there is no basis for carving out sales activities from the supervisory bar. Horning's continued association in a supervisory capacity with Moloney Securities presents opportunities for future violations. For example, Horning currently supervises Depew and Massee, who each loaned money to Clarke and were repaid with fictitious trading profits. Horning failed to detect these activities. Although Moloney, Horning's current supervisor, testified that he trusted Horning to fulfill his supervisory duties, Horning has taken no steps to investigate Depew and Massee's actions or to place them under heightened supervision in response to their conduct at Rocky Mountain, even though Horning testified that the conduct was "probably" dishonest. Horning's own expert testified that Depew and Massee's actions should have been investigated. Horning's supervisory failures and his fundamental misunderstanding of the duties of a supervisor present too great a risk to investors to allow him to remain in the industry as a supervisor. A supervisory bar will protect investors from dealing with securities professionals who are not adequately supervised and will deter Horning and others entrusted with supervisory positions from ignoring the important duties that accompany such positions. 43/ Accordingly, we find that the public interest warrants barring Horning from associating with any broker or dealer in a supervisory capacity.

Horning claims that the law judge erred by allowing the Division to change its position with respect to the sanctions sought. A respondent is entitled to be informed of the charges

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43/ In making this determination, we are mindful that although "general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry." PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

against him in enough detail to allow him adequately to prepare his defense. 44/ The Order Instituting Proceedings charged Horning with a failure to supervise pursuant to Exchange Act Sections 15(b)(4)(E) and 15(b)(6)(A)(i) and SIPA Section 14(b) which authorize the Commission to impose a supervisory bar, among other things, against any broker-dealer, any person associated with a broker-dealer, or the general partner of any broker-dealer for whom a trustee has been appointed pursuant to SIPA. Although the Division's Pretrial Brief states that it sought to bar Horning "from association with a broker-dealer in a supervisory, non-supervised capacity," at the hearing, prior to Horning's presentation of his direct case, the Division clarified that it was seeking a supervisory bar. Thus, Horning was aware that the issue in the case was the reasonableness of his supervision of Clarke and Andrade and that one of the sanctions being sought by the Division was a supervisory bar.

Horning argues that Section 14(b) of SIPA is unconstitutionally vague. However, in Dirks v. SEC, 45/ the Court of Appeals for the District of Columbia Circuit rejected this argument. The Court held that the Commission placed a narrowing gloss on Section 14(b) in Carol P. Teig. 46/ The Court stated that the Commission determined that Section 14(b) does not "impose a regime of strict liability on individuals whose firms enter SIPA liquidation," but instead "held that simple neglect or nonfeasance provides an adequate basis for imposition of sanctions under Section 14(b)." 47/

Horning claims that the conduct in two cases applying Section 14(b) is dissimilar from the conduct that occurred here. Specifically, Horning claims that respondents in these two cases had much greater knowledge of the problems that led to the demise of the firms in question. 48/ Regardless of the state of mind of the respondents in the cases cited by Horning, as discussed above, simple neglect or nonfeasance provides an adequate basis for imposition of sanctions

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44/ McConville, 85 SEC Docket at 3149 n.55.

45/ 802 F.2d 1468 (D.C. Cir. 1986).

46/ 46 S.E.C. 615 (1976).

47/ 802 F.2d at 1470-71.

48/ See Raymond L. Dirks, 48 S.E.C. 200 (1985) (finding that respondents aided and abetted the firm's net capital violations), aff'd, Dirks v. SEC, 802 F.2d 1468 (D.C. Cir. 1986); Thomas R. Brimberry, Exchange Act Rel. No. 23682 (Oct. 3, 1986), 36 SEC Docket 1289 (barring respondent in a default administrative proceeding and finding that respondent (1) had been found guilty of corruptly endeavoring to influence, obstruct, and impede the administration of justice in connection with federal grand jury proceedings, (2) had been found guilty of making false, material declarations to the grand jury, and (3) had converted the firm's assets to his personal benefit after the appointment of a trustee).

under Section 14(b). As we have stated previously, Section 14(b) was designed to protect public investors by authorizing us to sanction those persons in a position to guide a brokerage firm's financial affairs who fail to exercise reasonable diligence in preventing their firm's financial collapse. 49/ We have determined that Horning failed to exercise reasonable diligence in his supervision of Clarke and Andrade and in performing his duties with respect to the firm's net capital, customer reserve, and books and records requirements which resulted in the collapse of the firm. As such, his conduct falls within Section 14(b).

We also agree with the law judge's conclusion that Horning should be suspended from association with any broker-dealer for twelve months. Our net capital rule, which was "designed to assure financial responsibility of brokers and dealers," is "one of the most important weapons in the Commission's arsenal to protect investors." 50/ The net capital requirements are designed to "operate as an early warning system" of potential financial difficulties at a firm. 51/ The books and records that broker-dealers are required to maintain are "a keystone of the surveillance of brokers and dealers by [Commission] staff and by the securities industry's self-regulatory bodies." 52/ Although we have determined to bar Horning from association with a broker or dealer in a supervisory capacity, he still may be employed in a financial or operations position at a broker or dealer in a non-supervisory capacity. At a minimum, Horning was negligent in failing to take the steps necessary to ensure that Rocky Mountain complied with applicable net capital, customer reserve, and books and records requirements in order to prevent the firm's financial collapse, and, therefore, a suspension under Exchange Act Section 15(b)(6) and SIPA

49/ Dirks, 48 S.E.C. at 206.

50/ Livada Secs. Co., 45 S.E.C. 598, 600 (1974) (citing Blaise D'Antoni & Assocs., Inc. v. SEC, 289 F.2d 276, 277 (5th Cir. 1961)).

51/ William J. Blalock, Exchange Act Rel. No. 35002 (Nov. 23, 1994), 58 SEC Docket 155, 166 n.30, aff'd, 96 F.3d 1457 (11th Cir. 1996) (Table).

52/ Edward J. Mawod & Co., 46 S.E.C. 865, 873 n.39 (1977), aff'd, 591 F.2d 588 (10th Cir. 1979).

Section 14(b) is appropriate. A twelve-month suspension will impress upon Horning the seriousness of his misconduct with respect to the net capital, customer reserve, and books and records requirements and will protect the public interest by reducing the likelihood of any recurrence.

An appropriate order will issue. 53/

By the Commission (Chairman COX and Commissioners ATKINS, NAZARETH and CASEY).

Nancy M. Morris

Nancy M. Morris
Secretary

53/ We have considered all of the parties' contentions. We have rejected or sustained these contentions to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56886 / December 3, 2007

SECURITIES INVESTOR PROTECTION ACT OF 1970
Rel. No. 167 / December 3, 2007

Admin. Proc. File No. 3-12156

In the Matter of

STEPHEN J. HORNING

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Stephen J. Horning be, and he hereby is, barred from association with any broker or dealer in a supervisory capacity; and it is further

ORDERED that Stephen J. Horning be, and he hereby is, suspended for twelve months from association with any broker or dealer in any capacity.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

Commissioner Cox
Not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8866 / December 3, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2860 / December 3, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12896

In the Matter of FOUNDING PARTNERS CAPITAL MANAGEMENT COMPANY and WILLIAM GUNLICKS Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 203(e) 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 Section 8A of the Securities Act of 1933 ("Securities Act") and Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against Founding Partners Capital Management Company ("Founding Partners") and William Gunlicks ("Gunlicks") (collectively, the "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 Section 8A of the Securities Act of 1933 and Section 203(e) of the Investment Advisers Act of 1940 ("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. Gunlicks is the president, chief executive officer and sole shareholder of Founding Partners which is an investment adviser registered with the Commission. Gunlicks, 64 years old, resides in Naples, Florida.

2. Founding Partners, a Florida corporation, operates its principal office in Naples, Florida. Founding Partners is an investment adviser that has been registered with the Commission since August 20, 1999.

Other Relevant Entities

3. Founding Partners manages three hedge funds: Founding Partners Stable-Value, L.P. ("Stable-Value"), Founding Partners Equity Fund, L.P. ("Equity Fund") and Founding Partners Global Fund, Ltd. ("Global Fund") (collectively, the "hedge funds"). Stable-Value and Equity Fund are both limited partnerships based in Naples, Florida. Global Fund is registered as a mutual fund under Cayman Islands law. Founding Partners is the general partner for Equity Fund and Stable-Value and the investment manager of Global Fund.

4. Stewards & Partners Limited ("Stewards"), is a Bermuda-based company established by Gunlicks in December 1999 that further developed and implemented Stable-Value's investment strategy of financing with securitized loans the purchase of discounted healthcare receivables by third-party entities, which pay Stable-Value, monthly interest of 1.5% (18% on an annualized basis). Stewards receives a fee from Stable-Value every month at an annualized 1% of capital invested in Stable-Value. Stewards' chairman is Gunlicks, and one of its shareholders is Founding Partners. Gunlicks indirectly controls Stewards in which he has a pecuniary interest because of Founding Partners' 42.2 % ownership interest in Stewards.

Transactions that Were Not Consistent with the Hedge Funds' Confidential Offering Memoranda

Loans to Stewards

5. From about June 2001 through May 2002 related-party transactions were inconsistent with the terms of the Equity Fund and Stable-Value confidential offering memoranda. In pertinent part, the Equity Fund and Stable-Value offering memoranda provided:

> The Partnership will not make loans to and, absent the approval required pursuant to applicable securities laws and regulations, will not engage in principal transactions or other investment transactions with the General Partner or any entity under common control with the General Partner. The Partnership does not currently intend to engage in any transactions with the General

Partner or any entity under common control with the General Partner.

Contrary to the offering memoranda, Founding Partners caused Equity Fund and Stable-Value to make loans with entities under common control with Founding Partners. These loans are discussed more fully below.

6. In July 1999, Equity Fund agreed to invest $440,000 in an unincorporated entity that was in the process of developing an investment program (the "Developing Entity") for the purchase and finance of healthcare receivables. The investment was made through an equity-linked loan. The Developing Entity subsequently failed to complete the development of the investment program and defaulted under the equity-linked loan agreement. When it became clear that the Developing Entity could not repay the loan, Stewards, an entity under common control with Founding Partners, agreed to assume the Developing Entity's obligations for the full equity-linked loan and Stewards completed the development of the investment program.

7. On August 11, 2000, Founding Partners caused Equity Fund to loan Stewards $60,000, which Stewards mostly used to make the first interest payment to Equity Fund on the promissory note that Stewards had assumed from the Developing Entity.

8. In April 2001, Founding Partners caused Equity Fund to make another loan to Stewards in the amount of $80,000. Between April 2001 and December 2001, Founding Partners also caused Stable-Value to loan Stewards approximately $93,000. In return, Equity Fund and Stable-Value received five-year promissory notes that paid interest at an annualized rate of 18%. Stewards used all of these loan proceeds for start-up capital and to pay expenses that included, among other things, a $5,000 monthly management fee to Founding Partners for services unrelated to the advisory services Founding Partners provided to the hedge funds. From these loan proceeds of $173,000 Founding Partners received a total of $125,000 in management fees.

9. After the Commission's Office of Compliance Inspections and Examination ("OCIE") staff conducted an examination of Founding Partners, OCIE informed Founding Partners that these loans, which totaled $233,000, appeared to be inconsistent with the offering memoranda for Equity Fund and Stable-Value. In response, Founding Partners caused Equity Fund to purchase Stable-Value's loans even though they were inconsistent with the terms of both of their offering memoranda. After OCIE issued its deficiency letter, Founding Partners supplemented Equity Fund's offering memorandum and wrote Stable-Value's second offering memorandum supplement in part to disclose loans, respectively to "affiliates of the General Partner" and "affiliated and unaffiliated parties." These supplements, however, failed to disclose the loans that had already occurred. All of the loans have since been repaid with interest.

Payments from Stable-Value to Stewards

10. From March 2001 through May 2002, Stable-Value paid $169,180 in undisclosed fees to Stewards, which it characterized as a royalty fee in exchange for using the investment program it had developed for Stable-Value. The fees were paid to Stewards out of Stable-

Value's assets in addition to the management fees Stable-Value paid to Founding Partners. Stable-Value's supplemented offering memorandum omitted the fee and Founding Partners' pecuniary interest in the fee, through its ownership interest in Stewards.

11. After OCIE questioned the fee in its deficiency letter, Founding Partners disclosed the fee and its ownership interest in Stable-Value's and Equity Fund's financial statements for year-end December 31, 2001, released on May 23, 2002. In addition, Founding Partners added the following disclosure to Stable-Value's second offering memorandum supplement dated May 2002:

> Expenses
>
> The Partnership will pay a fee (the "Royalty Fee") to Stewards & Partners Limited, an affiliate of the General Partner. The fee will be charged against the capital accounts of the Partnership each month at an annualized rate of 1%. The Royalty Fee is being paid to Stewards & Partners for its having borne the expenses and risks of developing the Partnership's investment strategy with respect to healthcare receivables. The costs and expenses of Stewards & Partners to acquire and develop the healthcare receivables investment concept totaled approximately $812,000 all of which was funded by Stewards & Partners. The payment of any fee by the Partnership was deferred until the systems, operations and procedures could be tested over a full collections cycle.

12. This disclosure was incomplete in that it did not disclose that Stewards borrowed $233,000 of the $812,000 from Equity Fund and Stable-Value to fund its capital outlays in connection with developing Stable-Value's healthcare receivables investment strategy. In addition, the supplement did not disclose that Stewards had also assumed the $440,000 loan from the Equity Fund. The supplement also did not explain that a majority of the costs and expenses to acquire and develop the investment strategy were funded with loans form Stable-Value and the Equity Fund. Furthermore, the disclosure did not state that Stable-Value and the Equity Fund loans would be paid off with the cash flow from the royalty fee.

Equity Fund's Investment in Stable-Value

13. By March 31, 2002, Equity Fund had invested at least $1.6 million in Stable-Value. This investment was not consistent with the disclosed investment strategy set forth in Equity Fund's offering memorandum at that time. Equity Fund's offering memorandum stated that its investment objective is "to achieve above-average rates of return in the long term, while preserving capital and its purchasing power in the short term" and, further stated:

> The Partnership intends to accomplish this objective by allocating the Partnership's assets among a select group of unaffiliated, experienced portfolio managers ("Portfolio Managers") that invest primarily in the U.S. equity markets. Each selected Portfolio Manager has been successful in a specific, highly focused equity style that has resulted in above-average

> to superior investment histories. The Partnership may also invest its assets directly pursuant to investment advisory agreements granting the Portfolio Managers discretionary trading authority on a managed account basis. The utilization of this multi-manager, multi-equity strategy investment style is intended to result in a diversified portfolio of securities with overall volatility lower than the markets to which Partnership is exposed.

14. Equity Fund's investment in Stable-Value was not an investment with an unaffiliated portfolio manager that had been successful in a specific, highly focused equity style because Stable-Value was not invested in equities and it was operated by Founding Partners. Founding Partners profited from this arrangement because it earned two layers of management fees - from both Equity Fund and Stable-Value – on the same underlying assets. As a shareholder of Stewards, Founding Partners benefited from the fee Stable-Value paid to Stewards when Stable-Value's assets expanded by virtue of the investment from Equity Fund.

15. During the course of OCIE's exam, Founding Partners stopped collecting the two layered management fees and returned the fees it had collected from Equity Fund. In response to OCIE's deficiency letter, Founding Partners supplemented Equity Fund's offering memorandum in May 2002 to disclose Equity Fund's investment in Stable-Value and disclosed the investments intended to achieve its stated investment objective, as follows:

> In addition to investing in the U.S. equity markets, the Partnership and its Portfolio Managers may invest in a wide range of instruments and markets, including, but not limited to, domestic and foreign equities and equity-related instruments, fixed income and other debt-related instruments and asset backed instruments. The Partnership may invest in loans secured by healthcare, commercial and trade receivables and may also make loans, including loans to affiliates of the General Partner.

The amended disclosure, however, neglected to disclose that Equity Fund had already invested in Stable-Value. On September 20, 2002, Founding Partners disclosed in Equity Fund's 2001 financial statement that Equity Fund had invested in Stable-Value prior to May 2002.

Other Transactions That Were Not Consistent
<u>With Stable-Value's Offering Memorandum</u>

16. Stable-Value's offering memorandum supplement stated that the fund's investment objective was "to achieve above-average rates of return, while preserving capital and its purchasing power in the short-term" and that it's investment program was "designed to accomplish this objective through the implementation of a stable value investment strategy that has no correlation to the equity and bond markets." Stable-Value's supplement further stated that its investment program was limited to making loans to a third party which agreed to use the loan proceeds to only purchase healthcare receivables. Inconsistent with that disclosure, Founding Partners caused Stable-Value, from January 2002 through May 2002, to extend loans of approximately $11.7 million to a third-party entity to finance its purchases of commercial receivables.

17. Although the commercial receivables program operated in the same manner as the healthcare receivables investment program, use of Stable-Value funds to make loans to a third-

party to purchase commercial receivables was a material deviation from Stable-Value's offering memorandum because there are differences between healthcare and commercial receivables. For example, health care receivables are primarily payment obligations of well-known federal and state government agencies and insurance companies (third-party payers) that have high credit ratings from nationally recognized credit rating agencies. In contrast, the commercial receivables securing Stable-Value's loans came from a variety of small businesses (e.g. auto body shops, an employment agency, a direct mail advertising firm and a wine importer) that do not generate receivables of the same nature because many of these businesses have a higher risk of bankruptcy and fraud than third-party payers of healthcare receivables, like Medicare.

18. In further response to OCIE's concerns with respect to Stable-Value's investments in commercial receivables, Founding Partners revised Stable-Value's supplement to disclose investments in commercial receivables.

Violations

19. As a result of the conduct described above, Founding Partners willfully[1] 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. Specifically, among other things, Founding Partners caused Stable-Value to pay an undisclosed fee to Stewards and caused Equity Fund and Stable-Value to engage in transactions that were not consistent with their offering memoranda including transactions with entities under common control with Founding Partners.

20. As a result of the conduct described above, Gunlicks caused Founding Partners' 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. Specifically, among other things, Gunlicks caused Founding Partners to have Stable-Value pay an undisclosed fee to Stewards and had Equity Fund and Stable-Value engage in transactions that were not consistent with their offering memoranda including transactions with entities under common control with Founding Partners.

Founding Partners and Gunlicks' Cooperation

In determining to accept the Offers, the Commission considered cooperation afforded the Commission staff.

Undertakings

21. Founding Partners shall send a copy of this Order and a cover letter in a form acceptable to the staff of the Commission by certified mail, return receipt requested to all current and prospective clients as well as any investors and any potential investors in any Founding

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[1] "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).

Partners-advised hedge funds for a period of one year after the date of the Order. In addition, Gunlicks will execute an affidavit on behalf of Founding Partners that it has complied with this undertaking in accordance with the terms of this Order and deliver the executed affidavit to the Commission's staff within five (5) days after the completion of this undertaking.

22. Respondent Founding Partners undertakes to cooperate and assist the Commission staff with their development of a plan pursuant to Rule 1101 of the Commission's Rules on Fair Fund and Disgorgement Plans [17 C.F.R. § 201.1101] to distribute the disgorgement and prejudgment interest and any interest thereon (the "disgorgement funds") ("Distribution Plan"). Within 30 days of the entry of this Order, the proposed Distribution Plan will be published for comment and thereafter submitted to the Commission for final approval in accordance with Rule 1103 [17 C.F.R. § 201.1103]. Following a Commission order approving the Distribution Plan, as provided in Rule 1104 [17 C.F.R. § 201.1104], Respondent Founding Partners shall take all necessary and appropriate steps to continue to assist the Commission's staff administer the final Distribution Plan. Respondent Founding Partners agrees to bear all of its own costs and expenses that it may incur to assist the staff with the development and implementation of the final Distribution Plan.

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 Section 203(e) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Founding Partners is censured.

B. Respondent Founding Partners cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

C. Respondent Gunlicks cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

D. IT IS FURTHER ORDERED that Founding Partners shall, within 30 days of the entry of this Order, pay disgorgement of $169,180 and prejudgment interest of $13,064 for a total amount of $182,244 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 a separate cover letter that respectively identifies Founding Partners 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 Glenn S. Gordon, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Southeast Regional Office, 801 Brickell Avenue, 18th Floor, Miami, Florida 33131.

E. IT IS FURTHER ORDERED that Founding Partners shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $100,000 to the United States Treasury. Such payments shall be: (A) made by United States postal money orders, certified checks, bank cashier's checks or bank money orders; (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 Founding Partners 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 Glenn S. Gordon, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Southeast Regional Office, 801 Brickell Avenue, 18th Floor, Miami, Florida 33131.

F. Founding Partners shall comply with the undertakings enumerated in Section III above.

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 28073 / December 4, 2007

In the Matter of

NATIONAL PRESTO INDUSTRIES, INC.
3925 North Hastings Way
Eau Claire, WI 54703-3703

(811-21874)

ORDER UNDER SECTION 38(a) OF THE INVESTMENT COMPANY ACT OF 1940

National Presto filed a Form N-8A on March 22, 2006, indicating that it made the filing solely to comply with an Order of Permanent Injunction issued by the United States District Court for the Northern District of Illinois ("District Court Order").[1] On May 15, 2007, the United States Court of Appeals for the Seventh Circuit issued a decision reversing the District Court Order and stating that National Presto did not need to maintain its registration under the Act ("Decision of the Court of Appeals").[2]

Section 8(a) of the Act states that "[a]ny investment company organized or otherwise created under the laws of the United States or of a State may register for the purposes of [the Act] by filing with the Commission a notification of registration, in such form as the Commission shall by rules and regulations prescribe .... An investment company shall be deemed to be registered upon receipt by the Commission of such notification of registration." Form N-8A under the Act is the form the Commission adopted as the notification of registration under the Act. The Commission received National Presto's Form N-8A filing.

To effectuate the Decision of the Court of Appeal, the Commission believes that it is appropriate to the exercise of the powers conferred upon the Commission by the Act to issue an order under section 38(a) of the Act. Accordingly, the Commission is issuing an order, on its own motion pursuant to section 38(a) of the Act, declaring that National Presto shall not be deemed to have been registered under the Act by virtue of the Form N-8A it filed with the Commission on March 22, 2006 because National Presto filed its Form N-8A solely to comply with the District Court Order which was reversed by the Decision of the Court of Appeals.

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1 SEC v. Nat'l Presto Industries, Inc., 397 F. Supp.2d 943 (N.D. Ill., 2005).

2 SEC v. Nat'l Presto Industries, Inc., 486 F.3d 305 (7th Cir. 2007).

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The Commission has considered the matter, and the Commission finds that the issuance of the order is appropriate to the exercise of the powers conferred upon the Commission in the Act. Further, given that the order implements the Decision of the Court of Appeals, which is final, the Commission finds it appropriate to issue the order without notice and an opportunity for hearing.

Accordingly,

IT IS ORDERED, under section 38(a) of the Act, that National Presto Industries, Inc. shall not be deemed to have been registered under the Act by virtue of the Form N-8A it filed with the Commission on March 22, 2006.

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. 8867 / December 4, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56891 / December 4, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12897

In the Matter of Marshall W. Pagon and Howard E. Verlin, Respondents.	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 Marshall W. Pagon ("Pagon") and Howard E. Verlin ("Verlin") (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 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 Respondents' Offers, the Commission finds[1] that:

RESPONDENTS

A. **Pagon,** age 51, is a resident of Haverford, Pennsylvania. He was the founder, Chairman of the Board, and Chief Executive Officer of Pegasus Communications Corporation and controlled the vote of the Class B common stock of Pegasus Communications Corporation, resulting generally in majority control of the voting power of that entity.

B. **Verlin**, age 46, is a resident of Philadelphia, Pennsylvania. He helped found Pegasus Communications Corporation in 1991, and he has remained with the company ever since. During the relevant period (1999-2002), Verlin served as a Vice President and then as an Executive Vice President of Pegasus Communications Corporation.

RELEVANT ENTITIES

Pegasus Communications Corporation ("Pegasus"), was a Delaware corporation based in Bala Cynwyd, Pennsylvania, which, pursuant to a corporate re-organization in February of 2001, became the parent company of various operating subsidiaries including Pegasus Satellite Communications and Pegasus Media & Communications.[2] Pegasus' common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act. On January 4, 2007, Pegasus filed a Form 15 to terminate its registration and reporting status following a going-private transaction, which took it below the 300 record holder threshold set forth under Exchange Act Rules 12g-4(a)(1) and 12h-3(b)(1)(i). Pegasus and its subsidiaries followed a calendar year reporting cycle.

Pegasus Satellite Communications, Inc. ("PSC"), during all relevant times, was a Delaware corporation based in Bala Cynwyd, Pennsylvania. PSC filed annual and quarterly reports with the Commission on Forms 10-K and 10-Q commencing in November of 1996. During the period 1998 to 2001, PSC issued stock, options, warrants, and debt securities in public and private offerings. On February 22, 2001, PSC became a wholly-owned subsidiary of Pegasus. On June 2, 2004, PSC filed for bankruptcy. On August 2, 2004, PSC filed a Form 15 to terminate its duty to file reports with the Commission. On May 5, 2005, PSC ceased being a subsidiary of Pegasus when a plan of reorganization became effective that provided for a Liquidating Trustee overseeing the disposition of PSC's assets.

Pegasus Media & Communications, Inc. ("PM&C"), a Delaware corporation based in Bala Cynwyd, Pennsylvania during all relevant times, was a diversified media and communications company, which together with its subsidiaries, owned and operated broadcast

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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] Prior to the re-organization, Pagon and Verlin served as Chief Executive Officer and Executive Vice President, respectively, of the operating subsidiaries.

television systems and provided direct broadcast satellite television services to customers in certain rural areas of the United States. PM&C was a direct subsidiary of PSC. PM&C also filed annual and quarterly reports with the Commission commencing in May 1996. On September 3, 2003, it filed a Form 15 to terminate its reporting duties. On June 2, 2004, PM&C filed for bankruptcy. On May 5, 2005, PM&C ceased being an indirect subsidiary of Pegasus when a plan of reorganization became effective that provided for a Liquidating Trustee overseeing the disposition of PM&C's assets.[3]

SUMMARY

During the period from 1999 though 2001, Pegasus, a satellite television provider, engaged in a number of actions designed to increase the number of its active satellite subscribers. First, Pegasus extended the period of time that customers who had failed to pay their bills could be considered active and, therefore, part of the subscriber count. At Pegasus, these delinquent accounts whose status was extended were called "re-aged" accounts. Second, in 2001, Pegasus re-activated the accounts of certain customers who had voluntarily disconnected their service by reclassifying the accounts from disconnect to suspend status and by assigning one-cent credits to the customers' accounts, thus causing the billing system to restore those subscriber accounts to active status. At Pegasus, these accounts that were reactivated by one-cent credits were called "penny-suspends" or "penny-credits." As a result of these actions, the number of subscribers who were not generating revenue or receiving services from Pegasus grew substantially. Without these actions, Pegasus would have had nominal growth in its subscriber base for the year 2001. Up until April of 2002, when Pegasus disclosed an adjusted subscriber count, investors had no way of knowing that a significant number of Pegasus' subscribers had been retained by using the tactics described above. The Commission has previously addressed PSC and PM&C's violations of the federal securities laws arising out of these programs. *See In the Matter of Pegasus Satellite Communications, Inc., et al.*, File No. 3-12146 (January 11, 2006). This Order addresses the role of two individuals.

IV.

FACTS

A. Background

Pegasus' business plan focused on marketing satellite television products and services to rural areas within the United States. At all relevant times, Pegasus included subscriber data in its quarterly and annual reports filed with the Commission, and in quarterly earnings releases and conference calls with securities analysts. Subscriber data was also incorporated into a registration statement on Form S-4, as amended June 15, 2001, filed with the Commission by

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[3] Until the completion of a corporate reorganization in 2001, PSC was required to file periodic reports with the Commission under Section 13(a) of the Exchange Act as a result of registering securities pursuant to Section 12(g) of the Exchange Act. During the relevant time, PM&C's obligation to file periodic reports with the Commission under Section 15(d) of the Exchange Act was suspended, but it did file reports on a voluntary basis.

PSC, covering an exchange offering of securities under the Securities Act.[4] Stock analysts frequently cited subscriber statistics as a metric for measuring the value of satellite and cable television businesses such as Pegasus, and Pegasus monitored the movement of the subscriber base from period to period.

For example, on January 19, 2000, a research report prepared by an independent investment firm had said of Pegasus:

> *Despite the run-up in the stock, we argue that Pegasus is attractively valued. Pegasus trades at $3,600 per user, which compares favorably to Echostar's $6,900 per user. Our view is that a discount is warranted given that Echostar is an integrated provider rather than simply a reseller. A 50% discount, however, fails to reflect the fact that[, among other things,] Pegasus is growing, faster than Echostar—its net subscriber additions jumped by 50% in December versus only 23% for Echostar .... Based on a valuation of $4,000 per estimated end-2000 user.... we increase our price target to $150 from $70.*

Pegasus billed customers through a billing system designed and maintained by an independent telecommunications cooperative. The system generated subscriber statistics that Pegasus used to prepare reports. The system used certain criteria to determine which accounts would be considered active and included in the subscriber statistics and which accounts would be considered dropped, or "churned," and excluded from subscriber statistics. Prior to February 2000, the system automatically cut off and marked as churned accounts that were overdue by 52 days. Such churned accounts were not counted as part of the subscriber base reported by the system. Accounts of customers who voluntarily terminated their relationship with Pegasus were considered inactive and churned immediately unless an account had a credit balance, in which case, it would continue to be counted as active by the billing system maintained by the telecommunications cooperative.

B. <u>Re-aging Delinquent Subscribers</u>

From at least the third quarter of 1999 through 2001, Pegasus engaged in activities that had the effect of increasing the number of subscribers reported in its public filings. Specifically, in December of 1999, Pegasus extended the churn parameters for a number of delinquent subscribers from 51 to 60 days, thus allowing those subscribers to be reported as active for a longer period. In June and September 2000, Pegasus made similar extensions for even longer periods, in each instance extending the cut-off parameters from 60 days to 120 days. Many of the delinquent subscribers whose accounts were extended did not ultimately produce revenue for Pegasus, though they continued to receive satellite television services. The stated reason for

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4 Registration statements were also filed by Pegasus entities, including PSC, at different times. Such filings included, among others, a Form S-4 filed on January 7, 2000 covering an exchange offer for PSC senior notes and a Form S-4 filed on April 6, 2000 covering the issuance of Pegasus Class A common stock. These registration statements either restate subscriber data containing no-core numbers and/or incorporate by reference other filings that do so.

these parameter extensions was to allow customers the time and incentive to come current in their bills and to maintain or "remarket" them as active subscribers.

C. The Audit Committee Internal Review

At or around November 2000, a Pegasus board member learned of an allegation that Pegasus had inflated its subscriber count for the third quarter of 2000. On November 16, 2000, the board member e-mailed the senior managers including Pagon, asking them to investigate the activity in question. When Pagon was informed, he contacted the Company's general counsel, and the matter was elevated to the Audit Committee. The Audit Committee assigned the director of internal audit to review the allegations, interview the appropriate employees, and draft a report. In January 2001, the Audit Committee, after considering the report, determined that the Company had not intentionally extended parameters at the ends of quarters to manipulate subscriber counts. The Audit Committee expressed a concern that the Company's actions could be misinterpreted that way, however, and instructed management to set clear definitions and classifications of subscribers and to adhere to them in the future.

D. Renewed Efforts to Extend Subscriber Churn Dates

In 2001, Pegasus continued to re-age delinquent subscribers by extending cut-off parameters and, in addition, Pegasus initiated a new penny-suspend policy which targeted customers who had voluntarily disconnected their accounts. In May 2001, Pegasus further extended the churn date for delinquent accounts to 114 days — two months after the service cutoff date for delinquent accounts.

E. Using Penny-Suspends to Activate Closed Accounts

In 2000, Pegasus had used penny-suspends as a "work around" to address an anomaly in the billing system concerning the classification of a relatively small number of subscribers. In the spring of 2001, Pegasus began to use a new and different penny-suspend policy on a wide-spread basis. This penny-suspend policy involved taking accounts of voluntarily disconnected customers (customers who specifically stated they no longer wanted Pegasus' services and whose accounts were churned), reclassifying the accounts to suspend status, and placing a one-cent credit on those accounts to make them active again (in suspend status) in the billing system that Pegasus utilized. In order to attach the penny-credits to disconnected customer accounts, Pegasus employees had to move the accounts from a de-activated category with a zero balance to an active category by assigning the one-cent credits to such accounts. By these means, Pegasus added accounts to its no-core subscriber population that neither received services nor made payments, but remained active for purposes of the publicly reported subscriber count.

The combination of the re-aging and penny-suspend policies caused Pegasus' no-core population to rise significantly from period to period during 2001. By the fourth quarter of 2001, the penny-credit accounts became the largest subset of the so-called "no-core" group of active subscribers, meaning a category of subscribers who were not receiving core programming services.

	Total Count	No Core[5]	% of Total Count
Q1 2001	1,440,000	105,966	7%
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Q4 2001	1,519,000	188,554	12%

Pegasus discontinued these subscriber "retention" policies when Pegasus announced a change in its subscriber counting methodology in its 2001 Form 10-K and reduced its subscriber base by approximately 138,000. The bulk of this reduction consisted of subscribers who had been subject to re-aging and the penny-credit policies employed as part of the remarketing program.

F. Public Reporting of Subscriber Numbers

Until April 2000, Pegasus released information concerning its subscriber base on a monthly basis and thereafter it reported such information on a quarterly basis. Pegasus published its subscriber data in the form of press releases and conference calls with stock analysts who were covering the company. The same subscriber data was contained in periodic filings made with the Commission on Forms 10-K and 10-Q during the relevant time. Subscriber data was also referenced or incorporated by reference in registration statements filed with the Commission covering the offer and sale of securities.

Pegasus reported subscriber numbers in the periodic reports filed with the Commission between 1999 and December 2001. In each annual and quarterly filing on Forms 10-K and 10-Q during those reporting periods, Pegasus disclosed the number of subscribers and attributed increases in subscriber numbers to, among other things, "internal growth." Pegasus did not explain that a substantial portion of the subscriber base growth included a large number of subscribers whose status as subscribers was prolonged or re-activated by the re-aging of accounts and the issuance of one-cent credits as described above.

G. Pegasus Announces a Change in its Subscriber Counting Methodology

In its 2001 Form 10-K Pegasus announced that it was changing its method for publicly reporting its number of subscribers in order to improve its public reporting and internal analyses.

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[5] The amounts shown here reflect the total no-core category, which for purposes of this analysis includes the 54-114 day re-aged accounts, penny-suspends, suspends turned active, and unknown origin subscriber groups.

The disclosures made in the 2001 Form 10-K by Pegasus regarding the subscriber counting policy change read as follows:

> We have recently undertaken a review of the method by which we publicly report the number of our subscribers. Our publicly reported subscriber counts in the past have included a number of accounts whose service has been suspended for prolonged periods of time. Because we believe it would improve our public reporting and internal analyses, we are changing our method of reporting subscribers, beginning with the first quarter of 2002 so as to exclude these accounts. We estimate that if we had instituted this change at December 31, 2001, we would have reported approximately 1.4 million subscribers. This change would have had no effect on our 2001 consolidated financial statements if we had implemented it during 2001, and will have no effect on our future consolidated financial statements.

This announcement did not mention that in addition to suspended accounts, the written-off subscriber accounts also included 70,415 disconnected subscriber accounts which had penny-credits added. Although Pegasus did make a correction in April 2002 to its previously reported subscriber numbers for 2001, Pegasus did not revise its subscriber numbers reported for the periods between 1999 and the end of 2000.

H. <u>The Decision to Report the Re-Activated Subscribers as Active Is Independent of the Business Decision to Re-Activate them</u>

Certain officers at Pegasus approved of the re-aging and penny-suspend tactics as part of a remarketing effort designed to stem the rising trend in subscriber disconnections. Pegasus' stated reason for the reporting of re-aged subscribers and penny-credit subscribers was to allow for the possibility of winning back these customers. However, even if the re-aging and penny-credits were done for the business purpose of remarketing, certain Pegasus officers made a separate decision to include re-aged and penny-credit subscribers in their publicly reported subscriber counts. In other words, Pegasus could have backed these accounts out of its count of active subscribers before publicly reporting that metric.

I. <u>Respondents' Conduct</u>

As Pegasus' chairman and CEO, Pagon signed the periodic reports Pegasus filed with the Securities and Exchange Commission and participated in their preparation. Similarly, he signed registration statements and participated in their preparation. Pagon also hosted periodic conference calls for shareholders and stock analysts. As a result of his involvement with these reporting functions, Pagon had a duty to ensure that the Pegasus remarketing program did not negatively affect the accuracy of these reports. Pagon had accepted the use of re-aging as a method for remarketing customers. Pagon was also aware that – at least in 2000 – Pegasus had used the concept of penny-credits, in the context of using penny credits to address an anomaly in the billing system as described above. By accepting the use of these methods as part of a remarketing program, Pagon had an obligation to oversee the remarketing program to ensure that it was operated in a way that did not result in misstatements of subscriber numbers in public reports through April 2002. Pagon also failed to ensure that Pegasus considered whether the no-core subscriber data should have been backed out of Pegasus' subscriber metrics before they were publicly reported. Pagon was negligent in failing to carry out these duties, and as a result, the Pegasus SEC filings and analyst conference calls reported subscriber metrics that included the no-core re-aged and penny-credit subscribers as active subscribers.

Up until the issuance of the audit committee report in early January 2001, Verlin was involved in subscriber operations, including the decision to extend parameters for certain customers in the second and third quarters of 2000. Following the issuance of the audit report, Pegasus made some management changes, such that starting in January 2001, Mr. Verlin no longer was responsible for subscriber operations. However, after January 2001, he was copied from time to time on email updates regarding the status of churn or subscriber counts and he knew that Pegasus was reporting its subscriber counts. In that vein, Verlin became aware of the penny suspend program in June 2001 and even approved the text of a remarketing program to be directed at customers whose accounts had been reactivated with a penny credit. Despite his position in Pegasus senior management, Verlin failed to take affirmative steps to ensure that the re-aging and penny suspend programs came to an end such that subscriber numbers would be reported accurately.

V.

LEGAL DISCUSSION

Sections 17(a)(2) and 17(a)(3) of the Securities Act prohibit material misstatements and omissions in the offer or sale of a security. From 1999 to 2001, Pegasus issued stock in registered transactions on the U.S. securities markets. Because of the conduct described above, Pegasus violated these provisions. Negligent conduct can violate Sections 17(a)(2) and (3). *See, e.g., SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453 (3d Cir. 1997).

Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder require issuers with securities registered under Section 12 of the Exchange Act to file annual and quarterly reports with the Commission. The obligation to file such reports embodies the requirement that they be true and correct. Rule 12b-20 further requires the inclusion of any additional material information that is necessary to make required statements, in light of the circumstances under which they were made, not misleading. Negligence is enough for a reporting violation. *S.E.C. v. Savoy Indus.*, 587 F.2d 1149, 1167 (D.C. Cir. 1978).

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 dispositions of the assets of the issuer." Section 13(b)(2)(B) 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 preparation of financial statements in conformity with generally accepted accounting principles and to maintain the accountability of assets. Because of the conduct described above, Pegasus and PSC violated these provisions.

By their conduct, described above, Pagon and Verlin were causes of Pegasus' and PSC's violations of these provisions. Where the primary violations underlying a finding that a person is "a cause of" violations do not themselves require a finding of scienter, the standard of liability for being "a cause of" such violations is negligence. *See*, *KPMG LLP v. SEC*, 289 F.3d 109, 120 (DC Cir. 2002).

VI.

As a result of the conduct described above, Respondents caused Pegasus and PSC to violate Sections 17(a)(2) and 17(a)(3) of the Securities Act and Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 13a-1, 13a-13 and 12b-20 thereunder.

VII.

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

Accordingly, it is hereby ORDERED that:

A. Respondents shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

B. Respondents shall 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.

C. Respondent Verlin shall pay disgorgement in the principal amount of $16,285.28 and prejudgment interest in the amount of $7,674.60 for a total of $23,959.88, to the United States Treasury. Such payment (a) 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, mailed, or sent by overnight delivery service 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 Verlin as a Respondent in these proceedings and includes the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Cheryl J. Scarboro, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-5631. Respondent Verlin shall make his payments in two installments, the first installment of $11,979.50 shall be paid within 30 days of the entry of this Order, and the second installment of $11,979.50 shall be paid within 120 days of the entry of this Order, with prejudgment interest to accrue on the second installment amount until paid. 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 $23,959.88, 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

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8868 / December 4, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56892 / December 4, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12898

In the Matter of **Michael K. Smith,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

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 Michael K. Smith ("Smith" or "Respondent").

II.

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

Document 6 of 37

III.

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

RESPONDENT

Smith age 47 is a resident of St. Michaels, Maryland and was Chief Financial Officer of Pegasus from September 1999 until March of 2002. By March 2002, in addition to being CFO, Mr. Smith was Treasurer and Executive Vice President of Finance and Information Technology. Smith is an inactive Certified Public Account licensed in California.

RELEVANT ENTITIES

Pegasus Communications Corporation ("Pegasus") was a Delaware corporation based in Bala Cynwyd, Pennsylvania, which, pursuant to a corporate re-organization in February of 2001, became the parent company of various operating subsidiaries including Pegasus Satellite Communications and Pegasus Media & Communications.[2] Pegasus' common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act. On January 4, 2007, Pegasus filed a Form 15 to terminate its registration and reporting status following a going-private transaction, which took it below the 300 record holder threshold set forth under Exchange Act Rules 12g-4(a)(1) and 12h-3(b)(1)(i). Pegasus and its subsidiaries followed a calendar year reporting cycle.

Pegasus Satellite Communications, Inc. ("PSC"), during all relevant times, was a Delaware corporation based in Bala Cynwyd, Pennsylvania. PSC filed annual and quarterly reports with the Commission on Forms 10-K and 10-Q commencing in November of 1996. During the period 1998 to 2001, PSC issued stock, options, warrants, and debt securities in public and private offerings. On February 22, 2001, PSC became a wholly-owned subsidiary of Pegasus. On June 2, 2004, PSC filed for bankruptcy. On August 2, 2004, PSC filed a Form 15 to terminate its duty to file reports with the Commission. On May 5, 2005, PSC ceased being a subsidiary of Pegasus when a plan of reorganization became effective that provided for a Liquidating Trustee overseeing the disposition of PSC's assets.

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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] Prior to the re-organization, Smith served as Chief Financial Officer of the operating subsidiaries.

plan of reorganization became effective that provided for a Liquidating Trustee overseeing the disposition of PM&C's assets.[3]

SUMMARY

During the period from 1999 though 2001, Pegasus, a satellite television provider, engaged in a number of actions designed to increase the number of its active satellite subscribers. First, Pegasus extended the period of time that customers who had failed to pay their bills could be considered active and, therefore, part of the subscriber count. At Pegasus, these delinquent accounts whose status was extended were called "re-aged" accounts. Second, in 2001, Pegasus re-activated the accounts of certain customers who had voluntarily disconnected their service by reclassifying the accounts from disconnect to suspend status and by assigning one-cent credits to the customers' accounts, thus causing the billing system to restore those subscriber accounts to active status. At Pegasus, these accounts that were reactivated by one-cent credits were called "penny-suspends" or "Penny-credits." As a result of these actions, the number of subscribers who were not generating revenue or receiving services from Pegasus grew substantially. Without these actions, Pegasus would have had nominal growth in its subscriber base for the year 2001. Up until April of 2002, when Pegasus disclosed an adjusted subscriber count, investors had no way of knowing that a significant number of Pegasus' subscribers had been retained by using the tactics described above. The Commission has previously addressed PSC and PM&C's violations of the federal securities laws arising out of these programs. *See In the Matter of Pegasus Satellite Communications, Inc., et al.*, File No. 3-12146 (January 11, 2006). This Order addresses the role of Smith.

IV.

FACTS

A. Background

Pegasus' business plan focused on marketing satellite television products and services to rural areas within the United States. At all relevant times, Pegasus included subscriber data in its quarterly and annual reports filed with the Commission, and in quarterly earnings releases and conference calls with securities analysts. Subscriber data was also incorporated into a registration statement on Form S-4, as amended June 15, 2001, filed with the Commission by PSC, covering an exchange offering of securities under the Securities Act.[4] Stock analysts

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Pegasus discontinued these subscriber "retention" policies when Pegasus announced a change in its subscriber counting methodology in its 2001 Form 10-K and reduced its subscriber base by approximately 138,000. The bulk of this reduction consisted of subscribers who had been subject to re-aging and the penny-credit policies employed as part of the remarketing program.

F. Public Reporting of Subscriber Numbers

Until April 2000, Pegasus released information concerning its subscriber base on a monthly basis and thereafter it reported such information on a quarterly basis. Pegasus published its subscriber data in the form of press releases and conference calls with stock analysts who were covering the company. The same subscriber data was contained in periodic filings made with the Commission on forms 10-K and 10-Q during the relevant time. Subscriber data was also referenced or incorporated by reference in registration statements filed with the Commission covering the offer and sale of securities.

Pegasus reported subscriber numbers in the periodic reports filed with the Commission between 1999 and December 2001. In each annual and quarterly filing on Forms 10-K and 10-Q during those reporting periods, Pegasus disclosed the number of subscribers and attributed increases in subscriber numbers to, among other things, "internal growth." Pegasus did not explain that a substantial portion of the subscriber base growth included a large number of subscribers whose status as subscribers was prolonged or re-activated by the re-aging of accounts and the issuance of one-cent credits as described above.

G. Pegasus Announces a Change in its Subscriber Counting Methodology

In its 2001 Form 10-K Pegasus announced that it was changing its method for publicly reporting its number of subscribers in order to improve its public reporting and internal analyses. The disclosures made in the 2001 Form 10-K by Pegasus regarding the subscriber counting policy change read as follows:

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5 The amounts shown here reflect the total no-core category, which for purposes of this analysis includes the 54-114 day re-aged accounts, penny-suspends, suspends turned active, and unknown origin subscriber groups.

> We have recently undertaken a review of the method by which we publicly report the number of our subscribers. Our publicly reported subscriber counts in the past have included a number of accounts whose service has been suspended for prolonged periods of time. Because we believe it would improve our public reporting and internal analyses, we are changing our method of reporting subscribers, beginning with the first quarter of 2002 so as to exclude these accounts. We estimate that if we had instituted this change at December 31, 2001, we would have reported approximately 1.4 million subscribers. This change would have had no effect on our 2001 consolidated financial statements if we had implemented it during 2001, and will have no effect on our future consolidated financial statements.

This announcement did not mention that in addition to suspended accounts, the written-off subscriber accounts also included 70,415 disconnected subscriber accounts which had penny-credits added. Although Pegasus did make a correction in April 2002 to its previously reported subscriber numbers for 2001, Pegasus did not revise its subscriber numbers reported for the periods between 1999 and the end of 2000.

H. The Decision to Report the Re-Activated Subscribers as Active Is Independent of the Business Decision to Re-Activate them

Certain officers at Pegasus approved of the re-aging and penny-suspend tactics as part of a remarketing effort designed to stem the rising trend in subscriber disconnections. Pegasus' stated reason for the reporting of re-aged subscribers and penny-credit subscribers was to allow for the possibility of winning back these customers. However, even if the re-aging and penny-credits were done for the business purpose of remarketing, certain Pegasus officers made a separate decision to include re-aged and penny-credit subscribers in their publicly reported subscriber counts. In other words, Pegasus could have backed these accounts out of its count of active subscribers before publicly reporting that metric.

I. Respondent's Conduct

As the Chief Financial Officer of Pegasus, Smith was directly responsible for reporting financial results in public filings made with the Commission. Beginning in August 2001, he took over responsibility for marketing, customer care and other operational functions at Pegasus Because re-aging and penny-credit policies were considered remarketing initiatives, Smith was involved in the cut-off extensions as well as the penny-suspend activations. Smith directed others at Pegasus to start or, in certain cases, to stop penny-suspend jobs.

Smith also participated in earnings calls and signed Pegasus's Forms 10-K and 10-Q and registration statements on Forms S-4 during 1999 through 2000. In doing so, he was negligent in discussing subscriber data with stock analysts and submitting subscriber information that was incorporated into filings made with the Commission. Specifically, he did not inform public investors about the existence of Pegasus' no-core subscribers and did not explain the impact of re-aging and penny-suspends subscribers on Pegasus' performance metrics such as churn and subscriber growth. As a result, Pegasus' stock analysts and shareholders were misled about the nature and number of the company's subscribers and its prospects for future growth.

In November 2001, Smith signed his last Pegasus public filing, in the form of the third quarter 2001 Form 10-Q. In February 2002, prior to Pegasus' release of 2001 earnings, Smith sent a letter to Pegasus' president and former general counsel detailing the discrepancy between reported subscriber numbers and active subscribers. He recommended that Pegasus' Board of Directors and Audit Committee be informed of the problem and suggested corrective action. Smith resigned from Pegasus in March 2002, prior to Pegasus' filing of the 2001 Form 10-K containing the subscriber disclosure.

V.

LEGAL DISCUSSION

Sections 17(a)(2) and 17(a)(3) of the Securities Act prohibit material misstatements and omissions in the offer or sale of a security. From 1999 to 2001, Pegasus issued stock in registered transactions on the U.S. securities markets. Because of the conduct described above, Pegasus violated these provisions. Negligent conduct can violate Sections 17(a)(2) and (3). See, e.g., *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453 (3d Cir. 1997).

Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder require issuers with securities registered under Section 12 of the Exchange Act to file annual and quarterly reports with the Commission. The obligation to file such reports embodies the requirement that they be true and correct. Rule 12b-20 further requires the inclusion of any additional material information that is necessary to make required statements, in light of the circumstances under which they were made, not misleading. Negligence is enough for a reporting violation. *S.E.C. v. Savoy Indus.*, 587 F.2d 1149, 1167 (D.C. Cir. 1978).

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 dispositions of the assets of the issuer." Section 13(b)(2)(B) 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 preparation of financial statements in conformity with generally accepted accounting principles and to maintain the accountability of assets. Because of the conduct described above, Pegasus and PSC violated these provisions.

By his conduct, described above, Smith was a cause of Pegasus' and PSC's violations of these provisions. Where the primary violations underlying a finding that a person is "a cause of" violations do not themselves require a finding of scienter, the standard of liability for being "a cause of" such violations is negligence. *See, KPMG LLP v. SEC,* 289 F.3d 109, 120 (DC Cir. 2002).

VI.

As a result of the conduct described above, Respondent caused Pegasus and PSC to violate Section 17(a)(2) and 17(a)(3) of the Securities Act, Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 13a-1, 13a-13 and 12b-20 thereunder.

Respondent's Cooperation During the Investigation

In accepting the offer of settlement, the Commission recognizes the cooperation of the Respondent during the course of the investigation.

VII.

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

Accordingly, it is hereby ORDERED that:

A. Respondent shall cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

B. Respondent shall 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

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2681 / December 4, 2007

Admin. Proc. File No. 3-8424

In the Matter of

CHARLES E. GAECKE

ORDER DENYING IN PART PETITION TO VACATE ADMINISTRATIVE BAR ORDER

Charles E. Gaecke, the former president of Crescent Capital, Inc., a former registered investment adviser, seeks to vacate a July 20, 1994 Commission bar order ("Bar Order") entered with his consent. The Division of Enforcement has opposed the grant of relief. For the reasons set forth below, we have determined to deny Gaecke's petition.

On July 20, 1994, we issued an order instituting and settling administrative proceedings against Gaecke. 1/ Without admitting or denying the matters set forth in the order, Gaecke consented to findings that he willfully aided and abetted Crescent Capital's diversion of $123,000 from a client's brokerage account; aided and abetted the firm's failure to provide clients with quarterly statements as to funds held in custody, to have client funds verified by an annual surprise audit, and to file annual audited balance sheets with the Commission; and filed Forms ADV that falsely stated that Crescent Capital did not have custody of client funds and omitted requisite audited balance sheets. Based on this conduct, we barred Gaecke from association with any broker, dealer, municipal securities dealer, investment company, or investment adviser. 2/

Since the entry of the Bar Order, Gaecke has published an investment newsletter, apparently in reliance on the publisher's exclusion from the definition of investment adviser in the Investment Advisers Act of 1940, as interpreted by the United States Supreme Court in

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1/ Charles E. Gaecke, Investment Advisers Act Rel. No. 1426 (July 20, 1994), 57 SEC Docket 567.

2/ In addition to the bar, we ordered Gaecke to cease and desist from violations of Sections 206(1), 206(2), 206(4), and 207 of the Investment Advisers Act of 1940 and Rule 206(4)-2 thereunder, and to disgorge $123,000, plus interest, with the disgorgement and interest waived based upon Gaecke's demonstrated inability to pay.

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Lowe v. SEC. 3/ In Lowe, the Supreme Court held that the activities of Lowe and three corporations in publishing an investment newsletter fell within the Advisers Act's exclusion from the definition of "investment adviser" for "the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation." 4/ The Supreme Court concluded that Lowe's publication of the newsletter did not cause him to be either an "investment adviser" or a person associated with an investment adviser.

From Gaecke's submission, it appears that Gaecke has become involved in a dispute with a competitor and two former employees who have started a firm that provides a newsletter similar to Gaecke's newsletter. According to Gaecke, the competitor has approached his clients and represented that Gaecke's newsletter is "illegal" because of the bar imposed on Gaecke. Gaecke asks that we "lift, rescind or modify" the Bar Order so that he can reassure clients of the legality of the newsletter under Lowe.

We have stated that administrative bars should "remain in place in the usual case and be removed only in compelling circumstances." 5/ This exercise of caution before modifying or lifting administrative bars "ensures that the Commission, in furtherance of the public interest and investor protection, retains its continuing control over such barred individuals' activities." 6/ In evaluating requests to lift or modify administrative bars, we consider whether such an action would be "consistent with the public interest and investor protection under all the facts and circumstances." 7/ Consideration of a range of factors guides the public interest and investor protection inquiry. Such factors include: the nature of the misconduct at issue in the underlying matter; the time that has passed since issuance of the administrative bar; the compliance record of the petitioner since issuance of the administrative bar; the age and securities industry

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3/ 472 U.S. 181 (1985).

4/ Id. at 204.

5/ Jesse M. Townsley, Securities Exchange Act Rel. No. 52161 (July 29, 2005), 85 SEC Docket 4341, 4343; Salim B. Lewis, Exchange Act Rel. No. 51817 (June 10, 2005), 85 SEC Docket 2472, 2481 (reiterating the Commission's position that bars will only be vacated "in compelling circumstances" and that they "will remain in place in the usual case").

6/ Townsley, 85 SEC Docket at 4343. As we noted in Edward I. Frankel, Exchange Act Rel. No. 49002 (Dec. 29, 2003), 81 SEC Docket 3778, 3785 n.20, "significant Commission interests would be impaired if a modification standard is adopted that too readily lifts consent orders against violators -- by settling with the Commission, violators receive significant benefits and the Commission, in turn, advances investors' interests through an order that permits continuing control over respondents.".

7/ Lewis, 85 SEC Docket at 2482.

experience of the petitioner, and the extent to which we have granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; the position and persuasiveness of the Division of Enforcement's response to the petition for relief; and whether there exists any other circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors. 8/

We have determined that there are no compelling circumstances here that warrant vacating the Bar Order. The nature of the misconduct at issue, particularly the misappropriation of advisory client funds, involved serious violations of the federal securities laws. Only thirteen years have passed since imposition of the bar. 9/ We generally first grant incremental relief in our cases vacating bars. 10/ However, Gaecke has not been employed or sought permission to associate with an entity regulated by the Commission since issuance of the bar. Gaecke is sixty years old and has been in the investment advisory business for thirty-five years. He has been publishing his investment newsletter for at least the past ten years. Gaecke has not identified any verifiable, unanticipated consequences of the bar. To the extent that he complains that current or future clients might refuse to do business with him because of the bar, we have stated that reputational harm is a foreseeable consequence of the imposition of sanctions 11/ and is not grounds in itself for vacating the bar. 12/

The principal reason for Gaecke's petition appears to be his desire to obtain a ruling from the Commission confirming the legality of his newsletter under Lowe. However, we do not

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8/ Townsley, 85 SEC Docket at 4343; Lewis, 85 SEC Docket at 2481.

9/ See, e.g., Lewis, 85 SEC Docket at 2482 (noting that "[t]he fourteen-year period since the bar order is not unduly lengthy"); Frankel, 81 SEC Docket at 3786 (denying petition to vacate bar after thirty-one years).

10/ Townsley, 85 SEC Docket at 4343; Lewis, 85 SEC Docket at 2483.

11/ See, e.g., Donald H. Parsons, Exchange Act Rel. No. 32948 (Sept. 23, 1993), 55 SEC Docket 112, 113 (stating that the use of a bar order to attack or impugn respondent's reputation was a "foreseeable consequence" at the time the order was entered).

12/ See Gerard A. Miller, Administrative Proceeding File No. 3-6569 (Sept. 21, 1992), at 9 (stating that "reputational harm is not sufficient in itself to justify vacating an order because such 'harm' is a natural and intended consequence of the imposition of sanctions"), petition denied, Miller v. SEC, 998 F.2d 62, 64 (2d Cir.) (observing that "it is not enough to merely allege 'continuing embarrassment . . . in business relationships' as the basis for dissolving or modifying a decree") (citation omitted), cert. denied, 510 U.S. 1024 (1993).

believe that this entitles Gaecke to any relief. In Anthony J. Benincasa, 13/ the respondent there filed a motion seeking clarification of a bar order that prohibited him from, inter alia, associating with an investment company. The respondent argued that it was unclear whether the bar order applied to his association with companies excluded from the definition of "investment company" in the Investment Company Act of 1940. In denying the motion to clarify, we stated:

> The Commission issued the Order pursuant to its authority under the Company Act, and therefore the definition of "investment company" in the Company Act applies when that term is used in the Order. Accordingly, the bar from association with an investment company does not extend to entities that are excluded from the definition of "investment company" in the Company Act. We agree with the Division [of Enforcement] that there is no reason to clarify the Commission's Order with respect to the bar prohibiting [the respondent] from associating with an investment company. 14/

In this case, we issued the Bar Order pursuant to our authority under the Advisers Act, and the definition of "investment adviser" in the Advisers Act applies when that term is used in the Bar Order. Accordingly, as in Benincasa, the bar from association with an investment adviser does not extend to activities excluded from the definition of "investment adviser" in the Advisers Act. 15/ We do not express any opinion with regard to whether Gaecke's activities are subject to the exclusion.

Gaecke states that he may seek to associate with unidentified "investment advisors and broker-dealers" at some point in the future. This statement does not constitute a sufficient basis to modify his bar. If Gaecke subsequently wishes to request modification of his bar in order to associate with an investment adviser, we would expect his application to the Commission to identify the adviser and to provide information about the proposed association, including, among other things, the terms and conditions of his employment, the supervision to which he would be subject, and the qualifications, experience, and disciplinary record of the proposed supervisor. If he wishes to associate with a registered entity that is not a member of a self-regulatory organization, he must apply to us for consent to associate in accordance with the procedures set out in our Rule of Practice 193. 16/ This application "must show that the proposed association

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13/ 54 S.E.C. 1222 (2001).

14/ Id. at 1223.

15/ Id.

16/ 17 C.F.R. § 201.193

would be consistent with the public interest." 17/ If Gaecke wishes to seek to associate with a broker-dealer notwithstanding his bar, he must apply to the appropriate self-regulatory organization for that broker-dealer. In any event, while the bar remains in place, we have the flexibility to consider any proposed associations and to evaluate the nature and extent of the supervision to be exercised over Gaecke. Given the serious nature of Gaecke's past misconduct, we believe that the public interest and the protection of investors require continuation of this control.

For the reasons stated above, we find that the public interest and investor protection will not be served if Gaecke is permitted to function in the securities industry without the safeguards provided by the Bar Order. Accordingly, we decline to vacate the bar against Gaecke from association with any investment adviser. We have determined, however, that it is appropriate to modify the bar by vacating the portion of the order prohibiting Gaecke from association with a broker, dealer, investment company, or municipal securities dealer. 18/

Accordingly, IT IS ORDERED that the petition of Charles E. Gaecke to vacate the bar order entered against him on July 20, 1994, as it applies to the bar from association with any investment adviser be, and it hereby is, DENIED; and it is further

ORDERED that the 1994 order be, and it hereby is, VACATED insofar as it bars Gaecke from association with any broker, dealer, investment company, or municipal securities dealer.

By the Commission.

Nancy M. Morris
Secretary

Florence E Harmon

By: Florence E. Harmon
Deputy Secretary

17/ Id. (Preliminary Note).

18/ See Townsley, 85 SEC Docket at 4344; Lewis, 85 SEC Docket at 2484; Peter F. Comas, Exchange Act Rel. No. 49894 (June 18, 2004), 83 SEC Docket 251, 253.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56912 / December 5, 2007

Admin. Proc. File No. 3-12658

In the Matter of Laminaire Corp. (n/k/a Cavico Corp.), TAM Restaurants, Inc. (n/k/a Aerofoam Metals, Inc.), and Upside Development, Inc. (n/k/a Amorocorp)	ORDER GRANTING EXTENSION

The Chief Administrative Law Judge, who is presiding over this proceeding, has moved, pursuant to Commission Rule of Practice 360(a)(3), 1/ for an extension of time to issue her initial decision. For the reasons set forth below, we have determined to grant the law judge's motion.

On June 13, 2007, we instituted administrative proceedings against three Delaware corporations, including "TAM Restaurants, Inc. (n/k/a Aerofoam Metals, Inc.)" ("AMI"), pursuant to Section 12(j) of the Securities Exchange Act of 1934 2/ to determine whether to revoke or suspend the registration of these corporations. The order instituting proceedings ("OIP") alleged that the three issuers were delinquent in their required Exchange Act periodic filings with the Commission. 3/ The OIP directed the presiding law judge to hold a public hearing to take evidence regarding the allegations and the appropriate sanctions. The OIP further

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1/ 17 C.F.R. § 201.360(a)(3).

2/ 15 U.S.C. § 78*l*(g).

3/ Laminaire Corp. (n/k/a Cavico Corp.) and Upside Development, Inc. (n/k/a Amorocorp) each consented to the entry of our orders revoking the registration of each class of their securities registered pursuant to Exchange Act Section 12. See Order Making Findings and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 as to Laminaire Corp. (n/k/a Cavico Corp.), Securities Exchange Act Rel. No. 55968 (June 27, 2007), 90 SEC Docket 2881; Order Making Findings and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 as to Upside Development, Inc. (n/k/a Amorocorp), Exchange Act Rel. No. 56019 (July 6, 2007), 91 SEC Docket 31.

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specified that, pursuant to Commission Rule of Practice 360(a)(2), 4/ the presiding law judge should issue an initial decision in this proceeding no later than 120 days from the date of service of the OIP.

On August 3, 2007, the Division of Enforcement ("Division") moved pursuant to Rule of Practice 200(d) 5/ to amend the OIP to strike AMI as a party and leave "TAM Restaurants, Inc." ("TAMRI") as the remaining party on the basis that AMI is not the successor to TAMRI. It was unclear to us after reviewing the pleadings and exhibits furnished by the parties what AMI's relationship is to TAMRI. Accordingly, on October 22, 2007, we denied the Division's motion to amend the OIP and directed that the record with respect to AMI's relationship to TAMRI be further developed. 6/ On October 25, 2007, the law judge set a hearing date of November 19, 2007 to address our directive to further develop the facts surrounding AMI's relationship to TAMRI. 7/

Also on October 25, 2007, the law judge filed a motion pursuant to Commission Rule of Practice 360(a)(3) 8/ requesting an extension of time of 120 days from our October 22, 2007 order to issue her initial decision.

II.

We adopted Rules of Practice 360(a)(2) and 360(a)(3) as part of an effort to enhance the timely and efficient adjudication and disposition of Commission administrative proceedings. 9/ At that time, we determined that the adoption of mandatory deadlines for completion of

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4/ 17 C.F.R. § 201.360(a)(2).

5/ 17 C.F.R. § 201.200(d).

6/ See Order Denying Motion to Amend Order Instituting Proceedings, Exchange Act Rel. No. 56685 (Oct. 22, 2007), _ SEC Docket _.

7/ We subsequently denied the Division's motion for reconsideration on November 15, 2007. See Order Denying Motion for Reconsideration, Exchange Act Rel. No. 56789 (Nov. 15, 2007), _ SEC Docket _.

8/ 17 C.F.R. § 201.360(a)(3).

9/ See Adopting Release, Securities Act Rel. No. 8240 (June 11, 2003), 80 SEC Docket 1463.

administrative hearings would enhance timely completion of the adjudication process. In adopting those guidelines, however, we recognized that a "'one size fits all' approach to timely disposition is not feasible." 10/ We therefore established three different deadlines – 120, 210, or 300 days – depending on "the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors." 11/

We further provided for the granting of extensions to those deadlines under certain circumstances. If, during the proceeding, the presiding law judge decides that the proceeding cannot be concluded in the time specified in the OIP, Rule 360(a)(3) provides that the law judge may request an extension of the stated deadline. To obtain an extension, the law judge should consult with the Chief Administrative Law Judge. 12/ "Following such consultation, the Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension." 13/ The motion should "explain [] why circumstances require an extension and specify [] the length of the extension." 14/ While we intend to grant extensions sparingly, we may authorize an extension on the basis of the Chief Administrative Law Judge's motion, if we determine that "additional time is necessary or appropriate in the public interest." 15/ We note, however, that a heavy docket alone will not ordinarily be cause for an extension.

The Chief Administrative Law Judge supports her extension request by stating that the initial decision cannot be issued within the specified time because our October 22, 2007 order denying the Division's motion to amend the OIP requires findings about the relationship between AMI and TAMRI. The amount of time necessary for resolution of this issue is difficult to estimate and is in addition to the time required to resolve the determination of whether to revoke or suspend the registration of the respondent's securities. In light of the unanticipated complexity of the proceeding and the reasonableness of the requested extension, we have

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10/ Id.

11/ 17 C.F.R. § 201.360(a)(2).

12/ The law judge presiding in this proceeding also serves as the Chief Administrative Law Judge.

13/ 17 C.F.R. § 201.360(a)(3).

14/ See Adopting Release at 1463.

15/ 17 C.F.R. § 201.360(a)(3).

determined to grant the motion. Under the circumstances, we believe that it is appropriate to extend the deadline for issuance of the initial decision until 120 days from the date on which we issue the order herein.

Accordingly, IT IS ORDERED that the deadline for issuance of the initial decision in this matter be, and it hereby is, extended until April 3, 2008.

By the Commission.

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

December 5, 2007

In the Matter of Kimber-X Resources Corp. **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Kimber-X Resources Corp., a Delaware company with purported operations in Saskatchewan, Canada. Questions have arisen regarding the adequacy and accuracy of company press releases and other publicly-disseminated information concerning the company's current operations, issuance of securities, and transactions in company stock by company insiders.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Kimber-X Resources Corp.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Kimber-X Resources Corp. is suspended for the period from 9:30 a.m. EST, December 5, 2007, through 11:59 p.m. EST, on December 18, 2007.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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F-A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 56902 / December 5, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12614

In the Matter of **PARK FINANCIAL GROUP, INC., and GORDON C. CANTLEY,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING A CEASE-AND-DESIST ORDER AND REMEDIAL SANCTIONS PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

On April 11, 2007, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Park Financial Group, Inc. ("Park") and Gordon C. Cantley ("Cantley") (collectively "Respondents").

II.

Respondents have submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, Respondents consent to the entry of this Order Making Findings and Imposing a Cease-and-Desist Order and Remedial Sanctions Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

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A. Respondents

1. Park, a Winter Park, Florida broker-dealer, has been registered with the Commission since 1992 and is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"), formerly the NASD.

2. Cantley, 44, resides in Winter Park, Florida. Cantley was president and owner of Park during the relevant time period as described below. He was also Park's financial operations principal and oversaw the firm's trading department and the compliance officer responsible for filing Suspicious Activity Reports.

B. Other Relevant Entities and Individual

3. Spear & Jackson, Inc. is a Nevada corporation incorporated in 1998. It is the surviving entity of a September 2002 reverse merger between Spear & Jackson and Megapro Tools, Inc. ("Megapro"), a Canadian-based tool company. Spear & Jackson is in the business of manufacturing and distributing a variety of garden and household tools. Spear & Jackson's common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act. From February 2002 to July 2003 ("relevant time period"), Spear & Jackson was quoted on the OTC Bulletin Board, and its principal offices were located in Boca Raton, Florida.

4. Dennis P. Crowley, 42, resides in Highland Beach, Florida. During the relevant time period, Crowley was Spear & Jackson's CEO, chairman of its board of directors, and owner of more than 50% of its outstanding common stock. Crowley, a former registered representative, was permanently barred from association with any NASD member in 1991.

5. International Media Solutions, LLC ("IMS"), now defunct, was formerly a privately held Florida limited liability company with its headquarters in Longwood, Florida. IMS was an investor relations firm and promoted Spear & Jackson securities during the relevant time period.

6. Spear & Jackson, Crowley, and IMS were all previously enjoined by consent from future violations of the federal securities laws by the United States District Court for the Southern District of Florida stemming from their roles in Crowley's fraud.

C. Background

7. Beginning about January of 2002, Crowley engaged in a pump-and-dump scheme involving the securities of Spear & Jackson. Initially, Crowley secretly acquired approximately 800,000 shares of Megapro securities through the filing of a false Form S-8 and other fraudulent transfers. In September 2002, Crowley orchestrated and self-funded Megapro's acquisition of Spear & Jackson through a reverse merger in which Spear & Jackson emerged as the surviving entity. After the merger, Crowley became Spear & Jackson's president and chief executive officer and his secretly acquired Megapro shares became Spear & Jackson shares.

8. In February 2002, Crowley retained IMS to promote the stock of first Megapro and later Spear & Jackson to brokers and traders through the dissemination of false and misleading information intended to inflate artificially share prices. Crowley compensated IMS with large blocks of Spear & Jackson stock which he transferred from accounts at Park he controlled to an IMS brokerage account at Park. This promotion continued through July 2003. As discussed in more detail below, Crowley sold large amounts of his fraudulently obtained stock, reaping approximately $3 million in personal profits.

D. The Conduct of Park and Cantley

9. Around the same time Crowley began acquiring Megapro shares, three companies located in the British Virgin Islands ("BVI Companies") opened brokerage accounts at Park. Although individuals other than Crowley opened the accounts and had trading authority, the BVI Companies were, in fact, nominees clandestinely controlled by Crowley.

10. The BVI Companies' accounts were unusual for Park and Cantley in that Park rarely serviced foreign-based accounts. In addition, the accounts were opened over the telephone and by mail, and neither Cantley nor anyone else at Park met the directors who allegedly controlled the accounts.

11. Also around this time, Crowley opened several corporate brokerage accounts at Park with Cantley. Previously, IMS had opened an account at Park, and IMS referred the BVI Companies to Park. At all relevant times, Cantley was the registered representative on the accounts of the BVI Companies, Crowley, and IMS.

12. In early 2002, Park began making a market in Megapro securities. Cantley oversaw Park's market making in Megapro, and subsequently Spear & Jackson, during the relevant time period. Cantley conducted and updated due diligence on Megapro and Spear & Jackson, including collecting their filings with the Commission and staying up to date with earnings releases and management issues. During the time Park acted as a market maker for Megapro and Spear & Jackson, the share price increased from $2 to $16 on volume often exceeding 100,000 shares per day.

13. During the relevant time period, the BVI Companies engaged in more than 200 transactions in Spear & Jackson stock in their accounts at Park, for an aggregate total sale of almost one million shares. Spear & Jackson was the only stock in which the BVI Companies traded during the relevant time period.

14. During this same time, the BVI Companies transferred shares of Spear & Jackson to IMS' account. IMS was promoting Spear & Jackson stock and was typically compensated for its services with stock.

15. During the relevant time period, Crowley called Cantley on a few occasions and gave him sell orders for Spear & Jackson stock in at least one of the BVI Companies' accounts, which Cantley filled.

16. Cantley and Park executed Crowley's trade orders despite knowing: Crowley was not an authorized signatory on the BVI Companies' accounts; Park's written supervisory procedures required written authorization from any customer who grants third-party trading authority over the account; Crowley was CEO of Spear & Jackson; and Crowley ordered Spear & Jackson trades only in the BVI Companies' accounts, and not for any of the corporate accounts for which he was the listed owner.

17. While neither Park nor Cantley are alleged to have knowingly participated in Crowley's fraudulent scheme, Park and Cantley continued to effect transactions in the securities of Spear & Jackson for the BVI Companies' accounts during the relevant time period despite the obvious risks set forth above and the suspicious nature of the transactions by Crowley in the BVI Companies' accounts. As a result of these transactions, Park received $29,775.24 in the form of mark-ups and Cantley received $8,263.70 in commissions.

E. Failure to File Suspicious Activity Reports (SARs)

18. In April 2002, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The Patriot Act amended provisions of the Currency and Foreign Transactions Reporting Act of 1970 (commonly known as the "Bank Secrecy Act") and substantially expanded a broker-dealer's obligations to detect and prevent money laundering. The regulations implementing the Bank Secrecy Act mandate that, effective December 31, 2002, broker-dealers report suspicious transactions by filing a Suspicious Activity Report ("SAR") with the Financial Crimes Enforcement Network ("FinCEN") to report a transaction (or a pattern of transactions of which the transaction is a part) involving or aggregating to at least $5,000 that it "knows, suspects, or has reason to suspect:" (1) involves funds derived from illegal activity or is conducted to disguise funds derived from illegal activities; (2) is designed to evade any requirements of the Bank Secrecy Act; (3) has no business or apparent lawful purpose and the broker-dealer knows of no reasonable explanation for the transaction after examining the available facts; or (4) involves use of the broker-dealer to facilitate criminal activity. 31 C.F.R. § 103.19(a)(2).

19. The failure to file a SAR as required by 31 C.F.R. § 103.19 is a violation of Section 17(a) of the Exchange Act and Rule 17a-8 thereunder.

20. From December 31, 2002 through July 2003, the three BVI Companies' brokerage accounts made approximately 98 transactions in Spear & Jackson securities that each totaled more than $5,000.

21. The information available to Park and Cantley, in particular the red flags described in Paragraphs 9-17 above, should have suggested that the transactions in Spear & Jackson stock occurring through the BVI Companies' brokerage accounts involved the type of conduct that required the firm to generate and file SARs. However, from December 31, 2002 through July 2003, Park and Cantley failed to file SARs with FinCEN for the relevant transactions.

F. Violations

22. Based on the conduct described above, Cantley and Park willfully aided and abetted and caused Crowley's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Additionally, Park violated, and Cantley aided and abetted and caused Park's violations of, Section 17(a) of the Exchange Act and Rule 17a-8 thereunder.

IV.

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

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

A. Cantley and Park cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;

B. Park cease and desist from committing or causing and Cantley cease and desist from causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-8 thereunder;

C. Cantley is hereby barred from association with any broker or dealer with the right to reapply for association after two (2) years to the appropriate self-regulatory organization, or if there is none, to the Commission. Any reapplication for association by Cantley will be subject to the applicable law 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 Cantley, 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. Park is hereby censured;

E. Cantley shall pay, within 10 days of the entry of this Order, disgorgement of $8,263.70 and prejudgment interest of $166.01, for a total amount of $8,429.71, 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 Cantley 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 Robert K. Levenson, Regional Trial Counsel, Division of Enforcement, Securities and Exchange Commission, Miami Regional Office, 801 Brickell Avenue, Suite 1800, Miami, Florida, 33131;

F. Park shall pay, within 10 days of the entry of this Order, disgorgement of $29,775.24 and prejudgment interest of $598.15, for a total amount of $30,373.39, 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 Park 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 Robert K. Levenson, Regional Trial Counsel, Division of Enforcement, Securities and Exchange Commission, Miami Regional Office, 801 Brickell Avenue, Suite 1800, Miami, Florida, 33131;

G. Cantley shall pay, within 10 days of the entry of this Order, a civil money penalty of $25,000 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 Cantley 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 Robert K. Levenson, Regional Trial Counsel, Division of Enforcement, Securities and Exchange Commission, Miami Regional Office, 801 Brickell Avenue, Suite 1800, Miami, Florida, 33131; and

H. Park shall pay, within 10 days of the entry of this Order, a civil money penalty of $50,000 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 Park 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 Robert K. Levenson, Regional Trial Counsel, Division of Enforcement, Securities and Exchange Commission, Miami Regional Office, 801 Brickell Avenue, Suite 1800, Miami, Florida, 33131.

By the Commission.

Nancy M. Morris
Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

December 6, 2007

In the Matter of **ROANOKE TECHNOLOGY, CORP.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission ("Commission") that there is a lack of current and accurate information concerning the securities of Roanoke Technology, Corp. ("Roanoke"), because it is delinquent in its periodic filing obligations under Section 13(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 13a-1 and 13a-13 thereunder, having not filed a periodic report after its Form 10-Q for the quarter ended July 31, 2005.

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 Exchange Act, that trading in the above listed company is suspended for the period from 9:30 a.m. EST on Thursday, December 6, 2007, through 11:59 p.m. EST on Wednesday, December 19, 2007.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 239

[Release No. 33-8869; File No. S7-11-07]

RIN 3235-AH13

REVISIONS TO RULES 144 AND 145

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; request for comment on Paperwork Reduction Act burden estimates.

SUMMARY: Rule 144 under the Securities Act of 1933 creates a safe harbor for the sale of securities under the exemption set forth in Section 4(1) of the Securities Act. We are shortening the holding period requirement under Rule 144 for "restricted securities" of issuers that are subject to the reporting requirements of the Securities Exchange Act of 1934 to six months. Restricted securities of issuers that are not subject to the Exchange Act reporting requirements will continue to be subject to a one-year holding period prior to any public resale. The amendments also substantially reduce the restrictions applicable to the resale of securities by non-affiliates. In addition, the amendments simplify the Preliminary Note to Rule 144, amend the manner of sale requirements and eliminate them with respect to debt securities, amend the volume limitations for debt securities, increase the Form 144 filing thresholds, and codify several staff interpretive positions that relate to Rule 144. Finally, we are eliminating the presumptive underwriter provision in Securities Act Rule 145, except for transactions involving a shell company, and revising the resale requirements in Rule 145(d). We believe that the amendments

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will increase the liquidity of privately sold securities and decrease the cost of capital for all issuers without compromising investor protection.

DATES: Effective Date: [Insert date 60 days after publication in the Federal Register.] The revised holding periods and other amendments that we are adopting are applicable to securities acquired before or after the effective date of the changes announced today.

Comment Date: Comments regarding the collection of information requirements within the meaning of the Paperwork Reduction Act of 1995 should be received on or before [insert date 30 days after the date of 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/final.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File No. S7-11-07 on the subject line; or
- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-11-07. 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. 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: Katherine Hsu or Raymond A. Be, Special Counsels in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to Rule 144,[1] Rule 145,[2] Rule 190,[3] Rule 701,[4] Rule 903,[5] and Form 144[6] under the Securities Act of 1933.[7]

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1 17 CFR 230.144.

2 17 CFR 230.145.

3 17 CFR 230.190.

4 17 CFR 230.701.

5 17 CFR 230.903.

6 17 CFR 239.144.

7 15 U.S.C. 77a et seq.

Table of Contents

I. Background

The Securities Act of 1933 ("Securities Act") requires registration of all offers and sales of securities in interstate commerce or by use of the U.S. mails, unless an exemption from the registration requirement is available.[8] Section 4(1) of the Securities Act provides such an exemption for transactions by any person other than an issuer, underwriter or dealer.[9]

The definition of the term "underwriter" is key to the operation of the Section 4(1) exemption. Section 2(a)(11) of the Securities Act defines an underwriter as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking."[10] The Securities Act does not, however, provide specific criteria for determining when a person purchases securities "with a view to . . . the distribution" of those securities. In 1972, the Commission adopted Rule 144 to provide a safe harbor from this definition of "underwriter" to assist security holders in determining whether the Section 4(1) exemption is available for their resale of securities.[11]

Rule 144 regulates the resale of two categories of securities – restricted securities and control securities. Restricted securities are securities acquired pursuant to one of the

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8 See 15 U.S.C. 77e.

9 15 U.S.C. 77d(1).

10 15 U.S.C. 77b(a)(11). Section 2(a)(11) states that the term ''issuer'' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer. Therefore, any person who purchased securities from an affiliate of an issuer is an underwriter under Section 2(a)(11) if that person purchased with a view to the distribution of the securities.

11 Release No. 33-5223 (Jan. 11, 1972) [37 FR 591].

transactions listed in Rule 144(a)(3).[12] Although it is not a term defined in Rule 144, "control securities" is used commonly to refer to securities held by an affiliate of the issuer,[13] regardless of how the affiliate acquired the securities.[14] Therefore, if an affiliate acquires securities in a transaction that is listed in Rule 144(a)(3), those securities are both restricted securities and control securities. A person selling restricted securities, or a person selling restricted or other securities on behalf of the account of an affiliate, who satisfies all of Rule 144's applicable conditions in connection with the transaction, is deemed not to be an "underwriter," as defined in Section 2(a)(11) of the Securities Act, and therefore may rely on the Section 4(1) exemption for the resale of the securities.

Since its adoption, we have reviewed and revised Rule 144 several times. We last made major changes in 1997 ("1997 amendments").[15] At that time, we shortened the required holding periods for restricted securities.[16] Before the 1997 amendments, security holders could resell restricted securities under Rule 144, subject to limitation, after two years, and persons who were not affiliates and had not been affiliates during the prior three months, could resell restricted securities without limitation after three years. The 1997 amendments changed these two-year and three-year periods to one-year and two-year periods, respectively.

On the same day that we adopted those changes, we also proposed and solicited comment on several possible additional changes to Rule 144, Rule 145 and Form 144,

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12 17 CFR 230.144(a)(3).

13 An affiliate of the issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer. See 17 CFR 230.144(a)(1).

14 See, e.g., Release No. 33-7391 (Feb. 20, 1997) [62 FR 9246].

15 See Release No. 33-7390 (Feb. 20, 1997) [62 FR 9242] ("the 1997 Adopting Release").

16 We shortened the holding period requirements in paragraphs (d) and (k) of Rule 144.

including reducing the holding period further ("1997 Proposing Release" and "1997 proposals").[17] We received 38 comment letters on those proposed changes. While some commenters supported further shortening the holding periods, others suggested that we monitor the results of the 1997 amendments before making further changes. We did not take further action to adopt the 1997 proposals.

Rule 144 states that a selling security holder shall be deemed not to be engaged in a distribution of securities, and therefore not an underwriter, with respect to such securities, thus making available the Section 4(1) exemption from registration, if the resale satisfies specified conditions. The conditions include the following:

- There must be adequate current public information available about the issuer;[18]
- If the securities being sold are restricted securities, the security holder must have held the security for a specified holding period;[19]
- The resale must be within specified sales volume limitations;[20]
- The resale must comply with the manner of sale requirements;[21] and

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17 See the 1997 Proposing Release. In the 1997 Proposing Release, we proposed to (1) revise the Preliminary Note to Rule 144 to restate the intent and effect of the rule, (2) add a bright-line test to the Rule 144 definition of "affiliate," (3) eliminate the Rule 144 manner of sale requirements, (4) increase the Form 144 filing thresholds, (5) include in the definition of "restricted securities" securities issued pursuant to the Securities Act Section 4(6) exemption, (6) clarify the holding period determination for securities acquired in certain exchanges with the issuer and in holding company formations, (7) streamline and simplify several Rule 144 provisions, and (8) eliminate the presumptive underwriter provisions of Rule 145. We also solicited comment on (1) further revisions to the Rule 144 holding periods, (2) elimination of the trading volume tests to determine the amount of securities that can be resold under Rule 144, and (3) several possible regulatory approaches with respect to certain hedging activities.

18 17 CFR 230.144(c).

19 17 CFR 230.144(d).

20 17 CFR 230.144(e).

21 17 CFR 230.144(f) and (g).

- The selling security holder must file Form 144 if the amount of securities being sold exceeds specified thresholds.[22]

Rule 144, as it existed before today's amendments, permitted a non-affiliate to publicly resell restricted securities without being subject to the above limitations if the securities had been held for two years or more, provided that the security holder was not, and, for the three months prior to the sale, had not been, an affiliate of the issuer.[23]

On July 5, 2007, we again proposed to amend several aspects of Rule 144 and Rule 145, including by further shortening the holding periods (the "2007 Proposing Release").[24] We proposed to shorten the holding period requirement in Rule 144(d) for restricted securities of issuers that are subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act")[25] to six months. Restricted securities of issuers that are not subject to Exchange Act reporting requirements would continue to be subject to a one-year holding period under Rule 144(d). We also proposed to relieve non-affiliates of reporting issuers from having to comply with all conditions in Rule 144, except the current public information requirement, after a six-month holding period. Non-affiliates of non-reporting issuers would be allowed to resell their securities freely after a one-year holding period. In addition, we proposed to:

- Simplify the Preliminary Note to Rule 144 and text of Rule 144;

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22 17 CFR 230.144(h).

23 This provision was previously located in Rule 144(k).

24 Release No. 33-8813 (June 22, 2007) [72 FR 36822] (Jul. 5, 2007).

25 15 U.S.C. 78a et seq.

- Toll the holding period during the time that security holders engage in certain hedging transactions;
- Eliminate the "manner of sale" requirements with respect to the resale of debt securities;
- Increase the thresholds triggering the requirement to file Form 144; and
- Codify several staff positions relating to Rule 144.

We also solicited comment on amending the Form 144 filing deadline to coincide with the deadline for filing a Form 4[26] under Section 16[27] of the Exchange Act and permitting persons who are subject to Section 16 to meet their Form 144 filing requirement by filing a Form 4.[28] Finally, we proposed to eliminate the presumptive underwriter provision in Securities Act Rule 145, except for transactions involving a shell company, and to harmonize the resale provisions in Rule 145 with the Rule 144 provisions applicable to resales of securities of shell companies.

We received 32 comment letters from 30 commenters on the proposals in the 2007 Proposing Release.[29] A majority of the commenters expressed support for the proposals in general.[30] Several of these commenters expressed support for the proposed

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26 17 CFR 249.104.

27 15 U.S.C. 78p.

28 Section 16 applies to every person who is the beneficial owner of more than 10% of any class of equity securities registered under Section 12 of the Exchange Act, and each officer and director (collectively, "reporting persons" or "insiders") of the issuer of such security. Section 16(a) of the Exchange Act generally requires reporting persons to report changes in their beneficial ownership of all equity securities of the issuer on Form 4 before the end of the second business day following the day on which the transaction that caused the change in beneficial ownership was executed.

29 The comment letters on the 2007 Proposing Release are available on the Commission's public Web site at http://www.sec.gov/comments/s7-11-07/s71107.shtml.

30 See, e.g., comment letters on the 2007 Proposing Release from Jesse Brill (dated Aug. 1, 2007)("Brill 1"); Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb"); Feldman Weinstein and Smith LLP ("Feldman"); Fried, Frank, Harris, Shriver, and Jacobsen LLP ("Fried Frank"); Barry Gleicher ("Gleicher"); Krieger & Prager, LLP ("Krieger"); U.S. Securities Lawyers in

amendments to shorten the holding period requirement in Rule 144 for both affiliates and non-affiliates of Exchange Act reporting issuers.[31] Two commenters opposed shortening the holding period, as proposed.[32]

Some commenters expressed opposition to the proposed reintroduction of a provision that would toll, or suspend, for up to six months, the holding period during any period that a security holder engages in hedging activities with respect to any equity securities of the same class as the restricted securities or any securities convertible into that class (or, in the case of nonconvertible debt, with respect to any nonconvertible debt securities).[33] The commenters thought that the tolling provision could have a negative effect on capital raising transactions. These commenters provided several recommendations on how we should modify the tolling provision, if we decide to adopt it. We received general support for the other aspects of the proposed amendments, including the proposals relating to Form 144, the elimination of the manner of sale requirements for debt securities and the codification of several staff interpretations.

London ("London Forum"); Parsons/Burnett LLP ("Parsons"); Pink Sheets, LLC ("Pink Sheets"); Richardson Patel LLP ("Richardson Patel"); Roth Capital Partners ("Roth"); Society of Corporate Secretaries & Governance Professionals ("SCSGP"); Sichenzia Ross Friedman Ference LLP ("Sichenzia"); Sullivan & Cromwell LLP ("Sullivan"); Peter J. Weisman ("Weisman"); and Williams Securities Law ("Williams"); and a joint letter from the Securities Industry and Financial Markets Association, International Swaps and Derivatives Association, Inc. and Management Funds Association ("Financial Associations").

31 See comment letters on the 2007 Proposing Release from the Committee on Federal Regulation of Securities of the American Bar Association ("ABA"); Feldman; Financial Associations; Fried Frank; London Forum; Richardson Patel; Roth; Sichenzia; SCSGP; Weisman; and Williams.

32 See comment letters on the 2007 Proposing Release from the North American Securities Administrators Association, Inc. ("NASAA") and Marc I. Steinberg ("Steinberg").

33 See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Feldman; Financial Associations; Richardson Patel; Sichenzia; and Weisman.

II. Discussion of Final Amendments

A. Simplification of the Preliminary Note and Text of Rule 144

In the 2007 Proposing Release, we noted that the current Preliminary Note is complex and may be confusing to some security holders. We proposed amendments to simplify and clarify the Preliminary Note to Rule 144 and to incorporate plain English principles. The proposed amendments to the Preliminary Note were not intended to alter the substantive operation of the rule. In addition, we proposed changes throughout the rule to make the rule less complex and easier to read.

We received a few comments on the proposed changes to simplify Rule 144 and the Preliminary Note. One commenter believed that the Preliminary Note to Rule 144 is no longer necessary, because the purpose and meaning of the rule are well-understood.[34] Some commenters recommended that we further explain how Rule 144 can be used for the resale of control securities.[35]

We are adopting the amendments to the Preliminary Note with some modification from the proposed version. The revised Preliminary Note retains an explanation of the relationship among the exemption in Section 4(1) of the Securities Act, the Section 2(a)(11) definition of "underwriter" and the Rule 144 safe harbor. Consistent with the proposal, the revised Preliminary Note also clarifies that any person who sells restricted securities, and any person who sells restricted securities or other securities on behalf of an affiliate, shall be deemed not to be engaged in a distribution of such securities and therefore shall be deemed not to be an underwriter with respect to such

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34 See comment letter on the 2007 Proposing Release from ABA.

35 See comment letters on the 2007 Proposing Release from ABA; Bulldog Investors; and Sutherland Asbill & Brennan LLP ("Sutherland").

securities if the sale in question is made in accordance with all the applicable provisions of the rule. The revised Preliminary Note further states that, although Rule 144 provides a safe harbor for establishing the availability of the Section 4(1) exemption, it is not the exclusive means for reselling restricted and control securities. Therefore, Rule 144 does not eliminate or otherwise affect the availability of any other exemption for resales.[36] Consistent with a statement that was included in the original Rule 144 adopting release,[37] we are adding a statement to the Preliminary Note that the Rule 144 safe harbor is not available with respect to any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act.[38] We also are adopting plain English changes throughout the rule text substantially as proposed.

B. Amendments to Holding Periods for Restricted Securities

1. Six-Month Rule 144(d) Holding Period Requirement for Exchange Act Reporting Companies

As stated above, in 1997, we reduced the Rule 144 holding periods for restricted securities for both affiliates and non-affiliates.[39] Before the 1997 amendments, security holders could sell limited amounts of restricted securities after holding those securities

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[36] We are moving the statements indicating that Rule 144 is a non-exclusive safe harbor from paragraph (j) of the rule, as it existed prior to the amendments, to the Preliminary Note.

[37] Release No. 33-5223. In the original release adopting Rule 144, we stated:

> In view of the objectives and policies underlying the Act, the rule shall not be available to any individual or entity with respect to any transaction which, although in technical compliance with the provisions of the rule, is part of a plan by such individual or entity to distribute or redistribute securities to the public. In such case, registration is required.

[38] Similar language can also be found in other rules such as in the Preliminary Note to Securities Act Rule 144A [17 CFR 230.144A].

[39] See the 1997 Adopting Release.

for two years if they satisfied all other conditions imposed by Rule 144.[40] Under Rule 144(k), non-affiliates could sell restricted securities without being subject to any of the conditions in Rule 144 after holding their securities for three years. The 1997 amendments to Rule 144 reduced the two-year Rule 144(d) holding period to one year and amended the three-year Rule 144(k) holding period to two years.

In the 1997 Proposing Release, we solicited comment on whether the Rule 144(d) holding period should be further reduced for both affiliates and non-affiliates, and whether restrictions applicable to sales by non-affiliates also should be reduced. We received numerous comments on this issue. Twelve commenters recommended that we further reduce the holding period to six months.[41] Two other commenters thought that we should maintain the holding periods that we had just recently adopted.[42] Eight commenters recommended that we gain more experience with the new holding periods before proposing further amendments to those holding periods.[43]

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40 These other conditions included the availability of current public information, the volume of sale limitations, the manner of sale requirements, and the filing of Form 144. See 17 CFR 230.144(c), (e), (f) and (h).

41 See comment letters on the 1997 Proposing Release from American Society of Corporate Secretaries ("ASCS"); Association for Investment Management & Research ("AIMR"); Association of the City Bar of New York ("NY City Bar"); Baltimore Gas & Electric ("BG&E"); Investment Company Institute ("ICI"); Charles Lilienthal ("Lilienthal"); Loeb & Loeb LLP; New York State Bar Association ("NY Bar"); Schwartz Investments, LLC ("Schwartz Investments"); Sullivan; Testa, Hurwitz & Thibeault, LLP ("Testa Hurwitz"); and Willkie, Farr & Gallagher LLP ("Willkie Farr"). The comment letters on the 1997 Proposing Release are available on the Commission's Web site at http://www.sec.gov/rules/proposed/s7797.shtml or in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549. Interested persons should refer to File No. S7-07-97.

42 See comment letters on the 1997 Proposing Release from Argent Securities, Inc. ("Argent") and The Corporate Counsel ("Corporate Counsel").

43 See comment letters on the 1997 Proposing Release from ABA; joint letter from Goldman Sachs & Co., JP Morgan Securities, Inc., Morgan Stanley & Co., Inc., and Salomon Brothers Inc. ("Four Brokers"); Lehman Brothers Inc. ("Lehman Brothers"); Merrill Lynch & Co., Inc. ("Merrill Lynch"); Morgan Stanley & Co., Inc. ("Morgan Stanley"); Regional Investment Bankers Association ("Regional Bankers"); Securities Industry Association ("SIA"); and Smith Barney Inc. ("Smith Barney").

In the 2007 Proposing Release, we again proposed to shorten the Rule 144(d) holding period for restricted securities held by affiliates and non-affiliates.[44] The proposal would have permitted both affiliates and non-affiliates to publicly sell restricted securities of Exchange Act reporting issuers[45] after holding the securities for six months, subject to any other applicable condition of Rule 144, if they had not engaged in hedging transactions with respect to the securities. Because of our concern that the market does not have sufficient information and safeguards with respect to non-reporting issuers, we proposed to retain the one-year holding period for restricted securities of issuers that are not subject to Exchange Act Section 13(a) or Section 15(d) reporting obligations for both affiliates and non-affiliates.

Several commenters supported the proposal to shorten the holding period to six months for securities of reporting issuers.[46] These commenters noted that the shortened holding period would increase liquidity for issuers, make capital investment more attractive, and decrease costs of capital for smaller companies without sacrificing investor protection.[47] In this regard, one commenter noted that today's markets now function at an accelerated pace, and technology, particularly the Internet, has caused the markets to become more efficient.[48] Two commenters advocated an even shorter holding period

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44 See the 2007 Proposing Release at Section II.B.2.a.

45 Under the 2007 proposals, the six-month holding period would apply to securities of an issuer that is, and has been for at least 90 days before the sale, subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act.

46 See comment letters on the 2007 Proposing Release from ABA; Feldman; Financial Associations; Fried Frank; London Forum; Richardson Patel; Roth; Sichenzia; SCSGP; Weisman; and Williams.

47 See comment letters on the 2007 Proposing Release from Financial Associations; Pink Sheets; Richardson Patel; and Roth.

48 See comment letter on the 2007 Proposing Release from ABA. See also letter to John W. White, Director, SEC Division of Corporation Finance, from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, ABA Section of Business Law (Mar. 22, 2007) ("the March 2007 ABA Letter"), available at http://www.sec.gov/comments/s7-11-07/s71107.shtml.

requirement than the proposed six-month period, with one commenter advocating a four-month holding period and the other a three-month holding period.[49] Two commenters opposed shortening the holding period requirement under Rule 144, as proposed.[50]

The purpose of Rule 144 is to provide objective criteria for determining that the person selling securities to the public has not acquired the securities from the issuer for distribution. A holding period is one criterion established to demonstrate that the selling security holder did not acquire the securities to be sold under Rule 144 with distributive intent. We do not want the holding period to be longer than necessary or impose any unnecessary costs or restrictions on capital formation. After observing the operation of Rule 144 since the 1997 amendments, we believe that a six-month holding period for securities of reporting issuers provides a reasonable indication that an investor has assumed the economic risk of investment in the securities to be resold under Rule 144. Therefore, we are adopting a six-month holding period for reporting companies, as proposed.[51] Most commenters agreed that shortening the holding period to six months for restricted securities of reporting issuers will increase the liquidity of privately sold securities and decrease the cost of capital for reporting issuers, while still being consistent with investor protection.[52] By reducing the holding period for restricted securities, these amendments are intended to help companies to raise capital more easily and less expensively. For example, by making private offerings more attractive, the amendments may allow some companies to avoid certain types of costly financing structures involving

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49 See comment letters on the 2007 Proposing Release from Feldman and Weisman.

50 See comment letters on the 2007 Proposing Release from NASAA and Steinberg.

51 See amendments to Rule 144(d). The amendments do not change the Rule 144(d) requirement that, if the acquiror takes the securities by purchase, the holding period will not commence until the full purchase price is paid.

the issuance of extremely dilutive convertible securities. Many commenters supported the proposal to maintain the existing one-year holding period for restricted securities of non-reporting issuers.[53]

Under the amendments that we are adopting, the six-month holding period requirement will apply to the securities of an issuer that has been subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act for a period of at least 90 days before the Rule 144 sale.[54] Restricted securities of a "non-reporting issuer" will continue to be subject to a one-year holding period requirement.[55] A non-reporting issuer is one that is not, or has not been for a period of at least 90 days before the Rule 144 sale, subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act.[56]

We believe that different holding periods for reporting and non-reporting issuers are appropriate given that reporting issuers have an obligation to file periodic reports with updated financial information (including audited financial information in annual filings) that are publicly available on EDGAR, the Commission's electronic filing system. Although non-reporting issuers must make some information publicly available before resales can be made under Rule 144, this information typically is much more limited in scope than information included in Exchange Act reports, is not required to include audited financial information, and is not publicly available via EDGAR.[57] For these

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52 See Section VI. of this release.

53 See comment letters on the 2007 Proposing Release from ABA; Brill 1; Financial Associations; Gleicher; Weisman; and Williams.

54 See new Rule 144(d)(1)(i). We also are making conforming amendments to paragraphs (e)(3)(ii), (e)(3)(iii) and (e)(3)(iv) of Rule 144.

55 However, non-affiliates of non-reporting companies will no longer be subject to any other resale restrictions after meeting the one-year holding period. See Section II.B.3 below.

56 See new Rule 144(d)(1)(ii).

57 See 17 CFR 240.15c2-11.

reasons, we believe that continuing to require security holders of non-reporting issuers to hold their securities for one year is not unduly burdensome and is consistent with investor protection.

2. Significant Reduction of Conditions Applicable to Non-Affiliates

Before adoption of these amendments, both non-affiliates and affiliates were subject to all other applicable conditions of Rule 144, in addition to the Rule 144(d) holding period requirement, including the condition that current information about the issuer of the securities be publicly available, the limitations on the amount of securities that may be sold in any three-month period, the manner of sale requirements and the Form 144 notice requirement. However, pursuant to paragraph (k) of Rule 144 as it existed prior to the amendments that we are adopting, a non-affiliate of the issuer at the time of the Rule 144 sale who had not been an affiliate during the three months prior to the sale, could sell the securities after holding them for two years without complying with these other conditions.

In the 2007 Proposing Release, we proposed to permit non-affiliates to resell their restricted securities freely after meeting the applicable holding period requirement (i.e., six months with respect to a reporting issuer and one year with respect to a non-reporting issuer), except that non-affiliates of reporting issuers still would be subject to the current public information requirement in Rule 144(c) for an additional six months after the end of the initial six-month holding period.

In general, commenters supported the proposal to reduce substantially the requirements for the resale of restricted securities by non-affiliates under Rule 144.[58]

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58 See, e.g., comment letters on the 2007 Proposing Release from Brill 1; Cleary Gottlieb; Pink Sheets; and Weisman.

Noting the importance of the current public information condition, two commenters expressed support for the proposed retention of that requirement for the resales of restricted securities by non-affiliates occurring between six months and one year after acquisition of the securities.[59] Some commenters expressed support for removal of the manner of sale requirements and the Form 144 notice requirement,[60] while a few objected to removal of those requirements.[61] The commenters objecting to the removal of those requirements expressed concern about the transparency of Rule 144 transactions and the potential increase in violations of the holding period requirement if the manner of sale requirements and the Form 144 notice requirement were eliminated.[62] The two commenters that opposed shortening the Rule 144(d) holding period also opposed the proposals to permit non-affiliates to resell without being subject to any other condition (except the public information requirement, with respect to resales of securities of reporting companies) after they meet the holding period.[63]

We are adopting the amendments for the sale of restricted securities by non-affiliates after the holding period, as proposed.[64] Under the amendments, after the applicable holding period requirement is met, the resale of restricted securities by a non-affiliate under Rule 144 will no longer be subject to any other conditions of Rule 144 except that, with regard to the resale of securities of a reporting issuer, the current public

59 See comment letters on the 2007 Proposing Release from ABA and Weisman.

60 See, e.g., comment letters on the 2007 Proposing Release from ABA; BAIS; Cleary Gottlieb; Fried Frank; and SCSGP.

61 See comment letters on the 2007 Proposing Release from Argus Vickers Stock Research Corp. ("Argus"); Brill 1; and The Washington Service on the Form 144 requirement ("WS 2").

62 See comment letters on the 2007 Proposing Release from Brill 1 and WS 2.

63 See comment letters on the 2007 Proposing Release from NASAA and Steinberg.

information requirement in Rule 144(c) will apply for an additional six months after the six-month holding period requirement is met.[65] Therefore, a non-affiliate will no longer be subject to the Rule 144 conditions relating to volume limitations, manner of sale requirements, and filing Form 144.[66]

We believe that the complexity of resale restrictions may inhibit sales by, and imposes costs on, non-affiliates. Because Rule 144 is relied upon by many individuals to resell their restricted securities, we believe that it is particularly helpful to streamline and reduce the complexity of the rule as much as possible while retaining its integrity. We continue to believe that retaining the current public information requirement with regard to resales of restricted securities of reporting issuers for up to one year after the acquisition of the securities is important to help provide the market with adequate information regarding the issuer of the securities. In addition, we generally believe that most abuses in sales of unregistered securities involve affiliates of issuers[67] and securities

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64 Under the amendments, paragraph (k) of Rule 144 has been removed. The conditions that non-affiliates are required to meet for the sale of their securities under Rule 144 are now contained in paragraph (b)(1) of the rule.

65 Some commenters requested us to state that the Commission would not object if the restricted securities legend were removed from securities held by a non-affiliate, after all the applicable Rule 144 conditions to resale have been met. See comment letters on the 2007 Proposing Release from Cleary Gottlieb; Financial Associations; and Weisman. In the past, the staff in the Division of Corporation Finance has expressed the view that "it is not inappropriate for issuers to remove restrictive legends from securities that may be resold in reliance on Rule 144(k)." See, e.g., Toth Aluminum Corporation (Oct. 31, 1988). Under the amendments that we are adopting, we do not object if issuers remove restrictive legends from securities held by non-affiliates after all of the applicable conditions in Rule 144 are satisfied. However, the removal of a legend is a matter solely in the discretion of the issuer of the securities. Disputes about the removal of legends are governed by state law or contractual agreements, rather than federal law.

66 Although the Rule 144(e) volume limitations will no longer apply to resales of restricted securities by non-affiliates as a result of the amendments, an affiliate pledgor, donor, or trust settlor will be required to aggregate the amount of securities sold for the account of a pledgee, donee or trust, as applicable, even when there is no concerted action, in accordance with Rule 144(e)(3)(ii), (iii), and (iv) in order to determine the amount of securities that is permitted to be sold under Rule 144.

67 Pink Sheets also noted in its letter that most of the abuses in transactions involving unregistered securities involve sales and purchases by affiliates of the issuers.

of shell companies. As discussed below, we are codifying the staff's current interpretive position that Rule 144 cannot be relied upon for the resale of the securities of reporting and non-reporting shell companies.[68]

The final conditions applicable to the resale under Rule 144 of restricted securities held by affiliates and non-affiliates of the issuer can be summarized as follows:

	Affiliate or Person Selling on Behalf of an Affiliate	**Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)**
Restricted Securities of Reporting Issuers	During six-month holding period - no resales under Rule 144 permitted. After six-month holding period - may resell in accordance with all Rule 144 requirements including: • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144.	During six-month holding period - no resales under Rule 144 permitted. After six-month holding period but before one year – unlimited public resales under Rule 144 except that the current public information requirement still applies. After one-year holding period - unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.
Restricted Securities of Non-Reporting Issuers	During one-year holding period - no resales under Rule 144 permitted. After one-year holding period - may resell in accordance with all Rule 144 requirements, including: • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144.	During one-year holding period - no resales under Rule 144 permitted. After one-year holding period - unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.

68 See Section II.E.6 of this release.

3. Tolling Provision

In 1990, we eliminated a Rule 144 provision that tolled, or suspended, the holding period of a security holder maintaining a short position in, or any put or other option to dispose of, securities equivalent to the restricted securities owned by the security holder.[69] We eliminated this provision in conjunction with an amendment to broaden a security holder's ability to tack the holding periods of prior owners to the security holder's own holding period.[70]

We previously have expressed concern regarding the effect of hedging activities designed to shift the economic risk of investment away from the security holder with respect to restricted securities.[71] In the 1997 Proposing Release, we solicited comment on several alternatives designed to address these concerns.[72] Seven commenters recommended that we adopt measures to eliminate or restrict hedging activities during the holding period.[73] Six commenters recommended maintaining the status quo.[74] Six

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69 See Release No. 33-6862 (Apr. 23, 1990) [55 FR 17933].

70 "Tacking" the holding period is the ability of the security holder to include, under certain circumstances, the period that securities were held by a previous owner as part of his or her own holding period for the purposes of meeting the holding period requirement in Rule 144(d). Further discussion about tacking appears in Section II.E.2 of this release.

71 For a discussion on hedging arrangements in prior releases, see Section IV.B of the 1997 Proposing Release and Section II.A of Release No. 33-7187 (June 27, 1995) [60 FR 35645].

72 See the 1997 Proposing Release. In that release, we proposed five different alternatives: (1) make the Rule 144 safe harbor unavailable to persons who hedge during the restricted period; (2) independently of Rule 144, promulgate a rule that would define a sale for purposes of Section 5 to include specified hedging transactions; (3) adopt a shorter holding period during which hedging could not occur without losing the safe harbor; (4) reintroduce a tolling provision in Rule 144 similar to the provision that was included prior to 1990; or (5) maintain the status quo with no specific prohibition against hedging.

73 See comment letters on the 1997 Proposing Release from ABA; AIMR; Argent; ASCS; Constantine Katsoris; Corporate Counsel; and Schwartz Investments.

74 See comment letters on the 1997 Proposing Release from Bear, Stearns & Co., Inc.; BG&E; Intel Corporation ("Intel"); PaineWebber Incorporated; Wilkie Farr; and XXI Securities.

other commenters suggested that we adopt a safe harbor for certain hedging activities that would be deemed permissible under Rule 144.[75]

In the 2007 Proposing Release, we acknowledged a concern about the effect of hedging activities in connection with the adoption of a six-month holding period for securities of reporting issuers. We noted that, when we eliminated the tolling provision in 1990, the Rule 144 holding periods were longer.[76] We also expressed the view that the proposal to shorten the holding period to six months could make the entry into such hedging arrangements significantly easier and less costly because these arrangements would cover a much shorter period.[77] We therefore proposed to reintroduce a Rule 144 tolling provision that would have suspended the holding period for restricted securities of Exchange Act reporting issuers while a security holder engaged in certain hedging transactions.[78] However, we proposed that any suspension due to hedging would not have caused, under any circumstances, the holding period to extend beyond one year.

Because the proposed tolling provision also would have worked in conjunction with the Rule 144 provisions that permit tacking of holding periods, a selling security holder would have been required to determine whether a previous owner of the securities had engaged in hedging activities with respect to the securities, if the selling security holder wished to tack the previous owner's holding period to the holding period of the

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75 See comment letters on the 1997 Proposing Release from Four Brokers; NY Bar; SIA; Merrill Lynch; Citibank; and Lehman Brothers.

76 At that time, Rule 144 provided for a two-year holding period before a security holder could sell limited amounts of restricted securities, and a three-year period before a non-affiliate security holder could sell an unlimited amount of the securities.

77 See the 2007 Proposing Release at Section II.B.2.b.

78 We proposed to exclude from the holding period any period in which the security holder had a short position or had entered into a "put equivalent position," as defined by Exchange Act Rule 16a-1(h) [17 CFR 240.16a-1(h)], with respect to the same class of securities (or, in the case of nonconvertible debt, with respect to any nonconvertible debt securities of the same issuer).

selling security holder. The proposed provision would have tolled the holding period during any period in which the previous owner held a short position or put equivalent position with respect to the securities, however, there would have been no tolling of the previous owner's holding period if the security holder for whose account the securities were to be sold reasonably believed that no such short or put equivalent position was held by the previous owner.

In connection with the proposed tolling provision, we also proposed other related changes to Rule 144. First, we proposed to require that information be provided in Form 144 regarding any short or put equivalent position held with respect to the securities prior to the resale of the securities. The second proposal related to the manner of sale requirements in paragraphs (f) and (g) of Rule 144.[79]

Several commenters objected to the proposed reintroduction of the tolling provision and suggested modifications to the proposed provision, if the Commission chose to adopt it.[80] Commenters objecting to the proposed tolling provision provided the following reasons, among others, why the Commission should not adopt the proposed tolling provision:

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79 We proposed to amend Note (ii) to Rule 144(g)(3) [17 CFR 230.144(g)(3)] to supplement the reasonable inquiry requirement by requiring a broker to inquire into the existence and character of any short position or put equivalent position with regard to the securities held by the person for whose account the securities are to be sold, if the securities have been held for less than one year, whether such person has made inquiries into the existence and character of any short position or put equivalent position held by the previous owner of the securities, and the results of such person's inquiries.

80 See, e.g., comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Feldman; Financial Associations; Richardson Patel; Sichenzia; and Weisman.

- Hedging transactions involve costs and risks for the security holder and do not entirely transfer risk of the economic investment of the securities;[81]
- Any concern that the Commission has about hedging activities immediately after the acquisition is outweighed by the belief that hedging activities can enhance private placements as a means of capital formation and should be allowed to continue because they do not raise substantial concerns about unregistered distributions;[82]
- In the current environment, a security holder may hold long and short positions across multiple trading desks and complex financial institutions and positions may change daily or even intra-day. The task of tracing and processing such positions would necessitate the development of costly custom software and hardware systems. Consequently, security holders might ultimately choose to hold the securities for the default one-year period rather than implement these costly systems, thereby frustrating the intent of the Commission in adopting the six-month holding period;[83]
- There is a natural ceiling on the amount of hedging activity in restricted securities because the supply of unrestricted securities is limited;[84]
- The Commission has adequate enforcement tools to address abuses in hedging with respect to restricted securities;[85] and

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81 See, e.g., comment letters on the 2007 Proposing Release from Feldman; Financial Associations; and Richardson Patel.

82 See comment letter on the 2007 Proposing Release from ABA.

83 See, e.g., comment letter on the 2007 Proposing Release from Financial Associations.

84 See comment letter on the 2007 Proposing Release from ABA.

85 See, e.g., comment letters on the 2007 Proposing Release from ABA and Financial Associations.

- The Commission's reasoning for eliminating the tolling provision in 1990 was that a single holding period running from the date of purchase from the issuer, or an affiliate of the issuer, is sufficient to prevent unregistered distributions to the public.[86] This reasoning still applies, even if the holding period is reduced to six months for securities of reporting issuers.[87]

Some commenters reasoned that if the Commission detects an increase in abuse after implementation of the revised holding period, as proposed, the Commission could modify its treatment of hedging activities.[88] This would be consistent with the approaches taken by the Commission when it first adopted Rule 144, and in 1997 when commenters recommended that the Commission gain more experience with the shortened holding periods before making additional revisions.[89]

After considering the comments, we are not adopting the proposed tolling provision and related amendments. We note, in particular, the comments asserting that, in the current environment, the tolling provision would unduly complicate Rule 144 and could require security holders or brokers to incur significant costs to monitor hedging positions for purposes of determining whether they have met the holding period requirement. This would frustrate our primary objectives to streamline Rule 144 and

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86 See Release No. 33-6862.

87 See comment letter on the 2007 Proposing Release from Financial Associations.

88 See, e.g., comment letters on the 2007 Proposing Release from Cleary Gottlieb; Financial Associations; and Sichenzia.

89 See Release No. 33-5223 and Section I of this release.

reduce the costs of capital for issuers. We will revisit the issue if we observe abuse relating to the hedging activities of holders of restricted securities.[90]

C. Amendments to the Manner of Sale Requirements Applicable to Resales by Affiliates

Before today's amendments, the manner of sale requirements in Rule 144(f) required securities to be sold in "brokers' transactions"[91] or in transactions directly with a "market maker," as that term is defined in Section 3(a)(38) of the Exchange Act.[92] Additionally, the rule prohibits a selling security holder from: (1) soliciting or arranging for the solicitation of orders to buy the securities in anticipation of, or in connection with, the Rule 144 transaction; or (2) making any payment in connection with the offer or sale of the securities to any person other than the broker who executes the order to sell the securities.

In the 1997 Proposing Release, we proposed to eliminate the manner of sale requirements for the sale of both equity and debt securities alike, reasoning that the manner of sale requirements are not necessary to satisfy the purposes of Rule 144 and limit the liquidity of the security.[93] Some commenters opposed this proposal, asserting that brokers help ensure that selling security holders are complying with the applicable

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90 The Commission's staff has previously stated that, with respect to short sales in reliance on the safe harbor of Rule 144 where the borrower closes out using the restricted securities, all the conditions of Rule 144 must be met at the time of the short sale. See Questions 80 through 82 of Release No. 33-6099 (Aug. 2, 1979) [44 FR 46752, 46765]. In the Commission's view, the term "sale" under the Securities Act includes contract of sale. See Release No. 33-8591 (July 19, 2005) [70 FR 44722, 44765] and Release No. 34-56206 (August 6, 2007) [72 FR 45094]. The Commission has previously indicated that, in a short sale, the sale of securities occurs at the time the short position is established, rather than when shares are delivered to close out that short position, for purposes of Section 5 of the Securities Act. See, e.g., Questions 3 and 5 of Release No. 33-8107 (June 21, 2002) [67 FR 43234] and Release No. 34-56206 n. 46 (Aug. 6, 2007) [72 FR 45094, 45096].

91 Rule 144(g) defines the term for purposes of Rule 144.

92 15 U.S.C. 78c(a)(38).

Rule 144 conditions to resale.[94] As discussed below, although we proposed to eliminate the manner of sale requirements only for debt securities and not equity securities in the 2007 Proposing Release, we requested comment on whether it would be appropriate to eliminate the manner of sale requirements for the sale of equity securities as well.

The comments were mixed on this point. One commenter strongly discouraged the elimination of the manner of sale requirements for equity securities,[95] while another supported such a change.[96] One commenter did not object to retaining the manner of sale requirements for resales of equity securities of affiliates, on the grounds that affiliates generally find the assistance of a broker useful in navigating compliance with Rule 144 and thus brokers serve a useful function that is not unduly burdensome.[97] Instead of completely eliminating the manner of sale requirements, some commenters requested that we consider expanding the methods to sell the securities permitted by the manner of sale requirements.[98] For example, two commenters discussed amending the requirement to permit sales through alternative trading systems such as electronic venues where the broker's identity is anonymous prior to trade execution.[99]

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93 See Section III.C of the 1997 Proposing Release.

94 See comment letters on the 1997 Proposing Release from Corporate Counsel; Matthew Crain; Katsoris; Merrill Lynch; Regional Bankers; SIA; and Smith Barney.

95 See comment letter on the 2007 Proposing Release from Barron.

96 See comment letter on the 2007 Proposing Release from Sullivan.

97 See comment letter on the 2007 Proposing Release from ABA.

98 See, e.g., comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; and Sullivan.

99 See comment letters on the 2007 Proposing Release from ABA and Sullivan.

In response to comments, we are adopting amendments to the manner of sale requirements that apply to resales of equity securities of affiliates.[100] We last made substantive amendments to the manner of sale requirements in 1978.[101] Since then, the growth of technological and other developments directed at meeting the investment needs of the public and reducing the cost of capital for companies have led us to refine the rules governing the trading of securities.[102] We believe that it is appropriate now to adopt two amendments to the manner of sale requirements so that the restrictions better reflect current trading practices and venues.

First, we are adopting a change to Rule 144(f) to permit the resale of securities through riskless principal transactions in which trades are executed at the same price, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee, and the rules of a self-regulatory organization permit the transaction to be reported as riskless.[103] We believe that these riskless principal transactions are equivalent to agency trades.[104] As with agency trades, in order to qualify as a permissible manner of sale under the revised rule, the broker or dealer conducting the riskless principal

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100 Only affiliates are required to comply with the manner of sale requirements under the amendments that we are adopting.

101 See Release No. 33-5979 (Sept. 19, 1978) [43 FR 43709] (Sept. 27, 1978) (the Commission amended Rule 144(f) to permit sales under the rule to be made directly to a market maker in lieu of selling through a broker).

102 For example, in the second quarter of 2007, alternative trading systems handled approximately $1.3 trillion in volume of matched orders. (These amounts do not include orders that flow through a system, but are ultimately executed elsewhere). We obtained this data from information provided in Form ATS-R Quarterly Reports.

103 See new Rule 144(f)(1)(iii). A "riskless principal transaction" is defined as a principal transaction where, after having received from a customer an order to buy, a broker or dealer purchases the security as principal in the market to satisfy the order to buy or, after having received from a customer an order to sell, sells the security as principal to the market to satisfy the order to sell. See new Note to Rule 144(f)(1).

104 See also, e.g., SEC Interpretation: Commission Guidance on the Scope of Section 28(e) of the Exchange Act, Interpretive Release No. 34-45194 (Dec. 27, 2001) [67 FR 6]. This treatment is also consistent with NASD Rules 4632(d)(3)(B), 4642(d)(3)(B), and 6420(d)(3)(B).

transaction must meet all the requirements of a brokers' transaction, as defined by Rule 144(g), except the requirement that the broker does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold. The broker or dealer must neither solicit nor arrange for the solicitation of customers' orders to buy the securities in anticipation of or, in connection with, the transaction, must receive no more than the usual and customary markup or markdown, commission equivalent, or other fee, and must conduct a reasonable inquiry regarding the underwriter status of the person for whose account the securities are to be sold.

Second, we are amending Rule 144(g) which defines "brokers' transactions" for purposes of the manner of sale requirements. Under the definition of brokers' transactions, a broker must neither solicit nor arrange for the solicitation of customers' orders to buy the securities in anticipation of, or in connection with, the transaction. However, certain activities specified in three subparagraphs of Rule 144(g)(2) are deemed not to be a solicitation.[105] We are adding another subparagraph covering the posting of bid and ask quotations in alternative trading systems that will also be deemed not to be a solicitation. This new provision permits a broker to insert bid and ask quotations for the security in an alternative trading system, as defined in Rule 300 of Regulation ATS,[106] provided that the broker has published bona fide bid and ask quotations for the security in the alternative trading system on each of the last 12 business days.[107]

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105 See Release No. 34-5452 (Feb. 1, 1974; amended Feb. 21, 1974). These subparagraphs, as amended, are contained in paragraphs (g)(3)(i), (g)(3)(ii), and (g)(3)(iii) of Rule 144. Under the amendments, the previous paragraph (g)(2) has been redesignated as paragraph (g)(3), and the previous paragraph (g)(3) has been redesignated as paragraph (g)(4).

106 17 CFR 242.300.

107 See new Rule 144(g)(3)(iv).

D. Changes to Rule 144 Conditions Related to Resales of Debt Securities by Affiliates

1. Comments Received on Proposed Amendments Relating to Debt Securities

In the 2007 Proposing Release, we proposed to eliminate the manner of sale requirements in Rule 144 with regard to sales of debt securities by affiliates.[108] We also requested comment on whether there were any other conditions in Rule 144, such as the volume limitations, to which debt securities should not be subject. In the 2007 Proposing Release, we included preferred stock and asset-backed securities in the "debt securities" category for purposes of the proposed elimination of the manner of sale requirements.

Four commenters expressly supported the proposal to eliminate the manner of sale requirements for resales of debt securities,[109] and we did not receive any comments objecting to the proposal. We also did not receive any comments objecting to the proposed inclusion of preferred stock and asset-backed securities in the definition of debt securities. We received a few comments that we should expand the definition of debt securities for the purposes of proposed changes to the manner of sale requirements.[110]

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108 As noted in Section II.B.3 above, under the amendments that we are adopting in this release, the manner of sale requirements do not apply to the resale of securities of a non-affiliate under Rule 144. The manner of sale requirements also do not apply to securities sold for the account of the estate of a deceased person or for the account of a beneficiary of such estate, provided that the estate or beneficiary is not an affiliate of the issuer.

109 See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Financial Associations; and Sullivan.

110 See comment letter on the 2007 Proposing Release from ABA stating that the definition of debt should exclude any requirement that the preferred stock have a liquidation preference in excess of par.

2. No Manner of Sale Requirements Regarding Resales of Debt Securities

We are adopting the amendments to eliminate the manner of sale requirements for resales of debt securities held by affiliates, as proposed.[111] We agree that, as financial intermediaries, brokers serve an important function as gatekeepers for promoting compliance with Rule 144,[112] and we are concerned that eliminating the manner of sale requirements for equity securities would lead to abuse. However, we do not believe that the fixed income securities market raises the same concerns about abuse,[113] and are persuaded that the manner of sale requirements may place an unnecessary burden on the resale of fixed income securities.[114] Combined with the changes that we are making to the Rule 144(e) volume limitations, these amendments will permit holders of debt securities to rely on the Rule 144 to resell their debt securities in a way and amount that was not possible previously.

As proposed, our definition of debt securities in Rule 144 includes non-participatory preferred stock (which has debt-like characteristics)[115] and asset-backed

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111 See 17 CFR 230.144(f). As discussed above, we also are eliminating the manner of sale requirements for resales of equity and debt securities by non-affiliates.

112 Brokers also must comply with the criteria set forth in Rule 144(g) in order to claim the "brokers' transactions" exemption under Section 4(4) of the Securities Act.

113 We distinguish between debt and equity in the same way we distinguished debt and equity markets when we last amended Regulation S. There, we did not believe that the procedures and restrictions applicable to offerings of equity securities under Regulation S should be applicable to offerings of nonconvertible debt securities, reasoning that the nature of the trading markets for debt securities appears not to have facilitated similar abusive practices as the markets for equity securities. See Offshore Offers and Sales, Release No. 33-7505 (Feb. 17, 1998) [63 FR 9631].

114 The March 2007 ABA Letter noted that debt securities generally are traded in dealer transactions in which the dealer seeks buyers for securities to fill sell orders instead of through the means prescribed in Rule 144(f).

115 The definition of debt securities appears in amended Rule 144(a). "Non-participatory preferred stock" is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer.

securities (where the predominant purchasers are institutional investors including financial institutions, pension funds, insurance companies, mutual funds and money managers)[116] in addition to other types of nonconvertible debt securities. This definition of debt securities is consistent with the treatment of such securities under Regulation S.[117]

3. Raising Volume Limitations for Debt Securities

We also are adopting amendments to raise the Rule 144(e) volume limitations for debt securities. Before the amendments that we are adopting, under Rule 144(e), the amount of securities sold in a three-month period could not exceed the greater of: (1) one percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or (2) the average weekly volume of trading in such securities, as calculated pursuant to provisions in the rule.[118] In response to our request for comment regarding whether we should eliminate or revise any other conditions in Rule 144 with regard to debt securities, three commenters noted that the Rule 144(e) volume limitations effectively precluded resales of debt securities by affiliates.[119]

Debt securities generally are issued in tranches.[120] We agree that, prior to our amendments, the volume limitations in Rule 144 constrained the ability of debt holders to rely on Rule 144 for the resales of their securities. For the same reasons that we are eliminating the manner of sale requirements for debt securities, we believe that it is

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116 See Release No. 33-8518 (Dec. 22, 2004) [70 FR 1506].

117 See 17 CFR 230.901 through 230.905 and Release No. 33-7505.

118 See 17 CFR 230.144(e)(1)(i), (ii), and (iii).

119 See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; and Sullivan.

120 The term "tranche" is also used in the definition of "distribution compliance period" in Rule 902(f) of Regulation S. 17 CFR 230.902(f).

appropriate to adopt an alternative volume limitation that is specifically applicable to the resale of debt securities. We are amending Rule 144(e) to permit the resale of debt securities in an amount that does not exceed ten percent of a tranche (or class when the securities are non-participatory preferred stock), together with all sales of securities of the same tranche sold for the account of the selling security holder within a three-month period.[121] We believe that this new ten percent limitation provision will permit a more reasonable amount of trading in debt securities than the one percent limitation has permitted.[122] These revised volume limitations also apply to resales of non-participatory preferred stock or asset-backed securities, which are defined as debt securities for purposes of Rule 144.

E. Increase of the Thresholds that Trigger the Form 144 Filing Requirement for Affiliates

Before today's amendments, Rule 144(h) required a selling security holder to file a notice on Form 144 if the security holder's intended sale exceeded either 500 shares or $10,000 within a three-month period.[123] These filing thresholds had not been modified since 1972.[124] In the 1997 Proposing Release, we proposed to increase the filing thresholds to 1,000 shares or $40,000. Thirteen commenters supported raising the filing threshold and no commenters opposed the idea.[125] Some commenters suggested that we

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121 See newly revised Rule 144(e)(2).

122 Generally, because of the absence of an active trading market in debt securities, debt holders do not rely on the average daily trading volume test to sell their securities under Rule 144.

123 17 CFR 230.144(h).

124 We note, however, that in 1978, the Commission shortened the relevant time period in Rule 144(e) for calculating the amount of securities to be sold under Rule 144 from six months to three months and made conforming changes to the Form 144 filing requirement. Release No. 33-5995 (Nov. 8, 1978) [43 FR 54229].

125 See comment letters on the 1997 Proposing Release from ABA; ASCS; AT&T Corp. ("AT&T"); BG&E; Corporate Counsel; Merrill Lynch; Morgan Stanley; NY Bar; NY City Bar; Regional Bankers; SIA; Smith Barney; and Sullivan.

eliminate Form 144 altogether.[126] One commenter suggested raising the threshold to $100,000.[127] Another commenter suggested raising it to $250,000.[128]

In the 2007 Proposing Release, we proposed to increase the Form 144 filing thresholds to cover sales of 1,000 shares or $50,000 within a three-month period.[129] Some commenters specifically expressed support for raising the Form 144 filing thresholds.[130] One of these commenters recommended filing thresholds of 10,000 shares or $100,000, if the Commission chose to retain a Form 144 filing requirement for affiliates.[131]

We are adopting the increased Form 144 filing thresholds with some modification. As proposed, we are raising the dollar threshold to $50,000 to adjust for inflation since 1972.[132] After considering the comments, we are raising the share threshold to 5,000 shares, rather than the proposed 1,000 shares. We believe that the 5,000 share threshold is an appropriate alternate threshold for trades in amounts that may not reach the $50,000 dollar threshold, but that merit notice to the market.

In the 2007 Proposing Release, we also solicited comment on whether we should coordinate the Form 144 filing requirements with Form 4 filing requirements. Many

126 See comment letters on the 1997 Proposing Release from ABA; Benesch, Friedlander, Coplan & Aronoff, LLP; NY Bar; NY City Bar; and Sullivan.

127 See comment letter on the 1997 Proposing Release from ABA.

128 See comment letter on the 1997 Proposing Release from NY Bar.

129 Only affiliates of the issuer are required to file a notice of proposed sale on Form 144 when relying on Rule 144 under the amendments that we are adopting.

130 See, e.g., comment letters on the 2007 Proposing Release from ABA; Financial Associations; and SCSGP.

131 See comment letter on the 2007 Proposing Release from ABA. ABA supported elimination of Form 144 but recommended these filing thresholds, if the Commission chose to retain it.

132 The adjustment would be approximately $42,000 if based on the Personal Consumption Expenditures Chain-Type Price Index, as published by the Department of Commerce. In addition,

commenters supported a combination of the two forms.[133] Although we are not adopting those changes today, we expect to issue a separate release in the future to provide affiliates that are subject to both the Form 4 and Form 144 filing requirements with greater flexibility in satisfying their requirements.

F. Codification of Several Staff Positions

In the 2007 Proposing Release, we proposed to codify several interpretive positions issued by the staff of the Division of Corporation Finance. We proposed to codify the first three staff positions listed below in both the 1997 Proposing Release and the 2007 Proposing Release, but we proposed to codify the last four staff positions listed below only in the 2007 Proposing Release.

Some commenters expressed general support for the proposed codifications of staff interpretations relating to Rule 144.[134] One commenter specifically expressed the view that the action should help to resolve any lingering confusion regarding the calculation of holding periods in the circumstances addressed by the interpretations.[135] We are adopting all of the codifications substantially as proposed. The codifications should make these interpretations more transparent and readily available to the public.

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if based on the Consumer Price Index, the adjustment would be approximately \$50,000. To achieve a round number, we proposed to raise the filing threshold to \$50,000.

133 See, e.g., comment letters on the 2007 Proposing Release from ABA; BAIS; Brill 1; Fried Frank; Pink Sheets; Sichenzia; SCSGP; and Sullivan. The comment letters from ABA, BAIS, SCSGP and Sullivan advocated that the Commission should eliminate the Form 144 filing requirement; however, to the extent that we determine to retain any items required by Form 144, they provided suggestions regarding the proposal to combine Form 144 with Form 4.

134 See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Financial Associations; Fried Frank; and Richardson Patel.

135 See comment letter on the 2007 Proposing Release from Financial Associations.

1. Securities Acquired under Section 4(6) of the Securities Act are Considered "Restricted Securities"

In 1997, we first proposed to codify the Division of Corporation Finance's interpretive position that securities acquired from the issuer pursuant to an exemption from registration under Section 4(6) of the Securities Act[136] are considered "restricted securities" under Rule 144(a)(3).[137] We did not receive any comments on this proposal at the time. In the 2007 Proposing Release, we again proposed to codify this position. We did not receive any comments.

Section 4(6) provides for an exemption from registration for an offering that does not exceed $5,000,000 that is made only to accredited investors, that does not involve any advertising or public solicitation by the issuer or anyone acting on the issuer's behalf and for which a Form D has been filed.[138] Because the resale status of securities acquired in Section 4(6) exempt transactions should be the same as securities received in other non-public offerings that are included in the definition of restricted securities, we are of the view that securities acquired under Section 4(6) should be defined as restricted securities for purposes of Rule 144. Therefore, we are adopting an amendment to add securities acquired under Section 4(6) of the Securities Act to the definition of restricted securities, as proposed.[139]

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136 15 U.S.C. 77d(6). Section 4(6) was included in the Securities Act pursuant to the Small Business Investment Incentive Act of 1980 [Pub. L. No. 96-477 (Oct. 21, 1980)].

137 17 CFR 230.144(a)(3). See the Division of Corporation Finance's Compliance and Disclosure Interpretations on Rule 144 (Updated April 2, 2007), at Section 104 (Rule 144(a)(3)), Question No. 104.03.

138 See 15 U.S.C. 77d(6).

139 See amendments to Rule 144(a)(3).

2. Tacking of Holding Periods When a Company Reorganizes into a Holding Company Structure

In 1997, we also proposed to codify the Division of Corporation Finance's interpretive position that holders may tack the Rule 144 holding period in connection with transactions made solely to form a holding company.[140] When "tacking," holders may count the period during which they held the restricted securities of the predecessor company before the predecessor company reorganized into a holding company structure when calculating the holding period of the restricted securities of the holding company received in the reorganization. We did not receive any comments on this proposal.

We again proposed to codify this interpretive position in the 2007 Proposing Release. Two commenters recommended codification of the staff interpretive position covering tacking, in certain circumstances, in connection with the reincorporation of the issuer in a different state.[141] We did not receive any comments opposing this proposal.

We are adopting this amendment to Rule 144(d), as proposed.[142] This provision will permit tacking of the holding period if the following three conditions are satisfied:

- The newly formed holding company's securities were issued solely in exchange for the securities of the predecessor company as part of a reorganization of the predecessor company into a holding company structure;
- Security holders received securities of the same class evidencing the same proportional interest in the holding company as they held in the

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140 See the Division of Corporation Finance's letter to Morgan, Olmstead, Kennedy & Gardner Capital Corporation (Jan. 8, 1988).

141 See comment letters on the 2007 Proposing Release from Sichenzia and Sullivan.

142 See new Rule 144(d)(3)(ix).

predecessor company, and the rights and interests of the holders of such securities are substantially the same as those they possessed as holders of the predecessor company's securities; and

- Immediately following the transaction, the holding company had no significant assets other than securities of the predecessor and its existing subsidiaries and had substantially the same assets and liabilities on a consolidated basis as the predecessor had before the transaction.

In such transactions, tacking is appropriate because the securities being exchanged are substantially equivalent, and there is no significant change in the economic risk of the investment in the restricted securities. The amendment that we are adopting does not change the staff interpretive position that permits tacking in connection with the reincorporation of the issuer in a different state in certain situations.

3. Tacking of Holding Periods for Conversions and Exchanges of Securities

The 1997 Proposing Release proposed codifying the Division of Corporation Finance's position that, if the securities to be sold were acquired from the issuer solely in exchange for other securities of the same issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms.[143] As noted in the 1997 release, Rule 144 does not state whether the surrendered securities must have been convertible by their terms in order for tacking to be permitted, which led to some confusion on how to calculate the Rule 144 holding period. We did not receive any comments on this proposal.

143 See the Division of Corporation Finance's letter to Planning Research Corp. (Dec. 8, 1980).

We again proposed this amendment to Rule 144(d)(3)(ii) in the 2007 Proposing Release. In addition, we proposed a note to this provision that clarifies the Division's position that if:

- The original securities do not permit cashless conversion or exchange by their terms;
- The parties amend the original securities to allow for cashless conversion or exchange; and
- The security holder provides consideration, other than solely securities of the issuer, for that amendment,

then the newly acquired securities will be deemed to have been acquired on the date that the original securities were so amended.[144]

One commenter expressed support for this proposed amendment.[145] Another commenter provided a suggestion for a technical change to the proposed note, that the phrase "so long as the conversion or exchange itself meets the conditions of this section," be deleted.[146] We are adopting the changes to Rule 144(d), substantially as proposed.[147] In response to comment, we are further clarifying the note to Rule 144(d)(3)(ii) to clarify that the newly acquired securities shall be deemed to have been acquired at the same time as the amendment to the surrendered securities, so long as, in the conversion or exchange, the securities to be sold were acquired from the issuer solely in exchange for other securities of the same issuer.

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[144] See the Division of Corporation Finance's letter to Morgan Stanley & Co., Inc. (June 30, 1993).

[145] See comment letter on the 2007 Proposing Release from Feldman.

[146] See comment letter on the 2007 Proposing Release from Sullivan.

[147] See amendments to Rule 144(d)(3)(ii).

4. Cashless Exercise of Options and Warrants

Several commenters responding to the 1997 Proposing Release suggested that we codify the Division of Corporation Finance's position that, upon a cashless exercise of options or warrants, the newly acquired underlying securities are deemed to have been acquired when the corresponding options or warrants were acquired, even if the options or warrants originally did not provide for cashless exercise by their terms.[148]

In the 2007 Proposing Release, we proposed to revise Rule 144 to codify that position. We also proposed to add two notes to this new paragraph. As proposed, the first note would codify the Division's position that if:

- The original options or warrants do not permit cashless exercise by their terms; and
- The holder provides consideration, other than solely securities of the issuer, to amend the options or warrants to allow for cashless exercise,

then the amended options or warrants would be deemed to have been acquired on the date that the original options or warrants were so amended.[149] This treatment is analogous to our treatment of conversions and exchanges.

The second note would codify the Division's position that the grant of certain options or warrants that are not purchased for cash or property does not create an investment risk in a manner that would justify tacking the holding period for the options or warrants to the holding period for the securities received upon exercise of the options

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148 See the Division of Corporation Finance's Compliance and Disclosure Interpretations on Rule 144 (Updated April 2, 2007), at Section 212 (Rule 144(d)(3)), Interpretation No. 212.01.

149 See the Division of Corporation Finance's letter to Morgan Stanley & Co., Inc. (June 30, 1993).

or warrants.[150] This is the case for options granted under an employee benefit plan. The note would clarify that, in such instances, the holder would not be allowed to tack the holding period of the option or warrant and would be deemed to have acquired the underlying securities on the date the option or warrant was exercised, if the conditions of Rule 144(d)(1) and Rule 144(d)(2) are met at the time of exercise.

Three commenters supported the codification of the staff interpretation relating to the cashless exercise of options and warrants.[151] Some commenters believed that the proposed rule should be expanded,[152] such as to include warrants and options that have only a de minimis exercise price.[153] One commenter suggested that we delete the phrase "so long as the conditions of Rule 144(d)(1) and Rule 144(d)(2) are met at the time of exercise," in the second proposed note.[154]

We are adopting the amendments, substantially as proposed.[155] In response to comment, we have further clarified the second note to Rule 144 to make it clear that the newly acquired securities shall be deemed to have been acquired at the same time as the amendment to the options or warrants so long as the exercise itself was cashless.[156]

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150 See the Division of Corporation Finance's letters to Morgan Stanley & Co., Inc. (June 30, 1993) and Malden Trust Corporation (Feb. 21, 1989).

151 See comment letters on the 2007 Proposing Release from Cleary Gottlieb; Feldman; and Richardson Patel.

152 See comment letters on the 2007 Proposing Release from Cleary Gottlieb; Financial Associations; Richardson Patel; and Weisman.

153 See comment letters on the 2007 Proposing Release from Cleary Gottlieb and Financial Associations.

154 See comment letter on the 2007 Proposing Release from Sullivan.

155 See new Rule 144(d)(3)(x) and related notes.

156 See Note 2 to Rule 144(d)(3)(x).

5. Aggregation of Pledged Securities

In response to suggestions from commenters on the 1997 proposals, we proposed in the 2007 Proposing Release to add a note that would how a pledgee of securities should calculate the Rule 144(e) volume limitation condition.[157] The note would codify the Division of Corporation Finance's position that, so long as the pledgees are not the same "person" under Rule 144(a)(2), a pledgee of securities may sell the pledged securities without having to aggregate the sale with sales by other pledgees of the same securities from the same pledgor, as long as there is no concerted action by those pledgees.[158] As an example, assume that a security holder (the pledgor) pledges the securities he owns in Company A to two banks, Bank X and Bank Y (the pledgees). If the pledgor defaults:

- Upon default, Bank X does not have to aggregate its sales of Company A securities with Bank Y's sales of Company A securities unless Bank X and Bank Y are acting in concert, but
- Bank X individually still must aggregate its sales with the pledgor's sales, and
- Bank Y individually still must aggregate its sales with the pledgor's sales.

Provided that the loans and pledges are bona fide transactions and there is no concerted action among pledgees and no other aggregation provisions under Rule 144(e)

[157] Under the amendments that we are adopting, the volume limitations in Rule 144(e) would apply only to affiliates.

[158] See the Division of Corporation Finance's Compliance and Disclosure Interpretations on Rule 144 (Updated April 2, 2007), at Section 216 (Rule 144(e)(3)), Interpretation No. 216.01. See also the Division of Corporation Finance's letter to Standard Chartered Bank (June 22, 1987).

apply, we do not believe that extra burdens on pledgees to track and coordinate resales by other pledgees are warranted.

We received no comments on this proposal, and we are adopting the amendment to Rule 144(e), as proposed.[159]

6. Treatment of Securities Issued by "Reporting and Non-Reporting Shell Companies"

A blank check company is a company that:

- Is in the development stage;
- Has no specific business plan or purpose, or has indicated that its business plan is to merge with or acquire an unidentified third party; and
- Issues penny stock.[160]

Such companies historically have provided opportunity for abuse of the federal securities laws, particularly by serving as vehicles to avoid the registration requirements of the securities laws.[161] Rule 419 under the Securities Act[162] was adopted in 1992 to control the extent to which such companies are able to access funds from a public offering.

In 2005, we amended Securities Act Rule 405[163] to define a "shell company" to mean a registrant, other than an asset-backed issuer, that has:

(1) no or nominal operations; and

(2) either:

- no or nominal assets;

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159 See amendments to Rule 144(e)(3)(ii).

160 17 CFR 230.419. The term "penny stock" is defined in Exchange Act Rule 3a51-1 [17 CFR 240.3a51-1].

161 See Release No. 33-6932 (Apr. 28, 1992) [57 FR 18037].

162 17 CFR 230.419.

- assets consisting solely of cash and cash equivalents; or
- assets consisting of any amount of cash and cash equivalents and nominal other assets.[164]

On January 21, 2000, the Division of Corporation Finance concluded in a letter to NASD Regulation, Inc. that Rule 144 is not available for the resale of securities initially issued by companies that are, or previously were, blank check companies.[165] In an effort to curtail misuse of Rule 144 by security holders through transactions in the securities of blank check companies, we proposed to codify this position with some modifications. First, we proposed to modify the staff interpretation to address securities of all companies, other than asset-backed issuers, that meet the definition of a shell company, including blank check companies. The category of companies to whom the staff interpretation was proposed to apply is broader than the Rule 405 definition of a "shell company," however, as it would apply to any "issuer" meeting that standard, whereas the Rule 405 definition refers only to "registrants." For purposes of the discussion in this release only, we call these companies, "reporting and non-reporting shell companies." Under the proposed rule, a person who wishes to resell securities of a company that is, or

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163 17 CFR 230.405.

164 See Release No. 33-8587 (Jul. 15, 2005) [70 FR 42234].

165 See the Division of Corporation Finance's letter to Ken Worm, NASD Regulation, Inc. (Jan. 21, 2000). In that letter, the Division stated that "transactions in blank check company securities by their promoters or affiliates . . . are not the kind of ordinary trading transactions between individual investors of securities already issued that Section 4(1) [of the Securities Act] was designed to exempt." The Division stated its view that "both before and after the business combination or transaction with an operating entity or other person, the promoters or affiliates of blank check companies, as well as their transferees, are 'underwriters' of the securities issued. . . . Rule 144 would not be available for resale transactions in this situation, regardless of technical compliance with that rule, because these resale transactions appear to be designed to distribute or redistribute securities to the public without compliance with the registration requirements of the Securities Act."

was, a reporting or a non-reporting shell company, other than a business combination related shell company,[166] would not be able to rely on Rule 144 to sell the securities.

Several commenters provided comments on the proposal to codify this staff interpretation with some modification. Some commenters expressed support for the proposed codification,[167] with one commenter noting that most micro-cap frauds result from the purchase and sale of securities issued by shell companies.[168] Two commenters expressed concern that expanding the staff interpretation to shell companies would prohibit reliance on Rule 144 by security holders of businesses attempting to implement real business plans that technically meet the definition of a shell company, but are not blank check companies.[169] One commenter recommended that the Commission only preclude reliance on Rule 144 for the resale of securities if they were issued at the time the issuer was a shell company.[170]

We are adopting, as proposed, the amendment to prohibit reliance on Rule 144 for the resale of securities of a company that is a reporting or a non-reporting shell company.[171] Under the amended rules, Rule 144 will not be available for the resale of securities initially issued by either a reporting or non-reporting shell company (other than a business combination related shell company) or an issuer that has been at any time

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166 A "business combination related shell company" is defined in Securities Act Rule 405 as a shell company that is (1) formed by an entity that is not a shell company solely for the purpose of changing the corporate domicile of that entity solely within the United States; or (2) formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction (as defined in §230.165(f)) among one or more entities other than the shell company, none of which is a shell company.

167 See, e.g., comment letters on the 2007 Proposing Release from Feldman; Financial Associations; Parsons; Pink Sheets; and Williams.

168 See comment letter on the 2007 Proposing Release from Pink Sheets.

169 See comment letters on the 2007 Proposing Release from Sichenzia and Williams.

170 See comment letter on the 2007 Proposing Release from Sichenzia.

previously a reporting or non-reporting shell company, unless the issuer is a former shell company that meets all of the conditions discussed below.[172]

In another part of our proposal regarding the resale of securities of reporting and non-reporting shell companies, we proposed to modify the staff interpretation to make Rule 144 available for resales of securities of companies that were formerly shell companies under provisions that are similar to other provisions that permit the use of a Securities Act Form S-8[173] registration statement by reporting companies that were former shell companies.[174] Under the proposal, despite the general prohibition against reliance on Rule 144 with respect to securities acquired by shell companies or former shell companies, a security holder would have been able to resell securities subject to Rule 144 conditions if the issuer:

- had ceased to be a shell company;
- is subject to Exchange Act reporting obligations;
- has filed all required Exchange Act reports during the preceding twelve months; and

171 See new Rule 144(i).

172 Rule 144(i) does not prohibit the resale of securities under Rule 144 that were not initially issued by a reporting or non-reporting shell company or an issuer that has been at any time previously such an company, even when the issuer is a reporting or non-reporting shell company at the time of sale. Contrary to commenters' concerns, Rule 144(i)(1)(i) is not intended to capture a "startup company," or, in other words, a company with a limited operating history, in the definition of a reporting or non-reporting shell company, as we believe that such a company does not meet the condition of having "no or nominal operations."

173 17 CFR 239.16b.

174 See Release No. 33-8587. These provisions are consistent with the Form S-8 provisions for shell companies, except that Form S-8 requires a former shell company to wait 60 days, rather than 90 days, before it is able to use the form to register securities.

- at least 90 days have elapsed from the time the issuer files "Form 10 information" reflecting the fact that it had ceased to be a shell company before any securities were sold under Rule 144.

"Form 10 information" is equivalent to information that a company would be required to file if it were registering a class of securities on Form 10 or Form 20-F under the Exchange Act.[175] This information is ordinarily included in a Form 8-K if the former shell company has been filing Exchange Act reports.[176] As proposed, the Rule 144(d) holding period for restricted securities sold under this provision would have commenced at the time that the Form 10 information was filed.

We are adopting this part of the amendments, with some modification.[177] We have modified the proposal to require at least one year to elapse after Form 10 information is filed with Commission before a security holder can resell any securities of an issuer that was formerly a shell company subject to Rule 144 conditions. We believe that the one-year period is necessary for investor protection given the comments relating to the abuse and micro-cap fraud occurring in connection with the securities of shell companies. Both restricted securities and unrestricted securities will be subject to the same one-year waiting period. Thus, under the amendments that we are adopting, Rule 144 is available for the resale of restricted or unrestricted securities that were initially issued by a reporting or non-reporting shell company or an issuer that has been at any

175 17 CFR 249.210 and 17 CFR 249.220f. In another Commission release, we are rescinding Form 10-SB [17 CFR 249.210b]. See SEC Press Release No. 2007-233 (Nov. 15, 2007), available at http://www.sec.gov/news/press/2007/2007-233.htm.

176 17 CFR 249.308. Items 2.01(f) and 5.01(a)(8) of Form 8-K require a company in a transaction where the company ceases being a shell company to file a current report on Form 8-K containing the information (or identifying the previous filing in which the information is included) that would be required in a registration statement on Form 10 or Form 10-SB to register a class of securities under Section 12 of the Exchange Act.

time previously a reporting or non-reporting shell company, only if the following conditions are met:

- The issuer of the securities that was formerly a reporting or non-reporting shell company has ceased to be a shell company;
- The issuer of the securities is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act;
- The issuer of the securities has filed all reports and material required to be filed under Section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports and materials), other than Form 8-K reports (§249.308 of this chapter); and
- At least one year has elapsed from the time that the issuer filed current Form 10 type information with the Commission reflecting its status as an entity that is not a shell company.

One commenter requested clarification on when a Form 10 is deemed filed, if the staff is undertaking a review of the filing, and recommended that the Form 10 should be deemed filed when the information is filed initially with the Commission.[178] To promote consistency and to provide a date that security holders can rely upon, the Form 10 information will be deemed filed when the initial filing is made with the Commission, rather than when the staff of the Division of Corporation Finance has completed its

177 See new Rule 144(i)(2).

178 See comment letter on the 2007 Proposing Release from Sichenzia.

review of the filing or an amendment is made in response to staff comments, for purposes of the amendments.[179]

Some commenters recommended that we permit security holders of non-reporting companies that have merged with a private operating company and therefore have ceased to be shell companies to be able to rely on Rule 144.[180] We are not adopting a provision to permit this, because we believe that Form 10 type information and Exchange Act reporting requirements are important in protecting against potential abuse.

7. Representations Required from Security Holders Relying on Exchange Act Rule 10b5-1(c)

Rule 10b5-1[181] under the Exchange Act defines when a purchase or sale constitutes trading "on the basis of" material nonpublic information in insider trading cases brought under Exchange Act Section 10(b)[182] and Rule 10b-5.[183] Specifically, a purchase or sale of a security of an issuer is "on the basis of" material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale. However, Rule 10b5-1(c) provides an affirmative defense that a person's purchase or sale was not "on the basis of" material nonpublic information. For this defense to be available, the person must demonstrate that:

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179 See new Rule 144(i)(3).

180 See, e.g., comment letters on the 2007 Proposing Release from Charles Nelson; Tom Russell; and Williams.

181 17 CFR 240.10b5-1.

182 15 U.S.C. 78j(b).

183 17 CFR 240.10b-5. As stated in Rule 10b5-1(a), the "manipulative and deceptive devices" prohibited by Section 10(b) and Rule 10b-5 include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.

- before becoming aware of the material nonpublic information, he or she had entered into a binding contract to purchase or sell the securities, provided instructions to another person to execute the trade for the instructing person's account, or adopted a written plan for trading the securities;
- the contract, instructions or written trading plan satisfy the conditions of Rule 10b5-1(c); and
- the purchase or sale that occurred was pursuant to the contract, instruction, or plan.

Form 144 requires a selling security holder to represent, as of the date that the form is signed, that he or she "does not know any material adverse information in regard to the current and prospective operations of the issuer of the securities to be sold which has not been publicly disclosed." The Division of Corporation Finance has indicated that a selling security holder who satisfies Rule 10b5-1(c) may modify the Form 144 representation to indicate that he or she had no knowledge of material adverse information about the issuer as of the date on which the holder adopted the written trading plan or gave the trading instructions. In this case, the security holder must specify that date and indicate that the representation speaks as of that date.[184]

In order to reconcile the Form 144 representation with Rule 10b5-1, we proposed to codify this interpretive position. Under the proposed amendments, Form 144 filers would be able to make the required representation as of the date that they adopted written

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184 See the Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations, Fourth Supplement (May 30, 2001), at Rule 10b5-1; Form 144, Interpretation No. 2.

trading plans or gave trading instructions that satisfied Rule 10b5-1(c). We did not receive any comments specifically on this proposal. We are adopting this amendment, as proposed.[185]

G. Amendments to Rule 145

Securities Act Rule 145[186] provides that exchanges of securities in connection with reclassifications of securities, mergers or consolidations or transfers of assets that are subject to shareholder vote constitute sales of those securities. Unless an exemption from the registration requirement is available, Rule 145(a) requires the registration of these sales. Rule 145(c) deems persons who were parties to such a transaction, other than the issuer, or affiliates of such parties to be underwriters. Rule 145(d) permits the resale, subject to specified conditions, of securities received in such transactions by persons deemed underwriters. In the 1997 Proposing Release, we proposed to eliminate the presumed underwriter and resale provisions in Rule 145(c) and (d). Many commenters supported the 1997 proposal.[187]

In the 2007 Proposing Release, we proposed amendments to Rule 145(c) and (d) that would:

- Eliminate the presumed underwriter provision in Rule 145(c), except with regard to Rule 145(a) transactions that involve a shell company (other than a business combination related shell company);[188] and

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185 See amendments to Form 144.

186 17 CFR 230.145.

187 See comment letters on the 1997 Proposing Release from ABA; ASCS; AT&T; BG&E; Brobeck, Phleger & Harrison, LLP ("Brobeck"); Corporate Counsel; Intel; NY Bar; NY City Bar; SIA; Smith Barney; Sullivan; and Testa Hurwitz.

188 The terms "shell company" and "business combination related shell company" are defined in Securities Act Rule 405. See also Release No. 33-8587 (Jul. 15, 2005) [70 FR 42233].

- Harmonize the requirements in Rule 145(d) with the proposed provisions in Rule 144 that would apply to securities of shell companies.

Under the proposed rule, where a party to a Rule 145(a) transaction, other than the issuer, is a shell company (other than a business combination related shell company), the party and its affiliates could resell securities acquired in connection with the transaction only in accordance with Rule 145(d).

Five commenters expressly supported the proposed changes to Rule 145.[189] Two commenters requested that we reassess the impact of the proposed Rule 145 amendments on the staff's position that stock received in a reorganization that is exempt from registration pursuant to Section 3(a)(10) of the Securities Act[190] could be publicly resold pursuant to Rule 145(d)(2).[191]

After considering the comments, we believe that it is appropriate to adopt the amendments to Rule 145, as proposed. The presumptive underwriter provision in Rule 145 is no longer necessary in most circumstances. However, based on our experience with transactions involving shell companies that have resulted in abusive sales of securities, we believe that there continues to be a need to apply the presumptive underwriter provision to reporting and non-reporting shell companies and their affiliates and promoters. We are amending Rule 145 to eliminate the presumptive underwriter provision except when a party to the Rule 145(a) transaction is a shell company.[192]

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189 See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Fried Frank; Financial Associations; and SCSGP.

190 15 U.S.C. 77c(a)(10).

191 See comment letters on the 2007 Proposing Release from Barron and Fried Frank.

192 With respect to a transaction that is exempt from registration pursuant to Section 3(a)(10) of the Securities Act that falls within Rule 145(a), if any party to the transaction is a shell company, then any party to the transaction, other than the issuer, and its affiliates will be permitted to resell their

Rule 145(c) now provides that any party, other than the issuer, to a Rule 145(a) transaction involving a shell company (but not a business combination related shell company), including any affiliate of such party, who publicly offers or sells securities of the issuer acquired in connection with the transaction, will continue to be deemed an underwriter.[193]

Under the amendments to Rule 145 that we are adopting, if the issuer has met the requirements of new paragraph (i)(2) of Rule 144,[194] the persons and parties deemed underwriters will be able to resell their securities subject to paragraphs (c), (e), (f), and (g) of Rule 144 after at least 90 days have elapsed since the securities were acquired in the transaction. After six months have elapsed since the securities were acquired in the Rule 145(a) transaction, the persons and parties will be permitted to resell their securities, subject only to the Rule 144(c) current public information condition, provided that the sellers are not affiliates of the issuer at the time of sale and have not been affiliates during the three months before the sale. After one year has elapsed since the securities were acquired in the transaction, the persons and parties will be permitted to resell their securities without any limitations under Rule 145(d), provided that they are non-affiliates at the time of sale and have not been affiliates during the three months before the sale.

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securities in accordance with the restrictions of Rule 145(d). Also, the staff intends to issue a revised Staff Legal Bulletin No. 3 concurrently with the effective date of the amendments that we are adopting that will address the treatment of parties to a transaction and their affiliates that have acquired securities in a transaction exempt from registration pursuant to Section 3(a)(10) of the Securities Act.

193 We are also adding the definition of "affiliate" to paragraph (e) and transferring the definition of "party" from paragraph (c) to paragraph (e).

194 The requirement in the newly added Rule 144(i)(2) that Form 10 information be filed reflecting a company's status as no longer a shell company is fulfilled with respect to a Rule 145(a) transaction through the filing of the registration statement.

In addition, we are adopting, as proposed, a note to paragraphs (c) and (d) of Rule 145 that paragraph (d) is not available with respect to any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act.[195] We have included a similar statement in the Preliminary Note to Rule 144. We also are adopting, as proposed, the clarification to the language in Rule 145(d) regarding the securities that were acquired in a transaction specified in Rule 145(a).[196]

H. Conforming and Other Amendments

1. Regulation S Distribution Compliance Period for Category Three Issuers

The purpose of the distribution compliance period in Regulation S[197] is to ensure that during the offering period and in the subsequent aftermarket trading that takes place offshore, the persons complying with the Rule 903[198] safe harbor (issuers, distributors and their affiliates) are not engaged in an unregistered, non-exempt distribution of securities into the United States capital markets.[199] In the 2007 Proposing Release, we requested comment on whether to amend Regulation S to conform the one-year distribution compliance period in Rule 903(b)(3)(iii) for Category 3 issuers (U.S. reporting issuers) to the proposed six-month Rule 144(d) holding period, or to retain the one-year distribution compliance period.

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195 See new Note to Rule 145(c) and (d).

196 See amendments to Rule 145(d) relating to "securities acquired in a transaction specified in paragraph (a) that was registered under the Act."

197 17 CFR 230.901 through 230.905 and Preliminary Notes.

198 See 17 CFR 230.903.

199 See Release No. 33-7505.

Several commenters recommended revising the Regulation S distribution compliance period in Rule 903(b)(3)(iii) to coincide with the six-month holding period under a revised Rule 144.[200] Commenters reasoned, among other things, that such a revision is logical and would promote consistency among the rules.[201] We did not receive any comment letters objecting to such an amendment to Regulation S.

When Regulation S was amended in 1998, the distribution compliance period was revised to coincide with the Rule 144(d) holding period.[202] In making this revision, we noted that a distribution compliance period that is longer than the Rule 144 holding period is unnecessary and could be confusing to apply. For the same reason, we are amending Regulation S to conform the distribution compliance period in Rule 903(b)(3)(iii) for Category 3 reporting issuers to the amendments to the Rule 144 holding period.[203] As a result, U.S. reporting issuers will be subject to a distribution compliance period of six months under Regulation S.

2. Underlying Securities in Asset-Backed Securities Transactions

In 2004, we adopted Securities Act Rule 190 to clarify when registration of the sale of underlying securities in asset-backed securities transactions is required.[204] One of the basic premises underlying asset-backed securities offerings is that an investor is buying participation in the underlying assets. Therefore, if the assets being securitized are themselves securities under the Securities Act (commonly referred to as a

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200 See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Financial Associations; Fried Frank; Herbert Smith CIS LLP ("Herbert Smith"); London Forum; Parsons; and Sullivan.

201 See, e.g., comment letters on the 2007 Proposing Release from Cleary Gottlieb; Financial Associations; and London Forum.

202 See Release No. 33-7505.

203 See amendments to Rule 903(b)(3) of the Securities Act.

"resecuritization"), the offering of the underlying securities must itself be registered or exempt from registration under the Securities Act. Rule 190 provides the framework for determining if registration of the sale of these underlying assets is required at the time of the registered asset-backed securities offering.

One of the requirements of Rule 190 is that the depositor must be free to publicly resell the securities without registration under the Securities Act.[205] Before the amendments that we are adopting, this provision noted as an example that if the underlying securities are Rule 144 restricted securities, under the conditions of the previous Rule 144(k), at least two years must have elapsed from the date the underlying securities were acquired from the issuer, or an affiliate of the issuer, and the date they are pooled and resecuritized pursuant to Rule 190.

The changes to Rule 144 with no concurrent revision to Rule 190 would have allowed privately placed debt or other asset-backed securities to be publicly resecuritized in as little as six months after their original issuance without registration of the underlying securities.[206] Given that Rule 190 addresses the public distribution of privately placed securities via resecuritization transactions, we proposed to revise Rule 190 to retain the current two-year period for resecuritizations that do not require registration of the underlying securities.[207]

A particular issuance of asset-backed securities often involves one or more publicly offered classes (e.g., classes rated investment grade) as well as one or more

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204 17 CFR 230.190 and Release No. 33-8518.

205 17 CFR 230.190(a)(3).

206 Although the asset-backed securities we are discussing may be privately placed, the issuing trust will have also registered the sale of other asset-backed securities and may have a reporting obligation under Section 15(d) of the Exchange Act for some time.

privately placed classes (e.g., non-investment grade subordinated classes). In most instances, the subordinated classes act as structural credit enhancement for the publicly offered senior classes by receiving payments after, and therefore absorbing losses before, the senior classes. These unregistered asset-backed securities are typically rated below investment grade, or are unrated, and as such could not be offered on Form S-3. They typically are not fungible with registered securities from the same offering and are held by very few investors. Further, the trust or issuing entity usually ceases reporting under the Exchange Act with respect to the publicly offered classes after its initial Form 10-K is filed. We understand that the privately placed subordinated securities in these transactions are often the types of securities that are pooled and resecuritized into new asset-backed securities.[208]

One commenter provided comments on the proposal to retain the two-year period for resecuritizations that do not require registration of the underlying securities.[209] The commenter submitted that the proposed two-year holding period for resecuritizations should be shortened to no more than six months (or twelve months, if tolling were to be reinstituted). With respect to non-asset-backed securities (e.g., corporate debt), the commenter stated that we should permit securitization without registration during the revised period, as these securities face fewer complications and are not the focus of our concerns.

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207 This change would not in any way impact the disclosure requirements for resecuritizations.

208 See Saskia Scholtes, Left in the Dark on Debt Obligations, FT.com (Mar. 27, 2007) (describing privately placed collateralized debt obligations (CDOs) vehicles used to repackage portfolios of other debt and noting that "the biggest category of deals, at 44%, consisted of CDOS backed by asset-backed securities such as those backed by subprime mortgages").

209 See comment letter on the 2007 Proposing Release from Financial Associations.

Due to the particular circumstances of asset-backed securities and our experience with a two-year period under both Regulation AB and the prior staff positions that were codified by those rules, we are not making any changes to shorten the current two-year holding period for restricted securities that are to be resecuritized in publicly registered offerings. In light of the changes that we are making to Rule 144, we are amending Rule 190 to provide that if the underlying securities are restricted securities, Rule 144 is available for the sale of the securities in the resecuritization, if at least two years have elapsed since the later of the date the securities were acquired from the issuer of the underlying securities or from an affiliate of the issuer of the underlying securities.[210] Of course, the underlying securities could still be resecuritized if they do not meet this requirement; their sale would need to be concurrently registered with the offering of the asset-backed securities on a form for which the offering of the class of underlying securities would be eligible. In addition, nothing in Rule 190, as amended, will lengthen the six-month holding period of the underlying securities under Rule 144 for resales other than in connection with publicly registered resecuritizations.

3. Securities Act Rule 701(g)(3)

Securities Act Rule 701(g)(3)[211] outlines the resale limitations for securities issued under Rule 701. The limitations for resales by non-affiliates includes references to paragraphs (e) and (h) of Rule 144, which under the amendments that we are adopting no longer apply to resales by non-affiliates. We received one comment on the conforming change, and the commenter concurred with the proposed amendment to Securities Act

210 See amendments to Rule 190(a) of the Securities Act.

211 17 CFR 230.701(g)(3).

Rule 701(g)(3).[212] Accordingly, we believe that it is appropriate to conform the resale restrictions of securities acquired pursuant to employee benefit plans under Rule 701 of the Securities Act. We are adopting the amendment to remove references to Rule 144(e) and (h) from Rule 701.[213]

III. Paperwork Reduction Act

A. Background

Our amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[214] We submitted the amendments to Form 144 to the Office of Management and Budget (OMB) for review in accordance with the PRA.[215] OMB has approved the revision. The title for the information collection is "Notice of Proposed Sale of Securities Pursuant to Rule 144 under the Securities Act of 1933" (OMB Control No. 3235-0101). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid control number.

The primary purpose of this collection of information is the disclosure of a proposed sale of securities by security holders deemed not to be engaged in the distribution of the securities and therefore not underwriters. Form 144 may be filed in paper or electronically using the EDGAR filing system. Form 144 filings are publicly available. Persons reselling securities in reliance on Rule 144 are the respondents to the

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212 See comment letter on the 2007 Proposing Release from ABA.

213 See amendments to Rule 701(g)(3) of the Securities Act.

214 44 U.S.C. 3501 et seq.

215 See 44 U.S.C. 3507 and 5 CFR 1320.11.

information required by Form 144. The information collection requirements imposed by Form 144 are mandatory.

B. Summary of Amendments

In the 2007 Proposing Release, we proposed an amendment to the Form 144 filing requirement to eliminate the need for non-affiliates of the issuer to file Form 144 in order to sell their securities under Rule 144. In addition, the proposal would have raised the filing threshold for Form 144 to 1,000 shares or $50,000 worth of securities during a three-month period. Currently, the Form 144 filing threshold is 500 shares or $10,000. The proposed amendments also included two other minor changes to Form 144.[216]

The 2007 Proposing Release included a PRA analysis. We received one comment letter addressing this analysis. The commenter noted that our estimate of burden hours necessary to complete a notice on Form 4 is 0.5 hours, while we estimate that it takes 2.0 burden hours to complete Form 144.[217] This commenter believed our estimates for the two forms should be comparable. Because this commenter estimated that it takes only three minutes on average to key and proof Form 144 data items, the commenter believed that 0.5 hours is probably a more accurate estimate of the burden hours needed to complete the Form 144.

In addition, in response to comment, we are raising the thresholds that trigger a Form 144 filing requirement to 5,000 shares or $50,000 of securities within a three-

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216 We proposed to amend Form 144 to include information regarding security holders' hedging activities and to allow security holders to represent that they do not know of material adverse information about the company as of the date they adopt a plan under Exchange Act Rule 10b5-1. We are adopting the amendment to Form 144 regarding the representation that the security holder does not know of material adverse information about the company as of the date that he or she adopts a plan under Exchange Act Rule 10b5-1.

217 See comment letter on the 2007 Proposing Release from Washington Service on PRA estimates ("WS 1").

month period, from the proposed thresholds of 1,000 shares or $50,000. Therefore, we are adjusting our paperwork burden estimates for Form 144.

C. Revised Burden Estimates

Due to comment and the changes that we are adopting, we are publishing revised burden estimates for Form 144. Currently, we estimate that 60,500 notices on Form 144 are filed annually for a total burden of 121,000 hours.[218] As noted in the proposing release, the amendments that eliminate the need for non-affiliates to file Form 144 notices will decrease the annual Form 144 filings by approximately 45%. As a result, we estimate that the number of annual Form 144 filings will be reduced from 60,500 filings to 33,373 filings.[219]

In addition, we estimate that increasing the Form 144 filing thresholds from 500 shares or $10,000 to 5,000 shares or $50,000 will further reduce the number of Form 144 filings that we receive annually by approximately 30% (10,012 fewer filings).[220] After considering the comment letter that we received on the current PRA estimate for Form 144, we estimate that each notice on Form 144 imposes a burden for PRA purposes of one hour. Therefore, under these revised estimates, the amendments that we are adopting will reduce the burden on selling security holders who sell the securities under Rule 144 by a total of approximately 37,139 burden hours.

D. Solicitation of Comments

Pursuant to 44 U.S.C. 3506(c)(2)(A), we request comments to (1) evaluate whether the proposed collection of information is necessary for the proper performance

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218 This reflects current OMB estimates.

219 The Office of Economic Analysis obtained data from the Thomson Financial Wharton Research Database. The estimate is based on information contained in notices on Form 144 filed in 2005.

of the functions of the agency, including whether the information would have practical utility; (2) evaluate the accuracy of our estimate of the burden of the proposed collection of information; (3) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

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 20549-9303, with reference to File No. S7-11-07. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-11-07, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE, Washington, DC 20549-0609. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

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220 This estimate is based on information contained in notices on Form 144 filed in 2005.

IV. Cost-Benefit Analysis

A. Background

Rule 144 under the Securities Act of 1933 creates a safe harbor for the sale of securities under the exemption set forth in Section 4(1) of the Securities Act. Specifically, a selling security holder is deemed not to be an underwriter under Section 2(a)(11), and therefore may take advantage of the Section 4(1) exemption and need not register its sale of securities, if the sale complies with the provisions of the rule. Securities Act Rule 145 requires Securities Act registration of certain types of business combination transactions, unless an exemption from the registration requirement is available. Rule 145 contains a safe harbor provision similar to Rule 144 for presumed underwriters who receive securities in such a business combination transaction. Form 144 is required to be filed by persons intending to sell securities in reliance on Rule 144 if the amount of securities to be sold in any three-month period exceeds specified thresholds. The primary purpose of the form is to publicly disclose the proposed sale of securities by persons deemed not to be engaged in the distribution of the securities.

B. Description of Amendments

We are adopting, substantially as proposed, amendments to Rule 144, Rule 145, and Form 144 that will accomplish the following:

- Simplify the Preliminary Note to Rule 144 and the text of Rule 144, using plain English principles;
- Shorten the Rule 144(d) holding period for restricted securities of Exchange Act reporting issuers to six months for both affiliates and non-affiliates;

- Significantly reduce requirements applicable to non-affiliates of reporting and non-reporting issuers so that:
    - Non-affiliates of reporting issuers will be subject only to the current public information requirement after meeting the six-month holding period for restricted securities of these issuers and up until one year since the date they acquired the restricted securities from the issuer or affiliate of the issuer; and
    - Non-affiliates of non-reporting issuers will be able to resell restricted securities of these issuers after satisfying a one-year holding period without having to comply with any other condition of Rule 144;
- For affiliate sales':
    - Revise the "manner of sale" limitations,
    - Eliminate the "manner of sale" limitations with respect to debt securities,
    - Raise the volume limitations for debt securities, and
    - Increase the thresholds that trigger a Form 144 filing requirement;
- Codify staff interpretive positions, as they relate to Rule 144, concerning the following issues:
    - Inclusion of securities acquired in a transaction under Section 4(6) of the Securities Act in the definition of "restricted securities,"
    - The effect that creation of a holding company structure has on a security holder's holding period,
    - Holding periods for conversions and exchanges of securities,

- Holding periods for cashless exercise of options and warrants,
- Aggregation of a pledgee's resales with resales by other pledgees of the same security for the purpose of determining the amount of securities to be sold,
- The extent to which securities issued by reporting and non-reporting shell companies are eligible for resale under Rule 144, and
- Representations required from security holders relying on Exchange Act Rule 10b5-1(c); and

- Eliminate the presumptive underwriter provision in Securities Act Rule 145, except for transactions involving a shell company, and revise the resale provisions for presumed underwriters in that rule.

C. Benefits

We believe that the amendments will reduce the cost of complying with Rules 144 and 145. We examined the Forms 144 that were filed with the Commission since 1997.[221] In 2006, the volume of transactions filed under Rule 144 exceeded $71 billion, and more than 50% of U.S. public companies, large and small alike, every year have had at least one transaction reported on Form 144. Reducing the burden associated with these transactions can reduce the cost of capital to these companies.

One item on Form 144 requires security holders to provide information on the nature of the acquisition transaction. Some Form 144 filers acquire their securities from the issuer as a private investment, while others receive the securities as part of their employee awards, or as a form of payment for services to the issuer. Reducing the burden associated with selling these securities not only can reduce the cost of raising capital, but also may increase the value of these securities in non-cash transactions and thereby may reduce the cost of services and employment.

For the most part, transactions that have been reported on Form 144 have been small. In 2006, about 90% of the transactions had a market value of less than $2 million and 99% of these transactions had a market value of less than $20 million. More than half of the investors report total annual transactions of a market value of less than $240,000 with any specific issuer. Thus, reducing the costs associated with filing Form 144 and raising the thresholds that trigger a Form 144 filing requirement are likely to affect a large number of investors.

We expect that the increase in the value of these securities will come from several sources under the amendments we are adopting. The first is the increase in the liquidity of the securities. Investors, suppliers, or employees who are restricted from selling securities and who cannot hedge their positions are generally exposed to more risk than those who are not subject to such limitations, and generally require higher compensation (or a larger discount with respect to the securities) for this risk.[222] We also should expect

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[221] These filings were obtained through Thomson Financial's Wharton Research Database which includes Forms 144 filed from 1996 through 2007.

[222] There is also evidence that the non-trading period is associated with the premium that investors charge for lack of liquidity. See, for example, Silber, W.L., Discounts on restricted stock: The impact of illiquidity on stock prices, Financial Analysts Journal, 47, 60-64 (1991). Several studies have attempted to separate the discount associated with the non-transferability of the shares from other factors that affect the discount. See, e.g., Wruck, K. H., Equity Ownership Concentration and Firm Value, Evidence from Private Equity Financings, Journal of Financial Economics, 23, 3-28 (1989); Hertzel, M., and R. L. Smith, Market Discounts and Shareholder Gains for Placing Equity Privately, Journal of Finance, 459-485 (1993); Bajaj, M., Denis, D., Ferris, S.P., and A. Sarin, Firm Value and Marketability Discounts, Journal of Corporate Law, 27, 89-115 (2001); Finnerty, J.D., The Impact of Transfer Restrictions on Stock Prices (Fordham U. Working Paper, 2002). The average discounts attributed to lack of transferability across these studies is estimated between 7% and 20%. Among the other factors that could affect the discount are the amount of resources that private investors need to expend to assess the quality of the issuing firm or to

that the longer the non-trading period, the higher the premium that investors will charge for their lack of liquidity.[223] Thus, reducing the time limit for selling these securities in the market is likely to reduce the discount that investors will charge for these securities, or the amount of securities that the issuer will need to provide for services. The actual reduction in this cost of capital will depend on the extent to which the six-month limit has a binding impact on security holders' decisions to resell their securities, and the extent to which investors, employees, or service providers can protect themselves against such exposure.

Commenters expressed support for the belief that the proposals would increase liquidity for issuers and make capital investment more attractive without sacrificing investor protection.[224] Some commenters also stated that the proposals would decrease the cost of capital for smaller companies.[225] One commenter noted that if the proposals are adopted, companies will have greater financing options, which will save them time and resources.[226] One commenter noted that the reduction of the holding period requirement will reduce costs involved in any private investment in public equity financings, since investors will be incurring less risk in holding restricted securities.[227]

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monitor the firm, the ability of the investors to diversify the risk associated with the investment, whether the investors are cash constrained, and the financial situation of the firm.

223 We are not aware of any empirical work that examines the effect of shortening the holding period in Rule 144 on the discount. Longstaff calculates an upper bound for percentage discounts for lack of marketability. According to his model, drops in a restriction from two years to one year and from one year to 180 days are each associated with a 30% drop in the discount. Longstaff, F. A., How Much Can Marketability Affect Security Values?, Journal of Finance, 50, 1767-1774 (1995).

224 See, e.g., comment letters on the 2007 Proposing Release from Financial Associations; Richardson Patel; and Roth.

225 See, e.g., comment letters on the 2007 Proposing Release from Pink Sheets and Sichenzia.

226 See comment letter on the 2007 Proposing Release from Parsons.

227 See comment letter on the 2007 Proposing Release from Weisman.

Also, resale transactional costs for non-affiliate selling security holders should decrease as a result of the removal of all conditions other than the holding period condition and the current public information condition applicable to non-affiliates of reporting issuers. Reducing restrictions on resales by non-affiliates should streamline the rule and reduce the complexity of the rule. This and other simplifications of Rule 144 and its Preliminary Note should make it easier to understand and follow, reducing the time that investors must spend analyzing whether or not they can rely on the rule as a safe harbor from the requirement to register the resale of their securities. The differences in holding period conditions between resales of securities of reporting issuers and resales of securities of non-reporting issuers, however, adds some complexity to the rule that may diminish the effect of simplifying other aspects of the rule.

Under the amendments, non-affiliates no longer are required to file Form 144 or comply with the manner of sale requirements and volume limitations, after the Rule 144(d) holding period requirement is met. Therefore, they will save the cost of preparing and filing Form 144, as well as the transactional costs related to complying with the manner of sale requirements and volume of sale limitations. As noted above, we estimate that the amendments reducing the restrictions applicable to non-affiliates will decrease the annual Form 144 filings by approximately 45%.

In addition, the increase in the Form 144 filing thresholds should further reduce the number of transactions for which Form 144 needs to be filed for proposed sales of securities held by affiliates of the issuer. This will eliminate the cost of preparing and filing the form for transactions that fall below the new thresholds.

The elimination of the manner of sale requirements, combined with the relaxation of volume limitations, applicable to resales of debt securities will reduce costs for debt security holders. It is difficult to estimate the amount of reduction. Among the Forms 144 filed with the Commission in 2005, we found at least 200 filings covering a sale of debt securities, although we believe the actual number of debt securities resales relying on Rule 144 may be higher than this.[228] The elimination of the manner of sale requirements for resales of debt securities may also reduce brokers' fees and, therefore, result in a reduction of revenue for brokers.

In the 2007 Proposing Release, we requested comment on whether to eliminate the manner of sale requirements also for resales of equity securities. After considering the comments, we are retaining and amending the manner of sale requirements for resales of equity securities by affiliates. We believe that the amendments we are adopting will benefit investors and companies by modernizing Rule 144 so that it better reflects current trading practices and venues for sales of securities.[229]

The codification of existing staff interpretive positions should not create added cost to companies or investors because, substantively, there is no expected change in practice as a result of the codification.[230] However, these codifications should provide

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228 We base the estimate on number of filings that indicated that the securities were debt securities in the section of Form 144 that requests information on the nature of the acquisition transaction.

229 For example, under the amendments, the posting of bid and ask prices in alternative trading systems will not be considered a solicitation proscribed by Rule 144(g), provided that the broker has published bona fide bid and ask quotations for the security in the alternative trading system on each of the last twelve days. As noted above, trading in alternative trading systems has become increasingly common such that, in the second quarter of 2007, alternative trading systems handled approximately $1.3 trillion in volume of matched orders. We obtained this data from information provided in Form ATS-R Quarterly Reports.

230 We are, however, modifying the staff interpretation relating to the treatment of reporting and non-reporting shell companies to allow resales of securities of former shell companies one year after Form 10 information is filed reflecting the issuer of the securities has ceased to be a shell company.

substantial benefit to the investing community by clarifying and better publicizing the staff's positions. Greater clarity and transparency of our rules should reduce security holders' transactional costs by eliminating uncertainty and reducing the need for legal analysis. We received one comment letter in support of this reasoning, noting that codification of the staff's interpretive positions should help to resolve any lingering confusion and assist in making Rule 144 more readily understandable to market participants.[231] Another commenter noted that the codification of staff interpretations should reduce legal research costs for those who are considering the question for the first time.[232]

The amendments to Rule 145 remove what we believe are unnecessary restraints on the resale of securities by parties, or their affiliates, to a merger, recapitalization, or other transaction listed in Rule 145(a). The amendments to Rule 145 will reduce costs incurred by companies, parties to the transaction, and their affiliates to comply with the resale and other restrictions of the rule. Retaining the presumptive underwriter provision for transactions involving shell companies is intended to preserve for investors protection against manipulative practices or abusive sales by parties to the transaction and their affiliates after the completion of the Rule 145 transaction.

D. Costs

Relative to other options, the choice to register equity securities is attractive to issuers, because issuers can assure investors that there will be a liquid aftermarket for their equity securities. However, in the 2007 Proposing Release, we noted that reducing the requirements under Rule 144 might also cause a substitution effect, where companies

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[231] See comment letter on the 2007 Proposing Release from Financial Associations.

might choose to rely more on private transactions than on public transactions to raise capital. Also, reducing the requirements under Rule 144 could also lead to the movement of certain investors from public transactions to private transactions.

We also acknowledge that there is the risk that the market will not be informed about the nature of these transactions, given that these transactions are not required to be registered and given the changes to the Form 144 filing requirements. The market may also be less informed, given that restricted securities of reporting companies could be resold by non-affiliates earlier without satisfying the condition that current information on the issuer of the securities be publicly available, and restricted securities of non-reporting companies could be resold by non-affiliates without current information on the issuer ever being publicly available. This, in return, could lead to a less efficient price formation. Direct negotiated deals with companies could also lead to informational advantage of some investors. The effect of the amendments on these movements and their effect on investor wealth or on issuers' cost of capital are thus subject to many factors.

Under the amendments we are adopting, with respect to securities of reporting issuers, after the six-month holding period is satisfied, non-affiliates of the issuer will be subject, for an additional six months, only to the condition requiring the availability of adequate current information on the issuer. After one year, non-affiliates of both reporting and non-reporting issuers will be permitted to sell their restricted securities freely without being subject to any other Rule 144 condition. We received comments in support of the proposed amendments regarding non-affiliates, as well as a few comments

232 See comment letter on the 2007 Proposing Release from ABA.

objecting to some of the changes. Some commenters objected to the aspect of the proposed amendments that would allow non-affiliates to resell their restricted securities after the holding period without being required to comply with the manner of sale requirements,[233] or the Form 144 filing requirement,[234] for an additional year. Another commenter was concerned that, for sales of securities of a non-reporting company, relieving non-affiliates from compliance with Rule 144's existing conditions, including the current public information condition, would lead to abuse.[235] We did not receive comments quantifying the effect of the proposed amendments on investor wealth or on cost of capital.

While we acknowledge that these are potential costs of the amendments that we are adopting, we continue to believe that they are justified by the potential benefits of the amendments and may not be significant in the aggregate. As stated in the 2007 Proposing Release, there is some evidence that, on average, the announcement of resales under Rule 144 by security holders has no adverse effect on stock prices, suggesting that the market does not attribute an informational advantage to these security holders at the time of selling.[236] Second, the rule, as amended, continues to impose several conditions to selling restricted securities by affiliated investors to alleviate these concerns.

One commenter expressed concern about the extent of the reduction of the restrictions for non-affiliates and contended that the changes will shift the market value of a company's securities away from the security holders who have held the securities for

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233 See comment letter on the 2007 Proposing Release from Brill 1.

234 See comment letters on the 2007 Proposing Release from Brill 1 and WS 2.

235 See comment letter on the 2007 Proposing Release from Brill 1.

236 Osborne, Alfred E., Rule 144 Volume Limitations and the Sale of Restricted Securities in the Over-The-Counter Market, Journal of Finance, 37, 505-523 (1982).

a longer time period and "into the pockets of the security holders" who are able to sell their securities without limitation after holding them for six months.[237] However, we believe that the possible impact that such a change could have is likely temporary and not significant. Also, to the extent that privately negotiated deals give private investors lucrative terms at the expense of public investors, public investors may avoid such companies, and these companies may eventually be worse off.

V. Promotion of Efficiency, Competition and Capital Formation

Securities Act Section 2(b)[238] requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider in addition to the protection of investors whether the action will promote efficiency, competition, and capital formation.

The amendments are intended to reduce regulatory requirements for the resale of securities and simplify the process of reselling such securities. Before today's amendments, a security holder who wished to rely on the Rule 144 safe harbor for the resale of restricted securities had to wait until at least one year after the securities were last sold by the issuer or an affiliate before any securities could be sold under Rule 144. The amendments to Rule 144 will reduce this holding period requirement to six months for the resale of restricted securities of Exchange Act reporting companies. Restricted securities of non-reporting companies will continue to be subject to a one-year holding period requirement.

After considering the comments on the 2007 Proposing Release, we continue to believe that the shorter holding period requirement for restricted securities of reporting

[237] See comment letters on the 2007 Proposing Release from NASAA.

companies will increase the liquidity of securities sold in private transactions.[239] This could result in increased efficiency in securities offerings to the extent that companies are able to sell securities in private offerings at prices closer to prices that they may obtain in public markets, without the need to register those securities, and otherwise obtain better terms in private offerings. We also believe that this will promote capital formation, particularly for smaller companies, because the amendments will increase the liquidity of securities sold in private transactions. The amendments should increase a company's ability to raise capital in private securities transactions, which may improve the competitiveness of those companies, particularly smaller businesses that do not have ready access to public markets.

The other amendments to Rule 144 generally also should increase efficiency and assist in capital formation. We believe that the elimination of most of the Rule 144 conditions applicable to non-affiliates may further increase the liquidity of privately sold securities. We anticipate that the elimination of the manner of sale requirements for debt securities and the amendments to the volume limitations will provide debt security holders with greater flexibility in the resale of their securities, thereby increasing efficiency.

As noted above, several commenters supported the proposed amendments because they promote capital formation, noting that they enhance the ability to raise capital for issuers, and, in particular, smaller issuers.[240] One commenter, however, noted that the codification of the staff interpretation relating to reporting and non-reporting shell

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238 15 U.S.C. 77b(b).

239 See Section IV.C of this release.

companies will adversely affect small business capital formation.[241] We are, however, modifying the staff interpretation to permit resales of securities of former reporting and non-reporting shell companies under certain circumstances. Also, we believe that the impact on small business capital formation due to the amendments will be limited, given that we believe there will not be a substantial change in existing practices, and the interest of investor protection is paramount where we believe there may be significant potential for abuse.

Several commenters noted in their letters that the Form 144 filing requirement imposes a burden on selling security holders.[242] Raising the Form 144 filing thresholds should also improve efficiency by reducing security holders' paperwork burden.

Under the amendments to Rule 145, individuals and smaller entities owning securities in companies that engage in transactions specified in Rule 145(a) will no longer be subject to the presumptive underwriter provision, except in the case of transactions involving a shell company. These amendments should improve the competitiveness of many smaller entities in permitting them to resell securities without the restrictions that were imposed by the rule before the amendments that we are adopting.

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240 See, e.g., comment letters on the 2007 Proposing Release from Financial Associations; Pink Sheets; Richardson Patel; Roth; and Sichenzia.

241 See comment letter on the 2007 Proposing Release from Williams.

242 See, e.g., comment letters on the 2007 Proposing Release from Fried Frank and SCSGP. Some commenters even supported eliminating the Form 144 filing requirement for both affiliates and non-affiliates. See comment letters from ABA; BAIS; SCSGP; and Sullivan.

VI. Final Regulatory Flexibility Analysis

We have prepared this Final Regulatory Flexibility Analysis in accordance with Section 603 of the Regulatory Flexibility Act.[243] This analysis relates to the amendments to Rules 144 and 145 and Form 144 under the Securities Act. An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the Regulatory Flexibility Act in conjunction with the 2007 Proposing Release. The 2007 Proposing Release included, and solicited comment on, the IRFA.

A. Reasons for, and Objectives of, the Amendments

On July 5, 2007, we proposed amendments to Rules 144 and 145 of the Securities Act.[244] Rule 144 provides a safe harbor for the sale of securities under the exemption set forth in Section 4(1) of the Securities Act. If a selling security holder satisfies the Rule 144 conditions, that selling security holder may resell his or her securities publicly without registration and without being deemed an underwriter.

Rule 145 governs the offer and sale of certain securities received in connection with reclassifications, mergers, consolidations and asset transfers. It imposes restrictions similar to Rule 144 on a party to such transactions and to persons who are affiliates of that party at the time the transaction is submitted for vote or consent, with regard to securities acquired in that transaction.

Under the amendments we are adopting, Form 144 is required to be filed by affiliates of the issuer intending to sell securities in reliance on Rule 144 if the amount of securities to be sold in any three-month period exceeds 5,000 shares or other units or the aggregate sales price exceeds $50,000. The primary purpose of the form is to publicly

[243] 5 U.S.C. 603.

disclose the proposed sale of securities by persons who, under Rule 144, are deemed not to be engaged in the distribution of the securities.

We are amending Rule 144 to make it easier to understand and apply. We are streamlining both the Preliminary Note to Rule 144 and the Rule 144 text. In addition to codifying several staff interpretive positions, the amendments will reduce the Rule 144 holding period requirement and substantially reduce other Rule 144 conditions for the resales of securities by non-affiliates.

The reduction of the Rule 144 holding period requirement for restricted securities of reporting companies for affiliates and non-affiliates should increase the liquidity of privately issued securities, enabling companies to raise private capital more efficiently. Although the codification of several staff interpretive positions is not intended to substantively change the rules, this should simplify analysis under Rule 144 by compiling these interpretations in one readily accessible location. The objectives of the amendments are to simplify Rule 144, to reduce its burdens on investors where consistent with investor protection, and to facilitate capital formation.

The amendments that increase the share and dollar thresholds that trigger a Form 144 filing take into account the effects of inflation since 1972. The amendments to the Form 144 filing requirements will eliminate much of the paperwork burden for selling security holders.

[244] See Release No. 33-8813.

B. Significant Issues Raised by Comments

Some commenters stated that the proposals would facilitate capital raising for smaller companies without compromising investor protection.[245] One commenter noted that the elimination of the restrictions applicable to non-affiliates would save countless dollars and wasted resources.[246] On the other hand, one commenter that opposed the shortened holding periods stated that under the amendments, companies, especially small companies, will avoid registration on the federal and state level.[247] We acknowledge that, while this may be a potential cost of shortening the holding period, a six-month holding period is a reasonable indication that the security holder has assumed sufficient economic risk in the securities. Further, the potential cost caused by the amendments is justified by the potential benefits relating to capital formation that we believe will result from the amendments.

Some commenters had concerns about the codification of the staff interpretation that prohibits security holders of shell companies or former shell companies from relying on Rule 144 for the resale of their securities. Three commenters expressed concern that under the proposed amendments, security holders of non-reporting shell companies would not be able to rely on Rule 144.[248] Two commenters were concerned that this could reduce funding for and penalize smaller companies.[249] We believe that the amendments relating to the use of Rule 144 for the resale of securities of shell companies

245 See, e.g., comment letters on the 2007 Proposing Release from Pink Sheets; Roth; and Sichenzia.

246 See comment letter on the 2007 Proposing Release from Brill 1.

247 See comment letter on the 2007 Proposing Release from NASAA.

248 See comment letters on the 2007 Proposing Release from Nelson; Russell; and Williams. The comment letter on the 2007 Proposing Release from Pink Sheets submitted various recommendations regarding how to improve the adequacy of information on non-reporting companies.

are necessary to protect against abuses relating to the distribution of securities of shell companies.

C. Small Entities Subject to the Rule

The rules will affect both small entities that issue securities and small entities that hold such securities. An issuer, other than an investment company, is considered a "small business" for purposes of the Regulatory Flexibility Act if that issuer:

- Has assets of $5 million or less on the last day of its most recent fiscal year, and
- Is engaged or proposing to engage in a small business financing.[250]

An issuer is considered to be engaged in a small business financing if it is conducting or proposes to conduct an offering of securities that does not exceed the dollar limitation prescribed by Section 3(b)[251] of the Securities Act. This dollar amount is currently $5 million. When used with reference to an issuer or person, other than an investment company, Exchange Act Rule 0-10[252] defines small entity to mean an issuer or person that, on the last day of its most recent fiscal year, had total assets of $5 million or less.

We are aware of approximately 1,100 Exchange Act reporting companies that currently satisfy the definition of "small business" and may be affected by the amendments as issuers of the securities sold under Rule 144.[253] The amendments also may affect companies that are small businesses, but that are not subject to Exchange Act

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249 See comment letters on the 2007 Proposing Release from Nelson and Russell.

250 17 CFR 230.157.

251 15 U.S.C. 77c(b).

252 17 CFR 240.0-10.

253 The estimated number of reporting small entities is based on 2007 data including the SEC EDGAR database and Thomson Financial's Worldscope database. This represents an update from the number of reporting small entities estimated in prior rulemakings.

reporting requirements. As noted above, we currently estimate that approximately 60,500 notices on Form 144 are filed annually.[254] We do not collect information in Form 144 about the size of an issuer, but we believe that some non-reporting issuers may be "small."

The amendments that relate to the Rule 144 manner of sale requirements may also affect brokers that qualify as small entities. We estimate that 910 broker-dealers registered with the Commission are small entities for the purposes of the Regulatory Flexibility Act.[255]

In the 2007 Proposing Release, we solicited comment on the estimate of the number of small entities that may be affected by the proposed amendments. We did not receive any comments providing an estimate of the number of small entities that will be affected by the amendments.

D. Reporting, Recordkeeping and Other Compliance Requirements

We expect several of the amendments to reduce the number of Forms 144 filed with us by selling security holders. We are adopting amendments that will eliminate the need for non-affiliates relying on the Rule 144 safe harbor to comply with most of the conditions of Rule 144, after the holding period is met. We are also increasing the share number and dollar amount thresholds that trigger a Form 144 filing requirement.

As a result of the amendments, non-affiliates no longer will be required to file a Form 144, after the requisite holding period is met, in order to sell their securities under

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[254] This reflects current OMB estimates.

[255] For purposes of the Regulatory Flexibility Act, a broker or dealer is a small entity if it (i) had total capital of less than $500,000 on the date in its prior fiscal year as of which its audited financial statements were prepared or, if not required to file audited financial statements, on the last business day of its prior fiscal year, and (ii) is not affiliated with any person that is not a small entity and is not affiliated with any person that is not a small entity. 17 CFR 240.0-1.

Rule 144, regardless of the amount of securities to be sold. As noted earlier, we estimate that 45% of Forms 144 that we currently receive relate to restricted securities held by non-affiliates. Therefore, this particular amendment should result in a corresponding reduction in the number of Forms 144 filed annually.

The increase in the filing thresholds for Form 144 should decrease the number of Forms 144 filed by affiliates. Based on studies conducted by our Office of Economic Analysis, we expect the number of Form 144 filings to decrease further by approximately 30%, as a result of the increase in the filing thresholds to 5,000 shares or $50,000 in sales price in a three-month period.

Clerical skills are necessary to complete Form 144.

Also, because the amendments significantly reduce the conditions in Rule 144 to which non-affiliates are subject in the resale of their securities, non-affiliates will no longer be required to keep track of compliance with those conditions to which non-affiliates will no longer be subject. Non-affiliates selling securities of either reporting issuers or non-reporting issuers under Rule 144 will no longer be required to comply with the manner of sale requirements and volume limitations. Non-affiliates selling securities of non-reporting issuers under Rule 144 will no longer be required to comply with the current public information requirement.

The amendments eliminating the manner of sale requirements for debt securities also will obviate the need for security holders to determine whether such condition has been met in the resale of their debt securities. As a result of both the amendments relating to the manner of sale requirements and the volume limitations with regard to debt securities, however, more security holders will be able to sell their securities under the Rule 144 safe harbor.

The amendments to Rule 145 will eliminate the need for parties to a Rule 145(a) transaction or their affiliates to determine whether they have complied with the Rule 145 resale provisions for presumed underwriters, except when the transaction involves a shell company.

E. Agency Action to Minimize Effect on Small Entities

We considered different compliance standards for the small entities that will be affected by the amendments. In the 1997 Proposing Release, we solicited comment regarding the possibility of different standards for small entities. However, we believe that such differences would be inconsistent with the purposes of the rules.

Because the amendments will benefit all companies and holders of restricted securities, differing compliance timetables or standards for small entities are not appropriate. In addition, the shortened holding period will likely have a favorable impact on small entities by increasing a company's ability to raise capital in private securities transactions, which may improve the competitiveness of those companies, particularly smaller businesses that do not have ready access to public markets. The amendments that clarify and streamline Rule 144 should benefit all companies, including small entities. The amendments relating to the manner of sale requirements and volume limitations for debt securities should benefit issuers of debt securities, preferred stock, and asset-backed securities. We continue to believe that further changes, such as the use of performance standards or other exemptions with regard to small entities, would overly complicate the rule, which is contrary to our stated purpose. The prohibition against security holders of reporting and non-reporting shell companies from relying on Rule 144 protects against abuses relating to the resale of privately issued securities.

The amendments to Rule 145 will eliminate the presumptive underwriter provision and resale restrictions on parties to a transaction specified in Rule 145(a) and their affiliates, including small entities and their affiliates, except when the transaction involves a shell company. We believe that retaining the presumptive underwriter provision when the transaction involves a shell company is necessary, given the potential for abuse relating to such transactions.

VII. Statutory Basis and Text of Amendments

We are adopting the amendments pursuant to Sections 2(a)(11), 4(1), 4(3), 4(4), 7, 10, 19(a) and 28 of the Securities Act, as amended.

List of Subjects

17 CFR Part 230

Advertising, Reporting and recordkeeping requirements, Securities.

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

For the reasons set out above, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 230 -- GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. Revise the authority citation for Part 230 to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

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2. Amend §230.144 by:

a. Revising the preliminary note;

b. Revising paragraphs (a)(3)(vi) and (a)(3)(vii), and adding paragraphs (a)(3)(viii) and (a)(4);

c. Revising paragraphs (b), (c), (d)(1), (d)(3)(i), (d)(3)(ii), (d)(3)(vii) and (d)(3)(viii);

d. Adding paragraphs (d)(3)(ix) through paragraphs (d)(3)(x);

e. Revising the introductory text to paragraphs (e) and (e)(1);

f. Revising paragraphs (e)(2) and (e)(3);

g. Revising paragraph (f);

h Revising paragraph (g)(1);

i. Redesignating existing paragraph (g)(2) as paragraph (g)(3) and revising newly redesignated paragraph (g)(3);

j. Redesignating existing paragraph (g)(3) and related notes as paragraph (g)(4) and related notes;

k. Adding new paragraph (g)(2);

l. Revising paragraphs (h) and (i); and

m. Removing paragraphs (j) and (k).

The revisions and additions read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

PRELIMINARY NOTE

Certain basic principles are essential to an understanding of the registration requirements in the Securities Act of 1933 (the Act or the Securities Act) and the purposes underlying Rule 144:

1. If any person sells a non-exempt security to any other person, the sale must be registered unless an exemption can be found for the transaction.

2. Section 4(1) of the Securities Act provides one such exemption for a transaction "by a person other than an issuer, underwriter, or dealer." Therefore, an understanding of the term "underwriter" is important in determining whether or not the Section 4(1) exemption from registration is available for the sale of the securities.

The term "underwriter" is broadly defined in Section 2(a)(11) of the Securities Act to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates, or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. The interpretation of this definition traditionally has focused on the words "with a view to" in the phrase "purchased from an issuer with a view to . . . distribution." An investment banking firm which arranges with an issuer for the public sale of its securities is clearly an "underwriter" under that section. However, individual investors who are not professionals in the securities business also may be "underwriters" if they act as links in a chain of transactions through which securities move from an issuer to the public.

Since it is difficult to ascertain the mental state of the purchaser at the time of an acquisition of securities, prior to and since the adoption of Rule 144, subsequent acts and circumstances have been considered to determine whether the purchaser took the securities "with a view to distribution" at the time of the acquisition. Emphasis has been placed on factors such as the length of time the person held the securities and whether there has been an unforeseeable change in circumstances of the holder. Experience has shown, however, that reliance upon such factors alone has led to uncertainty in the application of the registration provisions of the Act.

The Commission adopted Rule 144 to establish specific criteria for determining whether a person is not engaged in a distribution. Rule 144 creates a safe harbor from the Section 2(a)(11) definition of "underwriter." A person satisfying the applicable conditions of the Rule 144 safe harbor is deemed not to be engaged in a distribution of the securities and therefore not an underwriter of the securities for purposes of Section 2(a)(11). Therefore, such a person is deemed not to be an underwriter when determining whether a sale is eligible for the Section 4(1) exemption for "transactions by any person other than an issuer, underwriter, or dealer." If a sale of securities complies with all of the applicable conditions of Rule 144:

1. Any affiliate or other person who sells restricted securities will be deemed not to be engaged in a distribution and therefore not an underwriter for that transaction;

2. Any person who sells restricted or other securities on behalf of an affiliate of the issuer will be deemed not to be engaged in a distribution and therefore not an underwriter for that transaction; and

3. The purchaser in such transaction will receive securities that are not restricted securities.

Rule 144 is not an exclusive safe harbor. A person who does not meet all of the applicable conditions of Rule 144 still may claim any other available exemption under the Act for the sale of the securities. The Rule 144 safe harbor is not available to any person with respect to any transaction or series of transactions that, although in technical compliance with Rule 144, is part of a plan or scheme to evade the registration requirements of the Act.

(a) * * *

(3) * * *

(vi) Securities acquired in a transaction made under §230.801 to the same extent and proportion that the securities held by the security holder of the class with respect to which the rights offering was made were, as of the record date for the rights offering, "restricted securities" within the meaning of this paragraph (a)(3);

(vii) Securities acquired in a transaction made under §230.802 to the same extent and proportion that the securities that were tendered or exchanged in the exchange offer or business combination were "restricted securities" within the meaning of this paragraph (a)(3); and

(viii) Securities acquired from the issuer in a transaction subject to an exemption under section 4(6) (15 U.S.C. 77d(6)) of the Act.

(4) The term <u>debt securities</u> means:

1. Any security other than an equity security as defined in §230.405;

2. Non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; and

3. Asset-backed securities, as defined in §229.1101 of this chapter.

(b) <u>Conditions to be met</u>. Subject to paragraph (i) of this section, the following conditions must be met:

(1) <u>Non-Affiliates</u>.

(i) If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (the Exchange Act), any person who is not an affiliate of the issuer at the time of the sale, and has not been an affiliate during the preceding three months, who sells restricted securities of the issuer for his or her own account shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if all of the conditions of paragraphs (c)(1) and (d) of this section are met. The requirements of paragraph (c)(1) of this section shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of one year has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer.

(ii) If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, any person who is not an affiliate of the issuer at the time of the sale, and has not been an affiliate during the preceding three months, who sells restricted securities of the issuer for his or her own account shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if the condition of paragraph (d) of this section is met.

(2) Affiliates or persons selling on behalf of affiliates. Any affiliate of the issuer, or any person who was an affiliate at any time during the 90 days immediately before the sale, who sells restricted securities, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, or any person who sells restricted or any other securities for the account of a person who was an affiliate at any time during the 90 days immediately before the sale, shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if all of the conditions of this section are met.

(c) Current public information. Adequate current public information with respect to the issuer of the securities must be available. Such information will be deemed to be available only if the applicable condition set forth in this paragraph is met:

(1) Reporting Issuers. The issuer is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and has filed all required reports under section 13 or 15(d) of the Exchange Act, as applicable, during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§249.308 of this chapter); or

(2) Non-reporting Issuers. If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, there is publicly available the

information concerning the issuer specified in paragraphs (a)(5)(i) to (xiv), inclusive, and paragraph (a)(5)(xvi) of §240.15c2-11 of this chapter, or, if the issuer is an insurance company, the information specified in section 12(g)(2)(G)(i) of the Exchange Act (15 U.S.C. 78l(g)(2)(G)(i)).

Note to §230.144(c). With respect to paragraph (c)(1), the person can rely upon:

1. A statement in whichever is the most recent report, quarterly or annual, required to be filed and filed by the issuer that such issuer has filed all reports required under section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§249.308 of this chapter), and has been subject to such filing requirements for the past 90 days; or

2. A written statement from the issuer that it has complied with such reporting requirements.

3. Neither type of statement may be relied upon, however, if the person knows or has reason to believe that the issuer has not complied with such requirements.

(d) * * *

(1) General rule.

(i) If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of six months must elapse between the later of the date of the acquisition of the securities from the issuer, or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.

(ii) If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of one year must elapse between the later of the date of the acquisition of the securities from the issuer, or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.

(iii) If the acquiror takes the securities by purchase, the holding period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer.

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(3) * * *

(i) Stock dividends, splits and recapitalizations. Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the recapitalization.

(ii) Conversions and exchanges. If the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms.

Note to §230.144(d)(3)(ii). If the surrendered securities originally did not provide for cashless conversion or exchange by their terms and the holder provided consideration, other than solely securities of the same issuer, in connection with the amendment of the surrendered securities to permit cashless conversion or exchange, then the newly acquired securities shall be deemed to have been acquired at the same time as such amendment to the surrendered securities, so long as, in the conversion or exchange, the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer.

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(vii) Estates. Where a deceased person was an affiliate of the issuer, securities held by the estate of such person or acquired from such estate by the estate beneficiaries shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

Note to §230.144(d)(3)(vii). While there is no holding period or amount limitation for estates and estate beneficiaries which are not affiliates of the issuer, paragraphs (c) and (h) of this section apply to securities sold by such persons in reliance upon this section.

(viii) Rule 145(a) transactions. The holding period for securities acquired in a transaction specified in §230.145(a) shall be deemed to commence on the date the securities were acquired by the purchaser in such transaction, except as otherwise provided in paragraphs (d)(3)(ii) and (ix) of this section.

(ix) Holding company formations. Securities acquired from the issuer in a transaction effected solely for the purpose of forming a holding company shall be deemed to have been acquired at the same time as the securities of the predecessor issuer exchanged in the holding company formation where:

(A) The newly formed holding company's securities were issued solely in exchange for the securities of the predecessor company as part of a reorganization of the predecessor company into a holding company structure;

(B) Holders received securities of the same class evidencing the same proportional interest in the holding company as they held in the predecessor, and the rights and interests of the holders of such securities are substantially the same as those they possessed as holders of the predecessor company's securities; and

(C) Immediately following the transaction, the holding company has no significant assets other than securities of the predecessor company and its existing subsidiaries and has substantially the same assets and liabilities on a consolidated basis as the predecessor company had before the transaction.

(x) <u>Cashless exercise of options and warrants</u>. If the securities sold were acquired from the issuer solely upon cashless exercise of options or warrants issued by the issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the exercised options or warrants, even if the options or warrants exercised originally did not provide for cashless exercise by their terms.

<u>Note 1 to §230.144(d)(3)(x)</u>. If the options or warrants originally did not provide for cashless exercise by their terms and the holder provided consideration, other than solely securities of the same issuer, in connection with the amendment of the options or warrants to permit cashless exercise, then the newly acquired securities shall be deemed to have been acquired at the same time as such amendment to the options or warrants so long as the exercise itself was cashless.

Note 2 to §230.144(d)(3)(x). If the options or warrants are not purchased for cash or property and do not create any investment risk to the holder, as in the case of employee stock options, the newly acquired securities shall be deemed to have been acquired at the time the options or warrants are exercised, so long as the full purchase price or other consideration for the newly acquired securities has been paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer at the time of exercise.

(e) Limitation on amount of securities sold. Except as hereinafter provided, the amount of securities sold for the account of an affiliate of the issuer in reliance upon this section shall be determined as follows:

(1) If any securities are sold for the account of an affiliate of the issuer, regardless of whether those securities are restricted, the amount of securities sold, together with all sales of securities of the same class sold for the account of such person within the preceding three months, shall not exceed the greatest of:

* * * * *

(2) If the securities sold are debt securities, then the amount of debt securities sold for the account of an affiliate of the issuer, regardless of whether those securities are restricted, shall not exceed either the limitation set forth in paragraph (e)(1) or, together with all sales of securities of the same tranche (or class when the securities are non-participatory preferred stock) sold for the account of such person within the preceding three months, ten percent of the principal amount of the tranche (or class when the securities are non-participatory preferred stock) attributable to the securities sold.

(3) Determination of amount. For the purpose of determining the amount of securities specified in paragraph (e)(1) of this section and, as applicable, paragraph (e)(2) of this section, the following provisions shall apply:

(i) Where both convertible securities and securities of the class into which they are convertible are sold, the amount of convertible securities sold shall be deemed to be the amount of securities of the class into which they are convertible for the purpose of determining the aggregate amount of securities of both classes sold;

(ii) The amount of securities sold for the account of a pledgee of those securities, or for the account of a purchaser of the pledged securities, during any period of three months within six months (or within one year if the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act) after a default in the obligation secured by the pledge, and the amount of securities sold during the same three-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;

Note to §230.144(e)(3)(ii). Sales by a pledgee of securities pledged by a borrower will not be aggregated under paragraph (e)(3)(ii) with sales of the securities of the same issuer by other pledgees of such borrower in the absence of concerted action by such pledgees.

(iii) The amount of securities sold for the account of a donee of those securities during any three-month period within six months (or within one year if the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act) after the donation, and the amount of securities sold during the same three-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;

(iv) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any three-month period within six months (or within one year if the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act) after the acquisition of the securities by the trust, and the amount of securities sold during the same three-month period for the account of the settlor, shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;

(v) The amount of securities sold for the account of the estate of a deceased person, or for the account of a beneficiary of such estate, during any three-month period and the amount of securities sold during the same three-month period for the account of the deceased person prior to his death shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable; provided, that no limitation on amount shall apply if the estate or beneficiary of the estate is not an affiliate of the issuer;

(vi) When two or more affiliates or other persons agree to act in concert for the purpose of selling securities of an issuer, all securities of the same class sold for the account of all such persons during any three-month period shall be aggregated for the purpose of determining the limitation on the amount of securities sold;

(vii) The following sales of securities need not be included in determining the amount of securities to be sold in reliance upon this section:

(A) Securities sold pursuant to an effective registration statement under the Act;

(B) Securities sold pursuant to an exemption provided by Regulation A (§230.251 through §230.263) under the Act;

(C) Securities sold in a transaction exempt pursuant to section 4 of the Act (15 U.S.C. 77d) and not involving any public offering; and

(D) Securities sold offshore pursuant to Regulation S (§230.901 through §230.905, and Preliminary Notes) under the Act.

(f) Manner of sale.

(1) The securities shall be sold in one of the following manners:

(i) brokers' transactions within the meaning of section 4(4) of the Act;

(ii) transactions directly with a market maker, as that term is defined in section 3(a)(38) of the Exchange Act; or

(iii) riskless principal transactions where:

(A) the offsetting trades must be executed at the same price (exclusive of an explicitly disclosed markup or markdown, commission equivalent, or other fee);

(B) the transaction is permitted to be reported as riskless under the rules of a self-regulatory organization; and

(C) the requirements of paragraphs (g)(2)(applicable to any markup or markdown, commission equivalent, or other fee), (g)(3), and (g)(4) of this section are met.

Note to §230.144(f)(1).

For purposes of this section, a riskless principal transaction means a principal transaction where, after having received from a customer an order to buy, a broker or dealer purchases the security as principal in the market to satisfy the order to buy or, after having received from a customer an order to sell, sells the security as principal to the market to satisfy the order to sell.

(2) The person selling the securities shall not:

(i) Solicit or arrange for the solicitation of orders to buy the securities in anticipation of or in connection with such transaction, or

(ii) Make any payment in connection with the offer or sale of the securities to any person other than the broker or dealer who executes the order to sell the securities.

(3) Paragraph (f) of this section shall not apply to:

(i) Securities sold for the account of the estate of a deceased person or for the account of a beneficiary of such estate provided the estate or estate beneficiary is not an affiliate of the issuer; or

(ii) Debt securities.

(g) * * *

(1) Does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold;

(2) Receives no more than the usual and customary broker's commission;

(3) Neither solicits nor arranges for the solicitation of customers' orders to buy the securities in anticipation of or in connection with the transaction; provided, that the foregoing shall not preclude:

(i) inquiries by the broker of other brokers or dealers who have indicated an interest in the securities within the preceding 60 days;

(ii) inquiries by the broker of his customers who have indicated an unsolicited bona fide interest in the securities within the preceding 10 business days;

(iii) the publication by the broker of bid and ask quotations for the security in an inter-dealer quotation system provided that such quotations are incident to the maintenance of a bona fide inter-dealer market for the security for the broker's own account and that the broker has published bona fide bid and ask quotations for the security in an inter-dealer quotation system on each of at least twelve days within the preceding thirty calendar days with no more than four business days in succession without such two-way quotations; or

(iv) the publication by the broker of bid and ask quotations for the security in an alternative trading system, as defined in §242.300 of this chapter, provided that the broker has published bona fide bid and ask quotations for the security in the alternative trading system on each of the last twelve business days; and

Note to §230.144(g)(3)(ii). The broker should obtain and retain in his files written evidence of indications of bona fide unsolicited interest by his customers in the securities at the time such indications are received.

* * * * *

(h) Notice of proposed sale.

(1) If the amount of securities to be sold in reliance upon this rule during any period of three months exceeds 5,000 shares or other units or has an aggregate sale price in excess of $50,000, three copies of a notice on Form 144 (§239.144 of this chapter)

shall be filed with the Commission. If such securities are admitted to trading on any national securities exchange, one copy of such notice also shall be transmitted to the principal exchange on which such securities are admitted.

(2) The Form 144 shall be signed by the person for whose account the securities are to be sold and shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities in reliance upon this rule or the execution directly with a market maker of such a sale. Neither the filing of such notice nor the failure of the Commission to comment on such notice shall be deemed to preclude the Commission from taking any action that it deems necessary or appropriate with respect to the sale of the securities referred to in such notice. The person filing the notice required by this paragraph shall have a bona fide intention to sell the securities referred to in the notice within a reasonable time after the filing of such notice.

(i) <u>Unavailability to securities of issuers with no or nominal operations and no or nominal non-cash assets</u>.

(1) This section is not available for the resale of securities initially issued by an issuer defined below:

(i) An issuer, other than a business combination related shell company, as defined in §230.405, or an asset-backed issuer, as defined in Item 1101(b) of Regulation AB (§229.1101(b) of this chapter), that has:

(A) No or nominal operations; and

(B) Either:

(<u>1</u>) No or nominal assets;

(<u>2</u>) Assets consisting solely of cash and cash equivalents; or

(3) Assets consisting of any amount of cash and cash equivalents and nominal other assets; or

(ii) An issuer that has been at any time previously an issuer described in paragraph (i)(1)(i).

(2) Notwithstanding paragraph (i)(1), if the issuer of the securities previously had been an issuer described in paragraph (i)(1)(i) but has ceased to be an issuer described in paragraph (i)(1)(i); is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act; has filed all reports and other materials required to be filed by section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports and materials), other than Form 8-K reports (§249.308 of this chapter); and has filed current "Form 10 information" with the Commission reflecting its status as an entity that is no longer an issuer described in paragraph (i)(1)(i), then those securities may be sold subject to the requirements of this section after one year has elapsed from the date that the issuer filed "Form 10 information" with the Commission.

(3) The term "Form 10 information" means the information that is required by Form 10 or Form 20-F (§249.210 or §249.220f of this chapter), as applicable to the issuer of the securities, to register under the Exchange Act each class of securities being sold under this rule. The issuer may provide the Form 10 information in any filing of the issuer with the Commission. The Form 10 information is deemed filed when the initial filing is made with the Commission.

3. Amend §230.145 by revising paragraphs (c), (d) and (e) and removing the authority citation following §230.145 to read as follows:

§230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.

* * * * *

(c) Persons and parties deemed to be underwriters. For purposes of this section, if any party to a transaction specified in paragraph (a) of this section is a shell company, other than a business combination related shell company, as those terms are defined in §230.405, any party to that transaction, other than the issuer, or any person who is an affiliate of such party at the time such transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with any such transaction, shall be deemed to be engaged in a distribution and therefore to be an underwriter thereof within the meaning of Section 2(a)(11) of the Act.

(d) Resale provisions for persons and parties deemed underwriters. Notwithstanding the provisions of paragraph (c), a person or party specified in that paragraph shall not be deemed to be engaged in a distribution and therefore not to be an underwriter of securities acquired in a transaction specified in paragraph (a) that was registered under the Act if:

(1) The issuer has met the requirements applicable to an issuer of securities in paragraph (i)(2) of §230.144; and

(2) One of the following three conditions is met:

(i) Such securities are sold by such person or party in accordance with the provisions of paragraphs (c), (e), (f), and (g) of §230.144 and at least 90 days have elapsed since the date the securities were acquired from the issuer in such transaction; or

(ii) Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and at least six months, as determined in accordance with paragraph

(d) of §230.144, have elapsed since the date the securities were acquired from the issuer in such transaction, and the issuer meets the requirements of paragraph (c) of §230.144; or

(iii) Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and at least one year, as determined in accordance with paragraph (d) of §230.144, has elapsed since the date the securities were acquired from the issuer in such transaction.

Note to §230.145(c) and (d).

Paragraph (d) is not available with respect to any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Act.

(e) Definitions.

(1) The term affiliate as used in paragraphs (c) and (d) of this section shall have the same meaning as the definition of that term in §230.144.

(2) The term party as used in paragraphs (c) and (d) of this section shall mean the corporations, business entities, or other persons, other than the issuer, whose assets or capital structure are affected by the transactions specified in paragraph (a) of this section.

(3) The term person as used in paragraphs (c) and (d) of this section, when used in reference to a person for whose account securities are to be sold, shall have the same meaning as the definition of that term in paragraph (a)(2) of §230.144.

4. Amend §230.190 by:

a. Revising paragraphs (a)(2) and (a)(3); and

b. Adding paragraph (a)(4).

The revisions and addition read as follows:

§230.190 Registration of underlying securities in asset-backed securities transactions.

(a) * * *

(1) * * *

(2) Neither the issuer of the underlying securities nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction;

(3) If the underlying securities are restricted securities, as defined in §230.144(a)(3), §230.144 must be available for the sale of the securities, provided however, that notwithstanding any other provision of §230.144, §230.144 shall only be so available if at least two years have elapsed since the later of the date the securities were acquired from the issuer of the underlying securities or from an affiliate of the issuer of the underlying securities; and

(4) The depositor would be free to publicly resell the underlying securities without registration under the Act. For example, the offering of the asset-backed security does not constitute part of a distribution of the underlying securities. An offering of asset-backed securities with an asset pool containing underlying securities that at the time of the purchase for the asset pool are part of a subscription or unsold allotment would be a distribution of the underlying securities. For purposes of this section, in an offering of asset-backed securities involving a sponsor, depositor or underwriter that was an underwriter or an affiliate of an underwriter in a registered offering of the underlying securities, the distribution of the asset-backed securities will not constitute part of a distribution of the underlying securities if the underlying securities were purchased at

arm's length in the secondary market at least three months after the last sale of any unsold allotment or subscription by the affiliated underwriter that participated in the registered offering of the underlying securities.

* * * * *

5. Amend §230.701, paragraph (g)(3), by revising the phrase "without compliance with paragraphs (c), (d), (e), and (h) of §230.144" to read "without compliance with paragraphs (c) and (d) of §230.144".

6. Amend §230.903 by revising paragraph (b)(3)(iii)(A), the introductory text of paragraph (b)(3)(iii)(B) and paragraph (b)(3)(iv) to read as follows:

§ 230.903 Offers or sales of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; conditions relating to specific securities.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(A) The offer or sale, if made prior to the expiration of a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer), is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(B) The offer or sale, if made prior to the expiration of a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer), is made pursuant to the following conditions:

* * * * *

(iv) Each distributor selling securities to a distributor, a dealer (as defined in section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day distribution compliance period in the case of debt securities, or a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer) in the case of equity securities, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

* * * * *

PART 239--FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

7. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

8. Amend §239.144 by revising paragraph (b) to read as follows:

§239.144 Form 144, for notice of proposed sale of securities pursuant to §230.144 of this chapter.

* * * * *

(b) This form need not be filed if the amount of securities to be sold during any period of three months does not exceed 5,000 shares or other units and the aggregate sale price does not exceed $50,000.

* * * * *

9. Form 144 (referenced in §239.144) is revised as set forth in the Appendix.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

December 6, 2007

Note: This Appendix to the Preamble will not appear in the Code of Federal Regulations.

Appendix

UNI[illegible]TATES
SECURITIES AND [illegible]HANGE COMMISSION
Washington, D.C. 20549

OMB APP[illegible]
OMB Number: [illegible]-0101
Expires: Decem[illegible]31, 2009
Estimated average burden hours per response 2.00

SEC USE ONLY
DOCUMENT SEQUENCE NO.
CUSIP NUMBER
WORK LOCATION

FORM 144
NOTICE OF PROPOSED SALE OF SECURITIES PURSUANT TO RULE 144 UNDER THE SECURITIES ACT OF 1933

ATTENTION: *Transmit for filing 3 copies of this form concurrently with either placing an order with a broker to execute sale or executing a sale directly with a market maker.*

1 *(a)* NAME OF ISSUER *(Please type or print)*		*(c)* S.E.C. FILE NO.

1 *(d)* ADDRESS OF ISSUER	STREET	CITY	STATE	ZIP CODE	*(e)* TELEPHONE NO. AREA CODE	NUMBER

2 *(a)* NAME OF PERSON FOR WHOSE ACCOUNT THE SECURITIES ARE TO BE SOLD		*(c)* RELATIONSHIP TO ISSUER	*(d)* ADDRESS STREET	CITY	STATE	ZIP CODE

INSTRUCTION: The person filing this notice should contact the issuer to obtain the I.R.S. Identification Number and the S.E.C. File Number.

3 *(a)* Title of the Class of Securities To Be Sold	*(b)* Name and Address of Each Broker Through Whom the Securities are to be Offered or Each Market Maker who is Acquiring the Securities	SEC USE ONLY Broker-Dealer File Number	*(c)* Number of Shares or Other Units To Be Sold *(See instr. 3(c))*	*(d)* Aggregate Market Value *(See instr. 3(d))*	*(e)* Number of Shares or Other Units Outstanding *(See instr. 3(e))*	*(f)* Approximate Date of Sale *(See instr. 3(f))* (MO. DAY YR.)	*(g)* Name of Each Securities Exchange *(See instr. 3(g))*

INSTRUCTIONS:

1. (a) Name of issuer
   (b) Issuer's I.R.S. Identification Number
   (c) Issuer's S.E.C. file number, if any
   (d) Issuer's address, including zip code
   (e) Issuer's telephone number, including area code

2. (a) Name of person for whose account the securities are to be sold
   (b) Such person's I.R.S. identification number, if such person is an entity
   (c) Such person's relationship to the issuer (e.g., officer, director, 10% stockholder, or member of immediate family of any of the foregoing)
   (d) Such person's address, including zip code

3. (a) Title of the class of securities to be sold
   (b) Name and address of each broker through whom the securities are intended to be sold
   (c) Number of shares or other units to be sold (if debt securities, give the aggregate face amount)
   (d) Aggregate market value of the securities to be sold as of a specified date within 10 days prior to filing of this notice
   (e) Number of shares or other units of the class outstanding, or if debt securities the face amount thereof outstanding, as shown by the most recent report or statement published by the issuer
   (f) Approximate date on which the securities are to be sold
   (g) Name of each securities exchange, if any, on which the securities are intended to be sold

Potential persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

TABLE I — SECURITIES TO BE SOLD

Furnish the following information with respect to the acquisition of the securities to be sold and with respect to the payment of all or any part of the purchase price or other consideration therefor:

Title of the Class	Date you Acquired	Nature of Acquisition Transaction	Name of Person from Whom Acquired *(If gift, also give date donor acquired)*	Amount of Securities Acquired	Date of Payment	Nature of Payment

INSTRUCTIONS: If the securities were purchased and full payment therefor was not made in cash at the time of purchase, explain in the table or in a note thereto the nature of the consideration given. If the consideration consisted of any note or other obligation, or if payment was made in installments describe the arrangement and state when the note or other obligation was discharged in full or the last installment paid.

TABLE II — SECURITIES SOLD DURING THE PAST 3 MONTHS

Furnish the following information as to all securities of the issuer sold during the past 3 months by the person for whose account the securities are to be sold.

Name and Address of Seller	Title of Securities Sold	Date of Sale	Amount of Securities Sold	Gross Proceeds

REMARKS:

INSTRUCTIONS:

See the definition of "person" in paragraph (a) of Rule 144. Information is to be given not only as to the person for whose account the securities are to be sold but also as to all other persons included in that definition. In addition, information shall be given as to sales by all persons whose sales are required by paragraph (e) of Rule 144 to be aggregated with sales for the account of the person filing this notice.

ATTENTION:

The person for whose account the securities to which this notice relates are to be sold hereby represents by signing this notice that he does not know any material adverse information in regard to the current and prospective operations of the Issuer of the securities to be sold which has not been publicly disclosed. If such person has adopted a written trading plan or given trading instructions to satisfy Rule 10b5-1 under the Exchange Act, by signing the form and indicating the date that the plan was adopted or the instruction given, that person makes such representation as of the plan adoption or instruction date.

DATE OF NOTICE

DATE OF PLAN ADOPTION OR GIVING OF INSTRUCTION, IF RELYING ON RULE 10B5-1

(SIGNATURE)

The notice shall be signed by the person for whose account the securities are to be sold. At least one copy of the notice shall be manually signed. Any copies not manually signed shall bear typed or printed signatures.

ATTENTION: Intentional misstatements or omission of facts constitute Federal Criminal Violations (See 18 U.S.C. 1001)

Commissioner Nazareth
Disapproved

SECURITIES AND EXCHANGE COMMISSION
17 CFR PART 240

RELEASE NO. 34-56914; IC-28075; FILE NO. S7-17-07

RIN 3235-AJ95

SHAREHOLDER PROPOSALS RELATING TO THE ELECTION OF DIRECTORS

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is publishing this adopting release to codify the meaning of Rule 14a-8(i)(8) under the Securities Exchange Act of 1934. Rule 14a-8 provides shareholders with an opportunity to place certain proposals in a company's proxy materials for a vote at an annual or special meeting of shareholders. Subsection (i)(8) of the Rule permits exclusion of certain shareholder proposals related to the election of directors. The Commission is adopting an amendment to Rule 14a-8(i)(8) to provide certainty regarding the meaning of this provision in response to a recent court decision.

EFFECTIVE DATE: [INSERT DATE 30 DAYS AFTER FEDERAL REGISTER PUBLICATION].

FOR FURTHER INFORMATION CONTACT: Lillian Brown or Tamara Brightwell, at (202) 551-3700, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3010.

Document 13 of 37

SUPPLEMENTARY INFORMATION: We are adopting an amendment to Rule 14a-8(i)(8)[1] under the Securities Exchange Act of 1934.[2]

I. Background

A. Purpose of the Rule 14a-8(i)(8) Exclusion

On July 27, 2007, the Commission published for comment the proposed amendment to Rule 14a-8(i)(8) that we are adopting today to address the uncertainty resulting from a recent decision of the U.S. Court of Appeals for the Second Circuit that did not defer to the agency's longstanding interpretation of the Rule.[3]

Rule 14a-8, which creates a procedure under which shareholders[4] may present certain proposals[5] in the company's proxy materials, does not require the inclusion of any proposal that "relates to an election for membership on the company's board of directors or analogous governing body."[6] The proper functioning of Rule 14a-8(i)(8) is particularly critical to assuring that investors receive adequate disclosure in election contests, and that they benefit from the full protection of the antifraud provisions of the

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1 17 CFR 240.14a-8(i)(8).

2 15 U.S.C. 78a et seq.

3 Release No. 34-56161 (July 27, 2007) [72 FR 43488] (the "Proposing Release").

4 To be eligible to submit a proposal, Exchange Act Rule 14a-8(b)(1) (17 CFR 240.14a-8(b)(1)) requires the shareholder to have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal for at least one year. The Rule also contains other eligibility and procedural requirements for shareholders who wish to include a proposal in the company's proxy materials.

5 With respect to subjects and procedures for shareholder votes, most state corporation laws provide that a corporation's charter or bylaws can specify the types of proposals that are permitted to be brought before the shareholders for a vote at an annual or special meeting. Rule 14a-8(i)(1) supports these determinations by providing that a proposal that is not a proper subject for action by shareholders under the laws of the jurisdiction of the corporation's organization may be excluded from the corporation's proxy materials.

6 Exchange Act Rule 14a-8(i)(8).

securities laws. Because the inclusion of shareholder nominees for director in a company's proxy materials normally would create a contested election of directors, the protections of the proxy solicitation rules designed to provide investors with full and accurate disclosure are of vital importance in this context. An interpretation of Rule 14a-8(i)(8) that resulted in the Rule being used as a means to include shareholder nominees in company proxy materials would, in effect, circumvent the other proxy rules designed to assure the integrity of director elections.

Several Commission rules, including Exchange Act Rule 14a-12,[7] regulate contested proxy solicitations so that investors receive adequate disclosure to enable them to make informed voting decisions in elections. The requirements to provide these disclosures to shareholders from whom proxy authority is sought are grounded in Rule 14a-3,[8] which requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information specified in Schedule 14A.[9] Items 4(b) and 5(b) of Schedule 14A require numerous specified disclosures if the solicitation is subject to Rule 14a-12(c).[10] A

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7 17 CFR 240.14a-12.

8 17 CFR 240.14a-3.

9 Rule 14a-3 provides, in pertinent part, that "[n]o solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A...."

10 17 CFR 240.14a-101, Items 4 and 5. Items 4 and 5 require disclosures made by participants in a solicitation. For purposes of Items 4 and 5, a "participant" in the solicitation includes:

- any person who solicits proxies;
- any director nominee for whose election proxies are being solicited; and
- any committee or group, any member of a committee or group, and other persons involved in specified ways in the financing of the solicitation.

See Item 4, Instruction 3. Thus, for each of the numerous disclosures required as to a "participant," the information must be disclosed as to all of such persons.

solicitation is subject to Rule 14a-12(c) if it is made "for the purpose of opposing" a solicitation by any other person "with respect to the election or removal of directors...."[11] Thus, the result of Schedule 14A's cross-referencing of Rule 14a-12(c) is to trigger, when a solicitation with respect to the election of directors is conducted in opposition to another solicitation, a number of disclosures relevant in proxy contests.[12] In addition, Item 7 of Schedule 14A[13] requires the furnishing of additional information as to nominees for director, including nominees of "persons other than the [company]" (e.g., shareholders), including:

- any arrangement or understanding between the nominee and any other person(s) (naming such person(s)) pursuant to which the nominee was or is selected as a

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[11] Because numerous protections of the federal proxy rules are triggered only by the presence of a solicitation made in opposition to another solicitation, the requirements regarding disclosures and procedures in contested elections do not contemplate the presence of competing nominees in the same proxy materials.

[12] See 17 CFR 240.14a-101, Items 4(b) and 5(b). These disclosures include:
- by whom the solicitation is made;
- the methods to be employed to solicit;
- total expenditures to date and anticipated in connection with the solicitation;
- by whom the cost of the solicitation will be borne;
- any substantial interest of each participant in the solicitation;
- the name, address, and principal occupation or principal business of each participant;
- whether any participant has been convicted in a criminal proceeding within the past 10 years;
- the amount of each class of securities of the company owned by the participant and the participant's associates;
- information concerning purchases and sales of the company's securities by each participant within the past two years;
- whether any part of the purchase price or market value of such securities is represented by funds borrowed;
- whether a participant is a party to any contract, arrangements or understandings with any person with respect to securities of the company;
- certain related party transactions between the participant or its associates and the company;
- whether the participant or any of its associates have any arrangement or understanding with any person with respect to any future employment with the company or its affiliates, or with respect to any future transactions to which the company or its affiliates will or may be a party; and
- with respect to any person who is a party to an arrangement or understanding pursuant to which a nominee is proposed to be elected, any substantial interest that such person has in any matter to be acted upon at the meeting.

[13] 17 CFR 240.14a-101, Item 7.

nominee;[14]

- business experience of the nominee;[15]
- any other directorships held by the nominee in an Exchange Act reporting company;[16]
- the nominee's involvement in certain legal proceedings;[17]
- certain transactions between the nominee and the company;[18] and
- whether the nominee complies with independence requirements.[19]

Finally, and of critical importance, all of these disclosures are covered by the prohibition contained in Rule 14a-9 on the making of a solicitation containing false or misleading statements or omissions.[20]

These numerous protections of the federal proxy rules are triggered only by the presence of a solicitation made in opposition to another solicitation. Accordingly, were the election exclusion not available for proposals that would establish a process for the election of directors that circumvents the proxy disclosure rules, it would be possible for a person to wage an election contest without providing the disclosures required by the

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14 See Item 401(a) of Regulation S-K [17 CFR 229.401(a)], which is referenced in Item 7 of Schedule 14A.

15 See Item 401(e)(1) of Regulation S-K [17 CFR 229.401(e)(1)], which is referenced in Item 7 of Schedule 14A.

16 See Item 401(e)(2) of Regulation S-K [17 CFR 229.401(e)(2)], which is referenced in Item 7 of Schedule 14A.

17 See Items 103 and 401(f) of Regulation S-K [17 CFR 229.103 and 17 CFR 229.401(f)], which are referenced in Item 7 of Schedule 14A.

18 See Item 404 of Regulation S-K [17 CFR 229.404], which is referenced in Item 7 of Schedule 14A.

19 See Item 407(a) of Regulation S-K [17 CFR 229.407(a)], which is referenced in Item 7 of Schedule 14A.

20 See 17 CFR 240.14a-9.

Commission's present rules governing such contests. Additionally, false and misleading disclosure in connection with such an election contest could potentially occur without liability under Exchange Act Rule 14a-9 for material misrepresentations made in a proxy solicitation. The Commission stated this rationale for the exclusion at the time it was proposed in 1976:

> [T]he principal purpose of [Rule 14a-8(i)(8)] is to make clear, with respect to corporate elections, that Rule 14a-8 is not the proper means for *conducting campaigns or effecting reforms in* elections of that nature, since other proxy rules, including Rule 14a-11, are applicable thereto. [21] (Emphasis added.)

Accordingly, the staff has determined that shareholder proposals that may result in a contested election – including those which establish a procedure to list shareholder-nominated director candidates in the company's proxy materials – fall within the election exclusion. We agree with this position and believe it is consistent with the explanation that the Commission gave in 1976.

As explained in the Proposing Release, except for a few brief references to the Rule, the Commission did not discuss the meaning of Rule 14a-8(i)(8) from the time of its 1976 statement until its shareholder access proposal in October 2003,[22] and the two

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21 Release No. 34-12598 (July 7, 1976) [41 FR 29982]. The Commission's reference in its 1976 statement to "other proxy rules, including Rule 14a-11," reflects the fact that, in 1976, Rule 14a-11 was the Commission proxy rule governing election contests. As part of a series of rule changes in 1999, the Commission rescinded Rule 14a-11 and moved many of the requirements of prior Rule 14a-11 to the current Rule 14a-12. [17 CFR 240.14a-12] See Release No. 33-7760 (October 22, 1999) [64 FR 61408]. Accordingly, the Commission's reference to Rule 14a-11 in 1976 was to the rules governing election contests, which now may be found generally elsewhere in the proxy rules and, in particular, in Rule 14a-12.

22 Release No. 34-48626 (October 14, 2003) [68 FR 60784].

proposing releases[23] in July 2007. Between 1976 and the time of the AFSCME v. AIG litigation, the staff of the Commission took "no-action" positions on the application of the Rule. Between 1976 and 1990, in applying the Rule to proposals that would have established procedures for shareholders to nominate candidates to the board, in the limited number of cases that presented the question, the staff did not concur with companies that the proposals could be excluded under the election exclusion.[24] In 1990, however, without mentioning the pre-1990 decisions, the staff clearly stated its position that the Rule permitted exclusion of a proposal that "would establish a procedure that may result in contested elections to the board" in a response to a request for no-action relief from Amoco.[25] In doing so, the staff aligned its interpretation with the Commission's 1976 statement. Between 1990 and 1998, the staff granted no-action relief under the election exclusion nine times[26] and denied relief twice[27] to operating companies seeking to exclude shareholder proposals to adopt procedures that would give

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23 See Proposing Release and Release No. 34-56160 (July 27, 2007) [72 FR 43466].

24 The proposals submitted between 1976 and 1990 typically presented similar, but not identical, procedures as those presented in the direct access proposals generally submitted in recent years. See, e.g., Pan Am Corp. (March 22, 1985); Union Oil Company (February 24, 1983); and Mobil Corp. (March 3, 1981). Cf. Tylan Corporation (September 25, 1987) (allowing exclusion under the prior version of Rule 14a-8(i)(8) of a shareholder proposal to reduce the number of directors and nominate a new slate of directors meeting certain criteria).

25 Amoco Corporation (February 14, 1990). See also Thermo Electron (March 22, 1990); Unocal Corp. (February 6, 1990); and Bank of Boston (January 26, 1990).

26 See Storage Technology Corporation (March 11, 1998); BellSouth Corp. (February 4, 1998); Unocal Corporation (February 8, 1991); AT&T (January 11, 1991); Flow International (July 16, 1990); Thermo Electron (March 22, 1990); Amoco Corporation (February 14, 1990); Unocal Corporation (February 6, 1990) and Bank of Boston (January 26, 1990). See also International Business Machine Corporation (March 4, 1992), in which the staff noted that the proposal would be excludable unless modified as specified in the staff's response letter.

27 See Dravo Corporation (February 21, 1995) and Pinnacle West Capital Corporation (March 26, 1993). See also, TCW/DW Term Trust 2003 (July 15, 1997), in which the Division of Investment Management denied no-action relief.

shareholders the ability to nominate director candidates in the company's proxy materials. For the past decade, since 1998, the Commission staff has repeatedly taken the position that shareholder proposals that may result in a contested election fall within the election exclusion. On several occasions after 1990, the Commission itself declined to review these "no-action" positions.[28]

B. Background Relating to Rule Amendment

In American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc.,[29] the U.S. Court of Appeals for the Second Circuit held that AIG could not rely on Rule 14a-8(i)(8) to exclude a shareholder proposal seeking to amend the company's bylaws to establish a procedure under which the company would be required, in specified circumstances, to include shareholder nominees for director in the company's proxy materials.[30] The Second Circuit described the Commission's statement in 1976 as limiting the election exclusion "to shareholder proposals used to oppose solicitations dealing with an identified board seat in an upcoming election and reject[ing] the somewhat broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures making such election contests more likely."[31] After 1976, in the Second Circuit's view, the

[28] See, e.g., Storage Technology Corporation, letter of Jonathan Katz, Secretary of the Commission, to Dr. Seymour Licht P.E. (April 6, 1998).

[29] 462 F.3d 121 (2d Cir. 2006) (AFSCME v. AIG).

[30] Consistent with the longstanding interpretation, the Commission staff had issued to AIG a letter stating that "[t]here appears to be some basis for your view that AIG may exclude the proposal under rule 14a-8(i)(8) . . . we will not recommend enforcement action to the Commission if AIG omits the proposal from its proxy materials . . . ." American International Group (February 14, 2005).

[31] AFSCME v. AIG, 432 F.3d at 128.

Commission gradually shifted away from this interpretation, and came to its present interpretation in 1990. The court then held "that an agency's interpretation of an ambiguous regulation made at the time the regulation was implemented or revised should control unless that agency has offered sufficient reasons for its changed interpretation."[32] Finding no such sufficient reason, the court declined to defer to what it viewed as the 1990 interpretation and deemed it "appropriate" instead to defer to its own reading of the meaning of the 1976 interpretation.[33] It is the Commission's position that the election exclusion should not be, and was not originally intended to be, limited in this way.[34]

This decision was issued on September 5, 2006, as companies and shareholders prepared for the 2007 proxy season. Although the decision is binding only within the Second Circuit, it created uncertainty in the rest of the nation about the continuing validity of the longstanding interpretation of Rule 14a-8(i)(8). While the Commission began the process that led to the current rulemaking to clarify the Rule's application, the staff of the Division of Corporation Finance received three no-action requests seeking to exclude similar proposals under Rule 14a-8(i)(8). The staff took a position of "no view" on the one request for no-action relief under the Rule that it received and that was not withdrawn.[35] This request for no-action relief was submitted by Hewlett-Packard

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32 Id. at 123.

33 Id. at 129.

34 In this regard, we note that the Second Circuit decision stated that "if the SEC determines that the interpretation of the election exclusion embodied in its 1976 Statement would result in a decrease in necessary disclosures or any other undesirable outcome, it can certainly change its interpretation of the election exclusion, provided that it explains its reasons for doing so." Id. at 130.

35 Hewlett-Packard Company (January 22, 2007), available at http://www.sec.gov/divisions/corpfin/cf-noaction/2007/hp012207-14a-8.htm.

Company, which asserted that any litigation related to the proposal would be handled by the U.S. Court of Appeals for the Ninth Circuit and that the staff therefore should grant no-action relief under Rule 14a-8(i)(8) on the basis that it was consistent with the agency's interpretation of the Rule and the Ninth Circuit was not bound by the decisions of the Second Circuit. Hewlett-Packard ultimately included the proposal in its proxy materials, but the proposal did not receive a majority of shareholder votes. A second request for no-action relief was submitted by Reliant Energy. Subsequent to the staff of the Division of Corporation Finance taking a "no view" position on Hewlett-Packard's request, Reliant Energy filed a complaint in the U.S. District Court for the Southern District of Texas seeking a declaratory judgment that the company could properly omit a similar proposal that it had received for inclusion in its proxy materials.[36] During the pendency of this litigation and prior to the staff's response to Reliant's no-action request, the shareholder withdrew the proposal and the company therefore withdrew its no-action request.[37] A third request for no-action relief was withdrawn after the company agreed to include the proposal in its proxy materials.[38] These events demonstrate the uncertainty the Second Circuit decision created.

Compounding this uncertainty created by the Second Circuit's decision is the U.S. Supreme Court's recent unanimous reversal of another Second Circuit decision involving

36 The Reliant complaint may be found at http://www.sec.gov/divisions/corpfin/cf-noaction/2007/reliantenergy011607-14a-8-incoming.pdf.

37 Reliant Energy, Inc. (February 23, 2007), available at http://www.sec.gov/divisions/corpfin/cf-noaction/2007/reliantenergy011607-14a-8-incoming.pdf.

38 UnitedHealth Group Inc. (March 29, 2007), available at http://www.sec.gov/divisions/corpfin/cf-noaction/2007/uhg032907-14a-8.htm.

an agency's interpretation of its rules. In Long Island Care at Home, Ltd. v. Coke,[39] the Supreme Court addressed the validity of the Department of Labor's changed interpretation of its rules. As in AFSCME v. AIG, the Second Circuit declined to follow the agency's more recent interpretation. In rejecting the Second Circuit's view, the Supreme Court held that an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted. The Supreme Court noted that the Department of Labor "may have interpreted these regulations differently at different times in their history."[40] Nonetheless, "as long as interpretive changes create no unfair surprise ... the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation."[41] Indeed, whereas the Second Circuit required the Commission to provide "sufficient reason" for what it regarded as a changed interpretation in order to merit deference, the Supreme Court, in reversing the Second Circuit's decision in another administrative law case, held that a department's change in interpretation alone presents no separate ground for disregarding the department's present interpretation. As a result of this post-AFSCME v. AIG decision, which binds all U.S. Courts of Appeals and other federal courts, it is more likely that a court would uphold this agency's interpretation of Rule 14a-8(i)(8). If a lower court were to apply the reasoning in Long Island Care at Home and reach a result contrary to the AFSCME v. AIG court, further litigation and confusion about the Commission's rules could follow.

39 127 S.Ct. 2339 (2007).

40 Long Island Care at Home, 127 S.Ct at 2349.

41 Id.

To permit this escalating state of confusion to continue for the 2008 proxy season and beyond would effectively require shareholders and companies to go to court to determine the meaning of the Commission's proxy rules, and it could take years before the U.S. Supreme Court resolved any resulting conflicts between the circuits. Inaction by the Commission would thus promote further uncertainty and leave both shareholders and companies in a position of "every litigant for himself." This would benefit neither shareholders nor companies. If the current environment was permitted to continue, and these types of proposals were included in proxy statements and subsequently approved, shareholders would be exposed to the risk that the disclosure provisions of the securities laws could be circumvented. And by furthering legal uncertainty about the meaning and application of the Commission's rules, it would impose needless costs on shareholders and companies alike, and undermine the Commission's statutory mission to protect investors, promote fair and orderly markets and facilitate capital formation.

The Commission has a fundamental responsibility to make sure that the rules and regulations it adopts have clear meaning so that the regulated community can conform its conduct accordingly. To that end, we previously reiterated the Commission's interpretation in the Proposing Release, and today we are adopting a clear and concise amendment to the text of Rule 14a-8 that codifies the agency's longstanding interpretation of Rule 14a-8(i)(8). It is our intention that this will enable shareholders and companies to know with certainty whether a proposal may or may not be excluded under Rule 14a-8(i)(8). It also will facilitate the staff's efforts in reviewing no-action requests and in interpreting Rule 14a-8 with certainty in responding to requests for no-action letters during the 2008 proxy season. We believe it is important to adopt a rule change to eliminate any uncertainty, particularly in light of Long Island Care at Home and its implications. Thus, today's release codifies the agency's longstanding interpretation of Rule 14a-8(i)(8) and the modifications to the rule we adopt today do not affect or address any other aspect of the staff's prior determinations under the election exclusion.

II. Commission Interpretation of Rule 14a-8(i)(8)

Rule 14a-8(i)(8) permits exclusion of a proposal that would result in an immediate election contest (e.g., by making or opposing a director nomination for a particular meeting) or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings.

In the AFSCME v. AIG opinion, the Second Circuit took the view that a shareholder proposal may be excluded under Rule 14a-8(i)(8) if it would result in an immediate election contest, but that a proposal may not be excluded under Rule 14a-8(i)(8) if it "establish[es] a process for shareholders to wage a future election contest."[42] As the Commission stated in 1976, however, the express purpose of the election exclusion is to make clear that Rule 14a-8 is not a proper "means" to achieve election contests because "other proxy rules" are applicable to such contests. We are acting today to state clearly that the phrase "relates to an election" in the election exclusion cannot be read so narrowly as to refer only to a proposal that relates to the current election, or a particular election, but rather must be read to refer to a proposal that "relates to an election" in subsequent years as well. In this regard, if one looked only to

[42] AFSCME v. AIG, 462 F.3d at 128.

what a proposal accomplished in the current year, and not to its effect in subsequent years, the purpose of the exclusion could be evaded easily. For example, such a reading might permit a company to exclude a shareholder proposal that nominated a candidate for election as director for the upcoming meeting of shareholders, but not exclude a proposal that resulted in the company being required to include the same shareholder-nominated candidate in the company's proxy materials for the following year's meeting.

Our interpretation of Rule 14a-8(i)(8) is fully consistent with the Commission's statement in 1976, that the Rule was not intended "to cover proposals dealing with matters previously held not excludable by the Commission, such as cumulative voting rights, general qualifications for directors...." The Commission's references in 1976 to proposals relating to "cumulative voting rights" and "general qualifications for directors" simply reflect the long-held belief that these proposals generally do not trigger the contested elections proxy rules and therefore are not excludable under Rule 14a-8(i)(8). Accordingly, the Commission's 1976 statement should not be interpreted to mean that Rule 14a-8(i)(8) permits exclusion of proposals establishing nomination or election procedures other than those that would result in a contested election. It also is consistent with the Commission's statement in 1976 that Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in corporate elections. As explained in the Proposing Release and above, the analysis under Rule 14a-8(i)(8) does not focus on whether the proposal would make election contests more likely, but whether the resulting contests would be governed by the Commission's proxy rules for contested elections.

We received numerous public comments regarding the Proposing Release, and have carefully considered them. Commenters supporting the agency's longstanding interpretation noted that, notwithstanding the court decision, no new facts or circumstances exist that warrant the Commission deviating from that interpretation.[43] Commenters believed that the court decision did not invalidate the agency's position, but rather required the Commission to state its position and its reasoning in a formal way.[44] Other commenters disagreed with the Commission's position entirely and therefore opposed the longstanding interpretation and the proposed Rule text amendment.[45] Some commenters opposing the interpretation and Rule proposal believed that the Commission should withhold action until it has the opportunity to assess the impact of the AFSCME v. AIG decision.[46]

Many of the comments we received on the amendment that we are adopting today went beyond the limited issue the Proposing Release sought to address – namely, the Commission's interpretation of existing Rule 14a-8(i)(8) and proposed rule amendment – and instead focused on the broader range of matters implicated by a separate companion release (the "Companion Release") that proposed a comprehensive package of

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43 See comment letters from U.S. Chamber of Commerce ("Chamber") and Society of Corporate Governance Professionals ("SCSGP").

44 See comment letter from Citigroup Inc. ("Citigroup"). See, e.g., comment letters from The Adams Express Company ("Adams") and Chamber.

45 See, e.g., comment letters from AFL-CIO; American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME"); State Board of Administration of Florida ("FL Board"); Amalgamated Bank LongView Funds ("Amalgamated Bank"); Board of Fire and Police Pension Commissioners of the City of Los Angeles ("LA Fire & Police"); and Comptroller of the City of New York ("NYC Comptroller").

46 See Form Letter B.

amendments to the proxy rules and related disclosure requirements.[47] We separately proposed the amendment that we are adopting today so that we could eliminate the uncertainty created by AFSCME v. AIG. As discussed throughout the Proposing Release, and in this release, we believe that a definitive codification of our longstanding interpretation is both needed and appropriate. We appreciate the thoughtful comments regarding the questions raised in the Companion Release but, because they go beyond the scope of the Proposing Release, they are more appropriately addressed in connection with the Companion Release. In this release, we are acting only on the matters that were the subject of the Proposing Release.

III. Amendment to Rule 14a-8(i)(8)

The amendment that we are adopting today is intended to clarify the meaning of Rule 14a-8(i)(8) by codifying the agency's longstanding interpretation of the Rule. The text of Rule 14a-8(i)(8) currently specifies that a proposal may be excluded "[i]f the proposal relates to an election for membership on the company's board of directors or analogous governing body." To clarify the meaning of this provision, consistent with the Commission's longstanding interpretation, we proposed to amend the language of the rule to read:

> If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous

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47 We received approximately 8800 comment letters addressing the rule proposal and accompanying interpretation. Approximately 8400 of these letters were form letters opposing both this release and the Companion Release published for comment on July 25. Of the 8800, approximately 400 were not form letters.

As discussed in more detail in the Companion Release, those proposals followed a long history of prior Commission consideration and examination of possible regulatory approaches to shareholder nominations of directors, including several prior proposals, hearings, and roundtables. See Release No. 34-56160 (July 27, 2007) [72 FR 43466].

governing body or a procedure for such nomination or election.

The term "procedures" in the election exclusion relates to procedures that would result in a contested election either in the year in which the proposal is submitted or in any subsequent year.

Commenters that addressed whether further clarification of the meaning of the election exclusion was necessary thought an amendment to Rule 14a-8(i)(8) was appropriate.[48] Commenters that supported the amendment believed that it would eliminate the uncertainty caused by the decision in AFSCME v. AIG.[49] Many commenters opposing the amendments addressed the matters that are the subject of the Companion Release. Some, for example, argued that the Commission's proxy rules should facilitate shareholders' ability to nominate directors.[50] Several commenters, some opposing the interpretation and rule amendment altogether and others supporting the interpretation and rule amendment, believed that the proposed language was too broad.[51] They asserted that under the proxy rules shareholders have been allowed to include proposals that may make contested elections more likely, such as proposals to de-stagger the board or introduce cumulative voting.[52] One commenter stated that any final rule should not inadvertently overrule other positions on shareholder proposals that the staff

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48 See, e.g., comment letters from Business Roundtable ("BRT") and SCSGP.

49 See, e.g., comment letters from American Bar Association ("ABA"); Adams; Bank of America ("BOA"); The Boeing Company ("Boeing"); BRT; Burlington Northern Santa Fe Corporation ("Burlington Northern"); Caterpillar Inc. ("Caterpillar"); Chevron Corporation ("Chevron"); Peabody Energy Corporation ("Peabody"); and SCSGP.

50 See, e.g., Form Letter B and comment letters from Stephen R. Van Winthrop ("Van Winthrop") and Group of Thirty-Nine Law Professors ("Thirty-Nine Law Professors").

51 See, e.g., comment letters from ABA; Corporate Governance; theRacetotheBottom.org ("Race"); and Sullivan & Cromwell ("Sullivan").

52 See, e.g., comment letters from Race and Sullivan.

has taken.[53] Several commenters recommended that the rule define the term "procedure" or contain a note that provides a list of circumstances that would constitute a proposal that may result in an election contest.[54] Other commenters believed that listing the procedures that the staff historically has found to fall under the exclusion is unnecessary and may result in confusion because it would be difficult to draft a comprehensive list that includes every possible permutation.[55]

As discussed above, we agree with those commenters that support amending Rule 14a-8(i)(8) in order to provide greater clarity to both shareholders and companies, and believe that the comments that address the broader issues in the Companion Release go beyond the scope of this release. We believe that the clarifying rule amendment is consistent with the agency's longstanding interpretation of the election exclusion and that the references to "nomination" and "procedure" in the rule text appropriately reflect the purpose of the exclusion. We have not included in the amended rule text a list of the specific types of proposals that may be excluded, as was suggested by some commenters, as we agree with commenters who asserted that inclusion of such a list is unnecessary and could be confusing. We therefore are adopting the change to the rule text as proposed. To meet some of the concerns expressed by commenters, however, we emphasize that the changes to the rule text relate only to procedures that would result in a contested election, either in the year in which the proposal is submitted or in subsequent years. The changes to the rule text do not affect or address any other aspect of the

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53 See comment letter from Amalgamated Bank.

54 See, e.g., comment letters from BRT and Peabody.

55 See, e.g., comment letters from ABA and SCSGP.

agency's prior interpretation of the exclusion.[56] Thus, under the Rule as amended, a shareholder proposal that would allow for shareholder use of the company's proxy materials to nominate director candidates, such as the proposal at issue in AFSCME v. AIG, would be excludable. We believe the actions we are taking today will provide certainty in the application of Rule 14a-8(i)(8) and will preserve our longstanding interpretation of the Rule.

We believe that the amendment we are adopting today, as well as the definitive interpretive guidance provided in this release, will provide certainty to shareholders and companies regarding the application of Rule 14a-8(i)(8).[57] The clarification provided will enable shareholders and companies to better understand the shareholder proposal

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56 For example, we note that, as stated in the Proposing Release, the staff has taken the position that a proposal relates to "an election for membership on the company's board of directors or analogous governing body" and, as such, is subject to exclusion under Rule 14a-8(i)(8) if it could have the effect of, or proposes a procedure that could have the effect of, any of the following:

- disqualifying board nominees who are standing for election;
- removing a director from office before his or her term expired;
- questioning the competence or business judgment of one or more directors; or
- requiring companies to include shareholder nominees for director in the companies' proxy materials or otherwise resulting in a solicitation on behalf of shareholder nominees in opposition to management-chosen nominees.

Conversely, the staff has taken the position that a proposal may not be excluded under Rule 14a-8(i)(8) if it relates to any of the following:

- qualifications of directors or board structure (as long as the proposal will not remove current directors or disqualify current nominees);
- voting procedures (such as majority or plurality voting standards or cumulative voting);
- nominating procedures (other than those that would result in the inclusion of a shareholder nominee in company proxy materials); or
- reimbursement of shareholder expenses in contested elections.

These lists represent non-exclusive examples of types of proposals that the staff has found to be excludable and non-excludable under the election exclusion.

57 The approach we are taking today is similar to the Commission's response to the decision of the Third Circuit in Levy v. Sterling Holding Co., 314 F.3d 106 (3d Cir. 2002), which also resulted in uncertainty and confusion about the interpretation of Commission rules. See 69 Fed. Reg. 35982 (June 25, 2004) (proposing release), 70 Fed. Reg. 46080 (August 9, 2005) (adopting release); Bruh v. Bessemer Venture Partners III L.P., 464 F.3d 202 (2d Cir. 2006) (accepting Commission interpretation of rule before amendment based on Commission's amicus brief in the case and the

process, and will facilitate the efforts of the Commission's staff in its review of future no-action requests.

IV. Paperwork Reduction Act

The proxy rules constitute a "collection of information" requirement within the meaning of the Paperwork Reduction Act of 1995, the PRA.[58] The amendment to Rule 14a-8(i)(8) described in this release relates to a previously approved collection of information, the title of which is "Proxy Statements - Regulation 14A (Commission Rules 14a-1 through 14a-16 and Schedule 14A)" (OMB Control No. 3235-0059). This regulation was adopted pursuant to the Exchange Act and sets forth the disclosure requirements for proxy statements filed by companies to help investors make informed voting decisions.

The Rule 14a-8(i)(8) amendment merely revises the text of Rule 14a-8(i)(8) in a manner that is consistent with the agency's longstanding interpretation of the rule. As such, the amendment does not affect the Schedule 14A collection of information for purposes of the PRA. Therefore, we are not submitting the amendment for OMB approval.

V. Cost-Benefit Analysis

The amendment to Rule 14a-8(i)(8) clarifies the Commission's existing proxy rules. The opinion in AFSCME v. AIG created uncertainty regarding the agency's longstanding interpretation of Rule 14a-8(i)(8), making it difficult for shareholders and

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rule amendments and observing that the amended rule was valid); Levy v. Sterling Holding Co., 475 F. Supp. 2d 463 (D. Del. 2007) (upholding Commission's amended rules and applying them retroactively); Tinney v. Geneseo Communications, Inc., 457 F. Supp. 2d 495 (D. Del. 2006) (same).

58 44 U.S.C. 3501 et seq.

companies to assess the operation of that rule. The amendment is intended to clarify the meaning of the exclusion in Rule 14a-8(i)(8), consistent with the agency's unwavering interpretation of the rule for the last decade. Without such clarification, shareholders and companies may need to resort to litigation to determine the range of shareholder proposals that are required to be included in company proxy materials. They may be uncertain as to the proper range of proposals that shareholders may submit to companies for inclusion in those proxy materials. For example, without clarification of the exclusion in Rule 14a-8(i)(8), shareholders may incur costs in preparing and submitting proposals that a company may properly exclude from its proxy materials.

The Commission solicited public comment on the benefits and costs of the proposed amendment to Rule 14a-8(i)(8). While not directly addressing the cost-benefit analysis, commenters that addressed whether further clarification of the meaning of the election exclusion was necessary generally thought that an amendment to Rule 14a-8(i)(8) was appropriate.[59] Commenters supporting the amendment agreed that it would eliminate the uncertainty caused by the decision in AFSCME v. AIG.[60] Several commenters opposing the amendment[61] argued that the Commission's proxy rules should facilitate a shareholder's ability to nominate directors.[62]

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59 See, e.g., comment letters from BRT and SCSGP.

60 See, e.g., comment letters from ABA; Adams; BOA; Boeing; BRT; Burlington Northern ; Caterpillar; Chevron; Peabody; and SCSGP.

61 As discussed above, this release addresses the limited issue of the Commission's interpretation of existing Rule 14a-8(i)(8) and corresponding rule amendment, and does not address the broader range of matters contemplated by the Companion Release. Accordingly, this release does not address the benefits and costs, and effects on efficiency, competition and capital formation, of the proposals in the Companion Release.

62 See, e.g., Form Letter B and comment letters from Van Winthrop and Thirty-Nine Law Professors.

The amendment should assist shareholders in determining the precise meaning of Rule 14a-8(i)(8) in connection with their preparation and submission of proposals for inclusion in a company's proxy materials. To the extent that proposals are properly excluded from proxy materials in reliance on the amended rule, companies and their shareholders will not incur additional costs that would otherwise be incurred if the proposals were included. Without the clarification of the proper scope of the Rule 14a-8(i)(8) exclusion that will be provided by the amendment, shareholders and companies may incur substantial expense in litigating disputes regarding that basis for exclusion. Thus, the clarification of Rule 14a-8(i)(8) will save both shareholders and companies potentially substantial expense in litigating disputes regarding its application.

In addition, the amendment will prevent circumvention of provisions of the proxy rules outside of Rule 14a-8, such as Rules 14a-9 and 14a-12, which are designed to assure the integrity of director elections. Finally, the amendment will facilitate the ability of staff in the Division of Corporation Finance to respond to no-action requests by clarifying the scope of the Rule 14a-8(i)(8) exclusion.

As we stated in the Proposing Release, because the proposed amendment would clarify that the scope of the exclusion in Rule 14a-8(i)(8) is consistent with the Commission's longstanding interpretation of that exclusion, shareholders and companies would not incur additional costs to determine the appropriate scope of the exclusion.

The Second Circuit decision may have altered the expectations of some shareholders, both within and outside of the Second Circuit, regarding their ability to require a company to include in its proxy statement a shareholder proposal under

Rule 14a-8 to amend the bylaws to establish procedures for shareholder-nominated candidates for director to be included in a company's proxy materials. Despite the fact that, since 1998, the Commission staff repeatedly has taken the position that shareholder proposals that may result in a contested election fall within an exclusion from the rule, some uncertainty regarding this position was created by the AFSCME v. AIG decision. In this regard, the Commission's restatement of the longstanding interpretation of Rule 14a-8(i)(8) could impose a cost on shareholders that may have already incurred expenses in connection with preparations for bylaw amendments in the upcoming proxy season. Because the Commission is persuaded that the unanimous decision of the U.S. Supreme Court in Long Island Care at Home has called the continuing validity of the Second Circuit's decision into question even within that judicial circuit, however, it is not clear that the reassertion of the agency's longstanding view of the scope of the election exclusion would itself be the sole reason that such costs would occur.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[63] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[64] and Section 2(c) of the Investment Company Act of 1940[65] require us, when engaging in rulemaking that requires us to

63 15 U.S.C. 78w(a)(2).

64 15 U.S.C. 78c(f).

65 15 U.S.C. 80a-2(c).

consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The AFSCME v. AIG opinion has created uncertainty regarding the Commission's longstanding interpretation of Rule 14a-8(i)(8), making it difficult for shareholders and companies to assess the operation of that rule. This has resulted in uncertainty regarding whether Rule 14a-8 requires companies to include in their proxy materials shareholder proposals that would establish procedures whereby shareholders could submit nominations for director to be included in the company's proxy materials, despite the exclusion provided by Rule 14a-8(i)(8). This uncertainty has made it difficult for shareholders and companies to assess the proper operation of the shareholder proposal rule and has generated economic inefficiency by introducing potential litigation costs and potential costs of preparing and responding to otherwise excludable shareholder proposals.

The amendment is intended to clarify the scope of the exclusion in Rule 14a-8(i)(8), consistent with the agency's longstanding interpretation of the Rule. This should improve shareholders' and companies' ability to assess shareholder proposals with a clear understanding whether Rule 14a-8 will require inclusion of the proposal. Informed decisions in this regard generally promote market efficiency and capital formation, but should not affect competition. We believe the amendment to Rule 14a-8(i)(8), and the attendant clarity and reduction of litigation risk, expense, and uncertainty for all parties will not impose a burden on competition, but will promote efficiency and capital formation.

VII. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to an amendment to Rule 14a-8 that clarifies the application of the exclusion provided by paragraph (i)(8) of that Rule.

A. Need for the Rules and Rule Amendments

The purpose of the amendment is to clarify the scope of Rule 14a-8(i)(8), which permits the exclusion from a company's proxy materials of certain bylaw proposals relating to procedures for the election of directors. The final rule should improve shareholders' and companies' ability to assess such shareholder proposals with a clear understanding of whether Rule 14a-8 will require inclusion or permit exclusion of the proposal.

B. Significant Issues Raised by Public Comment

We did not receive comments specifically on the application of the interpretation to small entities. Several commenters supported the agency's longstanding interpretation of Rule 14a-8(i)(8). Some believed that the AFSCME v. AIG opinion did not invalidate the interpretation, but rather required the Commission to state its position and its reasoning in a formal way.[66] Other commenters disagreed with the Commission's position entirely and therefore opposed the longstanding interpretation and the related proposed rule text amendment.[67] Some commenters opposing the interpretation and rule

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66 See comment letter from Citigroup. See, e.g., comment letters from Adams and Chamber.

67 See, e.g., comment letters from AFL-CIO; AFSCME; FL Board; Amalgamated Bank; LA Fire & Police; and NYC Comptroller.

proposal believed that the Commission should withhold action until it has the opportunity to assess the impact of the AFSCME v. AIG decision.[68]

C. Small Entities Subject to the Rule

The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[69] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.[70] A "small business" and "small organization," when used with reference to a company other than an investment company, generally means a company with total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 companies, other than investment companies, that may be considered reporting small entities.[71] The final rules may affect each of the approximately 1,315 small entities that are subject to the Exchange Act reporting requirements.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The amendment imposes no new reporting, recordkeeping, or compliance requirements. The impact of the amendment relates to clarifying the scope of Rule 14a-8(i)(8), which permits companies to omit certain shareholder proposals from their proxy materials.

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68 See Form Letter B.

69 5 U.S.C. 601(6).

70 Securities Act Rule 157 [17 CFR 230.157], Exchange Act Rule 0-10 [17 CFR 240.0-10], and Investment Company Act Rule 0-10 [17 CFR 270.0-10] contain the applicable definitions.

71 The estimated number of reporting small entities is based on 2007 data, including the Commission's EDGAR database and Thomson Financial's Worldscope database. Approximately 215 investment companies meet this definition.

E. Agency Action to Minimize Effect on Small Entities

The amendment to Rule 14a-8(i)(8) is intended to provide certainty and consistency to shareholders and companies of all sizes regarding the application of the Rule. It would be contrary to this objective if we minimized the effect of the amendment on small entities.

IX. Statutory Basis and Text of Amendment

We are adopting an amendment to the Rule pursuant to Sections 14, and 23(a) of the Exchange Act, as amended, and Sections 20(a) and 38 of the Investment Company Act of 1940, as amended.

List of Subjects

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend 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. Amend §240.14a-8 by revising paragraph (i)(8) to read as follows:

§240.14a-8 Shareholder proposals.

* * * * *

(i) * * *

(8) <u>Relates to election</u>: If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election;

* * * * * Nancy M. Morris

By the Commission.

Nancy M. Morris
Secretary

Dated: December 6, 2007

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 6, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12901

In the Matter of

ROANOKE
TECHNOLOGY, CORP.

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

RESPONDENT

1. Roanoke Technology, Corp. ("Roanoke") is a Florida corporation headquartered in Rocky Mount, North Carolina, with a class of equity securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. The stock was quoted on the Over-The-Counter Bulletin Board, but was delisted on March 21, 2006 because Roanoke was delinquent in its filings. Roanoke's common stock (symbol "RNKE") is currently quoted on the Pink Sheets.[1]

[1] On December 21, 2005, the Commission filed a civil injunctive action against Roanoke and others for their participation in a fraudulent S-8 scheme, and charged Roanoke with antifraud, registration, and reporting violations of the federal securities laws. Roanoke consented to all non-monetary relief sought in the complaint without admitting or denying the allegations of the complaint, and the court entered a final judgment of permanent injunction on September 27, 2006 and dismissed all monetary claims against Roanoke.

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DELINQUENT FILINGS

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

3. Roanoke filed its last Form 10-K for the year ended October 31, 2004 on February 23, 2005. Since then, Roanoke has filed only two Form 10-Qs for the quarters ended April 30, 2005 and July 31, 2005 and no Form 10-Ks.

4. The following periodic filings are delinquent.

Form	Period Ended	Due on or about
10-Q	01/31/05	03/17/05
10-K	10/31/05	01/29/06
10-Q	01/31/06	03/17/06
10-Q	04/30/06	06/14/06
10-Q	07/31/06	09/14/06
10-K	10/31/06	01/29/07
10-Q	01/31/07	03/19/07
10-Q	04/30/07	06/14/07
10-Q	07/31/07	09/14/07

5. As a result of the conduct described above, Roanoke 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 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

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. 56942 / December 11, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2756 / December 11, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12244

In the Matter of Anthony P. Dolanski, CPA	ORDER GRANTING APPLICATION FOR REINSTATEMENT 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

On March 21, 2006, Anthony P. Dolanski ("Dolanski") 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 Dolanski pursuant to Rule 102(e) of the Commission's Rules of Practice.[1] Dolanski consented to the entry of the order without admitting or denying the findings therein but for the Commission's finding that a final judgment and permanent injunction had been previously entered against him. This order is issued in response to Dolanski's application for reinstatement 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.

Dolanski served as the lead engagement partner overseeing KPMG LLP's ("KPMG") audits of Xerox Corporation ("Xerox") from 1995 through 1997. The Commission alleged that in fiscal year 1997 approximately $405 million of Xerox's $2.14 billion in pre-tax earnings was generated through the use of improper accounting devices in violation of GAAP. In the course of serving as the engagement partner for Xerox, Dolanski signed on behalf of KPMG an audit report that accompanied the 1997 Annual Report on Form 10-K filed by Xerox with the SEC. That audit report stated that KPMG conducted an audit of Xerox's financial statements in accordance with GAAS, that KPMG planned and performed the audit to obtain reasonable assurances that the financial statements were free of material misstatements, that KPMG

[1] *See* Accounting and Auditing Enforcement Release No. 2397 dated March 21, 2006. Dolanski was permitted, pursuant to the order, to apply for reinstatement after one year upon making certain showings.

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assessed the accounting principles used and significant estimates made by Xerox management and that it evaluated the overall consolidated financial statement presentation. The audit report further represented that, as a result of KPMG's audit, it was KPMG's opinion that Xerox's financial condition and results of operation were fairly presented in the financial statements in conformity with GAAP. The Commission alleged that each of these representations was materially false and misleading or omitted to disclose material information which would make the statements not false and misleading.

In his capacity as a preparer or reviewer, or as a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, Dolanski attests that he will undertake to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, while practicing before the Commission in this capacity. Dolanski is not, at this time, seeking to appear or practice before the Commission as an independent accountant. If he should wish to resume appearing and practicing before the Commission as an independent accountant, he will be required to submit an application to the Commission showing that he has complied and will comply with the terms of the original suspension order in this regard. Therefore, Dolanski's suspension from practice before the Commission as an independent accountant continues in effect until the Commission determines that a sufficient showing has been made in this regard in accordance with the terms of the original suspension order.

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."[2] This "good cause" determination is necessarily highly fact specific.

On the basis of information supplied, representations made, and undertakings agreed to by Dolanski, it appears that he has complied with the terms of the March 21, 2006 order suspending him from appearing or practicing 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 Dolanski, by undertaking to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, in his practice before the Commission as a preparer or reviewer of financial statements required to be filed with the Commission, has shown good cause for reinstatement. Therefore, it is accordingly,

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[2] 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).

ORDERED pursuant to Rule 102(e)(5)(i) of the Commission's Rules of Practice that Anthony P. Dolanski, CPA is hereby 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.

By the Commission.

Nancy M. Morris
Secretary

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

Commissioner Atkins
Not Participating

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 229, 231 and 241

[Release Nos. 33-8870; 34-56945; File No. S7-29-07]

RIN 3235-AK00

CONCEPT RELEASE ON POSSIBLE REVISIONS TO THE DISCLOSURE REQUIREMENTS RELATING TO OIL AND GAS RESERVES

AGENCY: Securities and Exchange Commission.

ACTION: Concept release.

SUMMARY: The Commission is publishing this Concept Release to obtain information about the extent and nature of the public's interest in revising oil and gas reserves disclosure requirements which exist in their current form in Regulation S-K and Regulation S-X under the Securities Act of 1933 and the Securities Exchange Act of 1934. The Commission adopted the current oil and gas reserves disclosure requirements between 1978 and 1982. In the decades that have passed since the adoption of these rules, there have been significant changes in the oil and gas industry. Some commentators have expressed concern that the Commission's rules have not adapted to current practices and may not provide investors with the most useful picture of oil and gas reserves public companies hold.

DATES: Comments should be received on or before [insert 60 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/concept.shtml); or

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- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-XX-07 on the subject line; or

Use the Federal e-Rulemaking Portal http://www.regulations.gov. Follow the instructions for submitting comments.

Paper comments:

- Send paper submissions 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-XX-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/concept.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 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: Questions on this Concept Release should be directed to Mellissa Campbell Duru, Attorney-Advisor or Dr. W. John Lee, Academic Petroleum Engineering Fellow at (202) 551-3740, Division of Corporation Finance; or Mark Mahar, Associate Chief Accountant, Office of the Chief Accountant at

(202) 551-5300; U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTAL INFORMATION:

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I. Introduction

Throughout the Commission's history, our focus on the information needs of investors in public companies has caused us to continually re-evaluate the disclosure requirements of the federal securities laws. The extent and pace of changes in the oil and gas industry, and public concern that our oil and gas reserves disclosure requirements are not fully aligned with current industry practice, have led us to reconsider those requirements. Through this Concept Release, the Commission seeks public comment on our oil and gas reserves disclosure requirements.[1] While we set forth a number of general and specific questions, we welcome comments on any other concerns commenters may have related to these issues.

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[1] The Commission is currently considering the use of International Financial Reporting Standards as published by the International Accounting Standards Board by U.S. public companies. The International Accounting Standards Board is also undertaking a project with respect to the convergence of accounting and disclosure reporting practices related to all extractive industries. This concept release is not seeking comment with respect to those matters.

The current oil and gas reserves disclosure requirements have been in place for some time. The Energy Policy and Conservation Act of 1975 directed the Commission to "take such steps as may be necessary to assure the development and observance of accounting practices to be followed in the preparation of accounts by persons engaged, in whole or in part, in the production of crude oil or natural gas in the United States."[2] In 1978, the Commission issued Accounting Series Release No. 253, which amended Regulation S-X by adding new Rule 3-18,[3] the precursor to Rule 4-10 of Regulation S-X.[4] Rule 4-10 prescribes the financial and reporting standards for companies engaged in oil and gas producing activities. Rule 4-10 defines what constitutes oil and gas producing activities and proved reserves.[5] Item 102 of Regulation S-K, which the Commission adopted in 1982, requires that companies disclose their proved reserves and prohibits them from disclosing other categories of reserves.[6] There have been significant technological advancements, changes in the oil and gas markets, and changes in the types of projects in which companies invest since the Commission adopted these rules and disclosure requirements. Many in the oil and gas industry, including some oil and gas companies, professional organizations and analysts, believe that our oil and gas reserves

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2 See 42 U.S.C. 6201-6422.

3 See Accounting Series Release No. 253 (August 31, 1978) [43 FR 40688]. See also Accounting Series Release No. 257 (December 19, 1978) [43 FR 60404] (further amending Rule 3-18 of Regulation S-X and revising the definition of proved reserves).

4 17 CFR 210.4-10. See Release No. 33-6233 (Sept. 25, 1980) [45 FR 63660] (adopting amendments to Regulation S-X, including Rule 4-10).

5 17 CFR 210.4-10(a).

6 Item 102 of Regulation S-K [17 CFR 229.102]. In 1982, the Commission adopted Item 102 of Regulation S-K. Item 102 contains the disclosure requirements previously located in Item 2 of Regulation S-K. See Release No. 33-6383 (March 16, 1982) [47 FR 11380]. The Commission also "recast[]... the disclosure requirements for oil and gas operations, formerly contained in Item 2(b) of Regulation S-K, as an industry guide." See Release No. 33-6384 (March 16, 1982) [47 FR 11476].

disclosure requirements have not kept pace with industry changes.[7] Other commentators suggest that our reserves disclosure requirements prevent an investor from viewing the company through management's eyes. These commentators also believe that our rules prevent companies from fully presenting the reasons for their oil and gas project investment decisions.[8]

II. Definition of Oil and Gas Reserves

Even though they do not appear on a company's balance sheet, oil and gas reserves are among the most significant assets of an oil and gas company. Given that they lie in deeply buried geological formations, oil and gas reserves are difficult to measure and, until a company extracts them, it can only estimate their volume.

Item 102 of Regulation S-K sets forth the disclosure requirements for the physical property of a company. Instruction 3 to Item 102 requires an oil and gas company to disclose material information about its proved reserves. Instruction 5 to Item 102 prohibits a company from disclosing reserves estimates other than proved reserves in any filing it makes with the Commission. Instruction 6 to Item 102 states that the definitions in Rule 4-10 of Regulation S-X shall apply to Item 102 with respect to oil and gas operations.[9]

Rule 4-10(a)(2) defines proved reserves as "the estimated quantities of crude oil, natural gas, and natural gas liquids which geological and engineering data demonstrate

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7 See, for example, Steve Levine, "Tracking the Numbers: Oil Firms Want SEC to Loosen Reserves Rules," Wall Street Journal (February 7, 2006); Christopher Hope, "Oil Majors Back Attack on SEC Rules," The Daily Telegraph (London) (February 24, 2005); "Deloitte Calls on Regulators to Update Rules for Oil and Gas Reserves Reporting," (February 9, 2005) Business Wire Inc. available at http://biz.yahoo.com/bw/050209/95991_1.html.

8 See, for example, Christopher Hope, "Oil Majors Back Attack on SEC Rules," The Daily Telegraph (London)(February 24, 2005).

with reasonable certainty to be recoverable in future years from known reservoirs under existing economic and operating conditions, i.e. prices and costs as of the date the estimate is made."[10] While the rule does not define "reasonable certainty," the staff has interpreted this term to mean a level of certainty such that, as more information about a reservoir becomes available, it is more likely than not that the additional data will confirm or enhance the company's original estimate of the quantity it can ultimately recover.[11] The staff has historically interpreted the requirement that the reserves be recoverable "under existing economic ... conditions," referred to in Rule 4-10(a)(2)(i) as "economic producibility," to mean that the company can sell the resources for more than its cost to extract and transport them to market.[12] In other words, the company may classify its reserves as proved only if it can economically produce them. Although Rule 4-10 does not specify the price a company should use to make this determination, the staff has historically applied the fiscal year end price requirements set forth in two related accounting standards – Statement of Financial and Accounting Standard No. 19 and Statement of Financial and Accounting Standard No. 69.[13]

Rule 4-10(a)(2) also requires that a company be able to recover resources "under existing ...operating conditions" before classifying them as proved reserves. In the

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9 17 CFR 229.102.

10 17 CFR 210.4-10(a)(2).

11 See Division of Corporation Finance, Current Issues and Rulemaking Projects (November 14, 2000) available at http://www.sec.gov/divisions/corpfin/guidance/cfoilgasinterps.htm.

12 Id.

13 See Financial Accounting Standards Board, Statement of Financial Accounting Standard No. 19: Financial Accounting and Reporting by Oil and Gas Producing Companies (December 1977); and Financial Accounting Standards Board, Statement of Financial Accounting Standard No. 69: Disclosures About Oil and Gas Producing Activities-an Amendment of FASB Statements 19, 25, 33, 39 (November 1982). These standards set forth the year-end price requirement used for calculating discounted future net cash flows of proved reserves.

absence of a definition of "existing operating conditions," the staff has historically interpreted this to include a ready market and a means to transport resources to that market.[14] For oil, these conditions are generally deemed to be met because a company can easily transport oil to a sales point. For gas, there must be a pipeline to transport the gas to a sales point.[15] If a company does not have a current means to transport gas, the staff assumes a ready market for gas does not exist.[16] Therefore, the staff does not consider gas without a means of transport, known as stranded gas, to qualify for classification as proved reserves under Rule 4-10.[17]

To estimate whether it can economically produce its oil and gas resources, a company relies on different methods to evaluate a reservoir where it believes reserves exist. Rule 4-10(a)(2)(i) specifies the tests a company must conduct and the type of data it must consider to estimate, with reasonable certainty, its proved reserves. The company must support its economic producibility conclusion by either actual production from a reservoir or by a conclusive formation test. Although not defined in Rule 4-10, the staff has historically considered a conclusive formation test to include a combination of drilling and well flow testing.[18]

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14 See Division of Corporation Finance, Current Issues and Rulemaking Projects (November 14, 2000) available at http://www.sec.gov/divisions/corpfin/guidance/cfoilgasinterps.htm.

15 An alternative is to convert the gas to a liquid. Historically, however, such conversion projects have been capital intensive and have not always been economically justified given the quantity of reserves.

16 See Division of Corporation Finance, Current Issues and Rulemaking Projects (November 14, 2000) available at http://www.sec.gov/divisions/corpfin/guidance/cfoilgasinterps.htm.

17 <u>Id.</u>

18 Under a particular set of circumstances, the staff viewed this requirement slightly differently. See the subsequent discussion in note 24 for details regarding companies operating in the deepwater Gulf of Mexico.

Rule 4-10(a)(4) allows a company to classify, as part of its proved reserves, the proved undeveloped reserves that it expects to recover from "new wells on undrilled acreage, or from existing wells where a relatively major expenditure is required."[19] Proved undeveloped reserves are restricted to "offsetting productive units that are reasonably certain of production when drilled."[20] In the absence of a definition of the term "offsetting" in Rule 4-10(a)(4), the staff has historically interpreted this to mean immediately adjacent.[21] Rule 4-10(a)(4) does not specify a period of time during which a company should expect to commence drilling the new well or the period of time in which a company will incur a relatively major expenditure. Some industry commentators have expressed concern that companies continue to categorize quantities of proved undeveloped reserves for extended periods of time without taking any action to develop these reserves.[22] This raises the question as to whether such quantities originally met, or currently meet, the reasonable certainty requirement.

Finally, Rule 4-10(a)(4) allows a company to claim resources as proved undeveloped reserves for other undrilled units "only where it can be demonstrated with certainty that there is continuity of production from the existing productive formation."[23] Many companies are utilizing new technologies, such as 3-D seismic, to provide estimates, which they believe are reasonably certain, of proved undeveloped reserves

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19 17 CFR 210.4-10(a)(4).

20 Id.

21 See Division of Corporation Finance, Current Issues and Rulemaking Projects (November 14, 2000). available at http://www.sec.gov/divisions/corpfin/guidance/cfoilgasinterps.htm

22 See, for example, Leslie Haynes, "Defining PUDs," Oil & Gas Investor; Volume 244; Issue 5 (May 1, 2004).

23 17 CFR 210.4-10(a)(4).

more than one offset away. Nevertheless, given Rule 4-10(a)(4)'s requirement of certainty versus reasonable certainty, the staff has considered the requirement of certainty to have a relatively higher threshold than reasonable certainty and, therefore, has not accepted estimates of proved undeveloped reserves based on such technologies . Some commentators have expressed concern that, in practice, this constitutes absolute certainty which they believe is too stringent a criterion.

III. The Impact of Technology

Technological advances since 1978 have improved how companies may identify oil and gas resources. Advances such as 3-D and 4-D seismic interpretation provide increased information about reservoirs and their boundaries. Reservoir description tools and computer reservoir simulation models continue to improve as technology changes.

While a company may currently choose to use new techniques to help it decide where to drill additional wells, the staff has, in nearly all cases, continued to require that, in the absence of actual production, a company support economic producibility through a conclusive formation test. With one exception, the staff interprets this to mean direct contact with the reservoir through drilling and a well-flow test.[24]

Given the scarcity of relatively accessible petroleum reserves that companies can

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[24] In a particular set of circumstances, the staff does not object to companies operating in the deepwater Gulf of Mexico asserting reasonable certainty and economic producibility without a well-flow test. In 2002 and 2003, the staff reviewed the disclosure of oil and gas companies operating in the deepwater Gulf of Mexico. In response to staff comments, companies provided extensive data from open hole logs, core samples, wire line conveyed sampling and seismic surveys to support their position that a traditional well-flow test was not necessary in that specific location. Given the results of this data, the staff does not object to classification of proved reserves in the absence of a traditional well flow test as long as a company's conclusions are supported by all four tests. This position, however, is limited to this specific geographic location. See the Division of Corporation Finance: Letter to Companies With Oil and Gas Operations in the Gulf of Mexico (April 15, 2004) available at http://www.sec.gov/divisions/corpfin/guidance/oilgasltr04152004.htm.

extract using conventional techniques, companies are increasingly looking to resources that are more difficult to access due to their geologic or geographical location or require specialized extraction techniques. Among these resources are tar sands and oil shales, both of which contain chemical compounds which can be processed into oil. When the Commission adopted the proved reserves definitions in 1978, the only effective way to extract these compounds was through traditional mining techniques. Since 1978, however, companies have developed techniques to extract these compounds using oil and gas drilling techniques. Despite these technological advances, Rule 4-10 prohibits a company from including the oil it extracts from tar sands and oil shales in its estimation of proved reserves. Rule 4-10 states that "oil and gas producing activities do not include ...[t]he extraction of hydrocarbons from shale, tar sands, or coal."[25] Rule 4-10 excludes "crude oil, natural gas, and natural gas liquids, that may be recovered from oil shales, coal, gilsonite and other such sources" from the definition of proved reserves.[26] Notwithstanding a company's ability to economically extract oil from tar sands and oil shales, Rule 4-10 prevents it from including these amounts in its estimates of proved reserves.[27]

IV. Alternative Classification Systems

The Commission's proved reserves definitions are those used by the Department of Energy in 1978 and were based upon definitions used by the Society of Petroleum

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[25] 17 CFR 210.4-10(a)(1)(ii)(D).

[26] 17 CFR 210.4-10(a)(2)(iii)(D).

[27] Canadian regulators have revised their definitions of oil reserves to include non-traditional resources such as bitumen, which is extracted from tar sands. See, for example, Statements of the Alberta Securities Commission with respect to National Instrument (NI) 51-101 (National Instrument 51-101 Standards of Disclosure for Oil and Gas Activities) available at www. albertasecurities.com.

Engineers and the general industry at that time. Since 1978, the Society of Petroleum Engineers has made several significant revisions to its classification framework. It released its most recent version, the "Petroleum Resources Management System," in February 2007.[28] This system was jointly sponsored by the World Petroleum Council, the American Association of Petroleum Geologists and the Society of Petroleum Evaluation Engineers. The classification framework defines a broad range of reserves categories, contingent resources and prospective resources.[29] We understand that oil and gas companies may use this classification framework to prepare reserves estimates for purposes other than their SEC filings and that investors in private financing transactions and participants in business combinations may use this framework as well.

The International Accounting Standards Board is currently consulting with the Society of Petroleum Engineers Oil and Gas Reserves Committee regarding oil and gas company accounting requirements.[30] The United Nations Economic Commission for Europe and the United Nations Economic and Social Council are currently working together to establish an international classification system to classify resources in the oil and gas and mining industries.[31] Finally, other jurisdictions, such as Canada, have

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28 See Society of Petroleum Engineers, the World Petroleum Council, American Association of Petroleum Geologists, and the Society of Petroleum Evaluation Engineers, Petroleum Resources Management System, SPE/WPC/AAPG/SPEE (2007).

29 Id.

30 See, for example, American Association of Petroleum Geologists and Society of Petroleum Engineers International Multidisciplinary Conference on Oil and Gas Reserves and Resources, Washington, DC (June 24-26, 2007) available at http://www.spe.org/spe-site/spe/spe/industry/reserves/AAPG-SPE_EXECUTIVE_SUMMARY_29AUG07.pdf.

31 See United Nations Framework Classification System for Fossil Energy and Mineral Resources, United Nations Economic Council For Europe (March, 2006) available at http://www.unece.org/ie/se/pdfs/UNFC/UNFCemr.pdf.

adopted disclosure requirements that share characteristics with the Petroleum Resources Management System.[32]

V. Independent Preparation, Assessment or Evaluation of Reserves Disclosure

Although a company may engage a third party to prepare its reserves estimates, assess its estimates, or evaluate the proved reserves information in the filings that it makes with us, our rules do not require it to do so. While some professional organizations may require their members to follow certain standards in providing such services, it does not appear that these standards are binding or that these professional organizations have any specialized enforcement mechanisms to assure compliance with them.

VI. General Request for Comment

As noted above, in light of the extent and pace of changes in the oil and gas industry and public concern that our oil and gas reserves disclosure requirements are not fully aligned with current industry practice, we are reconsidering our oil and gas reserves disclosure requirements. The Commission seeks public comment on our oil and gas reserves disclosure requirements and related issues.

Questions:

1. Should we replace our rules-based current oil and gas reserves disclosure requirements, which identify in specific terms which disclosures are required and which are prohibited, with a principles-based rule? If yes, what primary disclosure principles should the Commission consider? If the Commission were

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32 See SPE Oil and Gas Reserves Committee, Mapping Subcommittee Final Report (December 2005) – Comparisons of Selected Reserves of Selected Reserves and Resources Classifications and Associated Definitions.

to adopt a principles-based reserves disclosure framework, how could it affect disclosure quality, consistency and comparability?

2. Should the Commission consider allowing companies to disclose reserves other than proved reserves in filings with the SEC? If we were to allow companies to include reserves other than proved reserves, what reserves disclosure should we consider? Should we specify categories of reserves? If so, how should we define those categories?

3. Should the Commission adopt all or part of the Society of Petroleum Engineers – Petroleum Resources Management System? If so, what portions should we consider adopting? Are there other classification frameworks the Commission should consider? If the Commission were to adopt a different classification framework, how should the Commission respond if that framework is later changed?

4. Should we consider revising the current definition of proved reserves, proved developed reserves and proved undeveloped reserves? If so, how? Is there a way to revise the definition or the elements of the definition, to accommodate future technological innovations?

5. Should we specify the tests companies must undertake to estimate reserves? If so, what tests should we require? Should we specify the data companies must produce to support reserves conclusions? If so, what data should we require? Should we specify the process a company must follow to assess that data in estimating its reserves?

6. Should we reconsider the concept of reasonable certainty? If we were to replace it, what should we replace it with? How could that affect disclosure quality? Should we consider requiring companies to make certain assumptions? Should we prohibit others?

7. Should we reconsider the concept of certainty with regard to proved undeveloped reserves? Should we allow companies to indefinitely classify undeveloped reserves as proved?

8. Should we reconsider the concept of economic producibility? If we were to replace it, what should we replace it with? How could that affect disclosure quality? Should we consider requiring companies to make certain assumptions? Should we prohibit others?

9. Should we reconsider the concept of existing operating conditions? If we were to replace it, what should we replace it with? How could that affect disclosure quality? Should we consider requiring companies to make certain assumptions? Should we prohibit others?

10. Should we reconsider requiring companies to use a sale price in estimating reserves? If so, how should we establish the price framework? Should we require or allow companies to use an average price instead of a fixed price or a futures price instead of a spot price? Should we allow companies to determine the price framework? How would allowing companies to use different prices affect disclosure quality and consistency? Regardless of the pricing method that is used, should we allow or require companies to present a sensitivity analysis that would quantify the effect of price changes on the level of proved reserves?

11. Should we consider eliminating any of the current exclusions from proved reserves? How could removing these exclusions affect disclosure quality?

12. Should we consider eliminating any of the current exclusions from oil and gas activities? How could removing these exclusions affect disclosure quality?

13. Should we consider eliminating the current restrictions on including oil and gas reserves from sources that require further processing, e.g., tar sands? If we were to eliminate the current restrictions, how should we consider a disclosure framework for those reserves? What physical form of those reserves should we consider in evaluating such a framework? Is there a way to establish a disclosure framework that accommodates unforeseen resource discoveries and processing methods?

14. What aspects of technology should we consider in evaluating a disclosure framework? Is there a way to establish a disclosure framework that accommodates technological advances?

15. Should we consider requiring companies to engage an independent third party to evaluate their reserves estimates in the filings they make with us? If yes, what should that party's role be? Should we specify who would qualify to perform this function? If so, who should be permitted to perform this function and what professional standards should they follow? Are there professional organizations that the Commission can look to set and enforce adherence to those standards?

In addition to the areas for comment identified above, we are interested in any other issues that commenters may wish to address and the benefits and costs relating to investors, issuers and other market participants of the possibility of revising disclosure rules pertaining to petroleum reserves included in Commission filings. Please be as specific as possible in your discussion and analysis of any additional issues. Where possible, please provide empirical data or observations to support or illustrate your comments.

By the Commission.

Florence E. Harmon

Florence E. Harmon
Deputy Secretary

December 12, 2007

Commissioner Nazareth
Not Participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56961 / December 13, 2007

Admin. Proc. File No. 3-12596

In the Matter of SALVATORE F. SODANO c/o William R. Baker III, Esq. Latham & Watkins, LLP 555 Eleventh Street NW, Suite 1000 Washington, DC 20004-1304	ORDER DENYING MOTION FOR SUMMARY AFFIRMANCE

On August 20, 2007, an administrative law judge issued a decision dismissing an administrative proceeding against respondent Salvatore F. Sodano, formerly the Chairman and Chief Executive Officer ("CEO") of the American Stock Exchange, LLC ("Amex" or the "Exchange"). On August 27, 2007, the Commission's Division of Enforcement (the "Division") filed a petition for review of the law judge's decision. On August 29, 2007, Sodano filed a motion seeking summary affirmance by the Commission of the law judge's decision. The Division subsequently filed a response to Sodano's motion on September 4, 2007. We have determined to deny Sodano's motion.

The Division seeks a censure of Sodano under Section 19(h)(4) of the Securities Exchange Act of 1934. 1/ Under this section, the Commission is authorized "to remove from office or censure any officer or director of [a] self-regulatory organization" if the Commission finds "that such officer or director has willfully violated any provision of [the Exchange Act], the rules or regulations thereunder, or the rules of [the] self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance."

The Order Instituting Proceedings ("OIP"), issued by the Commission on March 22, 2007, alleges that, as the Amex's Chairman and CEO, Sodano failed to enforce compliance with federal securities laws, rules and regulations, and Amex rules by the Amex's members and persons associated with the Amex's members. On September 11, 2000, the Commission instituted a settled administrative proceeding against the Amex and three other respondent exchanges, in which the Commission found, among other things, that the Amex had failed to adequately enforce certain option order handling rules including critical customer-protection

1/ 15 U.S.C. § 78s(h)(4).

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rules relating to firm quote and trading ahead. 2/ The OIP charges that Amex's regulatory deficiencies and their continuation after the Commission ordered the Amex to enhance and improve its regulatory programs for enforcing these rules resulted from Sodano's failure to pay adequate attention to and dedicate sufficient resources to regulation.

The law judge never reached the merits of the charges against Sodano because the law judge found that Exchange Act Section 19(h)(4) authorized the Commission to censure only persons who are currently officers and directors of self-regulatory organizations. In January 2005, Sodano resigned his position as Amex CEO, and he resigned his position as Amex Chairman in April 2005. As a result, the law judge found that the Commission lacked authority under Exchange Act Section 19(h)(4) to censure Sodano. Accordingly, the law judge dismissed the proceedings.

Rule of Practice 411(e)(2) provides that the Commission may summarily affirm an initial decision if the Commission determines that no issue raised in the proceeding warrants further consideration. 3/ That rule provides further that the Commission may deny a motion for summary affirmance upon a reasonable showing that, among other reasons, the initial decision embodies an exercise of discretion that is important and that the Commission should review. 4/

Sodano claims that summary affirmance is warranted for two reasons. Sodano argues that the law judge's interpretation of Section 19(h)(4) is "straightforward and correct." Sodano further contends, "This case has already occupied more of the Commission's enforcement resources than it warrants. After briefing and argument before the full Commission on this arcane statutory issue, any remand would be followed by a four- to five-week trial involving dozens of witnesses and thousands of exhibits."

In opposition to Sodano's motion for summary affirmance, the Division contends that the law judge's decision is based on an incorrect interpretation of Exchange Act Section 19(h)(4). The Division claims that Sodano's violations were pervasive and continued after Commission warnings and, as a result, were the types of violations Section 19(h)(4) is designed to address. Although the Division acknowledges that its appeal presents a question of first impression to the Commission, the Division argues that the securities laws should be interpreted broadly in general and points more specifically to the use of the past tense in the text of Section 19(h)(4) as indicating that the Section applies both to former and current officers and directors of self-regulatory organizations. The Division further claims that the law judge's interpretation of Section 19(h)(4) would permit an officer or director to avoid a censure by resigning, up to as late

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2/ Certain Activities of Options Exchanges, Securities Exchange Act Rel. No. 43268 (Sept. 11, 2000), 73 SEC Docket 697.

3/ 17 C.F.R. § 201.411(e)(2).

4/ Id.

as the date of issuance of the law judge's decision. For these reasons, the Division argues that its appeal presents an important policy matter that merits Commission review.

We previously have noted that "[s]ummary affirmance is rare, given that generally we have an interest in articulating our views on important matters of public interest and the parties have a right to full consideration of those matters." 5/ Summary affirmance is appropriate when it is clear that "submission of briefs by the parties will not benefit us in reaching a decision." 6/

That is not the case here. We have an interest in articulating our own views on the matters raised in this proceeding, and we wish to have the benefit of the parties' views on whether the Commission's authority to censure under Exchange Act Section 19(h)(4) extends to former officers and directors of self-regulatory organizations such as the Amex. The questions posed by the Division's petition for review involve important matters regarding the Commission's regulatory authority. Under the circumstances, it appears appropriate to consider the record and the parties' arguments as part of the normal appellate process rather than the abbreviated process involved with a summary affirmance. We therefore deny Sodano's motion.

Accordingly, it is ORDERED that the motion for summary affirmance by Salvatore F. Sodano be, and it hereby is, denied.

By the Commission.

Nancy M. Morris
Secretary

5/ Richard Cannistraro, 53 S.E.C. 388, 389 n.3 (1998); see also Terry T. Steen, 52 S.E.C. 1337, 1338 (1997) (denying summary affirmance and noting that such action is appropriate only where there are "compelling reasons").

6/ Cannistraro, 53 S.E.C. at 389 n.3. In Cannistraro, we summarily affirmed the decision of a law judge denying a Division motion to suspend indefinitely administrative proceedings against a respondent who had evaded service. Our decision was based on Commission Rule of Practice 161, which, at the time, permitted postponement for a "reasonable period of time" and which we interpreted to mean not an "open-ended" period. In determining that summary affirmance was appropriate, we noted that the record was abbreviated, consisting primarily of the Division's motions for extensions of time to serve the respondent, and that such Commission action would "not be unjust for either party." Id. at 389; see also Christopher A. Lowry, 55 S.E.C. 481 (2001) (denying motion for summary affirmance where the Commission "wish[ed] to have the benefit of the parties' views on, among other matters, the appropriate sanctions in the public interest").

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56962 / December 13, 2007

Admin. Proc. File No. 3-12416

In the Matter of the Application of PERPETUAL SECURITIES, INC., YOUWEI P. XU, and CATHY Y. HUANG 1603 - 7300 Yonge Street Thornhill, Ontario L4J7Y5 Canada For Review of Disciplinary Action Taken by NASD	ORDER DENYING MOTION FOR RECONSIDERATION

On October 4, 2007, we issued an Opinion ("the Opinion") sustaining the findings of violations and modifying the sanctions imposed by NASD on Applicants Perpetual Securities, Inc. ("Perpetual" or "the Firm"), Youwei P. Xu, a part owner and executive of Perpetual, and Cathy Y. Huang, a part owner and executive of Perpetual. 1/ We found that Perpetual operated a securities business when its NASD membership was suspended, that Xu and Huang allowed Perpetual to operate a securities business while its NASD membership was suspended, and that Huang failed to respond timely and completely to an information request from NASD. We sustained NASD's expulsion of Perpetual from NASD, its bar of Xu and Huang from association with any NASD member in connection with the operation of the Firm while suspended, and reduced to a two-year suspension NASD's bar of Huang for her untimely and incomplete response to NASD's information request. On October 26, 2007, after receiving an extension of time in which to file, Applicants filed a Motion for Reconsideration of the Opinion ("the Motion").

1/ Perpetual Sec., Inc., Securities Exchange Act Rel. No. 56613 (Oct. 4, 2007), __ SEC Docket __.

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We consider the Motion under Rule 470 of the Commission's Rules of Practice. 2/ The "exceptional remedy" of a motion for reconsideration is designed to correct manifest errors of law or fact, or to permit the presentation of newly discovered evidence. 3/ Applicants may not use motions for reconsideration to reiterate arguments previously made or to cite authority previously available; moreover, we will accept only such additional evidence that "the movant could not have known about or adduced before entry of the order subject to the motion for reconsideration." 4/ Applicants' motion does not meet this standard.

In general, Applicants' motion is a reiteration of the arguments already made in their briefs on the merits and specifically considered by us, including challenges to the service of NASD's November 2002 Order suspending Perpetual's membership ("Suspension Order"), to certain procedural rulings made by NASD, and to NASD's entry of a default order against Applicants. We will not readdress those matters here. However, the Motion raises some new points that require a brief response.

a. Applicants repeatedly allege that the Opinion is "covering up" NASD misconduct. For example, Applicants complain that the Opinion purposely ignored NASD's termination of Perpetual's NASD membership on July 11, 2005, while noting Perpetual's January 16, 2003 submission of a Form BDW to withdraw its registration as a broker-dealer. Applicants assert that, as a result, we ignored their complaints about their interactions with NASD between January 2003 and July 2005. However, we considered and rejected Applicants' repeated allegations of NASD misconduct because they were not supported by evidence.

b. While reiterating their argument that NASD improperly served the Suspension Order, Applicants suggest that our rejection of their argument is "against Commission's Secretary Ms. Morris own practices on legal order delivery service," citing what they believe is the normal practice of the Office of the Secretary to ensure that Applicants received the Opinion.

2/ 17 C.F.R. § 201.470. The Comment to Rule 470 states that "[a] motion for reconsideration is intended to be an exceptional remedy." Exchange Act Rel. No. 35833 (Jan. 9, 1995), 59 SEC Docket 1546, 1588.

3/ KPMG Peat Marwick LLP, Order Denying Request for Reconsideration, 55 S.E.C. 1, 3 n.7 (2001). See also John Montelbano, Order Denying Motions for Reconsideration, 56 S.E.C. 372, 378 (2003) (motion for reconsideration must be based on "matters of record alleged to have been erroneously decided, the grounds relied on, and the relief sought," and is not an appropriate vehicle for adducing new evidence).

4/ Feeley & Wilcox Asset Mgmt. Corp., Order Denying Motion for Reconsideration, 56 S.E.C. 1264, 1269 n.18 (2003).

Service of a Commission order on an applicant is governed by Commission Rule of Practice 141(b) which permits service of decisions by mail. 5/ The Office of the Secretary initially transmitted the Opinion by both mail and facsimile. After Applicants informed the Office of the Secretary that there had been some problems with the initial facsimile transmission, the Office transmitted the Opinion by courier and confirmed its delivery. The additional steps taken by the Office of the Secretary to respond to an alleged transmission difficulty were an exercise of its discretion to ensure that there was no further miscommunication with Applicants. More critically, neither the Commission's Rule of Practice 141(b) nor the discretionary measures taken by the Office of the Secretary determine the propriety of NASD's actions in serving the Suspension Order on Applicants. As discussed in the Opinion, the Suspension Decision was served on Applicants' attorney properly and in accordance with NASD Rules.

c. The Opinion states "[h]ere the Applicants were aware of the Suspension Proceeding and had begun to close their New York office in anticipation of a possible sanction." Applicants assert that the Opinion's statement that Perpetual's office was closed in early November 2002 "in anticipation of sanctions" is a "false statement." However, in their opening brief, Applicants stated that they were attempting to settle the payment of the arbitration award (the basis for the suspension proceeding) and that they "followed NASD's . . . instructions . . . ready to close business if NASD in favor of [customer who won arbitration]." Applicants described further their actions before the decision in the suspension proceeding, "[t]o protect the Firm's clients . . . Firm contacted other brokerage firms for transferring [Perpetual's] clients to them . . . ." In the Motion, they reiterate that they had closed the office and laid off all "brokers and clerks." These statements support the Opinion's conclusion, which in turn underscores that Applicants were aware of the pendency of the suspension proceeding and, consequently, were responsible for monitoring their membership status.

d. The Motion argues, with respect to Huang's failure to respond to information requests, that the information "could be requested in the examination from January 2003 to May 2003, if NASD thought they were necessary . . . . It was NASD who did not request the information timely, on purpose." The Motion further asserts that Applicants had satisfied the examination staff. However, as noted in the Opinion, Perpetual was informed in NASD's May 2003 exit letter that the Firm's operation during its suspension had been referred to NASD's Department of Enforcement. The subsequent requests were made by Enforcement during the investigation of Applicants' conduct. To the extent the Motion purports to suggest that NASD's requests were somehow improper, the Opinion pointed out that Huang cannot "fulfill her obligation to provide information by 'second guessing' NASD's request[s]."

e. Applicants fault the Opinion's determination that there was not enough evidence to evaluate the claims with respect to a net-capital deficiency by Perpetual. The Opinion referred to the alleged deficiency solely in response to some of Applicants' allegations of NASD

5/ 17 C.F.R. § 201.141(b).

misconduct. NASD did not charge Applicants with any net-capital violation in this proceeding, and the merits of that deficiency were never before us.

f. Applicants assert that NASD's New Jersey District Director improperly signed the Notice of Complaint advising Applicants that NASD had filed a Complaint against them. This allegation could have been raised earlier and, therefore, is not properly raised in a motion for reconsideration. 6/ The Opinion addressed Applicants' related claim that the New Jersey District Director had commenced this disciplinary proceeding in violation of NASD Rules by signing the Complaint without a co-signer from NASD's Department of Enforcement. The Opinion found that Applicants' claim was factually mistaken: an attorney for NASD Enforcement had also signed the Complaint, as required by NASD Rules. Moreover, NASD Rules do not specify who may or may not sign the Notice of Complaint. Accordingly, we find no reason to fault the actions of the New Jersey District Director.

Therefore, IT IS ORDERED that Applicants' October 26, 2007 Motion for Reconsideration be, and it hereby is, denied.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

6/ Feeley & Wilcox, 56 S.E.C. at 1269 n.18.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 14, 2007

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

It appears to the Securities and Exchange Commission that the market for the securities of Avitech LifeSciences, Inc. ("Avitech," trading symbol AVLF), 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 of Avitech shares; (2) the financial performance and business prospects of Avitech; 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. EST, December 14, 2007 through 11:59 p.m. EST, on December 28, 2007.

By the Commission.

Nancy M. Morris
Secretary

J Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 14, 2007

In the Matter of
Xiiva Holdings, Inc.
File No. 500-1

ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that the market for the securities of Xiiva Holdings, Inc. ("Xiiva," trading symbol XIVAF), 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 of Xiiva shares; (2) the financial performance and business prospects of Xiiva; 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. EST, December 14, 2007 through 11:59 p.m. EST, on December 28, 2007.

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 14, 2007

In the Matter of **Green Machine Development Corp.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that the market for the securities of Green Machine Development Corp. ("Green Machine," trading symbol GMVP), 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 of Green Machine shares; (2) the financial performance and business prospects of Green Machine; 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. EST, December 14, 2007 through 11:59 p.m. EST, on December 28, 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 239

[RELEASE NO. 33-8871; FILE NO. S7-30-07]

RIN 3235-AK02

REVISIONS TO FORM S-11 TO PERMIT HISTORICAL INCORPORATION BY REFERENCE

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend Form S-11, a registration statement used by real estate entities to register offerings under the Securities Act of 1933. The amendments would permit an entity that has filed at least one annual report and that is current in its reporting obligations under the Securities Exchange Act of 1934 to incorporate by reference into Form S-11 information from its previously filed Exchange Act reports and documents. The proposed amendments are identical to amendments to Forms S-1 and F-1 previously adopted by the Commission and effective as of December 1, 2005.

DATES: Comments should be received on or before [insert date 30 days after date of publication in the Federal Register].

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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);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-30-07 on the subject line; or
- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-30-07. 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. 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: Michael McTiernan at (202) 551-3852 or Daniel Greenspan at (202) 551-3430, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3010.

SUPPLEMENTARY INFORMATION: On June 29, 2005, we adopted rules[1] that modified the registration, communications and offering processes under the Securities Act of 1933.[2] In order to integrate further the Securities Act and the Securities Exchange Act of 1934,[3] the Commission adopted amendments to Form S-1[4] and Form F-1[5] to permit a reporting issuer that has filed at least one annual report and that is current in its reporting obligation under the Exchange Act to incorporate by reference into its Form S-1 or Form F-1 information from its previously filed Exchange Act reports and documents. At that time, we did not adopt similar amendments to Form S-11.[6] We believe it is appropriate to extend to issuers using Form S-11 the same ability to take advantage of incorporation by reference. The proposed amendments therefore would make the requirements of Form S-11 consistent with Forms S-1 and F-1 with respect to incorporation by reference.

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1 See Securities Offering Reform, Release No. 33-8591 (Jul. 19, 2005) [70 FR 44722].

2 15 U.S.C. 77a et seq.

3 15 U.S.C. 78a et seq.

4 17 CFR 239.13.

5 17 CFR 239.33.

6 17 CFR 239.18.

I. Discussion

A. Background

Form S-11 is the form that real estate entities must use to register offerings under the Securities Act.[7] The form is mandatory for the registration of securities issued by real estate investment trusts and securities issued by other issuers whose business is primarily that of acquiring and holding for investment real estate, interests in real estate, or interests in other issuers whose business is primarily that of acquiring and holding real estate or interests in real estate for investment.[8] Form S-11 currently does not permit an issuer to satisfy the disclosure requirements of the form through incorporation by reference to the reports and other documents that the issuer previously has filed under the Exchange Act.

B. Reasons For Proposal

On June 29, 2005 we adopted amendments to Forms S-1 and F-1 to permit companies filing those forms to incorporate by reference information from their previously filed Exchange Act reports and documents.[9] The purpose of the amendments was to integrate further the Exchange Act and the Securities Act.[10] The ability to incorporate by reference is conditioned on the company having filed its annual report for the most recent fiscal year, being current in its reporting obligations under the Exchange Act, and making the incorporated Exchange Act reports and documents available and accessible on a Web site maintained by or for the registrant.[11] Blank check companies, shell companies and penny stock registrants are not

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[7] Real estate entities may also use Forms S-3 and S-4 if they meet the applicable eligibility requirements of those forms. When no other form is available, these entities are required to file on Form S-11 rather than Form S-1.

[8] See General Instruction A of Form S-11.

[9] See Release No. 33-8591.

[10] Id. at 237.

[11] See General Instruction VII of Form S-1 and General Instruction VI of Form F-1.

permitted to use incorporation by reference. Successor registrants may incorporate by reference if their predecessors are eligible.[12]

At that time, we did not adopt a similar amendment to Form S-11. However, we believe that Form S-11 should be consistent with Form S-1 with respect to incorporation by reference. Both Form S-11 and Form S-1 are long-form registration statements intended for new and unseasoned issuers. The only substantive difference between the two forms is that Form S-11 contains certain additional disclosure requirements specific to real estate entities. Since the Commission's interest in integrating disclosure under the Exchange Act and Securities Act extends equally to the disclosure obligations of real estate entities, we propose to amend Form S-11 to permit incorporation by reference on the same terms as we permit it in Forms S-1 and F-1.

C. Proposed Amendments to Form S-11

1. Eligibility

We are proposing to permit a reporting issuer that has filed at least one annual report and that is current in its reporting obligations under the Exchange Act to incorporate by reference into its Form S-11 information from previously filed Exchange Act reports and documents. Under the proposal, a successor registrant would be able to incorporate information by reference on the same terms if its predecessor were eligible to do so.[13] Consistent with Form S-1, the following issuers would not be able to incorporate by reference into a Form S-11:

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[12] Id.

[13] The succession would have to be either primarily for the purpose of changing the state or jurisdiction of incorporation of the issuer or forming a holding company and the assets and liabilities of the successor would have to be substantially the same as the predecessor at the time of the succession, or all of the predecessor issuers would have to be eligible at the time of the succession and the issuer must continue to be eligible.

- reporting issuers who are not current in their Exchange Act reports;[14]
- issuers who are or were, or any of whose predecessors were during the past three years:
  - blank check issuers;
  - shell companies (other than business combination related shell companies); or
  - issuers for offerings of penny stock.[15]

In addition, to enhance the availability to investors of incorporated information, the ability to incorporate by reference would be conditioned on the issuer making its incorporated Exchange Act reports and other materials readily accessible on a Web site maintained by or for the issuer. By conditioning the ability to incorporate by reference on the ready accessibility of an issuer's incorporated Exchange Act reports and other materials on its Web site, we are proposing to provide investors the ability to obtain the information from those reports and materials at the same time that they would have been able to obtain the information if it was set forth directly in the registration statement. Issuers would be able to satisfy this condition by including hyperlinks directly to the reports or other materials filed on EDGAR or on another third-party Web site where the reports or other materials are made available in the appropriate time frame and access to the reports or other materials is free of charge to the user.

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[14] As with Forms S-1, F-1 and S-3, under the proposal, to be current, at the time of filing the registration statement, the issuer must have filed all materials required to be filed pursuant to Exchange Act Sections 13, 14 or 15(d) [15 U.S.C. 78m, 78n, or 78o(d)] during the preceding 12 calendar months (or for such shorter period that the issuer was required to file such materials).

[15] See Securities Act Rule 419(a)(2) [17 CFR 230.419(a)(2)], Exchange Act Rule 3a51-1 [17 CFR.240.3a51-1] and Securities Act Rule 405 [17 CFR 230.405)] for definitions of "blank check company," "penny stock" and "shell company," respectively.

2. Procedural Requirements

As proposed, the prospectus in the registration statement at effectiveness would identify all previously filed Exchange Act reports and materials, such as proxy and information statements, that are incorporated by reference. There would be no permitted incorporation by reference of Exchange Act reports and materials filed after the registration statement is effective – known as "forward incorporation by reference." Under the proposal, an issuer eligible to incorporate by reference its Exchange Act reports and other materials into its Form S-11 would include the following in the prospectus that is part of the registration statement:

- a list of the incorporated reports and materials;
- a statement that it will provide copies of any incorporated reports or materials on request;
- an indication that the reports and materials are available from us through our EDGAR system or our public reference room;
- identification of the issuer's Web site address where such incorporated reports and other materials can be accessed; and
- required disclosures regarding material changes in, or updates to, the information that is incorporated by reference from an Exchange Act report or other material required to be filed.

D. Request for Comment

We request and encourage any interested person to submit comments on the proposal and any other matters that might have an impact on the proposal. With respect to any comments, we note that such comments are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

II. Paperwork Reduction Act

A. Background

The proposed amendments to Form S-11 contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[16] We are submitting these to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act.[17] The title for this information is "Form S-11" (OMB Control No. 3235-0067).

We adopted existing Form S-11 pursuant to the Securities Act. This form sets forth the disclosure requirements for registration statements prepared by real estate entities to provide investors with the information they need to make informed investment decisions in registered offerings.

Our proposed amendments to Form S-11 are intended to allow issuers that are required to use Form S-11 to incorporate by reference previously filed Exchange Act reports and documents. The proposed amendments would conform Form S-11 to Forms S-1 and F-1 with respect to incorporation by reference.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid control number. The information collection requirements related to registration statements on Form S-11 are mandatory. There is no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on the EDGAR filing system.

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[16] 44 U.S.C. 3501 et seq.

B. Summary of Information Collections

The proposals would decrease existing disclosure requirements for eligible issuers by eliminating the need to repeat information in a Form S-11 when that information was previously disclosed in Exchange Act filings. Any reporting issuer that has filed at least one annual report and that is current in its reporting obligation would be permitted to incorporate information by reference into its registration statement on Form S-11.

C. Paperwork Reduction Act Burden Estimates

For purposes of the Paperwork Reduction Act, we expect the annual decrease in the paperwork burden for companies to comply with Form S-11 to be approximately 36,811.5 hours of in-house company personnel time and approximately $44,173,800 for the services of outside professionals.[18] These estimates include the time and the cost of preparing and reviewing disclosure, filing documents, and retaining records. These estimates were based on the following assumptions:

- Each year, 82 registration statements on Form S-11, including post-effective amendments, would incorporate information by reference;[19]
- The estimated paperwork burden for a Form S-11 that does not incorporate information by reference is 1,977 hours, which consists of 494.25 internal hours and 1,482.75 professional hours.[20]

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[17] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[18] Consistent with recent rulemakings and based on discussions with several private law firms, we estimate that the cost of outside professionals retained by the issuer is an average of $400 per hour.

[19] We estimate that issuers that would have been eligible to incorporate by reference under the proposals filed 14 new registration statements on Form S-11 and 68 post-effective amendments to registration statements on Form S-11 (excluding post-effective amendments filed for the purpose of deregistering shares) from September 1, 2006 to August 31, 2007. With the elimination of small business registration forms, we estimate that the number of registration statements filed on Form S-11 will increase by 15 for a total of 29 new registration statements.

- The estimated paperwork burden for a Form S-11 that incorporates information by reference would be the same as the burden currently imposed by Form S-3, which is 459 hours, which consists of 114.75 internal hours and 344.25 professional hours.

- The amount of time eliminated for each Form S-11 that incorporates information by reference would be 1,518 hours per form (1,977 hours for a Form S-11 that does not incorporate information by reference minus 459 hours for a Form S-11 that incorporates information by reference).

- We estimate that the annual decrease in compliance burden resulting from the proposal would be 147,246 hours (97 registration statements multiplied by 1,518 hours per form). This would include 36,811.5 hours of issuer personnel time (97 registration statements times 379.5[21] hours of issuer personnel time per registration statement) and 110,434.5 hours of professional time (97 registration statements times 1,138.5[22] hours of professional time per registration statement.)

- The annual cost savings would be approximately $44,173,800 for the services of outside professionals.

See SEC Press Release No. 2007-233 (Nov. 15, 2007), available at http://www.sec.gov/news/press/2007/2007-233.htm.

[20] Assumes that 25% of total burden borne by internal staff and 75% by professionals.

[21] Reflects the difference between the amount of internal time required to prepare a Form S-11 without incorporation by reference (494.25 hours) and the amount of internal time required to prepare a Form S-11 with incorporation by reference (114.75 hours).

[22] Reflects the difference between the amount of professional time required to prepare a Form S-11 without incorporation by reference (1,483 hours) and the amount of professional time required to prepare a Form S-11 with incorporation by reference (344.25 hours).

D. Request for Comment

We request comment in order to evaluate the accuracy of our estimate of the burden of the collection of information. Any member of the public may direct to us any comments concerning the accuracy of these burden estimates. Persons submitting comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-30-07. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-30-07, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE, Washington, DC, 20549-0609. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

III. Cost-Benefit Analysis

A. Summary of Proposal

We are proposing revisions to Form S-11 that would allow real estate entities to take advantage of incorporation by reference for their previously filed Exchange Act reports and documents. Forms S-1 and F-1, which are similar long-form registration statements, currently permit this type of incorporation by reference. The proposed amendment, if adopted, would amend Form S-11 to permit incorporation by reference on the same terms as currently provided in Forms S-1 and F-1. The purpose of the amendments is to integrate further the disclosure obligations of the Exchange Act and the Securities Act for real estate entities.

B. Benefits

We anticipate that our proposal would enable real estate entities to access the capital markets at a lower cost. It would enable eligible issuers to use their Exchange Act filings to satisfy a portion of their Form S-11 disclosure requirements without having to incur costs to replicate information that they already have disclosed in previously filed Exchange Act reports and other documents. For purposes of our Paperwork Reduction Act analysis, we estimate that our proposed amendments to Form S-11 would reduce the annual paperwork burden by approximately 36,811.5 hours for issuer personnel time at a cost of approximately $6,442,013[23] and by a cost of approximately $44,173,800 for the services of outside professionals. In addition, we believe that the reduction in the size of the prospectus as a result of incorporation by reference would also result in some cost savings and efficiencies in printing and delivering prospectuses.

The proposed amendments are intended to result in regulatory simplification and efficiency by permitting incorporation by reference on Form S-11 and conforming the requirements of Form S-11 to the requirements of Forms S-1 and F-1 in that respect. Incorporation by reference would allow eligible issuers to avoid duplicating disclosure in Form S-11 when the information has already been disclosed in Exchange Act reports. In addition, the revisions would simplify the disclosure regime for long-form registration statements by permitting incorporation by reference equally, regardless of industry.

[23] Consistent with recent rulemaking releases, we estimate the value of work performed by the company internally at a cost of $175 per hour.

C. Costs

We expect that, if adopted, the proposed amendments would result in some ongoing costs to issuers that elect to use incorporation by reference. These potential costs relate to the issuer's obligation to make the incorporated Exchange Act reports and documents available on its Web site and include creating and/or maintaining a Web site as well as actually posting the required filings on the Web site. However, we believe that a substantial majority of issuers eligible to use incorporation by reference already maintain Web sites and thus would not have to incur any additional costs to establish a new Web site for this purpose. In addition, we believe that many issuers eligible to use incorporation by reference already post their Exchange Act reports on their Web sites. Those that do not would incur incremental costs to post the required filings. Given that the proposed amendments would not mandate use of incorporation by reference, issuers that are unwilling to bear the cost of complying with the Web site requirement could simply elect not to incorporate information by reference.

We also recognize that permitting incorporation by reference may impose an analytical burden on investors. For example, for offerings on Form S-11 today, much of the relevant information regarding an offering and the issuer is required to be contained in the registration statement. Under our proposal, offerings pursuant to Form S-11 could require an investor to assemble and assimilate information from various Exchange Act reports and the registration statement in order to compile all of the relevant information regarding an offering. Investors would have to compile the information integrated into the registration statement or delivered by means outside of the prospectus. We note, however, that Securities Act Forms S-3 and F-3 have long permitted incorporation by reference from the issuer's Exchange Act reports, as have Forms

S-1 and F-1 since December 2005, and we know of no indications that investors are unduly burdened when investing in offerings registered on these forms.

D. Requests for Comments

We request comment on all aspects of the cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed amendments. We also request that those submitting comments provide empirical data and other factual support for their views to the extent possible.

IV. Consideration of Promotion on Efficiency, Competition and Capital Formation

Section 2(b) of the Securities Act,[24] requires us, when engaged in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The proposed amendment, if adopted, would amend Form S-11 to permit incorporation by reference on terms equivalent to that currently provided in Forms S-1 and F-1. We believe the amendments would provide benefits, as discussed in further detail above, by reducing the costs of complying with the Form S-11 disclosure requirements by enabling eligible issuers to incorporate their Exchange Act filings. Eased filing burdens resulting from the proposed amendments would promote efficiency in capital formation for real estate entities and may provide a competitive benefit to entities filing on Form S-11 by allowing them to incorporate their periodic reports by reference to the same extent as registrants filing on Forms S-1 and F-1.

[24] 15 U.S.C. 77b(b).

We request comment on whether the proposed amendment, if adopted, would promote efficiency, competition and capital formation. We request that commenters provide empirical data and other factual support for their views if possible.

V. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed amendments to Form S-11.

A. Reasons for the Proposed Action

In 2005, the Commission adopted revisions to Forms S-1 and F-1 to permit incorporation by reference from previously filed Exchange Act reports and other documents. Currently, real estate entities are not permitted to use Form S-1 to register offerings under the Securities Act. Consequently, these entities are unable to take advantage of the important benefit of incorporation by reference that is enjoyed by companies in all other industries that file registration statements on Form S-1. The ability to use a prospectus that does not need to include information provided in previous Exchange Act filings permits companies to streamline the preparation of registration statements and raise capital more efficiently. Companies that are not permitted to incorporate by reference have a greater burden in preparing registration statements in connection with their public offerings. We believe there is no reason to distinguish between real estate entities and other industries for purposes of incorporation by reference.

B. Objectives

The purpose of the proposed amendments is to further integrate the Exchange Act and Securities Act by amending Form S-11 to permit incorporation by reference of Exchange Act filings on terms equivalent to that currently provided in Forms S-1 and F-1. The amendments would extend an important benefit to real estate entities.

C. Legal Basis

We are proposing the amendments under the authority in Sections 6, 7, 8, 10 and 19(a) of the Securities Act, as amended.

D. Small Entities Subject to the Proposed Amendments

The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[25] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.[26] Roughly speaking, a "small business" and "small organization," when used with reference to an issuer other than an investment company, means an issuer with total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 issuers, other than investment companies, that may be considered reporting small entities.[27] The proposed amendments would apply to all issuers required to file registration statements on Form S-11.

As previously noted, in the 12 months ended August 31, 2007, 82 registration statements on Form S-11 were filed, including new registration statements and post-effective amendments. We estimate that four of those were filed by small entities. We also estimate that approximately 15 registration statements were filed on Form SB-2 in the last fiscal year covering transactions by real estate entities that in the future will be required to register on Form S-11.[28] Thus, we

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[25] 5 U.S.C. 601(6).

[26] Rules 157 under the Securities Act [17 CFR 230.157], 0-10 under the Exchange Act [17 CFR 240.0-10] and 0-10 under the Investment Company Act [17 CFR 270.0-10] contain the applicable definitions.

[27] The estimated number of reporting small entities is based on 2007 data, including the Commission's EDGAR database and Thomson Financial's Worldscope database.

[28] See SEC Press Release No. 2007-233 (Nov. 15, 2007), available at http://www.sec.gov/news/press/2007/2007-233.htm.

estimate that 19 registration statements by small entities would be subject to the proposed amendments.

We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

E. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments are expected to impact all capital raising and selling security holder transactions that are registered under the Securities Act on Form S-11. Small entities required to register on Form S-11 would be able to take advantage of the ability to incorporate by reference previously filed Exchange Act reports and documents. We expect that permitting the incorporation by reference of previously filed Exchange Act reports and documents would reduce the costs incurred by small entities of preparing a registration statement on Form S-11 by $9,914,438.[29]

These estimates were based on the following assumptions:

- Each year, 19 registration statements filed by small entities on Form S-11, including post-effective amendments, could incorporate information by reference.
- The paperwork burden for a Form S-11 that does not incorporate information by reference is 1,977 hours, which consists of 494.25 internal hours and 1,482.75 professional hours.[30]
- The paperwork burden for a Form S-11 that incorporates information by reference would be the same as the burden currently imposed by Form S-3, which is 459 hours, which consists of 114.75 internal hours and 344.25 professional hours.

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[29] See n. 18 and n. 23.

[30] Assumes that 25% of total burden borne by internal staff and 75% by professionals.

- The amount of time eliminated for each Form S-11 that incorporates information by reference would be 1,518 hours per form (1,977 hours for a Form S-11 that does not incorporate information by reference minus 459 hours for a Form S-11 that incorporates information by reference).
- We estimate that the annual decrease in compliance burden to small entities resulting from the proposal would be 28,842 hours (19 registration statements multiplied by 1,518 hours per form). This would include 7,210.5 hours of issuer personnel time (19 registration statements times 379.5[31] hours of issuer personnel time per registration statement) and 21,631.5 hours of professional time (19 registration statements times 1,138.5[32] hours of professional time per registration statement).
- The annual cost savings to small entities would be approximately $8,652,600 for the services of outside professionals.

We expect that small entities eligible to register on Form S-11 may need to incur some insignificant additional costs related to complying with the Web site requirements related to incorporation by reference, although issuers could avoid such costs by electing not to incorporate information by reference.

We encourage written comments regarding this analysis. We solicit comments as to whether the proposed amendments could have an effect that we have not considered. We request

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[31] Reflects the difference between the amount of internal time required to prepare a Form S-11 without incorporation by reference (494.25 hours) and the amount of internal time required to prepare a Form S-11 with incorporation by reference (114.75 hours).

[32] Reflects the difference between the amount of professional time required to prepare a Form S-11 without incorporation by reference (1,483 hours) and the amount of professional time required to prepare a Form S-11 with incorporation by reference (344.25 hours).

that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

F. Duplicative, Overlapping or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, or overlap or conflict with, other federal rules.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposal, the Regulatory Flexibility Act requires us to consider the following alternatives:

1. establishing different compliance or reporting requirements that take into account the resources of small entities;
2. the clarification, consolidation, or simplification of disclosure for small entities;
3. use of performance standards rather than design standards; and
4. exempting smaller entities from coverage of the disclosure requirements or any part thereof.

Our proposal would extend the benefit of incorporation by reference to small entities that are required to file registration statements on Form S-11. Establishing a different standard for small business entities would impose a greater compliance burden on small entities and would be inconsistent with the benefits provided for small entities that register on Form S-1 and Form F-1.

H. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- the number of small entities that may be affected by the proposed amendments;
- the existence or nature of the potential impact of the proposed amendments on small entities as discussed in this analysis; and
- how to quantify the impact of the proposed amendments.

We ask those submitting comments to describe the nature of any impact and provide empirical data supporting the extent of the impact. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VI. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[33] a rule is "major" if it has resulted, or is likely to result in:

- an annual effect on the U.S. economy of $100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

We request comment on whether our proposal would be a "major rule" for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

[33] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

- the potential effect on the U.S. economy on an annual basis;
- any potential increase in costs or prices for consumers or individual industries; and
- any potential effect on competition, investment, or innovation.

VII. Statutory Authority and Text of the Proposed Amendments

The amendments described in this release are being proposed under the authority set forth in Sections 6, 7, 8, 10 and 19(a) of the Securities Act, as amended.

List of Subjects

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

1. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 77mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

2. Amend Form S-11 (referenced in §239.18) as follows:

a. Add General Instruction H;

b. In Part I, add Item 28A;

c. Redesignate Item 29 as Item 29A; and

d. Add new Item 29.

The additions read as follows:

Note -The text of Form S-11 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S-11

FOR REGISTRATION UNDER THE SECURITIES ACT OF 1933 OF SECURITIES OF CERTAIN REAL ESTATE COMPANIES

GENERAL INSTRUCTIONS

* * * * *

H. Eligibility to Use Incorporation by Reference

If a registrant meets the following requirements immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Items 3 through 28 of this Form in accordance with Item 28A and Item 29 of this Form:

1. The registrant is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 ("Exchange Act").

2. The registrant has filed all reports and other materials required to be filed by Sections 13(a), 14, or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials).

3. The registrant has filed an annual report required under Section 13(a) or Section 15(d) of the Exchange Act for its most recently completed fiscal year.

4. The registrant is not:

(a) And during the past three years neither the registrant nor any of its predecessors was:

(i) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2) of this chapter);

(ii) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§230.405 of this chapter); or

(iii) A registrant for an offering of penny stock as defined in Rule 3a51-1 of the Exchange Act (§240.3a51-1 of this chapter).

(b) Registering an offering that effectuates a business combination transaction as defined in Rule 165(f)(1) (§230.165(f)(1) of this chapter).

5. If a registrant is a successor registrant it shall be deemed to have satisfied conditions 1, 2, 3, and 4(b) above if:

(a) Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

(b) All predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession.

6. The registrant makes its periodic and current reports filed pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference pursuant to Item 28A or Item 29 of this Form readily available and accessible on a Web site maintained by or for the registrant and containing information about the registrant.

* * * * *

PART I – INFORMATION REQUIRED IN PROSPECTUS

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Item 28A. Material Changes.

If the registrant elects to incorporate information by reference pursuant to General Instruction H, describe any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest Form 10-K or Form 10-KSB and which have not been described in a Form 10-Q, Form 10-QSB, or Form 8-K filed under the Exchange Act.

Item 29. Incorporation of Certain Information by Reference.

If the registrant elects to incorporate information by reference pursuant to General Instruction H:

(a) It must specifically incorporate by reference into the prospectus contained in the registration statement the following documents by means of a statement to that effect in the prospectus listing all such documents:

(1) The registrant's latest annual report on Form 10-K or Form 10-KSB filed pursuant to Section 13(a) or Section 15(d) of the Exchange Act which contains financial statements for the registrant's latest fiscal year for which a Form 10-K or Form 10-KSB was required to have been filed; and

(2) All other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act or proxy or information statements filed pursuant to Section 14 of the Exchange Act since the end of the fiscal year covered by the annual report referred to in paragraph (a)(1) of this Item.

Note to Item 29(a). Attention is directed to Rule 439 (§230.439 of this chapter) regarding consent to use of material incorporated by reference.

(b)(1) The registrant must state:

(i) That it will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the reports or documents that have been incorporated by reference in the prospectus contained in the registration statement but not delivered with the prospectus;

(ii) That it will provide these reports or documents upon written or oral request;

(iii) That it will provide these reports or documents at no cost to the requester;

(iv) The name, address, telephone number, and e-mail address, if any, to which the request for these reports or documents must be made; and

(v) The registrant's Web site address, including the uniform resource locator (URL) where the incorporated reports and other documents may be accessed.

Note to Item 29(b)(1). If the registrant sends any of the information that is incorporated by reference in the prospectus contained in the registration statement to security holders, it also must send any exhibits that are specifically incorporated by reference in that information.

(2) The registrant must:

(i) Identify the reports and other information that it files with the SEC; and

(ii) State that the public may read and copy any materials it files with the SEC at the SEC's Public Reference Room at 100 F Street, N.E., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330.

If the registrant is an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (http://www.sec.gov).

* * * * *

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

Dated: December 14, 2007

Commissioner Atkins
Disapproved

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 8873/ December 18, 2007

Securities Exchange Act of 1934
Release No. 56986/ December 18, 2007

ORDER APPROVING PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD BUDGET AND ANNUAL ACCOUNTING SUPPORT FEE FOR CALENDAR YEAR 2008

The Sarbanes-Oxley Act of 2002 (the "Act") established the Public Company Accounting Oversight Board ("PCAOB") to oversee the audits of public companies and related matters, to protect investors, and to further the public interest in the preparation of informative, accurate and independent audit reports. The PCAOB is to accomplish these goals through registration of public accounting firms and standard setting, inspection, and disciplinary programs. Section 109 of the Act provides that the PCAOB shall establish a reasonable annual accounting support fee, as may be necessary or appropriate to establish and maintain the PCAOB. Section 109(h) amends Section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with Section 109 of the Act. Under Section 109(f), the aggregate annual accounting support fee shall not exceed the PCAOB's aggregate "recoverable budget expenses," which may include operating, capital and accrued items. Section 109(b) of the Act directs the PCAOB to establish a budget for each fiscal year in accordance with the PCAOB's internal procedures, subject to approval by the Securities and Exchange Commission (the "Commission").

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On July 18, 2006, the Commission amended its Rules of Practice related to its Informal and Other Procedures to add a rule to facilitate the Commission's review and approval of PCAOB budgets and accounting support fees.[1] The new budget rule provides, among other things, a timetable for the preparation and submission of the PCAOB budget and for Commission actions related to each budget, a description of the information that should be included in each budget submission, limits on the PCAOB's ability to incur expenses and obligations except as provided in the approved budget, procedures relating to supplemental budget requests, requirements for the PCAOB to furnish on a quarterly basis certain budget-related information, and a list of definitions that apply to the rule and to general discussions of PCAOB budget matters.

The new budget rule requires compliance beginning with the budget process for fiscal year 2008. Accordingly, in March 2007 the PCAOB provided the Commission with a narrative description of its program issues and outlook for the 2008 budget year. In response, the Commission staff provided to the PCAOB staff economic assumptions and budgetary guidance for the 2008 budget year. The PCAOB subsequently delivered a preliminary budget and budget justification to the Commission. The staff from the Commission's Offices of the Chief Accountant, Executive Director and Information Technology dedicated a substantial amount of time to the review and analysis of the PCAOB's programs, projects and budget estimates, reviewed the PCAOB's estimates of 2007 actual spending, and attended several meetings with management and staff of the PCAOB to develop an understanding of the PCAOB's budget and operations. During the course of the Commission's review, the Commission staff relied upon representations and

[1] 17 CFR 202.11. See Release No. 33-8724 (July 18, 2006) [71 FR 41998 (July 24, 2006)].

supporting documentation from the PCAOB. Based on this comprehensive review, the Commission issued a "pass back" to the PCAOB. The PCAOB approved its 2008 budget on November 19, 2007 and submitted that budget for Commission approval.

After considering the above, the Commission did not identify any proposed disbursements in the 2008 budget adopted by the PCAOB that are not properly recoverable through the annual accounting support fee, and the Commission believes that the aggregate proposed 2008 annual accounting support fee does not exceed the PCAOB's aggregate recoverable budget expenses for 2008.

As part of its review of the 2008 PCAOB budget, the Commission notes that this is the first year of compliance with the new budget rule. The Commission recognizes that the PCAOB is continuing to work with its program areas to develop full and robust submissions in response to the new budget rule. The PCAOB also is in an important review and reorganization phase regarding its IT program, and the PCAOB intends to implement annual and special reporting for registered public accounting firms, a function required by Section 102(d) of the Sarbanes-Oxley Act of 2002, in the 2008 budget year.

In addition, the Commission believes an integral part of the PCAOB's budget process, and of import to the Commission in fulfilling its oversight responsibilities, is the PCAOB's long-range strategic planning. The budget rule requires the PCAOB to maintain a comprehensive strategic plan that supports each budget request,[2] describes the required minimum elements of the plan,[3] and requires the PCAOB's budget submission to describe the relationship between the strategic plan and the resources requested in the

[2] See 17 CFR 202.11(g).

[3] See 17 CFR 202.11(b)(9).

budget.[4] The Board submitted a strategic plan to the Commission in May, 2007, and the Commission subsequently provided comments designed to improve the plan so that it better informs the budget request as anticipated by the rule and facilitates the Commission's review and approval thereof. Because of the important role that the strategic plan plays in informing the PCAOB's budget request, and to address the other items mentioned above, the Commission deems it necessary to set forth the following specific measures.

Accordingly, with respect to the PCAOB's 2009 budget cycle, the PCAOB will:

1. Develop a full and robust strategic plan, preliminary budget and budget justification. In particular:

    a. The PCAOB will review its strategic plan in connection with the description of the minimum elements of such a plan in the Commission's budget approval rule and the Commission's comments noted above. Consistent with the foregoing, the PCAOB will submit a draft to the Commission by February 29, 2008 of a revised strategic plan that includes, among other things, (i) quantifiable and measurable performance targets, (ii) forecasts of total headcount and budget summary figures for the current and four following years, (iii) a candid assessment of the PCAOB's strengths and weaknesses, and (iv) a broader discussion of environmental factors. The Commission will provide views to the PCAOB within two weeks after it receives the new draft plan. Thereafter, the PCAOB will adopt a new strategic plan, reflecting such views, by March 31, 2008.

[4] See 17 CFR 202.11(b)(2) and (b)(5).

b. The PCAOB will further develop and submit a more detailed preliminary budget, budget justification and performance budget, including performance targets as required under the budget rule.

2. Include more detailed information about the state of the PCAOB's IT review and reorganization in its quarterly reports to the Commission, including plans and estimated and actual costs for IT projects such as the proposed annual and special reporting system;
3. Implement annual and special reporting in accordance with the Act and provide an analysis of historical and planned expenditures related to the review and processing of registrations and annual reports of public accounting firms, including any associated information technology costs, and provide a timetable for recovering those amounts from registered public accounting firms as required by Section 102(f) of the Act;
4. Not increase Chairman and Board salaries for 2008 beyond the 3.3% budgeted increase in the 2008 budget, and Chairman and Board salaries shall not be further linked to FASB Chairman and Board salaries; and
5. Keep the Commission and its staff informed of any internal or third-party reviews of the PCAOB's programs and offices and the findings of any such reviews.

The Commission has determined that the PCAOB's 2008 budget and annual accounting support fee are consistent with Section 109 of the Act. Accordingly, IT IS ORDERED, pursuant to Section 109 of the Act, that the PCAOB budget and annual accounting support fee for calendar year 2008 are approved.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230 AND 239

[RELEASE NO. 33-8878; FILE NO. S7-10-07]

RIN 3235-AJ89

REVISIONS TO THE ELIGIBILITY REQUIREMENTS FOR PRIMARY SECURITIES OFFERINGS ON FORMS S-3 AND F-3

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to the eligibility requirements of Form S-3 and Form F-3 to allow certain domestic and foreign private issuers to conduct primary securities offerings on these forms without regard to the size of their public float or the rating of debt they are offering, so long as they satisfy the other eligibility conditions of the respective form, have a class of common equity securities listed and registered on a national securities exchange, and the issuers do not sell more than the equivalent of one-third of their public float in primary offerings over any period of 12 calendar months. The amendments are intended to allow more companies to benefit from the greater flexibility and efficiency in accessing the public securities markets afforded by Form S-3 and Form F-3 without compromising investor protection. The expanded form eligibility does not extend to shell companies, however, which are prohibited from using the new provisions until 12 calendar months after they cease being shell companies. In addition, we are adopting an amendment to the rules and regulations promulgated under the Securities Act to clarify that violations of the one-third restriction will also violate the requirements as to proper registration form, even though the registration statement has been declared effective previously.

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EFFECTIVE DATE: [Insert 30 days after publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Raymond A. Be, at (202) 551-3430, or the Office of Chief Counsel, at (202) 551-3500, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3010.

SUPPLEMENTARY INFORMATION: We are amending Form S-3,[1] Form F-3[2] and Rule 401(g)[3] under the Securities Act of 1933.[4]

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[1] 17 CFR 239.13.

[2] 17 CFR 239.33.

[3] 17 CFR 230.401(g).

[4] 15 U.S.C. 77a et seq.

I. Discussion

A. Background

1. Proposing Release and Public Comment Letters

On May 23, 2007, we proposed revisions to the eligibility requirements of Form S-3 and Form F-3 to allow domestic and foreign private issuers, respectively, to conduct primary securities offerings on these forms without regard to the size of their public float or the rating of debt they are offering, so long as they satisfy the other eligibility conditions of the applicable form and do not sell securities valued in excess of 20% of their public float in primary offerings pursuant to the new instructions on these forms over any period of 12 calendar months.[5]

In response to our request for comment on the Proposing Release, we received comment letters from a variety of groups and constituencies, most of whom expressed their general support for the proposed form amendments and the objectives that we articulated in the Proposing Release. Notwithstanding their general support, however, several commenters thought that some modifications to the proposal were advisable,

[5] Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3, Release No. 33-8812 (June 20, 2007) [72 FR 35118] (the "Proposing Release").

either to improve the usefulness of the form amendments to smaller public companies seeking capital,[6] or to ensure that the rule changes are consistent with investor protection.[7] After considering each of the comments, we are adopting amendments to Form S-3 and Form F-3 substantially in the form proposed, but with certain modifications as discussed more fully in this release.

These amendments are intended to allow a larger number of public companies to benefit from the greater flexibility and efficiency in accessing the public securities markets afforded by Form S-3 and Form F-3 in a manner that is consistent with investor protection. Accordingly, we are placing certain restrictions on the class of issuers who will be eligible under the new rules and are adopting a ceiling on the amount of securities that eligible issuers may offer pursuant to these rules. In creating new opportunities to facilitate capital formation consistent with the protection of investors, we believe that a careful and modest expansion of Form S-3 and Form F-3 eligibility is warranted at this time. However, as we indicated in the Proposing Release, we may revisit the appropriateness of the form restrictions at a later time if our experience with this revised requirement suggests issuer eligibility for primary offerings on Form S-3 and Form F-3 should be further revised.[8]

6 See, for example, letters from the American Bar Association, Committees on Federal Regulation of Securities and State Regulation of Securities ("ABA"); Brinson Patrick Securities Corporation ("Brinson Patrick"); Feldman Weinstein and Smith LLP ("Feldman Weinstein"); Malizia Spidi & Fisch ("Malizia Spidi"); Morrison & Foerster LLP ("Morrison & Foerster"); Office of Advocacy, Small Business Administration ("SBA"); Roth Capital Partners, LLP ("Roth Capital"); Marshal Shichtman ("M. Shichtman"); and Williams Securities Law ("Williams Securities"). All comment letters are publicly available at http://www.sec.gov/comments/s7-10-07/s71007.shtml.

7 See letter from the Council of Institutional Investors ("CII").

8 Proposing Release, at 35124.

2. Form S-3

Form S-3 is the "short form" used by eligible domestic companies to register securities offerings under the Securities Act of 1933. The form also allows these companies to rely on their reports filed under the Securities Exchange Act of 1934[9] to satisfy the form's disclosure requirements. Prior to today's amendments, companies have been able to register primary offerings (that is, securities offered by or on behalf of the registrant for its own account) on Form S-3 only if their non-affiliate equity market capitalization, or "public float," was $75 million or more.[10] In contrast, transactions involving primary offerings of non-convertible investment grade securities, certain rights offerings, dividend reinvestment plans and conversions, and offerings by selling shareholders of securities registered on a national securities exchange do not require the company to have a minimum public float.[11]

Recently, the issue of Form S-3 eligibility for primary offerings was addressed by the Commission's Advisory Committee on Smaller Public Companies (the "Advisory Committee"), which the Commission chartered in 2005 to assess the current regulatory system for smaller companies under U.S. securities laws.[12] In its April 23, 2006 Final Report to the Commission, the Advisory Committee recommended that we allow all reporting companies with securities listed on a national securities exchange or Nasdaq,[13]

9 15 U.S.C. 78a et seq.

10 General Instruction I.B.1. of Form S-3. The history and use of Form S-3 are discussed in greater detail in the Proposing Release.

11 See General Instructions I.B.2. through I.B.4. of Form S-3.

12 More information about the Advisory Committee is available at http://www.sec.gov/info/smallbus/acspc.shtml.

13 There is no longer a distinction between Nasdaq and national securities exchanges. On January 13, 2006, the Commission approved Nasdaq's application to become a national securities exchange. The Nadsaq Stock Market commenced operations on August 1, 2006.

or quoted on the Over-the-Counter Bulletin Board electronic quotation service, to be eligible to use Form S-3 if they have been reporting under the Exchange Act for at least one year and are current in their reporting at the time of filing.[14]

3. Reasons for New Form S-3 Amendments

The ability to conduct primary offerings on Form S-3 confers significant advantages on eligible companies.[15] Form S-3 permits the incorporation of required information by reference to a company's disclosure in its Exchange Act filings, including Exchange Act reports that were previously filed and those that will be filed in the future.[16]

Form S-3 eligibility for primary offerings also enables companies to conduct primary offerings "off the shelf" under Rule 415 of the Securities Act.[17] Rule 415 provides considerable flexibility in accessing the public securities markets from time to time in response to changes in the markets and other factors. The shelf eligibility

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[14] Recommendation IV.P.3. of the Final Report of the Advisory Committee on Smaller Public Companies (Apr. 23, 2006) (the "Final Report"), at 68-72. The Final Report is available at http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf. In addition to elimination of the public float requirement, Recommendation IV.P.3. also called for (1) elimination of General Instruction I.A.3.(b) to Form S-3 requiring that the issuer has timely filed all required reports in the last year and (2) extending Form S-3 eligibility for secondary transactions to issuers quoted on the Over-the-Counter Bulletin Board. The Proposing Release also included additional discussion of the Advisory Committee and its recommendations.

[15] See generally, Shelf Registration, Release No. 33-6499 (Nov. 17, 1983) [48 FR 5289] (discussing the benefits of shelf registration).

[16] Item 12 of Form S-3: "Incorporation of Certain Information by Reference."

[17] Rule 415 [17 CFR 230.415] provides that:

> (a) Securities may be registered for an offering to be made on a continuous or delayed basis in the future, Provided, That:
>
> (1) the registration statement pertains only to:
>
> . . .
>
> (x) Securities registered (or qualified to be registered) on Form S-3 or Form F-3 which are to be offered and sold on an immediate, continuous or delayed basis by or on behalf of the registrant, a majority owned subsidiary of the registrant or a person of which the registrant is a majority-owned subsidiary.

resulting from Form S-3 eligibility and the ability to forward incorporate information on Form S-3, therefore, allow companies to avoid additional delays and interruptions in the offering process and can reduce or even eliminate the costs associated with preparing and filing post-effective amendments to the registration statement.

By having more control over the timing of their offerings, these companies can take advantage of desirable market conditions, thus allowing them to raise capital on more favorable terms (such as pricing) or to obtain lower interest rates on debt. As a result, the ability to take securities off the shelf as needed gives issuers a significant financing alternative to other widely available methods, such as private placements with shares usually priced at discounted values based in part on their relative illiquidity.[18] Consequently, we believe that extending Form S-3 short-form registration to additional issuers should enhance their ability to access the public securities markets. Likewise, a significant proportion of commenters to the Proposing Release welcomed an expansion of Form S-3 eligibility, agreeing that such a measure would greatly enhance smaller public companies' access to capital in the securities markets, with far less burden and cost.[19]

Given the great advances in the electronic dissemination and accessibility of company disclosure transmitted over the Internet in the last several years,[20] we believe

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18 See, for example, Susan Chaplinsky and David Haushalter, Financing Under Extreme Uncertainty: Contract Terms and Returns to Private Investments in Public Equity (May 2006), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=907676 (discussing the typical contractual terms of PIPEs (Private Investments in Public Equities) financings, where the average purchase discount is between 18.5% to 19.7%, depending on the types of contractual rights embedded in the securities).

19 See, for example, letters from Feldman Weinstein; Malizia Spidi; and M. Shichtman.

20 See, for example, Internet Availability of Proxy Materials, Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597] and the Final Report of the Advisory Committee, at 69:

> The Commission has recently taken several steps acknowledging the widespread accessibility over the Internet of documents filed with the Commission. In its recent release concerning Internet

that moderately expanding the class of transactions that are permitted on Form S-3 for primary securities offerings is warranted once again. In contrast to 1992, when the Commission last adjusted the issuer eligibility requirements for Form S-3,[21] most public filings under the Securities Act and the Exchange Act, and all Forms S-3, are now filed on the Commission's Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR"). The pervasiveness of the Internet in daily life and the advent of EDGAR as a central repository of company filings have combined to allow widespread, direct, and contemporaneous accessibility to company disclosure at little or no cost to those interested in obtaining the information. For this reason, we think it is appropriate to once again expand the class of companies who may register primary offerings on Form S-3 in a limited manner.

4. Limited Expansion of Form Eligibility

We are not prepared at this time to abandon our longstanding prerequisite contained in the instructions to Form S-3 and allow unlimited use of this form for primary offerings by companies who do not have at least $75 million in public float. Although the Advisory Committee recommended the qualified elimination of this requirement[22] and some commenters supported removing the concept of float altogether

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delivery of proxy materials, the Commission notes that recent data indicates that up to 75% of Americans have access to the Internet in their homes, and that this percentage is increasing steadily among all age groups. As a result we believe that investor protection would not be materially diminished if all reporting companies on a national securities exchange, NASDAQ or the Over-the-Counter Bulletin Board were permitted to utilize Form S-3 and the associated benefits of incorporation by reference.

21 Simplification of Registration Procedures for Primary Securities Offerings, Release No. 33-6964 (Oct. 22, 1992) [57 FR 48970].

22 The Advisory Committee's recommendation to expand Form S-3 eligibility encompassed only companies whose securities are listed on a national securities exchange or Nasdaq (which, at the time, was not yet a national securities exchange), or quoted on the Over-the Counter Bulletin Board. Refer to Recommendation IV.P.3. of the Final Report.

as a criterion of eligibility,[23] we believe that retaining some capitalization restrictions on Form S-3 eligibility is still advisable. We are persuaded that the technological advances that have revolutionized communications between companies and the market should allow us to ease the Form S-3 eligibility standards without undermining investor protection or the integrity of the markets. However, as explained more fully below, we believe this warrants only the limited expansion of certain offerings on Form S-3, not the wholesale elimination of public float as an important criterion of form eligibility. The Commission's system of integrated disclosure has, since its inception, been premised on the idea that a company's disclosure in its registration statement can be streamlined to the extent that the market has already taken that information into account.[24] Public float has for many years been used as an approximate measure of a stock's market following and, consequently, the degree of efficiency with which the market absorbs information and reflects it in the price of a security.[25] While current technology provides investors with access to information about publicly reporting companies at an unprecedented level of

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23 See letters from the ABA; Morrison & Foerster; and Roth Capital.

24 See Release No. 33-6499, at 5:

> Forms S-3 and F-3 recognize the applicability of the efficient market theory to those companies which provide a steady stream of high quality corporate information to the marketplace and whose corporate information is broadly disseminated. Information about these companies is constantly digested and synthesized by financial analysts, who act as essential conduits in the continuous flow of information to investors, and is broadly disseminated on a timely basis by the financial press and other participants in the marketplace. Accordingly, at the time S-3/F-3 registrants determine to make an offering of securities, a large amount of information already has been disseminated to and digested by the marketplace.

See also Harold S. Bloomenthal and Samuel Wolff, Securities and Federal Corporate Law, § 9:30, available through Westlaw at 3B Sec. & Fed. Corp. Law § 9:30 (2d. ed.) ("Form S-3 epitomizes the efficient market concept."). See also Randall S. Thomas and James F. Cotter, Measuring Securities Market Efficiency in the Regulatory Setting, 63 Law & Contemp. Probs. 105 (2000) at 106.

25 See Reproposal of Comprehensive Revision to System for Registration of Securities Offerings, Release No. 33-6331 (Aug. 6, 1981) [46 FR 41902], at 9: "The Commission views as significant the strong relationship between float and information dissemination to the market and following by investment institutions." See also Thomas and Cotter, Measuring Securities Market Efficiency in the

ease and speed, it does not guarantee that the market has fully absorbed and synthesized all of the available information of a given company. Technology can facilitate and enhance market following, but it does not ensure it. Therefore, we are retaining public float as a factor in determining the extent of short-form eligibility. While the purpose of these amendments is to give smaller companies added flexibility to quickly respond to favorable market conditions by conducting some primary shelf offerings on Form S-3, this objective must be balanced against the imperatives of investor protection.

Concerns have been raised in the past when the Commission considered easing the restrictions of shelf registration eligibility to allow smaller public companies to use a modified form of shelf registration,[26] and similar concerns were voiced again during the comment period.[27] It has been observed that the securities of smaller public companies are comparatively more vulnerable to price manipulation than the securities of larger public companies,[28] and may also be more prone to financial reporting error and abuses.[29]

Regulatory Setting, at 108 (stating that the numerical thresholds of Form S-3 were intended to be a rough proxy for which companies were widely followed by the investment community).

26 See, for example, Report of the Task Force on Disclosure Simplification (Mar. 5, 1996), available at http://www.sec.gov/news/studies/smpl.htm. See also Delayed Pricing for Certain Registrants, Release No. 33-7393 (Feb. 20, 1997) [62 FR 9276].

27 See letter from the CII.

28 See, for example, Rajesh Aggarwal and Guojon Wu, Stock Market Manipulations, 79 Journal of Business, No. 4 (2006). The authors' data indicate that manipulative practices predominantly occur in the Over-the-Counter Bulletin Board, Pink Sheets and other regional or unidentified markets characterized by very low average trading volume and market capitalization. The authors conclude that stock manipulation is more likely to occur "in relatively inefficient markets . . . that are small and illiquid."

29 In its letter commenting on the Proposing Release, the CII "strongly opposed any weakening of the proposed limitations on eligibility in the final rule," stating:

> We share the Commission's concerns that the Proposed Rule presents "risks to investor protection by expanding the base of companies eligible for primary offerings" on Forms S-3 and F-3 . . . In addition [to the risks discussed by the Commission in the Proposing Release], we believe that the final rule should explicitly acknowledge that smaller public companies have long been especially prone to financial reporting fraud. Consistent with the historical evidence, a recent analysis of the reporting by public companies in response to SEC Staff Accounting Bulletin 108 found that (1)

As we stated in the Proposing Release, although we believe that the public securities markets have benefited from advances in both technology and corporate disclosure requirements, we are nevertheless mindful that companies with a smaller market capitalization as a group have a comparatively smaller market following than larger, well-seasoned issuers and are more thinly traded. In such markets, the potential for manipulative practices is more acute.[30] As such, we are sensitive to the market effects of loosening the standards for shelf eligibility without limitation.

We also note that the disclosure obligations and liability imposed by the federal securities laws on smaller public companies are comparable, but not identical, to the largest reporting companies.[31] We are comfortable that the scaled disclosure standards

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reporting errors at smaller public companies "tend to be more significant" than those of larger companies; and (2) smaller public companies "are more likely to sit on errors that decrease earnings than big companies." Thus, the Commission should ensure that the final rule avoids understating the significant risks that smaller public companies present to investors [emphasis in original].

30 The Commission's staff has stated previously that, with respect to short sales in reliance on the safe harbor of Rule 144 where the borrower closes out using the restricted securities, all the conditions of Rule 144 must be met at the time of the short sale. See Questions 80 through 82 of Resales of Restricted and Other Securities, Release No. 33-6099 (Aug. 2, 1979) [44 FR 46752, 46765]. In the Commission's view, the term "sale" under the Securities Act includes contract of sale. See Securities Offering Reform, Release No. 33-8591 (Jul. 19, 2005) [70 FR 44722, 44765] and Short Selling in Connection with a Public Offering, Release No. 34-56206 (Aug. 6, 2007)[72 FR 45094]. The Commission has previously indicated that, in a short sale, the sale of securities occurs at the time the short position is established, rather than when shares are delivered to close out that short position, for purposes of Section 5 of the Securities Act. See, for example, Questions 3 and 5 of Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules thereunder to Trading in Security Futures Products, Release No. 33-8107 (June 21, 2002) [67 FR 43234] and Release No. 34-56206 n. 46 (Aug. 6, 2007) [72 FR 45094, 45096].

31 Beginning with its introduction in 1992, Regulation S-B of the Securities Act provided for a scaled set of disclosure requirements for small business issuers. Small Business Initiatives, Release No. 33-6949 (July 30, 1992) [57 FR 36442]. Recent amendments to the disclosure regime for smaller companies maintain these scaled disclosure requirements, but integrate them into Regulation S-K. Smaller Reporting Company Regulatory Relief and Simplification, Release No. 33-8876 (Dec. 19, 2007).

In addition, we acknowledge that the companies implicated in this rulemaking are not yet fully subject to Section 404 of Sarbanes-Oxley. See Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies, Release No. 33-8760 (Dec. 15, 2006) [71 FR 76580]. We have taken steps to implement a plan to improve the efficiency and effectiveness of Section 404 implementation, including its scalability to smaller companies. See for smaller public companies are sufficiently comparable to those governing larger issuers such that the limited expansion of Form S-3 primary offering eligibility, as we are adopting it, will not adversely impact investors. However, the level of disclosure required of smaller public companies under the federal securities laws is yet another factor that we believe weighs against expanding Form S-3 eligibility further than we have in this release.[32]

In revising the shelf eligibility requirements, therefore, we must consider the unique set of investment risks posed by smaller public companies in the context of shelf registration, which provides speed and flexibility to issuers, but at the same time may limit Commission and underwriter involvement in the registration process. Extending the benefits of shelf registration to an expanded group of transactions will limit the staff's direct prior involvement in takedowns of securities off the shelf. Although the Commission's staff may review registration statements before they are declared effective, individual takedowns are not conditioned on further Commission action or subject to

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Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Release No. 34-55929 (June 20, 2007) [72 FR 35323]. It is true, however, that, unlike "large accelerated filers" and "accelerated filers," companies that are "non-accelerated filers" (companies with less than $75 million in float) will not need to comply with the auditor's attestation report requirements of Section 404 until they file their annual report for the fiscal year ending on or after December 15, 2008. For large accelerated filers and accelerated filers, the auditor's attestation report is required for all annual reports for fiscal years ending on or after November 15, 2004. In light of this fact, one commenter recommended that Form S-3 eligibility be contingent on full implementation of both the management and auditor attestation report requirements of Section 404. See letter from the CII. Because adding this condition would effectively delay the benefits of these Form S-3 amendments to smaller public companies for at least one year, and because the decision has been made to allow smaller public companies to phase in full compliance with Section 404, we have decided not to delay the effective date of this rulemaking. We may revisit the limitation on our expansion of Form S-3 after full compliance with Section 404 is complete.

32 This is especially true given that, under recent amendments, the scaled detailed disclosure regime for smaller companies will now extend to issuers who have a public float between $25 and $75 million. Release No. 33-8876. Prior to such amendments, only companies with less than $25 million in public float were covered by the disclosure requirements of Regulation S-B.

prior selective staff review.[33] In addition, the short time horizon of shelf offerings may also reduce the time that participating underwriters have to apply their independent scrutiny and judgment to an issuer's prospectus disclosure. Historically, concerns such as these have been at the center of the debate when the Commission has previously considered expanding shelf registration eligibility.[34]

Accordingly, since the Commission first introduced the system of integrated disclosure more than twenty-five years ago, the ability to use Form S-3 to conduct primary offerings "off the shelf" has been carefully tempered by restricting the class of companies eligible for this benefit. Consistent with this well-established approach, we are amending the Form S-3 eligibility requirements to enable more companies to use

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33 We note some commenters suggested that our concerns about expanding the base of companies eligible to use Form S-3 for primary offerings "off the shelf" could be alleviated by requiring more detailed disclosure from these companies. See letters from Feldman Weinstein and Morrison & Foerster. However, requiring additional disclosure would not address the fact that the staff does not have the ability to review, in advance, individual takedowns off an effective shelf registration statement. Prospectus supplements reflecting such takedowns are filed after the fact. Similarly, the fact that the Form S-3 filed by reporting companies with smaller public floats would not become automatically effective and would therefore remain subject to pre-effective review and comment by the Commission's staff does not satisfactorily address the lack of the staff's prior involvement in shelf takedowns. See letter from the ABA.

34 Among other things, the Commission's 1996 Task Force on Disclosure Simplification made several recommendations to amend the shelf registration procedure "so as to provide increased flexibility to a wider array of companies with respect to their capital-raising activities." These recommendations included a "modified form of shelf registration" that would have allowed smaller companies to price their securities on a delayed basis for up to one year in order to time securities offerings more effectively with opportunities in the marketplace. The Task Force stated:

> While this recommendation will afford small companies time and cost savings, the Task Force appreciates concerns raised about possible adverse effects shelf registration may have on the adequacy and accuracy of disclosures provided to investors, on Commission oversight of the disclosures and on the role of underwriters in the registration process. These concerns are similar to those raised when the shelf registration rule was first being considered on a temporary basis and was made available to any offering including an initial public offering.

Report of the Task Force on Disclosure Simplification, at 33. Following on the Task Force's recommendations, in 1997 the Commission proposed to permit certain smaller companies to price registered securities offerings on a delayed basis for up to one year after effectiveness. Release No. 33-7393. In that release, the Commission noted:

> Concerns have been raised that the expedited access to the markets that would be provided by these proposals could make it difficult for gatekeepers, particularly underwriters, to perform

Form S-3 for primary offerings,[35] but only to the extent that they are consistent with investor protection.

B. Amendments to Form S-3

We are adopting new General Instruction I.B.6. to Form S-3 to allow companies with less than $75 million in public float to register primary offerings of their securities on Form S-3,[36] provided they:

- meet the other registrant eligibility conditions for the use of Form S-3;[37]

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adequate due diligence for the smaller companies that would be eligible to use expanded Rule 430A.

[35] As part of Recommendation IV.P.3 of the Final Report, the Advisory Committee also recommended that the Commission extend S-3 eligibility for secondary transactions to issuers with securities quoted on the Over-the-Counter Bulletin Board. General Instruction I.B.3. to Form S-3 limits the use of the form for secondary offerings to securities "listed and registered on a national securities exchange or . . . quoted on the automated quotation system of a national securities association," a restriction that excludes the securities of Over-the-Counter Bulletin Board and Pink Sheets issuers. In addition, some commenters to the Proposing Release echoed the recommendation of the Advisory Committee and supported extending the use of Form S-3 for secondary offerings to additional issuers who are ineligible under current rules. See letters from the ABA; Feldman Weinstein; SBA; and Williams Securities. After considering the recommendation of the Advisory Committee and commenters, we are not at this time amending the Form S-3 eligibility rules for secondary offerings. As we made clear in the Proposing Release, this rulemaking pertains only to the limited issue of Form S-3 eligibility for primary securities offerings and is not intended to encompass or otherwise impact existing requirements for secondary offerings on Form S-3. Moreover, any amendment of the Form S-3 requirements for secondary offerings would have to be carefully weighed against the costs of further exposing the markets to the potential for abusive primary offerings disguised as secondary offerings. Therefore, at this time we are not revising secondary offering eligibility under General Instruction I.B.3.

[36] Form S-3 eligibility under new General Instruction I.B.6. (and Form F-3 eligibility under new General Instruction I.B.5.) applies only to an issuer's ability to conduct a limited primary offering on Form S-3 (or Form F-3, as applicable). That is, an issuer's eligibility to use Form S-3 or Form F-3 under these new form instructions does not mean that the issuer meets the requirements of Form S-3 or Form F-3 for purposes of any other rule or regulation of the Commission (apart from Rule 415(a)(1)(x), which pertains to shelf registration). Instruction 6 to new General Instruction I.B.6. of Form S-3 and Instruction 6 to new General Instruction I.B.5. of Form F-3.

Rule 415(a)(1)(x) permits shelf offerings of securities "registered (<u>or qualified to be registered</u>)" on Form S-3 or Form F-3 (emphasis added). We note that a closed-end investment company, including a business development company, ("closed-end fund") that meets the eligibility standards enumerated in Form S-3, as revised by new General Instruction I.B.6., may register its securities in reliance on Rule 415(a)(1)(x) notwithstanding the fact that closed-end funds register their securities on Form N-2 rather than Form S-3.

[37] See General Instruction I.A. of Form S-3. Among other things, General Instruction I.A. requires that the registrant:

- has a class of securities registered pursuant to Sections 12(b) or 12(g) of the Exchange Act or is required to file reports pursuant to Section 15(d) of the Exchange Act; and

- have a class of common equity securities that is listed and registered on a national securities exchange;[38]

- do not sell more than the equivalent of one-third of their public float in primary offerings under General Instruction I.B.6. of Form S-3 over the previous period of 12 calendar months;[39] and

- are not shell companies[40] and have not been shell companies for at least 12 calendar months before filing the registration statement.

1. One-Third Cap and Listed Securities Only

As discussed above, we are sensitive to the risks associated with making shelf registration available to more issuers. At the same time, we are also sensitive to the possibility that constraining the rule too much may limit its utility to the companies that qualify for its use. Therefore, we have decided to increase the limitation on the amount

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- has been subject to the requirements of Sections 12 or 15(d) of the Exchange Act and has filed in a timely manner all the material required to be filed pursuant to Sections 13, 14 or 15(d) for a period of at least twelve calendar months immediately preceding the filing of the Form S-3 registration statement.

38 A "national securities exchange" is a securities exchange that has registered with the Commission under Section 6 of the Exchange Act [15 U.S.C. 78f]. There are currently ten securities exchanges registered under Section 6(a) of the Exchange Act as national securities exchanges. These are the New York Stock Exchange, American Stock Exchange and Nasdaq, as well as the Boston Stock Exchange, Chicago Board Options Exchange, Chicago Stock Exchange, International Securities Exchange, National Stock Exchange (formerly the Cincinnati Stock Exchange), NYSE Arca (formerly the Pacific Exchange) and the Philadelphia Stock Exchange. In addition, an exchange that lists or trades security futures products (as defined in Section 3(a)(56) of the Exchange Act [15 U.S.C. 78c(56)]) may register as a national securities exchange under Section 6(g) of the Exchange Act solely for the purpose of trading security futures products. For purposes of new General Instruction I.B.6., however, only exchanges registered under Section 6(a) of the Exchange Act will be deemed to be "national securities exchanges." Instruction 8 to new General Instruction I.B.6.

39 The meaning of the phrase "period of 12 calendar months" is intended to be consistent with the way in which the phrase "12 calendar months" is used for purposes of the registrant eligibility requirements in Form S-3. A "calendar month" is a month beginning on the first day of the month and ending on the last day of that month. For example, for purposes of Form S-3 registrant eligibility, if a registrant were not timely on a Form 10-Q due on September 15, 2006, but was timely thereafter, it would first be eligible to use Form S-3 on October 1, 2007. Similarly, for purposes of new General Instruction I.B.6. of Form S-3, if a registrant relies on this Instruction to conduct a shelf takedown equivalent to one-third of its public float on September 15, 2007, it will next be eligible to do another takedown (assuming no change in its float) on October 1, 2008.

40 The term "shell company" is defined in Rule 405 of the Securities Act [17 CFR 230.405]. See also Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies, Release No. 33-8587 (July 15, 2005) [70 FR 42233] (adopting definition of shell company).

of securities that can be offered by companies under the new rules from 20% of public float to one-third of public float, while at the same time conditioning a company's eligibility under new General Instruction I.B.6. of Form S-3 on having a class of common equity securities listed and registered on a national securities exchange (often described as "listed" securities).[41]

As proposed, new General Instruction I.B.6. of Form S-3 would have limited the amount of securities eligible companies could sell in accordance with its provisions to no more than the equivalent of 20% of their public float over any period of 12 calendar months. We proposed a cap of 20% in order to allow an offering that is large enough to help an issuer obtain financing when market opportunities arise, yet small enough to take into account the effect such new issuance may have on the market for a thinly traded security. As we stated in the Proposing Release, we believed that the 20% ceiling would help a large number of smaller public companies with their capital raising.[42]

Some commenters, however, were critical of this proposed restriction and concerned that capping issuers at 20% of the value of their public float every twelve months would limit the usefulness of the rule.[43] The commenters thought that the 20% ceiling would be of limited utility because they believed that the capital needs of small

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41 New General Instruction I.B.6(c) of Form S-3.

42 As we noted in the Proposing Release, the Division of Corporation Finance undertook a study of shelf registration takedowns in 2006 by companies with a public float of moderate size in order to evaluate the appropriate public float ceiling for the new rule. Specifically, the Division looked at all prospectus supplements filed pursuant to shelf registration statements in calendar year 2006 by companies with a public float between $75 million and $140 million. While we observed a wide range of variously sized shelf takedowns (from less than 1% of float to greater than 80% of float), the data indicated that 20% of float was approximately the median annual takedown for companies in the band considered. This suggested that limiting smaller public companies to 20% of their public float in any 12-month period might increase the capital raising alternatives for these companies consistent with investor protection.

43 See, for example, letters from the ABA; SBA; Feldman Weinstein; Malizia Spidi; Morrison & Foerster; M. Shichtman; and Roth Capital.

businesses would, in many cases, greatly exceed the amount of securities that could be sold under the rule.[44] Several commenters also suggested various alternatives to a 20% limit,[45] including raising the ceiling from 20% to at least one-third of a company's public float.[46]

After considering these comments, we have decided to set the twelve-month offering threshold under new General Instruction I.B.6. of Form S-3 at one-third of an

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44 See letters from the SBA; Brinson Patrick; Feldman Weinstein; Malizia Spidi; M. Shichtman; and Roth Capital. For an opposing viewpoint, see letter from the CII.

45 See, for example, letters from Feldman Weinstein; Morrison & Foerster; and Williams Securities (commenters suggesting that a percentage of trading volume be used as an alternative to public float); Malizia Spidi and Roth Capital (commenters suggesting that shareholder approval be obtained for dilutive issuances constituting over 20% of public float); and letters from Feldman Weinstein and Morrison & Foerster (commenters suggesting that additional disclosure be required in lieu of imposing a 20% ceiling). Some commenters were also concerned that the Commission might amend Rule 430B of the Securities Act to vary the application of Section 11 liability to the various parties involved in a shelf registration statement based on the size of the issuer. See letters from BDO Seidman, LLP; Center for Audit Quality; Deloitte & Touche LLP; Ernst & Young LLP ("Ernst & Young"); and KPMG LLP ("KPMG"). These commenters maintained that the filing of a prospectus supplement to a shelf registration statement should not be considered a new effective date for purposes of Section 11 liability for auditors, regardless of the size of the issuer's public float. The set of comprehensive amendments in 2005, known as "Securities Offering Reform," provide in Rule 430B that the effective date for auditors who previously provided consent in an existing registration statement for their report on previously issued financial statements or previous reports on management's assessment of internal control over financial reporting does not change upon the filing of a prospectus supplement unless the prospectus supplement (and any Exchange Act report incorporated by reference into the prospectus and registration statement) contains new audited financial statements or other information as to which the auditor is an expert and for which a new consent is required. Release No. 33-8591. Two of the commenters emphasized that taking a different approach for smaller issuers would run the risk of creating substantial delays in the filing process (as auditors would have to provide new consents) and issuers would likely lose a substantial amount of flexibility in accessing the public markets. See letters from Ernst & Young and KPMG. We agree with these commenters and are not modifying Rule 430B in connection with this rulemaking.

46 See letters from the ABA; Feldman Weinstein; Morrison & Foerster; M. Shichtman; and Williams Securities. The SBA also suggested raising the threshold in its letter, but did not specify the size of the increase it favored. We note that some of the commenters who advocated increasing the threshold to one-third of a company's public float reasoned that doing so would harmonize the amount of securities which could be registered in a primary offering on Forms S-3 and F-3 under the proposed rule with a purported staff position in a different context. See letter from Feldman Weinstein. See also letters from Morrison & Foerster and Williams Securities. The purported staff position is not related to the instant Form S-3 and Form F-3 amendments, which concern expanding the availability of these forms for primary offerings to more companies. Rather, the staff has indicated that some resale registration statements may raise a concern where, among other things, there is an unusually large number of shares being registered in relation to the number of the issuer's outstanding shares held by nonaffiliates. In these situations, the staff may question whether the offering is a bona fide secondary transaction or a disguised primary offering.

issuer's public float. We are comfortable making this adjustment in light of the additional protection afforded by the new requirement in General Instruction I.B.6(c) of Form S-3 that eligibility under this instruction is contingent upon the registrant having a class of common equity securities listed and registered on a national securities exchange, as discussed below. We think raising the cap to one-third of public float will allow an offering that is large enough to help an issuer raise a relatively significant amount of capital when market opportunities arise, but still small enough for us to moderate the expansion of shelf eligibility with appropriate attention to the protection of investors, including the effect such new issuance may have on the market for a thinly traded security.

Under these amendments, offerings above the one-third cap would violate the form requirements of Form S-3. In order to provide absolute clarity on this point, we are adopting a corresponding amendment to Rule 401(g)[47] of the Securities Act to provide that violations of the one-third cap would also violate the requirements as to proper form under Rule 401 even though the registration statement previously has been declared effective.[48]

Our objective with this rulemaking is to provide smaller companies some additional financing flexibility that will aid them in their efforts to raise capital, but at the same time give the Commission an opportunity to consider the impact of this expansion in an environment where there are limitations in place to address investor protection. As a general proposition, the greater the magnitude of the offering, the more likely it is that

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[47] 17 CFR 230.401(g).

[48] See letter from the ABA (recommending that the Commission not revise current Rule 401(g) to provide that an issuer will be deemed to have used an incorrect registration form if it exceeds the one-third cap under new General Instruction I.B.6.).

the transaction will be transformative to the issuer rather than routine in nature, such as the incremental expansion of the issuer's business. At the current time, we believe that securities transactions exceeding one-third of the value of an issuer's public float are generally of such significance to the issuer that the opportunity for specific staff review of the transaction and a greater window for underwriter due diligence are advisable.

We believe that the one-third cap will help a substantial number of smaller public companies with their capital raising needs, which is supported by our observations of market activity of recent shelf registrants.[49] Moreover, it is important to understand that the one-third cap imposed by new General Instruction I.B.6. to Form S-3 only relates to other primary offerings conducted pursuant to this instruction. Accordingly, an issuer that is temporarily prevented from utilizing Form S-3 for shelf offerings to raise capital would not be foreclosed from registering a primary offering of securities on Form S-1 or in private placements. The new eligibility instruction that we are adopting today is not meant to be mutually exclusive. Rather, it is designed to provide added flexibility to smaller public companies by giving them supplemental avenues of capital formation. As we have stated previously, our adoption of this amendment does not foreclose the possibility that we may revisit the appropriateness of this one-third cap at a later time. For now, however, we think that this limitation promotes small business capital formation consistent with the protection of investors.

At the same time that we are adopting an offering ceiling under new General Instruction I.B.6. of one-third of an issuer's public float, we are also making eligibility

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[49] When we further narrowed the set of shelf registration takedowns reviewed (the original review is referenced in n. 42) to companies with at least one class of listed common equity, the data indicated that 75% of sample registrants took down the equivalent of one-third or less of their public float annually off the shelf. For the majority of these sample registrants, therefore, an offering ceiling of one-third would appear satisfactory.

under this new rule contingent on the issuer having a class of common equity securities listed and registered on a national securities exchange.[50] In the Proposing Release, we requested comment as to whether we should allow all companies with a public trading market, including companies with securities traded in the over-the-counter market such as the Pink Sheets, to use the amended Form S-3 as proposed or whether we should limit eligibility to inter-dealer quotations systems with some level of oversight and operated by a self-regulatory organization.[51] In addition, we asked whether there were other restraints on the proposed expansion of Form S-3 eligibility that should be considered, such as restrictions on the class of issuers that could utilize the revised forms.[52] Most commenters did not address these specific points directly, but their responses generally suggested that they would not favor further restrictions on a registrant's form eligibility in addition to those already proposed.[53] However, one commenter expressed concern over the risks inherent in expanding the base of companies eligible for primary offerings on Forms S-3 and F-3 and, accordingly, recommended that Form S-3 and Form F-3 eligibility be contingent on full implementation of both the management and auditor attestation report requirements of Section 404.[54] At a minimum, the commenter opposed any weakening of the proposed limitations on eligibility in the final rule.

Allowing only companies with at least one class of listed common equity securities to avail themselves of new General Instruction I.B.6. should help to minimize

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[50] New General Instruction I.B.6(c) of Form S-3.

[51] The Proposing Release, at 35127.

[52] Id.

[53] See, for example, letters from the ABA; Feldman Weinstein; Malizia Spidi; Morrison & Foerster; SBA; M. Shichtman; and Williams Securities.

[54] See letter from the CII. See also nn. 29 and 31 discussing this letter.

potential abuses that may arise from expanded shelf registration. This is because the exchanges' listing rules and procedures, as well as other requirements, provide an additional measure of protection for investors.[55] Exchanges have both quantitative and qualitative listing rules that are designed to evidence that their listed issuers meet specified minimum requirements when the issuer first lists on the exchange and thereafter. Initial listing standards serve as a means for an exchange to screen issuers and to provide listed status to issuers with sufficient public float, investor base, and trading interest to assure that the market for the issuer's security has the depth and liquidity necessary to maintain fair and orderly markets. Maintenance listing criteria help assure that the issuer continues to meet the exchange's standards for depth and liquidity. While the exchanges' listing standards with respect to common equity securities can vary,[56] generally the exchanges require the issuer to meet minimum standards relating to number of public shareholders and shares outstanding, shareholder approval of specified matters, and, in certain cases, earnings or income. Moreover, the exchanges' listing standards generally require issuers of common equity securities to meet strong corporate governance standards, including the requirement that the issuer's board be composed of a majority of independent directors and that key committees be composed solely of independent directors.[57] Exchange-listed securities also are subject to real-time reporting

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55 In contrast to the national securities exchanges, automated inter-dealer quotation systems such as the Over-the-Counter Bulletin Board and the Pink Sheets do not provide companies with the ability to list their securities, but, rather, serve as a medium for the over-the-counter securities market by collecting and distributing market maker quotes to subscribers. These automated inter-dealer quotation systems do not maintain or impose listing standards, nor do they have a listing agreement or arrangement with the companies whose securities are quoted through them.

56 See, for example, Nasdaq Rules 4300 et seq., and NYSE Listed Company Manual ("LCM"), Sections 1 through 9.

57 See, for example, Nasdaq Rule 4350 and NYSE LCM Section 3, which require listed issuers to comply with Rule 10A-3 under the Exchange Act, 17 CFR 240.10A-3, with regard to audit committee

of quotation and transaction information, which benefits investors by apprising them of current market information about the security. Together, these common attributes allow the exchanges to sustain efficient and liquid markets that should help monitor the expansion of shelf registration eligibility on Form S-3 and help mitigate any attendant risks posed by expansion.[58]

We also note that limiting eligibility under new General Instruction I.B.6. to companies with common equity securities listed on a national securities exchange is more consistent with our historical treatment of secondary offering eligibility on Form S-3.[59] We think this parallel approach is sensible given that Form S-3 has for many years allowed registrants to conduct secondary offerings on the form irrespective of public float, so long as the securities offered thereby were listed securities.[60]

Some commenters noted that, under the proposed amendments, companies with securities not listed or authorized for listing on a national securities exchange would nevertheless be eligible to offer such securities in primary offerings on Form S-3 or Form F-3 so long as there was a public trading market for their securities.[61] Because such

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responsibility and independence, as well as an additional, broader array of corporate governance standards.

58 See n. 28.

59 See General Instruction I.B.3. of Form S-3.

60 In its comment letter, the ABA pointed out that, as proposed, the eligibility standards for primary offerings on Form S-3 would have allowed both "listed and unlisted" reporting companies to make primary offerings on the form, while resale transactions on Form S-3 are limited to reporting companies whose securities are listed on a national securities exchange or quoted on the automated quotation system of a national securities association. In addition, the ABA noted that the staff of the Commission, through interpretive guidance, has historically permitted unlisted companies that are primarily eligible to use Form S-3 under the existing rules to register resale transactions on Form S-3 notwithstanding that the resale eligibility rules of Form S-3 require that the securities be listed on an exchange or quoted on the automated quotation system of a national securities association. We believe that the final rules, by limiting primary offering eligibility under new General Instruction I.B.6. to companies with equity securities listed on a national securities exchange, address these inconsistencies noted by the ABA in its comment letter.

61 See letters from the ABA; Feldman Weinstein; Morrison & Foerster; and Williams Securities Law.

securities would not be "covered securities," as defined by Section 18(b) of the Securities Act, commenters expressed concern that some companies registering transactions under new General Instruction I.B.6. might well be subject to state securities registration requirements, which would frustrate the speed and efficacy of shelf registration. However, because we are limiting eligibility under the new rules to companies with listed equity, in most cases issuers will not be subject to state securities registration requirements in their efforts to raise capital utilizing new General Instruction I.B.6. By requiring issuers to have at least one listed class of common equity securities, most securities offered pursuant to the new eligibility rules will be "covered securities," as defined by Section 18(b) of the Securities Act, and therefore exempt from state Blue Sky regulation.[62]

2. Calculation of Amount of Securities That May Be Sold

To ascertain the amount of securities that may be sold pursuant to Form S-3 by registrants with a public float below $75 million, the new rule requires a two-step process:

- determination of the registrant's public float immediately prior to the intended sale; and
- aggregation of all sales of the registrant's securities pursuant to primary offerings under General Instruction I.B.6. of Form S-3 in the previous 12-month period (including the intended sale) to determine whether the one-third cap would be exceeded.

The new rule requires registrants to compute their public float by reference to the price at which their common equity was last sold, or the average of the bid and asked prices of their common equity, in the principal market for the common equity as of a date within

[62] The exception would be a class of securities that are neither listed nor at least equal in seniority to a class of the issuer's listed securities. See Section 18(b)(1)(A) through (C) of the Securities Act [15

60 days prior to the date of sale.[63] Then, for purposes of calculating the aggregate market value of securities sold during the preceding period of 12 calendar months, the rule requires registrants to add together the gross sales price for all primary offerings pursuant to new General Instruction I.B.6. to Form S-3 during the preceding period of 12 calendar months. Based on that calculation, registrants will be permitted to sell securities with a value up to, but not greater than, the difference between one-third of their public float and the value of securities sold in primary offerings on Form S-3 under new General Instruction I.B.6. in the prior period of 12 calendar months.

The aggregate gross sales price includes sales of equity as well as debt offerings.[64] Therefore, eligible registrants will also be able to offer non-investment grade debt on Form S-3.[65] In the case of securities that are convertible into or exercisable for equity shares, such as convertible debt or warrants, however, we are requiring that registrants calculate the amount of securities they may sell in any period of 12 calendar months by reference to the aggregate market value of the underlying equity shares in lieu of the market value of the convertible securities. The aggregate market value of the underlying equity will be based on the maximum number of shares into which the securities sold in

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U.S.C. 77r(b)(1) (A) through (C)].

63 Instruction 1 to new General Instruction I.B.6. of Form S-3. This is modeled after the calculation of public float provided in the instruction to General Instruction I.B.1. of Form S-3. However, the relevant date for purposes of Instruction 1 to new General Instruction I.B.6. is the date of sale, while the relevant date for purposes of General Instruction I.B.1. is the date of filing.

64 As adopted, the method of calculating the one-third cap on sales is the same whether the registrant is selling equity or debt securities, or a combination of both. As we discussed in the Proposing Release, we had some concern that we would be inadvertently encouraging issuances of debt securities over equity if the proposed limitation on sales excluded debt. Because we do not intend for the rule to dictate or otherwise influence the overall form of security that companies offer, we have adopted the one-third cap on sales to include both equity and debt.

65 The provisions of Form S-3 in effect today allow registrants to offer non-convertible investment grade debt securities on Form S-3 regardless of the size of their public float. General Instruction I.B.2. to Form S-3.

the prior period of 12 calendar months are convertible as of a date within 60 days prior to the date of sale, multiplied by the same per share market price of the registrant's equity used for purposes of calculating its public float pursuant to Instruction 1 to new General Instruction I.B.6. of Form S-3. We believe calculating the one-third cap based on the market value of the underlying securities makes it less likely that convertible securities would be structured and offered in a manner designed to avoid the effectiveness of the cap.

It is important to note that the one-third cap on sales is not intended to impact a holder's ability to convert or exercise derivative securities purchased from the company. For example, this limit will apply to the amount of common stock warrants that a company can sell under Form S-3, and the number of common shares into which the warrants are exercisable will be relevant for determining the company's compliance with the one-third cap at the time the warrants were sold, but the number will not impede the purchaser's later exercise of the warrants.

As adopted, the one-third cap is designed to allow issuers flexibility. Because the restriction on the amount of securities that can be sold over a period of 12 calendar months is calculated by reference to a registrant's public float immediately prior to a contemplated sale, as opposed to the time of the initial filing of the registration statement, the amount of securities that an issuer is permitted to sell can continue to grow over time as the issuer's public float increases. Therefore, the value of one-third of a registrant's float during the period that a shelf registration statement is effective may, at any given time, be much greater than at the time the registration statement was initially filed. Registrants may therefore benefit from increases in the size of their public float during the time that the registration statement is effective. Conversely, the amount of securities that an issuer is permitted to sell at any given time may also decrease if the issuer's public float contracts. It is important to note, however, that a contraction in a registrant's float, such that the value of one-third of the float decreases from the time the registration statement was initially filed, would not necessarily run afoul of the cap because the relevant point in time for determining whether a registrant has exceeded the threshold is the time of sale. If the sale of securities, together with all securities sold in the preceding period of 12 calendar months, does not exceed one-third of the registrant's float calculated within 60 days of the sale, then the transaction would not violate new General Instruction I.B.6. to Form S-3 even if the registrant's public float later drops to a level such that the prior sale now accounts for over one-third of the new lower float.[66] To keep track of the securities sold under General Instruction I.B.6., the revised instructions to Form S-3 require registrants to disclose in each prospectus filed with the Commission their updated calculation of public float and the amount of securities offered pursuant to this instruction during the prior 12 calendar month period that ends on, and includes, the date of the prospectus.[67]

Because Form S-3 registrants who meet the $75 million float threshold of existing General Instruction I.B.1. at the time their registration statement is filed are not subject to restrictions on the amount of securities they may sell under the registration statement

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66 Along these lines, under the amendments registrants will be able to sell up to the equivalent of the full one-third of their public float immediately following the effective date of their registration statement, provided that there were no prior sales pursuant to new General Instruction I.B.6. of Form S-3. This is consistent with Rule 415(a)(1)(x), which was amended in 2005 to allow primary offerings on Form S-3 or Form F-3 to occur immediately after effectiveness of a shelf registration statement. Release No. 33-8591. Assuming that the sale of the entire one-third of public float allotted under the new form eligibility rules complied with the rule at the time of the takedown, the subsequent contraction in the registrant's public float will not invalidate this prior sale.

67 Instruction 7 to new General Instruction I.B.6.

even if their float falls below $75 million subsequent to the effective date of the Form S-3 but prior to the update required under Section 10(a)(3) of the Securities Act, we believe it is appropriate to provide issuers registering on Form S-3 pursuant to new General Instruction I.B.6. the same flexibility if their float increases to a level that equals or exceeds $75 million subsequent to the effective date of their Form S-3 without the additional burden of filing a new Form S-3 registration statement. Therefore, we are adopting an instruction to I.B.6. that lifts the one-third cap on additional sales in the event that the registrant's float increases to $75 million or more subsequent to the effective date of the registration statement.[68] Of course, pursuant to Rule 401 under the Securities Act, registrants are also required to recompute their public float each time an amendment to the Form S-3 is filed for the purpose of updating the registration statement in accordance with Section 10(a)(3) of the Securities Act — typically when an annual report on Form 10-K is filed. In the event that the registrant's public float as of the date of the filing of the annual report is less than $75 million, the one-third cap will be reimposed for all subsequent sales made pursuant to new General Instruction I.B.6. and will remain in place until the registrant's float equals or exceeds $75 million.

The following examples illustrate how the new Instruction will operate.[69] For purposes of these examples, we are assuming that the hypothetical registrants satisfy the registrant eligibility requirements in General Instruction I.A. of Form S-3, are not shell companies, and have at least one class of common equity securities listed and registered on a national securities exchange.

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68 Instruction 3 to new General Instruction I.B.6. of Form S-3.

69 The examples that follow are for illustrative purposes only and are not intended to be indicative of actual market activity.

Example A

On January 1, 2009, a registrant with a public float of $25 million files a shelf registration statement on Form S-3 pursuant to new General Instruction I.B.6. intending to register the offer and sale of up to $50 million of debt and equity securities over the next three years from time to time as market opportunities arise.[70] The registration statement is subsequently declared effective. In March 2009, the registrant decides to sell common stock off the registration statement. To determine the amount of securities that it may sell in connection with the intended takedown, the registrant calculates its public float as of a date within 60 days prior to the anticipated date of sale, pursuant to Instruction 1 to new General Instruction I.B.6. Calculating that its public float has risen to $30 million, the registrant determines that the total market value of all sales effected pursuant to new General Instruction I.B.6. over the past year, including the intended sale, may not exceed $10 million, or one-third of the registrant's float. Since the registrant has conducted no prior securities offerings on Form S-3 pursuant to new General Instruction I.B.6., it is able to sell the entire $10 million off the Form S-3.

Assuming that it sold the entire $10 million of securities in March 2009, the registrant in September 2009 once again contemplates a takedown off the shelf. It determines that its public float (as calculated pursuant to Instruction 1 to new General Instruction I.B.6.) has again risen, this time to $54 million. Because one-third of $54 million is $18 million, the registrant is now able to sell additional securities in accordance with new General Instruction I.B.6(a), even though in March 2009 it took down the

[70] Although only one-third of the public float may be sold in any year, a company may register a larger amount. Release No. 33-8591 at 44774-5 (discussing the adoption of an amendment to Rule 415 that eliminated limits on the amount of securities that may be registered on Form S-3 or Form F-3 under Rule 415(a)(1)(x) and Rule 415(a)(1)(ix)).

equivalent of what was then the entire one-third of its float. However, because the registrant has already sold $10 million worth of its securities within the 12 calendar months prior to the contemplated sale, the registrant may sell no more than $8 million of additional securities at this time ($18 million minus $10 million of securities previously sold).

In December 2009, the registrant determines that its public float has risen to $78 million. To this point, assuming it has only sold an aggregate of $18 million of its securities pursuant to the subject Form S-3 as described above, it has $32 million of securities remaining on the registration statement and potentially available for takedown (the total amount registered of $50 million, less the $18 million previously sold). Because one-third of $78 million is $26 million, and the registrant has already sold $18 million within the previous year, new General Instruction I.B.6(a) will, in most circumstances, prohibit the registrant from selling more than an additional $8 million of securities in the latest offering. However, under Instruction 3 to new General Instruction I.B.6., the registrant is no longer subject to the one-third cap on annual sales because its float has exceeded $75 million. If it chooses, the registrant may sell the entire $32 million of securities remaining on the registration statement all at once or in separate tranches at any time until the company next updates the registration statement pursuant to Section 10(a)(3) by filing its Form 10-K. This will be the case even if the registrant's float subsequently falls below $75 million before it files that Form 10-K, at which time the registrant is required to recompute its public float in accordance with Rule 401. In the event that the registrant's public float as of the date of that Form 10-K filing is less than $75 million, the one-third cap will be reimposed for all subsequent sales made pursuant to new General Instruction I.B.6. and will remain in place until the registrant's float equals or exceeds $75 million.

Example B

A registrant has 12 million shares of voting common equity outstanding held by nonaffiliates. The market price of this stock is $5 per share, so the registrant has a public float of $60 million. The registrant has an effective Form S-3 shelf registration statement filed in reliance on new General Instruction I.B.6. of Form S-3, pursuant to which the registrant wants to issue $10 million of convertible debt securities which will be convertible into common stock at a 10% discount to the market price of the common stock. Pursuant to Instruction 2 to new General Instruction I.B.6., the amount of securities issued is measured by reference to the value of the underlying common stock rather than the amount for which the debt securities will be sold. At the 10% discount, the conversion price is $4.50 and, as a result, 2,222,222 shares currently underlie the $10 million of convertible debt. Because the current market price of those underlying shares is $5 per share, for purposes of General Instruction I.B.6. the value of the securities being offered is $11,111,110 (2,222,222 shares at $5 per share), which is less than the $20 million allowed by the one-third cap (one-third of $60 million).

After the convertible debt securities are sold and are outstanding, the registrant contemplates an additional takedown. To determine the amount of securities that the registrant may sell under General Instruction I.B.6. in the anticipated offering, the registrant must know its current public float and must calculate the aggregate market value of all securities sold in the last year on Form S-3 pursuant to General Instruction I.B.6. Instruction 2 to new General Instruction I.B.6. requires that the registrant compute the market value of convertible debt securities sold under I.B.6. by reference to the value of the underlying common stock rather than the amount for which the debt securities were sold. With respect to the notes that were sold and have been converted, the aggregate market value of the underlying common stock is calculated by multiplying the number of common shares into which the outstanding convertible securities were converted times the market price on the day of conversion. With respect to the notes that were sold but have not yet been converted, the aggregate market value of the underlying common stock is calculated by multiplying the maximum number of common shares into which the notes are convertible as of a date within 60 days prior to the anticipated sale by the per share market price of the registrant's equity used for purposes of determining its current float.[71]

In this example, assume that the registrant has a current per share stock price of $5.55. If half of the notes converted into common stock while the per share market price was $5.00 ($4.50 discount), then, for purposes of Instruction 2 to new General Instruction I.B.6., the value of that prior issuance is $5,555,555 (half of the notes divided by the discounted conversion price of $4.50 and then multiplied by $5, the market price on the day of conversion).

As for the notes that have not yet been converted, the aggregate market value of the underlying common stock is determined by calculating the number of shares that may be received upon conversion and multiplying that by the current market value of $5.55. Therefore, the outstanding note amount ($5 million) is divided by the discount conversion price ($5), resulting in 1,000,000 shares and this amount is then multiplied by

[71] The date chosen by the registrant for determination of the maximum number of shares underlying the convertible notes must be the same date that the registrant chooses for determining its market price in connection with the calculation of public float pursuant to new General Instruction I.B.6. See Instruction 5 to new General Instruction I.B.6.

the current market value of $5.55. Thus, for purposes of Instruction 2 to new General Instruction I.B.6., $5,550,000 is the value of the outstanding notes that have not yet been converted. Adding this to the value of the notes that have already been converted results in a total value of $11,105,555 having been issued under this Form S-3.

To determine the amount of additional securities that the registrant may sell under General Instruction I.B.6., the registrant should add the value of the notes issued ($11,105,555) plus the value of all other securities sold by the registrant pursuant to Instruction I.B.6. during the preceding 12 calendar months. If this amount is less than one-third of the registrant's current public float, it may sell additional securities with a value up to, but not greater than, the difference between one-third of its current public float and the value of all securities sold by it pursuant to Instruction I.B.6. during the preceding 12 calendar months.

<u>Example C</u>

A registrant has an effective registration statement on Form S-3, filed pursuant to new General Instruction I.B.6., through which it intends to conduct shelf offerings of its securities. At the time of its first shelf takedown, the registrant's public float is equal to $21 million (which means that the maximum amount available to be sold under the one-third cap would be $7 million). Based on new General Instruction I.B.6(a), the registrant sells $3 million of its debt securities. Six months later, the registrant's public float has decreased to $9 million. The registrant wishes to conduct an additional takedown of debt securities off the shelf but, because of the reduction in its float, it is prohibited from doing so. This is because with a public float of $9 million, General Instruction I.B.6(a) only allows the registrant to sell a maximum of $3 million worth of securities (one-third of $9 million) pursuant to the registration statement during the prior period of 12 calendar months that ends on the date of the contemplated sale. However, the registrant has already sold securities valued (for purposes of new General Instruction I.B.6.) at $3 million in the 6 months prior to the contemplated sale and so must wait until at least one full year has passed since the $3 million sale of securities to undertake another offering off the Form S-3 unless its float increases. Note that although the registrant's float does not allow additional sales, the $3 million takedown of securities 6 months prior does not violate the one-third cap because, at the time of that prior sale, the registrant's float was $21 million.

Example D

Pursuant to new General Instruction I.B.6., a registrant with a public float of $48 million files a Form S-3, which the registrant intends to use as a universal shelf registration statement to sell up to $100 million of debt or equity securities, or a combination of both at any time or from time to time.

After the registration statement is declared effective, the registrant decides to do a takedown off the shelf comprised of convertible promissory notes and warrants to purchase to common stock. The notes are convertible into shares of common stock at a 50% discount to the market price of the common stock. The warrants are exercisable for shares of common stock at an exercise price equal to $5 per share. Because the registrant's float is $48 million, it may sell up to $16 million of securities (one-third of $48 million) pursuant to General Instruction I.B.6. The registrant wants to do a takedown of $1 million in convertible promissory notes. The registrant intends to issue the notes along with warrants to purchase an additional 10,000 shares of its common stock.

In order to determine if this sale is permissible under General Instruction I.B.6., the registrant must calculate the amount of securities it has sold pursuant to General

Instruction I.B.6. in the previous 12 months and add this to the value of the securities in the intended sale. If the combined value is $16 million or less, it may proceed with the sale.

Assume that the registrant has not sold any securities pursuant to the Instruction I.B.6. in the previous 12 months. To determine the value of the convertible promissory notes, the registrant is required by Instruction 2 to General Instruction I.B.6. to calculate the value of the shares underlying the convertible notes. The notes are convertible into shares of common stock at a 50% discount to the market price of the common stock. Assuming that the market price of the common stock is $2 per share, the notes are convertible as follows: $1 million (the price of the notes) divided by 1 (50% of the market price of the common stock) is equal to 1 million shares of common stock that the purchasers will receive upon conversion. Since the market price of the stock is $2 per share, the value of the 1 million shares is $2 million (1 million shares at $2 per share). Therefore, the value of the accompanying warrants for 10,000 shares must be less than $14 million for the sale to be within the one-third cap (one-third of $48 million, less the $2 million of common stock underlying the convertible notes).

To calculate the value of the warrants, which are derivative securities, Instruction 2 to General Instruction I.B.6. requires that the registrant calculate the value of the shares underlying the warrants in lieu of the market value of the warrants. Under the terms of the warrants, the warrants are exercisable for 10,000 shares at an exercise price of $5 per share.

Instruction 2 to General Instruction I.B.6. states that the aggregate market value of the underlying equity shall be calculated by multiplying the maximum number of common equity shares into which the derivative securities are convertible or for which they are exercisable, as of a date within 60 days prior to the date of sale, by the same per share market price of the registrant's equity used for purposes of calculating the registrant's float. Assuming that the market price of the registrant's stock is $2 per share, the value of the shares underlying the warrants is $20,000 (10,000 shares multiplied by $2 per share). Because the underlying value of the convertible notes is $2 million and the underlying value of the warrants is $20,000, the intended sale has a value of $2,020,000 and does not exceed the one-third cap (of $16 million).

3. Exclusion of Shell Companies

In accordance with our desire to expand Form S-3 eligibility consistent with the protection of investors, the expanded eligibility rules specifically exclude shell companies, which will be prohibited from registering securities in primary offerings on Form S-3 unless they meet the minimum $75 million float threshold of General Instruction I.B.1.[72] While we are not passing on the relative merits of shell companies and we recognize that these entities are used for many legitimate business purposes, we have repeatedly stated our belief that these entities may give rise to disclosure abuses.[73] Under the final rules, a former shell company that cannot meet the $75 million float

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72 This prohibition is intended to apply equally to "blank check companies," as such entities are defined in Rule 419 of the Securities Act. However, because we believe that the definition of "shell company" under Rule 405 is expansive enough to encompass blank check companies for purposes of excluding them from S-3 eligibility under new General Instruction I.B.6., we do not exclude them separately. See Use of Form S-8 and Form 8-K by Shell Companies, Release No. 33-8407 (Apr. 15, 2004) [69 FR 21650], at n. 20:

> We believe that under today's proposals all blank check companies as defined in Rule 419 would be considered shell companies until they acquire an operating business or more than nominal assets. Not all shell companies, however, would be classified as blank check companies under Rule 419.

73 See, for example, Release No. 33-8591; Release No. 33-8587; Release No. 33-7393; and Penny Stock Definition for Purposes of Blank Check Rule, Release No. 33-7024 (Oct. 25, 1993) [58 FR 58099].

criterion but otherwise satisfies the registrant requirements of Form S-3 will become eligible to use Form S-3 to register primary offerings of its securities, provided that:

- it has not been a shell company for at least 12 calendar months;[74]
- it has filed information that would be required in a registration statement on Form 10 or Form 20-F, as applicable, to register a class of securities under Section 12 of the Exchange Act;[75] and
- it has been timely reporting for 12 calendar months.[76]

Ordinarily, the information required to be filed would be in a current report on Form 8-K reporting completion of the transaction that caused it to cease being a shell company.[77] In other cases, the information may be filed in a Form 10 or Form 20-F. Consistent with the current registrant eligibility rules of Form S-3 that require at least 12 calendar months of timely reporting, the 12 calendar-month delay under the new rules is intended to provide investors in the former shell company with the benefit of disclosure over a full 12-month period in the newly structured entity prior to its use of Form S-3 for primary securities offerings.

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[74] Similarly, Form S-8 is not available to shell companies or to former shell companies until 60 days after they have ceased being shell companies and have filed information that would be required in a registration statement on Form 10 or Form 20-F, as applicable, to register a class of securities under Section 12 of the Exchange Act. Release No. 33-8587. Unlike the eligibility rules of Form S-8, however, a company must be reporting for at least 12 calendar months before it is eligible under <u>any</u> criteria to use Form S-3. Therefore, instead of the 60-day delay required by Form S-8, it is more appropriate for a shell company to be prohibited from using the new provisions of S-3 and F-3 until at least 12 calendar months after it ceases being a shell company.

[75] This information is collectively described as "Form 10 information." See Instruction 4 to new General Instruction I.B.6(b).

[76] New General Instruction I.B.6(b) of Form S-3 addresses the requirements pertaining to former shell companies.

[77] Items 2.01(f) and 5.01(a)(8) of Form 8-K require a company in a transaction where the company ceases being a shell company to file a current report on Form 8-K containing the information (or identifying the previous filing in which the information is included) that would be required in a registration statement on Form 10 to register a class of securities under Section 12 of the Exchange Act.

Commenters held contrasting opinions of our proposal to exclude shell companies[78] and the requirement that former shell companies may not rely on General Instruction I.B.6. to Form S-3 until at least one year has elapsed since they ceased being shell companies.[79] Because of the limited and less comprehensive public information available regarding shell companies, we are adopting General Instruction I.B.6(b) as proposed to ensure that investors have the benefit of one full year of disclosure once the entity ceases to be a shell company. In this regard, requiring one year of timely reporting puts our treatment of former shell companies on par with the eligibility requirements of any other new company wishing to use Form S-3.[80]

C. Amendments to Form F-3

Form F-3, which was designed to parallel Form S-3,[81] is the equivalent short-form registration form available for use by "foreign private issuers"[82] to register securities

[78] See letters from the ABA and Morrison & Foerster (supporting the exclusion of shell companies) and letter from M. Baum (opposing the exclusion).

[79] See letters from the ABA and Morrison & Foerster (supporting the one-year delay) and letters from Feldman Weinstein and Williams Securities (objecting to the one-year delay and contrasting it to the 90-day delay the Commission proposed in Release No. 33-8813 (July 5, 2007) [72 FR 36822] in order for shareholders of former shell companies to resell their securities in reliance on Rule 144). This analogy to Rule 144 is inapposite. A delay of at least 90 days under Rule 144, versus one year under Form S-3, is not unique to shell companies. Form S-3 requires any issuer to have been timely reporting for at least one year, while Rule 144 requires that an issuer be subject to the reporting requirements for at least 90 days before an affiliate of a reporting issuer is able to sell unrestricted securities under the rule.

[80] See General Instruction I.A.3. of Form S-3.

[81] Integrated Disclosure System for Foreign Private Issuers, Release No. 33-6360 (Nov. 20, 1981) [46 FR 58511], at 7:

> The three forms proposed under the Securities Act roughly parallel proposed Forms S-1, S-2 and S-3 in the domestic integration system, but the foreign system is based on the Form 20-F instead of the Form 10-K and annual report to shareholders as the uniform disclosure package.

[82] The term "foreign private issuer" is defined in Rule 405 of the Securities Act to mean any foreign issuer other than a foreign government except an issuer meeting the following conditions:

> (1) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and
>
> (2) .Any of the following:

offerings under the Securities Act. Similar to Form S-3, Form F-3 is available to foreign private issuers that satisfy the form's registrant requirements and at least one of the form's transaction requirements.[83] The Form F-3 registrant requirements are similar to Form S-3 and generally relate to a registrant's reporting history under the Exchange Act.[84] In addition, like the Form S-3 registration statement, Form F-3 limits the ability of registrants to conduct primary offerings on the form unless their public float equals or exceeds a particular threshold.[85]

As with Form S-3, the Commission has attempted to limit the availability of Form F-3 for primary offerings to a class of companies believed to provide a steady stream of corporate disclosure that is broadly disseminated to, and digested by, the marketplace. When the Commission adopted Form F-3 in 1982,[86] it set the public float test for foreign issuers at $300 million in response to public comment recommending that the numerical test for foreign issuers be much greater than for domestic registrants.[87] In 1994, however,

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(i) The majority of the executive officers or directors are United States citizens or residents;

(ii) More than 50 percent of the assets of the issuer are located in the United States; or

(iii) The business of the issuer is administered principally in the United States.

83 General Instruction I. of Form F-3: "Eligibility Requirements for Use of Form F-3."

84 One difference is that, unlike Form S-3, General Instruction I.A.1. of Form F-3 requires that registrants have previously filed at least one annual report on Form 20-F, Form 10-K or, in certain cases, Form 40-F under the Exchange Act. For an explanation of this difference, see Simplification of Registration and Reporting Requirements for Foreign Companies; Safe Harbors for Public Announcements of Unregistered Offerings and Broker-Dealer Research Reports, Release No. 33-7029 (Nov. 3, 1993) [58 FR 60307], at 3; and Simplification of Registration and Reporting Requirements for Foreign Companies; Safe Harbors for Public Announcements of Unregistered Offerings and Broker-Dealer Research Reports, Release No. 33-7053 (Apr. 19, 1994) [59 FR 21644], at 2 (explaining that the requirement was adopted "in order to ensure that information regarding the issuer is available to the market").

85 General Instruction I.B.1. of Form F-3. Note that, unlike Form S-3, the Instruction makes reference to the registrant's "worldwide" public float.

86 Adoption of Foreign Issuer Integrated Disclosure System, Release No. 33-6437 (Nov. 19, 1982) [47 FR 54764].

87 Release No. 33-7029, at 2.

the Commission reduced this threshold to $75 million in order to extend to foreign issuers the benefits of short-form registration "to the same extent available to domestic companies."[88] In explaining its rationale, the Commission stated:

> [Our] experience with foreign issuers, as well as the internationalization of securities markets, indicates that foreign issuers with a public float of $75 million or more have a degree of analyst following in their world-wide markets comparable to similarly-sized domestic companies.[89]

As a result, the Commission believed that expanding Form F-3 eligibility by lowering the float standard to $75 million would give foreign issuers the same capital raising advantages enjoyed by domestic issuers on Form S-3 consistent with investor protection.[90]

In order to maintain the rough equivalency between Form S-3 and Form F-3, which have had the same public float criteria for primary offering eligibility since 1994,[91] we are adopting amendments to Form F-3 that are comparable to our changes to Form S-3. Specifically, new General Instruction I.B.5. to Form F-3 will allow foreign private issuers with less than $75 million in worldwide public float to register primary offerings of their securities on Form F-3, provided:

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88 Release No. 33-7053, at 2. In the same rulemaking, the Commission also reduced the reporting history requirement in Form F-3 from 36 to 12 months to match the eligibility criteria applicable to domestic companies using Form S-3.

89 Release No. 33-7029, at 2.

90 The Commission stated:

> These provisions are part of the ongoing efforts of the Commission to ease the transition of foreign companies into the U.S. disclosure system, enhance the efficiencies of the registration and reporting processes and lower costs of compliance, where consistent with investor protection.

Release No. 33-7053, at 2.

91 The Commission's adoption of the "Securities Offering Reform" amendments in July 2005 is a recent instance where parallel changes were made to Form S-3 and Form F-3. See Release No. 33-8591. For example, the 2005 amendments provided that the ability to conduct an automatic shelf offering under both Form S-3 and Form F-3 is limited to registrants that qualify as "well-known seasoned issuers" under Rule 405 of the Securities Act. We note the minimum public float threshold required to be a well-known seasoned issuer is the same for both Form S-3 and Form F-3.

- they meet the other registrant eligibility conditions for the use of Form F-3;
- the class of securities to be offered is listed and registered on a national securities exchange;
- they do not sell more than the equivalent of one-third of their public float in primary offerings under General Instruction I.B.5. on Form F-3 over any period of 12 calendar months; and
- they are not shell companies and have not been shell companies for at least 12 calendar months before filing the registration statement.

II. Paperwork Reduction Act

A. Background

The new rules and amendments to Forms S-3 and F-3 contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[92] We published a notice requesting comment on the collection of information requirements in the Proposing Release and submitted these to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act.[93] The titles for the collection of information are:

"Form S-3" (OMB Control No. 3235-0073);

"Form F-3" (OMB Control No. 3235-0256);

"Form S-1"[94] (OMB Control No. 3235-0065); and

"Form F-1"[95] (OMB Control No. 3235-0258).

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92 44 U.S.C. 3501 et seq.

93 44 U.S.C. 3507(d) and 5 CFR 1320.11.

94 Because our amendments to Form S-3 and Form F-3 are anticipated to affect the annual number of Forms S-1 and Forms F-1 filed, we are including them in the titles of information collections even though we are not amending the substance of the collection in this release. Note that the Proposing Release also included our estimates with respect to Form SB-2 (OMB Control No. 3235-0418), in addition to Forms S-3, F-3, S-1 and F-1. However, Release No. 33-8876, which was adopted by the Commission on November 15, 2007, will eliminate Form SB-2 when it becomes effective. Therefore, our revised Paperwork Reduction Act estimates do not include new estimates for Form SB-2. As discussed in greater detail below, we have taken the elimination of Form SB-2 into consideration for purposes of revising our estimates of the burden associated with Forms S-3, S-1 and F-1.

We adopted existing Forms S-3, S-1, F-3 and F-1 pursuant to the Securities Act. These forms set forth the disclosure requirements for registration statements that are prepared by eligible issuers to provide investors with the information they need to make informed investment decisions in registered offerings.

Our amendments to Forms S-3 and F-3 are intended to allow issuers that are ineligible to use Forms S-3 and F-3 for primary offerings because they do not meet the forms' public float requirements to nevertheless register a limited amount of securities in primary offerings on Form S-3 or Form F-3, as applicable, so long as they are not shell companies, they meet the other eligibility requirements of the forms, and they have at least one class of common equity securities listed and registered on a national securities exchange.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The information collection requirements related to registration statements on Forms S-3, S-1, F-3 and F-1 are mandatory. There is no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on the EDGAR filing system.

B. Summary of Information Collections

Because the amendments that we are adopting in this release pertain principally to Forms S-3 and F-3 eligibility, rather than to the disclosure required by these forms, we do not believe that the amendments will impose any new recordkeeping or information

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[95] Id.

collection requirements, other than those that will be de minimis in nature.[96] On a per-response basis, therefore, the amendments should not increase or decrease existing disclosure burdens for Form S-3 or Form F-3. However, because we expect that many companies newly eligible for primary offerings on Forms S-3 and F-3 as a result of these amendments will choose to file short-form Form S-3 and Form F-3 registration statements in lieu of Forms S-1 or F-1, as applicable, we believe there will be an aggregate decrease in the disclosure burdens associated with Forms S-1 and F-1 and an increase in the disclosure burdens associated with Forms S-3 and F-3. The shift in aggregate disclosure burden among these forms will be due entirely to the change in the number of annual responses expected with respect to each form, as companies previously ineligible to use Form S-3 and Form F-3 switch to these forms for their public offerings and away from Forms S-1 and F-1.

In addition, because of the anticipated benefits to issuers associated with Forms S-3 and F-3, in particular the lower costs of preparing and filing the registration statements and the ability to make delayed and continuous offerings in response to changing market conditions, we think that this will increase the demand for, and lead to more, company filings on Forms S-3 and F-3 than would otherwise have been made on Forms S-1 and F-1. That is, we think that the opportunity for capital raising will be more

[96] Instruction 7 to new General Instruction I.B.6. of Form S-3 and Instruction 7 to new General Instruction I.B.5. of Form F-3 require registrants to disclose in each prospectus filed with the Commission their updated calculation of public float and the amount of securities offered on Form S-3 or F-3, as applicable, pursuant to this instruction during the prior 12 calendar months. Although this is a new disclosure requirement for Forms S-3 and F-3, we think that the registrant's determination of its public float and the amount of securities offered in the prior twelve-month period should be readily accessible and easily calculable. In addition, we note that registrants are already required to ascertain their public float at the time they file a registration statement for a primary offering on Form S-3 or Form F-3. See General Instruction I.B.1. of Form S-3 and General Instruction I.B.1. of Form F-3. As such, we anticipate that the total time, effort and financial resources to generate and maintain this information will be insignificant for each registrant.

robust for many companies because of the availability of shelf registration on Forms S-3 and F-3. We also anticipate that many companies newly eligible to use Forms S-3 or F-3 will choose to offer their securities directly to the public through registration on these registration forms instead of through private placements and, therefore, we expect comparatively more Forms S-3 and F-3 registration statements to be filed as companies forego private offerings in favor of the public markets.

In order to provide an estimate of the change in the collection of information burden for purposes of the Paperwork Reduction Act, our assumption is that the amendments to Forms S-3 and F-3 will result in an overall increase in the number of such forms filed annually by eligible companies and an overall decrease in the number of Forms S-1 and Forms F-1 filed annually by these companies. As discussed, however, we do not expect that the incremental increase in the number of all Forms S-3 and F-3 filed will be roughly equal to the incremental decrease in the number of Forms S-1 and Forms F-1 filed, because our assumption is that the advantages of shelf registration on Form S-3 and Form F-3 will encourage financings on these forms that would otherwise have been carried out through exempt offerings or perhaps not at all. Therefore, we believe the amendments will result in a net increase in the annual aggregate number of filings on all Forms S-3, S-1, F-3 and F-1 taken together, since the increased number of Form S-3 and F-3 filings should exceed the decreased number of Form S-1 and F-1 filings. Accordingly, we believe the overall net decrease in disclosure burden that should result from companies changing to the more streamlined Forms S-3 and F-3 will be offset to some extent by newly eligible companies filing Forms S-3 and F-3 more frequently than they did Forms S-1 or F-1. However, this offset could be lessened in part by the one-third cap on the amount of securities that eligible companies may sell on Form S-3 and

Form F-3 in any period of 12 calendar months pursuant to the new form eligibility rules.[97] Companies that require more capital but are prohibited by this one-third cap from using Form S-3 and Form F-3 for primary offerings may, as a result, continue to conduct some offerings on Forms S-1 or F-1 or through the private markets even though Forms S-3 and F-3 are preferable.

C. Summary of Comments and Revisions to Amendments

None of the commenters addressed our request for comment on the Paperwork Reduction Act analysis contained in the Proposing Release. We are nevertheless revising our Paperwork Reduction Act estimates in light of certain modifications we have made to the final rules as opposed to the proposal.

As proposed, new General Instruction I.B.6. of Form S-3 and new General Instruction I.B.5. of Form F-3 would have limited the amount of securities eligible companies could sell in accordance with these provisions to no more than the equivalent of 20% of their public float over any period of 12 calendar months. In consideration of commenters who were concerned that capping issuers at 20% of the value of their public float every twelve months would limit the usefulness of these new rules, we have decided to increase the twelve-month offering threshold to one-third of an issuer's public float. In light of this increase, however, we are adopting a further condition to eligibility under new General Instruction I.B.6. of Form S-3 and new General Instruction I.B.5. of Form F-3 that the issuer must have at least one class of common equity securities listed and

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97 As previously discussed, new General Instructions I.B.6. of Form S-3 and I.B.5. of Form F-3 prohibit registrants from selling more than the equivalent of one-third of their public float in any period of 12-calendar months.

registered on a national securities exchange. This additional restriction should help to minimize the potential abuses arising from expanded shelf registration because the securities exchanges, through their listing rules and procedures, as well as other requirements, provide an additional measure of protection for investors.

D. Revised Paperwork Reduction Act Burden Estimates

As discussed in Section II.C. above, we are revising our Paperwork Reduction Act burden estimates that were originally submitted to the Office of Management and Budget. Our revised estimates reflect the changes that we have made to the final rules as compared to the proposal.

For purposes of the Paperwork Reduction Act, we now estimate the annual decrease in the paperwork burden for companies to comply with our collection of information requirements to be approximately 10,375 hours of in-house company personnel time and to be approximately $12,450,000 for the services of outside professionals.[98] These estimates include the time and the cost of preparing and reviewing disclosure, filing documents and retaining records. Our methodologies for deriving the above estimates are discussed below.

Our estimates represent the burden for all issuers, both large and small. As mentioned, however, the estimated decreases are wholly attributable to our assumptions, discussed in Section II.B. above, about how the amendments will influence the behavior of certain issuers who were formerly ineligible to conduct primary offerings on Forms S-3 and F-3. These issuers are non-shell companies who satisfy the registrant eligibility

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[98] For administrative convenience, the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals have been rounded to the nearest thousand.

requirements of Form S-3[99] or Form F-3,[100] as applicable, have at least one class of common equity securities listed and registered on a national securities exchange, and had a public float of less than $75 million at the end of their last fiscal year. In all, we estimate that there were approximately 1,400 such companies at the end of calendar year 2006 and that they filed a total of 66 registration statements on Forms S-1, SB-2[101] and F-1 during the twelve months ending December 31, 2006.[102] To determine the effect of our amendments on the overall paperwork burden, we have assumed that these filings on Forms S-1, SB-2[103] and F-1 would be made instead on Form S-3 or Form F-3, as applicable, to the extent that the issuers would not be limited by the one-third cap on the amount of securities they may sell in any period of 12 calendar months under the new rules. Therefore, we assume that the Forms S-1 and F-1 filed by the subject companies will decrease from the number filed in 2006, but because of the one-third cap on sales, will not decrease to 0.[104] Instead, we believe that some Forms S-1 and F-1 will continue

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[99] See n. 37.

[100] See n. 83.

[101] As mentioned, the Commission voted to eliminate Form SB-2 on November 15, 2007. Release No. 33-8876. However, because some of the companies who filed on Form SB-2 in 2006 will become eligible to use Form S-3 under the new amendments to the form, we factor these Form SB-2 filings into our estimate of the number of additional Forms S-3 that will be filed in 2008 as a result of the rule change.

[102] The total of 66 filings is comprised of 37 Forms S-1; 26 Forms SB-2; and 3 Forms F-1.

[103] See n. 101.

[104] Because it has been eliminated, the number of new Forms SB-2 will, in fact, decrease to 0 after Release No. 33-8876 goes into effect. Therefore, companies that previously filed Forms SB-2, but who are now eligible to use Form S-3 under new General Instruction I.B.6. of the form, would not be able to fall back to Form SB-2 in the event that they exceed the one-third cap on Form S-3. Instead, to the extent they wanted to conduct an additional registered public offering, they would likely have to file on Form S-1. To reflect this, we have taken the number of 2006 Form SB-2 filings by companies that we estimate will become eligible on Form S-3 under the new rules and added this to the number of Forms S-1 filed in 2006 by companies who qualify to use Form S-3 for primary offerings under the new rules. This allows us to estimate how many total Forms S-1 will be filed by domestic companies that exceed the one-third cap but still wish to conduct registered public offerings. So, for purposes of

to be filed annually by these companies. To reflect this, we have taken the number of Forms S-1 and F-1 that were filed by these companies in calendar year 2006 and decreased this number by 90%[105] for each form, for a total decrease of 60 filings.[106] Therefore, we assume that approximately 60 fewer Forms S-1 and F-1 will be filed by all issuers annually as a result of the new amendments. The actual number could be more or less depending on various factors, including future market conditions.

Furthermore, we believe that the 1,400 companies that we estimate will be affected by the rule change would have conducted more registered securities offerings had they been able to use Forms S-3 and F-3, because of the benefits of forward incorporation and the ability to utilize shelf registration to maximize market opportunities. We assume that the inability of these companies to utilize Forms S-3 and F-3 limited their capacity to access the public securities markets and, because of the cost and lack of flexibility associated with Forms S-1, SB-2 and F-1, they either did not file registration statements on Forms S-1 SB-2 or F-1, or were limited in the number that they filed. We therefore believe that the annual number of responses on Forms S-3 and F-3 for purposes of the Paperwork Reduction Act will increase by an increment greater than simply the total of 60 fewer registration statements on Forms S-1 and F-1 that we

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our baseline assumptions, the number of Forms S-1 filed in 2006 by companies who will become eligible to use Form S-3 under the new rules will include the number of Forms SB-2 filed in 2006 by qualifying companies (26) and will therefore total 63 filings (37 Forms S-1 plus 26 Forms SB-2).

105 In the Proposing Release, this decrease was 85% for each form but has been raised to 90% in light of the 12-month offering restriction on sales being raised from 20% to one-third of a company's public float. In other words, because the ceiling has been raised, eligible companies will be able to expand the size and/or frequency of their offerings on Forms S-3 and F-3 and, consequently, will have less need to file alternate registration forms. Therefore, the number of filings on these forms should decrease even more than was predicted in the Proposing Release.

106 This number deducts 90% from the totals for each of the registration forms, as follows: Form S-1 (90% of 63, rounded up, equals 57) and Form F-1 (90% of 3, rounded up, equals 3). Adding these together, the combined reduction totals 60 filings.

estimate will be filed in future years by the 1,400 companies who would qualify for primary offerings on Forms S-3 and F-3 as a result of our amendments. We further assume that this increase in Forms S-3 and F-3 will be mitigated to some degree by the one-third cap on securities sold in any period of 12 calendar months under the new rules, which may limit the frequency and volume of additional securities offerings on Form S-3 and Form F-3. To reflect this, we have taken the total of 60 fewer Forms S-1 and F-1 that we think will be filed by these companies in future years as a result of the amendments (because of the availability of Forms S-3 and F-3) and increased this number by 15%[107] for each form, for a total increase of 70 filings.[108] Therefore, we assume that approximately 70 additional Forms S-3 and F-3 will be filed annually over and above the number of total Forms S-3 and F-3 filed by all issuers, large and small, as a result of the new amendments. The actual number could be more or less depending on various factors, including future market conditions.

To calculate the total effect of the amendments on the overall compliance burden for all issuers, large and small, we subtracted the burden associated with the 60 fewer Forms S-1 and F-1 registration statements that we expect will be filed annually in the future and added the burden associated with our estimate of 70 additional Forms S-3 and F-3 filed annually as a result of the amendments. We used current Office of

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107 In the Proposing Release, this increase was 10% for each form but has been raised to 15% in light of the 12-month offering restriction on sales being raised from 20% to one-third of a company's public float. That is, because the ceiling has been raised, eligible companies will be able to conduct somewhat larger and/or more frequent offerings on Form S-3 and F-3.

108 This number adds a 15% premium to the individual totals for each of the registration forms, as follows: Form S-1 (15% of 57, rounded up, equals 9) and Form F-1 (15% of 3, rounded up, equals 1). The sum of these increases, which is equal to 10, is then added to the total of 60 Forms S-1 and F-1 filed by the subject companies in 2006 that we believe will be filed on Forms S-3 and F-3 by these companies in future years. The total is an estimated increase of 70 Forms S-3 and F-3 (comprised of 66 additional Forms S-3 and four additional Forms F-3).

Management and Budget estimates in our calculation of the hours and cost burden associated with preparing, reviewing and filing each of these forms.

Consistent with current Office of Management and Budget estimates and recent Commission rulemaking,[109] we estimate that 25% of the burden of preparation of Forms S-3, S-1, F-3 and F-1 is carried by the company internally and that 75% of the burden is carried by outside professionals retained by the issuer at an average cost of $400 per hour.[110] The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

The table below illustrates our estimates concerning the incremental annual compliance burden in the collection of information in hours and cost for Forms S-3, S-1, F-3 and F-1 as a result of these amendments.

Form	Estimated Change in Annual Responses	Hours/Form[111]	Incremental Burden	25% Issuer	75% Professional	$400/hr Professional Cost
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.25	(E)=(C)*0.75	(F)=(E)*$400
S-3	66	459	30,294	7,573.50	22,720.50	$9,088,200
S-1	(57)	1,176	(67,032)	(16,758)	(50,274)	($20,109,600)
F-3	4	166	664	166	498	$199,200
F-1	(3)	1,809	(5,427)	(1,356.75)	(4,070.25)	($1,628,100)
Total			(41,501)	(10,375.25)	(31,125.75)	($12,450,300)

III. Cost-Benefit Analysis

A. Summary of Amendments

We are adopting revisions to the transaction eligibility requirements of Forms S-3 and F-3 that will allow companies to take advantage of these forms for primary

109 For discussions of the relative burden of preparation of registration statements under the Securities Act allocated between issuers internally and their outside advisers, see Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 56225] and Release No. 33-8591.

110 In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $400 as the average cost of outside professionals that assist issuers in preparing disclosures and conducting registered offerings.

111 This reflects current Office of Management and Budget estimates.

offerings regardless of the size of their public float. Whereas secondary offerings may be registered on Forms S-3 and F-3 irrespective of float, the instructions to Forms S-3 and F-3 have, before now, restricted the use of these forms for primary securities offerings to companies that have a minimum of $75 million in public float calculated within 60 days prior to the date the registration statement is filed. To expand the availability of Forms S-3 and F-3 for primary offerings to more companies, we are adopting revisions to these forms that allow companies with less than $75 million in public float to register primary offerings of their securities on Forms S-3 and F-3, provided:

- they meet the other registrant eligibility conditions for the use of Form S-3 or Form F-3, as applicable;
- they have at least one class of common equity securities listed and registered on a national securities exchange;
- they do not sell more than the equivalent of one-third of their public float in primary offerings under General Instruction I.B.6. of Form S-3 or under General Instruction I.B.5. of Form F-3, as applicable, over the previous period of 12 calendar months; and
- they are not shell companies and have not been shell companies for at least 12 calendar months before filing the registration statement.

B. Benefits

The ability to conduct primary offerings on Forms S-3 and F-3 confers significant advantages on eligible companies in terms of cost savings and capital formation. The time required to prepare Form S-3 or Form F-3 is significantly lower than that required for Forms S-1 and F-1.[112] This difference is magnified by the fact that Form S-3 and

[112] The Office of Management and Budget currently estimates the time required to prepare Form S-3 and Form F-3 as 459 hours and 166 hours, respectively. This is contrasted with current estimates for Form S-1 and F-1 as 1,176 hours and 638 hours, respectively.

Form F-3, unlike Forms S-1 and F-1, permit registrants to forward incorporate required information by reference to disclosure in their Exchange Act filings. Therefore, Form S-3 and Form F-3 registration statements can be automatically updated. This allows such companies to avoid additional delays and interruptions in the offering process and can reduce the costs associated with preparing and filing post-effective amendments to the registration statement.

Overall, we anticipate that the expansion of Form S-3 and Form F-3 eligibility will decrease the aggregate costs of complying with the Commission's rules by allowing companies previously eligible to use only Form S-1 or Form F-1 the use of short-form registration on Form S-3 or Form F-3, as applicable. Using our estimates prepared for purposes of the Paperwork Reduction Act, we estimate that under the amendments the annual decrease in the compliance burden for companies to comply with our collection of information requirements to be approximately 10,375 hours of in-house company personnel time (valued at $1,816,000[113]) and to be approximately $12,450,000 for the services of outside professionals.

In addition to the benefits associated with the estimated reduction in the time required to prepare Forms S-3 and F-3 in lieu of Forms S-1 and F-1, and a company's ability to forward incorporate prospectus disclosure by reference, Forms S-3 and F-3 provide substantial flexibility to companies raising money in the capital markets, which ultimately may reduce the cost of capital for such companies and facilitate their access to additional sources of investment. Companies that are eligible to use Form S-3 or Form

[113] Consistent with recent rulemaking releases, we estimate the value of work performed by the company internally at a cost of $175 per hour.

F-3 for primary offerings are able to conduct delayed and continuous registered offerings under Rule 415 of the Securities Act, which provides considerable flexibility in accessing the public securities markets from time to time in response to changes in the market and other factors. Eligible companies are permitted to register securities prior to planning any offering and, once the registration statement is effective, offer these securities in one or more tranches without waiting for further Commission action. By having more control over the timing of their offerings, these companies can take advantage of desired market conditions, thus allowing them to raise capital on more favorable terms (such as pricing) or to obtain lower interest rates on debt. In addition, they can vary certain terms of the securities being offered upon short notice, enabling them to more efficiently meet the competitive requirements of the public securities markets. We believe that extending shelf registration benefits to more companies, in the manner we have chosen, will facilitate the capital-raising efforts of smaller public companies who currently have fewer financing options than their larger counterparts.[114] Consequently, we anticipate that the amendments will result in smaller issuers raising more capital through the public markets rather than through exempt offerings conducted in the domestic and offshore markets. Investors in these companies will benefit by such companies' improved access to capital on more favorable terms. In particular, investors in smaller public companies may be less subject to the risk of dilution in the value of their shares if the companies in which they invest are able to meet more of their capital needs in the public markets. By selling into the public markets, these companies may be able to avoid the substantial pricing

[114] See generally, Chaplinsky and Haushalter, Financing Under Extreme Uncertainty: Contract Terms and Returns to Private Investments in Public Equity.

discounts that private investors often demand to compensate them for the relative illiquidity of the restricted shares they are purchasing.[115]

The public registration of securities also provides additional benefits to investors over alternative forms of capital raising. To the extent that the amendments lead to an increase in the use of registered offerings through the use of Form S-3 and Form F-3 as a source of financing and a resulting decrease in private market alternatives, investors in those offerings will benefit from the additional investor protections associated with public registration.

Notwithstanding our belief regarding the beneficial effects of the amendments, however, any resulting benefits that accrue to companies and their investors as a result of these amendments will depend on future market conditions and circumstances unique to each company.

C. Costs

As discussed in Section B. above, we do not expect that the amendments to Forms S-3 and F-3 will materially increase companies' overall compliance costs associated with preparing, reviewing and filing these registration statements, although there may be some additional costs incurred by companies to monitor their ongoing compliance with the one-third sales cap imposed by the amendments. At the same time, the amendments could result in certain additional market costs that are difficult to quantify. For example, it has been suggested that there are risks inherent in allowing smaller public companies to take advantage of shelf primary offerings on Forms S-3 and F-3. Because this would permit such companies to avail themselves of periodic takedowns without further

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115 Id.

Commission action or prior staff review, concerns have been raised about the increased potential for fraud and market manipulation.[116] Although the Commission would retain the authority to review registration statements before declaring them effective, individual takedowns are not subject to prior staff review. Under the current rules, if issuers are instead using Forms S-1 or F-1, they would be required to file separate registration statements for each new offering, which would be subject to selective staff review before going effective. If these issuers can instead conduct shelf offerings on Form S-3 and Form F-3, there may be some loss of the deterrent effect on the companies' disclosures in connection with each takedown off the shelf because of the lack of prior staff review. In addition, the short time horizon of shelf offerings may also reduce the time that participating underwriters have to apply their independent scrutiny and judgment to an issuer's prospectus disclosure. We have also considered the effect the amendments may have on market demand for the securities of smaller public companies offered on Form S-3 and Form F-3. If there is a perception that smaller public company securities offered through shelf registration statements are more prone to abuse because of the lack of involvement by the Commission staff, this may erode investor confidence in these offerings generally. This could, in turn, make it more difficult for these companies to raise capital and significantly negate some of the benefits of the rule.

While we recognize that extending the benefits of shelf registration to an expanded group of companies will limit the staff's direct involvement in takedowns of securities off the shelf and could therefore pose some risk to investors, we believe that the risks are justified by the benefits that we anticipate will accrue by facilitating the capital

[116] See n. 34.

formation efforts of smaller public companies. As we have discussed elsewhere in this release, we believe these risks have been mitigated by the emergence of the Internet which, in combination with the Commission's EDGAR database, has greatly enhanced the ability of the market to readily digest and assimilate public company information.

However, in order minimize risks to investors, the amendments include certain restrictions intended to moderate the impact of expanding Forms S-3 and F-3 eligibility. These are:

- excluding shell companies from eligibility;
- requiring that companies have at least one class of common equity securities listed and registered on a national securities exchange; and
- imposing a cap of one-third of a company's public float on the amount of securities that can be sold into the market in any period of 12 calendar months by eligible issuers on Forms S-3 and F-3.

We note, however, that monitoring compliance with the one-third cap may be difficult given the lack of staff review before a shelf offering.

IV. Consideration of Promotion of Efficiency, Competition and Capital Formation

Securities Act Section 2(b)[117] requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We expect the amendments will increase efficiency and enhance capital formation by facilitating the ability of smaller public companies to access the capital markets consistent with investor protection. Prior to these amendments, many companies have

[117] 15 U.S.C. 77b(b).

been ineligible to use Forms S-3 and F-3 to register primary offerings of their securities because the size of their public float did not satisfy the $75 million threshold required by these forms. Consequently, they have been unable to take advantage of the important benefits enjoyed by eligible companies, the most significant of which is the ability to conduct primary offerings on a delayed and continuous basis. The ability to register securities that may be taken off the shelf as needed, without prior staff review, provides a powerful tool for capital formation because it allows companies the flexibility to take advantage of desired market conditions efficiently and upon short notice. Companies may be able to raise capital more cheaply, quickly, and on more favorable terms than would otherwise be the case. By selling into the public markets, these companies may be able to avoid the substantial pricing discounts that private investors often demand to compensate them, in part, for the relative illiquidity of the restricted shares they are purchasing.[118]

We therefore believe that extending shelf registration benefits to more companies in the manner that we have chosen will facilitate the capital-raising efforts of smaller public companies who currently have fewer financing options than their larger counterparts.[119] Consequently, we anticipate that the amendments will lead to efficiencies in capital formation, as smaller issuers will be able to raise more capital through the public markets rather than through exempt offerings conducted in the domestic and offshore markets.

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[118] See n. 115.

[119] See n. 114.

At the same time, we have also considered the potential that the amendments might result in certain additional market costs that could limit any efficiencies realized. For example, it has been suggested that extending the benefits of shelf registration to an expanded group of companies will limit the staff's direct involvement in takedowns of securities off the shelf and could therefore pose some risk to investors. In addition, the short time horizon of shelf offerings also may reduce the time that participating underwriters have to apply their independent scrutiny and judgment to an issuer's prospectus disclosure. By reducing this staff and underwriter oversight, there is a risk that these securities offerings may be more vulnerable to abuses. Moreover, because companies with a smaller market capitalization, as a group, have a comparatively smaller market following than larger, well-seasoned issuers and are more thinly traded, smaller companies' securities may be more vulnerable to potential manipulative practices. We also have considered the effect the amendments may have on market demand for the securities of smaller public companies offered on Form S-3 and Form F-3. If there is a perception that smaller public company securities offered through shelf registration statements are more prone to abuse because of the lack of prior involvement by the Commission staff, this may erode investor confidence in these offerings generally. This could, in turn, make it more difficult for these companies to raise capital and significantly negate the benefits of the rule.

The effects of the amendments on competition are difficult to predict, but it is possible that making it easier for smaller public issuers to access the domestic public securities markets will lead to a reallocation of capital, as companies that previously had little choice but to offer their securities in private offerings or in offshore markets because of their Form S-3 and Form F-3 ineligibility will now find it cost-effective to offer their securities domestically in primary offerings on Form S-3 and Form F-3. If such a reallocation occurs, it may also impact securities market professionals, such as finders, brokers and agents, who specialize in facilitating private securities offerings. The demand for these services may shift to the public markets, where other professionals, such as investment banks that underwrite public offerings, have a comparative advantage.

V. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to revisions to the eligibility requirements for the use of registration statements on Forms S-3 and F-3 to register primary offerings of securities.

A. Need for the Amendments

Prior to these amendments, many smaller public companies have been ineligible to use Forms S-3 and F-3 to register primary offerings of their securities because the size of their public float did not satisfy the $75 million threshold required by these forms. Consequently, they have been unable to take advantage of the important benefits enjoyed by eligible companies, the most significant of which is the ability to conduct primary offerings on a delayed and continuous basis. The ability to register securities that may be taken off the shelf as needed, without prior staff review, provides a powerful tool for capital formation because it allows companies the flexibility to take advantage of desired market conditions efficiently and on short notice. As such, eligible companies may be able to raise capital more cheaply, quickly, and on more favorable terms than would otherwise be the case. Without this source of financing, smaller public companies that are not eligible to register primary offerings on Form S-3 or Form F-3 currently have fewer, and less favorable, financing options than their larger Form S-3 and F-3-eligible counterparts.

B. Significant Issues Raised by Public Comment

In the Proposing Release, we requested comment on any aspect of the Initial Regulatory Flexibility Act Analysis, including the number of small entities that would be affected by the proposals, and both the qualitative and quantitative nature of the impact. Several commenters supported the proposal because they believed it would benefit smaller public companies, but did not provide any specific comments on the Initial Regulatory Flexibility Act Analysis.

C. Small Entities Subject to the Amendments

The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[120] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.[121] Roughly speaking, a "small business" and "small organization," when used with reference to an issuer other than an investment company, means an issuer with total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 issuers, other than investment companies, that may be considered reporting small entities.[122]

The amendments will affect small entities that:

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120 5 U.S.C. 601(6).

121 Rules 157 under the Securities Act [17 CFR 230.157], 0-10 under the Exchange Act [17 CFR 240.0-10] and 0-10 under the Investment Company Act [17 CFR 270.0-10] contain the applicable definitions.

122 The estimated number of reporting small entities is based on 2007 data, including the Commission's EDGAR database and Thomson Financial's Worldscope database. See also Revisions to Rule 144 and Rule 145 to Shorten Holding Period for Affiliates and Non-Affiliates, Release No. 33-8813 (June 20, 2007) [72 FR 36822, 36841-36842]. This represents an update from the number of reporting small entities estimated in prior rulemakings. See, for example, Executive Compensation and Related Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158] (in which the Commission's estimated a total of 2,500 small entities, other than investment companies).

- are not shell companies;
- have at least one class of common equity securities listed and registered on a national securities exchange; and
- satisfy the registrant eligibility requirements for the use of Form S-3 or Form F-3, which generally pertain to a company's reporting history under the Exchange Act.[123]

Based on these registrant eligibility requirements, we estimate that there are approximately 115 to 350 small entities that will be affected by the amendments and therefore will become eligible to use Form S-3 or Form F-3 for primary securities offerings.[124]

D. Reporting, Recordkeeping and Other Compliance Requirements

Because Forms S-3 and F-3 are abbreviated registration forms that can be updated automatically through incorporation by reference of a registrant's Exchange Act filings, we believe use of the forms by eligible small entities will decrease their existing compliance burden. Because the amendments have little effect on the information disclosure requirements of Form S-3 or Form F-3,[125] we do not believe that the costs of complying with the amendments for small entities will be disproportionate to that of large entities.[126] We recognize, however, that there will be some additional costs associated

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123 See n. 37 and n. 83.

124 The burden estimates for small entities are presented as a range representing the minimum and maximum number of small entities that we estimate would currently qualify for eligibility under either General Instruction I.B.6. of Form S-3 or General Instruction I.B.5. of Form F-3, as applicable, based on data available to us.

125 See n. 96. Instruction 7 to new General Instruction I.B.6. of Form S-3 and Instruction 7 to new General Instruction I.B.5. of Form F-3 require disclosure of the registrant's updated calculation of public float and the amount of securities offered on Form S-3 or F-3, as applicable, pursuant to this instruction during the prior 12 calendar months, but we believe any burden associated with this requirement will be minimal.

126 It should be noted, however, that General Instruction II.C. of Form S-3 currently requires:

> . . . smaller reporting compan[ies] (as defined in Rule 405 of the Securities Act [17 CFR 230.405]) that [are] eligible to use Form S-3 shall use the disclosure items in Regulation S-K [17

with an issuer's need to continually monitor its compliance with the one-third cap on sales in any period of 12 calendar months, but we believe that any such costs will be insignificant.

For purposes of the Paperwork Reduction Act, we estimate the annual decrease in the paperwork burden for small entities to comply with our collection of information requirements to be approximately between 3,843 and 14,168 hours of in-house company personnel time (valued between $673,000 to 2,480,000[127]) and to be approximately between $4,612,000 and $17,001,000 for the services of outside professionals.

E. Agency Action to Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the amendments, the Regulatory Flexibility Act requires that we consider the following alternatives:

1. establishing different compliance or reporting requirements which take into account the resources available to smaller entities;

2. the clarification, consolidation or simplification of disclosure for small entities;

3. use of performance standards rather than design standards; and

4. exempting smaller entities from coverage of the disclosure requirements, or any part thereof.

CFR 229.10 <u>et seq</u>.] with specific attention to the subparagraph describing scaled disclosure, if any. Smaller reporting companies may provide the financial information called for by Item 310 of Regulation S-K in lieu of the financial information called for by Item 11 in this form.

Release No. 33-8876. Because such scaled disclosure requirements generally allow scaled disclosure for smaller reporting companies, small entities that file on Form S-3 may have a comparatively lesser compliance burden overall than larger issuers.

[127] See n. 113.

Of these alternatives, only the last appears germane to these amendments. Alternative 3 is not applicable, as the distinction between performance standards and design standards has no bearing on the amendments. Alternatives 1 and 2, because they pertain to establishing different or simplified reporting requirements for smaller entities, also would not seem helpful in this instance because our amendments are already expected to reduce the compliance burden on eligible smaller entities. Regarding Alternatives 1, 2 and 4, we considered relaxing the transaction eligibility requirements for Forms S-3 and F-3 to a greater degree than we are adopting, which would have the effect of further reducing the compliance burden among smaller entities by making more entities eligible for short-form disclosure. As we stated, however, we decline at this time to adopt a less restrictive eligibility requirement. We believe at this time that imposing the one-third cap on the amount of securities that smaller public companies listed on exchanges may sell pursuant to primary offerings on Forms S-3 and F-3, as described, will help to facilitate capital formation through the securities markets consistent with our primary objective of investor protection.

VI. Statutory Authority and Text of the Amendments

The amendments described in this release are being adopted under the authority set forth in Sections 6, 7, 8, 10 and 19(a) of the Securities Act, as amended.

List of Subjects

17 CFR Parts 230 and 239

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

2. Amend §230.401 by:

a. in paragraph (g)(1), revising the cite "paragraph (g)(2)" to read "paragraphs (g)(2) and (g)(3)"; and

b. adding paragraph (g)(3).

The addition reads as follows:

§230.401 Requirements as to proper form.

* * * * *

(g) * * *

(3) Violations of General Instruction I.B.6. of Form S-3 or General Instruction I.B.5. of Form F-3 will also violate the requirements as to proper form under this section notwithstanding that the registration statement may have been declared effective previously.

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

3. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 77mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

4. Amend Form S-3 (referenced in §239.13) by adding General Instruction I.B.6. to read as follows:

Note -The text of Form S-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form S-3 * * *

B. Transaction Requirements. * * *

6. Limited Primary Offerings by Certain Other Registrants. Securities to be offered for cash by or on behalf of a registrant; provided that:

(a) the aggregate market value of securities sold by or on behalf of the registrant pursuant to this Instruction I.B.6. during the period of 12 calendar months immediately prior to, and including, the sale is no more than one-third of the aggregate market value of the voting and non-voting common equity held by non-affiliates of the registrant;

(b) the registrant is not a shell company (as defined in §230.405 of this chapter) and has not been a shell company for at least 12 calendar months previously and if it has been a shell company at any time previously, has filed current Form 10 information with the Commission at least 12 calendar months previously reflecting its status as an entity that is not a shell company; and

(c) the registrant has at least one class of common equity securities listed and registered on a national securities exchange.

Instructions.

1. "Common equity" is as defined in Securities Act Rule 405 (§230.405 of this chapter). For purposes of computing the aggregate market value of the registrant's outstanding voting and non-voting common equity pursuant to General Instruction I.B.6., registrants shall use the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity, in the principal market for such common equity as of a date within 60 days prior to the date of sale. See the definition of "affiliate" in Securities Act Rule 405 (§230.405 of this chapter).

2. For purposes of computing the aggregate market value of all securities sold by or on behalf of the registrant in offerings pursuant to General Instruction I.B.6. during any period of 12 calendar months, registrants shall aggregate the gross proceeds of such sales; provided, that, in the case of derivative securities convertible into or exercisable for shares of the registrant's common equity, registrants shall calculate the aggregate market value of any underlying equity shares in lieu of the market value of the derivative securities. The aggregate market value of the underlying equity shall be calculated by multiplying the maximum number of common equity shares into which the derivative securities are convertible or for which they are exercisable as of a date within 60 days prior to the date of sale, by the same per share market price of the registrant's equity used for purposes of calculating the aggregate market value of the registrant's outstanding voting and non-voting common equity pursuant to Instruction 1 to General Instruction I.B.6. If the derivative securities have been converted or exercised, the aggregate market value of the underlying equity shall be calculated by multiplying the actual number of shares into which the securities were converted or received upon exercise, by the market price of such shares on the date of conversion or exercise.

3. If the aggregate market value of the registrant's outstanding voting and non-voting common equity computed pursuant to General Instruction I.B.6. equals or exceeds $75 million subsequent to the effective date of this registration statement, then the one-third limitation on sales specified in General Instruction I.B.6(a) shall not apply to additional sales made pursuant to this registration statement on or subsequent to such date and instead the registration statement shall be considered filed pursuant to General Instruction I.B.1.

4. The term "Form 10 information" means the information that is required by Form 10 or Form 20-F (§249.210 or §249.220f of this chapter), as applicable to the registrant, to register under the Securities Exchange Act of 1934 each class of securities being registered using this form. A registrant may provide the Form 10 information in another Commission filing with respect to the registrant.

5. The date used in Instruction 2 to General Instruction I.B.6. shall be the same date used in Instruction 1 to General Instruction I.B.6.

6. A registrant's eligibility to register a primary offering on Form S-3 pursuant to General Instruction I.B.6. does not mean that the registrant meets the requirements of Form S-3 for purposes of any other rule or regulation of the Commission apart from Rule 415(a)(1)(x) (§230.415(a)(1)(x) of this chapter).

7. Registrants must set forth on the outside front cover of the prospectus the calculation of the aggregate market value of the registrant's outstanding voting and non-voting common equity pursuant to General Instruction I.B.6. and the amount of all securities offered pursuant to General Instruction I.B.6. during the prior 12 calendar month period that ends on, and includes, the date of the prospectus.

8. For purposes of General Instruction I.B.6(c), a "national securities exchange" shall mean an exchange registered as such under Section 6(a) of the Securities Exchange Act of 1934.

* * * * *

5. Amend Form F-3 (referenced in §239.33) by adding General Instruction I.B.5. to read as follows:

Note -The text of Form F-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM F-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form F-3 * * *

B. Transaction Requirements * * *

5. <u>Limited Primary Offerings by Certain Other Registrants</u>. Securities to be offered for cash by or on behalf of a registrant; <u>provided that</u>:

(a) the aggregate market value of securities sold by or on behalf of the registrant pursuant to this Instruction I.B.5. during the period of 12 calendar months immediately prior to, and including, the sale is no more than one-third of the aggregate market value worldwide of the voting and non-voting common equity held by non-affiliates of the registrant;

(b) the registrant is not a shell company (as defined in §230.405 of this chapter) and has not been a shell company for at least 12 calendar months previously and if it has been a shell company at any time previously, has filed current Form 10 information with the Commission at least 12 calendar months previously reflecting its status as an entity that is not a shell company; and

(c) the registrant has at least one class of common equity securities listed and registered on a national securities exchange.

Instructions.

1. "Common equity" is as defined in Securities Act Rule 405 (§230.405 of this chapter). For purposes of computing the aggregate market value of the registrant's outstanding voting and non-voting common equity pursuant to General Instruction I.B.5., registrants shall use the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity, in the principal market for such common equity as of a date within 60 days prior to the date of sale. See the definition of "affiliate" in Securities Act Rule 405 (§230.405 of this chapter).

2. For purposes of computing the aggregate market value of all securities sold by or on behalf of the registrant in offerings pursuant to General Instruction I.B.5. during any period of 12 calendar months, registrants shall aggregate the gross proceeds of such sales; provided, that, in the case of derivative securities convertible into or exercisable for shares of the registrant's common equity, registrants shall calculate the aggregate market value of any underlying equity shares in lieu of the market value of the derivative securities. The aggregate market value of the underlying equity shall be calculated by multiplying the maximum number of common equity shares into which the derivative securities are convertible or for which they are exercisable as of a date within 60 days prior to the date of sale, by the same per share market price of the registrant's equity used for purposes of calculating the aggregate market value of the registrant's outstanding voting and non-voting common equity pursuant to Instruction 1 to General Instruction

I.B.5. If the derivative securities have been converted or exercised, the aggregate market value of the underlying equity shall be calculated by multiplying the actual number of shares into which the securities were converted or received upon exercise, by the market price of such shares on the date of conversion or exercise.

3. If the aggregate market value of the registrant's outstanding voting and non-voting common equity computed pursuant to General Instruction I.B.5. equals or exceeds $75 million subsequent to the effective date of this registration statement, then the one-third limitation on sales specified in General Instruction I.B.5(a) shall not apply to additional sales made pursuant to this registration statement on or subsequent to such date and instead the registration statement shall be considered filed pursuant to General Instruction I.B.1.

4. The term "Form 10 information" means the information that is required by Form 10 or Form 20-F (§249.210 or §249.220f of this chapter), as applicable to the registrant, to register under the Securities Exchange Act of 1934 each class of securities being registered using this form. A registrant may provide the Form 10 information in another Commission filing with respect to the registrant.

5. The date used in Instruction 2 to General Instruction I.B.5. shall be the same date used in Instruction 1 to General Instruction I.B.5.

6. A registrant's eligibility to register a primary offering on Form F-3 pursuant to General Instruction I.B.5. does not mean that the registrant meets the requirements of Form F-3 for purposes of any other rule or regulation of the Commission apart from Rule 415(a)(1)(x) (§230.415(a)(1)(x) of this chapter).

7. Registrants must set forth on the outside front cover of the prospectus the calculation of the aggregate market value of the registrant's outstanding voting and non-

voting common equity pursuant to General Instruction I.B.5. and the amount of all securities offered pursuant to General Instruction I.B.5. during the prior 12 calendar month period that ends on, and includes, the date of the prospectus.

8. For purposes of General Instruction I.B.5(c), a "national securities exchange" shall mean an exchange registered as such under Section 6(a) of the Securities Exchange Act of 1934.

* * * * *

By the Commission.

Nancy M. Morris
Secretary

Dated: December 19, 2007

Chairman Cox
Not Participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 8877A / December 19, 2007

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56996A / December 19, 2007

INVESTMENT ADVISERS ACT OF 1940
Rel. No.2684A / December 19, 2007

INVESTMENT COMPANY ACT OF 1940
Rel. No.28079A / December 19, 2007

Admin. Proc. File No. 3-12386

In the Matter of WARREN LAMMERT, LARS SODERBERG, and LANCE NEWCOMB	CORRECTED ORDER GRANTING EXTENSION

The Chief Administrative Law Judge has moved, pursuant to Commission Rule of Practice 360(a)(3), 1/ for an extension of time for the law judge presiding over this proceeding to issue her initial decision. For the reasons set forth below, we have determined to grant the law judge's motion.

I.

On July 31, 2006, we issued an order instituting proceedings ("OIP") against Warren Lammert, a portfolio manager employed by Janus Capital Management, LLC ("Janus Capital Management"), an investment adviser, Lars Soderberg, an officer and director of Janus Capital Management, and Lance Newcomb, also an officer and director of Janus Capital Management. The OIP alleges that Respondents violated certain antifraud provisions of the federal securities laws or, in the alternative, willfully aided and abetted and caused Janus Capital Management's violation of certain antifraud provisions and certain affiliated transactions provisions of the federal securities laws. The OIP further alleges that these violations occurred in connection with Respondents' involvement, variously, in market timing, frequent trading, and late trading

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1/ 17 C.F.R. § 201.360(a)(3).

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activity, which related to certain mutual funds managed by Janus Capital Management, pursuant to arrangements with broker-dealers Trautman Wasserman & Company, Inc. ("Trautman Wasserman") and Brean Murray & Company, Inc. ("Brean Murray"). 2/

The OIP directed the presiding law judge to hold a public hearing to take evidence regarding the allegations and the appropriate sanctions. The OIP further specified that, pursuant to Commission Rule of Practice 360(a)(2), 3/ the presiding law judge should issue an initial decision in this proceeding no later than 300 days from the date of service of the OIP.

The hearing was scheduled to occur on February 20, 2007. However, the law judge stayed the proceeding from February 15, 2007 through July 6, 2007. 4/ Although the 300-day timeline was tolled pursuant to Commission Rules of Practice 210(c)(3) and 360(a)(2), 5/ the law judge ordered that discovery proceed without delay. 6/ During the stay, the parties disagreed about their respective discovery obligations and entitlements regarding an unexpectedly large volume of material associated with the investigative files of the Trautman Wasserman and Brean Murray proceedings. In response, the parties filed numerous motions with us and the law judge, seeking certain relief. The process of resolving the dispute involved the issuance of several orders over the course of many months, extended beyond the end of the stay, elevated the complexity of the proceeding, and protracted discovery.

2/ Investigations of the two broker-dealers led to our issuance of an OIP against each, as well as various individual respondents. See Order Instituting Proceedings as to Trautman Wasserman & Co., Gregory O. Trautman, Samuel M. Wasserman, Mark Barbera, James A. Wilson, Jr., Jerome Snyder, and Forde Prigot, Admin. Proc. File No. 3-12559 (Feb. 5, 2007); Order Instituting Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order as to Brean Murray & Co., Admin. Proc. File No. 3-11836 (Feb. 17, 2005).

3/ 17 C.F.R. § 201.360(a)(2).

4/ On February 14, 2007, the New York Attorney General ("NYAG") had requested a stay of this proceeding pending the outcome of a criminal proceeding against James A. Wilson, Jr., a party in the Trautman Wasserman proceeding, that is alleged to be based on many of the same facts at issue in this proceeding. The law judge lifted the stay on July 6, 2007 shortly after resolution of that, and a related, criminal proceeding.

5/ 17 C.F.R. §§ 201.210(c)(3), 201.360(a)(2).

6/ See Order Granting Stay, Admin. Proc. File No. 3-12386 (Feb. 15, 2007).

The hearing in this proceeding occurred over several days in October and November 2007, and, according to the motion, resulted "in over 1,700 pages of transcripts and approximately 200 exhibits representing thousands of pages."

The initial decision is due on December 17, 2007. On November 15, 2007, the Chief Administrative Law Judge filed a motion pursuant to Commission Rule of Practice 360(a)(3) 7/ requesting an extension of time of 130 days for the presiding law judge to issue such decision.

II.

We adopted Rules of Practice 360(a)(2) and 360(a)(3) as part of an effort to enhance the timely and efficient adjudication and disposition of Commission administrative proceedings. 8/ At that time, we determined that the adoption of mandatory deadlines for completion of administrative hearings would enhance timely completion of the adjudication process. In adopting those guidelines, however, we recognized that a "'one size fits all' approach to timely disposition is not feasible." 9/ We therefore established three different deadlines – 120, 210, or 300 days – depending on "the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors." 10/

We further provided for the granting of extensions to those deadlines under certain circumstances. If, during the proceeding, the presiding law judge decides that the proceeding cannot be concluded in the time specified in the OIP, Rule 360(a)(3) provides that the law judge may request an extension of the stated deadline. To obtain an extension, the law judge should consult with the Chief Administrative Law Judge. "Following such consultation, the Chief Administrative Law Judge may determine, in his or her discretion, to submit a motion to the Commission requesting an extension." 11/ We find that the presiding law judge and the Chief Administrative Law Judge engaged in the proper procedural steps by having a consultation and submitting the motion to us in the appropriate manner.

7/ 17 C.F.R. § 201.360(a)(3).

8/ See Adopting Release, Securities Act Rel. No. 8240 (June 11, 2003), 80 SEC Docket 1463.

9/ Id.

10/ 17 C.F.R. § 201.360(a)(2).

11/ 17 C.F.R. § 201.360(a)(3).

We have stated that the motion should "explain [] why circumstances require an extension and specify [] the length of the extension." 12/ While we intend to grant extensions sparingly, we may authorize an extension on the basis of the Chief Administrative Law Judge's motion if we determine that "additional time is necessary or appropriate in the public interest." 13/ We have noted, however, that a heavy docket alone will not ordinarily be cause for an extension. 14/

Here, the motion supports the extension request by stating that the initial decision cannot be issued within the specified time based on the following factors: "(1) the NYAG requested a stay of this proceeding on the eve of hearing; (2) due to the NYAG's stay, the current case schedule conflicts with another complex case's schedule; (3) the complexity of the current case; and (4) document discovery issues." The motion states essentially that, as a result of the scheduling problems caused by the circumstances surrounding the eleventh-hour stay and the unanticipated complexity of and voluminous material related to discovery, the 137 of the 300 days that elapsed prior to the imposition of the stay have been rendered virtually meaningless and should be reinstated in order to afford the presiding law judge with sufficient time to properly adjudicate this proceeding. Otherwise, according to the motion, the presiding law judge "will have to file an Initial Decision less than one month following the conclusion of hearing and just days after the last post-hearing pleading is submitted." 15/ The motion therefore requests that the presiding law judge be provided with 130 additional days (137 days "minus the seven days in which the Division has to make the investigative file available") to issue her initial decision.

12/ See Laminaire Corp. (n/k/a Cavico Corp.), TAM Restaurants, Inc. (n/k/a Aerofoam Metals, Inc.), and Upside Development Inc. (n/k/a Amorocorp), Securities Exchange Act Rel. No. 56912 (Dec. 5, 2007), _ SEC Docket _; Raymond James Fin. Svcs., Inc., Securities Act Rel. No. 8597 (July 29, 2005), 85 SEC Docket 4318, 4320; Adopting Release, 80 SEC Docket at 1463.

13/ 17 C.F.R. § 201.360(a)(3).

14/ Laminaire Corp., Exchange Act Rel. No. 56912 (Dec. 5, 2007), _ SEC Docket _; Raymond James, 85 SEC Docket at 4320.

15/ The motion does not specify on what date the last post-hearing pleading is due. However the Hearing Information Record provides that the final briefing is due on December 14, 2007. The record does not contain any further information on this point, such as a verbal order the law judge may have given at the conclusion of the hearing.

In light of the circumstances described above and the reasonableness of the requested extension, we have determined to grant the motion. We believe that it is appropriate to extend the deadline for issuance of the initial decision until 130 days from the date on which we issue the order herein.

Accordingly, IT IS ORDERED that the deadline for issuance of the initial decision in this matter be, and it hereby is, extended until April 28, 2008.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 210, 228, 229, 230, 239, 240, 249, 260, and 269

[RELEASE NOS. 33-8876; 34-56994; 39-2451; FILE NO. S7-15-07]

RIN 3235-AJ86

SMALLER REPORTING COMPANY REGULATORY RELIEF AND SIMPLIFICATION

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting amendments to its disclosure and reporting requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934 to expand the number of companies that qualify for its scaled disclosure requirements for smaller reporting companies. Companies that have less than $75 million in public equity float will qualify for the scaled disclosure requirements under the amendments. Companies without a calculable public equity float will qualify if their revenues were below $50 million in the previous year. To streamline and simplify regulation, the amendments move the scaled disclosure requirements from Regulation S-B into Regulation S-K.

DATES: Effective Date: [Insert 30 days after publication in the Federal Register], except for § 249.308b and Form 10-QSB, which will be removed effective October 31, 2008, and Part 228, § 249.310b and Form 10-KSB, which will be removed effective March 15, 2009.

Compliance Dates: After the effective date of the rule amendments, companies currently qualifying as "small business issuers" under Regulation S-B will have the option to file their next annual report for a fiscal year ending on or after December 15,

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2007 on either Form 10-KSB, using the scaled disclosure requirements in Regulation S-B, or Form 10-K, using the new scaled disclosure requirements in Regulation S-K. After a "small business issuer" files that next annual report, it will be required to file quarterly reports on Form 10-Q and annual reports on Form 10-K, and may elect to comply with the new scaled disclosure requirements of Regulation S-K. Companies newly qualifying as "smaller reporting companies" will have the option to use the new scaled Regulation S-K requirements when filing their next periodic report due after the effective date of the amendments. These companies will determine eligibility for smaller reporting company status based on the last business day of their most recent second fiscal quarter, or based on the alternative initial registration statement calculation discussed in Section IV. If a registration statement was filed on an "SB" form before the effective date of the rule amendments, and the company seeks to amend it after the effective date of the rule amendments, the company must file the amendment on the appropriate form available to the issuer without an "SB" designation. As discussed in Section IV, to provide a transition period, these issuers will be able to continue using the disclosure format and content based on the "SB" form until six months after the effective date.

FOR FURTHER INFORMATION CONTACT: Kevin M. O'Neill, Special Counsel, or Johanna Vega Losert, Attorney-Advisor, Office of Small Business Policy, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628, (202) 551-3460.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Regulation

S-K,[1] and rules and forms under the Securities Act of 1933,[2] Securities Exchange Act of 1934,[3] and Trust Indenture Act of 1939.[4] In Regulation S-K, we are adopting amendments to Items 10, 101, 102, 201, 301, 302, 303, 305, 401, 402, 404, 407, 503, 504, 512, 601, 701, and 1118.[5] We are adopting amendments to Securities Act Rules 110, 138, 139, 158, 175, 405, 415, 428, 430B, 430C, 455, and 502.[6] Further, we are rescinding Regulation S-B[7] and eliminating the forms associated with it, Forms SB-1, SB-2, 10-SB, 10-QSB, and 10-KSB.[8] We are amending Securities Act Forms 0-1, S-1, S-3, S-4, S-8, S-11, 1-A, and F-X,[9] Exchange Act Rules 0-2, 0-12, 3b-6, 10A-1, 10A-3, 12b-2, 12b-23, 12b-25, 12h-3, 13a-10, 13a-13, 13a-14, 13a-16, 13a-20, 14a-3, 14a-5, 14a-8, 14c-3, 14d-3, 15d-10, 15d-13, 15d-14, 15d-20, and 15d-21,[10] and Exchange Act Forms 0-1, 8-A, 8-K, 10, 10-Q, 10-K, 11-K, 20-F, and SE.[11] We are amending Schedules 14A and 14C.[12] In Regulation S-X,[13] we are amending Rules 210.3-01, 210.3-05,

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1 17 CFR 229.10 – 229.1123.

2 15 U.S.C. 77a et seq.

3 15 U.S.C. 78a et seq.

4 15 U.S.C. 77aaa et seq.

5 17 CFR 229.10, 229.101, 229.102, 229.201, 229.301, 229.302, 229.303, 229.305, 229.401, 229.402, 229.404, 229.407, 229.503, 229.504, 229.512, 229.601, 229.701, and 229.1118.

6 17 CFR 230.110, 230.138, 230.139, 230.158, 230.175, 230.405, 230.415, 230.428, 230.430B, 230.430C, 230.455, and 230.502.

7 17 CFR 228.10 – 228.703.

8 17 CFR 239.9, 239.10, 249.210b, 249.308b, and 249.310b.

9 17 CFR 239.0-1, 239.11, 239.13, 239.25, 239.16b, 239.18, 239.90, and 239.42.

10 17 CFR 240.0-2, 240.0-12, 240.3b-6, 240.10A-1, 240.10A-3, 240.12b-2, 240.12b-23, 240.12b-25, 240.12h-3, 240.13a-10, 240.13a-13, 240.13a-14, 240.13a-16, 240.13a-20, 240.14a-3, 240.14a-5, 240.14a-8, 240.14c-3, 240.14d-3, 240.15d-10, 240.15d-13, 240.15d-14, 240.15d-20, and 240.15d-21.

11 17 CFR 249.0-1, 249.208a, 249.210, 249.308, 249.308a, 239.310, 249.311, 249.220f, and 249.444.

12 17 CFR 240.14a-101 and 240.14c-101.

13 17 CFR 210.3-01 – 210.12-29.

210.3-10, 210.3-12, 210.3-14, 210.4-01, and 210.10-01 and adding a new Article 8 containing the financial statement requirements available to smaller reporting companies.[14] Finally, we are amending Trust Indenture Act Rules 0-11, 4d-9, and 10a-5[15] and Section 269.0-1 of the Trust Indenture Act Forms.[16]

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14 17 CFR 210.3-01, 210.3-05, 210.3-10, 210.3-12, 210.3-14, 210.4-01, 210.10-01, and new Article 8 210.8-01 – 8-08.

15 17 CFR 260.0-11, 260.4d-9, and 260.10a-5.

16 17 CFR 269.0-1.

Table of Contents

I. Background and Summary

At an open Commission meeting on May 23, 2007, we approved publication of eight releases designed to update and improve federal securities regulations that significantly affect smaller companies and their investors in today's capital markets.[17] These releases reflected our efforts during the past few years to provide responsive solutions addressing the special characteristics and needs of smaller companies and their investors. One of the releases (the "Proposing Release") proposed rule amendments intended to provide general regulatory relief and simplification for smaller companies reporting under our rules.[18] In that release, we proposed a series of amendments to our

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17 These releases included (1) Release No. 33-8812 (June 20, 2007) [72 FR 35118] (proposing to expand eligibility requirements of Forms S-3 and F-3 to permit registration of annual primary offerings of up to a specified percentage of public float by companies with a public float of less than $75 million). The Commission voted to approve this proposal at an December 11, 2007 open meeting (archived webcast available at http://www.sec.gov/news/openmeetings.shtml); (2) Release No. 33-8813 (June 22, 2007) [72 FR 36822] (proposing amendments to Rule 144 to revise the holding period for the resale of restricted securities, simplify compliance for non-affiliates, revise the Form 144 filing thresholds, and codify certain staff interpretations, as well as to amend Rule 145). This proposal was adopted in Release No. 33-8869 (Dec. 6, 2007) [72 FR 71546]; (3) Release No. 33-8814 (June 29, 2007) [72 FR 37376] (proposing revisions to Form D and to mandate electronic filing of Form D). The Commission voted to approve this proposal at the December 11, 2007 open meeting (archived webcast available at http://www.sec.gov/news/openmeetings.shtml); (4) Release No. 33-8819 (July 5, 2007) [72 FR 39670] (proposing to increase the number of companies eligible for our scaled disclosure and reporting requirements for smaller companies); (5) Release No. 33-8828 (Aug. 3, 2007) [72 FR 45116] (proposing new Regulation D exemption for offers and sales of securities to a newly defined category of "large accredited investors," as well as proposing revisions to the Regulation D definition of "accredited investor," disqualification provisions, and integration safe harbor); (6) Release No. 34-56010 (July 5, 2007) [72 FR 37608] (proposing exemptions from requirement to register class of securities for compensatory stock options granted by reporting and non-reporting companies). This proposal was adopted in Release No. 34-56887 (Dec. 3, 2007) [72 FR 69554]; (7) Release No. 33-8810 (June 20, 2007) [72 FR 35324] (providing interpretive guidance regarding management's report on internal control over financial reporting under Section 13(a) or 15(d) of the Securities Exchange Act of 1934); and (8) Release No. 33-8811 (June 20, 2007) [72 FR 35346] (requesting additional comment on the definition of a significant deficiency). The last proposal was adopted in Release No. 33-8829 (Aug. 3, 2007) [72 FR 44927] (adopting definition of "significant deficiency").

18 Release No. 33-8819 (July 5, 2007) [72 FR 39670].

scaled disclosure and reporting requirements for smaller reporting companies. The release had three stated objectives:

- expanding the number of smaller companies eligible to use scaled disclosure requirements;
- reducing unnecessary complexity in our regulations by combining the category of "small business issuers" with the category of "non-accelerated filers" to the extent feasible; and
- simplifying disclosure requirements by moving our scaled disclosure requirements for smaller companies from Regulation S-B into Regulation S-K, the integrated disclosure system for other companies.

Several of the amendments in the Proposing Release had their genesis in the recommendations made by the Advisory Committee on Smaller Public Companies in 2006. The Commission had chartered the Advisory Committee in March 2005 to assess the current regulatory system for smaller companies under the federal securities laws and make recommendations for changes.[19] Among the specific charges of the Committee was to consider the corporate disclosure and reporting requirements for smaller companies, including differing regulatory requirements based on market capitalization, and other measurements of size or market characteristics.[20] In its Final Report, the Advisory Committee made several recommendations relating to scaling securities regulation for smaller companies and labeled them as priority items.[21]

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19 See SEC Advisory Committee on Smaller Public Companies, Final Report (2006) ("Advisory Committee Final Report"), available at http://www.sec.gov/info/smallbus/acspc.shtml.

20 Advisory Committee Final Report (p. 1).

21 Advisory Committee Final Report Recommendations II.P.1 (pp.14-22), IV.P.1 (pp. 60-64), and IV.P.2 (pp.65-68).

In 2006, 3,395 reporting companies elected to take advantage of our current scaled disclosure and reporting requirements for small business issuers by filing their annual reports on Form 10-KSB.[22] We estimate that a total of 4,976 companies will be eligible to use our scaled disclosure requirements under today's amendments, a difference of 1,581 additional companies.[23] The 1,581 companies would represent about 13% of the total 11,898 reporting companies that filed annual reports with us in 2006.

The amendments that we are adopting address the need to revisit and adjust the Commission's small company policies to reflect changes in our securities markets as well as changes to the regulatory landscape since 1992, when the Commission first adopted an integrated scaled disclosure system for small business in Regulation S-B.[24] The Commission adopted Regulation S-B and its associated Forms SB-1 and SB-2 based upon the success of Form S-18, which was a simplified registration form for smaller companies under the Securities Act that preceded Forms SB-1 and SB-2.[25] Regulation S-B was designed to reduce compliance costs and improve the ability of start-ups and other small businesses to obtain financing through the public capital markets.

The amendments we are adopting will result in the substantive changes highlighted below. The new provisions:

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22 As stated in the Proposing Release, these statistics are based on 2006 data from the Commission's EDGAR (Electronic Data Gathering, Analysis and Retrieval) filing system.

23 As we noted in the Proposing Release, these statistics are based on Thomson Financial (Datastream). The data includes available information on registered public firms trading on the New York Stock Exchange, the American Stock Exchange, the Nasdaq, the Over-the-Counter Bulletin Board, and the Pink Sheets and excludes closed end funds, exchange traded funds, American depositary receipts, and direct foreign listings.

24 See Release No. 33-6949 (July 30, 1992) [57 FR 36442].

25 The Commission adopted Forms SB-1and SB-2 after 10 years of issuers using Form S-18, an experimental form the Commission created to benefit small issuers in raising capital. Release No. 33-6924, p. 40 (Mar. 20, 1992) [57 FR 9768].

- Establish a category of "smaller reporting companies" eligible to use our scaled disclosure requirements. The primary determinant for eligibility will be that the company have less than $75 million in public float. When a company is unable to calculate public float, however, such as if it has no common equity outstanding or no market price for its outstanding common equity exists at the time of the determination, the standard will be less than $50 million in revenue in the last fiscal year;
- Move 12 non-financial scaled disclosure item requirements from Regulation S-B into Regulation S-K.[26] These scaled requirements will be available only for smaller reporting companies. The remaining 24 item requirements of Regulation S-B[27] are substantially the same as their corresponding Regulation

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26 The 12 scaled item requirements are: (1) Description of Business (Item 101); (2) Market Price of and Dividends on Registrant's Common Equity and Related Stockholder Matters (Item 201); (3) Selected Financial Data (Item 301); (4) Supplementary Financial Information (Item 302); (5) Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303); (6) Quantitative and Qualitative Disclosures about Market Risk (Item 305); (7) Executive Compensation (Item 402); (8) Transactions with Related Persons, Promoters and Certain Control Persons (Item 404); (9) Corporate Governance (Item 407); (10) Prospectus Summary, Risk Factors, and Ratio of Earnings to Fixed Charges (Item 503); (11) Use of Proceeds (Item 504); and (12) Exhibits (Item 601).

27 We did not propose changes to the following items of Regulation S-K because we believe our analysis showed that the disclosure standards in these items currently are substantially the same as the Regulation S-B requirements: (1) Description of Property (Item 102); (2) Legal Proceedings (Item 103); (3) Description of Registrant's Securities (Item 202); (4) Changes In and Disagreements with Accountants on Accounting and Financial Disclosure (Item 304); (5) Disclosure Controls and Procedures (Item 307); (6) Internal Control Over Financial Reporting (Item 308); (7) Internal Control Over Financial Reporting (Item 308T); (8) Directors, Executive Officers, Promoters and Control Persons (Item 401); (9) Security Ownership of Certain Beneficial Owners and Management (Item 403); (10) Compliance with Section 16(a) of the Exchange Act (Item 405); (11) Code of Ethics (Item 406); (12) Forepart of Registration Statement and Outside Front Cover Page of Prospectus (Item 501); (13) Inside Front and Outside Back Cover Pages of Prospectus (Item 502); (14) Determination of Offering Price (Item 505); (15) Dilution (Item 506); (16) Selling Security Holders (Item 507); (17) Plan of Distribution (Item 508); (18) Interest of Named Experts and Counsel (Item 509); (19) Disclosure of Commission Position on Indemnification for Securities Act Liabilities (Item 510); (20) Other Expenses of Issuance and Distribution (Item 511); (21) Recent Sales of Unregistered Securities; Use of Proceeds from Registered Securities (Item 701); (22) Indemnification of Directors and Officers (Item 702); and (23) Purchases of Equity Securities by the Issuer and Affiliated Purchasers (Item 703). In addition, although we proposed to amend Undertakings (Item 512), we are not adopting this

S-K item requirements. We therefore are not amending them except in one minor instance explained below;[28]

- Move the scaled financial statement requirements in Item 310 of Regulation S-B into new Article 8 of Regulation S-X, and amend these requirements to provide a scaled disclosure option for smaller reporting companies, requiring two years of balance sheet data instead of one year, and make other minor adjustments after considering comments we received;[29]
- Permit smaller reporting companies to elect to comply with scaled financial and non-financial disclosure on an item-by-item or "a la carte" basis. As adopted, eligible companies may elect to follow scaled financial statement requirements or to provide the larger company financial statement presentation on a quarterly basis, rather than require companies to elect the full fiscal year's financial presentation in the first quarterly report of the fiscal year, as was proposed;
- Eliminate our current "SB" forms but allow a phase-out period for small business issuers transitioning to smaller reporting company status;
- Combine elements relating to the accelerated filer definition with qualifying standards for the smaller reporting company determination and transition

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change because we believe it is clear which undertakings may and may not apply to a smaller reporting company.

28 See the discussion of Description of Property (Item 102) below. In addition, we are making technical changes to numerous item requirements to remove references to Regulation S-B and its associated "SB" forms.

29 The amendments also rescind Regulation S-B, since all of its substantive requirements will now be contained in Regulation S-K or new Article 8 of Regulation S-X.

provisions to promote uniformity and consistency with current regulations and, therefore, simplify regulation;

- Permit all foreign companies to qualify as "smaller reporting companies" if they otherwise qualify and choose to file on domestic company forms and provide financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles ("U.S. GAAP"); and
- Eliminate the transitional small business issuer format.

II. Description of Proposed Amendments

We proposed an eligibility standard for our scaled disclosure requirements for "smaller reporting companies" to replace the "small business issuer" definition found in Item 10 of Regulation S-B.[30] Under the proposals, the new definition of "smaller reporting company" would have established eligibility for companies with less than $75 million in public common equity float. We provided an alternative revenue test for those companies unable to calculate public common equity float, basing eligibility on whether the company had annual revenues of less than $50 million in its last fiscal year. In contrast, our previous eligibility requirements for "small business issuer" status required that companies have both less than $25 million in public common equity float and less than $25 million in annual revenues.

Under the proposals, which we are adopting in modified form, each company would determine its eligibility based on whether the company is: (1) a reporting company already filing periodic and annual reports;[31] (2) a non-reporting company filing

[30] 17 CFR 228.10.

[31] A reporting company is required to file reports under Section 13(a) and 15(d) of the Exchange Act. 15 U.S.C. 78m and 15 U.S.C. 78o.

a registration statement under either the Securities Act or Exchange Act; or (3) a reporting or non-reporting company that had no public float, such as if it had no public common equity outstanding or no market price for its common equity existed. A reporting company determining its eligibility as a smaller reporting company would calculate its public float as of the last business day of its most recently completed second fiscal quarter. Non-reporting companies filing a registration statement would calculate their public float as of a date within 30 days of the date of the filing of the registration statement.

Under the proposals, investment companies and asset-backed issuers would be excluded from eligibility for smaller reporting company status, as was the case under the definition of "small business issuer" in Regulation S-B.[32] As proposed, foreign companies could qualify as smaller reporting companies and provide scaled disclosure if they elected to use domestic company forms and provide financial statements prepared in accordance with U.S. GAAP. Removing the exclusion of foreign companies would make scaled treatment available to additional smaller companies.[33]

We proposed that smaller reporting companies be required to exit the scaled disclosure system the fiscal year after their public float rose above $75 million as of the last business day of their second fiscal quarter.[34] Smaller reporting companies attempting to establish eligibility to enter the scaled disclosure system again would be required to determine that their public float fell below $50 million as of the last business day of their

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[32] Item 10(a)(1)(iii) of Regulation S-B, 17 CFR 228.10(a)(1)(iii).

[33] Item 10(a)(1)(ii) of Regulation S-B only permits U.S. or Canadian issuers to qualify as "small business issuers."

[34] The entering and exiting rules in the smaller reporting company system are modeled after the method of determining accelerated filer status set forth in Rule 12b-2. 17 CFR 240.12b-2.

second fiscal quarter, and would be able to use scaled disclosure again in the next fiscal year following the determination, starting with the first Form 10-Q of the next fiscal year.

An objective of our proposals was to simplify and improve our disclosure and reporting rules for smaller companies by moving the Regulation S-B disclosure requirements for smaller companies into Regulation S-K, as recommended by the SEC Advisory Committee on Smaller Public Companies. As a result of our rulemaking, we identified 13 item requirements in Regulation S-B that provided scaled disclosure for smaller companies.[35] We reasoned that consolidation of the Regulation S-K and S-B disclosure requirements would provide a more unified set of rules that would be easier to use. To accomplish this, we proposed to move item requirements in Regulation S-B containing substantive scaled non-financial disclosure requirements into Regulation S-K by adding a new paragraph to the items of Regulation S-K that would contain separate disclosure standards for smaller reporting companies. We did not propose any major substantive changes to the items we were moving from Regulation S-B into Regulation S-K, but sought comment from the public on substantive changes they would recommend.

One of the item requirements in Regulation S-B providing scaled disclosure requirements did not have a similar disclosure item requirement in Regulation S-K. Consequently, our specific proposals included adding a new Item 310 in Regulation S-K for financial statements. Item 310 of Regulation S-K would have set forth the alternative requirements on form and content of financial statements for smaller companies that formerly appeared in Item 310 of Regulation S-B.

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[35] See note 26 above.

The proposals also allowed a smaller reporting company to choose, on an item-by-item basis or "a la carte" basis, to comply with either the scaled disclosure and financial reporting requirements made available in Regulation S-K for smaller reporting companies or the requirements for other companies in Regulation S-K, when the requirements for other companies were more rigorous.

The proposal, like the amendments we are adopting, would rescind all of our forms designated with the letters "SB." Smaller reporting companies would be eligible to file on Form S-1, rather than on Form SB-1 or SB-2 as before, to offer securities to the public. This would provide a smaller reporting company the ability to incorporate by reference its previously filed Exchange Act reports if the company meets the requirements set forth under General Instruction VII of Form S-1.[36]

Finally, the proposals, like the amendments we are adopting, would eliminate the "transitional small business issuer format" associated with Form SB-1 and annual reports on Form 10-KSB.[37] A small business issuer using the transitional format followed disclosure based on Model A or B found in Regulation A. These two disclosure models were intended to ease transition from non-reporting to reporting status for small business issuers preparing disclosure on initial registration statements and annual reports. In our

[36] General Instruction VII of Form S-1 sets forth the eligibility criteria to qualify for incorporation by reference. The registrant must be required to file reports pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 and must have filed all reports and materials during the preceding 12 months. The company must have filed an annual report for its most recently completed fiscal year. Section D of the instruction disqualifies companies that, in the past three years, were any of the following:

(a) A blank check company as defined in Rule 419(a)(2);
(b) A shell company, other than a business combination related shell company, each as defined in Rule 405; or
(c) A registrant for any offering of penny stock as defined in Rule 3a51-1 under the Exchange Act.

[37] See Proposing Release Release No. 33-8819, pp. 40-41 (July 5, 2007) [72 FR 39680].

Proposing Release we noted, however, that the number of companies registering on Form SB-1 and following the disclosure format within Form 10-KSB had significantly declined over time.[38]

We received 21 comment letters on the proposals,[39] including six from public accounting firms. We also received comment letters from professional and trade associations, a law firm, an associate professor of finance, two small business owners, and the Small Business Administration's Office of Advocacy. In general, the comment letters strongly supported our efforts to simplify our scaled disclosure requirements for smaller reporting companies and expand eligibility for them.

III. Discussion of Amendments We Are Adopting

After considering the public comments, we are adopting the amendments substantially as we proposed them, with the modifications discussed below.

A. Moving Scaled Disclosure Item Requirements from Regulation S-B into Regulation S-K

Many of the comment letters supported moving our scaled disclosure requirements from Regulation S-B into Regulation S-K.[40] In general, the comments in these letters viewed moving the requirements as having a positive impact by reducing complexity and promoting more streamlined regulation. One letter noted that combining the two disclosure systems would allow smaller reporting companies to more easily evaluate the extent of the differences between the requirements for smaller reporting companies and

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38 For example, during the past five years, the Commission has received only 56 Form SB-1 registration statements. For years 2000 through 2005, two small business issuers out of 56 filed a Form 10-KSB using the transitional disclosure format.

39 The public comments we received are available for inspection in our Public Reference Room at 100 F Street, NE, Washington, DC 20549 in File No. S7-15-07, or may be viewed at http://www.sec.gov/comments/s7-15-07/s71507.shtml.

40 See, e.g., Letter from the American Bar Association, Section of Business Law (ABA).

larger companies and consider which requirement better meets the needs of their investors.[41]

A few comment letters opposed moving the scaled disclosure requirements into Regulation S-K, indicating that having all of the smaller company rules in one place was convenient for smaller companies.[42] These comment letters expressed concern that the migration into Regulation S-K would increase legal and accounting costs for smaller companies and make the rules more complex for smaller companies to understand. A few comment letters suggested providing the scaled smaller reporting company disclosure requirements in a separate section of Regulation S-K.[43]

We are adopting our proposal to move our Regulation S-B scaled disclosure requirements into Regulation S-K. After considering the comments, we believe combining the two disclosure systems and setting out the smaller reporting company scaled item requirements in separate paragraphs within Regulation S-K is appropriate. We believe our amendments eliminate redundancies and provide a more streamlined disclosure system for smaller reporting companies. In response to the concern that moving the item requirements will create complexity for smaller companies, we are including an index of scaled disclosure requirements in the definition of smaller reporting company at the beginning of Regulation S-K[44] to highlight items of the Regulation that contain the scaled disclosure requirements specific to smaller reporting companies.

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41 See Letter from PricewaterhouseCoopers LLP.

42 See, e.g., Letters from the Chamber of Commerce and New York State Society of Certified Public Accountants (NYSSCPA).

43 See, e.g., Letter from KPMG.

44 See new Item 10(f) of Regulation S-K (Index of Scaled Disclosure Available to Smaller Reporting Companies).

Regulation S-B has 12 non-financial item requirements that provide scaled disclosure options to smaller reporting companies. Under this rulemaking, these 12 item requirements are being moved to separate paragraphs within Regulation S-K. In some cases, smaller reporting companies are not required to provide disclosures required of larger companies. For example, while larger companies are required to provide disclosure under Item 305 on quantitative and qualitative disclosures about market risk, smaller companies are not currently required to do so under the same item requirement in Regulation S-B. In cases like this, we include a paragraph in the relevant item of Regulation S-K indicating that smaller reporting companies are not required to respond to the item.

In addition to the Regulation S-B and S-K differences, the forms themselves may contain different disclosure requirements for smaller reporting companies. Currently, Forms 10-SB, 10-KSB and 10-QSB do not require risk factor disclosure from small business issuers. The amendments carry this difference in disclosure requirements over to Forms 10, 10-K and 10-Q by adding instructions indicating that smaller reporting companies are not required to provide risk factor disclosure in these Exchange Act forms.

B. Moving Smaller Reporting Company Financial Statement Requirements from Item 310 of Regulation S-B into New Article 8 of Regulation S-X; Additional Regulation S-X Changes

Several comment letters recommended moving the rules on form and content of financial statements for smaller reporting companies now in Item 310 of Regulation S-B into Regulation S-X, rather than into a new Item 310 of Regulation S-K, as proposed. Several comment letters also agreed with the Advisory Committee recommendation to require smaller reporting companies to provide two years of comparative audited balance sheet data in annual financial statements under these rules, rather than one year, as is currently required under Regulation S-B.[45] The comment letters are persuasive that we should adopt these recommendations as part of our rule amendments. Accordingly, we are moving the financial statement rules for smaller reporting companies into a new Article 8 of Regulation S-X[46] and will require two years of comparative audited balance sheet data of smaller reporting companies. Comparative balance sheets will provide a much more meaningful presentation for investors without a significant additional burden on smaller reporting companies, since the earlier year data should be readily available for the purposes of preparing the other financial statements.[47] We also are making technical and language changes to the rules on form and content of financial statements for smaller public companies to facilitate their placement in Article 8 of Regulation S-X rather than in Regulation S-B or Regulation S-K.

We also are adopting technical amendments to Rule 3-05(b)(2)(iv) of Regulation S-X that were tied conceptually to the small business issuer threshold in Regulation S-B that we are replacing with the definition of smaller reporting company in Regulation S-K. Rule 3-05 of Regulation S-X requires the inclusion of financial statements of businesses acquired or to be acquired, so-called "target companies," in registration statements and Form 8-K reports. The number of years of audited financial statements to be included for a target company is determined using the conditions specified in the definition of significant subsidiary in Rule 1-02(w) of Regulation S-X. If the net revenues reported by

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45 We had specifically asked for comments on this recommendation in the Proposing Release. See Proposing Release Release No. 33-8819, p. 26 [72 FR 39676].

46 To be codified at 17 CFR 210.8-01 – .8-08.

47 Although the earlier year data would be readily available, auditors must undertake appropriate audit procedures related to the prior fiscal year.

the target company for the latest fiscal year are less than $25 million and three years of financial statements would otherwise be required, the earliest of the three fiscal years may be omitted pursuant to Rule 3-05(b)(2)(iv) of Regulation S-X.

Several comment letters noted that in light of the $50 million in revenues threshold proposed for determining a company's qualification as a smaller reporting company if a company is unable to calculate public float, the Commission should consider revising this rule to raise to $50 million the $25 million threshold currently used to limit to two the periods required for audited financial statements of an acquired business.[48] The $25 million threshold was based on the $25 million in revenues standard in Regulation S-B that we are rescinding.[49] We are amending this standard to increase the threshold to $50 million in revenues, as suggested by the commenters.

C. Adopting Scaled Disclosure Item Requirements in Regulation S-K

1. Overview

The following is a list of item requirements we are amending in Regulation S-K to include the substance of the scaled standards for smaller reporting companies now in the same item number of Regulation S-B. The adopted amendments are substantially as described in the Proposing Release, but with the changes discussed below:

Item 101 (Description of Business). We are adding a new paragraph (h) to this item to set forth the alternative disclosure standards for smaller companies that appeared in Item 101 of Regulation S-B. Generally, the different requirements for smaller

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48 See, e.g., Letter from Center for Audit Quality (CAQ).

49 In 1996, the Commission adopted revisions to rules that streamlined requirements with respect to financial statements of significant business acquisitions in filings made under the Securities Act and the Exchange Act. The $25 million threshold limit was intended to be consistent with criteria for small business issuers. Release No. 33-7355, p. 36 (Oct. 10, 1996).

reporting companies under Item 101 involve providing a less detailed description of the company's business. For example, the Regulation S-K standard for Item 101 requires financial information about segments, which the standard for smaller reporting companies does not require.[50] In addition, smaller reporting companies will be required to provide and disclose business development activities for only three years, instead of the five-year disclosure required of larger companies by Item 101 of Regulation S-K.

We also are implementing additional minor revisions that replace the reference to Canadian issuers. Since we are making the smaller reporting company standards available to foreign issuers generally, we are requiring that these issuers provide disclosure on enforceability of civil liability against foreign persons. Previously, Item 101 of Regulation S-B had required this disclosure from Canadian issuers only because those were the only foreign issuers eligible for Regulation S-B disclosure standards. The item requirement applicable to smaller reporting companies also will no longer refer to the foreign private issuer requirement to disclose whether the report will include a reconciliation of financial information with U.S. generally accepted accounting principles, because smaller reporting companies must provide financial statements prepared in accordance with U.S. GAAP.

<u>Item 201 (Market Price of and Dividends on Registrant's Common Equity and Related Stockholder Matters)</u>. We are revising Instruction 6 to paragraph (e) of this Regulation S-K item requirement to reflect that smaller reporting companies (instead of "small business issuers") are not required to provide a performance graph.

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[50] Application of U.S. GAAP (FAS 131) may, however, require segment information in the notes to the financial statements. 17 CFR 229.101(b).

Item 301 (Selected Financial Data); Item 302 (Supplementary Financial Information). We are adding a new paragraph (c) to each item requirement, providing that smaller reporting companies are not required to present the information required by these item requirements.

Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations). As provided in new paragraph (d), this item sets forth the scaled requirements.[51] For example, under this item requirement, smaller reporting companies will:

- Provide only two years of analysis if the company is presenting only two years of financial statements, instead of the three years of analysis required of larger companies that are required to provide three years of financial statements; and
- Not be required to provide tabular disclosure of contractual obligations.

Item 305 (Quantitative and Qualitative Disclosures about Market Risk). New paragraph (e) in this item specifies that smaller reporting companies are not required to disclose Item 305 information.

Item 402 (Executive Compensation). New paragraphs (l) through (r) set forth the alternative standards for smaller reporting companies for disclosure of compensation of executives and directors that were in Item 402 of Regulation S-B.[52] Smaller reporting companies will:

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51 As discussed below, we are also adding references to two Industry Guides to this item.

52 As proposed, the scaled disclosure for this item would have been in new paragraph (l), but in order to clarify the requirements, the adopted Item restates the requirements for smaller reporting companies in several paragraphs.

- Provide executive compensation disclosure for only three named executive officers (specifically including the principal executive officer but not the principal financial officer), rather than the five required of larger companies;
- Provide the Summary Compensation Table disclosure for only two years, rather than the three years required of larger companies;
- Not be required to provide a Compensation Discussion and Analysis;
- Provide only three of the seven tables[53] required of larger companies;
- Provide alternative narrative disclosures; and
- Not be required to include footnote disclosure of the grant date fair value of equity awards in the Director Compensation Table.

Item 404 (Transactions with Related Persons, Promoters and Certain Control Persons). We are making changes to the introductory text of paragraph (c)(1), and adding paragraph (d) before the instructions to this item to change the calculation of total assets for smaller reporting companies from 1% of their total assets based on the average of total assets at year end for the last three completed fiscal years to the last two completed fiscal years. We believe this standard is more consistent with the two years of financial statements required of smaller reporting companies. Under new Item 404(d) of Regulation S-K, smaller reporting companies will:[54]

[53] These are the Summary Compensation Table, the Outstanding Equity Awards at Fiscal Year End Table, and the Director Compensation Table.

[54] See Section III.C.2, clarifying that to the extent the smaller reporting company scaled disclosure requirement is more rigorous than the same larger company item requirement, smaller reporting companies will be required to comply with the more rigorous smaller reporting company requirement.

- Not be required to disclose policies and procedures for reviewing related person transactions, which is required of larger companies;
- Be required to provide disclosure regarding a transaction where the amount exceeds the lesser of 1% of a smaller company's total assets or $120,000;
- Be required to provide additional specific information about underwriting discounts and commissions, and corporate parents; and
- Be required to provide disclosure regarding promoters and certain control persons.

Item 407 (Corporate Governance). New paragraph (g) to Item 407 of Regulation S-K specifies that smaller reporting companies are:

- Not required to provide Compensation Committee Interlock and Insider Participation disclosure or a Compensation Committee Report; and
- Not required to provide an Audit Committee Report until the first annual report after their initial registration statement is filed with the Commission and becomes effective.

Item 503 (Prospectus Summary, Risk Factors, and Ratio of Earnings to Fixed Charges). New paragraph (e) to this item specifies that smaller reporting companies need not provide the information required by paragraph (d) of Item 503 regarding the ratio of earnings to fixed charges when a registrant issues debt, or the ratio of combined fixed charges and preference dividends to earnings when a registrant issues preference equity securities. In addition, we have added instructions to the risk factor disclosure requirements set forth in Exchange Act Forms 10, 10-K and 10-Q to indicate that smaller reporting companies are not required to provide Item 503 risk factor disclosure in these filings.[55]

Item 504 (Use of Proceeds). We are revising Instruction 6 to this item to clarify that new Article 8 of Regulation S-X, rather than the other articles of Regulation S-X, will govern whether financial statements of businesses proposed to be acquired must be included in the filings of smaller reporting companies.

Item 601 (Exhibits). New paragraph (c) reflects that smaller reporting companies need not provide Exhibit 12 (Statements re Computation of Ratios).

Other Regulation S-K Items. We identified 24 item requirements in Regulation S-B that were substantially similar or identical to the same numbered item requirements in Regulation S-K. In these cases, we determined it was appropriate to require that smaller reporting companies follow the same item requirements as larger companies. In the Proposing Release, we identified Item 512 (Undertakings) as a scaled item requirement for smaller reporting companies; however, we now believe no change is needed because it is clear which undertakings may apply to a smaller reporting company's filings. We are, therefore, not including a new paragraph (m) in Regulation S-K, as proposed.

In addition, as described below, we are amending Item 102 (Description of Property) of Regulation S-K to include references to the Industry Guides[56] noted below

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55 See Section III.A above. The Securities Offering Reform final rule amendments stated that the risk factor disclosure requirement did not apply to small business issuers filing on Form 10-KSB or Form 10-SB. The amendments we are adopting carry this difference in disclosure requirements over to the Forms 10, 10-K and 10-Q for smaller reporting companies. See Securities Offering Reform Release 33-8591 (July 19, 2005) [70 FR 44722, 44786-87].

56 The Industry Guides serve as expressions of the policies and practices of the Division of Corporation Finance. They are of assistance to issuers, their counsel and others preparing registration statements and reports, as well as to the Commission's staff. The Industry Guides are

and highlighting the requirements of Item 401 (Directors, executive officers, promoters and control persons). To further maintain consistency with references to other industry guides in the disclosure item requirements, we also are adding instructions to Item 303 directing companies' attention to:

- Industry Guide 3 – Statistical disclosure by bank holding companies; and
- Industry Guide 6 – Disclosure concerning unpaid claims and claim adjustment expenses of property-casualty insurance underwriters.

The Regulation S-B item requirement on the Description of Property in Item 102 included detailed instructions specific to small business issuers engaged in: (1) significant mining operations; (2) oil and gas producing activities; and (3) real estate activities. Under Item 102 of Regulation S-B, mining companies are directed to the information called for in Industry Guide 7; oil and gas producing issuers are directed to the information called for in Industry Guide 2; and real estate companies are directed to the information called for in Industry Guide 5. Regulation S-K, however, does not include any references to these industry guides. Several commenters suggested that we revise Item 102 of Regulation S-K to include references to industry guides.[57] We agree, and are amending Item 102 of Regulation S-K to include references to the following industry guides:

- Industry Guide 2 – Disclosure of oil and gas operations;
- Industry Guide 4 – Prospectus relating to interests in oil and gas programs;

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not rules, regulations, or statements of the Commission. The Commission has neither approved nor disapproved these interpretations. See Release 33-6384 (Mar. 16, 1982).

57 See, e.g., Letters from KPMG and Grant Thornton.

- Industry Guide 5 – Preparation of registration statements relating to interests in real estate limited partnerships; and
- Industry Guide 7 – Description of property by issuers engaged or to be engaged in significant mining operations.

Item 401 of Regulation S-K (Directors, executive officers, promoters and control persons), differs from Regulation S-B in one respect. Under Regulation S-B, the disclosure pertaining to Federal bankruptcy laws or state insolvency laws related only to "any bankruptcy petition filed by or against any business of which such person was a general partner or executive officer either at the time of the bankruptcy or within two years prior to that time."[58] Under Regulation S-K, disclosure must be provided pertaining to any petitions filed under the Federal bankruptcy laws or any state insolvency laws filed by or against a director or officer of the company.[59] We believe it is appropriate to require disclosure about a personal bankruptcy petition filed by or against a director or officer of a smaller reporting company given that, in light of the generally smaller level of operations of smaller reporting companies, it may be material to an evaluation of the ability or integrity of any director or person to be nominated to become a director or executive officer of the smaller reporting company. Accordingly, smaller reporting companies now will be required to comply with the slightly different disclosure requirement of the Regulation S-K item.

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58 See Item 401(d)(1) of Regulation S-B. 17 CFR 228.401(d)(1). Under Regulation S-B, issuers provide legal proceedings disclosure about promoters and control persons for the past five years. Regulation S-K requires disclosure on legal proceedings for control persons and promoters for registrants that have not been subject to the reporting requirements for Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately before the filing of the registration statement, report or statement. 17 CFR 229.401(f) and (g).

59 See Item 401(f)(1) of Regulation S-K. 17 CFR 229.401(f)(1).

2. Electing Scaled Disclosure Standards on "A La Carte" Basis

Commenters generally supported the proposal to allow smaller reporting companies to choose compliance with either the smaller reporting company scaled disclosure requirements or the larger company disclosure requirements in Regulation S-K on an item-by-item or "a la carte" basis.[60] One comment letter expressed the view that the smaller reporting company disclosure requirements would serve as a baseline that would allow companies to provide any additional disclosure they deemed important to investors.[61] Another set of comments noted that the "a la carte" approach is already sanctioned by disclosure rules generally.[62] This letter explained that line-item disclosure requirements generally permit providing more disclosure than is required by the line items. Additionally, issuers are required to disclose all material facts that are necessary to make the statements included in the document not misleading, which may require disclosures in excess of line item requirements.[63]

Some accounting firms commenting on the a la carte approach requested that we address what one commenter referred to as the "lock-in" aspect of the proposal. In the Proposing Release, we explained that a smaller reporting company would have the option to take advantage of the smaller reporting company requirements for one, some, all or none of the item requirements, at its election, in any one filing. We proposed to require, however, that a smaller reporting company provide its financial statements on the basis of

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60 See, e.g., Letter from Independent Community Bankers of America (ICBA).

61 See Letter from Deloitte & Touche LLP (Deloitte).

62 See Letter from ABA.

63 The ABA cited the following in support of this statement: Sections 11 and 12(a)(2) of the Securities Act and Rule 408 under the Securities Act, and Rules 10b-5 and 12b-20 under the Exchange Act.

the scaled financial statement requirements or the larger company financial statement requirements for a single fiscal year, and not be permitted to switch back and forth from one to another in different filings within a single fiscal year.

One accounting firm noted that it was unclear how the a la carte approach would work if issuers were required to elect in the first quarterly report whether they would follow the scaled financial statement requirements or the larger company Regulation S-X requirements in that same fiscal year's annual report on Form 10-K.[64] According to this letter, making a determination in this manner would require a smaller reporting company that wants to preserve the option of following the smaller reporting company requirements in its annual report on Form 10-K to adhere to the smaller reporting company rules and not provide any additional information in the first quarterly report on Form 10-Q. Another accounting firm expressed the concern that a smaller reporting company might elect to provide more than the minimum disclosures only in periods when the additional disclosures tended to be favorable.[65] These comment letters agreed that the a la carte approach would work if the Commission clarified that although the smaller reporting company disclosure and financial statement requirements would appear to establish the minimum disclosure requirements, Rule 12b-20 under the Exchange Act[66] would require that a smaller reporting company provide any additional information beyond those minimum disclosure requirements, in order to avoid a misleading presentation.[67] The accounting firms suggested that we encourage smaller reporting

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64 See Letter from BDO Seidman, LLP (BDO).

65 See Letter from Ernst &Young LLP (E&Y).

66 17 CFR 240.12b-20.

67 See Letters from E&Y and CAQ.

companies to provide consistent disclosures in succeeding periods in order to respond to investor expectations and allow period-to-period comparisons.

The proposals would have required companies to make the determination whether to report financial statement disclosure on a scaled basis in the first quarter due after the fiscal year covering the determination date. After reviewing the suggestions in several comment letters, however, we believe it is appropriate to permit smaller reporting companies to choose to comply with both the non-financial and financial item requirements on an item-by-item basis when these disclosures are provided consistently and when they are consistent with the legal requirements under the federal securities laws, including Securities Act Rule 408 and Exchange Act Rule 12b-20. Additionally, we stress the importance of providing disclosure that permits investors to make period-to-period comparisons, whether quarterly or annually.

We continue to expect that our staff will evaluate item-by-item compliance by smaller reporting companies with only the Regulation S-K requirements applicable to smaller reporting companies, and not with the requirements applicable to larger companies. This will be the case even if the company whose filing is being reviewed chooses to comply with the larger company requirements. Finally, as we noted in the Proposing Release, the a la carte approach will have no effect on the legal requirements and liabilities that apply to all disclosures made by issuers.[68]

We are further clarifying that to the extent the smaller reporting company scaled item requirement is more rigorous than the same larger company item requirement, smaller reporting companies will be required to comply with the more rigorous, smaller

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68 Release No. 33-8819, n. 76 p. 33 [72 FR 39678].

reporting company item requirement. Also, we do not believe it is appropriate for a smaller reporting company to comply with a larger reporting company Regulation S-K item requirement if that requirement sets a higher threshold obviating the need for the smaller reporting company to provide disclosure. For example, unlike the larger company requirement under Item 404 of Regulation S-K, smaller reporting companies are required to disclose additional specific information about underwriting discounts and commissions and corporate parents.[69] In this case, a smaller reporting company would be required to provide the additional Item 404 disclosure.

Currently, the smaller reporting company requirements under Item 404 of Regulation S-K[70] present the only instance where the scaled requirements could be more rigorous than the larger company standard. This is because a smaller reporting company is required to provide disclosure on a related person transaction since the beginning of the company's last fiscal year if the amount involved in the transaction exceeds the lesser of $120,000 or 1% of the average of the company's total assets at year end for the last two completed fiscal years. In contrast, a larger company reporting under the same Item 404 Regulation S-K requirement is required to provide disclosure on a related person transaction since the beginning of the last fiscal year if the transaction exceeds $120,000.[71] A smaller reporting company's related person transaction may more easily exceed 1% of the average of the smaller reporting company's total assets than $120,000, as required for larger companies under the same item requirement. We believe this may

[69] See Instructions to Item 404(d) of Regulation S-K, 17 CFR 229.404(d).

[70] New Regulation S-K Item 404(d)(1) related person disclosure requirement for smaller reporting companies.

[71] 17 CFR 229.404(a).

be the case because 1% of a smaller company's total assets might be appreciably lower than $120,000.

D. Eliminating "SB" Forms Associated with Regulation S-B

While some comment letters appeared to support the elimination of the forms designated with the letters "SB" associated with Regulation S-B,[72] along with moving the smaller reporting company requirements from Regulation S-B into Regulation S-K, others questioned whether this approach would reduce compliance burdens and lower costs for smaller companies.[73] Some of the letters questioning the elimination of the SB forms recommended a two-year phase-in period to help smaller companies adjust to the transition. Some letters expressed a general perception that eliminating the SB forms would lead to increased costs for smaller reporting companies because Forms 10, 10-K, 10-Q and S-1, which would be used by smaller companies if the SB forms were eliminated, appeared to have more item disclosure requirements.[74] One commenter stated, however, that eliminating the "SB" forms would provide both time and cost savings to smaller reporting companies that will be eligible to incorporate information from their previously filed Exchange Act periodic reports into a Form S-1 registration statement.[75] None of the comment letters explained how using Forms 10, 10-K, 10-Q, and S-1 would increase costs for smaller reporting companies. One letter noted, however, that a smaller company probably would take longer to go through Form 10-K

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72 See, e.g., Letter from ABA.

73 See, e.g., Letter from Office of Advocacy of the U.S. Small Business Administration (SBA Advocacy Office).

74 See, e.g., Letter from the International Association of Small Business Broker Dealers and Advisors ("IASBDA").

75 See Letter from ABA.

and Form 10-Q to figure out exactly what applied to the company and what did not apply in terms of required disclosures.[76] In contrast, another comment letter noted that the elimination of "SB" forms would allow smaller reporting companies to incorporate information from their previously filed Exchange Act reports into a Form S-1 registration statement, which would result in time and cost savings to the smaller reporting company.[77]

Some of the comment letters apparently misperceived that the SB forms are simpler and shorter than forms larger companies use. This is not the case. The SB forms themselves are not necessarily simpler to use than the forms that larger companies use. The scaling and increased simplicity for smaller companies generally occurs in the item requirements of Regulation S-B, rather than the associated SB forms, and we are moving the item requirements into Regulation S-K with very few changes.[78]

Nevertheless, after considering the comments, we have decided not to eliminate the Exchange Act reporting SB forms immediately, but to phase them out to ease the transition for smaller companies. We considered commenters' concerns regarding current small business issuers moving to the Forms 10-K and 10-Q, and concluded that our transition schedule will provide an adequate period for these companies to continue to file reports on these forms, if they so desire.[79] Further, to help current small business issuers make the transition, the Division of Corporation Finance's Office of Small

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76 See Letter from James J. Angel, Ph.D., CFA ("Prof. James Angel").

77 See Letter from ABA.

78 Moreover, the SB forms are not necessarily substantially shorter than the comparable forms for larger companies. Form 10-SB is actually longer, at 4 ½ pages, than Form 10, which is less than 4 full pages long; Form 10-KSB is 11 pages long, while Form 10-K is 12; Form SB-2 is 5 pages long, while Form S-1 is just over 6 pages, not including instructions on summary prospectuses.

79 See Section IV below on compliance dates.

Business Policy plans to provide an informational brochure to assist their transition to the new smaller reporting company form requirements.

E. Qualifying Standards for Treatment as "Smaller Reporting Company"

Many of the comment letters in favor of our proposed definition of "smaller reporting company" agreed that combining the categories of non-accelerated filers with small business issuers for purposes of the definition provided a convenient and simple approach because it tracks the accelerated filer definition and reduces regulatory complexity.[80] In the Proposing Release, we reasoned that requiring only a public float test for most companies to qualify would provide additional simplicity, consistency and certainty. Eliminating a revenue test also would broaden the category of eligible companies. Our decision to focus on a company's non-affiliate common equity market capitalization or "public float" was also consistent with the Commission's current regulatory standards for purposes of Form 10-K, Form S-3, and the accelerated filer definition. Setting the public float ceiling at $75 million for smaller reporting companies further aligns the smaller reporting company definition with the non-accelerated filer definition.

The Advisory Committee recommended that we require companies to determine eligibility based on total equity market capitalization rather than public float. Although the Advisory Committee acknowledged that the Commission has historically and consistently used public float as a measurement in analogous regulatory contexts, it stated that equity market capitalization would better measure total financial exposure to

80 See, e.g., Letters from PricewaterhouseCoopers and E&Y.

investors.[81] The Advisory Committee recommended extending the Commission's non-financial scaled disclosure requirements, covering disclosure and reporting, to companies in the lowest 1% of market capitalization. Some of the comment letters we received on the Proposing Release agreed with the Advisory Committee equity market capitalization preference, stating that it was simpler and more widely understood than the calculation of public float. The majority of comment letters supported our proposals to require a public float standard only, agreeing we should require a revenue test only if a company is unable to calculate public float.

Several comment letters opposed increasing the public float ceiling to a level higher than $75 million.[82] One comment letter explained that because smaller companies typically do not have a large analyst following, financial information provided by the company takes on greater importance in communicating results to investors.[83] Another letter noted that to balance protecting investors and promoting capital formation by small businesses, "reduced" disclosures should be limited to those public companies with relatively limited and less complex operations.[84] Most comment letters, however, supported a higher public float ceiling than $75 million.[85] Some of these comment letters argued that many companies with a public float greater than $75 million are still quite small. Several commenters suggested that the Commission provide scaled regulation to

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81 Advisory Committee Final Report 19.

82 See Letters from PricewaterhouseCoopers and E & Y.

83 See Letter from PricewaterhouseCoopers.

84 See Letter from E&Y.

85 See, e.g., Letters from SBA Advocacy Office and ABA.

companies with up to $787 million in equity market capitalization, as they seemed to believe the Advisory Committee had recommended.[86]

We are adopting, as proposed, a definition for "smaller reporting companies" that requires companies to have a public float of less than $75 million. We believe this standard is appropriately scaled in that it reduces costs to smaller companies caused by unnecessary information requirements, consistent with investor protection.

As adopted, the definition will make eligibility for smaller reporting company status contingent solely on public float for most companies. Alternatively, for companies that are unable to calculate public float, we are, as proposed, providing a revenue test. If a company has no common equity outstanding or no market price for its outstanding common equity exists at the time of its eligibility determination, the company would qualify as a smaller reporting company if it had less than $50 million in revenues in the last fiscal year. This is a departure from the dual eligibility test under the Regulation S-B system, which required separate calculations under public float and annual revenues. By eliminating the revenue test for most companies, the new definition of smaller reporting company simplifies and streamlines the definition while expanding the number of companies eligible to qualify.

86 The Advisory Committee recommended extending the Commission's scaled disclosure regime to the lowest 6% of total U.S. equity market capitalization, which would have included companies with less than $787 million in market capitalization as of March 31 and June 10, 2005. But the Advisory Committee only identified the rules on form and content of financial statements in Item 310 of Regulation S-B as appropriate for application to that category of companies. The Advisory Committee recommended extending the Commission's other scaled disclosure rules, covering disclosure and reporting, to companies in the lowest 1% of market capitalization, which, as explained in the Proposing Release at page 16 [72 FR 39673], is essentially the same group and proposal contained in the Proposing Release—reporting companies with less than $75 million in public equity float—which we are adopting with few changes today. As calculated from data obtained from Thomson Financial (Datastream), the overlap between reporting companies with $128 million in market capitalization and reporting companies with $75 million in public float is approximately 98%.

As adopted, Item 10(f) of Regulation S-K will set forth the definition for "smaller reporting company." We are further streamlining the definition and clarifying technical inconsistencies in the Proposing Release. We are also modifying the proposed introduction of Item 10, which indicated that smaller reporting companies would be permitted to choose to comply with either the requirements applicable to smaller reporting companies or the requirements applicable to other companies. Companies may make a choice on most of the scaled disclosure item requirements, unless the requirements for smaller reporting companies specify that smaller reporting companies must comply with the smaller reporting company requirements.[87] If the item requirement does not require specific compliance, then the smaller reporting company will be permitted to choose scaled or standard disclosure requirements.

1. Eligibility and Exclusions

Currently, under Item 10 of Regulation S-B, small business issuer eligibility is limited to U.S. and Canadian issuers. This has been the case since 1992, when we adopted Regulation S-B and its associated forms and maintained eligibility for small business issuer status for Canadian companies because these companies had been able to use the Form SB-2 precursor, Form S-18. As adopted, we are expanding eligibility for smaller reporting company status to non-U.S. companies using domestic company forms. Foreign companies will qualify as smaller reporting companies if they are eligible to file on a form that permits disclosure based on the standards for smaller reporting companies, such as Forms S-1, S-3, S-4, 10-Q, and 10-K. Companies filing on forms available only

[87] See the discussion of Item 404 at the end of Part III.C.2.

to "foreign private issuers," such as Forms F-1, F-3, F-4, and 20-F, will be ineligible for the smaller reporting company scaled disclosure requirements.

Several commenters objected to the proposal requiring that Canadian and other foreign private issuers provide financial statements prepared according to U.S. GAAP if they want to use the scaled rules available to smaller reporting companies, which they may use only if they file on a form available to U.S. domestic companies. Generally, these comment letters stated that the proposals would eliminate an accommodation already enjoyed by Canadian companies filing on Form SB-2. Currently, Canadian companies are permitted to provide Canadian GAAP financial statements that are reconciled to U.S. GAAP on domestic forms. Some of the comment letters urged that we consider allowing all foreign private issuers to provide their own country's GAAP with U.S. GAAP reconciliation.

To the extent that a foreign company qualifies as a smaller reporting company, it may make filings with us on forms available to domestic U.S. companies if it presents financial statements pursuant to U.S. GAAP. We continue to believe that because we are extending eligibility for scaled disclosure on domestic forms to all foreign issuers, it is important to require that this significantly larger group of foreign filers provide financial data in accordance with U.S. GAAP on domestic forms at this time. Other than in limited situations, foreign filers using domestic forms are required to prepare their financial statements in accordance with U.S. GAAP. Unlike our filing forms that are specifically designed for foreign private issuers that permit the use of financial statements prepared in accordance with bases of accounting other than U.S. GAAP so long as U.S. GAAP reconciling information is presented, the disclosure and other requirements under our domestic filing forms do not contemplate the use of accounting principles other than U.S. GAAP. We believe eligible foreign registrants that choose to avail themselves of the option to provide scaled disclosure should comply fully with the scaled disclosure and financial statement presentation requirements applicable to domestic issuers.[88] Finally, the regulatory scheme for foreign private issuers on the "F" forms is specifically tailored to address their special circumstances, and we believe the scheme provides the accommodations most useful to these companies.

We will continue to exclude investment companies, including business development companies, and asset-backed issuers from eligibility for scaled treatment under our rules for smaller reporting companies. We requested comment on these exclusions and received none.

2. Determination Dates

The smaller reporting company determination dates we are adopting today are based on three categories of companies: reporting companies with a public float, non-reporting companies filing a registration statement, probably an initial registration statement, under either the Securities Act or the Exchange Act, and reporting or non-reporting companies without a public float.[89] We are amending the definition of smaller reporting company to remove the reference to an issuer having "no significant public common equity outstanding," based on a commenter's belief that it was confusing. Instead, the definition will indicate that in the case of an issuer whose public float as

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88 We have published a concept release on whether U.S. companies should be permitted to use International Financial Reporting Standards as published by the International Accounting Standards Board in their filings with the Commission. If we proceed with proposed rules in this area, we may consider the impact of any proposal on filers that use scaled disclosure. See Release No. 33-8831 (Aug. 7, 2007) [72 FR 45600].

89 See new Item 10(f) of Regulation S-K.

calculated under the definition was zero, most likely because the issuer had no public common equity outstanding or no market price for its common equity existed, the issuer must have had annual revenues of less than $50 million in its last fiscal year.

In the case of a reporting company, we are requiring the same public float calculation currently used to determine accelerated filer status, $75 million in public float computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity in the principal market for the common equity.

a. Reporting Companies

To determine smaller reporting company eligibility, reporting companies will follow the accelerated filer determination date in Rule 12b-2 under the Exchange Act — the last business day of a company's second fiscal quarter.[90] We believe this approach simplifies regulation and promotes consistency and uniformity with current Commission rules. The public float of a reporting company will be calculated by using the price at which the shares of its common equity were last sold or the average of the bid and asked prices of such shares in the principal market for the shares as of the last business day of the company's second fiscal quarter, multiplied by the number of outstanding shares held by non-affiliates. We are adopting, as proposed, a rule providing that if a reporting company determines it qualifies as a larger reporting company rather than a smaller reporting company on the last day of its second fiscal quarter, it will be required to comply with the larger company disclosure standards when it files its first quarterly

[90] New Item 10(f)(2)(i) of Regulation S-K explains how the determination dates work for companies already filing reports under the Exchange Act.

report in the fiscal year following the fiscal year of the determination date. We are permitting larger reporting companies, however, to opt for the scaled disclosure requirements beginning with the Form 10-Q covering the second fiscal quarter corresponding to the measurement date establishing eligibility as a smaller reporting company.[91]

b. Non-Reporting Companies Filing an Initial Registration Statement

Companies determining eligibility in connection with the filing of their initial registration statement with the Commission will have to choose a date within 30 days of filing to determine eligibility.[92] Under Regulation S-B, we had required companies to choose a public float calculation during a 60-day window before the filing. We believe requiring a 30-day window will lead to more accuracy and less uncertainty for filers, Commission staff, and investors.

The calculation methodology we are adopting for non-reporting companies varies slightly from the Regulation S-B standard we are rescinding. The Regulation S-K standards will require computing public float based on three components:

- Estimated offering price per share at the time of filing the registration statement;
- Number of shares of common stock outstanding that are held by non-affiliates before the offering; and

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91 See Section III.E.2.d below, explaining how a company enters and exits the smaller reporting company disclosure status.

92 See new Item 10(f)(1)(ii) of Regulation S-K

- Number of shares of common stock to be sold at the estimated offering price.

As adopted, the rule will require that non-reporting companies base the calculation on the estimated number of registered shares for offering to the public. For example, as we illustrated in the Proposing Release, a company that registers 7,000,000 shares in its initial public offering will be required to add that number to the total number of shares held by non-affiliates before the offering. If a company has 25,000,000 shares of common stock outstanding held by non-affiliates before the offering, it would add the 7,000,000 and 25,000,000 shares of common stock. The result would mean that the 32,000,000 shares of common stock outstanding would be multiplied by the estimated offering price per share in the initial public offering.

One commenter raised questions regarding the proposed method of calculation.[93] This commenter noted that the estimated public offering price and the number of shares being offered tends to change during the time between the initial filing of the registration statement and the final prospectus. The uncertainty raised by the final estimated public offering price and number of shares being offered caused the commenter to question whether an issuer would be required to switch midway through the process from using smaller reporting company disclosure standards to using more extensive regular disclosure standards. Conversely, this commenter noted that if the price range and/or the number of shares being offered decreased, the issuer will have satisfied a more extensive disclosure standard than it turns out it was required to satisfy.

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[93] See Letter from ABA.

We considered these comments, and believe it is appropriate to provide initial public offering registrants the option to recalculate their public float at the time the company completes the initial public offering. Our intention in providing this flexibility is to permit (but not require) these issuers to recalculate their eligibility based on the results of the initial public offering for purposes of filing the next periodic report. For example, if an issuer files an initial public offering registration statement under the Securities Act based on the larger company Regulation S-K item requirements but then determines after the close of the initial public offering that its public float is below $75 million, then this issuer would be a smaller reporting company and would be eligible to provide scaled disclosure in the first periodic report due after the initial public offering registration statement was declared effective.[94]

To address the commenter's concern that a smaller reporting company would be required to transition its disclosure to the larger company requirements if its public float rose above $75 million during the pre-effective stage of the filing, we are clarifying that this would not be the case if the issuer made a bona fide eligibility determination at the time it filed the initial public offering registration statement. The issuer will continue to be a smaller reporting company until its next annual determination date – the end of its second fiscal quarter.

With regard to a company's initial registration statement under the Exchange Act covering a class of securities, the company would calculate its public float as of a date within a 30-day window of the registration statement being filed. Because such an Exchange Act registration statement would not directly affect the issuer's public float, if

94 See new Item 10(f)(2)(ii) of Regulation S-K.

an issuer that files such an Exchange Act registration statement does not have a public float or its public float cannot be calculated because there is no market price for the issuer's equity securities, the issuer's eligibility for the scaled disclosure would be based on its revenue, as proposed.[95]

c. Alternative Revenue Test for Reporting and Non-Reporting Companies

As we stated in the Proposing Release, situations may arise in which a reporting company would be unable to calculate public float because it has no public common equity outstanding or no market price for its common equity exists. As adopted, the definition provides a third eligibility category to qualify for smaller reporting company status – companies unable to calculate a public float. To qualify as smaller reporting companies, this group of companies will be required to have annual revenues of less than $50 million during the last fiscal year before filing the registration statement.[96]

d. Entering and Exiting Smaller Reporting Company Status

The rules we are adopting on entering and exiting smaller reporting company status in Item 10 of Regulation S-K are less restrictive than the Regulation S-B requirements of Item 10. Item 10 of Regulation S-B currently requires issuers to calculate eligibility based on public float and revenue levels for two consecutive fiscal years. The Regulation S-B system had a significantly longer transition period to enter or exit the smaller company disclosure system.

We are adopting transition rules for entering and exiting smaller reporting company status that track the accelerated filer definition. The Proposing Release suggested that the

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95 See new Item 10(f)(1)(iii) of Regulation S-K.

96 Id.

accelerated filer transition rules were the same as the smaller reporting company transition requirements to move back and forth from larger company disclosure standards to smaller reporting company standards. One comment letter requested clarification, pointing out that accelerated filers are required to change to their new status when determining the due date of the annual report covering the year of the status change, but, as proposed, the smaller reporting company determination would not take effect until the first fiscal quarter of the next fiscal year.

As adopted, the rules provide that a larger reporting company that determines it is a smaller reporting company as of the last business day of its most recently completed second fiscal quarter is permitted to transition to the scaled disclosure requirements in the Form 10-Q quarterly report corresponding to the determination date's second fiscal quarter rather than, as proposed, the following fiscal year's first quarterly report. A smaller reporting company required to transition to the larger reporting system after its determination date calculation will not be required to satisfy the larger reporting company disclosure requirements until the first quarter after the determination date fiscal year.[97]

To illustrate, a larger reporting company with a fiscal year end of December 31, 2008 that qualified as a smaller reporting company on the last business day of its most recently completed second fiscal quarter in 2008 would be able to provide scaled disclosure beginning with the Form 10-Q for the same second fiscal quarter in which the company determined its eligibility, which would be due in August 2008. Conversely, a smaller reporting company with a fiscal year end of December 31, 2008 that is required to transition out of the scaled disclosure system into the larger company disclosure

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[97] See new Item 10(f)(2)(i) of Regulation S-K.

system will be required to do so beginning with the Form 10-Q for the first fiscal quarter of 2009, which would be due in May 2009.

As adopted, once an issuer fails to qualify for smaller company status, it will remain unqualified unless it determines that its public float, as calculated in accordance with the definition, was less than $50 million as of the last business day of its second fiscal quarter. Where an issuer does not have a public float or no public market for its common equity securities exists and it has less than $50 million in revenue, it will qualify to use the scaled disclosure item requirements until it exceeds $50 million in annual revenue. Once such an issuer fails to qualify as a smaller reporting company because its revenues exceed $50 million, that issuer will not become eligible for smaller reporting company status until it has annual revenues of less than $40 million in its last fiscal year.[98]

F. Miscellaneous[99]

1. Indexing for Inflation

Many comment letters favored the inflation adjustments to the public float levels and revenue ceilings in the definition of smaller reporting company, but noted that the accelerated filer definition also should be indexed in order to keep these two categories aligned. We are not adopting the indexing proposal, but will consider whether these suggestions should be the subject of a future rulemaking project to collectively index several thresholds in current Commission rules.

2. Eliminating Transitional Small Business Issuer Format

98 See new Item 10(f)(2)(iii) of Regulation S-K. 17 CFR 229.10(f)(2).

99 In addition to the matters discussed in this release, we are amending a number of rules to eliminate references to Regulation S-B and the SB forms and to make other technical changes, such as providing the Commission's current mailing address.

We are eliminating the transitional small business issuer format, as proposed. No commenters objected to this proposal.

3. Checking the "Smaller Reporting Company" Box

A company that qualifies as a smaller reporting company based on the appropriate eligibility test under the definition will be required to check the "smaller reporting company" box on the registration statement or periodic report filed, whether or not it chooses to rely on the scaled disclosure standards of the amended Regulation S-K requirements. Several comment letters supported this proposal.[100]

IV. Compliance Dates

Transition for Current Small Business Issuers. We are providing current small business issuers the option to file their next annual report for a fiscal year ending on or after December 15, 2007 on either Form 10-KSB or Form 10-K. A small business issuer may continue to file its periodic reports using Regulation S-B and the "SB" forms until its next annual report is filed. After a small business issuer files that next annual report, subsequent periodic reports must be filed on a form that does not have the "SB" designation. This will provide an optional transition period for companies that were small business issuers as of the effective date.

As a result of this transition period, Regulation S-B, Form 10-QSB, and Form 10-KSB need to be maintained while eligible small business issuers may continue to use them. Accordingly, while most of the amendments are effective on [Insert 30 days after publication in the Federal Register], Form 10-QSB will not be removed until October 31, 2008 and Regulation S-B and Form 10-KSB will not be removed until March 15, 2009.

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100 See, e.g., Letters from CAQ and ABA.

We are making numerous changes to rules and forms to implement these rule amendments, including replacing references to small business issuers with references to smaller reporting companies. During the optional transition period, small business issuers have the same reporting obligations as they had before these rule amendments, except to the extent that they voluntarily move to the new smaller reporting company system before being required to do so.

The "SB" Securities Act and Exchange Act registration statement forms, SB-1, SB-2, and 10-SB, will be rescinded on the effective date. Companies filing a registration statement after this date will be required to file on the appropriate form without an "SB" designation. If a registration statement was filed on an "SB" form before the effective date, and the company seeks to amend it after the effective date, the company must file the amendment on a correct form without an "SB" designation, but may continue to use the disclosure format and content based on the "SB" form until six months after the effective date.[101]

General Transition Provisions. Companies that qualify as smaller reporting companies after the effective date, whether or not they currently are small business issuers, will have the option to comply with the scaled disclosure item requirements for smaller reporting companies in their registration statements and periodic reports filed after the effective date. To determine their status after the effective date, reporting companies will refer to their most recent second fiscal quarter to calculate public float. In these cases, reporting companies have already calculated public float for purposes of

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[101] For example, a company that filed on Form SB-2 before the effective date would be required to file any pre- or post- effective amendments on Form S-1, but would be able to maintain the item requirement format of its Form SB-2 for up to six months after the effective date.

determining accelerated filer status and, therefore, no additional computation is necessary. Current small business issuers will be deemed to qualify as smaller reporting companies and need not make this calculation. Companies that recently became reporting companies before the effective date, but have not yet had a completed second fiscal quarter, will base eligibility on the public float calculated after the initial public offering. In all cases, companies that qualify for smaller reporting company status will continue to have this status until they make their annual determination at the end of the second fiscal quarter.

V. Paperwork Reduction Act

A. Background

The amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[102] As discussed in the Proposing Release, we submitted a request for approval of the "collection of information" requirements contained in the proposed amendments to the Office of Management and Budget in accordance with the PRA.[103] Some of the revisions that we are making to the original proposal affect these collections of information, but the revisions do not affect the burden estimates that we submitted to the OMB in connection with the Proposing Release. The titles of the collections of information are:[104]

(1) "Regulation S-B" (OMB Control No. 3235-0417);

(2) "Regulation S-K" (OMB Control No. 3235-0071);

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[102] 44 U.S.C. 3501 et seq.

[103] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[104] The paperwork burden from Regulation S-K and S-B is imposed through the forms that are subject to the requirements in those regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulations S-K and S-B.

(3) “Regulation C” (OMB Control No. 3235-0074);

(4) “Form SB-1” (OMB Control No. 3235-0423);

(5) “Form SB-2” (OMB Control No. 3235-0418);

(6) “Form S-1” (OMB Control No. 3235-0065);

(7) “Form S-3” (OMB Control No. 3235-0073);

(8) “Form S-4” (OMB Control No. 3235-0324);

(9) “Form S-8” (OMB Control No. 3235-0066);

(10) “Form S-11” (OMB Control No. 3235-0067);

(11) “Form 1-A” (OMB Control No. 3235-0286);

(12) “Form 10” (OMB Control No. 3235-0064);

(13) “Form 10-SB” (OMB Control No. 3235-0419);

(14) “Form 10-K” (OMB Control No. 3235-0063);

(15) “Form 10-KSB” (OMB Control No. 3235-0420);

(16) “Form 8-K” (OMB Control No. 3235-0060);

(17) “Form 8-A” (OMB Control No. 3235-0056);

(18) “Form 10-Q” (OMB Control No. 3235-0070);

(19) “Form 10-QSB” (OMB Control No. 3235-0416);

(20) “Form 11-K” (OMB Control No. 3235-0082); and

(21) “Form SE” (OMB Control No. 3235-0327).

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 hours and costs associated with preparing disclosure, filing information required by forms, and retaining records constitute reporting and cost burdens imposed by collection of information requirements. The information collections related to annual, periodic, and current reports and registration statements will be mandatory for larger reporting companies; some of the requirements, however, will be voluntary for smaller reporting companies. There is no mandatory retention period for the information disclosed, and the information disclosed will be made publicly available on the Commission's EDGAR filing system or in the Commission's public reference room in the case of a Form 1-A or Form SE filing.

For purposes of the Paperwork Reduction Act, as adopted, the burden changes are insignificant for companies that currently meet the small business issuer definition. We did not receive any comment letters providing data or other information concerning legal or accounting costs that would cause us to change our view.

We adopted existing Regulation S-B to provide an integrated disclosure system for small business issuers and Regulation S-K to provide an integrated disclosure system for larger reporting companies. Forms SB-1, SB-2, S-1, S-3, S-4, S-8, and S-11 are registration statements that are prepared by eligible issuers to provide investors with the information they need to make informed investment decisions in registered offerings. Form 1-A is the form required when a non-reporting company seeks to use the Regulation A exemption from the Securities Act. Regulation A is a conditional small issues exemption available to eligible issuers. Forms 10, 10-SB, 10-K, 10-KSB, 8-K, 8-A, 10-Q, 10-QSB, and 11-K are forms that set forth disclosure requirements for companies filing reports with the Commission pursuant to the Exchange Act. Finally, Form SE is a notice to the Commission by an EDGAR electronic filer that it is filing paper format exhibits.

Consistent with the information that we previously submitted to the OMB we estimate that the total increase in burden hours for Form 10-K, Form 10-Q, Form 10, Form S-1, and Form S-11 will be 7,857,948 and that the total increase in cost will be \$1,114,044,563. These increases are offset by the total decrease in burden hours for Form 10-KSB, Form 10-QSB, Form 10-SB, Form SB-1, and Form SB-2 of 7,853,542.5 burden hours and a total decrease in cost of \$1,108,787,363. The net difference between the increase and decrease is an increase of 4,405.5 burden hours and a cost of \$5,257,200.[105] The net increase of 4,405.5 burden hours and costs of \$5,257,200 is outweighed by the possible decrease of 356,290 burden hours and costs of \$47,479,000 for the 1,581 newly eligible smaller reporting companies.

The table below sets forth our current hourly and cost burden estimates for Forms 10-K, 10-Q, 10, S-1, and S-11 after these amendments.[106]

Form	Burden Hours	Annual Costs
10-K	23,430,170	$3,124,022,763
10-Q	4,583,290	$513,829,600
10	11,725	$14,070,000
S-1	167,912	$201,493,800
S-11	37,069	$44,484,000

105 As explained in the Proposing Release, the net difference arises primarily from the increased burden on real estate companies that previously could use Form SB-2, but under these amendments would now be required to use Form S-11, the form tailored to issuers in the real estate industry.

106 Collection affected by the rulemaking, but not included in the table, were either rescinded or their estimated burden was not changed.

B. Summary of Comment Letters and Revisions to the Proposals

We requested comment on the Paperwork Reduction Act analysis contained in the Proposing Release. One commenter[107] stated that the substitution of the Regulation S-K disclosure framework would only be beneficial to small issuers if there were no increase in legal and accounting costs. The commenter noted that the Commission does not guarantee that moving the current Regulation S-B disclosure requirements into Regulation S-K will be more cost effective. The commenter also disagreed with the Commission's average costs estimates, stating that costs vary between New York City and smaller communities throughout the country. Several other commenters[108] raised similar concerns that costs may increase as a result of these proposals. None of these commenters, however, provided any data or other information to show that legal and accounting costs will increase.

Our estimates of the average number of hours each entity spends completing the affected forms, allocation of burden between outside counsel and internal personnel, and the average hourly rate for outside securities counsel were obtained by contacting a number of law firms and other persons regularly involved in completing the forms and reflect regional variances.

Commenters who raise a concern about the transition from Regulation S-B and the "SB" forms to Regulation S-K and the "SK" forms wanted us to consider a phase-in period. The amendments, as adopted, will allow a former "SB" filer a choice to file its

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107 See Letter from the IASBDA.

108 See Letters from SBA Office of Advocacy, Center for Capital Markets (U.S. Chamber of Commerce), and Prof. James Angel.

first annual report on Form 10-K or Form 10-KSB during the transition period, but thereafter it will no longer be able to use the "SB" forms. For example, after the effective date of these amendments, an eligible calendar year company will be able to choose to file its first annual report on Form 10-K or Form 10-KSB. An eligible non-calendar company may file its quarterly reports on Form 10-Q or Form 10-QSB until its next annual report due after the effective date of the amendments. That next annual report may be filed on Form 10-K or Form 10-KSB, but thereafter the company may no longer use the "SB" forms.

We also received comment letters[109] expressing concern that legal and accounting costs will increase as a result of the proposals. We do not believe that legal or accounting costs should increase since, small business issuers generally will be providing the same disclosure as currently filed. In the case of a newly eligible smaller reporting company that previously filed under Regulation S-K using "SK" forms, the disclosure burden will decrease if the company elects to use the scaled disclosure available to smaller reporting companies. Otherwise the issuer may also file roughly the same information as it does currently. The Commission is providing an index to the scaled disclosure requirements in new Item 10(f) of Regulation S-K and plans to publish a brochure to assist smaller reporting companies in transitioning to the new scaled disclosure requirements.

In response to these comments, we decided to revise four items that were part of the original proposal.

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109 See Letters from IASBDA, SBA Office of Advocacy, Center for Capital Markets (U.S. Chamber of Commerce), and Prof. James Angel.

First, we are persuaded by the letters of the public accounting firms[110] that Item 310 should be placed in a separate section within Regulation S-X, instead of creating a new Item 310 within Regulation S-K. We agree that having all financial information requirements within one Regulation seems logical and appropriate.

Second, several commenters[111] cite the Advisory Committee's recommendation to require two years of balance sheets to go along with audited statements of income, cash flows, and changes in stockholders' equity for each of the latest two fiscal years, as required by Regulation S-X. We have been convinced by the comment letters and the Advisory Committee's report that two years of balance sheets will provide investors with valuable comparative information with minimal additional costs.

A third revision will allow a smaller reporting company to provide its financial statements on an "a la carte" basis like the other non-financial statement disclosure items. This revision differs from the Proposing Release, where the Commission proposed to require a smaller reporting company to provide its financial statements on the basis of Item 310 of Regulation S-K or Regulation S-X for an entire fiscal year, and not be permitted to switch back and forth from one to the other in different filings within a single fiscal year. A commenter[112] pointed out that this inflexibility within the "a la carte" system and requiring a smaller reporting company to "lock in" to one approach or the other when it files its first Form 10-Q for a year seems contrary to the proposed "a la carte" approach. As we proposed, if a smaller reporting company wanted to preserve the

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110 See Letters from Grant Thornton, BDO, KPMG, PricewaterhouseCoopers LLP, and CAQ.

111 See Letters from Grant Thornton, BDO, PricewaterhouseCoopers, and CAQ.

112 See Letter from BDO.

option of following the smaller reporting company rules in its filings, it perhaps could not provide the additional information required of larger companies in its first quarterly report or risk losing the ability to use the scaled disclosure requirements for the year. As adopted, we will allow "a la carte" disclosure for financial statements so that smaller reporting companies can provide additional information over and above the financial disclosure required by Article 8 of Regulation S-X.

The fourth revision requested by commenters[113] is to amend Rule 3-05 of Regulation S-X. Rule 3-05 provides the requirements for Financial Statements of Businesses Acquired or to be Acquired, and paragraph (b)(2)(iv) allows issuers to omit the financial statements for the earliest of three fiscal years required if the net revenues of the business to be acquired are less than $25 million. We agree with the commenters that the $25 million ceiling was related to the small business issuer definition, and since we are creating a new definition of smaller reporting company to replace the small business issuer definition that contains a $50 million revenue ceiling, it is appropriate to raise the Rule 3-05 ceiling to $50 million.

For purposes of the Paperwork Reduction Act, as adopted, the burden changes are insignificant for companies that currently meet the small business issuer definition. We did not receive any comment letters providing data or other information concerning legal or accounting costs that would cause us to change our view.

VI. Cost-Benefit Analysis

A. Background

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[113] See Letters from Grant Thornton, KPMG, and CAQ.

We have adopted amendments to eliminate our "SB" forms and move the Regulation S-B item requirements into amended Regulations S-K and S-X. The amendments will amend all relevant rules and forms under the Securities Act, the Exchange Act, and the Trust Indenture Act to replace the existing references to "small business issuer" to reference to "smaller reporting company." The new "smaller reporting company" definition will replace the current "small business issuer" eligibility standards to allow a greater number of public companies to provide disclosure based on the scaled disclosure requirements. The new definition for smaller reporting company will include companies with a public float of less than $75 million and will therefore be a significant increase from the $25 million levels for public float and revenue under the current "small business issuer" definition. For companies without a public float, we are requiring an alternative ceiling of below $50 million in revenue in the previous year.

B. Summary of Rules

As noted above, the amendments will eliminate the separate disclosure framework of Regulation S-B by moving those requirements into Regulation S-K and the financial disclosure into Regulation S-X. The new definition for "smaller reporting company" will expand the number of filers that will qualify to provide disclosure under the scaled item requirements of the current Regulation S-B framework. Smaller reporting companies and non-accelerated filers will both be subject to Regulation S-K, but smaller reporting companies will have the option to provide disclosure on an item-by-item basis according to the scaled item requirements of amended Regulation S-K. The newly adopted amendments will allow eligible smaller reporting companies to do the following:

- Provide three years rather than five years of business development activities, and not be required to provide segment disclosure under amended Item 101 of Regulation S-K;
- Not provide disclosure required by Items 301 and 302 relating to selected financial data and supplementary financial information;
- Provide more streamlined disclosure for management's discussion and analysis of financial condition and results of operations found in Item 303 by requiring only two years of analysis if the company is presenting only two years of financial statements, instead of three years currently required of larger companies;
- Provide audited balance sheets, audited statements of income, cash flows and changes in stockholders' equity for each of the last two fiscal years in new Article 8 of Regulation S-X instead of an audited balance sheet as of the end of the last two fiscal years and audited statement of income, cash flows and changes in stockholders' equity for each of the last three fiscal years as required by other parts of Regulation S-X;
- Provide disclosure about the chief executive officer and two other highly compensated executive officers only, rather than the information for the Chief Executive Officer, Chief Financial Officer and three other executive officers required of larger registrants;
- Not provide a Compensation Discussion and Analysis required of larger reporting companies;

- Provide only three of the seven tables (Summary Compensation, Outstanding Equity Awards, and Director Compensation) required of larger reporting companies; and
- Not provide disclosure regarding the company's policies and procedures for approving related person transactions. Smaller reporting companies will be required, however, to provide disclosure regarding a transaction where the amount exceeds the lesser of 1% of a smaller company's total assets or $120,000. They also will be required to provide additional specific information about underwriting discounts and commissions and corporate parents. Additionally, smaller reporting companies will be required to provide disclosure regarding promoters and certain control persons.

C. Benefits

As discussed above, the amendments adopted today will promote regulatory simplification by eliminating all "SB" forms and consolidating the Regulation S-B disclosure item requirements into Regulation S-K. The integrated Regulation S-K regime will enable a larger category of public companies to have more flexibility in tailoring disclosure standards to fit the need of investors and the realities of their company. We believe investors will benefit from the scaled disclosure amendments to Regulation S-K because the amendments allow issuers to make disclosure based on the size, business operations, and financial condition of the smaller reporting company. Allowing smaller reporting companies to choose scaled disclosure on an item-by-item basis allows companies to tailor their disclosure to reduce costs and thereby benefit shareholders. The increased public float standards in the definition of smaller reporting company will allow more companies the flexibility to choose between scaled item requirements such as financial statement information and executive compensation disclosure. By doing so, these newly eligible companies can appropriately determine the information needs of their investors in light of the costs of providing that information. Thus, moving the scaled disclosure requirements of Regulation S-B into Regulations S-K and S-X will provide regulatory flexibility that gives companies the ability to allocate resources to increased disclosure only in instances where they believe doing so would provide a benefit to shareholders.

Eliminating the "SB" forms will mitigate any perceived notion that smaller companies are currently reporting under a completely different and inferior disclosure framework. If current Regulation S-B filers are inappropriately penalized by the market for this perceived notion, as some commenters have suggested, then integrating Regulation S-B and Regulation S-K should benefit shareholders by decreasing the company's cost of capital. To the extent that these amendments, eliminate the perceived notion of an inferior disclosure framework, we believe that these amendments will increase the benefits and in some instances, reduce the costs of being a public company and will benefit the capital markets by encouraging private companies to consider offerings that are registered under the Securities Act or to enter the Exchange Act reporting system.

As amended, an integrated disclosure system for all companies filing forms using Regulation S-K will promote efficiency because practitioners and investors will refer to one disclosure framework. Filers and their practitioners will have one consolidated regulation to find all relevant disclosure item requirements, which will reduce complexity and improve regulatory efficiencies. Although some commenters[114] were concerned that finding the scaled disclosure provisions in Regulation S-K would be inefficient, the index of scaled disclosure in new Item 10(f) should mitigate this concern. For some smaller reporting companies, legal and accounting costs may decrease.

As discussed earlier in this release, we estimate that approximately 1,581 new companies will have an opportunity to use the restructured scaled disclosure requirements for smaller reporting companies and may experience significant burden and cost savings if they use them.[115] We assume that approximately 50% of the 1,581 companies (or 790 companies) will use the scaled disclosure requirements. For purposes of the Paperwork Reduction Act, we estimate that these 790 smaller reporting companies may save 356,290 internal burden hours and costs in the amount of $47,479,000 by using the scaled disclosure requirements.[116]

Finally, another benefit to smaller reporting companies is that by using Registration Statement Form S-1, a company may be permitted to incorporate by reference its previously filed periodic reports. We believe that this will result in some

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114 See e.g. Letters from Grant Thornton and BDO.

115 We estimate that 1,227 companies would be newly eligible to use the scaled disclosure available to smaller reporting companies in addition to another 354 companies that currently are eligible for scaled disclosure but do not use it, resulting in a total of 1,581 companies. Approximately 1,227 companies have a public float between $25 and $75 million, in addition to approximately 354 companies with a public float below $25 million that currently use the "SK" forms rather than the "SB" forms.

116 This estimate of a decrease in the compliance burden by 356,290 hours is based upon 790 responses by companies using regular Regulation S-K disclosure x 1,723 internal hours per company = 1,361,170 hours minus 790 responses by companies x 1,272 internal hours per company = 1,004,880 hours for smaller reporting companies and a decrease in the annual cost by $47,479,000 (574.25 professional hours x $400 per hour = $229,700 cost per response using regular Regulation S-K disclosure x 790 responses minus 424 professional hours X $400 per hour = $169,600 cost per response using the scaled disclosure x 790 annual responses).

cost savings and efficiencies in preparing registration statements for smaller reporting companies.

D. Costs

In our view, the elimination of the "SB" forms and moving the Regulation S-B disclosure standards into Regulation S-K and financial disclosure into Regulation S-X will not significantly increase the costs of complying with the Commission's rules.

The disclosure requirements will not change except in minor ways for current small business issuers that previously filed under Regulation S-B, so we do not anticipate any increase in costs due to the change in disclosure requirements.[117]

Four commenters[118] stated that these proposals may have unintended consequences, such as extra legal and accounting costs. One of these commenters[119] expressed concern that moving the disclosure requirements of Regulation S-B into Regulation S-K would only benefit small issuers if the legal and accounting costs do not increase. The commenter did not provide any data or information to support its position that costs could increase. The amount of disclosure a former small business issuer will provide on the "SK" forms should not increase unless the issuer chooses to provide additional disclosure above the required disclosure. We have added a heading entitled "Smaller Reporting Companies" to Items where scaled disclosure is available for smaller reporting companies. This will alleviate the concern that small issuers need guidance in

[117] For current "SB" filers, we estimate the net difference of reporting under Regulation S-K will be an increase of 4,405.5 burden hours and a cost of $5,257,200 for purposes of the Paperwork Reduction Act.

[118] See Letters from IASBDA, SBA Office of Advocacy, Center for Capital Markets (U.S. Chamber of Commerce), and Prof. James Angel.

[119] See Letter from IASBDA.

determining what disclosure requirements apply to them.[120] Thus, we do not believe that there should be any significant additional out-of-pocket costs associated with compliance.

We recognize that some of the 1,581 companies may choose to avail themselves of the scaled disclosure requirements when they have complied with standard Regulation S-K previously. In addition, the amount of disclosure reviewed by the Commission's staff may change for these companies. The staff will now evaluate compliance with Regulation S-K on the scaled disclosure requirements available to smaller reporting companies even if the company previously chose to comply with the larger company Regulation S-K disclosure requirements. If the amount of disclosure and corresponding SEC review under the prior reporting standard was valued by investors, using scaled disclosure may increase a company's cost of capital. Because the differences in smaller and larger company disclosure standards are small, however, we believe that any such costs will be minimal.

Investors may face additional costs in determining whether a newly eligible smaller reporting company has changed the amount of disclosure it provides to investors or whether the company continues to provide the maximum required disclosure. Allowing smaller reporting companies to choose financial statement items on an "a la carte" basis in a quarterly report may create additional costs for investors to determine whether the company has changed the type of disclosure from quarter to quarter. Since smaller reporting companies will be required to check a box indicating they qualify as such, however, investors will be alerted that these issuers are eligible to use the scaled disclosure requirements.

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120 See Letter from Prof. James Angel.

Another possible cost is requiring Canadian issuers, who seek to use the new scaled disclosure requirements, to provide their financial statements using U.S. GAAP rather than home country GAAP reconciled to U.S. GAAP. Based upon the Form 10-KSB filings received from Canadian issuers on the Commission's EDGAR filing system we estimate that under 50 Canadian issuers will be affected by this change. This change could increase audit costs for these companies if they chose to continue to file on the domestic forms which will now require financial statements in accordance with U.S. GAAP. Other cost increases could include staff training, administrative costs, and minor transition costs.

VII. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act requires us to consider the impact that any new rule will have on competition.[121] Section 23(a)(2) also prohibits us from adopting any rule that will impose a burden on competition not necessary or appropriate to carry out the purposes of the Exchange Act.

Furthermore, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, Section 2(b) of the Securities Act and Section 3(f) of the Exchange Act require the Commission to consider whether the action will promote efficiency, competition and capital formation.

We expect that the amendments adopted today will result in regulatory

[121] 15 U.S.C. 78w(a)(2).

simplification and efficiency by removing the duplicative sections of Regulation S-B and consolidating the scaled item requirements of Regulation S-B, such as executive compensation, into amended Regulation S-K. As adopted, the financial statement requirements for small business issuers previously found in Item 310 will be in a separate section of Regulation S-X. As amended, Regulations S-K and S-X will consolidate these requirements into a simplified framework applicable to all filers that are subject to the reporting requirements of Sections 13 and 15 of the Exchange Act and companies filing registration statements under the Securities Act. To comply with disclosure item requirements, practitioners and companies will no longer need to refer to two disclosure frameworks. Practitioners and companies will benefit from the ease of reference that a single disclosure framework will provide.

It is expected that the amendments will promote capital formation for smaller reporting companies and improve their ability to compete with larger companies for capital. For example, we believe capital formation will be improved by providing flexibility to more smaller reporting companies to tailor their disclosure to their investors' needs. In addition, the costs to raise capital may be reduced to the extent compliance costs, but not benefits, are reduced as a result of the scaled disclosure requirements. If smaller reporting companies allocate the capital they raise and save as a result of our scaled disclosure requirements to business development in an effective manner, these companies will be more competitive. More companies will be able to take advantage of more scaled disclosure item requirements, such as those contained currently in Item 310 and Item 402 of Regulation S-B. Smaller reporting companies that avail themselves of the scaled disclosure requirements will provide tailored disclosure that may better meet the needs of their investors.

VIII. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.[122] It relates to amendments to the rules and forms under the Securities Act and Exchange Act, which include a new definition of "smaller reporting company" under Regulation S-K. The new definition will expand the group of smaller companies that qualify to provide disclosure in accordance with the scaled requirements of the current Regulation S-B disclosure framework.

As adopted, a smaller reporting company is defined as a company that meets all of the following criteria: is not an investment company, an asset-backed issuer, or the majority-owned subsidiary of a parent that was not a smaller reporting company; had a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter; and in the case of an issuer whose public float was zero, had annual revenues of less than $50 million during its most recently completed fiscal year for which audited financial statements are available on the date of the filing.

The amendments also will eliminate the separate disclosure regime of Regulation S-B by removing all related "SB" forms and merging the Regulation S-B item requirements into Regulation S-K, except for Item 310 (Financial statements) which move into Regulation S-X. The revisions to Regulations S-K and S-X include revising item requirements to offer smaller reporting companies optional disclosure alternatives that are designed to provide flexibility, cost efficiencies and regulatory simplification.

A. Reasons for and Objectives of Amendments

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122 5 U.S.C. 604.

1. The Advisory Committee on Smaller Public Companies Recommended Scaled Federal Securities Regulation for Smaller Companies

In March 2005, the Commission chartered the Advisory Committee on Smaller Public Companies to assess the current regulatory system for smaller companies under the federal securities laws, including the disclosure and reporting requirements applicable to smaller companies, and to make recommendations for changes to improve regulatory conditions for smaller companies.

After receiving public input, the Advisory Committee made three recommendations in the disclosure area, which included making the scaled disclosure accommodations available to small business issuers available to all microcap companies, incorporating Regulation S-B into Regulation S-K, and incorporating Item 310 of Regulation S-B into Regulation S-K or Regulation S-X to make the scaled financial statement accommodations available to a much larger group of smaller companies.

2. Expanding Eligibility for Smaller Company Scaled Regulation Under Amended Regulation S-K

To make the scaled requirements of the Regulation S-B disclosure framework applicable to many more companies, the Advisory Committee recommended revising the definition of "small business issuer" to include a company with a higher public float threshold than the $25 million ceiling currently required in the small business issuer definition found in Item 10 of Regulation S-B.

Although the Advisory Committee did not recommend that we use a public float threshold, the $75 million public float threshold adopted is based on the reference to that number in the accelerated filer definition set forth in Rule 12b-2 of the Exchange Act. To maintain consistency with current regulation, we believe setting a public float threshold based on the current levels established for non-accelerated filers is practical and avoids regulatory complexity.

3. Integrating Substantive Requirements of Regulation S-B into Regulations S-K and S-X

The overall goal of the rule amendments is to integrate the scaled disclosure requirements of Regulation S-B into Regulation S-K and make these scaled disclosure requirements available to more companies as smaller reporting companies. We believe the amendments will:

- Further the goals of regulatory simplification by eliminating the current Regulation S-B framework as a separate stand-alone disclosure standard for the smallest reporting companies;
- Update the public float threshold and eliminate the revenue threshold restriction in the current "small business issuer" definition to accommodate many more companies that are contemplating an offering registered under the Securities Act or entry into the Exchange Act reporting system;
- Streamline and modernize forms under the Securities Act and the Exchange Act by eliminating all of the "SB" forms; and
- Provide regulatory flexibility by permitting smaller reporting companies to provide the same financial statement information previously found in Item 310 of Regulation S-B into Regulation S-X.

B. Significant Issues Raised by Public Comment

The initial Regulatory Flexibility Act analysis appeared in the Proposing Release. We requested comment on any aspect of the Initial Regulatory Flexibility Act analysis, especially empirical data on the impact on small businesses.

In the Proposing Release we stated that the proposed elimination of Regulation S-B and the "SB" forms will not increase significantly the costs of complying with the Commission's rules. While we still believe this is the case, we received four comment letters[123] expressing concern that the proposals could increase legal and accounting costs. One of these commenters[124] stated that "this type of one-size-fits-all regulation may have unintended consequences such as extra legal and accounting costs." Another commenter[125] stated that the proposals would not increase costs and that the backwards incorporation by reference on Form S-1 would save burden hours and costs.

As stated above, in response to the commenters' concerns about the transition from Regulation S-B and the "SB" forms to Regulation S-K and the "SK" forms, we have added a transition provision for companies that are current "SB" filers. These companies will have the choice of filing their next annual report due after the effective date on either a Form 10-KSB or a Form 10-K. Similarly, they may file any quarterly reports for periods before the next annual report due on either Form 10-QSB or Form 10-Q. Reports filed after the next annual report due may no longer be on the "SB" forms.

C. Small Entities Subject to the Amendments

The amendments will affect small entities, the securities of which are registered under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Exchange Act. The amendments also will affect small entities that file, or have filed, a registration statement that has not yet become effective under the Securities

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123 See Letters from IASBDA, SBA Office of Advocacy, Center for Capital Markets (U.S. Chamber of Commerce), and Prof. James Angel.

124 See Letter from the SBA Office of Advocacy.

125 See Letter from ABA.

Act and that has not been withdrawn. Securities Act Rule 157[126] and Exchange Act Rule 0-10(a)[127] define an issuer to be a "small entity" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We believe the amendments will affect some small entities. We estimate that there are approximately 1,100 issuers that may be considered small entities.[128] Further, we estimate that virtually all of the 1,100 small entities would be below $75 million in public equity float and will qualify for the scaled disclosure requirements.

D. Reporting, Recordkeeping, and Other Compliance Requirements

As adopted, moving Regulation S-B requirements into Regulations S-K and S-X and rescinding all of the "SB" forms will shift the location of disclosure requirements and will require smaller reporting companies to adapt to new formats in preparing their disclosure for Form S-1. The amendments to Regulation S-K include a new definition for smaller reporting company, which broadens the category of filers preparing disclosure to comply with the scaled item requirements of amended Regulation S-K. Companies with public floats between $25 and $75 million will be included in the class of filers that is eligible to provide disclosure based on the scaled requirements of proposed revisions to amended Regulation S-K. As adopted today, the scope and presentation of information disclosed based on the item requirements of amended Regulations S-K and S-X will

126 17 CFR 230.157.

127 17 CFR 240.0-10(a).

128 The estimated number of reporting small entities is based on 2007 data including the Commission's internal computerized filing system and Thomson Financials Worldscope database. This represents an update from the number of reporting small entities estimated in prior rulemakings.

differ in a number of significant ways from the current Regulation S-K disclosure framework. Amended Regulation S-K will allow smaller reporting companies to:

- Provide three years rather than five years of business development activities, and not be required to provide segment disclosure under amended Item 101 of Regulation S-K;
- Not provide disclosure required by Items 301 and 302 relating to selected financial data and supplementary financial information;
- Provide more streamlined disclosure for management's discussion and analysis of financial condition and results of operations found in Item 303 by requiring only two years of analysis if the company is presenting only two years of financial statements, instead of the three years currently required of larger companies;
- Provide audited balance sheets, audited statements of income, cash flows and changes in stockholders' equity for each of the last two fiscal years in new Article 8 of Regulation S-X instead of an audited balance sheet as of the end of the last two fiscal years and audited statement of income, cash flows and changes in stockholders' equity for each of the last three fiscal years as required by other parts of Regulation S-X;
- Provide disclosure about the chief executive officer and two other highly compensated executive officers only, rather than the information for the Chief Executive Officer, Chief Financial Officer and three other executive officers required of larger registrants;

- Not provide a Compensation Discussion and Analysis required of larger reporting companies;
- Provide only three of the seven tables (Summary Compensation, Outstanding Equity Awards, and Director Compensation) required of larger reporting companies; and

Not provide disclosure regarding the company's policies and procedures for approving related person transactions. Smaller reporting companies will be required, however, to provide disclosure regarding a transaction where the amount exceeds the lesser of 1% of a smaller company's total assets or $120,000. They also will be required to provide additional specific information about underwriting discounts and commissions and corporate parents. Additionally, smaller reporting companies will be required to provide disclosure regarding promoters and certain control persons. The amendments to Regulation S-K will not generally increase the disclosure requirements for former small business issuers, and could decrease the disclosure required for issuers with public float levels between $25 million and $75 million.

Amended Item 404 of Regulation S-K is the only example where it is possible that the disclosure required for smaller reporting companies will be more extensive than for standard Regulation S-K filers. In addition to a longer time period for required disclosure, as discussed above, Item 404 contains a provision that requires disclosure of transactions with related persons that exceed the lesser of $120,000 or 1% of the average of the smaller reporting company's total assets at the fiscal year end for the last two completed fiscal years. This requirement may be more burdensome to a smaller reporting company if 1% of total assets are less than $120,000. We believe transactions involving related persons are important to disclose, especially for smaller reporting companies, which generally have lower materiality thresholds. We believe these differences are important for the protection of investors. This disclosure issue will only affect smaller reporting companies that have related person transactions.

E. Agency Action to Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that will accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

(a) establishing different compliance or reporting requirements which take into account the resources available to smaller entities;

(b) the clarification, consolidation or simplification of disclosure for small entities;

(c) use of performance standards rather than design standards; and

(d) exempting smaller entities from coverage of the disclosure requirements or any part thereof.

As adopted, our amendments are intended to maintain current disclosure standards for small entities while further expanding the scope of eligibility for companies that elect to comply with the scaled disclosure item requirements currently set forth in Regulation S-B. These changes do not exempt smaller entities from coverage of the disclosure requirements; rather, they provide a greater number of smaller reporting companies the choice to provide scaled disclosure within Regulations S-K and S-X.

As adopted, the new definition for smaller reporting company will eliminate the current $25 million revenue threshold and increase the public float threshold requirement up to $75 million from the $25 million level currently set forth in the small business issuer definition of Regulation S-B. We believe that the $75 million threshold will appropriately result in reduced costs to smaller companies caused by unnecessary information requirements, consistent with investor protection. This is also consistent with our current regulatory system.

We considered alternatives such as including a revenue cap in the new definition of smaller reporting company, but currently believe that only requiring less than $75 million in public float is preferable, given its ease of reference and consistency with current rules under the Securities Act and the Exchange Act. We also seriously considered the comment letters submitted by the public. Some of the letters urged the Commission to use market capitalization instead of public float as a metric to determine eligibility as a smaller reporting company, but again, use of a float test provides more regulatory consistency.

As adopted, we will consolidate, clarify, and simplify our disclosure requirements by moving Regulation S-B into Regulations S-K and S-X. These amendments include a new definition of smaller reporting company, which greatly expands the number of small entities that will qualify to provide disclosure based on the scaled disclosure item requirements of the current Regulation S-B framework. We considered maintaining the Regulation S-B framework and making it available to many more companies, but we were not convinced by commenters that the Commission should not eliminate Regulation S-B and the "SB" forms. We still believe a single disclosure framework will be more cost effective and more efficient. The elimination of the "SB" forms will result in regulatory simplification for smaller entities by requiring all registrants to rely on one set of forms, such as Forms S-1, S-3, 10-K and 10-Q. These forms will include scaled item requirements for smaller reporting companies under the amendments adopted today for Regulations S-K and S-X.

Finally, we considered the use of performance rather than design standards but concluded that, although we allow some tailoring, investors need a basic level of consistency, uniformity and comparability among issuers in order to make appropriate investment decisions.

IX. Statutory Basis and Text of Amendments

The rule amendments described in this release are being adopted pursuant to Sections 6, 7, 10, and 19(a) of the Securities Act, as amended, Sections 12, 13, 14(a), 15(d), and 23(a) of the Exchange Act, as amended, and Section 319(a) of the Trust Indenture Act, as amended.

List of Subjects

17 CFR Part 228

Reporting and recordkeeping requirements, Securities, Small businesses.

17 CFR Parts 210, 229, 230, 239, 240, 249, 260, and 269

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF

1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for Part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 78c, 78j-1, 78l, 78m, 78n, 78o(d), 78q, 78u-5, 78w(a), 78ll, 78mm, 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202 and 7262, unless otherwise noted.

2. Amend § 210.3–01 by revising paragraphs (b), paragraph (c) introductory text and (f) to read as follows:

§ 210.3–01 Consolidated balance sheets.

* * * * *

(b) If the filing, other than a filing on Form 10–K or Form 10, is made within 45 days after the end of the registrant's fiscal year and audited financial statements for the most recent fiscal year are not available, the balance sheets may be as of the end of the two preceding fiscal years and the filing shall include an additional balance sheet as of an interim date at least as current as the end of the registrant's third fiscal quarter of the most recently completed fiscal year.

(c) The instruction in paragraph (b) of this section is also applicable to filings, other than on Form 10–K or Form 10, made after 45 days but within the number of days of the end of the registrant's fiscal year specified in paragraph (i) of this section: Provided, that the following conditions are met:

* * * * *

(f) Any interim balance sheet provided in accordance with the requirements of this section may be unaudited and need not be presented in greater detail than is required by § 210.10–01. Notwithstanding the requirements of this section, the most recent interim balance sheet included in a filing shall be at least as current as the most recent balance sheet filed with the Commission on Form 10–Q.

* * * * *

3. Amend § 210.3-05 by revising paragraph (b)(2)(iv) to read as follows:

§ 210.3-05 Financial statements of businesses acquired or to be acquired.

* * * * *

(b) * * *

(2) * * *

(iv) If any of the conditions exceed 50 percent, the full financial statements specified in §§ 210.3–01 and 210.3–02 shall be furnished. However, financial statements for the earliest of the three fiscal years required may be omitted if net revenues reported by the acquired business in its most recent fiscal year are less than $50 million.

* * * * *

4. Amend § 210.3–10 by revising paragraphs (h)(3) and (h)(4) to read as follows:

§ 210.3–10 Financial statements of guarantors and issuers of guaranteed securities registered or being registered.

* * * * *

(h) * * *

(3) Annual report refers to an annual report on Form 10–K or Form 20–F (§ 249.310 or 249.220f of this chapter).

(4) Quarterly report refers to a quarterly report on Form 10–Q (§ 249.308a of this chapter).

* * * * *

5. Amend § 210.3–12 by revising paragraphs (a) and (d) to read as follows:

§ 210.3–12 Age of financial statements at effective date of registration statement or at mailing date of proxy statement.

(a) If the financial statements in a filing are as of a date the number of days specified in paragraph (g) of this section or more before the date the filing is expected to become effective, or proposed mailing date in the case of a proxy statement, the financial statements shall be updated, except as specified in the following paragraphs, with a balance sheet as of an interim date within the number of days specified in paragraph (g) of this section and with statements of income and cash flows for the interim period between the end of the most recent fiscal year and the date of the interim balance sheet provided and for the corresponding period of the preceding fiscal year. Such interim financial statements may be unaudited and need not be presented in greater detail than is required by § 210.10–01. Notwithstanding the above requirements, the most recent interim financial statements shall be at least as current as the most recent financial statements filed with the Commission on Form 10–Q.

* * * * *

(d) The age of the registrant's most recent audited financial statements included in a registration statement filed under the Securities Act of 1933 or filed on Form 10 (17 CFR 249.210) under the Securities Exchange Act of 1934 shall not be more than one year and 45 days old at the date the registration statement becomes effective if the registration statement relates to the security of an issuer that was not subject, immediately before the time of filing the registration statement, to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934.

* * * * *

6. Amend § 210.3–14 by removing the authority citations following the section and revising paragraph (b) to read as follows:

§ 210.3–14 Special instructions for real estate operations to be acquired.

* * * * *

(b) Information required by this section is not required to be included in a filing on Form 10–K.

7. Amend § 210.4–01 by revising paragraphs (a)(3)(i)(A) and (a)(3)(i)(B) to read as follows:

§ 210.4–01 Form, order, and terminology.

(a) * * *

(3)(i) * * *

(A) The first interim or annual reporting period of the registrant's first fiscal year beginning on or after June 15, 2005, provided the registrant does not file as a smaller reporting company; and

(B) The first interim or annual reporting period of the registrant's first fiscal year beginning on or after December 15, 2005, provided the registrant files as a smaller reporting company.

* * * * *

8. Section 210.8-01 through 210.8-08 and an undesignated center heading is added before the undesignated heading "Bank Holding Companies" to read as follows:

Article 8 Financial Statements of Smaller Reporting Companies

§ 210.8-01 Preliminary Notes to Article 8.

§ 210.8-02 Annual financial statements.

§ 210.8-03 Interim financial statements.

§ 210.8-04 Financial statements of businesses acquired or to be acquired.

§ 210.8-05 Pro forma financial information.

§ 210.8-06 Real estate operations acquired or to be acquired.

§ 210.8-07 Limited partnerships.

§ 210.8-08 Age of financial statements.

* * * * *

§ 210.8-01 Preliminary Notes to Article 8.

Sections 210.8-01 to 210.8-08 shall be applicable to financial statements filed for smaller reporting companies. These section are not applicable to financial statements prepared for the purposes of Item 17 or Item 18 of Form 20-F.

Note 1 to § 210.8: Financial statements of a smaller reporting company, as defined by § 229.10(f)(1) of this chapter, its predecessors or any businesses to which the smaller reporting company is a successor shall be prepared in accordance with generally accepted accounting principles in the United States.

Note 2 to § 210.8: Smaller reporting companies electing to prepare their financial statements with the form and content required in this article need not apply the other form and content requirements in Regulation S-X with the exception of the following:

a. The report and qualifications of the independent accountant shall comply with the requirements of Article 2 of this part;

b. The description of accounting policies shall comply with Article 4–08(n) of this part; and

c. Smaller reporting companies engaged in oil and gas producing activities shall follow the financial accounting and reporting standards specified in Article 4–10 of this part with respect to such activities.

To the extent that Article 11–01 of this part (Pro Forma Presentation Requirements) offers enhanced guidelines for the preparation, presentation and disclosure of pro forma financial information, smaller reporting companies may wish to consider these items.

Note 3 to § 210.8: Financial statements for a subsidiary of a smaller reporting company that issues securities guaranteed by the smaller reporting company or guarantees securities issued by the smaller reporting company must be presented as required by § 210.3-10, except that the periods presented are those required by § 210.8-02.

Note 4 to § 210.8: Financial statements for a smaller reporting company's affiliates whose securities constitute a substantial portion of the collateral for any class of securities registered or being registered must be presented as required by § 210.3-16, except that the periods presented are those required by § 210.8-02.

Note 5 to § 210.8: The Commission, where consistent with the protection of investors, may permit the omission of one or more of the financial statements or the substitution of appropriate statements of comparable character. The Commission by informal written notice may require the filing of other financial statements where necessary or appropriate.

Note 6 to § 210.8: Section 210.4-01(a)(3) shall apply to the preparation of financial statements of smaller reporting companies.

§ 210.8-02 Annual financial statements.

Smaller reporting companies shall file an audited balance sheet as of the end of each of the most recent two fiscal years, or as of a date within 135 days if the issuer has existed for a period of less than one fiscal year, and audited statements of income, cash flows and changes in stockholders' equity for each of the two fiscal years preceding the date of the most recent audited balance sheet (or such shorter period as the registrant has been in business).

§ 210.8-03 Interim financial statements.

Interim financial statements may be unaudited; however, before filing, interim financial statements included in quarterly reports on Form 10–Q (§ 249.308(a) of this chapter) must be reviewed by an independent public accountant using professional standards and procedures for conducting such reviews, as established by generally accepted auditing standards, as may be modified or supplemented by the Commission. If, in any filing, the issuer states that interim financial statements have been reviewed by an independent public accountant, a report of the accountant on the review must be filed with the interim financial statements. Interim financial statements shall include a balance sheet as of the end of the issuer's most recent fiscal quarter, a balance sheet as of the end of the preceding fiscal year, and income statements and statements of cash flows for the interim period up to the date of such balance sheet and the comparable period of the preceding fiscal year.

(a) Condensed format. Interim financial statements may be condensed as follows:

(1) Balance sheets should include separate captions for each balance sheet component presented in the annual financial statements that represents 10% or more of total assets. Cash and retained earnings should be presented regardless of relative significance to total assets. Registrants that present a classified balance sheet in their annual financial statements should present totals for current assets and current liabilities.

(2) Income statements should include net sales or gross revenue, each cost and expense category presented in the annual financial statements that exceeds 20% of sales or gross revenues, provision for income taxes, discontinued operations, extraordinary items and cumulative effects of changes in accounting principles or practices. (Financial institutions should substitute net interest income for sales for purposes of determining items to be disclosed.) Dividends per share should be presented.

(3) Cash flow statements should include cash flows from operating, investing and financing activities as well as cash at the beginning and end of each period and the increase or decrease in such balance.

(4) Additional line items may be presented to facilitate the usefulness of the interim financial statements, including their comparability with annual financial statements.

(b) Disclosure required and additional instructions as to content.

(1) Footnotes. Footnote and other disclosures should be provided as needed for fair presentation and to ensure that the financial statements are not misleading.

(2) Material subsequent events and contingencies. Disclosure must be provided of material subsequent events and material contingencies notwithstanding disclosure in the annual financial statements.

(3) Significant equity investees. Sales, gross profit, net income (loss) from continuing operations and net income must be disclosed for equity investees that constitute 20% or more of a registrant's consolidated assets, equity or income from continuing operations.

(4) Significant dispositions and purchase business combinations. If a significant disposition or purchase business combination has occurred during the most recent interim period and the transaction required the filing of a Form 8–K (§ 249.308 of this chapter), pro forma data must be presented that reflects revenue, income from continuing operations, net income and income per share for the current interim period and the corresponding interim period of the preceding fiscal year as though the transaction occurred at the beginning of the periods.

(5) Material accounting changes. Disclosure must be provided of the date and reasons for any material accounting change. The registrant's independent accountant must provide a letter in the first Form 10–Q (§ 249.308a of this chapter) filed after the change indicating whether or not the change is to a preferable method. Disclosure must be provided of any retroactive change to prior period financial statements, including the effect of any such change on income and income per share.

(6) Development stage companies. A registrant in the development stage must provide cumulative financial information from inception.

Instruction 1 to § 210.8-03: Where Article 8 is applicable to a Form 10–Q and the interim period is more than one quarter, income statements must also be provided for the most recent interim quarter and the comparable quarter of the preceding fiscal year.

Instruction 2 to § 210.8-03: Interim financial statements must include all adjustments that, in the opinion of management, are necessary in order to make the financial statements not misleading. An affirmative statement that the financial statements have been so adjusted must be included with the interim financial statements.

§ 210.8-04 Financial statements of businesses acquired or to be acquired.

(a) If a business combination accounted for as a "purchase" has occurred or is probable, financial statements of the business acquired or to be acquired shall be furnished for the periods specified in paragraph (c) of this section:

(1) The term "purchase" encompasses the purchase of an interest in a business accounted for by the equity method.

(2) Acquisitions of a group of related businesses that are probable or that have occurred subsequent to the latest fiscal year end for which audited financial statements of the issuer have been filed shall be treated as if they are a single business combination for purposes of this section. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. A group of businesses is deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one business is conditioned on the acquisition of each other business; or

(iii) Each acquisition is conditioned on a single common event.

(3) Annual financial statements required by this rule shall be audited. The form and content of the financial statements shall be in accordance with §§ 210.8-02 and 8-03.

(b) The periods for which financial statements are to be presented are determined by comparison of the most recent annual financial statements of the business acquired or to be acquired and the smaller reporting company's most recent annual financial statements filed at or before the date of acquisition to evaluate each of the following conditions:

(1) Compare the smaller reporting company's investments in and advances to the acquiree to the total consolidated assets of the smaller reporting company as of the end of the most recently completed fiscal year.

(2) Compare the smaller reporting company's proportionate share of the total assets (after intercompany eliminations) of the acquiree to the total consolidated assets of the smaller reporting company as of the end of the most recently completed fiscal year.

(3) Compare the smaller reporting company's equity in the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principles of the acquiree to such consolidated income of the smaller reporting company for the most recently completed fiscal year.

<u>Computational note to § 210.8-04(b)</u>: For purposes of making the prescribed income test the following guidance should be applied: If income of the smaller reporting company and its subsidiaries consolidated for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

(c)(1) If none of the conditions specified in paragraph (b) of this section exceeds 20%, financial statements are not required. If any of the conditions exceed 20%, but none exceeds 40%, financial statements shall be furnished for the most recent fiscal year and any interim periods specified in § 210.8-03. If any of the conditions exceed 40%, financial statements shall be furnished for the two most recent fiscal years and any interim periods specified in § 210.8-03.

(2) The separate audited balance sheet of the acquired business is not required when the smaller reporting company's most recent audited balance sheet filed is for a date after the acquisition was consummated.

(3) If the aggregate impact of individually insignificant businesses acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50%, financial statements covering at least the substantial majority of the businesses acquired shall be furnished. Such financial statements shall be for the most recent fiscal year and any interim periods specified in § 210.8-03.

(4) Registration statements not subject to the provisions of § 230.419 of this chapter (Regulation C) and proxy statements need not include separate financial statements of the acquired or to be acquired business if it does not meet or exceed any of the conditions specified in paragraph (b) of this section at the 50 percent level, and either:

(i) The consummation of the acquisition has not yet occurred; or

(ii) The effective date of the registration statement, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business combination, and the financial statements have not been filed previously by the registrant.

(5) An issuer that omits from its initial registration statement financial statements of a recently consummated business combination pursuant to paragraph (c)(4) of this

section shall furnish those financial statements and any pro forma information specified by § 210.8-05 under cover of Form 8–K (§249.308 of this chapter) no later than 75 days after consummation of the acquisition.

(d) If the smaller reporting company made a significant business acquisition after the latest fiscal year end and filed a report on Form 8–K, which included audited financial statements of such acquired business for the periods required by paragraph (c) of this section and the pro forma financial information required by § 210.8-05, the determination of significance may be made by using pro forma amounts for the latest fiscal year in the report on Form 8–K rather than by using the historical amounts of the registrant. The tests may not be made by "annualizing" data.

(e) If the business acquired or to be acquired is a foreign business, financial statements of the business meeting the requirements of Item 17 of Form 20-F (§ 249.220f of this chapter) will satisfy this section.

§ 210.8-05 Pro forma financial information.

(a) Pro forma information showing the effects of the acquisition shall be furnished if financial statements of a business acquired or to be acquired are presented.

(b) Pro forma statements should be condensed, in columnar form showing pro forma adjustments and results, and should include the following:

(1) If the transaction was consummated during the most recent fiscal year or subsequent interim period, pro forma statements of income reflecting the combined operations of the entities for the latest fiscal year and interim period, if any; or

(2) If consummation of the transaction has occurred or is probable after the date of the most recent balance sheet required by § 210.8-02 or §210.8-03, a pro forma

balance sheet giving effect to the combination as of the date of the most recent balance sheet. For a purchase, pro forma statements of income reflecting the combined operations of the entities for the latest fiscal year and interim period, if any, are required.

§ 210.8-06 Real estate operations acquired or to be acquired.

If, during the period for which income statements are required, the smaller reporting company has acquired one or more properties that in the aggregate are significant, or since the date of the latest balance sheet required by § 210.8-02 or § 210.8-03, has acquired or proposes to acquire one or more properties that in the aggregate are significant, the following shall be furnished with respect to such properties:

(a) Audited income statements (not including earnings per unit) for the two most recent years, which shall exclude items not comparable to the proposed future operations of the property such as mortgage interest, leasehold rental, depreciation, corporate expenses and federal and state income taxes; Provided, however, that such audited statements need be presented for only the most recent fiscal year if:

(1) The property is not acquired from a related party;

(2) Material factors considered by the smaller reporting company in assessing the property are described with specificity in the registration statement with regard to the property, including source of revenue (including, but not limited to, competition in the rental market, comparative rents, occupancy rates) and expenses (including but not limited to, utilities, ad valorem tax rates, maintenance expenses, and capital improvements anticipated); and

(3) The smaller reporting company indicates that, after reasonable inquiry, it is not aware of any material factors relating to the specific property other than those

discussed in response to paragraph (a)(2) of this section that would cause the reported financial information not to be necessarily indicative of future operating results.

(b) If the property will be operated by the smaller reporting company, a statement shall be furnished showing the estimated taxable operating results of the smaller reporting company based on the most recent twelve-month period, including such adjustments as can be factually supported. If the property will be acquired subject to a net lease, the estimated taxable operating results shall be based on the rent to be paid for the first year of the lease. In either case, the estimated amount of cash to be made available by operations shall be shown. Disclosure must be provided of the principal assumptions that have been made in preparing the statements of estimated taxable operating results and cash to be made available by operations.

(c) If appropriate under the circumstances, a table should be provided that shows, for a limited number of years, the estimated cash distribution per unit, indicating the portion reportable as taxable income and the portion representing a return of capital with an explanation of annual variations, if any. If taxable net income per unit will be greater than the cash available for distribution per unit, that fact and the approximate year of occurrence shall be stated, if significant.

§ 210.8-07 Limited partnerships.

(a) Smaller reporting companies that are limited partnerships must provide the balance sheets of the general partners as described in paragraphs (b) through (d) of this section.

(b) Where a general partner is a corporation, the audited balance sheet of the corporation as of the end of its most recently completed fiscal year must be filed.

Receivables, other than trade receivables, from affiliates of the general partner should be deducted from shareholders' equity of the general partner. Where an affiliate has committed itself to increase or maintain the general partner's capital, the audited balance sheet of such affiliate must also be presented.

(c) Where a general partner is a partnership, there shall be filed an audited balance sheet of such partnership as of the end of its most recently completed fiscal year.

(d) Where the general partner is a natural person, there shall be filed, as supplemental information, a balance sheet of such natural person as of a recent date. Such balance sheet need not be audited. The assets and liabilities should be carried at estimated fair market value, with provisions for estimated income taxes on unrealized gains. The net worth of such general partner(s), based on such balance sheet(s), singly or in the aggregate, shall be disclosed in the registration statement.

§ 210.8-08 Age of financial statements.

At the date of filing, financial statements included in filings other than filings on Form 10–K must be not less current than the financial statements that would be required in Forms 10–K and 10–Q if such reports were required to be filed. If required financial statements are as of a date 135 days or more before the date a registration statement becomes effective or proxy material is expected to be mailed, the financial statements shall be updated to include financial statements for an interim period ending within 135 days of the effective or expected mailing date. Interim financial statements must be prepared and presented in accordance with paragraph (b) of this section.

(a) When the anticipated effective or mailing date falls within 45 days after the end of the fiscal year, the filing may include financial statements only as current as of the end of the third fiscal quarter; Provided, however, that if the audited financial statements for the recently completed fiscal year are available or become available before effectiveness or mailing, they must be included in the filing; and

(b) If the effective date or anticipated mailing date falls after 45 days but within 90 days of the end of the smaller reporting company's fiscal year, the smaller reporting company is not required to provide the audited financial statements for such year end provided that the following conditions are met:

(1) If the smaller reporting company is a reporting company, all reports due must have been filed;

(2) For the most recent fiscal year for which audited financial statements are not yet available, the smaller reporting company reasonably and in good faith expects to report income from continuing operations before taxes; and

(3) For at least one of the two fiscal years immediately preceding the most recent fiscal year the smaller reporting company reported income from continuing operations before taxes.

9. Amend § 210.10–01 by revising paragraphs (b)(6) and the introductory text of paragraph (c) to read as follows:

§ 210.10–01 Interim financial statements.

* * * * *

(b) * * *

(6) In addition to meeting the reporting requirements specified by existing standards for accounting changes, the registrant shall state the date of any material accounting change and the reasons for making it. In addition, for filings on Form 10–Q,

a letter from the registrant's independent accountant shall be filed as an exhibit (in accordance with the provisions of Item 601 of Regulation S-K, 17 CFR 229.601) in the first Form 10–Q after the date of an accounting change indicating whether or not the change is to an alternative principle which, in the accountant's judgment, is preferable under the circumstances; except that no letter from the accountant need be filed when the change is made in response to a standard adopted by the Financial Accounting Standards Board that requires such change.

* * * * *

(c) Periods to be covered. The periods for which interim financial statements are to be provided in registration statements are prescribed elsewhere in this Regulation (see §§ 210.3–01 and 3–02). For filings on Form 10–Q, financial statements shall be provided as set forth in this paragraph (c):

* * * * *

10. Part 228 is removed and reserved.

PART 229- STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 - REGULATION S-K

11. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; 18 U.S.C. 1350, unless otherwise noted.

* * * * *

12. Amend § 229.10 by adding paragraph (f) to read as follows:

§ 229.10 (Item 10) General.

* * * * *

(f) Smaller reporting companies. The requirements of this part apply to smaller reporting companies. A smaller reporting company may comply with either the requirements applicable to smaller reporting companies or the requirements applicable to other companies for each item, unless the requirements for smaller reporting companies specify that smaller reporting companies must comply with the smaller reporting company requirements. The following items of this part set forth requirements for smaller reporting companies that are different from requirements applicable to other companies:

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(1) Definition of smaller reporting company. As used in this part, the term smaller reporting company means an issuer that is not an investment company, an asset-backed issuer (as defined in § 229.1101), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that:

(i) Had a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter, computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity; or

(ii) In the case of an initial registration statement under the Securities Act or Exchange Act for shares of its common equity, had a public float of less than $75 million as of a date within 30 days of the date of the filing of the registration statement, computed by multiplying the aggregate worldwide number of such shares held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of such shares included in the registration statement by the estimated public offering price of the shares; or

(iii) In the case of an issuer whose public float as calculated under paragraph (i) or (ii) of this definition was zero, had annual revenues of less than $50 million during the most recently completed fiscal year for which audited financial statements are available.

(2) Determination: Whether or not an issuer is a smaller reporting company is determined on an annual basis.

(i) For issuers that are required to file reports under section 13(a) or 15(d) of the Exchange Act, the determination is based on whether the issuer came within the definition of smaller reporting company, using the amounts specified in paragraph (f)(2)(iii) of this Item, as of the last business day of the second fiscal quarter of the issuer's previous fiscal year. An issuer in this category must reflect this determination in the information it provides in its quarterly report on Form 10-Q for the first fiscal quarter of the next year, indicating on the cover page of that filing, and in subsequent filings for that fiscal year, whether or not it is a smaller reporting company, except that, if a determination based on public float indicates that the issuer is newly eligible to be a smaller reporting company, the issuer may choose to reflect this determination beginning with its first quarterly report on Form 10-Q following the determination, rather than waiting until the first fiscal quarter of the next year.

(ii) For determinations based on an initial Securities Act or Exchange Act registration statement under paragraph (f)(1)(ii) of this Item, the issuer must reflect the determination in the information it provides in the registration statement and must appropriately indicate on the cover page of the filing, and subsequent filings for the fiscal year in which the filing is made, whether or not it is a smaller reporting company. The issuer must redetermine its status at the end of its second fiscal quarter and then reflect any change in status as provided in paragraph (f)(2)(i) of this Item. In the case of a determination based on an initial Securities Act registration statement, an issuer that was not determined to be a smaller reporting company has the option to redetermine its status at the conclusion of the offering covered by the registration statement based on the actual offering price and number of shares sold.

(iii) Once an issuer fails to qualify for smaller reporting company status, it will remain unqualified unless it determines that its public float, as calculated in accordance with paragraph (f)(1) of this Item, was less than $50 million as of the last business day of its second fiscal quarter or, if that calculation results in zero because the issuer had no public equity outstanding or no market price for its equity existed, if the issuers had annual revenues of less than $40 million during its previous fiscal year.

13. Amend § 229.101 by:

a. Revising (a)(2) introductory text, (a)(2)(i), (a)(2)(ii), and (a)(2)(iii) introductory text; and

b. Adding paragraph (h) before the Instructions to Item 101.

The revision and addition read as follows:

§ 229.101 (Item 101) Description of business.

* * * * *

(a) (1) * * *

(2) Registrants:

(i) Filing a registration statement on Form S-1 (§ 239.11 of this chapter) under the Securities Act or on Form 10 (§ 249.210 of this chapter) under the Exchange Act;

(ii) Not subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act immediately before the filing of such registration statement; and

(iii) That (including predecessors) have not received revenue from operations during each of the three fiscal years immediately before the filing of such registration statement, shall provide the following information:

* * * * *

(h) Smaller reporting companies. A smaller reporting company, as defined by § 229.10(f)(1), may satisfy its obligations under this Item by describing the development of its business during the last three years. If the smaller reporting company has not been in business for three years, give the same information for predecessor(s) of the smaller reporting company if there are any. This business development description should include:

(1) Form and year of organization;

(2) Any bankruptcy, receivership or similar proceeding; and

(3) Any material reclassification, merger, consolidation, or purchase or sale of a significant amount of assets not in the ordinary course of business.

(4) Business of the smaller reporting company. Briefly describe the business and include, to the extent material to an understanding of the smaller reporting company:

(i) Principal products or services and their markets;

(ii) Distribution methods of the products or services;

(iii) Status of any publicly announced new product or service;

(iv) Competitive business conditions and the smaller reporting company's competitive position in the industry and methods of competition;

(v) Sources and availability of raw materials and the names of principal suppliers;

(vi) Dependence on one or a few major customers;

(vii) Patents, trademarks, licenses, franchises, concessions, royalty agreements or labor contracts, including duration;

(viii) Need for any government approval of principal products or services. If government approval is necessary and the smaller reporting company has not yet received that approval, discuss the status of the approval within the government approval process;

(ix) Effect of existing or probable governmental regulations on the business;

(x) Estimate of the amount spent during each of the last two fiscal years on research and development activities, and if applicable, the extent to which the cost of such activities is borne directly by customers;

(xi) Costs and effects of compliance with environmental laws (federal, state and local); and

(xii) Number of total employees and number of full-time employees.

(5) Reports to security holders. Disclose the following in any registration statement you file under the Securities Act of 1933:

(i) If you are not required to deliver an annual report to security holders, whether you will voluntarily send an annual report and whether the report will include audited financial statements;

(ii) Whether you file reports with the Securities and Exchange Commission. If you are a reporting company, identify the reports and other information you file with the Commission; and

(iii) That the public may read and copy any materials you file with the Commission at the SEC's Public Reference Room at 100 F Street, NE, Washington, DC

20549, on official business days during the hours of 10:00 am to 3:00 pm. State that the public may obtain information on the operation of the Public Reference Room by calling the Commission at 1-800-SEC-0330. State that the Commission maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the Commission and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet address, if available.

(6) Foreign issuers. Provide the information required by Item 101(g) of Regulation S-K (§ 229.101(g)).

* * * * *

14. Amend § 229.102 by adding an Instructions 7, 8, and 9 to read as follows:

§ 229.102 (Item 102) Description of property.

* * * * *

Instructions to Item 102:

* * * * *

7. The attention of issuers engaged in significant mining operations is directed to the information called for in Guide 7 (§ 229.801(g) and § 229.802(g)).

8. The attention of issuers engaged in oil and gas producing activities is directed to the information called for in Guides 2 and 4 (§ 229.801(b), § 229.802(b) and § 299.801(d), § 229.802(d)).

9. The attention of issuers engaged in real estate activities is directed to the information called for in Guide 5 (§ 229.801(e) of this chapter).

15. Amend § 229.201 by:

a. Revising paragraph (a)(1)(ii); and

b. Revising paragraph (a)(2); and

c. Revising Instruction 6 to Item 201(e).

The revision and addition read as follows:

§ 229.201 (Item 201) Market price of and dividends on the registrant's common equity and related stockholder matters.

(a) * * *

(1) * * *

(ii) If the principal United States market for such common equity is an exchange, state the high and low sales prices for the equity for each full quarterly period within the two most recent fiscal years and any subsequent interim period for which financial statements are included, or are required to be included by Article 3-01 through 3-04 of Regulation S-X (§ 210.3-01 through 3-04 of this chapter), or Article 8-02 through 8-03 of Regulation S-X (§ 210.8-02 through 8-03 of this chapter) in the case of smaller reporting companies, as reported in the consolidated transaction reporting system or, if not so reported, as reported on the principal exchange market for such equity.

* * * * *

(2) If the information called for by this paragraph (a) is being presented in a registration statement on Form S-1 (§ 239.11 of this chapter) under the Securities Act or on Form 10 (§ 249.210 of this chapter) under the Exchange Act relating to a class of common equity for which at the time of filing there is no established United States public trading market, indicate the amount(s) of common equity:

(i) That is subject to outstanding options or warrants to purchase, or securities convertible into, common equity of the registrant;

(ii) That could be sold pursuant to § 230.144 of this chapter or that the registrant has agreed to register under the Securities Act for sale by security holders; or

(iii) That is being, or has been publicly proposed to be, publicly offered by the registrant (unless such common equity is being offered pursuant to an employee benefit plan or dividend reinvestment plan), the offering of which could have a material effect on the market price of the registrant's common equity.

* * * * *

Instructions to Item 201(e):

* * * * *

(6) Smaller reporting companies. A registrant that qualifies as a smaller reporting company, as defined by § 229.10(f)(1), is not required to provide the information required by paragraph (e) of this Item.

* * * * *

16. Amend § 229.301 by removing the authority citation following the section and adding paragraph (c) before the Instruction to Item 301 to read as follows:

§ 229.301 (Item 301) Selected financial data.

* * * * *

(c) Smaller reporting companies. A registrant that qualifies as a smaller reporting company, as defined by § 229.10(f)(1), is not required to provide the information required by this Item.

* * * * *

17. Amend § 229.302 by adding paragraph (c) to read as follows:

§ 229.302 (Item 302) Supplementary financial information.

* * * * *

(c) Smaller reporting companies. A registrant that qualifies as a smaller reporting company, as defined by § 229.10(f)(1), is not required to provide the information required by this Item.

18. Amend § 229.303 by:

a. Revising a sentence to Instruction 1 to paragraph 303(a);

b. Adding Instructions 13 and 14;

c. Revising a sentence to Instruction 1 to paragraph 303(b); and

d. Adding paragraph (d) to read as follows:

§ 229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.

* * * * *

Instructions to paragraph 303(a): 1. The registrant's discussion and analysis shall be of the financial statements and other statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition and results of operations. Generally, the discussion shall cover the three-year period covered by the financial statements and shall use year-to-year comparisons or any other formats that in the registrant's judgment enhance a reader's understanding. However, where trend information is relevant, reference to the five-year selected financial data appearing pursuant to Item 301 of Regulation S-K (§ 229.301) may be necessary. A smaller reporting company's discussion shall cover the two-year period required in Article 8 of Regulation S-X and shall use year-to-year comparisons or any other formats that in the registrant's judgment enhance a reader's understanding.

* * * * *

13. The attention of bank holding companies is directed to the information called for in Guide 3 (§ 229.801(c) and § 229.802(c)).

14. The attention of property-casualty insurance companies is directed to the information called for in Guide 6 (§ 229.801(f)).

* * * * *

Instructions to paragraph 303(b): 1. If interim financial statements are presented together with financial statements for full fiscal years, the discussion of the interim financial information shall be prepared pursuant to this paragraph (b) and the discussion of the full fiscal year's information shall be prepared pursuant to paragraph (a) of this Item. Such discussions may be combined.

* * * * *

(d) Smaller reporting companies. A smaller reporting company, as defined by § 229.10(f)(1), may provide the information required in paragraph (a)(3)(iv) of this Item for the last two most recent fiscal years of the registrant if it provides financial information on net sales and revenues and on income from continuing operations for only two years. A smaller reporting company is not required to provide the information required by paragraph (a)(5) of this Item.

19. Amend § 229.305 by revising paragraph (e) to read as follows:

§ 229.305 (Item 305) Quantitative and qualitative disclosures about market risk.

* * * * *

(e) Smaller reporting companies. A smaller reporting company, as defined by § 229.10(f)(1), is not required to provide the information required by this Item.

* * * * *

20. Amend § 229.401 by revising Instruction 3 to paragraph (b) to read as follows:

§ 229.401 (Item 401) Directors, executive officers, promoters and control persons.

* * * * *

(b) * * *

Instructions to Paragraph (b) of Item 401:

* * * * *

3. The information regarding executive officers called for by this Item need not be furnished in proxy or information statements prepared in accordance with Schedule 14A under the Exchange Act (§ 240.14a-101 of this chapter) by registrants relying on General Instruction G of Form 10-K under the Exchange Act (§ 249.310 of this chapter); Provided, that such information is furnished in a separate item captioned "Executive officers of the registrant" and included in Part I of the registrant's annual report on Form 10-K.

* * * * *

21. Amend § 229.402 by adding paragraphs (l), (m), (n), (o), (p), (q), and (r) before the Instruction to Item 402 to read as follows:

§ 229.402 (Item 402) Executive compensation.

* * * * *

(l) Smaller reporting companies. A registrant that qualifies as a "smaller reporting company," as defined by Item 10(f) (§ 229.10(f)(1)), may provide the scaled disclosure in paragraphs (m) through (r) instead of paragraphs (a) through (k) of this Item.

(m) Smaller reporting companies - General

(1) All compensation covered. This Item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (m)(2) of this Item, and directors covered by paragraph (r) of this Item, by any person for all services rendered in all capacities to the smaller reporting company and its subsidiaries, unless otherwise specifically excluded from disclosure in this Item. All such compensation shall be reported pursuant to this Item, even if also called for by another requirement, including transactions between the smaller reporting company and a third party where a purpose of the transaction is to furnish compensation to any such named executive officer or director. No amount reported as compensation for one fiscal year need be reported in the same manner as compensation for a subsequent fiscal year; amounts reported as compensation for one fiscal year may be required to be reported in a different manner pursuant to this Item.

(2) Persons covered. Disclosure shall be provided pursuant to this Item for each of the following (the "named executive officers"):

(i) All individuals serving as the smaller reporting company's principal executive officer or acting in a similar capacity during the last completed fiscal year ("PEO"), regardless of compensation level;

(ii) The smaller reporting company's two most highly compensated executive officers other than the PEO who were serving as executive officers at the end of the last completed fiscal year; and

(iii) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (m)(2)(ii) of this Item but for the fact that the individual was not serving as an executive officer of the smaller reporting company at the end of the last completed fiscal year.

<u>Instructions to Item 402(m)(2)</u>.

1. <u>Determination of most highly compensated executive officers</u>. The determination as to which executive officers are most highly compensated shall be made by reference to total compensation for the last completed fiscal year (as required to be disclosed pursuant to paragraph (n)(2)(x) of this Item) reduced by the amount required to be disclosed pursuant to paragraph (n)(2)(viii) of this Item, <u>provided, however</u>, that no disclosure need be provided for any executive officer, other than the PEO, whose total compensation, as so reduced, does not exceed $100,000.

2. <u>Inclusion of executive officer of a subsidiary</u>. It may be appropriate for a smaller reporting company to include as named executive officers one or more executive officers or other employees of subsidiaries in the disclosure required by this Item. See Rule 3b–7 under the Exchange Act (17 CFR 240.3b–7).

3. <u>Exclusion of executive officer due to overseas compensation</u>. It may be appropriate in limited circumstances for a smaller reporting company not to include in the disclosure required by this Item an individual, other than its PEO, who is one of the smaller reporting company's most highly compensated executive officers due to the

payment of amounts of cash compensation relating to overseas assignments attributed predominantly to such assignments.

(3) Information for full fiscal year. If the PEO served in that capacity during any part of a fiscal year with respect to which information is required, information should be provided as to all of his or her compensation for the full fiscal year. If a named executive officer (other than the PEO) served as an executive officer of the smaller reporting company (whether or not in the same position) during any part of the fiscal year with respect to which information is required, information shall be provided as to all compensation of that individual for the full fiscal year.

(4) Omission of table or column. A table or column may be omitted if there has been no compensation awarded to, earned by, or paid to any of the named executive officers or directors required to be reported in that table or column in any fiscal year covered by that table.

(5) Definitions. For purposes of this Item:

(i) The term stock means instruments such as common stock, restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or any similar instruments that do not have option-like features, and the term option means instruments such as stock options, stock appreciation rights and similar instruments with option-like features. The term stock appreciation rights ("SARs") refers to SARs payable in cash or stock, including SARs payable in cash or stock at the election of the smaller reporting company or a named executive officer. The term equity is used to refer generally to stock and/or options.

(ii) The term plan includes, but is not limited to, the following: Any plan, contract, authorization or arrangement, whether or not set forth in any formal document, pursuant to which cash, securities, similar instruments, or any other property may be received. A plan may be applicable to one person. Smaller reporting companies may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the smaller reporting company and that are available generally to all salaried employees.

(iii) The term incentive plan means any plan providing compensation intended to serve as incentive for performance to occur over a specified period, whether such performance is measured by reference to financial performance of the smaller reporting company or an affiliate, the smaller reporting company's stock price, or any other performance measure. An equity incentive plan is an incentive plan or portion of an incentive plan under which awards are granted that fall within the scope of Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment, as modified or supplemented ("FAS 123R"). A non-equity incentive plan is an incentive plan or portion of an incentive plan that is not an equity incentive plan. The term incentive plan award means an award provided under an incentive plan.

(iv) The terms date of grant or grant date refer to the grant date determined for financial statement reporting purposes pursuant to FAS 123R.

(v) Closing market price is defined as the price at which the smaller reporting company's security was last sold in the principal United States market for such security as of the date for which the closing market price is determined.

(n) Smaller reporting companies - Summary compensation table (1) General. Provide the information specified in paragraph (n)(2) of this Item, concerning the compensation of the named executive officers for each of the smaller reporting company's last two completed fiscal years, in a Summary Compensation Table in the tabular format specified below.

Summary Compensation Table

Name and principal position (a)	**Year** (b)	**Salary ($)** (c)	**Bonus ($)** (d)	**Stock awards ($)** (e)	**Option awards ($)** (f)	**Nonequity incentive plan compensation ($)** (g)	**Nonqualified deferred compensation earnings ($)** (h)	**All other compensation ($)** (i)	**Total ($)** (j)
PEO									
A									
B									

(2) The Table shall include:

(i) The name and principal position of the named executive officer (column (a));

(ii) The fiscal year covered (column (b));

(iii) The dollar value of base salary (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (c));

(iv) The dollar value of bonus (cash and non-cash) earned by the named executive officer during the fiscal year covered (column (d));

Instructions to Item 402(n)(2)(iii) and (iv).

1. If the amount of salary or bonus earned in a given fiscal year is not calculable through the latest practicable date, a footnote shall be included disclosing that the amount of salary or bonus is not calculable through the latest practicable date and providing the date that the amount of salary or bonus is expected to be determined, and such amount must then be disclosed in a filing under Item 5.02(f) of Form 8–K (17 CFR 249.308).

2. Smaller reporting companies shall include in the salary column (column (c)) or bonus column (column (d)) any amount of salary or bonus forgone at the election of a named executive officer under which stock, equity-based or other forms of non-cash compensation instead have been received by the named executive officer. However, the receipt of any such form of non-cash compensation instead of salary or bonus must be disclosed in a footnote added to the salary or bonus column and, where applicable, referring to the narrative disclosure to the Summary Compensation Table (required by paragraph (o) of this Item) where the material terms of the stock, option or non-equity incentive plan award elected by the named executive officer are reported.

(v) For awards of stock, the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with FAS 123R (column (e));

(vi) For awards of options, with or without tandem SARs, the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with FAS 123R (column (f));

Instruction to Item 402(n)(2)(v) and (vi). For awards reported in columns (e) and (f), disregard the estimate of forfeitures related to service-based vesting conditions. Include a footnote describing all forfeitures during the year, and disclosing all assumptions made in the valuation. Disclose assumptions made in the valuation by reference to a discussion of those assumptions in the registrant's financial statements, footnotes to the financial statements, or discussion in the Management's Discussion and Analysis. The sections so referenced are deemed part of the disclosure provided pursuant to this Item.

(vii) The dollar value of all earnings for services performed during the fiscal year pursuant to awards under non-equity incentive plans as defined in paragraph (m)(5)(iii) of this Item, and all earnings on any outstanding awards (column (g));

Instructions to Item 402(n)(2)(vii).

1. If the relevant performance measure is satisfied during the fiscal year (including for a single year in a plan with a multi-year performance measure), the earnings are reportable for that fiscal year, even if not payable until a later date, and are not reportable again in the fiscal year when amounts are paid to the named executive officer.

2. All earnings on non-equity incentive plan compensation must be identified and quantified in a footnote to column (g), whether the earnings were paid during the fiscal

year, payable during the period but deferred at the election of the named executive officer, or payable by their terms at a later date.

(viii) Above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on nonqualified defined contribution plans (column (h));

Instruction to Item 402(n)(2)(viii). Interest on deferred compensation is above-market only if the rate of interest exceeds 120% of the applicable federal long-term rate, with compounding (as prescribed under section 1274(d) of the Internal Revenue Code, (26 U.S.C. 1274(d))) at the rate that corresponds most closely to the rate under the smaller reporting company's plan at the time the interest rate or formula is set. In the event of a discretionary reset of the interest rate, the requisite calculation must be made on the basis of the interest rate at the time of such reset, rather than when originally established. Only the above-market portion of the interest must be included. If the applicable interest rates vary depending upon conditions such as a minimum period of continued service, the reported amount should be calculated assuming satisfaction of all conditions to receiving interest at the highest rate. Dividends (and dividend equivalents) on deferred compensation denominated in the smaller reporting company's stock ("deferred stock") are preferential only if earned at a rate higher than dividends on the smaller reporting company's common stock. Only the preferential portion of the dividends or equivalents must be included. Footnote or narrative disclosure may be provided explaining the smaller reporting company's criteria for determining any portion considered to be above-market.

(ix) All other compensation for the covered fiscal year that the smaller reporting company could not properly report in any other column of the Summary Compensation Table (column (i)). Each compensation item that is not properly reportable in columns (c) through (h), regardless of the amount of the compensation item, must be included in column (i). Such compensation must include, but is not limited to:

(A) Perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than $10,000;

(B) All "gross-ups" or other amounts reimbursed during the fiscal year for the payment of taxes;

(C) For any security of the smaller reporting company or its subsidiaries purchased from the smaller reporting company or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the smaller reporting company, the compensation cost, if any, computed in accordance with FAS 123R;

(D) The amount paid or accrued to any named executive officer pursuant to a plan or arrangement in connection with:

(1) Any termination, including without limitation through retirement, resignation, severance or constructive termination (including a change in responsibilities) of such executive officer's employment with the smaller reporting company and its subsidiaries; or

(2) A change in control of the smaller reporting company;

(E) Smaller reporting company contributions or other allocations to vested and unvested defined contribution plans;

(F) The dollar value of any insurance premiums paid by, or on behalf of, the smaller reporting company during the covered fiscal year with respect to life insurance for the benefit of a named executive officer; and

(G) The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value for the stock or option award; and

Instructions to Item 402(n)(2)(ix).

1. Non-equity incentive plan awards and earnings and earnings on stock or options, except as specified in paragraph (n)(2)(ix)(G) of this Item, are required to be reported elsewhere as provided in this Item and are not reportable as All Other Compensation in column (i).

2. Benefits paid pursuant to defined benefit and actuarial plans are not reportable as All Other Compensation in column (i) unless accelerated pursuant to a change in control; information concerning these plans is reportable pursuant to paragraph (q)(1) of this Item.

3. Reimbursements of taxes owed with respect to perquisites or other personal benefits must be included in the columns as tax reimbursements (paragraph (n)(2)(ix)(B) of this Item) even if the associated perquisites or other personal benefits are not required to be included because the aggregate amount of such compensation is less than $10,000.

4. Perquisites and other personal benefits shall be valued on the basis of the aggregate incremental cost to the smaller reporting company.

5. For purposes of paragraph (n)(2)(ix)(D) of this Item, an accrued amount is an amount for which payment has become due.

(x) The dollar value of total compensation for the covered fiscal year (column (j)). With respect to each named executive officer, disclose the sum of all amounts reported in columns (c) through (i).

Instructions to Item 402(n).

1. Information with respect to the fiscal year prior to the last completed fiscal year will not be required if the smaller reporting company was not a reporting company pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) at any time during that year, except that the smaller reporting company will be required to provide information for any such year if that information previously was required to be provided in response to a Commission filing requirement.

2. All compensation values reported in the Summary Compensation Table must be reported in dollars and rounded to the nearest dollar. Reported compensation values must be reported numerically, providing a single numerical value for each grid in the table. Where compensation was paid to or received by a named executive officer in a different currency, a footnote must be provided to identify that currency and describe the rate and methodology used to convert the payment amounts to dollars.

3. If a named executive officer is also a director who receives compensation for his or her services as a director, reflect that compensation in the Summary Compensation Table and provide a footnote identifying and itemizing such compensation and amounts. Use the categories in the Director Compensation Table required pursuant to paragraph (r) of this Item.

4. Any amounts deferred, whether pursuant to a plan established under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), or otherwise, shall be included in the appropriate column for the fiscal year in which earned.

(o) Smaller reporting companies - Narrative disclosure to summary compensation table. Provide a narrative description of any material factors necessary to an understanding of the information disclosed in the Table required by paragraph (n) of this Item. Examples of such factors may include, in given cases, among other things:

(1) The material terms of each named executive officer's employment agreement or arrangement, whether written or unwritten;

(2) If at any time during the last fiscal year, any outstanding option or other equity-based award was repriced or otherwise materially modified (such as by extension of exercise periods, the change of vesting or forfeiture conditions, the change or elimination of applicable performance criteria, or the change of the bases upon which returns are determined), a description of each such repricing or other material modification;

(3) The waiver or modification of any specified performance target, goal or condition to payout with respect to any amount included in non-stock incentive plan compensation or payouts reported in column (g) to the Summary Compensation Table required by paragraph (n) of this Item, stating whether the waiver or modification applied to one or more specified named executive officers or to all compensation subject to the target, goal or condition;

(4) The material terms of each grant, including but not limited to the date of exercisability, any conditions to exercisability, any tandem feature, any reload feature,

any tax-reimbursement feature, and any provision that could cause the exercise price to be lowered;

(5) The material terms of any non-equity incentive plan award made to a named executive officer during the last completed fiscal year, including a general description of the formula or criteria to be applied in determining the amounts payable and vesting schedule;

(6) The method of calculating earnings on nonqualified deferred compensation plans including nonqualified defined contribution plans; and

(7) An identification to the extent material of any item included under All Other Compensation (column (i)) in the Summary Compensation Table. Identification of an item shall not be considered material if it does not exceed the greater of $25,000 or 10% of all items included in the specified category in question set forth in paragraph (n)(2)(ix) of this Item. All items of compensation are required to be included in the Summary Compensation Table without regard to whether such items are required to be identified.

Instruction to Item 402(o). The disclosure required by paragraph (o)(2) of this Item would not apply to any repricing that occurs through a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of the option or SAR exercise or base price, an antidilution provision in a plan or award, or a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.

(p) Smaller reporting companies - Outstanding equity awards at fiscal year-end table. (1) Provide the information specified in paragraph (p)(2) of this Item, concerning unexercised options; stock that has not vested; and equity incentive plan awards for each named executive officer outstanding as of the end of the smaller reporting company's last completed fiscal year in the following tabular format:

Outstanding Equity Awards at Fiscal Year-End

Name	Option awards					Stock awards			
	Number of securities underlying unexercised options (#) exercisable	Number of securities underlying unexercised options (#) unexercisable	Equity incentive plan awards: Number of securities underlying unexercised unearned options (#)	Option exercise price ($)	Option expiration date	Number of shares or units of stock that have not vested (#)	Market value of shares of units of stock that have not vested ($)	Equity incentive plan awards: Number of unearned shares, units or other rights that have not vested (#)	Equity incentive plan awards: Market or payout value of unearned shares, units or other rights that have not vested ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
PEO									
A									
B									

(2) The Table shall include:

(i) The name of the named executive officer (column (a));

(ii) On an award-by-award basis, the number of securities underlying unexercised options, including awards that have been transferred other than for value, that are exercisable and that are not reported in column (d) (column (b));

(iii) On an award-by-award basis, the number of securities underlying unexercised options, including awards that have been transferred other than for value, that are unexercisable and that are not reported in column (d) (column (c));

(iv) On an award-by-award basis, the total number of shares underlying unexercised options awarded under any equity incentive plan that have not been earned (column (d));

(v) For each instrument reported in columns (b), (c) and (d), as applicable, the exercise or base price (column (e));

(vi) For each instrument reported in columns (b), (c) and (d), as applicable, the expiration date (column (f));

(vii) The total number of shares of stock that have not vested and that are not reported in column (i) (column (g));

(viii) The aggregate market value of shares of stock that have not vested and that are not reported in column (j) (column (h));

(ix) The total number of shares of stock, units or other rights awarded under any equity incentive plan that have not vested and that have not been earned, and, if applicable the number of shares underlying any such unit or right (column (i)); and

(x) The aggregate market or payout value of shares of stock, units or other rights awarded under any equity incentive plan that have not vested and that have not been earned (column (j)).

Instructions to Item 402(p)(2).

1. Identify by footnote any award that has been transferred other than for value, disclosing the nature of the transfer.

2. The vesting dates of options, shares of stock and equity incentive plan awards held at fiscal-year end must be disclosed by footnote to the applicable column where the outstanding award is reported.

3. Compute the market value of stock reported in column (h) and equity incentive plan awards of stock reported in column (j) by multiplying the closing market price of the smaller reporting company's stock at the end of the last completed fiscal year by the number of shares or units of stock or the amount of equity incentive plan awards, respectively. The number of shares or units reported in column (d) or (i), and the payout value reported in column (j), shall be based on achieving threshold performance goals, except that if the previous fiscal year's performance has exceeded the threshold, the disclosure shall be based on the next higher performance measure (target or maximum) that exceeds the previous fiscal year's performance. If the award provides only for a single estimated payout, that amount should be reported. If the target amount is not determinable, smaller reporting companies must provide a representative amount based on the previous fiscal year's performance.

4. Multiple awards may be aggregated where the expiration date and the exercise and/or base price of the instruments is identical. A single award consisting of a combination of options, SARs and/or similar option-like instruments shall be reported as separate awards with respect to each tranche with a different exercise and/or base price or expiration date.

5. Options or stock awarded under an equity incentive plan are reported in columns (d) or (i) and (j), respectively, until the relevant performance condition has been satisfied. Once the relevant performance condition has been satisfied, even if the option

or stock award is subject to forfeiture conditions, options are reported in column (b) or (c), as appropriate, until they are exercised or expire, or stock is reported in columns (g) and (h) until it vests.

(q) Smaller reporting companies - Additional narrative disclosure. Provide a narrative description of the following to the extent material:

(1) The material terms of each plan that provides for the payment of retirement benefits, or benefits that will be paid primarily following retirement, including but not limited to tax-qualified defined benefit plans, supplemental executive retirement plans, tax-qualified defined contribution plans and nonqualified defined contribution plans.

(2) The material terms of each contract, agreement, plan or arrangement, whether written or unwritten, that provides for payment(s) to a named executive officer at, following, or in connection with the resignation, retirement or other termination of a named executive officer, or a change in control of the smaller reporting company or a change in the named executive officer's responsibilities following a change in control, with respect to each named executive officer.

(r) Smaller reporting companies - Compensation of directors. (1) Provide the information specified in paragraph (r)(2) of this Item, concerning the compensation of the directors for the smaller reporting company's last completed fiscal year, in the following tabular format:

Director Compensation

Name (a)	Fees earned or paid in cash ($) (b)	Stock awards ($) (c)	Option awards ($) (d)	Non-equity incentive plan compensation ($) (e)	Nonqualified deferred compensation earnings ($) (f)	All other compensation ($) (g)	Total ($) (h)
A							
B							
C							
D							
E							

(2) The Table shall include:

(i) The name of each director unless such director is also a named executive officer under paragraph (m) of this Item and his or her compensation for service as a director is fully reflected in the Summary Compensation Table pursuant to paragraph (n) of this Item and otherwise as required pursuant to paragraphs (o) through (q) of this Item (column (a));

(ii) The aggregate dollar amount of all fees earned or paid in cash for services as a director, including annual retainer fees, committee and/or chairmanship fees, and meeting fees (column (b));

(iii) For awards of stock, the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with FAS 123R (column (c));

(iv) For awards of stock options, with or without tandem SARs, the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with FAS 123R (column (d));

Instruction to Item 402(r)(2)(iii) and (iv). For each director, disclose by footnote to the appropriate column, the aggregate number of stock awards and the aggregate number of option awards outstanding at fiscal year end.

(v) The dollar value of all earnings for services performed during the fiscal year pursuant to non-equity incentive plans as defined in paragraph (m)(5)(iii) of this Item, and all earnings on any outstanding awards (column (e));

(vi) Above-market or preferential earnings on compensation that is deferred on a basis that is not tax-qualified, including such earnings on nonqualified defined contribution plans (column (f));

(vii) All other compensation for the covered fiscal year that the smaller reporting company could not properly report in any other column of the Director Compensation Table (column (g)). Each compensation item that is not properly reportable in columns (b) through (f), regardless of the amount of the compensation item, must be included in column (g) and must be identified and quantified in a footnote if it is deemed material in accordance with paragraph (o)(7) of this Item. Such compensation must include, but is not limited to:

(A) Perquisites and other personal benefits, or property, unless the aggregate amount of such compensation is less than $10,000;

(B) All "gross-ups" or other amounts reimbursed during the fiscal year for the payment of taxes;

(C) For any security of the smaller reporting company or its subsidiaries purchased from the smaller reporting company or its subsidiaries (through deferral of salary or bonus, or otherwise) at a discount from the market price of such security at the date of purchase, unless that discount is available generally, either to all security holders or to all salaried employees of the smaller reporting company, the compensation cost, if any, computed in accordance with FAS 123R;

(D) The amount paid or accrued to any director pursuant to a plan or arrangement in connection with:

(1) The resignation, retirement or any other termination of such director; or

(2) A change in control of the smaller reporting company;

(E) Smaller reporting company contributions or other allocations to vested and unvested defined contribution plans;

(F) Consulting fees earned from, or paid or payable by the smaller reporting company and/or its subsidiaries (including joint ventures);

(G) The annual costs of payments and promises of payments pursuant to director legacy programs and similar charitable award programs;

(H) The dollar value of any insurance premiums paid by, or on behalf of, the smaller reporting company during the covered fiscal year with respect to life insurance for the benefit of a director; and

(I) The dollar value of any dividends or other earnings paid on stock or option awards, when those amounts were not factored into the grant date fair value for the stock or option award; and

Instruction to Item 402(r)(2)(vii). Programs in which smaller reporting companies agree to make donations to one or more charitable institutions in a director's name, payable by the smaller reporting company currently or upon a designated event, such as the retirement or death of the director, are charitable awards programs or director legacy programs for purposes of the disclosure required by paragraph (r)(2)(vii)(G) of this Item. Provide footnote disclosure of the total dollar amount payable under the program and other material terms of each such program for which tabular disclosure is provided.

(viii) The dollar value of total compensation for the covered fiscal year (column (h)). With respect to each director, disclose the sum of all amounts reported in columns (b) through (g).

Instruction to Item 402(r)(2). Two or more directors may be grouped in a single row in the Table if all elements of their compensation are identical. The names of the directors for whom disclosure is presented on a group basis should be clear from the Table.

(3) Narrative to director compensation table. Provide a narrative description of any material factors necessary to an understanding of the director compensation disclosed in this Table. While material factors will vary depending upon the facts, examples of such factors may include, in given cases, among other things:

(i) A description of standard compensation arrangements (such as fees for retainer, committee service, service as chairman of the board or a committee, and meeting attendance); and

(ii) Whether any director has a different compensation arrangement, identifying that director and describing the terms of that arrangement.

Instruction to Item 402(r). In addition to the Instruction to paragraph (r)(2)(vii) of this Item, the following apply equally to paragraph (r) of this Item: Instructions 2 and 4 to paragraph (n) of this Item; the Instructions to paragraphs (n)(2)(iii) and (iv) of this Item; the Instruction to paragraphs (n)(2)(v) and (vi) of this Item; the Instructions to paragraph (n)(2)(vii) of this Item; the Instruction to paragraph (n)(2)(viii) of this Item; the Instructions to paragraph (n)(2)(ix) of this Item; and paragraph (o)(7) of this Item. These Instructions apply to the columns in the Director Compensation Table that are analogous to the columns in the Summary Compensation Table to which they refer and to disclosures under paragraph (r) of this Item that correspond to analogous disclosures provided for in paragraph (n) of this Item to which they refer.

22. Amend § 229.404 by revising the introductory text of paragraph (c)(1) and adding paragraph (d) before the Instructions to Item 404 to read as follows:

§ 229.404 (Item 404) Transactions with related persons, promoters and certain control persons.

* * * * *

(c) Promoters and certain control persons. (1) Registrants that are filing a registration statement on Form S–1 under the Securities Act (§ 239.11 of this chapter) or on Form 10 under the Exchange Act (§ 249.210 of this chapter) and that had a promoter at any time during the past five fiscal years shall:

* * * * *

<u>(d) Smaller reporting companies</u>. A registrant that qualifies as a "smaller reporting company," as defined by § 229.10(f)(1), must provide the following information in order to comply with this Item:

(1) The information required by paragraph (a) of this Item for the period specified there for a transaction in which the amount involved exceeds the lesser of $120,000 or one percent of the average of the smaller reporting company's total assets at year end for the last two completed fiscal years;

(2) The information required by paragraph (c) of this Item; and

(3) A list of all parents of the smaller reporting company showing the basis of control and as to each parent, the percentage of voting securities owned or other basis of control by its immediate parent, if any.

<u>Instruction to Item 404(d)</u>

1. Include information for any material underwriting discounts and commissions upon the sale of securities by the smaller reporting company where any of the persons specified in paragraph (a) of this Item was or is to be a principal underwriter or is a controlling person or member of a firm that was or is to be a principal underwriter.

2. For smaller reporting companies information shall be given for the period specified in paragraph (a) of this Item and, in addition, for the fiscal year preceding the small reporting company's last fiscal year.

* * * * *

23. Amend § 229.407 by revising paragraphs (a)(1)(iii), (d)(4)(i)(B) and adding paragraph (g) before the Instructions to Item 407 to read as follows:

§ 229.407 **(Item 407) Corporate governance.**

(a) * * *

(1) * * *

(iii) If the information called for by paragraph (a) of this Item is being presented in a registration statement on Form S–1 (§ 239.11 of this chapter) under the Securities Act or on a Form 10 (§ 249.210 of this chapter) under the Exchange Act where the registrant has applied for listing with a national securities exchange or in an inter-dealer quotation system that has requirements that a majority of the board of directors be independent, the definition of independence that the registrant uses for determining if a majority of the board of directors is independent, and the definition of independence that the registrant uses for determining if members of the specific committee of the board of directors are independent, that is in compliance with the independence listing standards of the national securities exchange or inter-dealer quotation system on which it has applied for listing, or if the registrant has not adopted such definitions, the independence standards for determining if the majority of the board of directors is independent and if members of the committee of the board of directors are independent of that national securities exchange or inter-dealer quotation system.

* * * * *

(d) * * *

(4) (i) * * *

(B) The registrant is filing an annual report on Form 10-K (§ 249.310 of this chapter) or a proxy statement or information statement pursuant to the Exchange Act (15 U.S.C. 78a et seq.) if action is to be taken with respect to the election of directors; and

* * * * *

(g) Smaller reporting companies. A registrant that qualifies as a "smaller reporting company," as defined by § 229.10(f)(1), is not required to provide:

(1) The disclosure required in paragraph (d)(5) of this Item in its first annual report filed pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m (a) or 78o(d)) following the effective date of its first registration statement filed under the Securities Act (15 U.S.C. 77a et seq.) or Exchange Act (15 U.S.C. 78a et seq.); and

(2) Need not provide the disclosures required by paragraphs (e)(4) and (e)(5) of this Item.

* * * * *

24. Amend § 229.503 by adding paragraph (e) before the Instruction to Item 503 to read as follows:

§ 229.503 (Item 503) Prospectus summary, risk factors, and ratio of earnings to fixed charges.

* * * * *

(e) Smaller reporting companies. A registrant that qualifies as a smaller reporting company, as defined by § 229.10(f), need not comply with paragraph (d) of this Item.

* * * * *

25. Amend § 229.504 by revising Instruction 6 to Item 504 to read as follows:

§ 229.504 (Item 504) Use of proceeds.

* * * * *

Instructions to Item 504:

* * * * *

6. Where the registrant indicates that the proceeds may, or will, be used to finance acquisitions of other businesses, the identity of such businesses, if known, or, if not known, the nature of the businesses to be sought, the status of any negotiations with respect to the acquisition, and a brief description of such business shall be included. Where, however, pro forma financial statements reflecting such acquisition are not required by Regulation S-X (17 CFR 210.01 through 210.12-29), including Rule 8-05 for smaller reporting companies, to be included in the registration statement, the possible terms of any transaction, the identification of the parties thereto or the nature of the business sought need not be disclosed, to the extent that the registrant reasonably determines that public disclosure of such information would jeopardize the acquisition. Where Regulation S-X, including Rule 8-04 for smaller reporting companies, as applicable, would require financial statements of the business to be acquired to be included, the description of the business to be acquired shall be more detailed.

* * * * *

26. Amend § 229.512 by revising the introductory text of paragraph (e) to read as follows:

§ 229.512 (Item 512) Undertakings.

* * * * *

(e) <u>Incorporated annual and quarterly reports</u>. Include the following if the registration statement specifically incorporates by reference (other than by indirect incorporation by reference through a Form 10–K (§ 249.310 of this chapter) report) in the prospectus all or any part of the annual report to security holders meeting the requirements of Rule 14a–3 or Rule 14c–3 under the Exchange Act (§ 240.14a–3 or § 240.14c–3 of this chapter):

* * * * *

27. Amend § 229.601 by:

a. Revising paragraph (a)(4); the Exhibit Table; and paragraphs (b)(4)(ii), (b)(4)(v), (b)(10)(iii)(C)(6), introductory text (b)(13), (b)(13)(i), (b)(15), (b)(19), and (b)(22); and

b. Adding paragraph (c) to read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

(4) If a material contract or plan of acquisition, reorganization, arrangement, liquidation or succession is executed or becomes effective during the reporting period reflected by a Form 10-Q or Form 10-K, it shall be filed as an exhibit to the Form 10-Q or Form 10-K filed for the corresponding period. Any amendment or modification to a previously filed exhibit to a Form 10, 10-K or 10-Q document shall be filed as an exhibit to a Form 10-Q and Form 10-K. Such amendment or modification need not be filed where such previously filed exhibit would not be currently required.

* * * * *

Exhibit Table

Instructions to the Exhibit Table.

1. The exhibit table indicates those documents that must be filed as exhibits to the respective forms listed.

2. The "X" designation indicates the documents which are required to be filed with each form even if filed previously with another document, Provided, However, that such previously filed documents may be incorporated by reference to satisfy the filing requirements.

3. The number used in the far left column of the table refers to the appropriate subsection in paragraph (b) where a description of the exhibit can be found. Whenever necessary, alphabetical or numerical subparts may be used.

EXHIBIT TABLE

	Securities Act Forms									Exchange Act Forms			
	S-1	S-3	S-4[1]	S-8	S-11	F-1	F-3	F-4[1]	10	8-K[2]	10-D	10-Q	10-K
(1) Underwriting agreement	X	X	X	---	X	X	X	X	---	X	---	---	---
(2) Plan of acquisition, reorganization, arrangement, liquidation or succession	X	X	X	---	X	X	X	X	X	X	---	X	X
(3) (i) Articles of incorporation	X	---	X	---	X	X	---	X	X	X	X	X	X
(ii) Bylaws	X	---	X	---	X	X	---	X	X	X	X	X	X
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X	X	X	X	X	X	X	X	X	X
(5) Opinion re legality	X	X	X	X	X	X	X	X	---	---	---	---	---
(6) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) Correspondence from an independent accountant regarding non-reliance on a previously issued audit report or completed interim review	---	---	---	---	---	---	---	---	---	X	---	---	---
(8) Opinion re tax matters	X	X	X	---	X	X	X	X	---	---	---	---	---
(9) Voting trust agreement	X	---	X	---	X	X	---	X	X	---	---	---	X
(10) Material contracts	X	---	X	---	X	X	---	X	X	---	X	X	X
(11) Statement re computation of per share earnings	X	---	X	---	X	X	---	X	X	---	---	X	X
(12) Statements re computation of ratios	X	X	X	---	X	X	---	X	X	---	---	---	X

(13) Annual report to security holders, Form 10-Q or quarterly report to security holders[3]	---	---	X	---	---	---	---	---	---	---	---	---	X
(14) Code of Ethics										X	---		X
(15) Letter re unaudited interim financial information	X	X	X	X	X	X	X	X	---	---	---	X	---
(16) Letter re change in certifying accountant[4]	X	---	X	---	X	---	---	---	X	X	---	---	X
(17) Correspondence on departure of director	---	---	---	---	---	---	---	---	---	X	---	---	---
(18) Letter re change in accounting principles	---	---	---	---	---	---	---	---	---	---	---	X	X
(19) Report furnished to security holders	---	---	---	---	---	---	---	---	---	---	---	X	---
(20) Other documents or statements to security holders	---	---	---	---	---	---	---	---	---	X	---	---	---
(21) Subsidiaries of the registrant	X	---	X	---	X	X	---	X	X	---	---	---	X
(22) Published report regarding matters submitted to vote of security holders	---	---	---	---	---	---	---	---	---	---	X	X	X
(23) Consents of experts and counsel	X	X	X	X	X	X	X	X	---	X[5]	X[5]	X[5]	X[5]
(24) Power of attorney	X	X	X	X	X	X	X	X	X	X	---	X	X
(25) Statement of eligibility of trustee	X	X	X	---	---	X	X	X	---	---	---	---	---
(26) Invitation for competitive bids	X	X	X	---	---	X	X	X	---	---	---	---	---
(27) through (30) [Reserved]													
(31) (i) Rule 13a-14(a)/15d-14(a) Certifications (ii) Rule 13a-14/15d-14 Certifications	---	---	---	---	---	---	---	---	---	---	---	X ---	X X
(32) Section 1350 Certifications[6]	---	---	---	---	---	---	---	---	---	---	---	X	X
(33) Report on assessment of compliance with servicing criteria for asset-backed issuers	---	---	---	---	---	---	---	---	---	---	---	---	X
(34) Attestation report on assessment of compliance with servicing criteria for asset-backed securities	---	---	---	---	---	---	---	---	---	---	---	---	X
(35) Servicer compliance statement	---	---	---	---	---	---	---	---	---	---	---	---	X
(36) through (98) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(99) Additional exhibits	X	X	X	X	X	X	X	X	X	X	X	X	X
(100) XBRL-Related Documents									X	X		X	X

[1] An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Form S-4 or F-4 to provide information about such company at a level prescribed by Form S-3 or F-3; and (2) the form, the level of which has been elected under

Form S-4 or F-4, would not require such company to provide such exhibit if it were registering a primary offering.

[2] A Form 8-K exhibit is required only if relevant to the subject matter reported on the Form 8-K report. For example, if the Form 8-K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

[3] Where incorporated by reference into the text of the prospectus and delivered to security holders along with the prospectus as permitted by the registration statement; or, in the case of the Form 10-K, where the annual report to security holders is incorporated by reference into the text of the Form 10-K.

[4] If required pursuant to Item 304 of Regulation S-K.

[5] Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

[6] Pursuant to §§ 240.13a-13(b)(3) and 240.15d-13(b)(3) of this chapter, asset-backed issuers are not required to file reports on Form 10-Q.

(b) * * *

(4) * * *

(ii) Except as set forth in paragraph (b)(4)(iii) of this Item for filings on Forms S-1, S-4, S-11, N-14, and F-4 under the Securities Act (§ 239.11, 239.25, 239.18, 239.23 and 239.34 of this chapter) and Forms 10 and 10-K under the Exchange Act (§§ 249.210 and 249.310 of this chapter) all instruments defining the rights of holders of long-term debt of the registrant and its consolidated subsidiaries and for any of its unconsolidated subsidiaries for which financial statements are required to be filed.

* * * * *

(v) With respect to Forms 8-K and 10-Q under the Exchange Act that are filed and that disclose, in the text of the Form 10-Q, the interim financial statements, or the footnotes thereto the creation of a new class of securities or indebtedness or the modification of existing rights of security holders, file all instruments defining the rights of holders of these securities or indebtedness. However, there need not be filed any instrument with respect to long-term debt not being registered which meets the exclusion set forth in paragraph (b)(4)(iii)(A) of this Item.

* * * * *

(10) * * *

(iii) * * *

(C) * * *

(6) Any compensatory plan, contract, or arrangement if the registrant is a wholly owned subsidiary of a company that has a class of securities registered pursuant to section 12 or files reports pursuant to section 15(d) of the Exchange Act and is filing a report on Form 10-K or registering debt instruments or preferred stock that are not voting securities on Form S-1.

* * * * *

(13) Annual report to security holders, Form 10-Q or quarterly report to security holders.

(i) The registrant's annual report to security holders for its last fiscal year, its Form 10-Q (if specifically incorporated by reference in the prospectus) or its quarterly report to security holders, if all or a portion thereof is incorporated by reference in the filing. Such report, except for those portions thereof that are expressly incorporated by reference in the filing, is to be furnished for the information of the Commission and is not to be deemed "filed" as part of the filing. If the financial statements in the report have been incorporated by reference in the filing, the accountant's certificate shall be manually signed in one copy. See Rule 411(b) (§ 230.411 (b) of this chapter).

* * * * *

(15) Letter re unaudited interim financial information. A letter, where applicable, from the independent accountant that acknowledges awareness of the use in a registration statement of a report on unaudited interim financial information that pursuant to Rule 436(c) under the Securities Act (§ 230.436(c) of this chapter) is not considered a part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of that Act. Such letter may be filed with the registration statement, an amendment thereto, or a report on Form 10-Q which is incorporated by reference into the registration statement.

* * * * *

(19) Report furnished to security holders. If the registrant makes available to its security holders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of Part I of Form 10-Q, the information called for may be incorporated by reference to such published document or statement, provided copies thereof are included as an exhibit to the registration statement or to Part I of the Form 10-Q report.

* * * * *

(22) Published report regarding matters submitted to vote of security holders. Published reports containing all of the information called for by Item 4 of Part II of Form 10-Q or Item 4 of Part I of Form 10-K that is referred to therein in lieu of providing disclosure in Form 10-Q or 10-K, that are required to be filed as exhibits by Rule 12b-23(a)(3) under the Exchange Act (§ 240.12b-23(a)(3) of this chapter).

* * * * *

(c) Smaller reporting companies. A smaller reporting company need not provide the disclosure required in paragraph (b)(12) of this Item, Statements re computation of ratios.

28. Amend § 229.701 by revising paragraph (e) to read as follows:

§ 229.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.

* * * * *

(e) Terms of conversion or exercise. If the information called for by this paragraph (e) is being presented on Form 8-K, Form 10-Q, Form 10-K, or Form 10-D under the Exchange Act (§ 249.308, § 249.308(a), § 240.310 or § 249.312) of this chapter, and where the securities sold by the registrant are convertible or exchangeable into equity securities, or are warrants or options representing equity securities, disclose the terms of conversion or exercise of the securities.

* * * * *

29. Amend § 229.1118 by revising paragraph (b)(2) to read as follows:

§ 229.1118 (Item 1118) Reports and additional information.

* * * * *

(b) * * *

(2) State that the public may read and copy any materials filed with the Commission at the Commission's Public Reference Room at 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. State that the public may obtain information on the operation of the Public Reference Room by calling the Securities and Exchange Commission at 1–800–SEC–0330. State that the Commission maintains an Internet site that contains reports, proxy

and information statements, and other information regarding issuers that file electronically with the Commission and state the address of that site (http://www.sec.gov).

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

30. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

31. Amend § 230.110 by revising paragraph (a) to read as follows:

§ 230.110 Business hours of the Commission.

(a) General. The principal office of the Commission, at 100 F Street, NE, Washington, DC 20549, is open each day, except Saturdays, Sundays, and Federal holidays, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, provided that hours for the filing of documents pursuant to the Act or the rules and regulations thereunder are as set forth in paragraphs (b), (c) and (d) of this section.

* * * * *

32. Amend § 230.138 by revising paragraph (a)(2)(i) to read as follows:

§ 230.138 Publications or distributions of research reports by brokers or dealers about securities other than those they are distributing.

(a) * * *

(2) * * *

(i) Is required to file reports, and has filed all periodic reports required during the preceding 12 months (or such shorter time that the issuer was required to file such reports) on Forms 10–K (§ 249.310 of this chapter), 10–Q (§ 249.308a of this chapter), and 20–F (§ 249.220f of this chapter) pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)); or

* * * * *

33. Amend § 230.139 by revising paragraph (a)(1)(i)(A)(2) to read as follows:

§ 230.139 Publications or distributions of research reports by brokers or dealers distributing securities.

(a) * * *

(1) * * *

(i) * * *

(A) * * *

(2) As of the date of reliance on this section, has filed all periodic reports required during the preceding 12 months on Forms 10–K (§ 249.310 of this chapter), 10-Q (§ 249.308a of this chapter), and 20–F (§ 249.220f of this chapter) pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)); or

* * * * *

34. Amend § 230.158 by revising paragraphs (a)(1)(i), (a)(2)(i), and (b) to read as follows.

§ 230.158 Definitions of certain terms in the last paragraph of section 11(a).

(a) * * *

(1) * * *

(i) In Item 8 of Form 10-K (§ 239.310 of this chapter), part I, Item 1 of Form 10-Q (§ 240.308a of this chapter), or Rule 14a-3(b) (§ 240.14a-3(b) of this chapter) under the Securities Exchange Act of 1934;

* * * * *

(2) * * *

(i) On Form 10–K, Form 10–Q, Form 8–K (§ 249.308 of this chapter), or in the annual report to security holders pursuant to Rule 14a–3 under the Securities Exchange Act of 1934 (§ 240.14a-3 of this chapter); or

* * * * *

(b) For purposes of the last paragraph of section 11(a) only, the "earning statement" contemplated by paragraph (a) of this section shall be deemed to be "made generally available to its security holders" if the registrant:

(1) Is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 and

(2) Has filed its report or reports on Form 10–K and Form 10–KSB, Form 10–Q and Form 10–QSB, Form 8–K, Form 20–F, Form 40–F, or Form 6–K, or has supplied to the Commission copies of the annual report sent to security holders pursuant to Rule 14a-3(c), (§ 240.14a-3(c) of this chapter) containing such information.

A registrant may use other methods to make an earning statement "generally available to its security holders" for purposes of the last paragraph of section 11(a).

* * * * *

35. Amend § 230.175 by revising paragraphs (b)(1), (b)(1)(i), and (b)(2) to read as follows:

§ 230.175 Liability for certain statements by issuers.

* ** * *

(b) * * *

(1) A forward-looking statement (as defined in paragraph (c) of this section) made in a document filed with the Commission, in Part I of a quarterly report on Form 10-Q, (§ 249.308a of this chapter), or in an annual report to security holders meeting the requirements of Rule 14a-3(b) and (c) or 14c-3(a) and (b) under the Securities Exchange Act of 1934 (§§ 240.14a-3(b) and (c) or 240.14c-3(a) and (b) of this chapter), a statement reaffirming such forward-looking statement after the date the document was filed or the annual report was made publicly available, or a forward-looking statement made before the date the document was filed or the date the annual report was publicly available if such statement is reaffirmed in a filed document, in Part I of a quarterly report on Form 10-Q, or in an annual report made publicly available within a reasonable time after the making of such forward-looking statement; Provided, that

(i) At the time such statements are made or reaffirmed, either the issuer is subject to the reporting requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 and has complied with the requirements of Rule 13a-1 or 15d-1 (§§ 239.13a-1 or 239.15d-1 of this chapter) thereunder, if applicable, to file its most recent annual report on Form 10-K, Form 20-F, or Form 40-F; or if the issuer is not subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, the statements are made in a registration statement filed under the Act, offering statement or solicitation of interest, written document or broadcast script under Regulation A or pursuant to sections 12(b) or (g) of the Securities Exchange Act of 1934; and

* * * * *

(2) Information that is disclosed in a document filed with the Commission, in Part I of a quarterly report on Form 10–Q (§ 249.308a of this chapter) or in an annual report to shareholders meeting the requirements of Rules 14a–3 (b) and (c) or 14c–3 (a) and (b) under the Securities Exchange Act of 1934 (§§ 240.14a–3(b) and (c) or 240.14c-3(a) and (b) of this chapter) and that relates to:

(i) The effects of changing prices on the business enterprise, presented voluntarily or pursuant to Item 303 of Regulation S-K (§ 229.303 of this chapter), "Management's Discussion and Analysis of Financial Condition and Results of Operations," Item 5 of Form 20–F (§ 249.220(f) of this chapter), "Operating and Financial Review and Prospects," Item 302 of Regulation S-K (§ 229.302 of this chapter), "Supplementary Financial Information," or Rule 3-20(c) of Regulation S-X (§ 210.3–20(c) of this chapter); or

(ii) The value of proved oil and gas reserves (such as a standardized measure of discounted future net cash flows relating to proved oil and gas reserves as set forth in paragraphs 30–34 of Statement of Financial Accounting Standards No. 69) presented voluntarily or pursuant to Item 302 of Regulation S-K (§ 229.302 of this chapter).

* * * * *

36. Amend § 230.405 by removing the definition of "small business issuer" and adding the definition of "smaller reporting company" in alphabetical order to read as follows:

§ 230.405 **Definitions of terms.**

* * * * *

Smaller reporting company: As used in this part, the term smaller reporting company means an issuer that is not an investment company, an asset-backed issuer (as defined in § 229.1101 of this chapter), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that:

(1) Had a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter, computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity; or

(2) In the case of an initial registration statement under the Securities Act or Exchange Act for shares of its common equity, had a public float of less than $75 million as of a date within 30 days of the date of the filing of the registration statement, computed by multiplying the aggregate worldwide number of such shares held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of such shares included in the registration statement by the estimated public offering price of the shares; or

(3) In the case of an issuer whose public float as calculated under paragraph (1) or (2) of this definition was zero, had annual revenues of less than $50 million during the most recently completed fiscal year for which audited financial statements are available.

(4) <u>Determination</u>: Whether or not an issuer is a smaller reporting company is determined on an annual basis.

(i) For issuers that are required to file reports under section 13(a) or 15(d) of the Exchange Act, the determination is based on whether the issuer came within the definition of smaller reporting company using the amounts specified in paragraph (f)(2)(iii) of Item 10 of Regulation S-K (§ 229.10(f)(1)(i) of this chapter), as of the last business day of the second fiscal quarter of the issuer's previous fiscal year. An issuer in this category must reflect this determination in the information it provides in its quarterly report on Form 10-Q for the first fiscal quarter of the next year, indicating on the cover page of that filing, and in subsequent filings for that fiscal year, whether or not it is a smaller reporting company, except that, if a determination based on public float indicates that the issuer is newly eligible to be a smaller reporting company, the issuer may choose to reflect this determination beginning with its first quarterly report on Form 10-Q following the determination, rather than waiting until the first fiscal quarter of the next year.

(ii) For determinations based on an initial Securities Act or Exchange Act registration statement under paragraph (f)(1)(ii) of Item 10 of Regulation S-K (§ 229.10(f)(1)(ii) of this chapter), the issuer must reflect the determination in the information it provides in the registration statement and must appropriately indicate on the cover page of the filing, and subsequent filings for the fiscal year in which the filing is made, whether or not it is a smaller reporting company. The issuer must redetermine its status at the end of its second fiscal quarter and then reflect any change in status as provided in paragraph (4)(i) of this definition. In the case of a determination based on an initial Securities Act registration statement, an issuer that was not determined to be a smaller reporting company has the option to redetermine its status at the conclusion of the offering covered by the registration statement based on the actual offering price and number of shares sold.

(iii) Once an issuer fails to qualify for smaller reporting company status, it will remain unqualified unless it determines that its public float, as calculated in accordance with paragraph (f)(1) of this definition, was less than $50 million as of the last business day of its second fiscal quarter or, if that calculation results in zero because the issuer had no public equity outstanding or no market price for its equity existed, if the issuer had annual revenues of less than $40 million during its previous fiscal year.

* * * * *

37. Amend § 230.415 by revising paragraph (a)(3) to read as follows:

§ 230.415 Delayed or continuous offerings and sale of securities.

(a) * * *

(3) The registrant furnishes the undertakings required by Item 512(a) of Regulation S-K (§ 229.512(a) of this chapter), except that a registrant that is an investment company filing on Form N-2 must furnish the undertakings required by Item 34.4 of Form N-2 (§ 239.14 and § 274.11a-1 of this chapter).

* * * * *

38. Amend § 230.428 by revising paragraphs (b)(2)(ii), (b)(2)(iii), (b)(2)(iv), and (b)(4) to read as follows:

§ 230.428 Documents constituting a section 10(a) prospectus for Form S–8 registration statement; requirements relating to offerings of securities registered on Form S–8.

* * * * *

(b) * * *

(2) * * *

(ii) The registrant's annual report on Form 10–K (§ 249.310 of this chapter), 20-F (§ 249.220f of this chapter) or, in the case of registrants described in General Instruction A.(2) of Form 40–F (§ 249.240f of this chapter), for its latest fiscal year;

(iii) The latest prospectus filed pursuant to Rule 424(b) (§ 230.424(b)) under the Act that contains audited financial statements for the registrant's latest fiscal year, Provided that the financial statements are not incorporated by reference from another filing, and Provided further that such prospectus contains substantially the information required by Rule 14a–3(b) (§ 240.14a-3(b) of this chapter) or the registration statement was on Form S-1 (§ 239.11 of this chapter) or F–1 (§ 239.31 of this chapter); or

(iv) The registrant's effective Exchange Act registration statement on Form 10 (§ 249.210 of this chapter), 20–F or, in the case of registrants described in General Instruction A.(2) of Form 40–F, containing audited financial statements for the registrant's latest fiscal year.

* * * * *

(4) Where interests in a plan are registered, the registrant shall deliver or cause to be delivered promptly, without charge, to each employee to whom information is required to be delivered, upon written or oral request, a copy of the then latest annual report of the plan filed pursuant to section 15(d) of the Exchange Act, whether on Form

11–K (§ 249.311 of this chapter) or included as part of the registrant's annual report on Form 10–K.

* * * * *

39. Amend § 230.430B by revising paragraphs (f)(4) introductory text, (ii), and (i) to read as follows:

§ 230.430B Prospectus in a registration statement after effective date.

* * * * *

(f) * * *

(4) Except for an effective date resulting from the filing of a form of prospectus filed for purposes of including information required by section 10(a)(3) of the Act or pursuant to Item 512(a)(1)(ii) of Regulation S-K (§ 229.512(a)(1)(ii) of this chapter), the date a form of prospectus is deemed part of and included in the registration statement pursuant to this paragraph shall not be an effective date established pursuant to paragraph (f)(2) of this section as to:

(i) * * *

(ii) Any person signing any report or document incorporated by reference into the registration statement, except for such a report or document incorporated by reference for purposes of including information required by section 10(a)(3) of the Act or pursuant to Item 512(a)(1)(ii) of Regulation S-K (such person except for such reports being deemed not to be a person who signed the registration statement within the meaning of section 11(a) of the Act).

* * * * *

(i) Issuers relying on this section shall furnish the undertakings required by Item 512(a) of Regulation S-K.

* * * * *

40. Amend § 230.430C by revising paragraph (d) to read as follows:

§ 230.430C Prospectus in a registration statement pertaining to an offering other than pursuant to Rule 430A or Rule 430B after the effective date.

* * * * *

(d) Issuers subject to paragraph (a) of this section shall furnish the undertakings required by Item 512(a) of Regulation S-K (§ 229.512(a) of this chapter) or Item 34.4 of Form N–2 (§§ 239.14 and 274.11a–1 of this chapter), as applicable.

41. Revise § 230.455 to read as follows:

§ 230.455 Place of filing.

All registration statements and other papers filed with the Commission shall be filed at its principal office. Such material may be filed by delivery to the Commission; provided, however, that only registration statements and post-effective amendments thereto filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)) may be filed by means of facsimile transmission.

42. Amend § 230.502 by revising paragraphs (b)(2)(i)(B)(1), (b)(2)(i)(B)(2), (b)(2)(ii)(A), (b)(2)(ii)(B), and (b)(2)(iii) to read as follows:

§ 230.502 General conditions to be met.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(B) Financial statement information. (1) Offerings up to $2,000,000. The information required in Article 8 of Regulation S-X (§ 210.8 of this chapter), except that only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited.

(2) Offerings up to $7,500,000. The financial statement information required in Form S-1 (§ 239.10 of this chapter) for smaller reporting companies. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

* * * * *

(ii) * * *

(A) The issuer's annual report to shareholders for the most recent fiscal year, if such annual report meets the requirements of Rules 14a-3 or 14c-3 under the Exchange Act (§ 240.14a–3 or § 240.14c–3 of this chapter), the definitive proxy statement filed in connection with that annual report, and if requested by the purchaser in writing, a copy of the issuer's most recent Form 10–K (§ 249.310 of this chapter) under the Exchange Act.

(B) The information contained in an annual report on Form 10–K (§ 249.310 of this chapter) under the Exchange Act or in a registration statement on Form S–1 (§ 239.11 of this chapter) or S–11 (§ 239.18 of this chapter) under the Act or on Form 10 (§

249.210 of this chapter) under the Exchange Act, whichever filing is the most recent required to be filed.

* * * * *

(iii) Exhibits required to be filed with the Commission as part of a registration statement or report, other than an annual report to shareholders or parts of that report incorporated by reference in a Form 10–K report, need not be furnished to each purchaser that is not an accredited investor if the contents of material exhibits are identified and such exhibits are made available to a purchaser, upon his or her written request, a reasonable time before his or her purchase.

* * * * *

PART 239-FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

43. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

44. Amend § 239.0-1 by revising paragraph (b) to read as follows:

§ 239.0-1 Availability of forms.

* * * * *

(b) Any person may obtain a copy of any form prescribed for use in this part by written request to the Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549. Any persons may inspect the forms at this address and at the

Commission's regional offices. (See § 200.11 of this chapter for the addresses of the SEC regional offices.)

45. By removing and reserving §§ 239.9 and 239.10 and removing Forms SB-1 and Form SB-2.

Note- The text of Forms SB-1 and SB-2 does not appear in the Code of Federal Regulations.

46. Amend Form S-1 (referenced in § 239.11) by:

a. Adding to the cover page, above the calculation of the registration fee table, check boxes requesting the registrant to indicate whether it is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company; and

b. Revising Items 11(e), 11A, and 12(a)(1) in Part I.

The revisions and addition read as follows:

Note- The text of Form S-1 does not and this amendment will not appear in the Code of Federal Regulations.

* * * * *

FORM S-1

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☐ Accelerated filer ☐

Non-accelerated filer ☐ Smaller reporting company ☐
(Do not check if a smaller reporting company)

* * * * *

PART I-INFORMATION REQUIRED IN PROSPECTUS

* * * * *

Item 11. Information with Respect to the Registrant.

* * * * *

(e) Financial statements meeting the requirements of Regulation S-X (17 CFR Part 210) (Schedules required under Regulation S-X shall be filed as "Financial Statements Schedules" pursuant to Item 15, Exhibits and Financial Statement Schedules, of this form), as well as any financial information required by Rule 3-05 and Article 11 of Regulation S-X. A smaller reporting company may provide the information in Rule 8-04 and 8-05 of Regulation S-X in lieu of the financial information required by Rule 3-05 and Article 11 of Regulation S-X;

* * * * *

Item 11A. Material Changes.

If the registrant elects to incorporate information by reference pursuant to General Instruction VII, describe any and all material changes in the registrant's affairs that have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest Form 10-K and that have not been described in a Form 10-Q or Form 8-K filed under the Exchange Act.

Item 12. Incorporation of Certain Information by Reference.

* * * * *

(a) * * *

(1) The registrant's latest annual report on Form 10-K filed pursuant to Section 13(a) or Section 15(d) of the Exchange Act that contains financial statements for the registrant's latest fiscal year for which a Form 10-K was required to have been filed; and

* * * * *

47. Amend Form S-3 (referenced in § 239.13) by adding to the cover page, above the calculation of the registration fee table, check boxes requesting the registrant to indicate whether it is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company and revising General Instruction II C., and in Part I, Items 11(a) and 12(a)(1) to read as follows.

Note- The text of Form S-3 does not and this amendment will not appear in the Code of Federal Regulations.

* * * * *

FORM S-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☐ Accelerated filer ☐

Non-accelerated filer ☐ Smaller reporting company ☐
(Do not check if a smaller reporting company)

* * * * *

GENERAL INSTRUCTIONS

* * * * *

II. Application of General Rules and Regulations

* * * * *

C. A smaller reporting company, defined in Rule 405 (17 CFR 230.405), that is eligible to use Form S-3 shall use the disclosure items in Regulation S-K (17 CFR 229.10 et seq.) with specific attention to the scaled disclosure provided for smaller reporting companies, if any. Smaller reporting companies may provide the financial information called for by Article 8 of Regulation S-X in lieu of the financial information called for by Item 11 in this form.

* * * * *

Part I

INFORMATION REQUIRED IN PROSPECTUS

* * * * *

Item 11. Material Changes.

(a) Describe any and all material changes in the registrant's affairs that have occurred since the end of the latest fiscal year for which certified financial statements were included in the latest annual report to security holders and that have not been described in a report on Form 10-Q (§ 249.308a of this chapter) or Form 8-K (§ 249.308 of this chapter) filed under the Exchange Act.

* * * * *

Item 12. Incorporation of Certain Information by Reference.

(a) * * *

(1) the registrant's latest annual report on Form 10-K (17 CFR 249.310) filed pursuant to Section 13(a) or 15(d) of the Exchange Act that contains financial statements for the registrant's latest fiscal year for which a Form 10-K was required to be filed; and

* * * * *

48. Amend Form S-8 (referenced in § 239.16b) by adding to the cover page, above the calculation of registration fee table, check boxes requesting the registrant to indicate whether a registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company and revising General Instructions A.1(a)(6) and B.3. to read as follows:

Note- The text of Form S-8 does not and this amendment will not appear in the Code of Federal Regulations.

FORM S-8

REGISTRATION OF SECURITIES UNDER THE SECURITIES ACT OF 1933

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☐ Accelerated filer ☐

Non-accelerated filer ☐ Smaller reporting company ☐
(Do not check if a smaller reporting company)

* * * * *

GENERAL INSTRUCTIONS

A. Rule as to Use of Form S-8

1. * * *

(a) * * *

(6) The term "Form 10 information" means the information that is required by Form 10 or Form 20-F (§ 249.210 or § 249.220f of this chapter), as applicable to the registrant, to register under the Securities Exchange Act of 1934 each class of securities being registered using this form. A registrant may provide the Form 10 information in another Commission filing with respect to the registrant.

* * * * *

B. Application of General Rules and Regulations

* * * * *

3. A "smaller reporting company," defined in § 230.405, shall use the disclosure items in Regulation S-K (17 CFR 229.10 et seq.) with specific attention to the scaled disclosure provided for smaller reporting companies, if any.

* * * * *

49. Amend Form S-11 (referenced in § 229.18) by:

a. Adding to the cover page, above the calculation of registration fee table, check boxes requesting the registrant to indicate whether it is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company; and

b. Revising Item 27.

The revision and addition read as follows:

Note- The text of Form S-11 does not and this amendment will not appear in the Code of Federal Regulations.

FORM S-11

FOR REGISTRATION UNDER THE SECURITIES ACT OF 1933 OF SECURITIES OF CERTAIN REAL ESTATE COMPANIES

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☐ Accelerated filer ☐

Non-accelerated filer ☐ Smaller reporting company ☐
(Do not check if a smaller reporting company)

* * * * *

Item 27. Financial Statements and Information.

Include in the prospectus the financial statements required by Regulation S-X, the supplementary financial information required in Item 302 of Regulation S-K (§ 229.302 of this chapter) and the information concerning changes in and disagreements with accountants on accounting and financial disclosure required by Item 304 of Regulation S-K (§ 229.304 of this chapter). Although all schedules required by Regulation S-X are to be included in the registration statement, all such schedules other than those prepared in accordance with Rules 12-12, 12-28, and 12-29 of Regulation S-X (§§ 210.12-12, 12-28, and 12-29 of this chapter) may be omitted from the prospectus. A smaller reporting company may provide the information in Article 8 of Regulation S-X (§ 210.8 of this chapter) in lieu of the financial information required by other parts of Regulation S-X, and need not provide the supplementary financial information required in Item 302 of Regulation S-K.

* * * * *

50. Amend Form S-4 (referenced in § 239.25) by:

a. Adding to the cover page, above the calculation of the registration fee table, check boxes requesting the registrant to indicate whether it is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company;

b. Removing paragraph 4 of General Instruction D; and

c. Revising paragraph 1 of General Instruction I and in Part I Item 4(b), Item 5, Item 12(a) before the Instruction, the introductory text of Item 12(b), paragraph 3 of Item 12(c), Item 17(b)(8), Item 18(b), and Item 19(c).

The addition and revisions read as follows:

* * * * *

Note- The text of Form S-4 does not and this amendment will not appear in the Code of Federal Regulations.

* * * * *

FORM S-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☐ Accelerated filer ☐

Non-accelerated filer ☐ Smaller reporting company ☐
(Do not check if a smaller reporting company)

* * * * *

GENERAL INSTRUCTIONS

* * * * *

I. Roll-Up Transactions.

1. If securities to be registered on this Form will be issued in a roll-up transaction as defined in Item 901(c) of Regulation S-K (17 CFR 229.901(c)), then the disclosure provisions of Subpart 229.900 of Regulation S-K (17 CFR 229.900) shall apply to the transaction in addition to the provisions of this Form. A smaller reporting company, defined in § 230.405, that is engaged in a roll-up transaction shall refer to the disclosure items in subpart 900 of Regulation S-K. To the extent that the disclosure requirements of Subpart 229.900 are inconsistent with the disclosure requirements of any other applicable forms or schedules, the requirements of Subpart 229.900 are controlling.

* * * * *

PART I

INFORMATION REQUIRED IN THE PROSPECTUS

* * * * *

A. Information About the Transaction

* * * * *

Item 4. Terms of the Transaction

* * * * *

(b) If a report, opinion or appraisal materially relating to the transaction has been received from an outside party, and such report, opinion or appraisal is referred to in the prospectus, furnish the same information as would be required by Item 1015(b) of Regulation M-A (§ 229.1015(b) of this chapter).

Item 5. Pro Forma Financial Information.

Furnish financial information required by Article 11 of Regulation S-X (§ 210.11-01 et.seq. of this chapter) with respect to this transaction. A smaller reporting company may provide the information in Rule 8-05 of Regulation S-X (§ 210.8-05 of this chapter) in lieu of the financial information required by Article 11 of Regulation S-X.

* * * * *

Item 12. Information with Respect to S-3 Registrants.

* * * * *

(a) If the registrant elects to deliver this prospectus together with a copy of either its latest Form 10-K filed pursuant to Section13(a) or 15(d) of the Exchange Act or its latest annual report to security holders, which at the time of original preparation met the requirements of either Rule 14a-3 or Rule 14c-3:

(1) Indicate that the prospectus is accompanied by either a copy of the registrant's latest Form 10-K or a copy of its latest annual report to security holders, whichever the registrant elects to deliver pursuant to paragraph (a) of this Item.

(2) Provide financial and other information with respect to the registrant in the form required by Part I of Form 10-Q as of the end of the most recent fiscal quarter which ended after the end of the latest fiscal year for which certified financial statements were included in the latest Form 10-K or the latest report to security holders (whichever the registrant elects to deliver pursuant to paragraph (a) of this Item), and more than forty-

five days before the effective date of this registration statement (or as of a more recent date) by one of the following means:

(i) including such information in the prospectus;

(ii) providing without charge to each person to whom a prospectus is delivered a copy of the registrant's latest Form 10-Q; or

(iii) providing without charge to each person to whom a prospectus is delivered a copy of the registrant's latest quarterly report that was delivered to security holders and included the required financial information.

(3) If not reflected in the registrant's latest Form 10-K or its latest annual report to security holders (whichever the registrant elects to deliver pursuant to paragraph (a) of this Item) provide information required by Rule 3-05 (§ 210.3-05 of this chapter) and Article 11 (§ 210.11-01 through 210.11.03 of this chapter) of Regulation S-X. Smaller reporting companies may provide the information required by Rules 8-04 and 8-05 of Regulation S-X.

(4) Describe any and all material changes in the registrant's affairs that have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest Form 10-K or latest annual report to security holders (whichever the registrant elects to deliver pursuant to paragraph (a) of this Item) and that were not described in a Form 10-Q or quarterly report delivered with the prospectus in accordance with paragraph (a)(2)(ii) or (iii) of this Item.

* * * * *

(b) If the registrant does not elect to deliver its latest Form 10-K or its latest annual report to security holders:

* * * * *

(c) * * *

(3) such restatement of financial statements or disposition of assets was not reflected in the registrant's latest annual report to security holders and/or in its latest Form 10-K filed pursuant to Section 13(a) or 15(d) of the Exchange Act.

* * * * *

Item 17. Information with Respect to Companies Other than S-3 Companies.

* * * * *

(b) * * *

(8) the quarterly financial and other information that would have been required had the company being acquired been required to file Part I of Form 10-Q (§ 249.308a of this chapter) for the most recent quarter for which such a report would have been on file at the time the registration statement becomes effective or for a period ending as of a more recent date.

* * * * *

Item 18. Information if Proxies, Consents or Authorizations are to be Solicited.

* * * * *

(b) If the registrant or the company being acquired meets the requirements for use of Form S-3, any information required by paragraphs (a)(5)(ii) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 10-K.

Item 19. Information if Proxies, Consents or Authorizations are not to be Solicited or in an Exchange Offer.

* * * * *

(c) If the registrant or the company being acquired meets the requirements for use of Form S-3, any information required by paragraphs (a)(5) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 10-K.

* * * * *

51. Revise § 239.42 to read as follows:

§ 239.42 Form F-X, for appointment of agent for service of process and undertaking for issuers registering securities on Form F–8, F–9, F–10, or F–80 (§§ 239.38, 239.39, 239.40, or 239.41), or registering securities or filing periodic reports on Form 40–F (§ 249.240f of this chapter), or by any issuer or other non-U.S. person filing tender offer documents on Schedule 13E–4F, 14D–1F, or 14D–9F (§§ 240.13e–102, 240.14d–102, or 240.14d–103 of this chapter), by any non-U.S. person acting as trustee with respect to securities registered on Form F–7 (§ 239.37), F–8, F–9, F–10, or by a Canadian issuer qualifying an offering statement pursuant to Regulation A (§ 230.251 et seq. of this chapter) on Form 1–A (§ 239.90), or by any non-U.S. issuer providing Form CB (§ 249.480 of this chapter) to the Commission in connection with a tender offer, rights offering or business combination.

Form F-X shall be filed with the Commission:

(a) By any issuer registering securities on Form F–8, F–9, F–10, or F–80 under the Securities Act of 1933;

(b) By any issuer registering securities on Form 40–F under the Securities Exchange Act of 1934;

(c) By any issuer filing a periodic report on Form 40–F, if it has not previously filed a Form F-X in connection with the class of securities in relation to which the obligation to file a report on Form 40–F arises;

(d) By any issuer or other non-U.S. person filing tender offer documents on Schedule 13E–4F, 14D–1F, or 14D–9F;

(e) By any non-U.S. person acting as trustee with respect to securities registered on Form F–7, F–8, F–9, F–10, or F–80;

(f) By a Canadian issuer qualifying an offering statement pursuant to the provisions of Regulation A; and

(g) By any non-U.S. issuer providing Form CB to the Commission in connection with a tender offer, rights offering or business combination.

52. Amend Form F-X (referenced in § 239.42) by revising General Instructions I.(e) and II. F. (a) and (c) to read as follows:

Note- The text of Form F-X does not and this amendment will not appear in the Code of Federal Regulations.

FORM F-X
APPOINTMENT OF AGENT FOR SERVICE OF PROCESS AND UNDERTAKING

GENERAL INSTRUCTIONS

I. * * *

* * * * *

(e) by any non-U.S. person acting as trustee with respect to securities registered on Form F-7, F-8, F-9, F-10, or F-80; and

* * * * *

II. * * *

F. Each person filing this Form in connection with:

(a) the use of Form F-9, F-10, or 40-F or Schedule 13E-4F, 14D-1F, or 14D-9F stipulates and agrees to appoint a successor agent for service of process and file an amended Form F-X if the Filer discharges the Agent or the Agent is unwilling or unable to accept service on behalf of the Filer at any time until six years have elapsed from the date the issuer of the securities to which such Forms and Schedules relate has ceased reporting under the Exchange Act;

* * * * *

(c) its status as trustee with respect to securities registered on Form F-7, F-8, F-9, F-10, or F-80 stipulates and agrees to appoint a successor agent for service of process and file an amended Form F-X if the Filer discharges the Agent or the Agent is unwilling or unable to accept service on behalf of the Filer at any time during which any of the securities subject to the indenture remain outstanding; and

* * * * *

53. Amend Form 1-A (referenced in § 239.90) by revising paragraph B in Part II to read as follows:

Note – The text of Form 1-A does not and this amendment will not appear in the Code of Federal Regulations.

FORM 1-A
REGULATION A OFFERING STATEMENT
UNDER THE SECURITIES ACT OF 1933

* * * * *

PART II— OFFERING CIRCULAR

* * * * *

B. For all other issuers and for any issuer that so chooses — the information required by either Part I of Form S-1, (17 CFR 239.11), except for the financial statements called for there, or Model B of this Part II of Form 1-A. Offering circulars prepared pursuant to this instruction need not follow the order of the items or other requirements of the disclosure form. Such information shall not, however, be set forth in such a fashion as to obscure any of the required information or information necessary to keep the required information from being incomplete or misleading. Information requested to be presented in a specified tabular format shall be given in substantially the tabular form specified in the item.

* * * * *

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

54. The authority citations 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.

* * * * *

55. Amend § 240.0-2 by revising paragraph (a) to read as follows:

§ 240.0-2 Business hours of the Commission.

(a) The principal office of the Commission, at 100 F Street, NE, Washington, DC 20549, is open each day, except Saturdays, Sundays, and Federal holidays, from 9 a.m. to 5:30 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever currently is in effect in Washington, DC, provided that hours for the filing of documents pursuant to the Act or the rules and regulations thereunder are as set forth in paragraphs (b) and (c) of this section.

* * * * *

56. Amend § 240.0-12 by revising the second sentence of paragraph (c) to read as follows:

§ 240.0-12 Commission procedures for filing applications for orders for exemptive relief under Section 36 of the Exchange Act.

* * * * *

(c) * * * Five copies of every paper application and every amendment to such an application must be submitted to the Office of the Secretary at 100 F Street, NE, Washington, DC 20549-1090. * * *

* * * * *

57. Amend § 240.3b-6 by revising the introductory text of paragraph (b)(1), paragraphs (b)(1)(i) and (b)(2) to read as follows:

§ 240.3b-6 Liability for certain statements by issuers.

* * * * *

(b) * * *

(1) A forward-looking statement (as defined in paragraph (c) of this section) made in a document filed with the Commission, in Part I of a quarterly report on Form 10–Q, § 249.308a of this chapter, or in an annual report to security holders meeting the requirements of Rules 14a–3(b) and (c) or 14c–3(a) and (b) (§§ 240.14a-3(b) and (c) or 240.14c-3(a) and (b)), a statement reaffirming such forward-looking statement after the date the document was filed or the annual report was made publicly available, or a forward-looking statement made before the date the document was filed or the date the annual report was made publicly available if such statement is reaffirmed in a filed document, in Part I of a quarterly report on Form 10–Q, or in an annual report made

publicly available within a reasonable time after the making of such forward-looking statement; Provided, that:

(i) At the time such statements are made or reaffirmed, either the issuer is subject to the reporting requirements of Section 13(a) or 15(d) of the Act and has complied with the requirements of Rule 13a–1 or 15d–1 thereunder, if applicable, to file its most recent annual report on Form 10–K, Form 20–F or Form 40–F; or if the issuer is not subject to the reporting requirements of Section 13(a) or 15(d) of the Act, the statements are made in a registration statement filed under the Securities Act of 1933 offering statement or solicitation of interest, written document or broadcast script under Regulation A or pursuant to Section 12 (b) or (g) of the Securities Exchange Act of 1934; and

* * * * *

(2) Information that is disclosed in a document filed with the Commission in Part I of a quarterly report on Form 10–Q (§ 249.308a of this chapter) or in an annual report to security holders meeting the requirements of Rules 14a–3(b) and (c) or 14c–3(a) and (b) under the Act (§§ 240.14a–3(b) and (c) or 240.14c–3(a) and (b) of this chapter) and that relates to:

(i) The effects of changing prices on the business enterprise, presented voluntarily or pursuant to Item 303 of Regulation S-K (§ 229.303 of this chapter), "Management's Discussion and Analysis of Financial Condition and Results of Operations," Item 5 of Form 20–F (§ 240.220(f) of this chapter), "Operating and Financial Review and Prospects," Item 302 of Regulation S-K (§ 229.302 of this chapter) "Supplementary Financial Information," or Rule 3–20(c) of Regulation S-X (§ 210.3–20(c)) of this chapter); or

(ii) The value of proved oil and gas reserves (such as a standardized measure of discounted future net cash flows relating to proved oil and gas reserves as set forth in paragraphs 30–34 of Statement of Financial Accounting Standards No. 69), presented voluntarily or pursuant to Item 302 of Regulation S-K (§ 229.302 of this chapter).

* * * * *

58. Amend § 240.10A-1 by revising paragraphs (a)(4)(ii) and (b)(3) to read as follows:

§ 240.10A-1 Notice to the Commission Pursuant to Section 10A of the Act.

(a)(1) * * *

(4) * * *

(ii) The disclosure requirements of Item 304 of Regulation S-K, § 229.304 of this chapter.

(b)(1) * * *

(3) Submission of the report (or documentation) by the independent accountant as described in paragraphs (b)(1) and (b)(2) of this section shall not replace, or otherwise satisfy the need for, the newly engaged and former accountants' letters under Items 304(a)(2)(D) and 304(a)(3) of Regulation S-K, §§ 229.304(a)(2)(D) and 229.304(a)(3) of this chapter, respectively, and shall not limit, reduce, or affect in any way the independent accountant's obligations to comply fully with all other legal and professional responsibilities, including, without limitation, those under generally accepted auditing standards and the rules or interpretations of the Commission that modify or supplement those auditing standards.

* * * * *

59. Amend § 240.10A-3 by revising paragraph (a)(5)(i)(A) to read as follows:

§ 240.10A-3 Listing standards relating to audit committees.

(a) * * *

(5) * * *

(i) * * *

(A) July 31, 2005 for foreign private issuers and smaller reporting companies (as defined in § 240.12b–2); and

* * * * *

60. Amend § 240.12b-2 by:

a. Revising paragraphs (1)(iv) and (2)(iv) in the definition of accelerated filer and large accelerated filer;

b. Removing the definition of small business issuer; and

c. Adding the definition of smaller reporting company in alphabetical order.

The revisions and addition to read as follows:

§ 240.12b-2 Definitions.

* * * * *

Accelerated filer and large accelerated filer

(1) * * *

(iv) The issuer is not eligible to use the requirements for smaller reporting companies in Part 229 of this chapter for its annual and quarterly reports.

(2) * * *

(iv) The issuer is not eligible to use the requirements for smaller reporting companies in Part 229 of this chapter for its annual and quarterly reports.

* * * * *

Smaller reporting company: As used in this part, the term smaller reporting company means an issuer that is not an investment company, an asset-backed issuer (as defined in § 229.1101 of this chapter), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that:

(1) Had a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter, computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity; or

(2) In the case of an initial registration statement under the Securities Act or Exchange Act for shares of its common equity, had a public float of less than $75 million as of a date within 30 days of the date of the filing of the registration statement, computed by multiplying the aggregate worldwide number of such shares held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of such shares included in the registration statement by the estimated public offering price of the shares; or

(3) In the case of an issuer whose public float as calculated under paragraph (1) or (2) of this definition was zero, had annual revenues of less than $50 million during the most recently completed fiscal year for which audited financial statements are available.

(4) Determination: Whether or not an issuer is a smaller reporting company is determined on an annual basis.

(i) For issuers that are required to file reports under section 13(a) or 15(d) of the Exchange Act, the determination is based on whether the issuer came within the definition of smaller reporting company using the amounts specified in paragraph (f)(2)(iii) of Item 10 of Regulation S-K (§ 229.10(f)(1)(i) of this chapter), as of the last business day of the second fiscal quarter of the issuer's previous fiscal year. An issuer in this category must reflect this determination in the information it provides in its quarterly report on Form 10-Q for the first fiscal quarter of the next year, indicating on the cover page of that filing, and in subsequent filings for that fiscal year, whether or not it is a smaller reporting company, except that, if a determination based on public float indicates that the issuer is newly eligible to be a smaller reporting company, the issuer may choose to reflect this determination beginning with its first quarterly report on Form 10-Q following the determination, rather than waiting until the first fiscal quarter of the next year.

(ii) For determinations based on an initial Securities Act or Exchange Act registration statement under paragraph (f)(1)(ii) of Item 10 of Regulation S-K (§ 229.10(f)(1)(ii) of this chapter), the issuer must reflect the determination in the information it provides in the registration statement and must appropriately indicate on the cover page of the filing, and subsequent filings for the fiscal year in which the filing is made, whether or not it is a smaller reporting company. The issuer must redetermine its status at the end of its second fiscal quarter and then reflect any change in status as provided in paragraph (4)(i) of this definition. In the case of a determination based on an initial Securities Act registration statement, an issuer that was not determined to be a smaller reporting company has the option to redetermine its status at the conclusion of the offering covered by the registration statement based on the actual offering price and number of shares sold.

(iii) Once an issuer fails to qualify for smaller reporting company status, it will remain unqualified unless it determines that its public float, as calculated in accordance with paragraph (f)(1) of this definition, was less than $50 million as of the last business day of its second fiscal quarter or, if that calculation results in zero because the issuer had no public equity outstanding or no market price for its equity existed, if the issuers had annual revenues of less than $40 million during its previous fiscal year.

* * * * *

61. Amend § 240.12b-23 by revising paragraphs (a)(3)(i) and (b) to read as follows:

§ 240.12b-23 Incorporation by reference.

(a) * * *

(3) * * *

(i) A proxy or information statement incorporated by reference in response to Part III of Form 10–K (17 CFR 249.310);

* * * * *

(b) Any incorporation by reference of matter pursuant to this section shall be subject to the provisions of § 229.10(d) of this chapter restricting incorporation by reference of documents that incorporate by reference other information. Material incorporated by reference shall be clearly identified in the reference by page, paragraph, and caption or otherwise. Where only certain pages of a document are incorporated by reference and filed as an exhibit, the document from which the material is taken shall be clearly identified in the reference. An express statement that the specified matter is incorporated by reference shall be made at the particular place in the statement or report where the information is required. Matter shall not be incorporated by reference in any case where such incorporation would render the statement or report incomplete, unclear or confusing.

62. Amend § 240.12b-25 by revising the section heading and paragraphs (a) and (b)(2)(ii) to read as follows:

§ 240.12b-25 Notification of inability to timely file all or any required portion of a Form 10–K, 20–F, 11–K, N–SAR, N–CSR, 10–Q, or 10–D.

(a) If all or any required portion of an annual or transition report on Form 10–K, 20–F or 11–K (17 CFR 249.310, 249.220f or 249.311), a quarterly or transition report on Form 10–Q (17 CFR 249.308a), or a distribution report on Form 10–D (17 CFR 249.312) required to be filed pursuant to Section 13 or 15(d) of the Act (15 U.S.C. 78m or 78o(d)) and rules thereunder, or if all or any required portion of a semi-annual, annual or transition report on Form N–CSR (17 CFR 249.331; 17 CFR 274.128) or Form N–SAR (17 CFR 249.330; 17 CFR 274.101) required to be filed pursuant to Section 13 or 15(d) of the Act or section 30 of the Investment Company Act of 1940 (15 U.S.C. 80a–29) and the rules thereunder, is not filed within the time period prescribed for such report, the registrant, no later than one business day after the due date for such report, shall file a Form 12b–25 (17 CFR 249.322) with the Commission which shall contain disclosure of its inability to file the report timely and the reasons therefore in reasonable detail.

(b) * * *

(2) * * *

(ii) The subject annual report, semi-annual report or transition report on Form 10–K, 20-F, 11–K, N–SAR, or N–CSR, or portion thereof, will be filed no later than the fifteenth calendar day following the prescribed due date; or the subject quarterly report or transition report on Form 10–Q or distribution report on Form 10–D, or portion thereof, will be filed no later than the fifth calendar day following the prescribed due date; and

* * * * *

63. Amend § 240.12h-3 by revising paragraph (e) to read as follows:

§ 240.12h-3 Suspension of duty to file reports under section 15(d).

* * * * *

(e) If the suspension provided by this section is discontinued because a class of securities does not meet the eligibility criteria of paragraph (b) of this section on the first day of an issuer's fiscal year, then the issuer shall resume periodic reporting pursuant to section 15(d) of the Act by filing an annual report on Form 10–K for its preceding fiscal year, not later than 120 days after the end of such fiscal year.

64. Amend § 240.13a-10 by revising paragraphs (c), (d)(2)(ii), (d)(2)(iii), the introductory text of paragraph (e), paragraphs (e)(1), (e)(2), (e)(4), the Note to paragraphs (c) and (e) and the introductory text of paragraph (j)(2) to read as follows:

§ 240.13a-10 Transition reports.

* * * * *

(c) If the transition period covers a period of less than six months, in lieu of the report required by paragraph (b) of this section, a report may be filed for the transition period on Form 10–Q (§ 249.308a of this chapter) not more than the number of days specified in paragraph (j) of this section after either the close of the transition period or the date of the determination to change the fiscal closing date, whichever is later. The report on Form 10–Q shall cover the period from the close of the last fiscal year end and shall indicate clearly the period covered. The financial statements filed therewith need not be audited but, if they are not audited, the issuer shall file with the first annual report for the newly adopted fiscal year separate audited statements of income and cash flows covering the transition period. The notes to financial statements for the transition period included in such first annual report may be integrated with the notes to financial statements for the full fiscal period. A separate audited balance sheet as of the end of the transition period shall be filed in the annual report only if the audited balance sheet as of the end of the fiscal year prior to the transition period is not filed. Schedules need not be filed in transition reports on Form 10–Q.

(d) * * *

(2) * * *

(ii) The first report required to be filed by the issuer for the newly adopted fiscal year after the date of the determination to change the fiscal year end is a quarterly report on Form 10-Q; and

(iii) Information on the transition period is included in the issuer's quarterly report on Form 10–Q for the first quarterly period (except the fourth quarter) of the newly adopted fiscal year that ends after the date of the determination to change the fiscal year. The information covering the transition period required by Part II and Item 2 of Part I may be combined with the information regarding the quarter. However, the financial statements required by Part I, which may be unaudited, shall be furnished separately for the transition period.

(e) Every issuer required to file quarterly reports on Form 10–Q pursuant to § 240.13a-13 of this chapter that changes its fiscal year end shall:

(1) File a quarterly report on Form 10–Q within the time period specified in General Instruction A.1. to that form for any quarterly period (except the fourth quarter) of the old fiscal year that ends before the date on which the issuer determined to change its fiscal year end, except that the issuer need not file such quarterly report if the date on which the quarterly period ends also is the date on which the transition period ends;

(2) File a quarterly report on Form 10–Q within the time specified in General Instruction A.1. to that form for each quarterly period of the old fiscal year within the transition period. In lieu of a quarterly report for any quarter of the old fiscal year within the transition period, the issuer may file a quarterly report on Form 10–Q for any period of three months within the transition period that coincides with a quarter of the newly adopted fiscal year if the quarterly report is filed within the number of days specified in paragraph (j) of this section after the end of such three month period, provided the issuer thereafter continues filing quarterly reports on the basis of the quarters of the newly adopted fiscal year;

* * * * *

(4) Unless such information is or will be included in the transition report, or the first annual report on Form 10–K for the newly adopted fiscal year, include in the initial quarterly report on Form 10–Q for the newly adopted fiscal year information on any period beginning on the first day subsequent to the period covered by the issuer's final quarterly report on Form 10–Q or annual report on Form 10–K for the old fiscal year. The information covering such period required by Part II and Item 2 of Part I may be

combined with the information regarding the quarter. However, the financial statements required by Part I, which may be unaudited, shall be furnished separately for such period.

Note to paragraphs (c) and (e): If it is not practicable or cannot be cost-justified to furnish in a transition report on Form 10–Q or a quarterly report for the newly adopted fiscal year financial statements for corresponding periods of the prior year where required, financial statements may be furnished for the quarters of the preceding fiscal year that most nearly are comparable if the issuer furnishes an adequate discussion of seasonal and other factors that could affect the comparability of information or trends reflected, an assessment of the comparability of the data, and a representation as to the reason recasting has not been undertaken.

* * * * *

(j) * * *

(2) For transition reports to be filed on Form 10-Q (§ 249.308a of this chapter) the number of days shall be:

* * * * *

65. Amend § 240.13a-13 by revising the section heading, paragraph (a), the introductory text of paragraph (c), and paragraph (d) to read as follows:

§ 240.13a-13 Quarterly reports on Form 10–Q (§ 249.308a of this chapter).

(a) Except as provided in paragraphs (b) and (c) of this section, every issuer that has securities registered pursuant to section 12 of the Act and is required to file annual reports pursuant to section 13 of the Act, and has filed or intends to file such reports on Form 10–K (§ 249.310 of this chapter), shall file a quarterly report on Form 10–Q (§ 249.308a of this chapter) within the period specified in General Instruction A.1. to that form for each of the first three quarters of each fiscal year of the issuer, commencing with the first fiscal quarter following the most recent fiscal year for which full financial statements were included in the registration statement, or, if the registration statement included financial statements for an interim period subsequent to the most recent fiscal year end meeting the requirements of Article 10 of Regulation S-X and Rule 8-03 of Regulation S-X for smaller reporting companies, for the first fiscal quarter subsequent to the quarter reported upon in the registration statement. The first quarterly report of the issuer shall be filed either within 45 days after the effective date of the registration statement or on or before the date on which such report would have been required to be filed if the issuer has been required to file reports on Form 10–Q as of its last fiscal quarter, whichever is later.

* * * * *

(c) Part I of the quarterly reports on Form 10–Q need not be filed by:

* * * * *

(d) Notwithstanding the foregoing provisions of this section, the financial information required by Part I of Form 10–Q shall not be deemed to be "filed" for the purpose of Section 18 of the Act or otherwise subject to the liabilities of that section of the Act, but shall be subject to all other provisions of the Act.

66. Amend § 240.13a-14 by revising paragraph (a) to read as follows:

§ 240.13a-14 Certification of disclosure in annual and quarterly reports.

(a) Each report, including transition reports, filed on Form 10–Q, Form 10–K, Form 20–F or Form 40–F (§§ 249.308a, 249.310, 249.220f or 249.240f of this chapter) under Section 13(a) of the Act (15 U.S.C. 78m(a)), other than a report filed by an

Asset-Backed Issuer (as defined in § 229.1101 of this chapter) or a report on Form 20–F filed under § 240.13a–19, must include certifications in the form specified in the applicable exhibit filing requirements of such report and such certifications must be filed as an exhibit to such report. Each principal executive and principal financial officer of the issuer, or persons performing similar functions, at the time of filing of the report must sign a certification. The principal executive and principal financial officers of an issuer may omit the portion of the introductory language in paragraph 4 as well as language in paragraph 4(b) of the certification that refers to the certifying officers' responsibility for designing, establishing and maintaining internal control over financial reporting for the issuer until the issuer becomes subject to the internal control over financial reporting requirements in § 240.13a–15 or 240.15d–15.

* * * * *

67. Amend § 240.13a-16 by revising paragraph (a)(3) to read as follows:

§ 240.13a-16 Reports of foreign private issuers on Form 6–K (17 CFR 249.306).

(a) * * *

(3) Issuers filing periodic reports on Forms 10–K, Form 10–Q, and Form 8–K; or

* * * * *

68. Amend § 240.13a-20 by revising the introductory text of paragraph (a) to read as follows:

§ 240.13a-20 Plain English presentation of specified information.

(a) Any information included or incorporated by reference in a report filed under section 13(a) of the Act (15 U.S.C. 78m(a)) that is required to be disclosed pursuant to Item 402, 403, 404 or 407 of Regulation S–K (§ 229.402, 229.403, 229.404 or 229.407 of this chapter) must be presented in a clear, concise and understandable manner. You must prepare the disclosure using the following standards:

* * * * *

69. Amend § 240.14a-3 by:

a. Removing the Note to Small Business Issuers following the introductory text of paragraph (b);

b. Revising paragraph (b)(1) and Note 1;

c. Revising the heading "Note 2" to read "Note 2 to Paragraph (b)(i)"; and

d. Revising paragraphs (b)(5)(ii), (b)(10) and its Note, and (d) to read as follows:

§ 240.14a-3 Information to be furnished to security holders.

* * * * *

(b) * * *

(1) The report shall include, for the registrant and its subsidiaries, consolidated and audited balance sheets as of the end of the two most recent fiscal years and audited statements of income and cash flows for each of the three most recent fiscal years prepared in accordance with Regulation S-X (part 210 of this chapter), except that the provisions of Article 3 (other than §§ 210.3-03(e), 210.3-04 and 210.3-20) and Article 11 shall not apply. Any financial statement schedules or exhibits or separate financial statements which may otherwise be required in filings with the Commission may be omitted. If the financial statements of the registrant and its subsidiaries consolidated in the annual report filed or to be filed with the Commission are not required to be audited, the financial statements required by this paragraph may be unaudited. A smaller

reporting company may provide the information in Article 8 of Regulation S-X (§ 210.8 of this chapter) in lieu of the financial information required by this paragraph 9(b)(1).

Note 1 to Paragraph (b)(1): If the financial statements for a period prior to the most recently completed fiscal year have been examined by a predecessor accountant, the separate report of the predecessor accountant may be omitted in the report to security holders, provided the registrant has obtained from the predecessor accountant a reissued report covering the prior period presented and the successor accountant clearly indicates in the scope paragraph of his or her report (a) that the financial statements of the prior period were examined by other accountants, (b) the date of their report, (c) the type of opinion expressed by the predecessor accountant and (d) the substantive reasons therefore, if it was other than unqualified. It should be noted, however, that the separate report of any predecessor accountant is required in filings with the Commission. If, for instance, the financial statements in the annual report to security holders are incorporated by reference in a Form 10–K, the separate report of a predecessor accountant shall be filed in Part II or in Part IV as a financial statement schedule.

* * * * *

(5) * * *

(ii) The report shall contain management's discussion and analysis of financial condition and results of operations required by Item 303 of Regulation S-K (§ 229.303 of this chapter).

* * * * *

(10) The registrant's proxy statement, or the report, shall contain an undertaking in bold face or otherwise reasonably prominent type to provide without charge to each

person solicited upon the written request of any such person, a copy of the registrant's annual report on Form 10-K, including the financial statements and the financial statement schedules, required to be filed with the Commission pursuant to Rule 13a–1 (§ 240.13a-1 of this chapter) under the Act for the registrant's most recent fiscal year, and shall indicate the name and address (including title or department) of the person to whom such a written request is to be directed. In the discretion of management, a registrant need not undertake to furnish without charge copies of all exhibits to its Form 10–K, provided that the copy of the annual report on Form 10–K furnished without charge to requesting security holders is accompanied by a list briefly describing all the exhibits not contained therein and indicating that the registrant will furnish any exhibit upon the payment of a specified reasonable fee, which fee shall be limited to the registrant's reasonable expenses in furnishing such exhibit. If the registrant's annual report to security holders complies with all of the disclosure requirements of Form 10–K and is filed with the Commission in satisfaction of its Form 10–K filing requirements, such registrant need not furnish a separate Form 10–K to security holders who receive a copy of such annual report.

Note to Paragraph (b)(10): Pursuant to the undertaking required by paragraph (b)(10) of this section, a registrant shall furnish a copy of its annual report on Form 10–K (§ 249.310 of this chapter) to a beneficial owner of its securities upon receipt of a written request from such person. Each request must set forth a good faith representation that, as of the record date for the solicitation requiring the furnishing of the annual report to security holders pursuant to paragraph (b) of this section, the person making the request was a beneficial owner of securities entitled to vote.

* * * * *

(d) An annual report to security holders prepared on an integrated basis pursuant to General Instruction H to Form 10–K (§ 249.310 of this chapter) may also be submitted in satisfaction of this section. When filed as the annual report on Form 10–K, responses to the Items of that form are subject to section 18 of the Act notwithstanding paragraph (c) of this section.

* * * * *

70. Amend § 240.14a-5 by removing the authority citation following the section and revising paragraph (f) to read as follows:

§ 240.14a-5 Presentation of information in proxy statement.

* * * * *

(f) If the date of the next annual meeting is subsequently advanced or delayed by more than 30 calendar days from the date of the annual meeting to which the proxy statement relates, the registrant shall, in a timely manner, inform shareholders of such change, and the new dates referred to in paragraphs (e)(1) and (e)(2) of this section, by including a notice, under Item 5, in its earliest possible quarterly report on Form 10–Q (§ 249.308a of this chapter), or, in the case of investment companies, in a shareholder report under § 270.30d-1 of this chapter under the Investment Company Act of 1940, or, if impracticable, any means reasonably calculated to inform shareholders.

71. Amend § 240.14a-8, by revising paragraph (e)(1) to read as follows:

§ 240.14a-8 Shareholder proposals.

* * * * *

(e) * * *

(1) If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10–Q (§ 249.308a of this chapter), or in shareholder reports of investment companies under § 270.30d–1 of this chapter of the Investment Company Act of 1940. In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.

* * * * *

72. Amend § 240.14a-101 by:

a. Revising Notes C. and D.1, and the introductory text of Note E.;

b. Removing Notes F. and G. to the cover page;

c. Revising paragraph (e)(1) of Item 9, and revising paragraph (a)(1) of Item 13

The revisions to read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

* * * * *

Schedule 14A Information

Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934

* * * * *

Notes: * * *

C. Except as otherwise specifically provided, where any item calls for information for a specified period with regard to directors, executive officers, officers or other persons holding specified positions or relationships, the information shall be given with regard to any person who held any of the specified positions or relationship at any time during the period. Information, other than information required by Item 404 of Regulation S–K (§ 229.404 of this chapter), need not be included for any portion of the period during which such person did not hold any such position or relationship, provided a statement to that effect is made.

D. * * *

1. Any incorporation by reference of information pursuant to the provisions of this schedule shall be subject to the provisions of § 229.10(d) of this chapter restricting incorporation by reference of documents that incorporate by reference other information. A registrant incorporating any documents, or portions of documents, shall include a statement on the last page(s) of the proxy statement as to which documents, or portions of documents, are incorporated by reference. Information shall not be incorporated by reference in any case where such incorporation would render the statement incomplete, unclear or confusing.

* * * * *

E. In Item 13 of this Schedule, the reference to "meets the requirement of Form S–3" shall refer to a registrant who meets the following requirements:

* * * * *

Item 9. Independent public accountants.

* * * * *

(e) (1) Disclose, under the caption Audit Fees, the aggregate fees billed for each of the last two fiscal years for professional services rendered by the principal accountant for the audit of the registrant's annual financial statements and review of financial statements included in the registrant's Form 10–Q (17 CFR 249.308a) or services that are normally provided by the accountant in connection with statutory and regulatory filings or engagements for those fiscal years.

* * * * *

Item 13. Financial and other information. (See Notes D and E at the beginning of this Schedule.)

(a) * * *

(1) Financial statements meeting the requirements of Regulation S-X, including financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than pursuant to which action is to be taken as described in this proxy statement (A smaller reporting company may provide the information in Rules 8-04 and 8-05 of Regulation S-X (§ 210.8-04 and § 210.8-05 of this chapter) in lieu of the financial information required by Rule 3-05 and Article 11 of Regulation S-X);

* * * * *

73. Amend § 240.14c-3 by removing the Note to Small Business Issuers following paragraph (a)(2).

74. Amend § 240.14c-101 by revising the Note that follows the cover page to read as follows:

§ 240.14c-101 Schedule 14C. Information required in information statement.

Schedule 14C Information

Information Statement Pursuant to Section 14(c) of the Securities Exchange Act of 1934

* * * * *

Note to Cover Page: Where any item, other than Item 4, calls for information with respect to any matter to be acted upon at the meeting or, if no meeting is being held, by written authorization or consent, such item need be answered only with respect to proposals to be made by the registrant. Registrants and acquirees that meet the definition of "smaller reporting company" under Rule 12b–2 of the Exchange Act (§ 240.12b–2) shall refer to the disclosure items in Regulation S-K (§§ 229.10 through 229.1123 of this chapter) with specific attention to the scaled disclosure requirements for smaller reporting companies, if any. A smaller reporting company may provide the information in Article 8 of Regulation S-X in lieu of any financial statements required by Item 1 of § 240.14c–101.

* * * * *

75. Amend § 240.14d-3 by removing the authority citation following the section and revising paragraph (a)(3)(i) to read as follows:

§ 240.14d-3 Filing and transmission of tender offer statement.

(a) * * *

(3) * * *

(i) To each national securities exchange where such class of the subject company's securities is registered and listed for trading (which may be based upon information contained in the subject company's most recent Annual Report on Form 10-K (§ 249.310 of this chapter) filed with the Commission unless the bidder has reason to believe that such information is not current), which telephonic notice shall be made when practicable before the opening of each such exchange; and

* * * * *

76. Amend § 240.15d-10 by revising paragraphs (c), (d)(2)(ii), (d)(2)(iii), the introductory text of (e), paragraphs (e)(1), (e)(2), (e)(4), the Note to paragraphs (c) and (e), paragraph (f), and the introductory text of (j)(2) to read as follows:

§ 240.15d-10 Transition reports.

* * * * *

(c) If the transition period covers a period of less than six months, in lieu of the report required by paragraph (b) of this section, a report may be filed for the transition period on Form 10–Q (§ 249.308 of this chapter) not more than the number of days specified in paragraph (j) of this section after either the close of the transition period or the date of the determination to change the fiscal closing date, whichever is later. The report on Form 10–Q shall cover the period from the close of the last fiscal year end and shall indicate clearly the period covered. The financial statements filed therewith need not be audited but, if they are not audited, the issuer shall file with the first annual report for the newly adopted fiscal year separate audited statements of income and cash flows covering the transition period. The notes to financial statements for the transition period included in such first annual report may be integrated with the notes to financial statements for the full fiscal period. A separate audited balance sheet as of the end of the transition period shall be filed in the annual report only if the audited balance sheet as of the end of the fiscal year before the transition period is not filed. Schedules need not be filed in transition reports on Form 10–Q.

(d) * * *

(2)(i) * * *

(ii) The first report required to be filed by the issuer for the newly adopted fiscal year after the date of the determination to change the fiscal year end is a quarterly report on Form 10-Q; and

(iii) Information on the transition period is included in the issuer's quarterly report on Form 10–Q for the first quarterly period (except the fourth quarter) of the newly adopted fiscal year that ends after the date of the determination to change the fiscal year. The information covering the transition period required by Part II and Item 2 of Part I may be combined with the information regarding the quarter. However, the financial statements required by Part I, which may be unaudited, shall be furnished separately for the transition period.

* * * * *

(e) Every issuer required to file quarterly reports on Form 10–Q pursuant to § 240.15d-13 that changes its fiscal year end shall:

(1) File a quarterly report on Form 10–Q within the time period specified in General Instruction A.1. to that form for any quarterly period (except the fourth quarter) of the old fiscal year that ends before the date on which the issuer determined to change its fiscal year end, except that the issuer need not file such quarterly report if the date on which the quarterly period ends also is the date on which the transition period ends;

(2) File a quarterly report on Form 10–Q within the time specified in General Instruction A.1 to that form for each quarterly period of the old fiscal year within the transition period. In lieu of a quarterly report for any quarter of the old fiscal year within the transition period, the issuer may file a quarterly report on Form 10–Q for any period of three months within the transition period that coincides with a quarter of the newly

adopted fiscal year if the quarterly report is filed within the number of days specified in paragraph (j) of this section after the end of such three month period, provided the issuer thereafter continues filing quarterly reports on the basis of the quarters of the newly adopted fiscal year;

* * * * *

(4) Unless such information is or will be included in the transition report, or the first annual report on Form 10–K for the newly adopted fiscal year, include in the initial quarterly report on Form 10–Q for the newly adopted fiscal year information on any period beginning on the first day after the period covered by the issuer's final quarterly report on Form 10–Q or annual report on Form 10–K for the old fiscal year. The information covering such period required by Part II and Item 2 of Part I may be combined with the information regarding the quarter. However, the financial statements required by Part I, which may be unaudited, shall be furnished separately for such period.

<u>Note to Paragraphs (c) and (e)</u>: If it is not practicable or cannot be cost-justified to furnish in a transition report on Form 10–Q or a quarterly report for the newly adopted fiscal year financial statements for corresponding periods of the prior year where required, financial statements may be furnished for the quarters of the preceding fiscal year that most nearly are comparable if the issuer furnishes an adequate discussion of seasonal and other factors that could affect the comparability of information or trends reflected, an assessment of the comparability of the data, and a representation as to the reason recasting has not been undertaken.

(f) Every successor issuer that has a different fiscal year from that of its predecessor(s) shall file a transition report pursuant to this section, containing the required information about each predecessor, for the transition period, if any, between the close of the fiscal year covered by the last annual report of each predecessor and the date of succession. The report shall be filed for the transition period on the form appropriate for annual reports of the issuer not more than the number of days specified in paragraph (j) of this section after the date of the succession, with financial statements in conformity with the requirements set forth in paragraph (b) of this section. If the transition period covers a period of less than six months, in lieu of a transition report on the form appropriate for the issuer's annual reports, the report may be filed for the transition period on Form 10–Q not more than the number of days specified in paragraph (j) of this section after the date of the succession, with financial statements in conformity with the requirements set forth in paragraph (c) of this section. Notwithstanding the foregoing, if the transition period covers a period of one month or less, the successor issuer need not file a separate transition report if the information is reported by the successor issuer in conformity with the requirements set forth in paragraph (d) of this section.

* * * * *

(j) * * *

(2) For transition reports to be filed on Form 10–Q (§ 249.308 of this chapter), the number of days shall be:

* * * * *

77. Amend § 240.15d-13 by revising the section heading, paragraph (a), the introductory text of (c), and paragraphs (d) and (e) to read as follows:

§ 240.15d-13 Quarterly reports on Form 10–Q (§ 249.308 of this chapter).

(a) Except as provided in paragraphs (b) and (c) of this section, every issuer that has securities registered pursuant to the Securities Act and is required to file annual reports pursuant to section 15(d) of the Act on Form 10–K (§ 249.310 of this chapter) shall file a quarterly report on Form 10–Q (§ 249.308 of this chapter) within the period specified in General Instruction A.1 to that form for each of the first three quarters of each fiscal year of the issuer, commencing with the first fiscal quarter following the most recent fiscal year for which full financial statements were included in the registration statement, or, if the registration statement included financial statements for an interim period after the most recent fiscal year end meeting the requirements of Article 10 of Regulation S-X, or Rule 8-03 of Regulation S-X for smaller reporting companies, for the first fiscal quarter after the quarter reported upon in the registration statement. The first quarterly report of the issuer shall be filed either within 45 days after the effective date of the registration statement or on or before the date on which such report would have been required to be filed if the issuer had been required to file reports on Form 10–Q as of its last fiscal quarter, whichever is later.

* * * * *

(c) Part I of the quarterly reports on Form 10–Q need not be filed by:

* * * * *

(d) Notwithstanding the foregoing provisions of this section, the financial information required by Part I of Form 10–Q shall not be deemed to be "filed" for the purpose of section 18 of the Act or otherwise subject to the liabilities of that section of the Act, but shall be subject to all other provisions of the Act.

(e) Notwithstanding the foregoing provisions of this section, the financial information required by Part I of Form 10–Q, or financial information submitted in lieu thereof pursuant to paragraph (d) of this section, shall not be deemed to be "filed" for the purpose of section 18 of the Act or otherwise subject to the liabilities of that section of the Act, but shall be subject to all other provisions of the Act.

78. Amend § 240.15d-14 by revising paragraph (a) to read as follows:

§ 240.15d-14 Certification of disclosure in annual and quarterly reports.

(a) Each report, including transition reports, filed on Form 10–Q, Form 10–K, Form 20–F or Form 40–F (§249.308a, 249.310, 249.220f or 249.240f of this chapter) under section 15(d) of the Act (15 U.S.C. 78o(d)), other than a report filed by an Asset-Backed Issuer (as defined in § 229.1101 of this chapter) or a report on Form 20–F filed under § 240.15d–19, must include certifications in the form specified in the applicable exhibit filing requirements of such report, and such certifications must be filed as an exhibit to such report. Each principal executive and principal financial officer of the issuer, or persons performing similar functions, at the time of filing of the report must sign a certification. The principal executive and principal financial officers of an issuer may omit the portion of the introductory language in paragraph 4 as well as language in paragraph 4(b) of the certification that refers to the certifying officers' responsibility for designing, establishing and maintaining internal control over financial reporting for the issuer until the issuer becomes subject to the internal control over financial reporting requirements in § 240.13a–15 or 240.15d–15.

* * * * *

79. Amend § 240.15d-20 by revising the introductory text of paragraph (a) to read as follows:

§ 240.15d-20 Plain English presentation of specified information.

(a) Any information included or incorporated by reference in a report filed under section 15(d) of the Act (15 U.S.C. 78o(d)) that is required to be disclosed pursuant to Item 402, 403, 404 or 407 of Regulation S–K (§229.402, 229.403, 229.404 or 229.407 of this chapter) must be presented in a clear, concise and understandable manner. You must prepare the disclosure using the following standards:

* * * * *

80. Amend § 240.15d-21 by revising paragraph (a)(1) to read as follows:

§ 240.15d-21 Reports for employee stock purchase, savings and similar plans.

(a) * * *

(1) The issuer of the stock or other securities offered to employees through their participation in the plan files annual reports on Form 10–K (§ 249.310 of this chapter); and

* * * * *

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

81. The authority citations for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq., 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

82. Amend § 249.0-1 by revising paragraph (b) to read as follows:

§ 249.0-1 Availability of forms.

* * * * *

(b) Any person may obtain a copy of any form prescribed for use in this part by written request to the Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549. Any person may inspect the forms at this address and at the Commission's regional offices. (See § 200.11 of this chapter for the addresses of SEC regional offices).

83. Amend Form 8-A (referenced in § 249.208a) by revising Item 1 before the Instruction to read as follows:

Note- The text of Form 8-A does not and this amendment will not appear in the Code of Federal Regulations.

FORM 8-A

FOR REGISTRATION OF CERTAIN CLASSES OF SECURITIES PURSUANT TO SECTION 12(b) OR (g) OF THE SECURITIES ACT OF 1934

* * * * *

Item 1. Description of Registrant's Securities to be Registered.

Furnish the information required by Item 202 of Regulation S-K (§ 229.202 of this chapter), as applicable.

* * * * *

84. Amend Form 10 (referenced in § 249.210) by:

a. Adding check boxes to the cover page, above the Information Requested in Registration Statement, requesting the registrant indicate by check mark whether it is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company;

b. Revising Item 1A; and

c. Revising Item 13.

The addition and revision read as follows:

Note-The text of Form 10 does not and this amendment will not appear in the Code of Federal Regulations.

FORM 10

GENERAL FORM FOR REGISTRATION OF SECURITIES
Pursuant to Section 12(b) or (g) of The Securities Exchange Act of 1934

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☐ Accelerated filer ☐

Non-accelerated filer ☐ Smaller reporting company ☐
(Do not check if a smaller reporting company)

* * * * *

Item 1A. Risk Factors.

Set forth, under the caption "Risk Factors," where appropriate, the risk factors described in Item 503(c) of Regulation S-K (§ 229.503(c) of this chapter) applicable to the registrant. Provide any discussion of risk factors in plain English in accordance with Rule 421(d) of the Securities Act of 1933 (§ 230.421(d) of this chapter). Smaller reporting companies are not required to provide the information required by this item.

* * * * *

Item 13. Financial Statements and Supplementary Data.

Furnish all financial statements required by Regulation S-X and supplementary financial information required by Item 302 of Regulation S-K (§ 229.302 of this chapter). Smaller reporting companies may provide the financial information required by Article 8 of Regulation S-X in lieu of the information required by in other parts of Regulation S-X.

* * * * *

85. By removing and reserving § 249.210b and removing Form 10-SB.

Note- The text of Form 10-SB does not appear in the Code of Federal Regulations.

86. Amend Form 20-F (referenced in § 249.220f) by adding instruction (f) to the General Instructions B to read as follows:

Note- The text of Form 20-F does not and this amendment will not appear in the Code of Federal Regulations.

FORM 20-F

* * * * *

GENERAL INSTRUCTIONS

* * * * *

B. General Rules and Regulation That Apply to this Form

* * * * *

(f) A foreign private issuer that is a smaller reporting company, as defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), may not use the scaled disclosure requirements in Regulation S-X and Regulation S-K available to smaller reporting companies for the purposes of preparing this form.

* * * * *

87. Amend Form 8-K (referenced in § 249.308) by revising General Instruction B.4.; removing General Instruction C.3; revising Item 2.01 paragraph (f) before the

Instructions; Instructions 2 and 4 to Item 2.02; Item 2.03 paragraph (d); Item 3.02 paragraphs (a) and (b) before the Instructions and Instruction 2; Item 4.01 paragraphs (a) and (b) before the Instructions; Item 4.02 the introductory text of paragraph (a); Item 5.01 paragraphs (a)(8) and (b); Item 5.02 paragraphs (c)(2), (d)(4), (f), and Instruction 4; in Item 5.03 paragraph (b), revise the phrase "Form 10-K, Form 10-KSB, Form 10-Q or Form 10-QSB" to read "Form 10-K or Form 10-Q", and revise Instruction 1; Item 5.05 paragraph (a); and Item 9.01 paragraphs (a)(1), (a)(3), (b)(1) and (d) before the Instruction

The revisions read as follows:

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 OR 15(d) of the Securities Exchange Act of 1934

* * * * *

GENERAL INSTRUCTIONS

* * * * *

B. Events to be Reported and Time for Filing of Reports.

* * * * *

4. Copies of agreements, amendments or other documents or instruments required to be filed pursuant to Form 8-K are not required to be filed or furnished as exhibits to the Form 8-K unless specifically required to be filed or furnished by the applicable Item. This instruction does not affect the requirement to otherwise file such agreements, amendments or other documents or instruments, including as exhibits to

registration statements and periodic reports pursuant to the requirements of Item 601 of Regulation S-K.

* * * * *

Item 2.01 Completion of Acquisition or Disposition of Assets.

* * * * *

(f) If the registrant was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before the transaction, the information that would be required if the registrant were filing a general form for registration of securities on Form 10 under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the transaction, with such information reflecting the registrant and its securities upon consummation of the transaction. Notwithstanding General Instruction B.3 to Form 8-K, if any disclosure required by this Item 2.01(f) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

* * * * *

Item 2.02 Results of Operations and Financial Condition.

* * * * *

Instructions.

* * * * *

2. The requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K (17 CFR 229.10(e)(1)(i)) shall apply to disclosures under this Item 2.02.

* * * * *

4. This Item 2.02 does not apply in the case of a disclosure that is made in a quarterly report filed with the Commission on Form 10-Q (17 CFR 249.308a) or an annual report filed with the Commission on Form 10-K (17 CFR 249.310).

Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.

* * * * *

(d) For purposes of this Item 2.03, <u>off-balance sheet arrangement</u> has the meaning set forth in Item 303(a)(4)(ii) of Regulation S-K (17 CFR 229.303(a)(4)(ii)).

* * * * *

Item 3.02 Unregistered Sales of Equity Securities.

(a) If a registrant sells equity securities in a transaction that is not registered under the Securities Act, furnish the information set forth in paragraphs (a) and (c) through (e) of Item 701 of Regulation S-K (17 CFR 229.701(a) and (c) through (e)). For purposes of determining the required filing date for the Form 8-K under this Item 3.02(a), the registrant has no obligation to disclose information under this Item 3.02 until the registrant enters into an agreement enforceable against the registrant, whether or not subject to conditions, under which the equity securities are to be sold. If there is no such agreement, the registrant must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the equity securities are to be sold.

(b) No report need be filed under this Item 3.02 if the equity securities sold, in the aggregate since its last report filed under this Item 3.02 or its last periodic report, whichever is more recent, constitute less than 1% of the number of shares outstanding of the class of equity securities sold. In the case of a smaller reporting company, no report need be filed if the equity securities sold, in the aggregate since its last report filed under this Item 3.02 or its last periodic report, whichever is more recent, constitute less than 5% of the number of shares outstanding of the class of equity securities sold.

Instructions.

* * * * *

2. A smaller reporting company is defined in Item 10(f)(1) of Regulation S-K (17 CFR 229.10(f)(1)).

* * * * *

Item 4.01 Changes in Registrant's Certifying Accountant.

(a) If an independent accountant who was previously engaged as the principal accountant to audit the registrant's financial statements, or an independent accountant upon whom the principal accountant expressed reliance in its report regarding a significant subsidiary, resigns (or indicates that it declines to stand for re-appointment after completion of the current audit) or is dismissed, disclose the information required by Item 304(a)(1) of Regulation S-K (§ 229.304(a)(1) of this chapter), including compliance with Item 304(a)(3) of Regulation S-K (§ 229.304(a)(3) of this chapter).

(b) If a new independent accountant has been engaged as either the principal accountant to audit the registrant's financial statements or as an independent accountant on whom the principal accountant is expected to express reliance in its report regarding a significant subsidiary, the registrant must disclose the information required by Item 304(a)(2) of Regulation S-K (17 CFR 229.302(a)(2)).

* * * * *

Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.

(a) If the registrant's board of directors, a committee of the board of directors or the officer or officers of the registrant authorized to take such action if board action is not required, concludes that any previously issued financial statements, covering one or more years or interim periods for which the registrant is required to provide financial statements under Regulation S-X (17 CFR 210) should no longer be relied upon because of an error in such financial statements as addressed in Accounting Principles Board Opinion No. 20, as may be modified, supplemented or succeeded, disclose the following information:

* * * * *

Item 5.01 Changes in Control of the Registrant.

(a) * * *

(8) if the registrant was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before the change in control, the information that would be required if the registrant were filing a general form for registration of securities on Form 10 under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the change in control, with such information reflecting the registrant and its securities upon consummation of the transaction. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 5.01(a)(8) is previously reported, as that term is defined in Rule

12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

(b) Furnish the information required by Item 403(c) of Regulation S-K (17 CFR 229.403(c)).

Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

* * * * *

(c) * * *

(2) the information required by Items 401(b), (d), (e) and Item 404(a) of Regulation S-K (17 CFR 229.401(b), (d), (e) and 229.404(a); and

* * * * *

(d) * * *

(4) the information required by Item 404(a) of Regulation S-K (17 CFR 229.404(a)).

* * * * *

(f) If the salary or bonus of a named executive officer cannot be calculated as of the most recent practicable date and is omitted from the Summary Compensation Table as specified in Instruction 1 to Item 402(c)(2)(iii) and (iv) of Regulation S-K, disclose the appropriate information under this Item 5.02(f) when there is a payment, grant, award, decision or other occurrence as a result of which such amounts become calculable in whole or in part. Disclosure under this Item 5.02(f) shall include a new total compensation figure for the named executive officer, using the new salary or bonus information to recalculate the information that was previously provided with respect to the named executive officer in the registrant's Summary Compensation Table for which the salary and bonus information was omitted in reliance on Instruction 1 to Item 402(c)(2)(iii) and (iv) of Regulation S-K (17 CFR 229.402(c)(2)(iii) and (iv)).

Instructions to Item 5.02.

* * * * *

(4) For purposes of this Item, the term "named executive officer" shall refer to those executive officers for whom disclosure was required in the registrant's most recent filing with the Commission under the Securities Act (15 U.S.C. 77a et seq.) or Exchange Act (15 U.S.C. 78a et seq.) that required disclosure pursuant to Item 402(c) of Regulation S-K (17 CFR 229.402(c)).

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

* * * * *

Instructions to Item 5.03.

1. Refer to Item 601(b)(3) of Regulation S-K (17 CFR 229.601(b)(3)) regarding the filing of exhibits to this Item 5.03.

* * * * *

Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.

(a) Briefly describe the date and nature of any amendment to a provision of the registrant's code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions and that relates to any element of the code of ethics definition enumerated in Item 406(b) of Regulation S-K (17 CFR 229.406(b)).

* * * * *

Item 9.01 Financial Statements and Exhibits.

* * * * *

(a) * * *

(1) For any business acquisition required to be described in answer to Item 2.01 of this form, financial statements of the business acquired shall be filed for the periods specified in Rule 3-05(b) of Regulation S-X (17 CFR 210.3-05(b)) or Rule 8-04(b) of Regulation S-X (17 CFR 210.8-04(b) for smaller reporting companies.

* * * * *

(2) * * *

(3) With regard to the acquisition of one or more real estate properties, the financial statements and any additional information specified by Rules 3-14 (17 CFR 210.3-14) or Rule 8-06 of Regulation S-X (17 CFR 210.8-06) for smaller reporting companies.

(b) * * *

(1) For any transaction required to be described in answer to Item 2.01 of this form, furnish any pro forma financial information that would be required pursuant to Article 11 of Regulation S-X (§ 210.11 of this chapter) or Rule 8-05 of Regulation S-X (§ 210.8-05 of this chapter) for smaller reporting companies.

* * * * *

(d) Exhibits. The exhibits will be deemed to be filed or furnished, depending upon the relevant item requiring such exhibit, in accordance with the provisions of Item 601 of Regulation S-K (17 CFR 229.601) and Instruction B.2 of this form.

* * * * *

88. Amend Form 10-Q (referenced in § 249.308a) by:

a. Revising the cover page of Form 10-Q to add, above Part I Financial Information, check boxes requesting the registrant to indicate whether it is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company;

b. In Part I, revising the text of Item 1; and

c. In Part II, revising the text of Item 1A.

The revisions and addition read as follows:

Note – The text of Form 10-Q does not and this amendment will not appear in the Code of Federal Regulations.

FORM 10-Q

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☐	Accelerated filer ☐
Non-accelerated filer ☐ (Do not check if a smaller reporting company)	Smaller reporting company ☐

PART I—FINANCIAL INFORMATION

Item 1. Financial Statements.

Provide the information required by Rule 10-01 of Regulation S-X (17 CFR 210). A smaller reporting company, defined in Rule 12b-2 (§ 240.12b-2 of this chapter) may provide the information required by Article 8-03 of Regulation S-X (§ 210.8-03 of this chapter).

* * * * *

PART II—OTHER INFORMATION

* * * * *

Item 1A. Risk Factors

Set forth any material changes from risk factors as previously disclosed in the registrant's Form 10-K (§ 249.310) in response to Item 1A. to Part 1 of Form 10-K. Smaller reporting companies are not required to provide the information required by this item.

89. By removing and reserving § 249.308b and removing Form 10-QSB.

Note – The text of Form 10-QSB does not appear in the Code of Federal Regulations.

90. Amend Form 10-K (referenced in § 249.310) by:

a. Revising the cover page of Form 10-K to add, above the line asking the registrant to indicate whether it is a shell company, check boxes requesting the registrant to indicate whether it is a large accelerated filer, or an accelerated filer; a non-accelerated filer, or a smaller reporting company;

b. Revising Item 1A; and

c. Revising Item 5 paragraph (a), Item 8 and Item 14 paragraph (1).

The additions and revisions read as follows:

Note- The text of Form 10-K does not and this amendment will not appear in the Code of Federal Regulations.

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

FORM 10-K

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☐ Accelerated filer ☐

Non-accelerated filer ☐ Smaller reporting company ☐
(Do not check if a smaller reporting company)

* * * * *

Item 1A. Risk Factors

Set forth, under the caption "Risk Factors," where appropriate, the risk factors described in Item 503(c) of Regulation S-K (§ 229.503(c) of this chapter) applicable to the registrant. Provide any discussion of risk factors in plain English in accordance with Rule 421(d) of the Securities Act of 1933 (§ 230.421(d) of this chapter). Smaller reporting companies are not required to provide the information required by this item.

* * * * *

Item 5. Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities.

(a) Furnish the information required by Item 201 of Regulation S-K (17 CFR 229.201) and Item 701 of Regulation S-K (17 CFR 229.701) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act. If the Item 701 information previously has been included in a Quarterly Report on Form 10-Q (17 CFR 249.308a) or in a Current Report on Form 8-K (17 CFR 249.308), it need not be furnished.

* * * * *

Item 8. Financial Statements and Supplementary Data.

(a) Furnish financial statements meeting the requirements of Regulation S-X (§ 210 of this chapter), except § 210.3-05 and Article 11 thereof, and the supplementary financial information required by Item 302 of Regulation S-K (§ 229.302 of this chapter). Financial statements of the registrant and its subsidiaries consolidated (as required by Rule 14a-3(b)) shall be filed under this item. Other financial statements and schedules required under Regulation S-X may be filed as "Financial Statement Schedules" pursuant to Item 15, Exhibits, Financial Statement Schedules, and Reports on Form 8-K, of this Form.

(b) A smaller reporting company may provide the information required by Article 8 of Regulation S-X in lieu of any financial statements required by Item 8 of this Form.

* * * * *

Item 14. Principal Accounting Fees and Services.

* * * * *

(1) Disclose, under the caption <u>Audit Fees</u>, the aggregate fees billed for each of the last two fiscal years for professional services rendered by the principal accountant for the audit of the registrant's annual financial statements and review of financial statements included in the registrant's Form 10-Q (17 CFR 249.308a) or services that are normally provided by the accountant in connection with statutory and regulatory filings or engagements for those fiscal years.

* * * * *

91. By removing and reserving § 249.310b and removing Form 10-KSB.

Note – The text of Form 10-KSB does not appear in the Code of Federal Regulations.

92. Amend Form 11-K (referenced in § 249.311) by removing General Instruction E(b) and redesignating the text of General Instruction E(a) as General Instruction E.

93. Amend Form SE (referenced in § 249.444) by revising General Instruction 3.C to read as follows:

* * * * *

FORM SE

FORM FOR SUBMISSION OF PAPER FORMAT EXHIBITS BY EDGAR ELECTRONIC FILERS

* * * * *

FORM SE GENERAL INSTRUCTIONS

* * * * *

3. Filing of Form SE.

* * * * *

C. Identify the exhibit being filed. Attach to the Form SE the paper format exhibit and an exhibit index if required by Item 601 of Regulation S-K (§ 229.601 of this chapter).

* * * * *

PART 260--GENERAL RULE AND REGULATIONS, TRUST INDENTURE ACT OF 1939

94. The authority citation for Part 260 continues to read as follows:

Authority: 15 U.S.C. 77eee, 77ggg, 77nnn, 77sss, 78ll(d), 80b-3, 80b-4, and 80b-11.

95. Amend § 260.0-11 by revising the introductory text of paragraph (b)(1), paragraphs (b)(1)(i) and (b)(2) to read as follows:

§ 260.0-11 Liability for certain statements by issuers.

* * * * *

(b) * * *

(1) A forward-looking statement (as defined in paragraph (c) of this section) made in a document filed with the Commission, in Part I of a quarterly report on Form 10–Q, § 249.308a of this chapter, or in an annual report to security holders meeting the requirements of Rules 14a–3(b) and (c) or 14c–3(a) and (b) under the Securities Exchange Act of 1934 (§ 240.14a-3(b) and (c) or § 240.14c-3(a) and (b) of this chapter), a statement reaffirming such forward-looking statement after the date the document was filed or the annual report was made publicly available, or a forward-looking statement made before the date the document was filed or the date the annual report was made publicly available if such statement is reaffirmed in a filed document, in Part I of a quarterly report on Form 10–Q, or in an annual report made publicly available within a reasonable time after the making of such forward-looking statement; Provided, that:

(i) At the time such statements are made or reaffirmed, either the issuer is subject to the reporting requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 and has complied with the requirements of Rule 13a–1 or 15d–1 (§ 240.13a-1 or § 240.15d-1 of this chapter) thereunder, if applicable, to file its most recent annual report on Form 10–K, Form 20–F, or Form 40–F; or if the issuer is not subject to the reporting requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934, the statements are made in a registration statement filed under the Securities Act of 1933 or pursuant to section 12(b) or (g) of the Securities Exchange Act of 1934; and

* * * * *

(2) Information relating to the effects of changing prices on the business enterprise presented voluntarily or pursuant to Item 303 of Regulation S-K (§ 229.303 of this chapter), Item 5 of Form 20–F (§ 249.220f of this chapter), "Operating and Financial Review and Prospects," Item 302 of Regulation S-K (§ 229.302 of this chapter), "Supplementary Financial Information," or Rule 3–20(c) of Regulation S-X (§ 210.3–20(c) of this chapter), and disclosed in a document filed with the Commission, in Part I of a quarterly report on Form 10–Q, or in an annual report to shareholders meeting the requirements of Rules 14a–3(b) and (c) or 14c–3(a) and (b) (§ 240.14a-3(b) and (c) or § 240.14c-3(a) and (b)) under the Securities Exchange Act of 1934.

* * * * *

96. Amend § 260.4d-9 by revising the introductory text to read as follows:

§ 260.4d-9 Exemption for Canadian Trust Indentures from Specified Provisions of the Act.

Any trust indenture filed in connection with offerings on a registration statement on Form S–1, (§ 239.1 of this chapter) F–7, F–8, F–9, F–10 or F–80 (§§ 239.37 through 239.41 of this chapter) shall be exempt from the operation of sections 310(a)(3) and 310(a)(4), sections 310(b) through 316(a), and sections 316(c) through 318(a) of the Act; provided that the trust indenture is subject to:

* * * * *

97. Amend § 260.10a-5 by revising paragraph (a) to read as follows:

§ 260.10a-5 Eligibility of Canadian Trustees.

(a) Subject to paragraph (b) of this section, any trust company, acting as trustee under an indenture qualified or to be qualified under the Act and filed in connection with offerings on a registration statement on Form S–1 (§ 239.11 of this chapter) F–7, F–8, F-9, F–10 or F–80 (§§ 239.37 through 239.41 of this chapter) that is incorporated and regulated as a trust company under the laws of Canada or any of its political subdivisions and that is subject to supervision or examination pursuant to the Trust Companies Act (Canada), R.S.C. 1985, or the Canada Deposit Insurance Corporation Act, R.S.C. 1985 shall not be subject to the requirement of domicile in the United States under section 310(a) of the Act (15 U.S.C. 77jjj(a)).

* * * * *

PART 269—FORMS PRESCRIBED UNDER THE TRUST INDENTURE ACT OF 1939

98. The authority citation for Part 269 is revised to read as follows:

Authority: 15 U.S.C. 77ddd(c), 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77sss, and 78ll(d), unless otherwise noted.

99. Amend § 260.01 by revising paragraph (b) to read as follows:

§ 269.0-1 Availability of forms.

* * * * *

(b) Any person may obtain a copy of any form prescribed for use in this part by written request to the Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549. Any person may inspect the forms at this address and at the Commission's regional offices. (See § 200.11 of this chapter for the addresses of SEC regional offices.)

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

December 19, 2007

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8875 / December 19, 2007

SECURITIES EXCHANGE ACT OF 1934
Release No. 56990 / December 19, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12908

In the Matter of MoneyMax Financial Solutions, Inc. and Todd A. Martin, 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 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 MoneyMax Financial Solutions, Inc. ("MoneyMax") and Todd A. Martin ("Martin") (Martin and MoneyMax are collectively referred to herein as "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

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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 and Sections 15(b)(6) 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:[1]

A. RESPONDENTS

1. MoneyMax Financial Solutions, Inc. is a Colorado corporation located in Littleton, Colorado. MoneyMax offers mortgage lending and other financial programs. MoneyMax has never been registered with the Commission.

2. Todd A. Martin, age 37, resides in Littleton, Colorado. Martin has been the president of MoneyMax since its inception in 1997. Martin was associated with a registered broker-dealer from 1998 until 2002 but has not been associated with a registered broker-dealer since that time.

B. FACTS

1. From October 2005 through November 2005, MoneyMax and Martin offered and sold securities issued by Navigators International Management Co., Ltd. ("Navigators") to at least five investors, raising a total of approximately $1.1 million.

2. MoneyMax and Martin told investors that they were participating in a bond funding program and would receive a 67% to 80% return, plus a return of principal, within 90 days of December 10, 2005. MoneyMax and Martin also told investors that their investments were safe and fully collateralized.

3. MoneyMax and Martin had arranged with Navigators that they would receive transaction-based compensation in connection with their sales of these securities.

4. The time period for payment to investors expired by March 11, 2006. No investors have received the promised returns.

5. Respondents offered the securities through means and instruments of interstate commerce. Respondents used telephonic and Internet communications to offer the securities to prospective investors.

---

[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.

6. No registration statement was filed with the Commission or was in effect as to the transactions in securities issued by Navigators. Moreover, the securities issued by Navigators and sold by Respondents were not exempt from registration.

7. As a result of the conduct described above, Respondents willfully violated Sections 5(a) and 5(c) of the Securities Act and Section 15(a) of the Exchange Act.

8. Respondent MoneyMax has submitted a sworn Statement of Financial Condition dated May 20, 2007 and other evidence and has asserted its inability to pay a civil penalty. Respondent Martin has submitted a sworn Statement of Financial Condition dated May 15, 2007 and other evidence and has asserted his inability to pay a civil penalty.

IV.

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

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. Respondents shall cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act and Section 15(a) of the Exchange Act.

B. Respondents be, and hereby are, barred from association with any broker or dealer, 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. Any reapplication for association by Respondents 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. Based upon MoneyMax's sworn representations in its Statement of Financial Condition dated May 20, 2007 and other documents submitted to the Commission, the Commission is not imposing a penalty against MoneyMax. Based upon Martin's sworn representations in his Statement of Financial Condition dated May 15, 2007 and other documents submitted to the Commission, the Commission is not imposing a penalty against Martin.

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 Respondents provided accurate and complete financial information at the time such representations were made; and (2) 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 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 a penalty should not be ordered; (3) 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

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

December 19, 2007

In the Matter of **Score One, Inc.** **Physical Property Holdings, 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 the issuers listed below. For each issuer, questions have arisen regarding the adequacy and accuracy of press releases and other publicly-disseminated information concerning, among other things: (1) the companies' assets; (2) the companies' current business operations; (3) the companies' current financial condition; (4) the issuance of the companies' securities; and (5) transactions in the companies' securities by insiders, consultants, and other individuals and entities.

1. **Score One, Inc**. is a Nevada corporation headquartered in Hong Kong. The company is dually quoted on the Over-the-Counter Bulletin Board and Pink Sheets under the ticker symbol "SREA." The company has recently been the subject of spam e-mails touting the company's shares.

2. **Physical Property Holdings, Inc.** is a Delaware corporation headquartered in Hong Kong. The company is dually quoted on the Over-the-Counter Bulletin Board and Pink Sheets under the ticker symbol "PPYH." The company has recently been the subject of spam e-mails touting the company's shares.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Score One, Inc. and Physical Property Holdings, Inc.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Score One, Inc. and Physical Property Holdings, Inc. is suspended for the period commencing at 9:30 a.m. EST, December 19, 2007, and terminating at 11:59 p.m. EST, on January 3, 2008.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57008 / December 20, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2759 / December 20, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-11171

In the Matter of Gregory B. Tayler, CA	: ORDER GRANTING APPLICATION FOR : REINSTATEMENT 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

On July 7, 2003, Gregory B. Tayler ("Tayler") 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 Tayler pursuant to Rule 102(e) of the Commission's Rules of Practice.[1] Tayler consented to the entry of the order without admitting or denying the findings therein but for the Commission's finding that a Final Judgment and Permanent Injunction and Other Equitable Relief had been previously entered against him. This order is issued in response to Tayler's application for reinstatement 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.

The Commission's complaint alleged that Tayler, along with other senior executives of Xerox Corporation ("Xerox"), played a significant role in misleading investors about Xerox's earnings in order to polish the company's reputation on Wall Street and to boost its stock price. Through their conduct, Tayler and others were responsible for accelerating the recognition of equipment revenues by approximately $3 billion and increasing pre-tax earnings by approximately $1.4 billion in Xerox's 1997-2000 financial results. These overstatements were achieved through the use of undisclosed manipulative accounting devices employed at the end of each financial reporting period during the relevant time.

[1] *See* Accounting and Auditing Enforcement Release No. 1812 dated July 7, 2003. Tayler was permitted, pursuant to the order, to apply for reinstatement after three years upon making certain showings.

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In his capacity as a preparer or reviewer, or as a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, Tayler attests that he will undertake to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, while practicing before the Commission in this capacity. Tayler is not, at this time, seeking to appear or practice before the Commission as an independent accountant. If he should wish to resume appearing and practicing before the Commission as an independent accountant, he will be required to submit an application to the Commission showing that he has complied and will comply with the terms of the original suspension order in this regard. Therefore, Tayler's suspension from practice before the Commission as an independent accountant continues in effect until the Commission determines that a sufficient showing has been made in this regard in accordance with the terms of the original suspension order.

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."[2] This "good cause" determination is necessarily highly fact specific.

On the basis of information supplied, representations made, and undertakings agreed to by Tayler, it appears that he has complied with the terms of the July 7, 2003 order suspending him from appearing or practicing 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 Tayler, by undertaking to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, in his practice before the Commission as a preparer or reviewer of financial statements required to be filed with the Commission, 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 Gregory B. Tayler, C.A. is hereby 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.

By the Commission.

Nancy M. Morris
Secretary

By: J. Lynn Taylor
Assistant Secretary

[2] 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).

UNITED STATES OF AMERICA
BEFORE THE
SECURITES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57031/December 21, 2007

ORDER GRANTING REGISTRATION OF EGAN-JONES RATING COMPANY AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION

Egan-Jones Rating Company, 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 (iii) of Section 3(a)(62)(B) of the Exchange Act. The Commission finds that the application furnished by Egan-Jones Rating Company 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 Egan-Jones Rating Company with the Commission as an NRSRO under Section 15E of the Exchange Act for the classes of credit ratings described in clauses (i) through (iii) of Section 3(a)(62)(B) of the Exchange Act is granted.

By the Commission.

Nancy M. Morris
Secretary

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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No.8880 / December 21, 2007

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57027 / December 21, 2007

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2686 / December 21, 2007

Admin. Proc. File No. 3-12288

In the Matter of

DAVID HENRY DISRAELI
and
LIFEPLAN ASSOCIATES, INC.

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING
INVESTMENT ADVISER PROCEEDING
CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud Violations

Registration Violations

Books and Records Violations

Investment adviser and corporation incorporated by investment adviser made material misstatements and omissions in offer and sale of securities to clients. Investment adviser registered with the Commission without satisfying the requirements for Commission registration and made material misstatements to the Commission in registration filings. Investment adviser failed to maintain accurate books and records. Held, it is in the public interest to revoke investment adviser's registration, to bar investment adviser from association with a broker, dealer, or investment adviser, to impose a civil money penalty on investment adviser, to order disgorgement from investment adviser, and to impose cease-and-desist orders on investment adviser and corporation.

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APPEARANCES:

David Henry Disraeli, pro se and for Lifeplan Associates, Inc.

Marshall Gandy, for the Division of Enforcement.

Appeal filed: March 29, 2007
Last brief received: July 2, 2007

I.

David Henry Disraeli ("Disraeli") and Lifeplan Associates, Inc. ("Lifeplan") appeal the initial decision of an administrative law judge. The law judge found that Disraeli and Lifeplan willfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5, and that Disraeli violated Section 206 of the Investment Advisers Act of 1940 and Advisers Act Rule 206(4)-4(a)(1), by making material misstatements and omissions in the offer and sale of securities. 1/ The law judge also found that Disraeli willfully violated Advisers Act Sections 203A and 207 by registering with the Commission as an investment adviser when he did not qualify for Commission registration and by making material misstatements and omissions in his registration applications. 2/ The law judge found further that Disraeli violated Advisers Act Section 204 and Advisers Act Rules 204-2(a)(1), 204-2(a)(2), and 204-2(a)(6) by failing to maintain accurate books and records. 3/ The law judge revoked Disraeli's investment adviser registration, barred Disraeli from association with a broker, dealer, or investment adviser, imposed a $120,000 civil money penalty on Disraeli, ordered that Disraeli disgorge $84,300 plus prejudgment interest, and imposed cease-and-desist orders on Disraeli and Lifeplan. We base our findings on an independent review of the record except with respect to those findings not challenged on appeal. 4/

1/ 15 U.S.C. §§ 77q(a), 78j(b), 80b-6; 17 C.F.R. §§ 240.10b-5, 275.206(4)-4(a)(1).

2/ 15 U.S.C. §§ 80b-3a, 80b-7.

3/ 15 U.S.C. § 80b-4; 17 C.F.R. § 275.204-2(a)(1), (2), (6). The Order Instituting Proceedings also charged that Disraeli violated Advisers Act Rules 204-3(a) and 204-3(c)(1). The law judge found that the Division failed to prove these violations, and the Division did not appeal the law judge's determination.

4/ Disraeli has filed a motion "for Abatement and Settlement Discussions" requesting "that the Commission abate the current appeal pending the outcome of settlement discussions." Disraeli represented, however, that counsel for the Division of Enforcement "would not support any settlement discussions." We deny the motion.

II.

Respondents

David Henry Disraeli is registered with the Commission as an investment adviser under the name "David Henry Disraeli DBA Lifeplan Associates." Disraeli provides discretionary investment advisory services to twenty-five clients, twenty-four of whom reside in Texas, and has received more than $500 in fees more than six months in advance. Pursuant to written advisory agreements with his clients, Disraeli receives a fee equal to 1.5% of the assets under management for advice about his clients' investments.

Disraeli incorporated Lifeplan in Texas around September 30, 2003. He holds eighty percent of Lifeplan's outstanding stock; approximately eleven of his advisory clients hold the remaining twenty percent. Disraeli is Lifeplan's sole officer, director, and employee. Lifeplan shares Disraeli's home address.

III.

The Lifeplan Offering

From September 2003 to December 2003, and also in December 2004 and March 2005, Disraeli offered and sold shares of Lifeplan common stock. A "Confidential Limited Offering Memorandum," dated October 21, 2003 (the "October Memorandum"), offered 200,000 Lifeplan shares pursuant to Rule 504 of Regulation D of the Securities Act of 1933. 5/ It stated that the shares would "be sold at $.50 each to capitalized [sic] the company with $100,000" and listed a minimum offering amount of $50,000. According to the October Memorandum, Lifeplan planned to "form two limited partnerships, one a market neutral hedge fund and the other a fund to purchase charged off consumer debt." The October Memorandum also stated that Disraeli "will not draw a salary but will distribute all profits annually pro rata based on stock ownership." The October Memorandum represented that the proceeds of the offering would "be used for working capital, legal fees administrative fees and other expenses." 6/

The October Memorandum stated that Lifeplan "was granted registration as an Investment Advisor with the Securities and Exchange Commission," and represented that Lifeplan was "the successor entity to Disraeli and Associates in all respects." Disraeli & Associates was a sole proprietorship that Disraeli had registered with the Commission as an investment adviser in 1993.

5/ 17 C.F.R. § 230.504. The October Memorandum consisted of two double-sided pages.

6/ Although the October Memorandum is dated October 21, 2003, the record indicates that Disraeli sold Lifeplan shares as early as September 30, 2003.

The October Memorandum stated that Lifeplan would "attempt to consummate management agreements with Disraeli and Associates' former clients" and that Lifeplan would "charge 1.5% of assets under management." Disraeli's clients were friends and family with whom Disraeli had had a business relationship of between ten and twenty years' duration. In his investigative testimony, Disraeli testified that these individuals executed new advisory agreements after Disraeli formed Lifeplan. Disraeli stated that his clients "got a new agreement with a new fee schedule." The record indicates that, after Disraeli formed Lifeplan, Disraeli began charging his investment advisory clients fees around November 2003.

Disraeli offered and sold the Lifeplan shares to his investment advisory clients. Disraeli testified that he conducted the offering by calling his clients and sending them the October Memorandum. He stated that the October Memorandum constituted "the nuts and bolts of what [he] was telling people." He added that he told them they would get "20 percent of their original investment in cash per year." According to Disraeli, his clients had the opportunity to ask questions, and he met with at least two clients personally. Disraeli told his clients that he "needed to raise some money." He testified that he did not "remember having any substantive discussion about the specific use of the proceeds" and "thought it was understood that [he] needed the money to operate." Disraeli testified further that, regarding his use of the funds for personal expenses, he "didn't tell [his clients] anything." 7/ The one subscription agreement in the record states that the investor "received no representations or warranties (other than any contained in the Offering Memorandum) from the Company or its employees or agents, or any other person and [sic], in making [his] investment decision." A document entitled "Lifeplan Corporate Books" indicates that, between September 2003 and December 2004, nine clients purchased 200,000 Lifeplan shares for a total of $95,000. 8/

On October 9, 2003, after raising only $30,000 of the $50,000 minimum offering amount, Disraeli transferred $12,000 from Lifeplan's bank account to his personal bank account to cover the purchase of a $9,300 cashier's check payable to the IRS to release a lien on all property and rights to property belonging to Disraeli for failing to pay personal income taxes. 9/

7/ Disraeli provided this testimony in response to a question from his counsel asking him if it was correct that he did not inform his clients that the proceeds would be used for personal expenses. Disraeli's counsel objected that Disraeli's answer was non-responsive and asked the question a second time. Disraeli then stated that he "did have conversations about that" but did not describe the conversations.

8/ According to the document, one investor paid $5,000 for his 20,000 shares rather than the $10,000 that would be expected at $.50 per share. At some point, two clients purchased a total of an additional 20,000 Lifeplan shares at $.50 per share to increase the total proceeds of the offering to $105,000.

9/ Although the IRS filed the lien after Disraeli failed to pay $39,384.92 in taxes, it released the lien in a negotiated compromise after Disraeli paid $9,364.

Disraeli continued using the proceeds raised by the sale of Lifeplan shares. He states that, of the $85,000 that had been raised by early December 2003, he "loaned himself" $84,300 "to pay for both personal and business expenses." Disraeli's and Lifeplan's bank statements confirm that, between October 9, 2003 and December 23, 2003, Disraeli transferred $83,500 from Lifeplan's checking account directly into his personal bank account. 10/ These statements establish that, after Disraeli transferred the funds into his personal account, he made payments for personal expenses such as credit cards, groceries, pets, restaurants, and shopping. These statements also establish that Disraeli paid personal expenses with Lifeplan funds directly out of Lifeplan's account. Disraeli himself created a document listing "personal expenses that [he] felt were not legitimate business expenses paid out of the corporate account." These payments included payments for coffee, ice cream, groceries, restaurants, and videos. When asked during investigative testimony why he used the Lifeplan account to pay personal expenses, Disraeli answered that he did not "have a good reason." Although Disraeli contends that some of the proceeds raised in the offering and expended from Lifeplan's account were used for business purposes, he concedes that he "did pay personal expenses out of Lifeplan checking accounts." 11/

Although Disraeli "thought [he] made adequate disclosures" in the October Memorandum, he provided investors with a second "Confidential Limited Offering Memorandum," dated December 9, 2003 (the "December Memorandum"), after he consulted a law firm and became "concerned about the possibility that a third-party regulator might take th[e] position" that his clients had not been fully informed about the use of the proceeds. The law firm prepared the December Memorandum as well as a rescission offer. 12/

Notwithstanding that Disraeli had started spending the proceeds of the offering after raising only $30,000, the December Memorandum represented that Lifeplan would hold and segregate the offering proceeds, for return to investors, until reaching the $50,000 minimum offering amount. It reiterated that Lifeplan would apply the offering proceeds to the operation of the advisory business, to the creation of a partnership that would purchase distressed consumer

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10/ Disraeli provided Commission staff with a document acknowledging these transfers and indicating that he also transferred an additional $800 from the Lifeplan account into his personal bank account for a total of $84,300.

11/ Lifeplan's bank statements indicate payments from the account for expenses that could be used for business purposes, such as Federal Express, Comp USA, and OfficeMax.

12/ Disraeli testified that "almost all" of the proceeds of the offering had been raised by the date of the December Memorandum.

debt, and to administrative and start-up expenses and working capital. 13/ It added that, due to "the number and variability of factors that determine the Company's use of the net proceeds of the Offering, the Company cannot assure [investors] that such uses will not vary from the Company's current intentions or that shareholders will agree with the uses it has chosen."

Neither offering memorandum disclosed either the transfer of $84,300 from Lifeplan's account into Disraeli's personal bank account or the use of proceeds from the offering for Disraeli's personal expenses. The offering memoranda also did not disclose either the existence of Disraeli's federal tax lien or the use of the proceeds of the offering to release that lien. Disraeli testified that, at the time of the December Memorandum, he did not feel it was necessary to inform his investors that he had spent almost the totality of the money that they invested in Lifeplan. No investor funds were used for the purchase and collection of distressed consumer debt, and Lifeplan never launched any of the ventures contemplated in the offering memoranda.

In January 2005, Commission staff from the Division of Enforcement and the Office of Compliance, Inspections, and Examinations conducted a cause examination of Disraeli during which it noted the expenditure of $84,300 from the offering proceeds. In response, Disraeli produced an undated promissory note stating that he agreed to pay Lifeplan $84,300 plus interest from November 10, 2003. Disraeli testified that he "could have" executed the note around that November date. The law judge found, however, that the "evidence strongly suggest[ed] that Disraeli created the promissory note much later than November 10, 2003." With respect to his entire testimony, Disraeli's "many inconsistent and contradictory positions and [her] observation of his demeanor cause[d] [her] to conclude that Disraeli's testimony was not credible."

After the staff's examination, Disraeli wrote an undated letter to his "fellow shareholders" disclosing that he had "placed a large portion of the offering proceeds into [his] personal bank account" because "[b]y the time Lifeplan Associates, Inc. was operational [he] had personally absorbed approximately $25,000 in cash expenses attributable to the formation of the business." According to Disraeli, he "felt the need to create this [letter] when [he] heard the types of questions that [the Division of Enforcement] was asking [his] shareholders."

Two Lifeplan shareholders testified at the hearing. One shareholder, Nicholas Mallouf, testified that Disraeli's $84,300 loan from the proceeds of the Lifeplan offering did not disturb him because "there was no doubt in [Mallouf's] mind [Disraeli] was going to use [the Lifeplan offering] for personal operating expenses." Mallouf also signed an affidavit stating that it "was not material that a portion of the proceeds was used to satisfy a tax obligation, or any other

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13/ The memorandum included a table "set[ting] forth the anticipated initial uses of the funds to develop the business." It assumed that $100,000 would be raised and included $18,000 for "personnel," $10,000 for "legal, other professional expenses," $2,000 for "capital expenditures," $12,000 for "management fee credits," and $58,000 for "working capital."

personal obligation." He signed further a "Shareholder Ratification and Release" "ratif[ying] any and all management decisions by David Disraeli regarding the use of offering proceeds." 14/

Ron Marek, another Lifeplan investor, testified at the hearing that he was not aware at the time of the offering that Disraeli was loaning the proceeds of the offering to himself, that it would have been important to him to know that fact before making his investment, and that he would not have chosen to invest in Lifeplan had he known this information. Marek's wife Lenese signed a declaration which mirrored her husband's testimony. 15/ Marek now does not want Disraeli involved in his financial affairs in any respect.

Antifraud Violations

A. Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5 forbid material misstatements or omissions in connection with the offer or sale of a security. 16/ "A statement is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether or not to invest his money in a particular security." 17/ "Violations of Section 17(a)(1), Section 10(b), and Rule 10b-5 require scienter." 18/ "Scienter is not an element of a Section 17(a)(2) or Section 17(a)(3) cause of action, however." 19/ "Scienter may be established by recklessness, defined as . . . an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it." 20/

We find that Disraeli and Lifeplan made material misstatements and omissions regarding the use of the offering proceeds. "The disposition of the proceeds of a securities offering is

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14/ Several other Lifeplan investors signed affidavits and ratifications similar to Mallouf's.

15/ Although two other investors signed similar declarations, these investors also signed the "Shareholder Ratification and Release."

16/ SEC v. Phan, 500 F.3d 895, 907-08 (9th Cir. 2007).

17/ SEC v. Fife, 311 F.3d 1, 9 (1st Cir. 2002) (citing Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)).

18/ SEC v. Dain Rauscher, Inc., 254 F.3d 852, 856 (9th Cir. 2001).

19/ Meadows v. SEC, 119 F.3d 1219, 1226 n.15 (5th Cir. 1997).

20/ SEC v. Rubera, 350 F.3d 1084, 1094 (9th Cir. 2003); accord Rockies Fund, Inc. v. SEC, 428 F.3d 1088, 1093 (D.C. Cir. 2005); SEC v. Infinity Group Co., 212 F.3d 180, 192 (3d Cir. 2000); SEC v. McNulty, 137 F.3d 732, 741 (2d Cir. 1998); Meadows, 119 F.3d at 1226; SEC v. Carriba Air, Inc., 681 F.2d 1318, 1324 (11th Cir. 1982).

material information, and issuers must adhere strictly to the uses for the proceeds described in [a private placement memorandum]." 21/ Disraeli did not devote the proceeds of the offering to the ventures contemplated in the offering memoranda or to the administrative and start-up expenses described therein. 22/ Instead, Disraeli lent himself proceeds of the offering to pay for the release of a personal tax lien against him and for other personal expenses.

Both offering memoranda represented that the minimum offering amount was $50,000. The December Memorandum further represented that Lifeplan would hold and segregate the offering proceeds until reaching the minimum offering amount. At the time the December Memorandum was written, however, Disraeli had already transferred $12,000 of the first $30,000 raised in the offering into his personal bank account. The misrepresentation of the size of the offering and segregation and use of the offering proceeds and the failure to disclose the actual use of the proceeds constituted material misstatements and omissions. 23/

"[K]nowledge . . . is sufficient to satisfy [the scienter] requirement. 24/ Disraeli prepared and distributed the October Memorandum, and distributed the December Memorandum, which falsely described the use and disposition of the offering proceeds. Although the offering memoranda stated that the proceeds would be used for business expenses such as "working capital, legal fees[,] administrative fees[,] and other expenses" in connection with acquiring distressed consumer debt and starting a market neutral hedge fund, Disraeli transferred $84,300

21/ Brian Prendergast, 55 S.E.C. 289, 303 (2001).

22/ Although Disraeli contends that he had "discretion" to launch these ventures, the October Memorandum informed investors that Lifeplan "will form two limited partnerships, one a market neutral hedge fund and the other a fund to purchase charged off consumer debt."

23/ See SEC v. Randy, 38 F. Supp. 2d 657, 669 (N.D. Ill. 1999) (finding failure to disclose to investors the use of investor funds for unrelated personal expenses material); Robert M. Fuller, 56 S.E.C. 976, 986 (2003) ("A reasonable investor would have wanted to know that such a substantial amount of the proceeds of the offering was not used in accordance with the purpose stated in the Registration Statement.") (citing Erik W. Chan, 55 S.E.C. 715, 725 (2002) ("Many of the misrepresentations in and omissions from these documents concerned issues fundamental to [issuer's] business, including . . . its intended use of the proceeds from the securities offerings. As such, the misrepresentations and omissions were material.")), petition denied, 95 Fed. Appx. 361 (D.C. Cir. 2004); DWS Sec. Corp., 51 S.E.C. 814, 818 (1993) (finding the "actual use of proceeds [] not adequately disclosed in the offering documents" where the bulk of the funds were used "to pay [Applicants'] personal expenses" rather than the uses stated in the documents).

24/ Graham v. SEC, 222 F.3d 994, 1004 (D.C. Cir. 2000); see also SEC v. U.S. Env't., Inc., 155 F.3d 107, 111 (2d Cir. 1998) ("It is well-settled that knowledge of the proscribed activity is sufficient scienter under § 10(b).").

from Lifeplan's checking account into his personal account and "admitted that he loaned himself $85,000 to pay for both personal and [unspecified] business expenses." Disraeli did not disclose his actual use of the funds to his investors. The offering memoranda also stated that the minimum offering amount was $50,000 and that Lifeplan would hold and segregate the offering proceeds until reaching the $50,000 minimum, but Disraeli used the proceeds of the offering to cover a personal tax lien after raising only $30,000. Disraeli, therefore, knew that he informed investors that the proceeds would be used for business expenses, that he did not use the proceeds in this manner, and that his investors did not know about his actual use of the funds. It is indisputable that Disraeli knew the falsity of the statements in the offering memoranda. We therefore find that Disraeli, and thus Lifeplan, 25/ acted with scienter. 26/

Although Disraeli admits that "the Lifeplan offering could have been handled differently" and that he "did pay personal expenses out of Lifeplan checking accounts and also paid business expenses out of his personal account," he contends that this accounting arrangement "is not fraud." Disraeli argues that he was entitled to borrow funds from the Lifeplan offering as reimbursement for expenses incurred by him and associated with forming Lifeplan. Neither offering memorandum, however, disclosed that he had advanced funds or that the proceeds from the offering would be used for this purpose. The October Memorandum states that "[t]he proceeds will be used for working capital, legal fees administrative fees and other expenses." The December Memorandum lists, under "Uses of Funds," personnel, legal and other professional expenses, capital expenditures, management fee credits, and working capital. Disraeli claims that he was "entitled to borrow or simply take up to $70,000 from the offering proceeds as specified in the offering documents for working capital and personnel expenses, especially since the registered entity was then a sole proprietorship," but the offering memoranda stated that Lifeplan was a corporation and that Lifeplan would use the proceeds of the offering as described in the memoranda.

Although Disraeli also maintains that he "produce[d] evidence that all personal expenses paid from Lifeplan funds were added to the salary calculation to which he was/is entitled," Disraeli does not identify this purported evidence, and both offering memoranda, as well as Disraeli's employment agreement, stated that Disraeli would not receive a salary. Even if the

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25/ "The scienter of a corporation's officers and directors establishes the scienter of the corporation for purposes of the antifraud provisions." Fuller, 56 S.E.C. at 987 n.26 (citing SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 n.16 (2d Cir. 1992)).

26/ See Lowry v. SEC, 340 F.3d 501, 506 (8th Cir. 2003) (finding that investment adviser's "plan[] to use [his investors'] funds for personal reasons without advising his investors or the Commission" satisfied the scienter requirement); Prendergast, 55 S.E.C. at 304 (finding that respondent acted with scienter because he was "actively involved with preparation of the [offering memorandum]," "knew of its provisions regarding the use of the offering proceeds," and "made the decision to change the disposition of the proceeds and did not disclose this decision to the investors").

proceeds were actually used to reimburse Disraeli for expenses, the failure to disclose this use would be a material omission. 27/

Disraeli also contends that he did not commit securities fraud because his investors "do not consider the alleged misstatements or omissions to be material." 28/ However, "[t]he question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." 29/ "[T]he reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective." 30/ "[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information." 31/

> Although in general materiality is primarily a factual inquiry, "the question of materiality is to be resolved as a matter of law when the information is 'so

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27/ Cf. Christopher A. Lowry, 55 S.E.C. 1133, 1140 (2002) (finding that, "[e]ven if there had been a valid 'loan,' [adviser] acted fraudulently because he failed to disclose that he had 'borrowed' or intended to 'borrow' investor funds for his personal use when he offered and sold [his company's] stock to his [advisory] clients"), aff'd, 340 F.3d 501 (8th Cir. 2003).

28/ Although Disraeli also contends that investors signed releases "ratif[ying] any and all management decisions by David Disraeli regarding the use of offering proceeds received by Lifeplan Associates, Inc.," investor ratifications do not absolve Disraeli from fraudulently departing from the stated use of the proceeds. See Lowry, 55 S.E.C. at 1140 (finding that the "fact that a majority of the company's investors in the offering may have ratified [respondent's] purported 'loan' several months after he used the funds does not affect our authority to sanction him for conduct that violated the securities laws" where he departed from the stated use of the offering proceeds); Wilshire Disc. Sec., 51 S.E.C. 547, 551 (1993) (stating that "even assuming that certain investors ratified or endorsed [applicant's] action, that would not alter the objective fact that [he] fraudulently departed from the issuer's stated use of proceeds").

29/ TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976); see also Basic, 485 U.S. at 232 ("We now expressly adopt the TSC Industries standard of materiality for the § 10(b) and Rule 10b-5 context."); SEC v. Blatt, 583 F.2d 1325, 1331 (5th Cir. 1978) ("We should emphasize, however, that the test for materiality is objective.")(citing TSC Indus.).

30/ Richmark Capital Corp., Securities Act Rel. No. 8333 (Nov. 7, 2003), 81 SEC Docket 2205, 2211 (citing TSC Indus., 426 U.S. at 445); see also SEC v. Nat'l Student Marketing Corp., 457 F. Supp. 682, 708 (D.D.C. 1978) (stating that the materiality analysis "is an [o]bjective one, involving the significance of an omitted or misrepresented fact to a [r]easonable investor, not the significance of the information to various individual investors") (citing TSC Indus., 426 U.S. at 445).

31/ Basic, 485 U.S. at 240.

> obviously important [or unimportant] to an investor, that reasonable minds cannot differ on the question of materiality.'" 32/

We find that a reasonable investor would want to know that Disraeli was diverting the proceeds of the offering to his own use, particularly when Disraeli claimed he was going to vastly increase assets under management and pay dividends. 33/

Disraeli also argues that "each Lifeplan shareholder invested based on their confidence in Disraeli, not what was contained in the offering documents," and that "there is no causal relationship between any alleged violations and investor harm." However, "the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money." 34/ Although Disraeli contends further that "each investor[']s contribution was insignificant in light of their net worth," misrepresentations "cannot be excused because the amount of money involved is small and the

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32/ SEC v. Cochran, 214 F.3d 1261, 1267 (10th Cir. 2000) (alteration in original) (citations omitted); see also TSC Indus., 426 U.S. at 450 ("Only if the established omissions are 'so obviously important to an investor, that reasonable minds cannot differ on the question of materiality' is the ultimate issue of materiality appropriately resolved 'as a matter of law' by summary judgment.") (citation omitted); accord Phan, 500 F.3d at 908 (same); SEC v. Research Automation Corp., 585 F.2d 31, 35 (2d Cir. 1978) (same).

33/ See SEC v. Murphy, 626 F.2d 633, 653 (9th Cir. 1980) ("Surely the materiality of information relating to financial condition, solvency, and profitability is not subject to serious challenge."); SEC v. Smith, 2005 WL 2373849 (S.D. Ohio 2005) ("For certain, a reasonable investor would have considered Smith's omission that the majority of funds raised from the offerings would be spent on Smith's personal items and expenses for his other businesses instead of [in the manner described in private offering memorandums] a significant factor in determining whether to invest in the offerings."), aff'd, 208 Fed. Appx. 402 (6th Cir. 2006); SEC v. Better Life Club of Am., Inc., 995 F. Supp. 167, 177 (D.D.C. 1998) ("[N]o rational investor would knowingly invest in a project which never funded profitable ventures and which diverted substantial funds to the personal use of its promoters. Therefore, there is no question that defendants' frequent misrepresentations and omissions were material."), aff'd, 203 F.3d 54 (D.C. Cir. 1999) (Table); Fuller, 56 S.E.C. at 976 (stating that a reasonable investor would have wanted to know that a substantial amount of the offering proceeds would not be used as described); City of Miami, 56 S.E.C. 317, 336 (2003) (stating that a reasonable investor would have wanted to know that Miami needed to use bond proceeds to satisfy operational expenses).

34/ SEC v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985).

salesman believes the customer can afford the risk." 35/ Disraeli further asserts that his investors are sophisticated, but the sophistication of investors does not justify misleading them. 36/

Disraeli also cannot rely on the statement in the December Memorandum that due to "the number and variability of factors that determine the Company's use of the net proceeds of the Offering, the Company cannot assure [investors] that such uses will not vary from the Company's current intentions or that shareholders will agree with the uses it has chosen." "[I]n offering documents, specific statements control more general language such as that an allocation plan is 'flexible.'" 37/ A statement that the use of proceeds may vary from a company's current intentions cannot cure the diversion of offering proceeds from specific business expenses identified in offering memoranda to the personal use of the company's officers. 38/ Here, Disraeli provided the December Memorandum after having diverted proceeds of the offering to his personal use. The statement that the use of the proceeds could vary was itself misleading because he had already deviated from the use of the proceeds described in the memorandum. 39/

35/ Alfred Miller, 43 S.E.C. 233, 238 (1966), aff'd sub nom. Freimark v. SEC, No. 31270 (2d Cir. Jan. 4, 1968), available at Fed. Sec. L. Rep. (CCH) ¶ 92,152.

36/ Everest Sec., Inc. v. SEC, 116 F.3d 1235, 1240 (8th Cir. 1997).

37/ Prendergast, 55 S.E.C. at 303.

38/ DWS Sec., 51 S.E.C. at 817-18 (rejecting reliance of company's president and vice-president on statements in private placement memorandum that they "would have some latitude in using the [] offering proceeds" where the memorandum "state[d] only that proceeds would be used for corporate expenses and acquiring and developing unspecified entertainment businesses" and did not "inform investors that Applicants would spend the bulk of investor funds on [Applicants'] personal expenses").

39/ Although Disraeli does not advance a reliance on counsel defense before us, he testified that a law firm prepared the December Memorandum, and he stated in his post-hearing brief that he "secured the services of reputable counsel to prepare an offering to cure deficiencies in the earlier documents." On the record here a reliance on counsel defense is not available. A claim of reliance on the advice of counsel requires a showing that the party claiming it "made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith." Markowski v. SEC, 34 F.3d 99, 104-05 (2d Cir. 1994) (citing SEC v. Savoy Indus., Inc., 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981)). The record contains no evidence that Disraeli made complete disclosures to counsel regarding his use of the offering proceeds, that he received advice that his conduct was legal, and that he relied on any advice in good faith despite knowing that he did not intend to use the proceeds of the offering as described in either the October Memorandum or the December Memorandum. Disraeli fraudulently diverted the majority of the proceeds of the offering to his personal use, moreover, before consulting counsel.

Disraeli also testified that he was "under the impression that under a Reg D offering or a limited offering in Texas, there's no disclosure requirements, period." However, "Regulation D transactions are exempt from the registration requirements of the Securities Act, not the antifraud provisions." 40/ "Though Regulation D offerings are subject to fewer requirements, affirmative misleading statements are not permitted." 41/ Disraeli decided to issue material statements in the offering memorandums. These statements, whether or not Regulation D required such disclosures, could not be false or misleading.

Accordingly, we find that Disraeli and Lifeplan willfully violated Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5. 42/

B. "Advisers Act Section 206(1) provides that it is unlawful for an investment adviser 'to employ any device, scheme, or artifice to defraud any client or prospective client.'" 43/ Section 206(2) "prohibits any investment adviser from 'engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.'" 44/ The Advisers Act "reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser -- consciously or unconsciously -- to render advice which was not disinterested." 45/ An investment adviser thus has "'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' his clients." 46/

40/ Interpretive Release on Regulation D, Securities Act Rel. No. 6455 (Mar. 3, 1983), 27 SEC Docket 561, 565 n.26.

41/ Everest Secs., Inc., 52 S.E.C. 958, 963 (1996), aff'd in part and sanctions vacated in part, 116 F.3d 1235 (8th Cir. 1997).

42/ Willfulness means "intentionally committing the act which constitutes the violation" and does not require that the actor "also be aware that he is violating one of the Rules or Acts." Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Gearheart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).

43/ Vernazza v. SEC, 327 F.3d 851, 860 n.6 (9th Cir. 2003); 15 U.S.C. § 80b-6(1).

44/ Monetta Fin. Servs. v. SEC, 390 F.3d 952, 955 (7th Cir. 2004); 15 U.S.C. § 80b-6(2).

45/ SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-92 (1963).

46/ Id. at 194.

Advisers Act Section 206 therefore "prohibits failures to disclose material information, not just affirmative frauds." 47/ Scienter is required for a Section 206(1) violation but need not be found for a violation of Section 206(2). 48/ "Facts showing a violation of [Securities Act] Section 17(a) or [Exchange Act Section] 10(b) by an investment advisor will also support a showing of a Section 206 violation." 49/ As discussed above, Disraeli made material misstatements and omissions with scienter by misrepresenting the use of the proceeds of the offering to his advisory clients and failing to disclose to them that he planned to use the proceeds of the offering to pay personal expenses.

Although Disraeli states in his brief that he "was not a registered investment advisor during the initial offering of Lifeplan stock," Section 206 is not limited to registered investment advisers, 50/ and Disraeli concedes that he "has always been viewed as an investment advisor while he has been properly registered and while he wasn't."

Disraeli, moreover, stipulated that he is an investment adviser, and the record confirms that he acted as an investment adviser at the time of his misconduct. Advisers Act Section 202(a)(11) defines an investment adviser as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." Disraeli's clients executed new advisory agreements after Disraeli formed Lifeplan. Disraeli stated that his clients "got a new agreement with a new fee schedule." The October Memorandum stated that Lifeplan would "charge 1.5% of assets under management." Although Disraeli was not charging his clients fees at the time he began the Lifeplan offering, he resumed charging fees during the offering period. Disraeli, therefore, provided investment advice to his clients for compensation during the Lifeplan offering. He solicited investments in Lifeplan securities from those investment advisory clients. Disraeli thus acted as an investment adviser and willfully violated Advisers Act Sections 206(1) and (2). 51/

47/ SEC v. Washington Inv. Network, 475 F.3d 392, 395 (D.C. Cir. 2007).

48/ Capital Gains, 375 U.S. at 195; SEC v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992); Steadman v. SEC, 603 F.2d 1126, 1134 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

49/ SEC v. Haligiannis, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007) (citing SEC v. Berger, 244 F. Supp. 2d 180, 188-89 (S.D.N.Y. 2001)).

50/ See Teicher v. SEC, 177 F.3d 1016, 1017-19 (D.C. Cir. 1999).

51/ See Alexander V. Stein, 52 S.E.C. 296, 299 (1995) ("Our authority to proceed under Section 203(f), however, does not rest on whether or not an entity or individual has registered with this Commission. It does rest on whether or not an entity or individual in fact acted as an investment adviser. While Stein claims that there is insufficient evidence

(continued...)

C. Advisers Act Section 206(4) prohibits an investment adviser from engaging in "'any act, practice, or course of business which is fraudulent, deceptive, or manipulative' and provides that the [Commission] shall promulgate rules thereunder." 52/ Scienter is not required for violation of a rule promulgated under Section 206(4). 53/ Advisers Act Rule 206(4)-4(a)(1) provides that it is a fraudulent, deceptive, or manipulative act, practice, or course of business to fail to disclose to any client or prospective client all material facts with respect to the adviser's financial condition that are reasonably likely to impair the ability of the adviser to meet contractual commitments to clients, if the adviser has discretionary authority or custody over such client's funds or securities, or requires prepayment of advisory fees of more than $500 from such client, six months or more in advance. 54/

Disraeli had discretionary authority over his client's funds and stipulated that he received more than $500 in fees more than six months in advance. He failed to disclose to his clients that the IRS had placed a lien on all property and rights to property belonging to him, that he planned to borrow investor funds for personal expenses, and that he would not devote all the proceeds of the offering to the operation of the advisory business as described in the offering memoranda. His IRS lien, his indebtedness to Lifeplan, and his diversion of Lifeplan funds to his personal use all were material facts that impacted his financial condition and his ability to meet his contractual commitments to his clients. Thus, Disraeli willfully violated Advisers Act Section 206(4) and Rule 206(4)-4(a)(1).

IV.

Commission Registration as an Investment Adviser

As noted, Disraeli was registered with the Commission as an investment adviser, as a sole proprietorship under the name Disraeli & Associates, from November 1993 until June 1997, when he withdrew his registration voluntarily after the National Securities Market Improvement Act of 1996 added Section 203A to the Advisers Act. That section generally prohibits an

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51/ (...continued)
on this record from which to conclude that he acted as an investment adviser, we cannot agree. The record reflects that Stein held himself out as an investment adviser to members of the public when he recommended, in the course of his business activities undertaken through the AVS companies he controlled, that clients invest their funds in his 'fully hedged arbitrage program.' Stein received the requisite compensation for his services when he subsequently diverted certain of these funds for his personal use.").

52/ Valicenti Adv. Servs. v. SEC, 198 F.3d 62, 64 n.4 (2d Cir. 1999); 15 U.S.C. § 80b-6(4).

53/ SEC v. Steadman, 967 F.2d 636, 647 (D.C. Cir. 1992).

54/ 17 C.F.R. § 275.206(4)-4(a)(1).

investment adviser from registering with the Commission unless it has more than $25 million of assets under management or is an adviser to a registered investment company. 55/

In July 1997, Disraeli registered David Henry Disraeli DBA Disraeli and Associates as an investment adviser with the Texas State Securities Board (the "TSSB"). Disraeli's TSSB registration lapsed on December 31, 2000. 56/ He continued, however, to conduct an advisory business. He also continued to collect fees until the autumn of 2002; he did not resume collecting fees for almost a year. Between the time his registration lapsed and the time he stopped collecting fees, Disraeli collected between $80,000-$90,000.

Disraeli stopped collecting fees at around the time that he became the subject of a TSSB disciplinary proceeding. On November 6, 2002, the TSSB issued an emergency cease-and-desist order against Disraeli and converted it to a cease-and-desist order on April 2, 2003. Disraeli consented to the April 2, 2003 order without admitting or denying wrongdoing. The TSSB's order required that Disraeli cease and desist from offering in Texas the securities of a proposed retirement community until the securities were registered or an exemption was available; from offering those securities in Texas through the use of fraud or an offer containing a statement that was materially misleading or otherwise likely to deceive the public; and from rendering services as an investment adviser in Texas until Disraeli registered with the state.

After Disraeli consented to the TSSB cease-and-desist order, "it was imperative that [he] find a way to get back in business" because, Disraeli asserted, he was not able to charge fees without registration. Disraeli therefore "filed a U-4 to become a registered principal with 1st Discount Brokers" on or about August 13, 2003. The TSSB opposed Disraeli's application to register with it as a registered representative of 1st Discount Brokerage, Inc. 57/

On October 8, 2003, after incorporating Lifeplan in September 2003, Disraeli filed a Form ADV registering Lifeplan with the Commission as an investment adviser. Disraeli had about twenty clients and $3.5 to $4 million in assets under management at this time. In Lifeplan's Form ADV, however, Disraeli claimed that Lifeplan satisfied Advisers Act Rule 203A-2(d), which allows a newly-formed investment adviser to register if it reasonably expects to qualify for Commission registration within 120 days. Disraeli represented that Lifeplan was a

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55/ 15 U.S.C. § 80b-3a.

56/ Disraeli states that he failed to renew his TSSB registration because he was "in the middle of a family crisis" and acknowledges that this failure "was a highly irresponsible act."

57/ Disraeli reapplied in September 2005 but the TSSB again opposed his application. Nonetheless, Disraeli's Central Registration Depository report indicates that he was registered with NASD as a registered representative of 1st Discount Brokerage, Inc. from August 2003 to April 2004 and from September 2005 to June 2006.

"newly formed adviser" and had a "reasonable expectation" that it would "be eligible to register with the SEC within 120 days after the date [its] registration with the SEC [became] effective."

As Disraeli had registered Lifeplan with the Commission identifying himself as Lifeplan's advisory representative (as opposed to the adviser), Texas law required Disraeli to register with the TSSB because Lifeplan had advisory clients in Texas. Around October 21, 2003, Disraeli submitted his advisory representative application to the TSSB. The TSSB notified Disraeli around November 12, 2003, that it opposed this application.

However, Texas law permits an individual that is registered with the Commission as an adviser to operate in Texas without registering with the state as an advisory representative. Accordingly, on November 13, 2003, Disraeli filed an amendment to the Form ADV that changed the name of the registered investment adviser to David Henry Disraeli DBA Lifeplan Associates and changed the organizational structure of the investment adviser from a corporation to a sole proprietorship. Disraeli again claimed the Rule 203A-2(d) exemption for a newly-formed adviser. According to Disraeli, the "effective consequence was to allow [him] to operate in the State of Texas without hindrance from the [TSSB]."

Disraeli acknowledged that, in order to be remain registered with the Commission and therefore remain exempt from Texas registration requirements, he had to notify the Commission that he either had $25 million under management or satisfied one of the exemptions for registration by the conclusion of the 120-day period for satisfying Rule 203A-2(d), or February 5, 2004. However, Disraeli did not have $25 million under management by that date.

Accordingly, on February 13, 2004, Disraeli filed an amendment to the Form ADV stating that David Henry Disraeli DBA Lifeplan Associates was "a multi-state adviser" within the meaning of Advisers Act Rule 203A-2(e). Rule 203A-2(e) permits an adviser to register with the Commission if the adviser is required by the laws of thirty or more states to register as an adviser in those states. According to Disraeli, he satisfied this rule because he planned to "us[e] the Internet as an advertising medium" to solicit new clients. Although Disraeli admitted that state securities authorities told him that an adviser did not generally have to register with the state until the adviser had six clients in the state, 58/ Disraeli asserted that it was the "most cautious approach" "to assume . . . if you're soliciting, talking to residents of a state, you should be registered in that state." Disraeli concluded that, because he was "actively soliciting their residents," he "would be required to register in" at least thirty states.

58/ Advisers Act Section 222(d) prohibits a state from requiring the registration of an investment adviser if the adviser does not have a place of business in the state and has had fewer than six clients who are residents of the state during the preceding twelve-month period. 15 U.S.C. § 80b-18a; see also infra notes 67-69 and accompanying text.

Disraeli filed additional amendments to the Form ADV claiming the multi-state adviser exemption on July 1, 2004, March 31, 2005, and November 9, 2005. 59/ At the time of all these filings, Disraeli's only office and all but one client were located in Texas.

Registration Violations

Section 203A of the Advisers Act prohibits an investment adviser from registering with the Commission unless it has more than $25 million of assets under management or otherwise qualifies for registration. 60/ However, Rule 203A-2(d) exempts an adviser from this prohibition if, at the time of registration, the adviser is not registered or required to be registered with the Commission or any state but has a reasonable expectation that it would be eligible for Commission registration within 120 days after the date its registration becomes effective. 61/ The Commission has stated that this rule "is designed to ensure that the exemption is available only to start-up advisers." 62/ Although various circumstances could support a reasonable expectation of Commission eligibility, the Commission anticipated that the rule "would be used primarily by persons who start their own advisory firms after having been employed by or affiliated with other advisers, and that have received an indication from clients with substantial assets that they will transfer those assets to the management of the newly formed adviser." 63/

59/ Advisers Act Rule 204-1(a) requires an adviser to amend its Form ADV at least annually within ninety days of the end of the adviser's fiscal year. 17 C.F.R. § 275.204-1(a). The July 1, 2004 and March 31, 2005 amendments were annual amendments; the record does not indicate the purpose of the November 9, 2005 amendment.

60/ 15 U.S.C. § 80b-3a(a); Investment Advisers Act Rel. No. 1733 (July 17, 1998), 67 SEC Docket 1850, 1850.

61/ 17 C.F.R. § 275.203A-2(d); Advisers Act Rel. No. 2333 (Dec. 2, 2004), 84 SEC Docket 1087, 1096 n.107. Advisers Act Section 203A(c) authorizes the Commission to exempt advisers from the prohibition on Commission registration if the prohibition would be "unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes" of Section 203A. 15 U.S.C. § 80b-3a(c); Advisers Act Rel. No. 1633 (May 15, 1997), 64 SEC Docket 1525, 1530. The Commission has adopted exemptions under Rule 203A-2 from the prohibition on Commission registration. 17 C.F.R. § 275.203A-2; Advisers Act Rel. No. 2504 (Mar. 30, 2006), 87 SEC Docket 2276, 2276 n.1.

62/ 64 SEC Docket at 1531 n.69.

63/ Id. at 1531 n.68; Advisers Act Rel. No. 2028 (Apr. 12, 2002), 77 SEC Docket 1343, 1344 n.15 ("This rule was designed for use principally by new advisory firms that have been 'spun-off' from existing portfolio management firms and therefore can reasonably expect to have at least $25 million in assets under management within 120 days.").

David Henry Disraeli DBA Lifeplan Associates, Disraeli's sole proprietorship, did not qualify as a newly-formed adviser because it was the successor to his previous sole proprietorship, Disraeli & Associates. We take official notice of Lifeplan's website which states that "Lifeplan Associates is the successor entity for Disraeli and Associates." 64/ Disraeli also stated in his investigative testimony that, "for the most part," David Henry Disraeli DBA Lifeplan Associates continued to serve as the investment adviser for the same people for whom Disraeli had been an investment adviser in 2000 before his registration lapsed. Disraeli stated at the hearing that he registered with the Commission as an investment adviser because, after the TSSB imposed the cease-and-desist order on him, "it was imperative that [he] find a way to get back in business." We reject Disraeli's contention that he "could not have continued the business of another adviser as none existed" because he was not "receiving any management fees from November of 2002 until November of 2003." The fact that Disraeli did not collect management fees for one year did not render David Henry Disraeli DBA Lifeplan Associates a newly-formed adviser. We agree with the law judge that "[t]he evidence compels the conclusion that Disraeli created Lifeplan and registered it with the Commission so that he could continue to do business as an investment adviser without approval from the TSSB."

Disraeli, moreover, lacked a reasonable expectation that he would qualify for Commission registration within 120 days. He acknowledged that, absent an exemption, an investment adviser needed $25 million under management in order to qualify for registration with the Commission and that the maximum amount of assets under his management at any point in his career was $11 million. In his investigative testimony, Disraeli stated that, at the time he filed his Form ADV, he had had no discussions with potential clients that would increase his assets under management to $25 million. Disraeli acknowledged further that he "abandoned the hope of having 25 million probably within a month or two after the initial ADV filing."

Disraeli, however, claims that he qualified as a "multi-state" adviser. Rule 203A-2(e), which exempts investment advisers from the prohibition on Commission registration if the adviser is obligated to register in thirty or more states, 65/ permits a newly formed investment adviser to register with the Commission if it reasonably expects that it would satisfy this

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64/ See 17 C.F.R. § 201.323 (stating that the Commission may take official notice "of any material fact which might be judicially noticed by a district court of the United States") and Fed. R. Evid. 201(b) (stating that a "judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); O'Toole v. Northrop Grumman Corp., 499 F.3d 1218, 1225 (10th Cir. 2007)(stating that "[i]t is not uncommon for courts to take judicial notice of factual information found on the world wide web" and finding that the district court abused its discretion by not taking judicial notice of earnings data posted on Northrop Grumman's own website because "the information should not be subject to dispute by Northrop Grumman because Northrop Grumman created it").

65/ 17 C.F.R. § 275.203A-2(e).

requirement within 120 days after the date its registration became effective. 66/ Advisers Act Section 222(d) provides that a state may not require an adviser to register with its state securities authority unless the adviser has a place of business in the state and has had, during the preceding twelve-month period, at least six clients who are residents of that state. 67/ We have stated that, "[i]n determining the number of states in which an adviser is required to register, the investment advisor would be required to exclude those states in which it is not obligated to register because of . . . section 222(d) of the Advisers Act (15 U.S.C. 80b-18a)." 68/

When Disraeli filed his Form ADV and subsequent amendments to that form, Disraeli's sole office and all but one client were in Texas. Thus, pursuant to Advisers Act Section 222(d), no state other than Texas could require Disraeli's registration during the relevant period. 69/ Disraeli concedes that state securities authorities advised him that he was not required to register until he had at least six clients in the state. Disraeli therefore lacked a reasonable expectation that he would satisfy the multi-state exemption when he filed his original Form ADV under Rule 203A-2(d), and did not satisfy the exemption when he filed the subsequent amendments to the form claiming the exemption under Rule 203A-2(e)..

Disraeli notes that Rule 203A-2(f) exempts advisers from the prohibition on Commission registration if the adviser provides investment advice to its clients exclusively through an interactive website. 70/ As he observes, the Commission recognized that "[b]ecause an Internet

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66/ 67 SEC Docket at 1851-52.

67/ 15 U.S.C. § 80b-18a; Advisers Act Rel. No. 2333 (Dec. 2, 2004), 84 SEC Docket 1087, 1110 n.268.

68/ 67 SEC Docket at 1852 n.17.

69/ Disraeli criticizes the law judge's decision for failing to provide "any discussion about the rules of any single individual state" and argues that "[t]he fact that NSMIA created a national de minimis standard is not dispositive on whether any state can find a way to require registration by a legislative work-around." However, Advisers Act Section 222(d) provides specifically that state investment adviser statutes are "inapplicable to advisers that do not have a place of business in the state and have fewer than six clients who are residents of that state." Advisers Act Rel. No. 1794 (Mar. 25, 1999), 69 SEC Docket 1185, 1186 n.9.

70/ 17 C.F.R. § 275.203A-2(f); Advisers Act Rel. 2091 (Dec. 12, 2002), 79 SEC Docket 434, 435. An "interactive website" is a "website in which computer software-based models or applications provide investment advice to clients based on personal information each client supplies through the website." 17 C.F.R. § 275.203A-2(f)(2); see also 79 SEC Docket at 435.

(continued...)

Investment Adviser uses an interactive website to provide investment advice, the adviser's clients can come from any state, at any time, without the adviser's prior knowledge. . . . Consequently, these advisers would be required, absent an exemption, to register in every state." 71/

Although Disraeli admits that he did not satisfy Rule 203A-2(f) because he did not employ an interactive website, he contends that he, like Internet investment advisers, could obtain clients from any state, at any time, because he "us[es] the Internet as an advertising medium" to solicit clients. Disraeli argues that, as a result, he is entitled to the multi-state adviser exemption because he would not "know if and when [he would] reach the sixth client, which would require state registration."

This claim is not persuasive. The multi-state exemption is not available "until the adviser obtain[s] the requisite number of clients in thirty states to trigger its registration obligations in those states." 72/ State securities authorities informed Disraeli that he did not have to register in a state until he obtained six clients in that state, and Disraeli was never near having six clients in each of thirty states. Individuals responding to Disraeli's Internet solicitations could not become his clients without his knowledge. In adopting the Internet investment adviser exemption, we stated that it is "not available to advisers that merely use websites as marketing tools," and that "expansion of the rule to include such activities . . . could undermine NSMIA's allocation of regulatory responsibility over smaller advisers to state securities authorities." 73/ It would be similarly inappropriate to expand the application of the multi-state adviser exemption based on the solicitation of clients in several states through the Internet.

Accordingly, we find that Disraeli willfully violated Advisers Act Section 203A. Advisers Act Section 207 prohibits "willfully making false statements of material fact, or material omissions, in applications or reports to the Commission, such as a Form ADV." 74/

70/ (...continued)
Rule 203A-2(f) includes an exception that would permit an adviser relying on the rule to advise clients through means other than its interactive website, so long as the adviser had fewer than fifteen of these non-Internet clients during the preceding twelve months. 17 C.F.R. § 275.203A-2(f); 79 SEC Docket at 435. Disraeli conceded that he had too many "real clients" to satisfy this exception.

71/ 79 SEC Docket at 435 (emphasis in original).

72/ Id. at 435 n.13.

73/ Id. at 435.

74/ Vernazza, 327 F.3d at 858 (citing 15 U.S.C. § 80b-7).

Scienter need not be found to support a Section 207 violation. 75/ As discussed, Disraeli made material misstatements in his Forms ADV by misrepresenting that he satisfied the requirements for Commission registration and thus also willfully violated Advisers Act Section 207. 76/

V.

Disraeli's Books and Records

Commission staff conducted an examination of Disraeli from January 10-14, 2005. The staff called Disraeli one week before the examination and provided him with a list of documents that Disraeli should have available for inspection. This list included those books and records that Advisers Act Section 204 and the rules thereunder require an investment adviser to keep. 77/ Advisers Act Rules 204-2(a)(1), (2), and (6) require, respectively, that investment advisers make and keep true, accurate, and current (1) journals, including cash receipts and disbursements, records, and any other records of original entry forming the basis of entries in any ledger; (2) general and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital income and expense accounts; and (3) trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser. 78/

Disraeli did not produce all the requested records during the staff's examination. He was unable to produce the financial records required to be kept by Advisers Act Rule 204-2(a)(1) for 2004. Although he did provide financial records required to be kept by that rule for the 2003 fiscal year, the evidence indicates that those records were not true and accurate and were not kept up to date. Testimony at the hearing confirmed that Disraeli was "missing a lot of entries that he supposedly made with personal money," that entries "consisted of bills paid out of the corporate account that were personal bills," and that Disraeli had an entry for goodwill but "it was impossible to have an entry of goodwill" because Disraeli had not bought a company. Also, Disraeli apparently only updated his books once a year. The records that Disraeli provided that were required to be kept by Advisers Act Rule 204-2(a)(2) contained "many erroneous postings." Disraeli provided the staff records required to be kept under Advisers Act Rule 204-2(a)(6) for 2003 but was unable to produce any financial records or trial balances for 2004.

75/ Id. at 860.

76/ The law judge did not "give[] any weight to the Division's claim that Disraeli violated Section 207 by failing to report the [TSSB's] Cease-and-Desist Order in his Forms ADV." Although the Division notes this failure in its brief, it did not appeal the law judge's finding. Thus, that issue is not before us. George J. Kolar, 55 S.E.C. 1009, 1011 (2002).

77/ 15 U.S.C. § 80b-4.

78/ 17 C.F.R. § 275.204-2(a)(1), (2), (6).

Moreover, the books and records that Disraeli produced were not accurate. Disraeli did not have adequate back-up documentation for the figures in the firm's books and records. Disraeli intermingled his business and personal accounts, paid personal bills out of the business account and business bills out of the personal account, and failed to make journal entries to reflect those transactions.

Books and Records Violations

Section 204 of the Advisers Act requires that investment advisers make and keep records and furnish copies of such records as prescribed by the Commission. 79/ The undisputed record evidence establishes that for 2003 and 2004 Disraeli failed to make, keep, and furnish all the records required by Advisers Act Rules 204-2(a)(1), (2), and (6), promulgated pursuant to Section 204.

Disraeli contends on appeal that he "provided 2004 records after his exam which became Stipulated Exhibit 28." This exhibit is an undated one-page document entitled Lifeplan "Profit and Loss 1/1/04 to 12/31/04." Although this document might be considered part of the financial statements required to be kept pursuant to Rule 204-2(a)(6), Disraeli did not provide it to the staff at the time of the exam. Nor does it satisfy the requirements that Disraeli also keep journals and ledgers. Assuming, moreover, that the profit and loss statement was complete and accurate, financial statements generally include, among other things, a balance sheet. We therefore reject the contention that the one-page profit and loss statement alone fulfilled the requirements of Advisers Act Section 204 for the year 2004.

"The requirement that records be kept embodies the requirement that those records be true and accurate." 80/ Disraeli does not dispute the record evidence demonstrating the deficiencies in the books and records described above. Respondents' counsel admitted at the hearing that "there were some books-and-records sloppiness," Respondents admitted in their post-hearing brief that "some of the required information was not 'readily-accessible,'" and Respondents admitted in their brief before the Commission that Disraeli "did not keep all the books and records that were required." Accordingly, we find that Disraeli willfully violated Advisers Act Section 204 and Advisers Act Rules 204-2(a)(1), 204-2(a)(2), and 204-2(a)(6). 81/

79/ 15 U.S.C. § 80b-4; SEC v. Slocum, Gordon & Co., 334 F. Supp. 2d 144, 179 (D.R.I. 2004) ("Section 204 requires a registered investment adviser to 'make and keep' such records 'as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.'").

80/ Anthony A. Adonnino, 56 S.E.C. 1273, 1288 (2003), aff'd, 111 Fed. Appx. 46 (2d Cir. 2004).

81/ See The Barr Fin. Group. Inc., 56 S.E.C. 1243, 1258 (2003) (stating that "the finding that respondents violated Advisers Act Section 204 is, as is made clear by our factual

(continued...)

VI.

Revocation of Registration and Bar from Association

Advisers Act Section 203 provides that the Commission may revoke the registration of registered advisers or bar association with advisers as penalties for making false material statements. 82/ Exchange Act Section 15(b)(6)(A) provides that the Commission may bar a person associated or seeking association with a broker or dealer from association with a broker or dealer if the person willfully violated the federal securities laws and such sanction is in the public interest. 83/ As noted, during the time of his misconduct, Disraeli was associated or seeking association as a registered representative of 1st Discount Brokerage, Inc.

We consider "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 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." 84/ "[T]he Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive." 85/

We find that it is in the public interest to bar Disraeli from association with an investment adviser, a broker, and a dealer. Disraeli acted egregiously and with a high degree of scienter. As noted above, Disraeli prepared and distributed offering memoranda to his advisory clients stating that the proceeds of the offering would be used for business purposes. Instead, Disraeli lent himself the proceeds from the offering and diverted proceeds for his own personal use without disclosing this information to his investors. Disraeli, moreover, committed repeated violations. He made material misrepresentations and omissions regarding the use of the proceeds of the offering in the October Memorandum and, after realizing that the October Memorandum was inadequate, continued to make these misrepresentations and omissions in the December Memorandum. He also filed several forms that misrepresented that he qualified for Commission

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81/ (...continued)
findings, supported independently by the consistent accounts of the several Commission employees who testified at the hearing and who were credited by the law judge").

82/ 15 U.S.C. § 80b-3(e), (f); Vernazza, 327 F.3d at 862.

83/ 15 U.S.C. § 78*o*(b)(6)(A), (4)(D); Irfan Mohammed Amanat, Securities Exchange Act Rel. No. 54708 (Nov. 3, 2006), 89 SEC Docket 714, 733, appeal pending, No. __ (3d Cir.).

84/ Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

85/ Conrad P. Seghers, Advisers Act Rel. No. 2656 (Sept. 26, 2007), __ SEC Docket __, __.

registration. Throughout this period, Disraeli failed to maintain books and records in compliance with Commission rules. Disraeli's misappropriation of the offering proceeds obtained from his clients, his repeated attempts to register with the Commission despite his failure to qualify, and his failure to maintain accurate books and records suggest that he poses a threat to the investing public if allowed to remain in the securities industry. 86/

The TSSB's cease-and-desist order further demonstrates the necessity of a severe sanction to prevent Disraeli from committing future violations. The TSSB order was specifically directed at the failure to properly register as an adviser and the use of fraud in the offer of securities. Disraeli committed the antifraud and registration violations while subject to that order. Disraeli's misconduct in the face of the cease-and-desist order demonstrates the likelihood of future violations and the necessity of imposing a bar.

The law judge noted that "Disraeli gave no persuasive assurances against future violations or any indication that he recognizes that he committed serious violations." Disraeli admits that the law judge "is correct in that Disraeli showed no signs of remorse." According to Disraeli, his "defense is that there were no fraud violations, therefore remorse would be inconsistent with this defense." We have found, however, that Disraeli committed serious violations of the antifraud, registration, and books and records provisions of the securities laws. Accordingly, Disraeli demonstrates either a misunderstanding or a lack of recognition of his obligation to provide full and fair disclosure of all material facts and his affirmative duties as an investment adviser. 87/

These specific factors provide compelling reasons for a bar. 88/ We reject Disraeli's contention that "a bar from association with a registered entity is far too harsh and provides no protection for future investors in Respondents' business projects." A bar provides necessary protection for future investors. "Absent a bar, there would be no obstacle to [Disraeli's] associating with another investment adviser or broker-dealer that would neither restrict his conduct nor his access to funds." 89/

Disraeli also asserts that "Lifeplan shareholders have not been harmed, they will only be harmed if the sanctions that the [law judge] ordered are affirmed." Disraeli's clients, however, remain free to find another investment adviser. The Commission has an obligation to protect the

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86/ Lowry, 340 F.3d at 505-06 (affirming bar where investment adviser used his clients' funds for personal expenses).

87/ Seghers, __ SEC Docket at __.

88/ See Steadman, 603 F.2d at 1140.

89/ Bradley T. Smith, Exchange Act Rel. No. 55771 (May 16, 2007), 90 SEC Docket 1989, 1998-99.

investing public. 90/ Lifeplan investors, moreover, suffered harm. Marek testified that he did not receive his $10,000 investment back, and Disraeli acknowledged that no investors received checks from him returning their investment. Although Disraeli also asserts, without verifying documentation, that he "paid back a portion of the loan early," no evidence suggests that he repaid the entire loan, plus interest, as required by the terms of the undated promissory note. In any event, Disraeli's repayment of funds after the fact would not excuse his misconduct. 91/

Conduct that violates the antifraud provisions "is especially serious and subject to the severest of sanctions." 92/ As described above, we agree with the law judge that there is a "high probability that, if allowed to remain in the securities industry, Disraeli will commit future violations." Thus, we find it in the public interest to bar Disraeli from association with a broker, dealer, and investment adviser and to revoke Disraeli's investment adviser registration. 93/

Cease-and-Desist Order

"Securities Act Section 8A, Exchange Act Section 21C, and Advisers Act Section 203(k) each authorize the Commission to impose a cease-and-desist order if it finds that any person has

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90/ See Lowry, 55 S.E.C. at 1145. Disraeli notes that several clients "signed affidavits swearing that they are aware of the [Division of Enforcement's] issues and refuse to rescind their investment." Although we have considered this evidence, we believe that the conduct established in the record demonstrates the need to protect the public by barring Disraeli. Id. at 1145 n.26 (noting that "several former or current [investment advisory] clients expressed their satisfaction with Lowry's investment advisory services and criticized the Division's action against him" but finding that "the conduct established in the record demonstrates the need to protect the public by barring Lowry").

91/ Id. at 1142 (rejecting respondent's contention that his conduct "was not egregious because none of his advisory clients lost money as a result of his actions" because his "repayment of funds after the fact would not have excused his initial misrepresentations").

92/ Marshall E. Melton, 56 S.E.C. 695, 713 (2003).

93/ Respondents argue that they "can not find any Commission actions which resulted in sanctions as harsh as the instant case outside of parallel civil or criminal actions." We have, however, previously sanctioned violations of the antifraud provisions by revoking the registration of the investment adviser and imposing a bar from association with any investment adviser, broker, and dealer. See, e.g., John J. Kenny, 56 S.E.C. 448 (2003), aff'd, 87 Fed. Appx. 608 (8th Cir. 2004). In any case, "[t]he employment of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." Rooms v. SEC, 444 F.3d 1208, 1215 (10th Cir. 2006) (alteration in original) (citing Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973)).

violated or caused violations of the federal securities laws or rules thereunder." 94/ We impose cease-and-desist orders only where there is some risk of future violations. 95/ We also consider, in addition to the factors mentioned above, the remedial function to be served by a cease-and-desist order in the context of other sanctions sought in the proceeding. 96/

We believe, as stated above, that there is a high probability of future violations here. "In view of Respondents' failure to appreciate their obligation to deal honestly with public investors and to understand important regulatory requirements, there is a risk that they will transgress in the future." 97/ The cease-and-desist order is the only sanction sought against Lifeplan and is therefore necessary to protect the public. As for Disraeli, although we have ordered that his investment adviser registration be revoked and that he be barred from association with a broker, dealer, and investment adviser, the issuance of a cease-and-desist order should serve the remedial purpose of encouraging him to take his responsibilities more seriously in the future should he ever be allowed to reenter the industry. 98/ Disraeli himself notes, moreover, that "[o]ne need not be an investment adviser to misappropriate corporate funds." The antifraud provisions of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5 "apply to securities transactions by 'any person.'" 99/ A cease-and-desist order is therefore necessary to protect the public against future violations that Disraeli could commit without being an investment adviser or associated person of a broker-dealer. Accordingly, we find it is in the public interest to order that Disraeli and Lifeplan cease and desist from committing or causing any violations or future violations of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5, and that Disraeli cease and desist from committing or causing any

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94/ Kenny, 56 S.E.C. at 490.

95/ KPMG Peat Marwick, LLP, 54 S.E.C. 1135, 1185 (2001), reconsideration denied, 55 S.E.C. 1 (2001), petition denied, 289 F.3d 109 (D.C. Cir. 2002).

96/ Ira Weiss, Securities Act Rel. No. 8641 (Dec. 2, 2005), 86 SEC Docket 2588, 2611-12, petition denied, 468 F.3d 849 (D.C. Cir. 2006).

97/ Fundamental Portfolio Advisors, Inc., 56 S.E.C. 651, 693-94 (2003), petition denied, 167 Fed. Appx. 836 (2d Cir. 2006).

98/ See Rizek v. SEC, 215 F.3d 157, 161 (1st Cir. 2000) ("We also note that the term 'permanent bar' is more than a bit of a misnomer. It does not literally mean that the sanctioned person may never reenter the securities industry."); cf. Vladlen Larry Vindman, Securities Act Rel. No. 8679 (Apr. 14, 2006), 87 SEC Docket 2626, 2648 (stating that, "[a]lthough we have ordered a penny stock bar and the payment of a civil penalty, the issuance of a cease-and-desist order should serve the remedial purpose of encouraging Vindman to take his responsibilities more seriously in the future").

99/ Cady, Roberts & Co., 40 S.E.C. 907, 911 (1961).

violations or future violations of Advisers Act Sections 203A, 204, 206(1), 206(2), 206(4), and 207, and Rules 204-2(a)(1), 204-2(a)(2), 204-2(a)(6), and 206(4)-(4)(a)(1) thereunder.

Disgorgement

Securities Act Section 8A, Exchange Act Section 21C, and Advisers Act Section 203(k) authorize the Commission to require disgorgement, including reasonable interest, in a cease-and-desist proceeding. 100/ "Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." 101/ "[T]he amount of disgorgement should include 'all gains flowing from the illegal activities.'" 102/ "[D]isgorgement need only be a reasonable approximation of profits causally connected to the violation." 103/ "Once the [Division] shows that the disgorgement is a reasonable approximation, the burden shifts to the defendant to demonstrate that the amount of disgorgement is not a reasonable approximation." 104/ "The risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." 105/

The Division requests that we order Disraeli to disgorge $84,300, or "all ill-gotten offering proceeds that he applied to personal expenses, plus prejudgment interest." This figure reasonably approximates Disraeli's unjust enrichment. Disraeli acknowledges that he borrowed $84,300 of the offering proceeds, and the record documents personal expenses paid with Lifeplan funds. As the law judge noted, Disraeli does not "offer a specific alternative to the Division's disgorgement amount." Disraeli claimed in July 2005, and at the hearing in August 2006, that he had repaid approximately $20,000. In his financial statements submitted to the Commission in connection with this appeal, he claims that he has repaid approximately $32,000. Disraeli, however, does not provide documentation verifying these assertions, and, as noted, he carries the burden of doing so. We thus order Disraeli to disgorge $84,300, plus prejudgment interest. 106/

100/ 15 U.S.C. §§ 77h-1(e); 78u-3(e); 80b-3(k)(5).

101/ SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989).

102/ SEC v. JT Wallenbrock & Assocs., 440 F.3d 1109, 1114 (9th Cir. 2006).

103/ SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995) (citing First City Fin., 890 F.2d at 1231).

104/ SEC v. Happ, 392 F.3d 12, 31 (1st Cir. 2004) (citing First City Fin., 890 F.2d at 1232).

105/ Id. (citing First City, 890 F. 2d at 1232; Patel, 61 F.3d at 140).

106/ Repayments that Disraeli proves he made could offset his disgorgement. See SEC v. Palmisano, 135 F.3d 860, 863-64 (2d Cir. 1998) (modifying judgment "to provide that to the extent that Palmisano pays or has paid restitution as ordered in the criminal judgment, such payments will offset his disgorgement obligation under the present judgment").

Disraeli contends that "[d]isgorgement is clearly inappropriate where the alleged victims are opposed to receiving disgorged funds." However, "[t]he primary purpose of disgorgement is not to refund others for losses suffered but rather 'to deprive the wrongdoer of his ill-gotten gain.'" 107/ Disgorgement ensures "that wrongdoers will not profit from their wrongdoing." 108/

Civil Money Penalty

Exchange Act Section 21B and Advisers Act Section 203(i) authorize the Commission to impose a first-tier civil money penalty if a respondent has willfully violated any provision of the Securities Act, the Exchange Act, the Advisers Act, or the rules and regulations thereunder, and such penalty is in the public interest. 109/ We may impose a second-tier penalty if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 110/ A third-tier penalty is authorized if the violation also "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed" the violation. 111/

In considering whether a penalty is in the public interest, we consider whether the act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; the harm to other persons resulting either directly or indirectly from such act or omission; the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior; whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the federal securities laws, state securities laws, or the rules of a self-regulatory organization, or has been enjoined from or convicted of committing such violations by a court; the need to deter such persons and other persons from committing such acts or omissions; and such other matters as justice may require. 112/

107/ SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994) (citation omitted); see also SEC v. Fischbach Corp., 133 F.3d 170, 175-76 (2d Cir. 1997) (approving disgorgement "regardless of whether the disgorged funds will be paid to . . . investors as restitution").

108/ SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987); see also SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978) (Friendly, J.) (stating that the "primary purpose of disgorgement is not to compensate investors" but "is a method of forcing a defendant to give up the amount by which he was unjustly enriched").

109/ 15 U.S.C. §§ 78u-2, 80b-3(i).

110/ Id. §§ 78u-2(b)(2), 80b-3(i)(2)(B).

111/ Id. §§ 78u-2(b)(3), 80b-3(i)(2)(C).

112/ Id. §§ 78u-2(c), 80b-3(i)(3).

We believe that Disraeli's misconduct warrants a third-tier civil money penalty of $85,000, approximately the amount of Disraeli's unjust enrichment. 113/ Disraeli's misconduct involved fraud, deceit, and a deliberate or reckless disregard of numerous regulatory requirements because he knowingly used the proceeds of the Lifeplan offering for his own personal use after representing that he would use the proceeds for Lifeplan business expenses. The failure to use the proceeds for the business purposes described in the offering memoranda created a significant risk of substantial losses for investors who had invested their money in Lifeplan. Disraeli's personal use of the proceeds of the Lifeplan offering also resulted in substantial pecuniary gain to himself because he used the funds to pay for the release of a personal tax lien against him and other personal expenses. Disraeli obtained approximately $85,000 of Lifeplan's funds through his fraudulent conduct. He committed the misconduct here, which involved violations of federal antifraud and registration provisions, after he had been ordered by the TSSB to cease and desist from rendering services as an investment adviser without registration and from offering securities in a manner that the TSSB found fraudulent. We therefore impose one third-tier penalty of $85,000. 114/

Inability to Pay

On appeal to the Commission, Disraeli contends that "Respondents cannot repay the disgorgement and penalty amounts." Disraeli submits a sworn financial statement pursuant to Commission Rule of Practice 630(b). Rule 630(b) provides that a "respondent who asserts an inability to pay disgorgement, interest or penalties may be required to file a sworn financial disclosure statement and to keep the statement current." 115/ Disraeli's sworn financial statement consists of a balance sheet listing his assets, liabilities, and net worth as of May 25, 2007, and a list of all income and expenses from October 1, 2003 through May 17, 2007. 116/

113/ 17 C.F.R. § 201.1002.

114/ Although Disraeli does not address the civil money penalty in his brief to the Commission, he contended in his post-hearing brief that civil money penalties "are warranted when flagrant misconduct has occurred" and that "his conduct was neither flagrant nor of such a degree to warrant such a severe penalty." To the contrary, as required by the statutory criteria, Disraeli's misconduct involved a deliberate or reckless disregard of numerous regulatory requirements and substantial pecuniary gain to himself.

115/ 17 C.F.R. § 201.630(b).

116/ Rule of Practice 410(c) provides that any person who files a petition for review of an initial decision that asserts an inability to pay disgorgement, interest, or a penalty shall file with the opening brief a sworn financial disclosure statement containing the information specified in Rule 630(b). 17 C.F.R. § 201.410(c).

Disraeli's balance sheet indicates that his net worth is slightly less than the combined disgorgement and civil penalty amount. 117/

Disraeli has waived his right to assert the defense of an inability to pay because he did not raise the issue before the law judge below. Rule 630(b) contemplates that the respondent will have raised the issue of an inability to pay before the law judge. 118/ We have held previously that "an argument regarding a respondent's inability to pay may be waived if not raised before the law judge." 119/ We have also stated that where "a respondent raises the issue of inability to pay but fails to adduce at the earliest available opportunity material evidence of his then-current financial position, Rule of Practice 452 would appear to govern the terms under which additional evidence on the same issue may be considered by the Commission." 120/ Rule 452 requires that the additional evidence "is material and that there were reasonable grounds for failure to adduce such evidence previously." 121/ Disraeli does not suggest any reasonable grounds for his failure to adduce financial information before the law judge. 122/

In any event, Disraeli provides no supporting documentation, such as tax returns, to corroborate his asserted financial information, as required by 17 C.F.R. § 209.1. The valuation of Disraeli's assets and liabilities on his balance sheet cannot be verified. The balance sheet, moreover, contains only vague descriptions of his assets and liabilities, such as assets consisting of "personal effects" and liabilities consisting of "law firms." Disraeli's list of income and

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117/ We granted in part Disraeli's request for a protective order for these documents, but we stated that "disclosure of certain information included in the documents will be necessary to the resolution of the issues before us."

118/ Terry T. Steen, 53 S.E.C. 618, 627 (1998) (rejecting respondent's argument that under the language of Rule 630 he had "discretion whether to provide a financial statement before the law judge" because "[g]iven the respondent's burden of demonstrating inability to pay, financial information supporting that argument must be presented before the law judge").

119/ Dolphin and Bradbury, Inc., Securities Act Rel. No. 8721 (July 13, 2006), 88 SEC Docket 1298, 1322 (citing Brian A. Schmidt, 55 S.E.C. 576, 597 (2002)), appeal pending, No. 06-1319 (D.C. Cir.); Steen, 53 S.E.C. at 628 (stating that "we may consider that a respondent who fails to introduce material evidence of inability to pay before the law judge has waived this issue").

120/ Steen, 53 S.E.C. at 628.

121/ 17 C.F.R. § 201.452.

122/ Steen, 53 S.E.C. at 628 (finding that respondent "failed to make the showing required by Rule 452" because although the documents he submitted were "clearly material" he did "not suggest any reasonable grounds for the failure to adduce comparable financial information earlier").

expenses contains similarly vague descriptions of the amounts received and expended. For example, Disraeli describes an expense of $52,057 as "miscellaneous" and an expense of $19,928 as "payment." Disraeli also does not break down his income and expenses by year but includes one statement for a three-and-a-half year period. The vague and unsubstantiated nature of Disraeli's disclosures renders them neither adequate nor credible as a basis for reducing the disgorgement or penalty amounts. 123/

Moreover, "[e]ven when a respondent demonstrates an inability to pay, we have discretion not to waive the penalty, particularly when the misconduct is sufficiently egregious." 124/ Disraeli's misconduct is sufficiently egregious, as discussed above with respect to the imposition of the bar and revocation of registration, that it outweighs any financial information submitted by Disraeli at this late date. Ordering disgorgement and a civil penalty is necessary to deter others from misappropriating offering proceeds and from registering with the Commission without satisfying the standards for Commission registration. 125/

Fair Fund

The law judge ordered that "the amount of disgorgement and civil money penalties be used to create a fund for the benefit of Lifeplan investors who were harmed by the violations,"

123/ See Philip A. Lehman, Exchange Act Rel. No. 54660 (Oct. 27, 2006), 89 SEC Docket 536, 549 (finding respondent's evidence of inability to pay "neither adequate nor credible because his assertions variously are vague, unsubstantiated, inconsistent, or contradicted by reliable evidence").

124/ Lehman, 89 SEC Docket at 543.

125/ Cf. Schmidt, 55 S.E.C. at 600 (finding that, although respondent's "financial statements, on their face, indicate that he is impecunious, the egregiousness of his conduct outweighs any consideration of his ability to pay"); Charles Trento, Securities Act Rel. No. 8391 (Feb. 23, 2004), 82 SEC Docket 785, 793 ("Even accepting [respondent's] financial report at face value, we find that the egregiousness of his conduct far outweighs any consideration of his present ability to pay a penalty."); see also Lehman, 89 SEC Docket at 549 ("Further considerations affecting our decision not to reduce or waive the penalty include [respondent's] recidivism and our view that his misconduct is egregious.").

pursuant to Rule of Practice 1100. 126/ "Sarbanes-Oxley's Fair Fund provision provides the [Commission] with flexibility by permitting it to distribute civil penalties among defrauded investors by adding the civil penalties to the disgorgement fund." 127/ We direct that the civil money penalties and disgorgement amounts ordered in this matter be paid into such a fund.

An appropriate order will issue. 128/

By the Commission (Chairman COX and Commissioners ATKINS, NAZARETH, and CASEY).

Nancy M. Morris
Secretary

126/ 17 C.F.R. § 201.1100.

127/ Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC, 467 F.3d 73, 82 (2d Cir. 2006) (citing Section 308(a) of the Sarbanes-Oxley Act, 15 U.S.C. § 7246(a)).

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 8880 / December 21, 2007

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57027 / December 21, 2007

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2686 / December 21, 2007

Admin. Proc. File No. 3-12288

In the Matter of

DAVID HENRY DISRAELI
and
LIFEPLAN ASSOCIATES, INC.

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the investment adviser registration of David Henry Disraeli DBA Lifeplan Associates, Inc. be, and it hereby is, revoked; and it is further

ORDERED that David Henry Disraeli be, and he hereby is, barred from association with any broker, dealer, or investment adviser; and it is further

ORDERED that Disraeli disgorge $84,300, and prejudgment interest of $25,519 from October 9, 2003, as calculated in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Disraeli pay a civil money penalty of $85,000; and it is further

ORDERED that the disgorgement and civil money penalty be used to create a "Fair Fund" for the benefit of investors pursuant to Commission Rules of Practice 1100-1106; and it is further

ORDERED that the Division of Enforcement submit to the Commission a proposed plan for the administration and distribution of funds in the Fair Fund established in this order no later than sixty days after payment of the amounts due and any appeals of this Order have been waived or are no longer available; and it is further

ORDERED that Disraeli cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 203A, 204, 206(1), 206(2), 206(4), and 207 of the Investment Advisers Act of 1940 and Rules 204-2(a)(1), 204-2(a)(2), 204-2(a)(6), and 206(4)-4(a)(1) thereunder; and it is further

ORDERED that Lifeplan Associates, Inc. cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Payment of the amount to be disgorged and the civil money penalty shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312; and (iv) submitted under cover letter that identifies respondents and the file number of this proceeding.

A copy of the cover letter and check shall be sent to Marshall Gandy, counsel for the Division of Enforcement, Securities and Exchange Commission, Fort Worth Regional Office, Burnett Plaza, Suite 1900, 801 Cherry Street, Unit #18, Forth Worth, TX 76102-6882.

By the Commission.

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57039 / December 21, 2007

ORDER REGARDING ALTERNATIVE NET CAPITAL COMPUTATION FOR JPMORGAN SECURITIES INC.

JPMorgan Securities Inc. ("JPMSI"), a broker-dealer registered with the Securities and Exchange Commission ("Commission"), has submitted an application to the Commission for authorization to use the alternative method of computing net capital contained in Appendix E to Rule 15c3-1 (17 CFR 240.15c3-1e) to the Securities Exchange Act of 1934 ("Exchange Act").

Based on a review of the application that JPMSI submitted, the Commission has determined that the application meets the requirements of Appendix E. The Commission also has determined that JPMorgan Chase & Co., JPMSI's ultimate holding company, is in compliance with the terms of its undertakings, as provided to the Commission under Appendix E. The Commission, therefore, finds that approval of the application is appropriate in the public interest or for the protection of investors.

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Accordingly,

IT IS ORDERED, under paragraph (a)(7) of Rule 15c3-1 (17 CFR 240.15c3-1) to the Exchange Act, that JPMSI may calculate net capital using the market risk standards of Appendix E to compute a deduction for market risk on some or all of its positions, instead of the provisions of paragraphs (c)(2)(vi) and (c)(2)(vii) of Rule 15c3-1, and using the credit risk standards of Appendix E to compute a deduction for credit risk on certain credit exposures arising from transactions in derivatives instruments, instead of the provision of paragraph (c)(2)(iv) of Rule 15c3-1.

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 230, 239 and 249

[RELEASE NOS. 33-8879; 34-57026; INTERNATIONAL SERIES RELEASE NO. 1306; File No. S7-13-07]

RIN 3235-AJ90

ACCEPTANCE FROM FOREIGN PRIVATE ISSUERS OF FINANCIAL STATEMENTS PREPARED IN ACCORDANCE WITH INTERNATIONAL FINANCIAL REPORTING STANDARDS WITHOUT RECONCILIATION TO U.S. GAAP

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting rules to accept from foreign private issuers in their filings with the Commission financial statements prepared in accordance with International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB") without reconciliation to generally accepted accounting principles ("GAAP") as used in the United States. To implement this, we are adopting amendments to Form 20-F, conforming changes to Regulation S-X, and conforming amendments to other regulations, forms and rules under the Securities Act and the Securities Exchange Act. Current requirements regarding the reconciliation to U.S. GAAP do not change for a foreign private issuer that files its financial statements with the Commission using a basis of accounting other than IFRS as issued by the IASB.

EFFECTIVE DATE: [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

COMPLIANCE DATE: Amendments regarding acceptance of financial statements prepared in accordance with IFRS as issued by the IASB are applicable to financial

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statements for financial years ending after November 15, 2007 and interim periods within those years contained in filings made after the effective date. Amendments to General Instruction G of Form 20-F relating to first-time adopters of IFRS are applicable to filings made after the effective date.

FOR FURTHER INFORMATION CONTACT: Michael D. Coco, Special Counsel, Office of International Corporate Finance, Division of Corporation Finance, at (202) 551-3450, or Katrina A. Kimpel, Professional Accounting Fellow, Office of the Chief Accountant, at (202) 551-5300, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: The Commission is amending Form 20-F[1] under the Securities Exchange Act of 1934 (the "Exchange Act"),[2] Rules 1-02, 3-10 and 4-01 of Regulation S-X,[3] Forms F-4 and S-4 under the Securities Act of 1933 (the "Securities Act"),[4] and Rule 701 under the Securities Act.[5]

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[1] 17 CFR 249.220f.

[2] 15 U.S.C. 78a et seq. Form 20-F is the combined registration statement and annual report form for foreign private issuers under the Exchange Act. It also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act of 1933. 15 U.S.C. 77a et seq.

The term "foreign private issuer" is defined in Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)]. A foreign private issuer means any foreign issuer other than a foreign government except an issuer that meets the following conditions: (1) more than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.

[3] 17 CFR 210.1-02, 17 CFR 210.3-10 and 17 CFR 210.4-01. Regulation S-X sets forth the form and content of requirements for financial statements.

[4] 17 CFR 239.34 and 17 CFR 239.13.

[5] 17 CFR 230.701.

b. Financial Statements in Securities Act Registration Statements and Prospectuses and Initial Exchange Act Registration Statements Used More Than Nine Months after the Financial Year End

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I. EXECUTIVE SUMMARY

A. Proposed Amendments

The Commission has long viewed reducing the disparity between the accounting and disclosure practices of the United States and other countries as an important objective both for the protection of investors and the efficiency of capital markets.[6] The use of a single set of high-quality globally accepted accounting standards by issuers will help investors understand investment opportunities outside the United States more clearly and with greater comparability than if those issuers disclosed their financial results under a multiplicity of national accounting standards, and it will enable issuers to access capital markets worldwide at a lower cost.

Towards this end, the Commission has undertaken several measures to foster the use of International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB") and fully supports the efforts of the IASB and the Financial Accounting Standards Board ("FASB") to converge their accounting standards.[7] Specifically, the Commission has adopted rules to encourage the use of IFRS, which has become increasingly widespread throughout the world. Approximately 100 countries now require or allow the use of IFRS, and many other countries are replacing their national standards with IFRS. Following the adoption of a regulation in the European Union ("EU") to require companies incorporated in one of its

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[6] See "Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards without Reconciliation to U.S. GAAP," Release No. 33-8818 (July 2, 2007) [72 FR 37962 (July 11, 2007)] (the "Proposing Release") for a summary of the Commission's past consideration of a single set of globally accepted accounting standards.

[7] See the Proposing Release for a summary of the IASB, the FASB and the process of convergence.

Member States and whose securities are listed on an EU regulated market to use IFRS beginning with their 2005 financial year,[8] we adopted an accommodation to allow any foreign private issuer preparing its financial statements using IFRS for the first time to provide two years rather than three years of financial statements in their filings with the Commission.[9] Acknowledging the significant efforts expended by many foreign private issuers in their transition to IFRS, we also extended compliance dates for management's report on internal control over financial reporting.[10]

Most recently, on July 11, 2007, the Commission issued for public comment a proposal to amend Form 20-F and Regulation S-X to accept financial statements of foreign private issuers that are prepared on the basis of the English language version of IFRS as published by the IASB without a reconciliation to U.S. GAAP.[11] We did not propose to change existing reconciliation requirements for foreign private issuers that file their financial statements under other sets of accounting standards, or that are not in full

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[8] Consistent with Form 20-F, IFRS and general usage outside the United States, we use the term "financial year" to refer to a fiscal year. See Instruction 2 to Item 3 of Form 20-F.

[9] Release No. 33-8567 (April 12, 2005) [70 FR 20674 (April 20, 2005)] (the "2005 Adopting Release"). Other than first-time adopters of IFRS eligible to rely on that accommodation, foreign private issuers that register securities with the SEC, and that report on a periodic basis thereafter under Section 13(a) or 15(d) of the Exchange Act, are required to present audited statements of income, changes in shareholders' equity and cash flows for each of the past three financial years.

[10] Release No. 33-8545 (March 2, 2005) [70 FR 11528 (March 8, 2005)].

[11] As used in this release the phrase "IFRS as issued by the IASB" refers to the authoritative text of IFRS, which, according to the IASC Foundation Constitution, is published in English. See "International Financial Reporting Standards (IFRSs), including International Accounting Standards (IASs) and Interpretations as at 1 January 2007," Preface to International Financial Reporting Standards, at 23. As described below in Section III.A.2., the Proposing Release used the phrase "IFRS as published by the IASB" to refer to the authoritative text of IFRS.

compliance with IFRS as issued by the IASB.[12] As part of our efforts to foster a single set of globally accepted accounting standards, we are now adopting amendments to accept from foreign private issuers financial statements prepared in accordance with IFRS as issued by the IASB in filings with the Commission without reconciliation to U.S. GAAP.

B. Overview of Comments Received

In the Proposing Release we sought comment on a number of issues, including the goal of achieving a single set of global accounting standards, the role of the IASB as standard setter, the potential effect of the proposed rule changes on convergence, the ability of investors and others to understand and use IFRS financial statements without a U.S. GAAP reconciliation, and the application of IFRS by preparers of financial statements. We received approximately 125 comment letters in response to the Proposing Release from a wide variety of respondents, including investors, analysts, foreign and U.S. issuers, business associations, accounting firms, law firms, credit rating agencies and regulators.[13] The majority of commenters agreed that, overall, the use of high-quality, internationally accepted accounting standards was an important and worthwhile goal. In general, commenters supporting the proposal, which included many foreign private issuers, accounting firms, legal firms and foreign standard setters, as well as some investors, agreed that IFRS were suitable to be used as an internationally accepted set of standards. Further, they expressed that allowing IFRS without a U.S.

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[12] See Items 17 and 18 of Form 20-F; see also Article 4 of Regulation S-X. See the Proposing Release for a history of the reconciliation requirement.

[13] These comment letters are available on the Commission's Internet Web site, located at http://www.sec.gov/comments/s7-13-07/s71307.shtml, and in the Commission's Public Reference Room in its Washington, DC headquarters.

GAAP reconciliation would be perceived as recognition of the adequacy of the convergence process to date and would promote and encourage the ongoing convergence process. However, the views of several other commenters, including those representing some institutional investors and analysts, were mixed. While these commenters also expressed the view that IFRS have the potential to fulfill the role of a set of high-quality, international standards at some time in the future, some thought the time was not yet ripe for accepting those financial statements without a U.S. GAAP reconciliation. Among the varying reasons cited by those who believed the time had not yet come were that the convergence process is insufficient to date and adopting the proposal would likely slow, and possibly halt, the convergence process. Other commenters did think that the time was ripe to accept financial statements prepared in accordance with IFRS as issued by the IASB without a U.S. GAAP reconciliation.

Regarding the effect on information quality if the U.S. GAAP reconciliation was removed, many commenters in support of the proposal stated that the reconciliation information is highly technical and not widely understood. These commenters also generally expressed confidence in the quality of application of IFRS in practice. On the other hand, commenters that expressed concerns with the proposal supported the usefulness of both the quantitative and qualitative aspects of the U.S. GAAP reconciliation. These commenters cited the presence of significant differences in important line items, such as net income, in the U.S. GAAP reconciliations of many foreign private issuers as evidence that the convergence process is not sufficiently complete. In their view, such differences would be more difficult to discern without the U.S. GAAP reconciliation. They also asserted that the U.S. GAAP reconciliation is helpful to financial statement quality, and they advocated further cross-jurisdictional structural and enforcement efforts regarding IFRS, including efforts to strengthen governance of the IASB and funding of the International Accounting Standards Committee ("IASC") Foundation, the stand-alone organization responsible for overseeing the activities of the IASB.

Many commenters that supported the proposal also urged the Commission to make amendments that go further than those we proposed. These commenters suggested that the Commission also accept from foreign private issuers financial statements prepared using jurisdictional adaptations of IFRS without a U.S. GAAP reconciliation, jurisdictional adaptations of IFRS with a reconciliation to IFRS as issued by the IASB, or any home country GAAP with a reconciliation to IFRS as issued by the IASB.

C. Summary of Final Amendments

The Commission has considered the comments received and believes it is appropriate at this time to adopt revisions, substantially as proposed, to Items 17 and 18 of Form 20-F to allow foreign private issuers to include in their filings with the Commission financial statements prepared in accordance with IFRS as issued by the IASB without reconciliation to U.S. GAAP. However, the amendments adopted differ in some areas in consideration of the responses we received to questions we asked in the Proposing Release.

In summary, the Commission is adopting amendments that:

- permit foreign private issuers to file financial statements prepared in accordance with IFRS as issued by the IASB without reconciliation to U.S. GAAP;

- require that foreign private issuers taking advantage of this option state explicitly and unreservedly in the notes to their financial statements that such financial statements are in compliance with IFRS as issued by the IASB and provide an unqualified auditor's report that opines on that compliance;
- allow these foreign private issuers also to file financial statements for required interim periods without reconciliation to U.S. GAAP (and without providing disclosure under Article 10 of Regulation S-X) if the interim financial statements fully comply with IAS 34;
- extend indefinitely the two-year accommodation contained in General Instruction G of Form 20-F to all first-time adopters of IFRS as issued by the IASB; and
- make conforming amendments to Rules 1-02, 3-10 and 4-01 of Regulation S-X, Securities Act Forms F-4 and S-4, and Securities Act Rule 701.

II. ACCEPTANCE OF IFRS FINANCIAL STATEMENTS FROM FOREIGN PRIVATE ISSUERS WITHOUT A U.S. GAAP RECONCILIATION

In the Proposing Release, the Commission requested comment on a number of broad areas with regard to whether we should proceed with our proposal to accept from foreign private issuers IFRS financial statements without a reconciliation to U.S. GAAP. Commenters had a range of views on these areas and offered useful input, and we considered many factors in our determination to adopt these amendments. We received mixed views on the utility of the information provided by the U.S. GAAP reconciliation of IFRS financial statements. Some commenters expressed concern about the overall quality of IFRS, either due to institutional considerations such as the governance or funding of the IASB or due to operational considerations such as the future of the convergence process. As described below, there are initiatives that directly address these concerns. We believe these initiatives will be more effective in addressing concerns than any indirect effects of retaining the reconciliation requirement to U.S. GAAP for financial statements that comply with IFRS as issued by the IASB.

We believe that it is appropriate to adopt these amendments at this time because we expect our acceptance of IFRS financial statements without a U.S. GAAP reconciliation will encourage more foreign issuers to prepare financial statements in accordance with IFRS. We also expect it will facilitate capital formation for foreign private issuers that are registered with the Commission. Adopting these amendments now may serve as an incentive to encourage the use of IFRS as issued by the IASB, as well as to support their development as a truly globally accepted set of high-quality accounting standards.

A. The IASB

In the Proposing Release we noted that the IASB's sustainability, governance and continued operation in a stand-alone manner as a standard setter are significant considerations in our acceptance of IFRS financial statements without a U.S. GAAP reconciliation, as those factors relate to the ability of the IASB to continue to develop high-quality globally accepted standards. We solicited comment on ways in which the Commission could further support the IFRS standard-setting and interpretive processes, and also how the Commission should consider its role with regard to the IASB.

1. Governance and Structure

Commenters generally agreed that the IASB is a stand-alone standard setter with a robust due process in its standard-setting procedures.[14] Although most commenters did not express concerns over governance, a few commenters identified several concerns relating to the organization, governance and operation of the IASB as standard setter. Specifically, these commenters felt that improvements were needed to enhance the geographic diversity of the board,[15] and to better align its membership with investor interests.[16]

In reflection on these comments and its own considerations, the Commission has joined other authorities responsible for capital market regulation - the European Commission, the Financial Services Agency of Japan and the International Organization of Securities Commissions ("IOSCO") - to work together to achieve a means of greater accountability for the IASB and the IASC Foundation to those governmental authorities charged with protecting investors and regulating capital markets.[17] This interest in increasing the accountability of the IASB and the IASC Foundation is a reflection of the widespread acceptance of IFRS. The increased use of IFRS has raised interest in establishing formal ties between securities regulatory stakeholders and the IASC Foundation.

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[14] See, for example, letters from American Bankers Association, Georg Merkl ("Merkl"), and UBS AG ("UBS").

[15] See, for example, letter from Korean Accounting Institute and Korean Accounting Standards Board ("KAI-KASB").

[16] See, for example, letter from CFA Institute Centre for Financial Market Integrity ("CFA Institute").

[17] See, SEC Press Release No. 2007-226, November 7, 2007, available at: http://www.sec.gov/news/press/2007/2007-226.htm.

The authorities described in the paragraph above propose to utilize the occasion of the IASC Foundation's 2008 Constitution review to put forward, in collaboration with the IASC Foundation, certain changes to strengthen the IASC Foundation's governance framework, while emphasizing the continued importance of an independent standard-setting process. Central to this effort is the establishment of a new monitoring body within the governance structure of the IASC Foundation to reinforce the existing public interest oversight function of the IASC Foundation Trustees. Likewise we note the IASC Foundation Trustees' announcement of their proposals, following a strategy review over recent months, to enhance the organization's governance arrangements and reinforce the organization's public accountability.[18]

As described in the Proposing Release, the Commission participates in the development of IFRS primarily through its participation in IOSCO, in which it takes an active role in reviewing and contributing to comments on exposure drafts of standards issued by the IASB and in contributing to its working groups. The Commission staff, as an IOSCO representative, serves as a non-voting observer at International Financial Reporting Interpretations Committee ("IFRIC") meetings.[19] The Commission also is an observer of the IASB Standards Advisory Council, whose responsibilities include

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[18] See, IASC Foundation Press Release, "Trustees Announce Strategy to Enhance Governance - Report on Conclusions at Trustees Meeting," November 6, 2007, available at http://www.iasb.org/News/Press+Releases/Trustees+Announce+Strategy+to+Enhance+Governance+-+Report+on+Conclusions+at+Trustees++Meeting.htm (the "IASC Foundation November 6 Press Release").

[19] IFRIC interprets IFRS and reviews accounting issues that are likely to receive divergent or unacceptable treatment in the absence of authoritative guidance, with a view to reaching consensus on the appropriate accounting treatment. The IFRIC is currently comprised of twelve voting members, and the IASC Foundation has recently approved an increase to fourteen voting members. All IFRIC members are appointed by the IASC Foundation Trustees for renewable terms of three years. IFRIC Interpretations are ratified by the IASB prior to becoming effective.

consulting with the IASB as to technical issues on the IASB's agenda and project priorities. Most commenters that addressed the role of the Commission with respect to the IASB felt that the Commission should continue to participate in the IASB and IFRIC's due process.[20] Many felt that continued interaction with the IASB through IOSCO was appropriate.[21]

One commenter noted that in July 2006, following the reaffirmation of the IASB and the FASB of their commitment to convergence, the IASB announced that it would not require the application of new standards before January 1, 2009.[22] The establishment of that lead time for the application of major new standards was intended to allow increased opportunity for consultation, to set a clear target date for adoption, and to provide stability in the IFRS platform of standards for issuers that had already adopted IFRS. The commenter expressed concern that the 2009 effective date would delay improvement in the quality of financial statements and disclosures, and argued that our acceptance of IFRS financial statements without reconciliation should not occur until after the IASB lifted its "moratorium" on new standards.[23] We note, however, that the IASB continues to issue new standards even if it does not require their application before January 1, 2009, and that voluntary early adoption of new standards prior to their mandatory effective date generally is allowed.

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[20] See, for example, letters from Deloitte Touche Tohmatsu ("Deloitte"), Institute of International Finance, London Investment Banking Association ("LIBA"), PricewaterhouseCoopers LLP ("PwC") and the Swedish Export Credit Corporation ("SEK").

[21] See, for example, letters from UBS and PwC.

[22] The press release in which the IASB made this announcement is available at: http://www.iasb.org/News/Press+Releases/IASB+takes+steps+to+assist+adoption+of+IFRSs+and+reinforce+consultation+No+new+IFRSs+effective+until.htm.

[23] See letter from CFA Institute.

2. Funding

Several comment letters, including those from financial statement users and investors, raised the independence of IASB funding as an issue.[24] Most of these commenters were concerned that the current voluntary nature of contributions might impact at least the appearance of the IASB's independence as well as the quality and timeliness of its standards.[25] A few commenters pointed out that the concentration of private contributions was a concern that led to the FASB's current funding mechanism.[26]

We support a strong, independent IASB, and as we noted in the Proposing Release, there are initiatives underway to address its funding structure. We believe promotion of these efforts is a more efficient and productive course of action than continuing to require a U.S. GAAP reconciliation for financial statements prepared in accordance with IFRS as issued by the IASB. Currently the operations of the IASC Foundation are financed by a combination of voluntary, private contributions and levied funds. Trustees of the IASC Foundation have indicated that a long-term objective of its funding plan is to move away from relying on voluntary, private contributions. In June 2006, the IASC Foundation Trustees agreed on four elements that should govern the establishment of a funding approach that would enable the IASC Foundation to remain a stand-alone, private sector organization with the necessary resources to conduct its work

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[24] See, for example, letters from California Public Employees' Retirement System, CFA Institute, and Goldman Sachs.

[25] See, for example, letters from Colgate-Palmolive Company and Investors Technical Advisory Committee ("ITAC").

[26] See, for example, letters from Council of Institutional Investors ("CII"), Lawrence A. Cunningham, and Gaylen R. Hansen.

in a timely fashion.[27] The Trustees continue to make progress in obtaining stable funding that satisfies those elements. Commenters have indicated that such a change would be beneficial to the stability of the organization, as it would spread the costs more equitably.[28]

In light of the comments received and its own considerations, the Commission has taken note of the IASC Foundation's funding progress as most recently announced following an October 31, 2007 IASC Foundation Trustee meeting.[29] The Commission is encouraged by the progress in diversifying the sources of the IASC Foundation's funding among and within jurisdictions, as well as by the number of jurisdictions (such as Australia, the Netherlands, New Zealand and the United Kingdom) that have moved away from a voluntary funding scheme either to a levy or national payment.

B. The Convergence Process

As discussed in the Proposing Release, continued progress towards convergence between U.S. GAAP and IFRS as issued by the IASB is another consideration in our acceptance of IFRS financial statements without a U.S. GAAP reconciliation. We

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[27] The Trustees determined that "characteristics of the new scheme for 2008 would be:

- Broad-based: Fewer than 200 companies and organizations participate in the current financing system. A sustainable long-term financing system must expand the base of support to include major participants in the world's capital markets, including official institutions, in order to ensure diversification of sources.
- Compelling: Any system must carry with it enough pressure to make free riding very difficult. This could be accomplished through a variety of means, including official support from the relevant regulatory authorities and formal approval by the collecting organizations.
- Open-ended: The financial commitments should be open-ended and not contingent on any particular action that would infringe on the independence of the IASC Foundation and the International Accounting Standards Board.
- Country-specific: The funding burden should be shared by the major economies of the world on a proportionate basis, using Gross Domestic Product as the determining factor of measurement. Each country should meet its designated target in a manner consistent with the principles above."

See http://www.iasb.org/About+Us/About+the+Foundation/Future+Funding.htm.

[28] See the letter from KPMG IFRG Limited ("KPMG").

[29] See the IASC Foundation November 6 Press Release.

believe that investors can understand and work with both IFRS and U.S. GAAP and that these two systems can co-exist in the U.S. public capital markets in the manner described in this rule making, even though convergence between IFRS and U.S. GAAP is not complete and there are differences between reported results under IFRS and U.S. GAAP. As we stated in the Proposing Release, we do not believe that eliminating the reconciliation should be contingent upon achieving a particular degree of convergence. Rather, the robustness of the convergence process over time, among other factors, is of greater importance.

The majority of commenters agreed that attaining a single set of high-quality global accounting standards was a worthwhile goal, with several agreeing that a specific level of convergence was not required to eliminate the reconciliation requirement.[30] In highlighting that acceptance of IFRS financial statements without a U.S. GAAP reconciliation should not be contingent on achieving a particular level of convergence, one commenter noted, "[e]ven today users cannot assume that the U.S. GAAP reconciliation always ensures direct comparability with U.S. GAAP financial statements of other entities."[31]

We received a variety of viewpoints about the level of convergence between U.S. GAAP and IFRS as issued by the IASB and about the potential effect of eliminating the reconciliation requirement on the convergence process. Respondents in favor of the

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[30] See, for example, letters from the American Insurance Group, Inc. ("AIG"), Ernst & Young LLP ("Ernst & Young"), PwC, American Accounting Association – Financial Accounting Standards Committee.

[31] See letter from KPMG.

amendments generally felt that acceptance of IFRS financial statements[32] without a reconciliation to U.S. GAAP would be perceived as an indication of the adequacy of convergence and the convergence process to date.[33] Many of those not in favor of the amendments believed that convergence to date was insufficient to merit the removal of the reconciliation requirement at this time,[34] or that acceptance of IFRS financial statements without reconciliation would impede progress on further convergence.[35] Some commenters who took the latter view cited the presence of substantial differences in important items in the reconciliation as evidence that the convergence process is not sufficiently complete, and gave examples of several items that are disclosed in the reconciliation of which they would be unaware if they had to rely on IFRS financial statements alone.[36] Several commenters suggested that if we accept IFRS financial statements without reconciliation, users of financial statements would benefit if issuers continued to provide qualitative disclosure of the nature of the differences between IFRS and the unreported U.S. GAAP results.[37] Other commenters representing users of financial statements, though, noted that the reconciling information is not very useful to

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[32] The phrase "IFRS financial statements" as used in this release refers to financial statements prepared in accordance with IFRS as issued by the IASB, unless otherwise specified.

[33] See, for example, letters from Institute of Chartered Accountants in England and Wales ("ICAEW"), Siemens Aktiengesellschaft ("Siemens"), KPMG, Goldman Sachs, and Federation of European Accountants ("FEE").

[34] See, for example, letters from New York State Society of Certified Public Accountants ("NYSSCPA"), Maverick Capital ("Maverick"), and ITAC.

[35] See, for example, letters from CFA Institute, ITAC, NYSSCPA, R.G. Associates, and Terry Warfield ("Warfield").

[36] See, for example, letters from the CFA Institute, Maverick, and R.G. Associates.

[37] See, for example, letters from AIG, BP plc ("BP"), and Fitch Ratings.

them in evaluating IFRS financial statements,[38] and many foreign issuers commented that they rarely receive questions from securities analysts and others relating to their U.S. GAAP reconciliations.[39] Many commenters believed that market forces and demand for comparable information in global capital markets will continue to provide sufficient incentive for further convergence of U.S. GAAP and IFRS as issued by the IASB.[40]

IFRS as issued by the IASB and U.S. GAAP are both sets of high-quality accounting standards that are similar to one another in many respects, and the convergence efforts to date have progressed in eliminating many differences. We recognize, however, that there are still a number of differences between U.S. GAAP and IFRS as issued by the IASB, and that there remain specific accounting subjects that IFRS has yet to address fully. One goal of the convergence effort underway with the FASB and IASB is to remove the remaining differences and to avoid creating significant new differences as standard setters continue to address existing and emerging accounting issues.

These rule amendments are based on many factors, including the progress of the IASB and the FASB towards convergence, the joint commitment that both boards have expressed to achieving further convergence of accounting standards in the future, and our belief that investors and capital markets are best served with high-quality accounting standards. Our focus is on whether IFRS is a set of high-quality accounting standards

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[38] See, for example, letters from Corporate Reporting Users' Forum ("CRUF"), Goldman Sachs, and Merrill Lynch & Company.

[39] See, for example, letters from Novartis and Nokia.

[40] See, for example, letters from British Bankers' Association, Microsoft Corporation ("Microsoft"), Ernst & Young, PwC, Prudential plc ("Prudential"), and Fitch Ratings.

established through a robust process, the application of which yields information investors can understand and work with despite any differences with U.S. GAAP.

We anticipate that the process towards convergence will continue, because capital markets will provide an ongoing incentive for a common set of high-quality globally accepted accounting standards, regardless of the existence of an IFRS to U.S. GAAP reconciliation requirement. The IASB and the FASB are now developing standards in areas where improvement is warranted. These circumstances exist regardless of whether the U.S. GAAP reconciliation requirement is in place. The IASB and the FASB have, in 2002 and 2006, issued Memoranda of Understanding that acknowledge their joint commitment to developing high-quality global standards, the establishment of which remains a long-term strategic priority for both Boards. In November 2007, the Trustees of the IASC Foundation reiterated their support for continuing the convergence work program described in these Memoranda, noting that future work is largely focused on areas in which the objective is to develop new world-class international standards.[41]

It also is important to note that some reconciling differences between IFRS and U.S. GAAP will continue to exist independent of the U.S. GAAP reconciliation and the convergence process. Due to their sources, these differences between U.S. GAAP and IFRS will remain regardless of the level of future convergence that can be attained. These differences include the effects of legacy transactions, such as business combinations, that occurred before U.S. GAAP and IFRS became more converged, and of self-selected differences that arise as a function of differing accounting elections (e.g. hedge accounting) that foreign private issuers make under IFRS and U.S. GAAP.

[41] See the IASC Foundation November 6 Press Release.

C. Investor Understanding and Education

In the Proposing Release we posed several questions about the ability of investors to understand and use financial statements prepared in accordance with IFRS as issued by the IASB without a U.S. GAAP reconciliation, and whether that ability would depend on the size or nature of the investor, the value of the investment, or other considerations.

Commenters noted that investors vary considerably in their ability to understand and use IFRS financial statements and that the same is true of their ability to understand and use financial statements prepared using U.S. GAAP.[42] However, many commenters were encouraged by the apparent lack of difficulty with transition to IFRS in the EU from many different country-specific GAAPs.[43] One respondent took an opposing view and asserted that the present lack of investor understanding of IFRS should be a factor in deciding whether to eliminate the reconciliation requirement.[44] That commenter believed that eliminating the reconciliation will require more work (and possibly self-education) by investors to understand IFRS financial statements, which may result in investment decisions becoming more costly.[45] Another commenter indicated its belief that currently there is a lack of IFRS-based educational programs.[46]

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[42] See, for example, letters from BDO Global Coordination B.V. ("BDO"), ICAEW, Merkl, and Shell International B.V. ("Shell").

[43] See, for example, letters from British Bankers' Association, LIBA, International Swaps and Derivatives Association ("ISDA"), and Financial Reporting Council.

[44] See letter from ITAC.

[45] Id.

[46] See letter from CFA Institute.

As is also the case with U.S. GAAP, we understand investors and other users of financial statements do not all possess the same level of understanding of IFRS or the resources that would facilitate gaining such an understanding. We anticipate, however, that by encouraging the use of IFRS as issued by the IASB, these amendments will help investors to understand international investment opportunities more clearly and with greater comparability in the long-term than if they had to continue to rely on a multiplicity of national accounting standards. The disclosures provided pursuant to the U.S. GAAP reconciliation are not an exact substitute for an issuer preparing its financial statements in U.S. GAAP. While some commenters have indicated that the U.S. GAAP reconciliation is useful, it is not the equivalent of U.S. GAAP financial statements. Investors currently must make use of IFRS financial statements and financial statements under various national GAAPs, even when accompanied by a U.S. GAAP reconciliation. We are encouraged by comments from other institutional investors indicating their degree of comfort and familiarity with IFRS financial statements.[47]

The present use of IFRS financial statements described above does not diminish the importance of recognizing that some investors are not as familiar with using IFRS financial statements as they are with using U.S. GAAP financial statements or the information provided in the U.S. GAAP reconciliation. These investors may need to obtain training or education in IFRS before they are comfortable working without the U.S. GAAP reconciliation. In this regard, we note the amendments we are adopting will affect a small number of issuers relative to the overall size of the U.S. public capital markets. In addition, we are allowing only financial statements prepared in accordance

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[47] See, for example, letter from CRUF.

with IFRS as issued by the IASB to be filed without a U.S. GAAP reconciliation, so concern over having to learn multiple jurisdictional variations of IFRS is not a factor. More broadly, as companies increasingly move to IFRS, investors that have gained familiarity with IFRS should see an increasing return on their investment in education. A number of accounting firms and other organizations currently provide information about IFRS as issued by the IASB on their web sites free of charge. As more countries adopt IFRS as the basis of accounting for their listed companies, we anticipate that investors who are not yet familiar with IFRS will have the opportunity to gain such familiarity.

D. Consistent and Faithful Application of IFRS in Practice

The degree of consistency and faithfulness with which IFRS is applied is another consideration in our acceptance of IFRS financial statements without reconciliation to U.S. GAAP. The Commission staff has gained an increasing understanding of the application of IFRS standards through its regular review of the periodic reports of publicly registered companies, a number of which prepare their financial statements in accordance with IFRS.[48] The Commission staff will continue to review and comment on IFRS financial statements and disclosure as part of its normal review function.[49]

Commenters had a range of views with regard to our request for comments on the application of IFRS as issued by the IASB. Some commenters who favored the

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[48] The Staff of the Commission's Division of Corporation Finance has published its observations on the review of IFRS financial statements included in the annual reports of more than 100 foreign private issuers. Those observations are available at http://www.sec.gov/divisions/corpfin/ifrs_staffobservations.htm.

[49] Pursuant to Section 408 of the Sarbanes-Oxley Act of 2002, the Commission is required to review disclosures made by reporting issuers with securities listed on a national securities exchange or traded on an automated quotation facility of a national securities association on a regular and systematic basis for the protection of investors. Such review shall include a review of the issuer's financial statements.

amendments highlighted the fact that IFRS has been applied for more than two years by thousands of companies throughout the world, including approximately seven thousand in the EU, and that investors are already employing information from IFRS financial statements to make investment decisions.[50] In contrast, some commenters who were not supportive of the proposal noted that the U.S. GAAP reconciliation offers auditors a quality control mechanism that identifies IFRS application issues, and referred to the staff's "Observations in the Review of IFRS Financial Statements" as evidence that supports their concerns about the consistent application of IFRS by reporting issuers.[51] One such commenter also felt that it would be difficult to audit for compliance with IFRS as issued by the IASB because of the current state of IFRS-based training for auditors.[52] Auditors, however, generally commented that they do have sufficient experience and familiarity with IFRS to be able to opine on IFRS financial statements, and that the elimination of the U.S. GAAP reconciliation would provide an incentive to develop IFRS capabilities faster than if the U.S. GAAP reconciliation were retained.[53] Some respondents believed that latitude in the application of IFRS results in inconsistent reporting,[54] while several supporters of the proposal believed application of IFRS did not vary between companies that are registered under the Exchange Act and those that are

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[50] See, for example, letters from Deutsche Bank, Ernst & Young, HSBC Holdings plc ("HSBC"), SEK, and Siemens.

[51] See, for example, letters from ITAC, R.G. Associates, CFA Institute.

[52] See letter from CFA Institute.

[53] See, for example, letter from Grant Thornton LLP ("Grant Thornton").

[54] See, for example, letters from Robert Mladek, and Fund for Stockowners Rights.

not.[55] One firm, while acknowledging diversity in the application of IFRS, felt that such diversity should diminish with time as application and interpretive issues are identified and addressed.[56]

As described in the Proposing Release, the Commission has a long history of supporting the work of the IASB and its predecessor the International Accounting Standards Committee in developing high-quality global accounting standards. In addition to understanding the standards, the Commission staff has developed a growing familiarity with their application. The Commission staff has reviewed and commented upon the filings of foreign private issuers that prepare their financial statements using IFRS. The staff has indicated that issues that it has observed in its ordinary review of IFRS financial statements do not appear to be more pervasive or significant than those it has identified in U.S. GAAP financial statements. We anticipate that the increasing use of IFRS as issued by the IASB will lead to even greater consistency of application, as well as to increased training opportunities for preparers, auditors, and investors.

E. Regulatory Processes and Infrastructure to Promote Consistent and Faithful Application of IFRS

In the Proposing Release, we discussed the cooperative infrastructure that regulators have put in place to identify and avoid inconsistent or inaccurate applications of IFRS globally so as to foster the consistent and faithful application of IFRS around the world. This infrastructure includes IOSCO, in which the Commission participates, which has established a database among member regulators for sharing regulators' decisions on

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[55] See, for example, letters from HSBC, Cleary Gottlieb Steen & Hamilton ("Cleary"), Syngenta AG ("Syngenta").

[56] See letter from Deloitte.

the application of IFRS.[57] The Commission and the Committee of European Securities Regulators ("CESR"), which the European Commission has charged with evaluating the implementation of IFRS in the EU, have established a work plan in which they agree to consult with one another with the goal of avoiding conflicting conclusions regarding the application and enforcement of IFRS.[58]

In the Proposing Release, we asked for feedback regarding our work with other regulators to provide for the enforcement of IFRS as issued by the IASB. Many commenters did not express concern with the current processes and infrastructure that have been established between regulators to promote consistent and faithful application of IFRS. Most commenters responding on this topic believed that the infrastructure is in place to identify and avoid inconsistent and inaccurate applications of IFRS globally.[59] Some of these commenters noted the Commission's involvement and leadership role in IOSCO and encouraged the Commission to continue to work through IOSCO to coordinate with other regulators in bringing matters to the IASB and to IFRIC.[60] Several of these commenters also supported the Commission's continued involvement in information sharing arrangements with other regulators and the interaction with CESR.[61] Some commenters who did not support the proposal believed that the lack of a global

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[57] See IOSCO's press release regarding its IFRS database at http://www.iosco.org/news/pdf/IOSCONEWS92.pdf.

[58] The press release announcing the SEC-CESR work plan, and the text of the work plan, are available at http://www.sec.gov/news/press/2006/2006-130.htm.

[59] See, for example, letters from HSBC, LIBA, and SIFMA.

[60] See, for example, letters from Business Europe, BP, HSBC, and UBS.

[61] See, for example, letters from International Finance, LIBA, PwC, and Securities Industry and Financial Markets Association ("SIFMA").

enforcement mechanism means that the necessary controls to successfully implement global standards are currently lacking.[62] The Commission believes the current system can be effective, and will continue its work in this area to support multilateral and bilateral efforts, including its participation in IOSCO and its collaboration with CESR and other regulators as appropriate.

III. DISCUSSION OF THE AMENDMENTS

We are adopting the amendments substantially as proposed. We have, however, in response to comments, made some modification in certain areas, as discussed below.

A. Eligibility and Implementation

1. Foreign Private Issuer Status

The amendments the Commission is adopting will apply only to foreign private issuers that file on Form 20-F, regardless of whether the issuer complies with IFRS as issued by the IASB voluntarily or in accordance with the requirements of the issuer's home country regulator or exchange on which its securities are listed.

A large number of comment letters addressed eligibility requirements and commenters almost unanimously supported the applicability of the proposed amendments to all foreign private issuers.[63] Some commenters indicated that other types of issuers also should be permitted to file IFRS financial statements without a U.S. GAAP reconciliation, for example reporting U.S. subsidiaries of foreign private issuers that use IFRS to prepare their consolidated financial statements[64] or reporting foreign issuers that

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[62] See, for example, letters from CFA Institute, and Brent Kobayashi.

[63] See, for example, letters from Grant Thornton, Microsoft, and Sullivan & Cromwell LLP ("Sullivan & Cromwell").

[64] See, for example, letter from Financial Security Assurance Holdings Ltd.

did not fall within the definition of foreign private issuer under Rule 3b-4 under the Exchange Act.[65] We note that the scope of our proposal was limited to foreign private issuers, for which the Commission has an established disclosure regime distinct from that applicable to companies that are not foreign private issuers. The question of which disclosure regime an entity should report under was beyond the scope of the proposal, and thus we are not extending the application of the adopted amendments to entities that do not satisfy the definition of foreign private issuer under Rule 3b-4, or foreign private issuers that do not file their annual report on Form 20-F. We are examining the possibility of the broader use of IFRS by entities that are not foreign private issuers in the Concept Release on Allowing U.S. Issuers to Prepare Financial Statements in Accordance with International Financial Reporting Standards.[66]

We requested comment as to whether we should place limitations on the eligibility of a foreign private issuer to file financial statements prepared in accordance with IFRS as issued by the IASB without a U.S. GAAP reconciliation. We also asked whether our acceptance of IFRS financial statements without a U.S. GAAP reconciliation should be phased in based on, for example, issuer size or other criteria. Most commenters opposed any limitations on the application of any final rules, and did not see any benefit to a transition approach that phases in registrants.[67] One commenter pointed out that appropriate application of IFRS would not be dependent on an issuer's size,[68]

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[65] See memorandum from the Executive Staff on a meeting with representatives of INVESCO plc.

[66] Release No. 33-8831 (August 7, 2007) [72 FR 45600 (August 14, 2007)], available on the Commission Web site at http://www.sec.gov/rules/concept/2007/33-8831.pdf.

[67] See, for example, letters from Cleary, Deloitte, Fitch Ratings, PwC, and Sullivan & Cromwell.

[68] See letter from Fitch Ratings.

while others stated that smaller companies face a greater relative burden in preparing a U.S. GAAP reconciliation.[69] One commenter also opposed a phase-in based on issuers' experience with IFRS, as it would be difficult to establish meaningful criteria to evaluate that experience.[70] We are not adopting any issuer limitations or phase-in for the application of the adopted amendments, as we believe that to do so would not effectively encourage the use by foreign private issuers of IFRS as issued by the IASB and may create inappropriate disparity in our treatment of foreign private issuers.

2. IFRS as Issued by the IASB

We are adopting as proposed the amendments to Items 17 and 18 of Form 20-F. Under the amendments, a foreign private issuer is eligible to omit the reconciliation to U.S. GAAP if it states, unreservedly and explicitly in an appropriate note to the financial statements, that its financial statements are in compliance with IFRS as issued by the IASB.[71] Also, the independent auditor must opine in its report on whether those financial statements comply with IFRS as issued by the IASB. As described in the Proposing Release, the auditor's report can include this language in addition to any opinion relating to compliance with standards required by the home country.

The majority of commenters believed that auditors should be able to provide audit opinions that financial statements were fully compliant with IFRS as issued by the

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[69] See, for example, letters from Cleary, Deloitte, Grant Thornton, and Sullivan & Cromwell.

[70] See letter from Grant Thornton.

[71] The amendments would not encompass use of the IASB's proposed IFRS for Small and Medium-sized Entities ("IFRS for SMEs"), because those proposed standards relate only to smaller issuers that do not have debt or equity securities listed on a public market. More information on IFRS for SMEs is available on the IASB Web site at http://www.iasb.org/Current+Projects/IASB+Projects/Small+and+Medium-sized+Entities/Small+and+Medium-sized+Entities.htm.

IASB.[72] Several commenters indicated that they were not aware of any reason why the auditor and the issuer would not be able to provide the dual statement of compliance with both IFRS as issued by the IASB and a jurisdictional variation of IFRS in cases where accounting policy choices ensure compliance with both IFRS as issued by the IASB and the jurisdictional variation of IFRS.[73] One commenter, however, believed that the additional opinion in the auditor's report relating to compliance with IFRS as issued by the IASB would be both duplicative and unnecessary, as the auditor would already be expected to issue a qualified opinion if it found deviations from IFRS as issued by the IASB given an issuer's unreserved statement of compliance.[74] We believe that in cases where there is no discrepancy between IFRS as issued by the IASB and a jurisdictional variation, the issuer and the auditor should be able to provide the dual statements without undue difficulty.

A foreign private issuer will continue to be required to provide a reconciliation to U.S. GAAP under these amendments if its financial statements include deviations from IFRS as issued by the IASB, if it does not state unreservedly and explicitly that its financial statements are in compliance with IFRS as issued by the IASB, if the auditor does not opine on compliance with IFRS as issued by the IASB, or if the auditor's report contains any qualification relating to compliance with IFRS as issued by the IASB. A foreign private issuer using a jurisdictional or other variation of IFRS will be able to rely

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[72] See, for example, letters from Galileo Global Advisors LLC, Grant Thornton, Microsoft, PwC, and UBS.

[73] See, for example, letters from PwC and UBS.

[74] See letter from CESR.

on the amendments if that issuer also is able to state compliance with both IFRS as issued by the IASB and a jurisdictional variation of IFRS (and does so state), and its auditor opines that the financial statements comply with both IFRS as issued by the IASB and the jurisdictional variation, as long as the statement relating to the former is unreserved and explicit.

Many commenters supported the objective of encouraging the development of a single set of high-quality international accounting standards, but suggested that we also accept without a U.S. GAAP reconciliation financial statements prepared in accordance with a jurisdictional variation of IFRS, and in particular IFRS as adopted by the EU.[75] Some of these and other commenters thought it would be appropriate also to permit a reconciliation from a jurisdictional variation of IFRS to IFRS as issued by the IASB. Further, some commenters suggested the Commission also permit a reconciliation from

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[75] Many commenters noted that issuers listed in the EU are required to prepare their statutory financial statements using IFRS as adopted by the EU. Commenters noted that presently the only difference between IFRS as issued by the IASB and IFRS as adopted by the EU relates to IAS 39, "Financial Instruments: Recognition and Measurement," whereby IFRS as adopted by the EU offers greater flexibility with respect to hedge accounting for certain financial instruments than does IFRS as issued by the IASB. We understand that few companies make use of this ability to "carve-out" these provisions of IAS 39 from IFRS as issued by the IASB. As the European Commission noted in its comment letter, "[f]or the vast majority of EU issuers listed in the U.S., this carve-out has no practical significance and as such their financial statements prepared under IFRS as adopted by the EU would be identical to those prepared under IFRS as published by the IASB." As a practical matter, this difference applies only to foreign financial institutions, several of which have commented that they do not avail themselves of the approach afforded by the EU-endorsed standard (see letters from Deutsche Bank, HSBC, Lloyds), and that therefore they would be able to assert compliance with both IFRS as endorsed by the EU and IFRS as issued by the IASB. Other commenters either did not address the issue or did not express concern about their ability to assert dual compliance at the present time.

Issuers expressed concern, however, that they may not be able to express dual compliance in the future if the timing of the EU's endorsement of new standards, or an EU decision not to endorse a standard, were to create differences between EU IFRS and IFRS as issued by the IASB such that compliance with EU IFRS necessarily precluded compliance with IFRS as issued by the IASB.

See Section III.A.3. below for a discussion of transition provisions applicable to European companies that make use of the EU's carve-out from IAS 39.

any home country GAAP to IFRS as issued by the IASB. Commenters did not suggest that accepting financial statements that comply with IFRS as issued by the IASB from foreign private issuers was dependent on implementing any of these additional suggested approaches. We are not extending the proposal to these variations because we believe that allowing any of these approaches would not as effectively foster the development and use of a single set of high-quality global accounting standards.

In the Proposing Release, the phrase we used to describe the authoritative text of IFRS was "the approved English language version of IFRS as published by the IASB." The final amendments refer to the same authoritative text of IFRS as it is provided for by the IASC Foundation Constitution, although we are using the phrase "IFRS as issued by the IASB" to describe it. As one commenter pointed out, according to the IASC Foundation Constitution, "the authoritative text of any Exposure Draft or International Accounting Standard or International Financial Reporting Standards or Draft or final Interpretation shall be that published by the IASB in the English language" and, for this reason, there is no need to make reference to language when describing the authoritative text.[76] Further, because the standards are issued by the Board and published by the IASC Foundation, it is to standards "issued" that we refer.

3. Implementation

In the Proposing Release we sought input on what commenters thought might be an appropriate compliance date if the Commission were to adopt the proposed amendments, as well as on issues relating to the timing of implementation for any adopted amendments.

[76] See letter from KPMG.

Of the commenters who provided feedback relating to implementation and timing, a majority of those who supported acceptance of IFRS financial statements without reconciliation indicated that the amendments should be effective for filings covering the 2008 financial year, with some of those commenters indicating that such timing would allow investors and other affected parties more time to familiarize themselves with IFRS.[77] A significant portion of commenters that supported the proposed rules felt that the amendments should be effective at the earliest date possible.[78]

Commenters did not indicate that the number of issuers that prepare their financial statements in accordance with IFRS should be a factor in determining the implementation of any adopted rules, and some stated that acceptance of IFRS financial statements without a U.S. GAAP reconciliation would encourage other issuers to adopt IFRS, which may assist in promoting the achievement of a single set of high-quality internationally accepted accounting standards.[79] Most commenters responding to our question as to whether the timing of any rule should be based on further experience and knowledge of IFRS stated that these should not be factors in determining the implementation timing,[80] with some noting that there was already sufficient experience in the application of IFRS to warrant immediate effectiveness of the amendments.[81] Some commenters, including some from the investor community, however, felt that elimination of the reconciliation

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[77] See, for example, letter from Syngenta.

[78] See, for example, letters from Citigroup, Financial Reporting Counsel, and PwC.

[79] See, for example, letters from BP, British Bankers' Association, and UBS.

[80] See, for example, letters from Deutsche Bank, Fitch Ratings, and ICAEW.

[81] See, for example, letter from Deloitte.

may be premature, or thought deferral of adopting the amendments would be appropriate until more experience was gained with IFRS even if they supported the idea of accepting IFRS without reconciliation as a move towards the use of a single set of high-quality international accounting standards.[82] Those that thought taking action at this time was premature cited the "readiness" concerns described in Part II above; namely concerns regarding IASC Foundation's governance and funding, the state of and prospects for convergence of IFRS and U.S. GAAP, investor education, regulators' mechanisms for interaction, and so forth. The Commission's consideration of those comments is noted in Part II with respect to its decision to adopt rule amendments at this time.

The Commission has concluded that the amendments to accept financial statements from foreign private issuers prepared in accordance with IFRS as issued by the IASB will be applicable to annual financial statements for financial years ending after November 15, 2007, and to interim periods within those years, that are contained in filings made after the effective date of these rule amendments.

In deciding to make the rule amendments available for financial statements that cover the 2007 financial year for many foreign private issuers, the Commission considered the fact that it was not awaiting any particular event to support its policy decision and, further, by making the rule amendments available for the 2007 financial year for many foreign private issuers, the Commission's objectives in implementing this policy decision would begin to be realized that much sooner.

The Commission notes that there may be foreign private issuers that are existing Commission registrants who - pursuant to policy decisions the European Union made in

[82] See, for example, letters from CFA Institute, William Craven, Gaylen R. Hansen, and ITAC.

its role as an "early adopter" of IFRS - have already been preparing their financial statements by applying the EU's "carve out" from IAS 39 with respect to hedge accounting for certain financial instruments (the "IAS 39 carve out"), as described above in Section III.A.2.[83] Given the timing of this decision, registrants who may have taken advantage of the IAS 39 carve out would have done so without the knowledge that its use would be at odds with the IFRS reporting alternative that the Commission is adopting today. Accordingly, the Commission is making available temporary transition relief to these existing registrants. Specifically, for only their first two financial years that end after November 15, 2007, the Commission will accept from existing SEC registrants from the EU that have already utilized the IAS 39 carve out in financial statements previously filed with the Commission financial statements that do not include a reconciliation to U.S. GAAP, if those financial statements otherwise comply with IFRS as issued by the IASB and contain a reconciliation to IFRS as issued by the IASB. This reconciliation to IFRS as issued by the IASB is to contain information relating to financial statement line items and footnote disclosure based on full compliance with IFRS as issued by the IASB. It is to be prepared and disclosed in the same manner that foreign private issuers presently provide reconciliations of their financial statements to U.S. GAAP under Item 17 and Item 18 of Form 20-F. All financial statements of foreign private issuers that used the IAS 39 carve out for periods prior to the financial year that ends after November 15, 2007 must continue to be reconciled to U.S. GAAP. At the end of this transition period, these registrants will have the same financial statement reporting choices as that of any

[83] See http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_363/l_36320041209en00010065.pdf.

foreign private issuer (e.g., if they continue to use the IAS 39 carve out as described in Section III.A.2., above, they will remain subject to the U.S. GAAP reconciliation requirements of Items 17 and 18). The Commission has adopted an amendment to Items 17 and 18 of Form 20-F to accommodate this transition provision.

The Commission observes that the IAS 39 carve out relates to hedge accounting for certain financial instruments. The Commission and its staff have had several opportunities to consult and discuss with different constituencies regarding the accounting for derivative and hedging transactions. The Commission will make its staff available to the staffs of the IASB, FASB and European Commission to identify any ways to address this area.

B. Amendments to Effect Acceptance of IFRS Financial Statements without Reconciliation to U.S. GAAP

1. General

The basic financial statement requirements for foreign private issuers are described in Items 17 and 18 of Form 20-F. Under Item 17(c), a foreign private issuer must either prepare its financial statements and schedules in accordance with U.S. GAAP or, if the financial statements and schedules are prepared using another basis of accounting, include a reconciliation to U.S. GAAP as described under Item 17(c)(2). This reconciliation includes a narrative discussion of reconciling differences,[84] a reconciliation of net income for each year and any interim periods presented,[85] a reconciliation of major balance sheet captions for each year and any interim periods,[86]

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[84] See Item 17(c)(1) of Form 20-F.

[85] See Item 17(c)(2)(i) of Form 20-F.

[86] See Item 17(c)(2)(ii) of Form 20-F.

and a reconciliation of cash flows for each year and any interim periods.[87] The Commission is adopting as proposed amendments to Item 17(c) so that a reconciliation will no longer be required from foreign private issuers that prepare financial statements that comply with IFRS as issued by the IASB.

Several subparagraphs of Item 17(c)(2) relate to reconciling disclosures that rely on certain International Accounting Standards ("IAS") and were available to foreign private issuers that use home country GAAP or IFRS. We proposed to delete Items 17(c)(2)(iv)(B) and (C), which relate to reconciling disclosures from issuers that rely on IAS 21, "The Effects of Changes in Foreign Exchange Rates." Because some commenters recommended that the IAS 21 accommodation could continue to be useful to foreign private issuers that may operate in a hyperinflationary economy, we are retaining that provision.[88] We are eliminating Item 17(c)(2)(viii) which relates to reconciling disclosures to be provided by issuers that use IAS 22, "Business Combinations," as IAS 22 has been superseded by IFRS 3, "Business Combinations." Because IAS 22 may no longer be used by an issuer preparing IFRS financial statements, we also are deleting Instruction 6 to Item 17 as proposed.

A reconciliation to U.S. GAAP under Item 18 of Form 20-F requires that an issuer provide all information required by U.S. GAAP and Regulation S-X, in addition to the reconciling information for line items specified in Item 17(c). Because our acceptance of financial statements prepared using IFRS as issued by the IASB without a

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[87] See Item 17(c)(2)(iii) of Form 20-F, containing the exception relating to IAS 7 "Cash Flow Statements."

[88] See, for example, letters from Deloitte and Shell.

U.S. GAAP reconciliation is intended to apply equally to an Item 18 reconciliation, we are revising Item 18(b) as proposed to indicate that U.S. GAAP and Regulation S-X disclosures will not be required if the issuer files financial statements using IFRS as issued by the IASB.

2. Interim Period Financial Statements

We are adopting as proposed that a foreign private issuer that is eligible to omit a U.S. GAAP reconciliation from its audited annual financial statements also will be able to omit a reconciliation from its unaudited interim period financial statements which, to the extent such financial statements are required,[89] also will have to be prepared in accordance with IFRS as issued by the IASB. Based on the responses that we received to questions posed in the Proposing Release relating to the ability of issuers to prepare interim period financial statements that are in accordance with IFRS as issued by the IASB,[90] we believe that the preparation of interim period financial statements in accordance with the provisions of IFRS as issued by the IASB that pertain to interim financial reporting will not create difficulties for issuers, and that issuers that have changed to IFRS as issued by the IASB for their annual financial statements and prepare interim financial statements will do so in accordance with IFRS as issued by the IASB.

a. Financial Information in Securities Act Registration Statements and Prospectuses and Initial Exchange Act Registration Statements Used Less Than Nine Months After the Financial Year End

In registration statements and prospectuses under the Securities Act and initial registration statements under the Exchange Act, if the document is dated less than nine

[89] See Item 8.A.5 of Form 20-F for requirements relating to interim period financial statements.

[90] See, for example, letters from BP, Deutsche Bank, Shell, and UBS.

months after the end of the last audited financial year, foreign private issuers are not required to include interim period financial information. If a foreign private issuer has published interim period financial information, however, Item 8.A.5 of Form 20-F requires these registration statements and prospectuses to include that information.[91] The intent of this requirement is to make information available in U.S. offering documents as current as information that is available elsewhere.

The instructions to Item 8.A.5 require that an issuer which provides published interim financial information describe any material variations between the accounting principles used and U.S. GAAP and quantify any material variations that have not been quantified in the annual financial statements. We are adopting as proposed an instruction to Item 8.A.5 of Form 20-F to clarify that interim period financial information that is made public by a foreign private issuer need not be reconciled to U.S. GAAP if the basis of accounting used in the audited annual financial statements and the published interim information is IFRS as issued by the IASB.

b. <u>Financial Statements in Securities Act Registration Statements and Prospectuses and Initial Exchange Act Registration Statements Used More Than Nine Months after the Financial Year End</u>

In registration statements and prospectuses under the Securities Act and initial registration statements under the Exchange Act, if the document is dated more than nine months after the end of the last audited financial year, foreign private issuers must provide consolidated interim period financial statements covering at least the first six

[91] Under Item 512(a)(4) of Regulation S-K [17 CFR 22.512(a)(4)], a foreign private issuer that registers securities on a shelf registration statement also is required to undertake to include any financial statements required by Item 8.A of Form 20-F at the start of any delayed offering or throughout a continuous offering.

months of the financial year and the comparative period for the prior financial year.[92] These unaudited financial statements must be prepared using the same basis of accounting as the audited financial statements contained or incorporated by reference in the document and include or incorporate by reference a reconciliation to U.S. GAAP.[93]

We proposed a new instruction to Item 8.A.5 to clarify that an issuer would not need to provide that reconciliation if it prepares its interim financial statements using IFRS as issued by the IASB. Under the proposed amendment, an issuer relying on the new instruction to provide IFRS financial statements for an interim period without reconciliation would continue to be required to comply with Article 10 of Regulation S-X with regard to the minimum content of the financial statements for interim periods, when that information is required under Item 8.A.5 of Form 20-F.

In the Proposing Release we enumerated several differences between the requirements of Article 10 of Regulation S-X and IAS 34, "Interim Financial Reporting," which prescribes the minimum content of an interim financial report and the principles for recognition and measurement in interim period financial statements. These differences relate primarily to the detail required for major headings and subtotals used in the financial statements, statements regarding the sufficiency of the interim disclosures, minimum contingent liability disclosures, and footnote disclosure of summarized data for equity investees.

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[92] See Item 8.A.5 of Form 20-F and Item 512(a)(4) of Regulation S-K.

[93] See Items 17(c) and 18 of Form 20-F.

Many commenters did not view differences between IAS 34 and Article 10 as significant[94] and felt that IAS 34 information was sufficient without needing to require compliance with Article 10 when preparing IFRS financial statements for interim periods.[95] Accordingly, under the rules we are adopting a foreign private issuer that relies on the new instruction to provide IFRS financial statements for an interim period without reconciliation to U.S. GAAP will not be required to comply with Article 10 of Regulation S-X for interim period financial statements provided pursuant to Item 8.A.5 of Form 20-F, if it complies with and explicitly states compliance with IAS 34.

c. Transition Period Interim Financial Statements in Securities Act Registration Statements and Prospectuses and Initial Exchange Act Registration Statements

Eligible foreign private issuers will be able to omit the U.S. GAAP reconciliation from their unaudited financial statements relating to interim periods only if the audited annual financial statements included or incorporated by reference for all required periods are prepared in accordance with IFRS as issued by the IASB, as described in Section III.A.2. above. If the audited annual financial statements are not so prepared, then in order to be able to omit the U.S. GAAP reconciliation from required interim period financial statements, an issuer would amend prior filings in order to appropriately revise the audited financial statements.[96]

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[94] See, for example, letters from BP, British Bankers Association, Ernst & Young, and Royal Bank of Scotland Group plc.

[95] See, for example, letters from AXA, Deloitte, KAI-KASB, and Group of 100.

[96] For example, an issuer that previously had filed an annual report on Form 20-F containing financial statements which were not prepared in accordance with IFRS as issued by the IASB, as described in Section III.A.2. above, could file an amendment to that annual report which included financial statements that were so prepared.

C. Related Accounting and Disclosure Issues

1. Selected Financial Data

Under Item 3.A. of Form 20-F, issuers must provide five years of selected financial data. We proposed to revise the instruction to Item 3.A. to clarify that selected financial data based on the U.S. GAAP reconciliation is required only if the issuer prepares its primary financial statements using a basis of accounting other than IFRS as issued by the IASB.

Almost all commenters that addressed the issue believed that U.S. GAAP selected financial data should not be required if an issuer prepares its primary financial statements in accordance with IFRS as issued by the IASB.[97] One commenter noted that efforts to keep the previously filed selected U.S. GAAP financial information current, for example due to retrospective effects of changes of accounting methods or discontinued operations, would not be cost-effective.[98]

We are amending Item 3.A. of Form 20-F as proposed to clarify that selected financial data based on the U.S. GAAP reconciliation is required only if the issuer prepares its primary financial statements using a basis of accounting other than IFRS as issued by the IASB.

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[97] See, for example, letters from BP, DaimlerChrysler, Deloitte, and KAI-KASB.

[98] See letter from PwC.

2. **Other Form 20-F Disclosure**

a. Reference to U.S. GAAP Pronouncements in Form 20-F

Several non-financial statement disclosure items in Form 20-F refer to specific U.S. GAAP pronouncements.[99] We proposed to add an Instruction to Item 5 and Item 11 stating that an IFRS filer that will not be required to provide a U.S. GAAP reconciliation will continue to respond to those items of Form 20-F that make reference to U.S. GAAP pronouncements. Under the proposed instruction, in providing that disclosure the issuer would apply the appropriate corresponding IFRS pronouncements that embody the principles contained in the referenced U.S. GAAP pronouncement.

A number of commenters suggested that individual issuers may reach different determinations as to which IFRS pronouncement to look to in response to Form 20-F item requirements that refer to U.S. GAAP provisions. To facilitate the use of Form 20-F by IFRS users, those commenters recommended that we revise the non-financial statement disclosure requirements to itemize the specific IFRS pronouncements that correspond to the referenced U.S. GAAP pronouncements.[100]

In evaluating these comments, we concluded that in responding to the non-financial statement disclosure requirements of Form 20-F, issuers should continue to meet the objective of the stated disclosure regardless of the basis on which the financial statements are prepared. We believe issuers should not have undue difficulty in

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[99] See, for example, Item 5 ("Operating and Financial Review and Prospects"), which contains references to FASB Interpretations No. 45 "Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others" and No. 46 "Consolidation of Variable Interest Entities," and Item 11, which contains reference to multiple FASs.

[100] See, for example, letters from Accounting Standards Committee of Germany and Germany Accounting Standards Board, and Center for Audit Quality ("CAQ").

determining the objective of those disclosure requirements. We therefore are adopting instructions to Item 5 and Item 11 to indicate that issuers preparing their financial statements in accordance with IFRS as issued by the IASB should provide, in responding to paragraphs of those items that refer to specific pronouncements of U.S. GAAP, disclosure that satisfies the objective of the item's disclosure requirements. If information called for by the non-financial statement requirements of Form 20-F duplicates information that is contained in the IFRS financial statements, an issuer need not repeat such information but may cross-reference to the appropriate footnote in the audited financial statements. We will continue to evaluate whether specific changes to the non-financial statement disclosure items of Form 20-F would be beneficial.

b. Disclosure from Oil and Gas Companies

We proposed to amend Item 18 of Form 20-F to expressly require that any issuer that provides disclosure under FAS 69, "Disclosures about Oil and Gas Producing Activities," continue to provide that disclosure even if the issuer is preparing financial statements in accordance with IFRS as issued by the IASB without a reconciliation to U.S. GAAP.[101] We are adopting this amendment as proposed to continue to require FAS 69 disclosure. Most commenters responding to our question on this matter supported our proposal to continue to require FAS 69 disclosure, which they felt was useful to investors and analysts.[102] Some issuers indicated, however, that FAS 69 disclosure should cease to be required once the IASB issues disclosure requirements for oil and gas related

[101] Disclosure provided pursuant to FAS 69 is supplementary information that is provided with the financial statements.

[102] See, for example, letters from Ernst &Young and Deloitte.

activities.[103] We will continue to consider appropriate revisions to our requirements in this area in light of future developments.

c. Market Risk Disclosure and the Safe Harbor Provisions

We recognize that IFRS filers have expressed particular concerns related to the applicability of the safe harbor for forward-looking statements provided under Section 27A of the Securities Act[104] and Section 21E of the Exchange Act.[105] Those safe harbor provisions expressly exclude any information "included in a financial statement prepared in accordance with generally accepted accounting principles."[106] Because forward-looking market risk disclosure required by IFRS 7, "Financial Instruments: Disclosure," will appear in the footnotes to audited IFRS financial statements, it is not covered by the safe harbor provisions. In contrast, market risk disclosure provided pursuant to Item 11 of Form 20-F is not included as part of the financial statements in a filing and is expressly subject to the safe harbor provisions.

In the Proposing Release, while we did not propose any changes, we did solicit feedback on the non-availability of the safe harbor provisions to financial statement information, including disclosure required by IFRS 7. In response, a number of commenters indicated that the Commission should address the implications of the safe harbor provisions and financial statement disclosure, including forward-looking information called for by IFRS 7.[107] This is an issue that exists currently even with a

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[103] See, for example, letters from BP and Shell.

[104] 15 USC 77z-2.

[105] 15 USC 78u-5.

[106] See Securities Act Section 27A(b)(2)(A) and Exchange Act Section 21E(b)(2)(A).

[107] See, for example, letters from American Bar Association, CAQ, and PwC.

U.S. GAAP reconciliation, and therefore is distinct from our acceptance of IFRS financial statements without a U.S. GAAP reconciliation and affects foreign private issuers generally.[108] We therefore believe the question warrants further consideration and, if appropriate, we may address it through a separate rulemaking initiative.

3. IFRS Treatment of Certain Areas

In the Proposing Release we noted that although IFRS as issued by the IASB constitutes a comprehensive basis of accounting that may be used by foreign private issuers in the preparation of their financial statements contained in Commission filings, there are certain areas in which the IASB has yet to develop standards or in which IFRS permits disparate options. As discussed in the Proposing Release, IFRS does not have a specific standard or interpretation on accounting treatment for common control mergers, recapitalization transactions, reorganizations, acquisitions of minority shares not resulting in a change of control and similar transactions.[109] While IFRS does include a standard on financial statement presentation, it lacks specific conventions as to the form and content of the income statement.[110] We did not receive extensive comments in these areas. Other examples given in the Proposing Release include accounting for insurance contracts and extractive activities.

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[108] Some foreign private issuers have early adopted IFRS 7 in their financial statements relating to their 2006 financial years.

[109] The IASB and the FASB are expected to issue a final standard for the accounting for business combinations and non-controlling interests. This joint project is expected to converge numerous areas of application and reduce certain alternative treatments currently available under IFRS, but will not address all areas listed herein.

[110] Early in 2008, the IASB and the FASB are expected to publish a discussion document relating to financial statement presentation, including the presentation of information on the face of the financial statements.

IFRS 4, "Insurance Contracts," provides some requirements in accounting for issued insurance contracts and held reinsurance contracts. As IFRS 4 was the first part of a two-phase project, the standard generally permits a company to continue to apply its home country accounting principles for insurance contracts, though it imposes certain accounting requirements in order to eliminate certain inconsistencies in application, and establishes many disclosure requirements. The IASB has a project to further address the accounting for insurance contracts and has issued a discussion paper on its preliminary views on such a standard.[111]

IFRS 6, "Exploration for and Evaluation of Mineral Resources," provides some requirements in accounting for exploration and evaluation activities of oil and gas and mining companies. For limited areas of accounting for extractive activities, IFRS 6 establishes guidelines under which preparers can continue to apply home country accounting principles.

In the Proposing Release we solicited comment as to whether there are any accounting subject areas that the IASB should address before we accept IFRS financial statements without reconciliation, and whether investors can understand and use IFRS financial statements which include activities in areas for which IFRS does not have a specific standard. Some commenters noted that IFRS is not alone in having gaps in accounting for certain areas, and gave as examples the lack of standards for property,

[111] The IASB currently has projects underway addressing accounting for insurance contracts and extractive activities. See the IASB work plan for further detail at http://www.iasb.org/Current+Projects/IASB+Projects/IASB+Work+Plan.htm.

plant and equipment, revenue recognition, consolidation and joint venture accounting under U.S. GAAP.[112]

Several commenters indicated that, where gaps might exist in IFRS, preparers may look to accounting guidance issued by other standards, such as U.S. GAAP, pursuant to IAS 8, "Accounting Policies, Changes in Accounting Estimates and Errors."[113] In areas for which an IFRS does not exist, IAS 8 requires preparers to use judgment in developing accounting policies such that financial information is provided that, among other things, is relevant to the needs of users and the financial statements reliably reflect the economic substance of transactions. In applying such judgment, preparers must consider other guidance found in IFRS and, if no analogous guidance is found, the definitions, criteria and concepts in the IFRS conceptual framework. Finally, IAS 8 allows preparers to consider pronouncements of other standard-setting bodies to the extent that such guidance does not conflict with the concepts underlying IFRS. In areas that are not addressed by IFRS, we expect companies, consistent with IAS 1 and IAS 8, to provide full and transparent disclosure in the financial statements and operating and financial review and prospects disclosure[114] about the accounting policies selected and the effects of those policies on the IFRS financial statements.[115]

[112] See, for example, letter from Kurt S. Schulzke.

[113] See, for example, letters from Diageo plc ("Diageo") and Ernst & Young.

[114] See Item 5 of Form 20-F.

[115] For example, the embedded deposit component of certain types of insurance contracts written by an insurance company might be unbundled as a liability, or might not be unbundled and thus included in premium revenues and policy benefit expenses. Similarly, exploration and evaluation costs of a company in the extractive industries might be expensed as incurred, or capitalized as assets and subsequently depreciated. Similarly, common control mergers, reorganizations or recapitalizations might be reported at the historical cost basis of the entit(ies) involved or at a new basis in whole or in part.

Accounting for insurance contracts was the area most frequently cited by commenters as lacking complete standards, and some letters addressed extractive activities as well.[116] However, most of the commenters believed that, while IFRS 4 has not addressed many recognition and measurement items for insurance contracts, the rule amendments to allow the filing of IFRS financial statements without reconciliation to U.S. GAAP should not be delayed and noted that European investors are currently using financial statements prepared under IFRS by insurance companies to make financial decisions.[117] One commenter noted that even though the implementation of an insurance standard may occur after the Commission's acceptance of IFRS financial statements without reconciliation to U.S. GAAP, global practices in this area are sufficiently developed to not require reconciliation.[118] Another commenter indicated that IFRS 4 does provide minimum requirements for insurance contracts accounting and requires extensive disclosure of the accounting policies used and other matters so that investors can inform themselves. The commenter noted that in some areas these disclosures are more extensive than those called for under U.S. GAAP.[119] Another commenter indicated that although IFRS provides more options in the selection of accounting policies in some areas compared to U.S. GAAP, it also provides sufficient transparency of the options chosen such that the U.S. GAAP reconciliation does not provide added benefit.[120]

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[116] See, for example, letters from CFA Institute and Fitch Ratings.

[117] See, for example, letters from Allianz, Prudential, and PwC.

[118] See letter from AIG.

[119] See letter from ING.

[120] See letter from PwC.

In a few cases, commenters recommended that some or all insurance companies be excluded from the scope of the proposed amendments or that additional disclosure requirements be imposed because IFRS 4 may not provide the same level of transparency to investors as other IFRS applicable to other sectors of the financial services industry.[121] Another commenter said that once there is a robust IFRS on insurance, the lack of convergence should not further delay the elimination of the reconciliation.[122]

The IASB continues to make progress towards developing standards under IFRS for both insurance and extractive activities. As we accept and support the use of IFRS as issued by the IASB as a comprehensive basis of accounting for the preparation of financial statements included in filings with the Commission by foreign private issuers, we do not believe that the IFRS standards in these or other discrete areas should delay our full acceptance of IFRS as issued by the IASB without a U.S. GAAP reconciliation.

4. Other Considerations Relating to IFRS and U.S. GAAP Guidance

As discussed in the Proposing Release and in Section III.C.3. of this release, the Commission recognizes that an issuer that will not be required to reconcile its IFRS financial statements to U.S. GAAP may, nevertheless, pursuant to the application of IAS 8 look for guidance from Commission sources, such as rules and regulations, and including Accounting Series Releases ("ASRs") and Financial Reporting Releases ("FRRs").[123] In addition, such an issuer may look to the guidance that the Commission

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[121] See, for example, letters from ACLIG, American Academy of Actuaries, and GNAIE.

[122] See letter from Fitch Ratings.

[123] FRRs contain the Commission's views and interpretations relating to financial reporting. Prior to 1982, the Commission published its views and interpretations relating to financial reporting in Accounting Series Releases (ASRs). In FRR 1, Adoption of the Financial Reporting Release Series and Codification of Currently Relevant ASRs, the Commission codified certain previously issued ASRs on financial reporting matters.

staff provides in Staff Accounting Bulletins ("SABs"), and, if the company is engaged in certain lines of business, various Industry Guides.[124]

As described in the Proposing Release, we believe that a company that is no longer required to reconcile its IFRS financial statements to U.S. GAAP under the adopted amendments, and its auditor, must continue to follow any Commission guidance that relates to auditing issues.[125]

5. **First-Time Adopters of IFRS**

General Instruction G to Form 20-F provides for an accommodation that permits a foreign private issuer in its first year of reporting under "IFRS as published by the IASB" to file two years rather than three years of statements of income, changes in shareholders' equity and cash flows prepared in accordance with IFRS, with appropriate related disclosure in its registration statements or annual report filed with the Commission.[126] The amendments to accept financial statements prepared in accordance with IFRS as issued by the IASB that we are adopting today will apply to, among others, foreign private issuers that are able to rely on the accommodation to first-time adopters of IFRS

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[124] Staff Accounting Bulletins reflect the Commission staff's views regarding accounting-related disclosure practices. They represent interpretations and policies followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the federal securities laws. Industry Guides serve as expressions of the policies and practices of the Division of Corporation Finance. They are of assistance to issuers, their counsel and others preparing registration statements and reports, as well as to the Commission's staff. SABs and Industry Guides are not rules, regulations, or statements of the Commission. The Commission has neither approved nor disapproved these interpretations.

[125] In addition, foreign private issuers are required to have audits conducted in accordance with the Standards of the PCAOB (U.S.) regardless of the comprehensive basis of accounting they use to prepare their financial statements.

[126] See the 2005 Adopting Release.

contained in General Instruction G. As a conforming amendment, we are changing all references to "IFRS as published by the IASB" contained in General Instruction G to "IFRS as issued by the IASB," which has the same definition.

We proposed to amend General Instruction G to provide consistency with the proposed acceptance of financial statements prepared in accordance with IFRS as issued by the IASB without a U.S. GAAP reconciliation. Commenters were supportive of the conforming amendments as proposed, which we are adopting. Specifically, we are revising paragraph (a) of General Instruction G, "Omission of Certain Required Financial Statements," to provide for this. We also are revising paragraph (d) of General Instruction G, "Information on the Company," to refer to "*a* U.S. GAAP reconciliation" rather than "*the* U.S. GAAP reconciliation" to avoid any inference that a reconciliation would be required. In addition, we are revising paragraph (e) to eliminate the reference to the U.S. GAAP reconciliation, which will no longer be required.

Contained in paragraph (f) of General Instruction G are three options by which an issuer relying on the two-year accommodation could satisfy the interim financial statement requirements of Item 8.A.5 of Form 20-F in a transitional registration statement. One of these options allows for two years of audited financial statements and interim financial statements prepared in accordance with IFRS as issued by the IASB and reconciled to U.S. GAAP as required by Item 17(c) or 18 of Form 20-F. We proposed to eliminate the reconciliation requirement from this option in a manner consistent with the proposed amendments to Items 17 and 18. We did not receive extensive comment on this aspect of the proposal, and are eliminating the reconciliation requirement from this option as proposed. We are retaining the other options as they currently stand, and note that few if any issuers appeared to use the option requiring condensed U.S. GAAP financial information as a bridge between three years of previous GAAP financial statements and two years of IFRS interim information. We also note that issuers may continue to contact the staff if they are unable to comply with one of the options but have comparable information available.[127]

We are adopting as proposed the revisions to paragraph (h) of General Instruction G to eliminate the U.S. GAAP reconciliation requirement for the two most recent financial years for which financial statements prepared in accordance with IFRS as issued by the IASB are filed. We also are adopting the conforming amendment to Instruction 2.b of General Instruction G(h) to specify that disclosure on operating and financial review and prospects provided in response to Item 5 of Form 20-F need not refer to a reconciliation to U.S. GAAP. That revision is intended to clarify that disclosure should not refer to any U.S. GAAP reconciling information prepared for previous years.

As we noted in the Proposing Release, the accommodation to first-time adopters of IFRS contained in General Instruction G was scheduled to expire after the first financial year starting on or after January 1, 2007. That timing was intended to comport with the requirements of the EU Regulation relating to the transition to IFRS of European companies, although the accommodation is available to an eligible first-time adopter of IFRS from any jurisdiction. As many other countries are expected to adopt IFRS in the coming years, we proposed to extend the accommodation contained in General Instruction G to Form 20-F for five years to cover financial statements for the 2012 financial year or earlier that are included in annual reports or registration statements. We

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[127] See the Instruction to General Instruction G(f) of Form 20-F.

also solicited comment as to whether extending the accommodation for a longer or indefinite period would be appropriate.

All commenters addressing this matter supported extension of the accommodation contained in General Instruction G.[128] Rather than the five-year extension as proposed, most commenters believed that the accommodation should be extended indefinitely to provide an ongoing incentive for the adoption of IFRS as issued by the IASB in filings with the Commission.[129] We agree with this view, and therefore are extending the accommodation to first-time adopters of IFRS as issued by the IASB contained in General Instruction G for an indefinite period.

One accounting firm commented that temporary or permanent recognition or measurement differences between IFRS as issued by the IASB and local variations of IFRS may create difficulties in the ability of an issuer to rely on IFRS 1, "First-time Adoption of International Financial Reporting Standards."[130] The firm indicated that similar difficulties may arise if an entity that prepares its financial statements in accordance with a local GAAP that has converged with IFRS over time has not gone through the adoption process of IFRS 1 with appropriate transition adjustments. We recognize that a specific issuer may need to make a determination as to when it may rely on IFRS 1 as a first-time adopter of IFRS. We believe that an issuer may rely on the provisions of General Instruction G if and only if that issuer has not previously stated its

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[128] See, for example, letters from CAQ and Deloitte.

[129] See, for example, letters from BDO, CAQ, Deloitte, Ernst & Young, Grant Thornton, ICAEW, PwC, and Shell.

[130] See letter from Ernst & Young.

reliance on IFRS 1. Further, an issuer may only rely on the provisions of General Instruction G once.

Paragraph (i) of General Instruction G contains a special instruction that requires European issuers that prepare their financial statements using IFRS as adopted by the EU to reconcile their financial statements to IFRS as issued by the IASB to qualify for the accommodation. A U.S. GAAP reconciliation also is required. This paragraph presently applies only to issuers incorporated in an EU Member State, and would cease to be applicable after the 2007 financial year, at which time the mandatory switch to IFRS under the EU Regulation will be complete. Because the provisions will no longer be applicable after that time, we are deleting General Instruction G(i) of Form 20-F.[131]

6. Check Boxes on the Cover Page of Form 20-F

We proposed adding check boxes to the cover page of Form 20-F in which a filer would indicate whether the financial statements included in the filing have been prepared using U.S. GAAP, IFRS as issued by the IASB, or another basis of accounting. If, in response to this check box, an issuer has indicated that it uses a basis of accounting other than U.S. GAAP or IFRS as issued by the IASB, the issuer would then indicate in response to a subsequent check box whether it follows Item 17 or 18 to prepare its U.S. GAAP reconciliation.

We also proposed to revise the cover page of Form 20-F to require that issuers provide contact information for a person to whom Commission or staff enquiries may be

[131] The transition provisions discussed in Section III.A.3. relating to IFRS as adopted by the EU are available only for existing registrants, all of whom have already been first-time adopters of IFRS.

directed.[132] This information would include the name of an individual at the company or its legal counsel and the telephone, e-mail, and/or facsimile number, or other means by which that person can be contacted. Information provided on the Form 20-F in response to the proposed check boxes and the company contact information will constitute required disclosure that is subject to all applicable federal securities laws.

We did not receive extensive comment on these proposed revisions to Form 20-F. One commenter thought that the naming of individuals on the cover page would be viewed as sensitive because of potential exposure to litigation, and suggested that we obtain contact information by non-public means.[133] Because identification on the cover page does not expose that individual to additional liability or responsibility for the contents of the filing, we are adopting the amendments as proposed.[134] We also note that forms for domestic issuers already require contact information. Consistent with the usage throughout the amendments we are adopting today, however, the reference in the check boxes on the Form 20-F cover page has been changed to "IFRS as issued by the IASB" rather than the proposed "IFRS as published by the IASB."[135]

D. Regulation S-X

Regulation S-X contains, among other things, the form and content requirements for financial statements included in filings made with the Commission. It also includes many provisions that do not relate to U.S. GAAP, for example, requirements for auditor

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[132] An example of this enquiry would be a staff comment letter. Identifying the person on the cover page would not make that person an agent for service of process.

[133] See letter from Fried, Frank, Harris, Shriver & Jacobson (London), LLP.

[134] We will consider the possibility of including this information as an EDGAR header.

[135] EU companies using the transition provisions discussed in Section III.A.3. should check the "IFRS as issued by the IASB" box.

qualifications and reports. Regulation S-X will continue to apply to the filings of all foreign private issuers, including those who file financial statements prepared using IFRS as issued by the IASB without reconciliation to U.S. GAAP.[136]

1. Application of the Amendments to Rules 3-05, 3-09, and 3-16

Under Rules 3-05, 3-09 and 3-16 of Regulation S-X, an issuer, in certain circumstances, must include the financial statements of another entity in its filings.[137] We did not propose any changes to Rules 3-05, 3-09, and 3-16 of Regulation S-X, although the amendments that we are adopting to accept IFRS financial statements without a U.S. GAAP reconciliation will apply equally in their application. In response to our questions, respondents found the description in the Proposing Release of how the new amendments would apply to the preparation of financial statements provided under Rules 3-05, 3-09, and 3-16 to be sufficiently clear. We have summarized below the guidance provided in the Proposing Release.

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[136] Foreign private issuers that file financial statements prepared in accordance with IFRS as issued by the IASB will comply with IASB requirements for form and content within the financial statements, rather than with the specific presentation and disclosure provisions in Articles 4, 5, 6, 7, 9, and 10 of Regulation S-X.

[137] Rule 3-05 specifies the requirements for financial statements of businesses acquired or to be acquired. Rule 3-09 specifies the requirements for financial statements of unconsolidated majority-owned subsidiaries and 50 percent or less owned investments accounted for by the equity method. Both Rule 3-05 and 3-09 require financial statements when the applicable entity is significant to the issuer.

Rule 3-16 specifies the requirement for financial statements of affiliates whose securities collateralize an issue registered or being registered. The requirement to provide separate financial statements under Rule 3-16 is based upon whether or not the securities are a substantial portion (as defined) of the collateral for the class of securities registered or being registered.

a. Significance Testing

Requirements for significance testing are governed by the financial statements of the issuer.[138] Generally, a foreign private issuer that prepares its own financial statements using IFRS as issued by the IASB also would perform the significance tests under Rules 3-05, 3-09, and 3-16 using IFRS as issued by the IASB, regardless of the basis of accounting used by the other entity. If the significance thresholds under Rule 3-05, 3-09, or 3-16 are met, then the issuer must provide on a separate basis audited annual financial statements of the subject entity.

Some commenters pointed out that significance testing under Rule 1-02(w) has historically been performed using U.S. GAAP amounts and, notwithstanding the amendments we are adopting today, an issuer would still need to prepare a U.S. GAAP reconciliation for the purpose of significance testing even if such a reconciliation was no longer required to be disclosed.[139] In order to clarify our intent and to implement fully our acceptance from foreign private issuers of financial statements prepared in accordance with IFRS as issued by the IASB, we are revising Rule 1-02(w) to specify significance testing using amounts determined under IFRS as issued by the IASB when the issuer's financial statements are prepared in accordance with IFRS as issued by the IASB.

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[138] An entity is significant to the issuer if the issuer's investment in the entity exceeds 20% of the issuer's total assets, the entity's income (as defined) exceeds 20% of the issuer's corresponding income, or (for Rule 3-05 only) the entity's total assets exceed 20% of the issuer's total assets.

[139] See, for example, letter from CAQ.

b. Separate Historical Financial Statements of Another Entity Provided under Rule 3-05 or 3-09

Generally, the historical financial statement requirements for a foreign acquired business or investee under Rule 3-05 or 3-09 are governed by the status of that entity, and do not impose a higher presentation burden on a non-issuer entity than on an issuer. In applying the amendments, if the entity's audited financial statements are in accordance with IFRS as issued by the IASB, those financial statements will not be required to be reconciled to U.S. GAAP. For example, under Rule 3-05 both foreign private issuers and U.S. companies that acquire a "significant" foreign business will be permitted, under the adopted rules, to include the acquiree's financial statements prepared in accordance with IFRS as issued by the IASB without reconciliation to U.S. GAAP, in accordance with U.S. GAAP, or in accordance with another comprehensive basis of accounting reconciled to U.S. GAAP. The same is true for the financial statements of a "significant" foreign investee under Rule 3-09.

An issuer that includes financial statements for a foreign entity under Rule 3-05 or Rule 3-09 currently is permitted to omit the reconciliation to U.S. GAAP for that entity, regardless of the comprehensive basis of accounting in which that entity's financial statements are presented, if the significance of that entity, as defined in Rule 1-02(w) of Regulation S-X, does not exceed 30 percent of the registrant.[140] Although we are not amending Rules 3-05 or 3-09, we are revising Items 17(c)(2)(v) and (vi) of Form 20-F as proposed to clarify, respectively, that if the financial statements of a foreign entity filed under Rule 3-05 or 3-09 are presented in accordance with IFRS as issued by the IASB,

[140] See Item 17(c)(2)(v) and (vi) of Form 20-F.

those financial statements may omit the reconciling information specified under Item 17(c)(2)(i)-(iii) regardless of the significance of the entity.

2. Pro Forma Financial Statements Provided under Article 11

Article 11 of Regulation S-X requires issuers to prepare unaudited pro forma financial information that is intended to give effect as if a particular transaction, such as a significant recent or probable business combination, had occurred at the beginning of the financial period. Following the adoption of the amendments described in this release, requirements for pro forma financial information under Article 11 continue to be governed by the financial statements of the issuer rather than of the acquiree or other entity, as the pro forma results must be presented using the same basis of accounting as the issuer. Similarly, the rules that we are adopting do not impose a higher presentation burden on pro forma financial information than would be imposed on the historical financial statements of the issuer.

As proposed, we are not amending Article 11, although the amendments that we are adopting will affect the application of Article 11. Accordingly, a foreign private issuer using IFRS as issued by the IASB as its basis of accounting will not be required to reconcile to U.S. GAAP its pro forma financial information. Therefore, an issuer using IFRS as issued by the IASB will prepare the pro forma financial information by presenting its IFRS results and converting the financial statements of the business acquired (or to be acquired) into IFRS as issued by the IASB.

3. **Financial Statements Provided under Rule 3-10**

Rule 3-10 of Regulation S-X specifies financial statement requirements for issuers of guaranteed securities and guarantors.[141] Generally, under this rule both the issuer of the guaranteed security and the guarantor must follow the financial statement requirements of a registrant. If both entities are reporting foreign private issuers filing on Form 20-F, we will accept financial statements prepared in accordance with IFRS as issued by the IASB without reconciliation from each one under the rules we are adopting.[142]

Rule 3-10 permits modified reporting by subsidiary issuers of guaranteed securities and subsidiary guarantors. Separate financial statements need not be filed for subsidiaries meeting the applicable conditions contained in Rules 3-10(b) through 3-10(f). Instead, condensed consolidating financial information is presented in the parent company's reports in an additional audited footnote to the financial statements. In applying modified reporting under Rule 3-10, however, the reconciliation requirement would be based on the consolidated financial statements of the parent company, as under current rules. A parent issuer or guarantor that presents consolidated financial statements in accordance with IFRS as issued by the IASB would present the condensed consolidating financial information on the basis of IFRS as issued by the IASB, without reconciliation to U.S. GAAP. As noted in the Proposing Release, we do not believe that

[141] A guarantee of a registered security is itself a security, so a guarantor of a registered security is itself considered an issuer of a security. See Securities Act Section 2(a)(1).

[142] In this situation, when an issuer of a guaranteed security and a guarantor each file complete audited financial statements, the separate financial statements of each entity also may be on a different basis of accounting and, if not prepared under U.S. GAAP or IFRS as published by the IASB, must be reconciled to U.S. GAAP.

any substantive revision to Rule 3-10 is necessary to implement the acceptance of financial statements prepared using IFRS as issued by the IASB without reconciliation.

As a conforming amendment, we did propose to revise the reference to the reconciliation to U.S. GAAP of the condensed consolidating financial information contained in Rule 3-10 to clarify that we would accept the condensed consolidating financial information without a U.S. GAAP reconciliation if it is prepared using IFRS as issued by the IASB. Commenters generally agreed that this change was sufficient, and we are adopting it as proposed.[143]

4. Conforming Amendment to Rule 4-01

Rule 4-01 of Regulation S-X sets out the general requirements for financial statements included in Commission filings and requires that foreign private issuers include an Item 18 reconciliation if they use a basis of accounting other than U.S. GAAP, except as otherwise stated in the applicable form.[144] In order to implement fully the proposed acceptance of financial statements prepared using IFRS as issued by the IASB and to avoid ambiguity for issuers, we proposed to revise Rule 4-01 to clarify that financial statements of foreign private issuers may be prepared using IFRS as issued by the IASB without reconciliation to U.S. GAAP. Commenters generally agreed that this approach was sufficient, and we are adopting the revision to Rule 4-01 as proposed.

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[143] See, for example, letters from Ernst & Young and UBS.

[144] As noted above, Item 17 reconciliation is permitted in various circumstances.

E. Application of the Amendments to other Forms, Rules and Schedules

1. Conforming Amendments to Securities Act Forms F-4 and S-4

In order to implement fully our acceptance of financial statements prepared in accordance with IFRS as issued by the IASB without reconciliation to U.S. GAAP,[145] we proposed to make certain conforming amendments to references to the U.S. GAAP reconciliation that are contained in Securities Act Forms F-4 and S-4.[146]

Based on the comments received, our acceptance of IFRS financial statements from foreign private issuers in both Exchange Act and Securities Act filings appears to be well understood. Many of the commenters that responded to the questions we posed indicated that the proposed changes were sufficiently clear, and did not believe that any other rules or forms would need to be specifically amended to permit the filing of IFRS financial statements without a reconciliation to U.S. GAAP.[147] A few commenters thought that various other forms, rules and regulations would require modification, and set forth the changes they thought would be necessary in their comment letters.[148] After considering the suggestions, we continue to believe that the proposed revisions to other rules and forms were sufficiently clear, and therefore we do not believe additional revisions are necessary and are adopting the revisions proposed.

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[145] Form 20-F serves as the combined registration statement and annual report for foreign private issuers under the Exchange Act, and also sets forth the disclosure requirements for registration statements filed by foreign private issuers under the Securities Act.

[146] Form F-4 is the registration statement for securities of foreign private issuers in certain business combinations, and Form S-4 is the registration statement for securities of domestic issuers issued in business combinations.

[147] See, for example, letters from UBS and Deutsche Bank.

[148] See, for example, letters from Ernst & Young and Cleary.

We therefore are adopting as proposed the revisions to the references to the U.S. GAAP reconciliation contained in Items 10, 12 and 17 of Form F-4 to make that form consistent with the amendments we are adopting to Items 17(c) and 18(b) of Form 20-F to indicate that the referenced U.S. GAAP reconciliation would be required only for financial statements prepared using a basis of accounting other than U.S. GAAP or IFRS as issued by the IASB. We also are adopting as proposed the analogous revision to the reference to the U.S. GAAP reconciliation contained in the instruction to Item 17 of Form S-4.

2. **Conforming Amendment to Rule 701**

Rule 701 under the Securities Act provides an exemption from registration for offers and sales made under certain compensatory benefit plans. The exemption generally is not available to issuers that have a reporting obligation under the Exchange Act and does not involve the filing of any information with the Commission. However, an issuer conducting an offering under Rule 701 must deliver to investors certain information, including financial statements, if more than $5 million in securities are sold over a 12-month period. For foreign private issuers, financial statements provided under Rule 701 must include a reconciliation under Item 17 of Form 20-F if they are not prepared in accordance with U.S. GAAP. To implement fully our acceptance of IFRS financial statements without reconciliation to U.S. GAAP, we proposed to amend Rule 701 to clarify that a foreign private issuer that conducts an offering under Rule 701 and prepares its financial statements using IFRS as issued by the IASB should not be required to present a U.S. GAAP reconciliation. Commenters were supportive of the revision to

Rule 701 as a means of facilitating stock ownership and compensatory plans for employees of foreign private issuers,[149] which we are adopting as proposed.

3. Schedule TO and Schedule 13E-3

Schedule TO, the tender offer statement under the Exchange Act, and Schedule 13E-3, the transaction statement under Section 13(e) of the Exchange Act, both contain a reference to U.S. GAAP reconciliation in accordance with Item 17 of Form 20-F.

Respondents who commented on the issue, including accounting firms and foreign private issuers, generally felt that changes to Schedule TO and Schedule 13E-3 were not necessary where changes to Item 17 of Form 20-F were made.[150] Other accounting firms and law firms suggested additional specific revisions to those schedules to clarify that no reconciliation or discussion of differences from U.S. GAAP would be necessary if financial statements that complied with IFRS as issued by the IASB were included.[151]

The amendments we are adopting to Form 20-F to implement our acceptance of IFRS financial statements without reconciliation to U.S. GAAP are intended to apply to all Securities Act and Exchange Act filings that reference the U.S. GAAP reconciliation requirement contained in Item 17 or Item 18 of Form 20-F. We therefore are not adopting any revision to Schedule TO or Schedule 13E-3.

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[149] See, for example, letter from Cleary.

[150] See, for example, letters from PwC, Deloitte, Deutsche Bank, and UBS.

[151] See, for example, letters from Cleary and Ernst & Young.

4. **Small Business Issuers**

Under rules currently in effect, a Canadian foreign private issuer that qualifies as a small business issuer under Regulation S-B may elect to provide disclosure in its registration statements and annual reports, in compliance with forms based on Regulation S-B rather than on Form 20-F.[152] Regulation S-B describes the financial statement requirements for a small business issuer, which must be prepared in accordance with U.S. GAAP or, if filed by a foreign private issuer that also is a small business issuer, reconciled to U.S. GAAP in accordance with the requirements of Items 17 or 18 of Form 20-F, as appropriate.[153]

We recently adopted amendments under which disclosure requirements for smaller companies previously contained in Regulation S-B are integrated into Regulation S-K[154] and smaller reporting companies that file annual reports on Form 20-F or a Securities Act registration statement based on Form 20-F will be able to file financial statements prepared using U.S. GAAP, IFRS as issued by the IASB without a U.S. GAAP reconciliation, or another comprehensive basis of accounting with a U.S. GAAP reconciliation. If that issuer chooses to file a registration statement or annual report on a domestic form based on Regulation S-K, financial statements prepared using U.S. GAAP would be required. Because we adopted these amendments for smaller company

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[152] 17 CFR 228. A "small business issuer" is defined in Item 10 of Regulation S-B (17 CFR 228.10) as a company that (i) has revenues of less than $25,000,000; (ii) is a U.S. or Canadian issuer; and (iii) is not an investment company and is not an asset-backed issuer; and (iv) if a majority owned subsidiary, the parent corporation is also a small business issuer. An entity that meets all of these criteria is not a small business issuer if it has a public float (defined as the aggregate market value of the issuer's outstanding voting and non-voting common equity held by non-affiliates) of $25,000,000 or greater.

[153] See Notes 1 and 2 to Item 310 of Regulation S-B.

[154] See "Smaller Reporting Company Regulatory Relief and Simplification," Release No. 33-8819 (July 5, 2007), available at http://www.sec.gov/rules/proposed/2007/33-8819.pdf.

regulatory simplification, we are not making any revisions to Regulation S-B as part of our final rules to accept IFRS financial statements from foreign private issuers.

In the Proposing Release we solicited comment asking whether we should permit the use in Form 1-A of financial statements prepared in accordance with IFRS as issued by the IASB without a reconciliation.[155] Presently, a Canadian issuer that files a Form 1-A may use unaudited financial statements reconciled to U.S. GAAP. We received several comment letters noting that it would be appropriate to make such an amendment to Form 1-A once Canada officially adopts IFRS,[156] with one commenter indicating that requiring a reconciliation could make a Regulation A offering cost prohibitive for a Canadian issuer that did not use U.S. GAAP.[157] Some issuers supported immediate revision to Form 1-A in this way as a means of furthering our acceptance of IFRS.[158] While we fully support the use of financial statements prepared in accordance with IFRS as issued by the IASB in filings with the Commission by foreign private issuers, we are not at this time revising Form 1-A as it appears that Canadian issuers filing on that form would not be able to avail themselves of the adopted amendments until Canadian accounting standards setters permit the use of IFRS, as discussed below in Section III.F.

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[155] Form 1-A is the Securities Act form for offerings made under Regulation A, a conditional exemption from Securities Act registration for securities offerings not exceeding $5 million. Regulation A may be used by eligible U.S. or Canadian issuers that do not have a reporting obligation under the Exchange Act.

[156] See, for example, letter from CAQ.

[157] See letter from CAQ.

[158] See, for example, letters from BP and Deloitte.

F. Application to Filings under the Multijurisdictional Disclosure System

Certain Canadian foreign private issuers file registration statements and annual reports under the Multijurisdictional Disclosure System ("MJDS"), which permits eligible Canadian companies to use their disclosure documents prepared in accordance with Canadian requirements in filings with the Commission. Certain filings under the MJDS are not required to contain a reconciliation to U.S. GAAP.[159] A U.S. GAAP reconciliation is required, however, in registration statements and annual reports on Form 40-F[160] and registration statements on Form F-10,[161] each when used for common equity securities, securities convertible into common equity securities and other securities not rated investment grade. Canadian issuers that participate in the MJDS generally use either Canadian GAAP, with a U.S. GAAP reconciliation when required, or U.S. GAAP in their filings with the Commission.

Canadian accounting standards setters have indicated that they expect to permit the use of IFRS as issued by the IASB as the basis of accounting for all Canadian public companies. The date for application of IFRS in Canada has not yet been confirmed, but is expected to be 2011.[162] A number of commenters therefore have felt that it would be too early to describe acceptance of IFRS by a Canadian company before Canadian

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[159] A U.S. GAAP reconciliation is not required under Form F-7 relating to rights offers, Forms F-8 and F-80 for exchange offers and business combinations, Form F-9 relating to investment grade securities, and Form 40-F when used as an annual report relating to an issuer's Section 15(d) reporting obligations for any of the these offerings or a Section 13(a) reporting obligation relating to investment grade securities.

[160] 17 CFR 249.240f.

[161] 17 CFR 239.40.

[162] See letter from Canadian Accounting Standards Board.

requirements allow the use of IFRS.[163] Canadian issuers supported the acceptance of IFRS financial statements without reconciliation, and urged that it should apply equally to MJDS filers.[164]

We are not adopting any revisions to the MJDS forms. As described in the Proposing Release, we do not believe any amendments to Forms 40-F and F-10 would be necessary to permit an MJDS issuer to file financial statements prepared in accordance with IFRS as issued by the IASB without reconciliation. Some commenters shared this view, as Forms 40-F and F-10 already contain a cross-reference to the U.S. GAAP reconciliation requirement under Items 17 and 18 of Form 20-F which are being amended.[165]

G. Periodic Reporting Deadlines for Foreign Private Issuers

In the Proposing Release we solicited comment on periodic reporting due dates for foreign private issuers, including whether it would be appropriate to shorten the current six-month deadline for annual reports on Form 20-F if a reconciliation were not required. We received significant feedback from commenters raising a number of considerations applicable to reporting deadlines for foreign private issuers that are independent of the reconciliation requirement, including annual report deadlines in home jurisdictions and time needed for language translation, among others.[166] Most commenters indicated that in no event should the Form 20-F deadline be earlier than in

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[163] See, for example, letters from PwC and Ernst & Young.

[164] See letter from Manulife Financial.

[165] See, for example, letter from Deloitte.

[166] See, for example, letters from HSBC, ING, and Sullivan & Cromwell.

an issuer's home jurisdiction, and ideally the Form 20-F should be due after the home country filing deadline.[167] A number of commenters support consideration of deadlines for Form 20-F in a separate rulemaking.[168] Given the many considerations that may affect our consideration of periodic reporting deadlines, which may apply to foreign private issuers generally, we believe it is appropriate to consider the issue in a separate rulemaking initiative so as to obtain broader public input.

H. Quality Control Issues

As part of the quality control standards of the PCAOB, Appendix K applies to PCAOB registered firms that are associated with international firms and establishes procedures to enhance the quality of SEC filings by registrants whose financial statements are audited by foreign associated firms.[169] Appendix K procedures require that the international organization or individual foreign associated firm of PCAOB registered firms adopt policies and procedures that address the review of filings by persons knowledgeable about U.S. GAAP, U.S. generally accepted auditing standards, and independence matters. We did not propose and are not adopting any amendments to our rules that relate to the continued need for compliance with standards of the PCAOB, including Appendix K. However, in the Proposing Release we did provide commenters the opportunity to address compliance with PCAOB standards, including Appendix K, in the context of the proposed acceptance of IFRS financial statements without a U.S.

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[167] See, for example, letters from European Association of Listed Companies and Union of Issues Quoted in Europe UNIQUE, New York City Bar, and ING.

[168] See, for example, letters from Ernst & Young, and LIBA.

[169] The text of Appendix K is available at: http://www.pcaobus.org/Standards/Interim_Standards/Quality_Control_Standards/SECPS_1000.08_Appendicies_bookmarks.pdf#nameddest=k.

GAAP reconciliation. In particular, we asked whether we should be concerned about PCAOB registered firm requirements to have persons knowledgeable in U.S. auditing and independence standards review IFRS financial statements filed with the Commission.

Several commenters, including those from registered public accounting firms, pointed out that since the Appendix K procedures were adopted in 1999 the concerns that it sought to address have been mitigated by developments in the global financial reporting environment.[170] Because of these changes, they believed that it is no longer necessary for the Appendix K procedures to require the involvement of a filing reviewer. Commenters also pointed out that if U.S. GAAP information were no longer required, then a primary focus of Appendix K filing reviews would no longer apply.[171] However, some commenters believe that Appendix K procedures would still be useful because U.S. auditing standards, independence rules and SEC rules still would apply.[172] We understand that the PCAOB is aware of this matter.[173]

IV. PAPERWORK REDUCTION ACT

A. Background

The final amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[174] We are submitting the

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[170] See, for example, letters from CAQ, KPMG, PwC, and Deloitte.

[171] See, for example, letter from KPMG.

[172] See, for example, letters from ICAEW and Syngenta.

[173] The audit implications of IFRS financial statements in SEC filings was a matter on the agenda of the PCAOB Standing Advisory Group Meeting on October 18, 2007. See http://www.pcaobus.org/News_and_Events/Events/2007/10-18.aspx. A PCAOB briefing paper on the subject is available at: http://www.pcaobus.org/Standards/Standing_Advisory_Group/Meetings/2007/10-18/IFRS_Briefing_Paper.pdf.

[174] 44 U.S.C. 3501 et seq.

amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[175] The titles for the affected collections of information are:

(1) "Form 20-F" (OMB Control No. 3235-0288);

(2) "Form F-1" (OMB Control No. 3235-0258);

(3) "Form F-4" (OMB Control No. 3235-0325);

(4) "Form S-4" (OMB Control No. 3235-0324); and

(5) "Rule 701" (OMB Control No. 3235-0522).

These forms were adopted pursuant to the Exchange Act and the Securities Act and set forth the disclosure requirements for annual reports and registration statements filed by foreign private issuers. The hours and costs associated with preparing, filing and sending these forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The amendments will allow a foreign private issuer that prepares its financial statements in accordance with IFRS as issued by the IASB to file those financial statements in its registration statements and periodic reports filed with the Commission without reconciliation to U.S. GAAP. These amendments are collections of information for purposes of the Paperwork Reduction Act. For purposes of this Paperwork Reduction Analysis, these amendments will result in a decrease in the hour and cost burden calculations. We believe these amendments will eliminate potential burdens and costs for

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[175] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

foreign issuers that use IFRS. The disclosure will be mandatory. There will be no mandatory retention period for the information disclosed, and responses to the disclosure requirements will not be kept confidential.

We are adopting the amendments substantially as proposed, and do not believe any differences between the proposed and adopted amendments will impact our burden estimates for purposes of the Paperwork Reduction Act. We solicited comments on the Paperwork Reduction Analysis included in the Proposing Release. The few commenters that addressed the issue thought, based on their experience in preparing their U.S. GAAP reconciliation, that we had underestimated the number of hours by which registrant burdens would be reduced if the amendments were adopted.[176] We note, however, that the time required to prepare a U.S. GAAP reconciliation may vary greatly between issuers. We are not changing our estimates of the percentage of incremental decrease in the burden resulting from our amendments. Our Paperwork Reduction Analysis for Form F-1 and Rule 701 is unchanged from the Proposing Release. However, we are revising our estimates for Forms 20-F, F-4, and S-4. For Form 20-F, we have revised our estimate of the number of filers affected by the amendments from 110 to 140. For Form F-4, the total burden hour estimates were revised from 24,503 hours to 24,599 hours subsequent to the issuance of the Proposing Release. We are revising our analysis for Form F-4 accordingly, although we are not changing our estimate of the percentage of incremental decrease in burden that we expect to result from the adopted amendments. For Form S-4, we are revising the analysis to reflect an assumption that 25% percent of the burden to prepare financial statements for that form is borne by the registrant and 75% percent is

[176] See, for example, letters from Diageo and Syngenta.

borne by outside professionals retained by the registrant at an average cost of $400 per hour.

For purposes of the Paperwork Reduction Act, we estimate that the incremental decrease in the paperwork burden for all foreign private issuers that use IFRS and issuers that acquire foreign private issuers that use IFRS will be approximately 4,945 hours of company time and approximately $5,934,000 for the services of outside professionals. We estimated the average number of hours each entity spends completing the forms and the average hourly rate for outside professionals. That estimate includes the time and the cost of in-house preparers, reviews by executive officers, in-house counsel, outside counsel, independent auditors and members of the audit committee.[177] Our estimates of the number of affected foreign private issuers are based on the number of recent filings received from issuers that we believe may be immediately eligible to rely on the adopted amendments.

B. Burden and Cost Estimates Related to the Accommodation

1. <u>Form 20-F</u>

We estimate that currently foreign private issuers file 942 Form 20-Fs each year. We assume that 25% of the burden required to produce the Form 20-Fs is borne internally by foreign private issuers, resulting in 619,601 annual burden hours borne by foreign private issuers out of a total of 2,478,404 annual burden hours. Thus, we estimate that 2,631 total burden hours per response currently are required to prepare the Form 20-

[177] In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $400 as the cost to companies for the services of outside professionals retained to assist in the preparation of these disclosures. For Securities Act registration statements, we also consider additional reviews of the disclosure by underwriter's counsel and underwriters.

F. We further assume that 75% of the burden to produce the Form 20-Fs is carried by outside professionals retained by foreign private issuers at an average cost of $400 per hour, for a total cost of $743,520,600.

We estimate that approximately 140 companies that file Form 20-F may be currently impacted by the amendment.[178] We expect that the amendment would cause those foreign private issuers to have fewer burden hours. We estimate that for each of the companies affected by the proposal, there would occur a decrease of 5% (132 hours) in the number of burden hours required to prepare their Form 20-F, for a total decrease of 18,480 hours. We expect that 25% of these decreased burden hours (4,620 hours) will be saved by foreign private issuers. We further expect that 75% of these decreased burden hours (13,860 hours) will be saved by outside firms, at an average cost of $400 per hour, for a total of $5,544,000 in decreased costs to the respondents of the information collection.

Thus, we estimate that the amendment to Form 20-F will decrease the annual burden borne by foreign private issuers in the preparation of Form 20-F from 619,601 hours to 614,981 hours. We further estimate that the amendment will decrease the total annual burden associated with Form 20-F preparation to 2,459,924 burden hours, which will decrease the average number of burden hours per response to 2,611. We further estimate that the amendment will decrease the total annual costs attributed to the preparation of Form 20-F by outside firms to $737,977,200.

[178] We are using this figure for purposes of the Paperwork Reduction Analysis based on the number of Form 20-Fs that were filed with IFRS financial statements during the last twelve months. As additional jurisdictions adopt IFRS as their basis of accounting in the future, the number of issuers that use IFRS is expected to increase.

2. Form F-1

We estimate that currently foreign private issuers file 42 registration statements on Form F-1 each year. We assume that 25% of the burden required to produce a Form F-1 is borne by foreign private issuers, resulting in 18,999 annual burden hours incurred by foreign private issuers out of a total of 75,996 annual burden hours. Thus, we estimate that 1,809 total burden hours per response currently are required to prepare a registration statement on Form F-1. We further assume that 75% of the burden to produce a Form F-1 is carried by outside professionals retained by foreign private issuers at an average cost of $400 per hour, for a total cost of $22,798,800.

We estimate that currently approximately five companies that file registration statements on Form F-1 will be impacted by the amendment.[179] We expect that the proposed amendment will cause those foreign private issuers to have fewer burden hours. We estimate that each company affected by the amendment would have a 5% decrease (90.45 hours) in the number of burden hours required to prepare their registration statements on Form F-1, for a total decrease of 452 hours. We expect that 25% of these decreased burden hours (113 hours) will be saved by foreign private issuers. We further expect that 75% of the decreased burden hours (339 hours) will be saved by outside firms, at an average cost of $400 per hour, for a total of $135,600 in decreased costs to the respondents of the information collection.

Thus, we estimate that the amendment to Form 20-F will decrease the annual burden incurred by foreign private issuers in the preparation of Form F-1 from 18,999

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[179] This figure is based on our estimate of the number of Form F-1s that were filed with IFRS financial statements during the 2006 calendar year.

hours to 18,886 hours. We further estimate that the amendment will decrease the total annual burden associated with Form F-1 preparation to 75,544 burden hours, which will decrease the average number of burden hours per response to 1,799. We further estimate that the amendment will decrease the total annual costs attributed to the preparation of Form F-1 by outside firms to $22,663,200.

3. **Form F-4**

We estimate that currently foreign private issuers file 68 registration statements on Form F-4 each year. We assume that 25% of the burden required to produce a Form F-4 is borne internally by foreign private issuers, resulting in 24,599 annual burden hours incurred by foreign private issuers out of a total of 98,396 annual burden hours. Thus, we estimate that 1,447 total burden hours per response currently are required to prepare a registration statement on Form F-4. We further assume that 75% of the burden to produce a Form F-4 is carried by outside professionals retained by foreign private issuers at an average cost of $400 per hour, for a total cost of $29,518,800.

We estimate that currently approximately 5 companies that file registration statements on Form F-4 will be impacted by the amendment.[180] We expect that the amendment will cause those foreign private issuers to have fewer burden hours. . We estimate that each of the affected companies will have a decrease of 5% (72 hours) in the number of burden hours required to prepare their registration statements on Form F-4, for a total decrease of 360 hours. We expect that 25% of these decreased burden hours (90 hours) will be saved by foreign private issuers. We further expect that 75% of the

[180] This figure is based on our estimate of the number of Form F-4s that were filed with IFRS financial statements during the 2006 calendar year.

decreased burden hours (270 hours) will be saved by outside firms at an average cost of $400 per hour, for a total of $108,000 in decreased costs to the respondents of the information collection.

Thus, we estimate that the amendment to Form 20-F will decrease the annual burden incurred by foreign private issuers in the preparation of Form F-4 from 24,599 hours to 24,509 hours. We further estimate that the amendment will decrease the total annual burden associated with Form F-4 preparation to 98,036 burden hours, which will decrease the average number of burden hours per response to 1,441. We further estimate that the amendment will decrease the total annual costs attributed to the preparation of Form F-4 by outside firms to $29,410,800.

4. **Form S-4**

When a domestic issuer files a registration statement on Form S-4 for the acquisition of a foreign business, the domestic issuer may be required to include the financial statements of the acquired business in the Form S-4. If those financial statements are prepared using a basis of accounting other than U.S. GAAP, the domestic issuer must provide a reconciliation to U.S. GAAP, unless a U.S. GAAP reconciliation is unavailable or not obtainable without unreasonable cost or expense.

We estimate that issuers file 619 registration statements on Form S-4 each year. We estimate that 4,065 total burden hours per response currently are required to prepare a registration statement on Form S-4. We assume that 25% of the burden required to prepare the financial statements for use in a Form S-4 is borne by the registrant, resulting in 629,059 annual burden hours incurred by registrants out of a total of 2,516,236 annual burden hours. We further assume that 75% of the burden to produce financial statements for a Form S-4 is carried by outside professionals retained by the issuer at an average cost of $400 per hour for a total cost of $754,871,000.

We estimate that currently approximately 6 registration statements filed on Form S-4 will contain the financial statements of a foreign target that will be impacted by the amendment.[181] We expect that the amendment will cause registrants that file Form S-4 registration statements to have fewer burden hours. We estimate that for each of these registrants, there will be a decrease of 2% (81 hours) in the number of burden hours required to prepare their registration statements on Form S-4, for a total decrease of 486 hours.[182] We expect that 25% of these decreased burden hours (122 hours) will be saved by issuers. We further expect that 75% of the decreased burden hours (364 hours) will be saved by outside professionals at an average cost of $400 per hour for a total of $145,600 in decreased costs to the respondents of the information collection.

Thus, we estimate that the amendment will decrease the annual burden incurred by issuers in the preparation of Form S-4 from 629,059 hours to 628,937 hours. We further estimate that the amendment will decrease the total annual burden associated with Form S-4 preparation to 2,515,748 burden hours, which will decrease the average number of burden hours per response to 4,064. We further estimate that the amendment will decrease the total annual costs attributed to the preparation of Form S-4 by outside firms to $754,725,400.

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[181] This figure is based on our estimate of the number of Form S-4s that were filed during the 2006 calendar year that contained IFRS financial statements.

[182] We estimate the burden decrease for purposes of this Paperwork Reduction Analysis would be less for Form S-4 than for other forms described in this section because, in the case of Form S-4, the registrant is obtaining the U.S. GAAP reconciliation from the foreign private issuer. Further, the registrant is not required to provide the reconciliation if it is unavailable or unobtainable without unreasonable cost or expense.

5. Rule 701

Rule 701 provides an exemption from registration for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation. Issuers conducting employee benefit plan offerings in excess of $5 million in reliance on Rule 701 are required to provide employees covered by the plan with certain disclosures, including financial statement disclosures. This disclosure is a collection of information.

We estimate that currently 300 issuers provide information under Rule 701, and that the estimated number of burden hours per respondent is two. Therefore, we estimate an aggregate of 600 burden hours per year. We believe that the reduction in burden hours caused by the rules will be insignificant. Therefore, we do not believe the rules will alter current burden estimates associated with Rule 701.

V. COST-BENEFIT ANALYSIS

The adopted amendments provide foreign private issuers the option of not including a U.S. GAAP reconciliation in their Commission filings if their financial statements comply with IFRS as issued by the IASB. We are not amending the current reconciliation requirements for foreign private issuers that prepare their financial statements using a basis of accounting other than IFRS as issued by the IASB.

The amendments apply to a foreign private issuer's financial statements contained in annual reports and registration statements on Form 20-F as well as to financial statements included in Securities Act registration statements filed by foreign private issuers or, when applicable, included in a registration statement or reported pursuant to Rules 3-05, 3-09 or 3-16 of Regulation S-X. We also are adopting a conforming amendment to Rule 701, which provides an exemption from Securities Act registration for securities offered in certain employee benefit plans, to clarify that a foreign private issuer conducting an offering in excess of $5 million in reliance on that rule may furnish investors with financial statements prepared using IFRS as issued by the IASB without reconciliation.

The amendments are available to any foreign private issuer that files financial statements that comply with IFRS as issued by the IASB, whether voluntarily or in accordance with the requirements of the issuer's home country regulator or exchange on which its securities are listed.

We recognize that the acceptance of financial statements that comply with IFRS as issued by the IASB without reconciliation does not affect all foreign private issuers equally, as there are some issuers that will continue to find it more attractive to reconcile their financial statements to U.S. GAAP or to continue to prepare financial statements in U.S. GAAP. Approximately 140 of approximately 1,100 foreign private issuers currently file financial statements in which they represent in the footnotes to the financial statements that the financial statements either comply with IFRS as issued by the IASB or a jurisdictional variation of IFRS where such jurisdictional variation may not prevent compliance with IFRS as issued by the IASB. If these issuers are able to state, and their auditors are able to opine, that the financial statements comply with IFRS as issued by the IASB, then these issuers will be able to file their IFRS financial statements without reconciliation to U.S. GAAP. In coming years, as more countries adopt IFRS as their basis of accounting or permit companies to use IFRS as issued by the IASB as their basis of accounting, we believe that the number of foreign private issuers that will be eligible to rely on the adopted amendments will increase. For instance, approximately 80 foreign private issuers from Israel[183] and approximately 500 from Canada[184] file financial statements with the Commission and both of these countries have announced moves to IFRS reporting. Additionally, foreign private issuers incorporated in other jurisdictions would be able to take advantage of the adopted amendments by preparing financial statements in accordance with IFRS as issued by the IASB for purposes of Commission filings. Finally, approximately 40 additional foreign private issuers that are incorporated in jurisdictions that have moved to IFRS historically have included in their filings with the Commission financial statements prepared using U.S. GAAP. Some of these issuers also may be in a position to file financial statements that comply with IFRS as issued by the IASB without a U.S. GAAP reconciliation under the amendments.[185]

Although few commenters provided quantitative data to support their views,[186] the Commission has revised the proposed amendments in response to the concerns that the commenters expressed. The Commission expects that the adopted amendments will result in the following benefits and costs to investors.

A. Expected Benefits

Our acceptance of financial statements prepared using IFRS as issued by the IASB is expected to help foster the use of IFRS as issued by the IASB as a way of

[183] Israel Accounting Standard No. 29 "Adoption of International Financial Reporting Standards," stipulating that Israeli public companies that prepare their primary financial statements in accordance with Israeli GAAP are obliged to adopt IFRS unreservedly for years starting on January 1, 2008.

[184] See "Implementation Plan for Incorporating International Financial Reporting Standards into Canadian GAAP," available at http://www.acsbcanada.org/client_asset/document/3/2/7/3/5/document_8B452E12-FAF5-7113-C4CB8F89B38BC6F8.pdf?sfgdata=4.

[185] The figures contained in this paragraph are per staff estimates based on the jurisdiction of the filers.

[186] See, for example, letters from Diageo and Syngenta.

moving to a single set of globally accepted accounting standards, which we believe will have positive effects on investors. Financial statements prepared using a common, high-quality set of accounting standards are expected to help investors better understand and compare investment opportunities as compared to financial statements prepared under differing sets of national accounting standards. Without a common standard, global investors are likely to incur the extra costs of time and effort to understand financial statements reported using different bases of accounting so that they can compare opportunities. While financial statements filed with the Commission and prepared under a set of home country accounting standards have included a reconciliation to U.S. GAAP, this reconciliation is not a complete substitute for comparing financial statements prepared using U.S. GAAP.

The benefits of a single set of globally accepted, high-quality accounting standards that improve financial statement comparability may be diminished if there is a wide latitude in application of IFRS that results in inconsistent reporting. This latitude potentially harms investors' ability to compare financial statements across companies and potentially allows more opportunity for obfuscatory reporting as noted by one commenter.[187] As noted in Section II., the Commission and its staff continue to be involved in efforts to promote consistent and faithful application of IFRS. We believe, based on the staff's review of IFRS financial statements, that financial statements prepared in accordance with IFRS as issued by the IASB are of sufficient quality. Investors therefore should be able to understand and work with them, a situation which

[187] See letter from Maverick.

will contribute to the use of globally accepted accounting standards, likely resulting in a more efficient allocation of capital.

The amendments are expected to increase the likelihood of realizing the net benefits to investors of the use of globally accepted accounting standards. This benefit is due to potential network effects of the proposed amendments: the more issuers that use IFRS as issued by the IASB, the greater the incentive for other issuers to do so. The utility for investors of a set of accounting standards increases as the number of issuers using it increases. For example, a foreign private issuer may be concerned about public perception costs, as it may be perceived as being the outlier if companies with which it competes for capital report using a different basis of accounting. The perception costs of being an outlier in such a case are likely to be smaller if a critical mass of issuers with whom the issuer competes for capital (such as those in its industry sector) report pursuant to the same set of standards, such as IFRS as issued by the IASB. In such situations, the use of IFRS as issued by the IASB is expected to make it more efficient for investors to analyze an issuer's financial results in comparison with the results of others with whom that issuer competes for capital. At the same time, the issuers reporting in home country GAAP may experience higher perception costs if a critical mass of comparable issuers adopts IFRS as issued by the IASB.

We believe that issuers will be affected by the amendments in a number of ways, including needing fewer resources to prepare Commission filings.[188] Issuers that

[188] For purposes of the Paperwork Reduction Analysis, as described above, we have estimated that the incremental decrease in the paperwork burden for all foreign private issuers that currently use IFRS and issuers that acquire foreign private issuers that currently use IFRS would be approximately 3,943 hours of company time and approximately $4,731,120 for the services of outside professionals. For purposes of these calculations, we estimated the average number of hours each entity spends completing the forms and the average hourly rate for outside professionals, including the time and the cost of in-house preparers,

commented on our estimates of the cost of reconciliation believe we underestimated these costs suggesting that accepting IFRS financial statements without a U.S. GAAP reconciliation will result in greater than expected savings to issuers.[189] Investors will benefit to the extent that an issuer relying on the amendments can reallocate its cost savings from not preparing a reconciliation to U.S. GAAP or possibly a second set of financial statements in U.S. GAAP to higher earning opportunities and not suffer an even greater increase in its cost of capital relative to the cost of reconciling to U.S. GAAP.

The amendments are expected to facilitate capital formation by foreign companies in the United States capital markets. Our amendments to accept IFRS financial statements without reconciliation to U.S. GAAP are expected to reduce regulatory burdens for foreign private issuers that rely on them, thereby lowering the information disclosure preparation cost of raising capital in the United States for those issuers. We believe that foreign private issuers therefore may be more likely to enter or remain in the U.S. capital markets. To the extent our acceptance of IFRS financial statements without reconciliation encourages foreign private issuers to enter or remain in the U.S. capital markets, investors also will benefit from the protections of the U.S. regulatory and disclosure system relative to the protections they may receive if purchasing those securities overseas and the ease of investing in these opportunities in the United States.

The expected benefits of a single set of high quality accounting standards may be mitigated if the standards were not to continue to be of a high quality. Investors may face uncertainty about the future quality of IFRS. Factors that could affect the quality of IFRS

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reviews by executive officers, in-house counsel, outside counsel, independent auditors and members of the audit committee. The impact on an individual issuer may vary, based on its specific circumstances.

[189] See, for example, letters from Diageo and Syngenta.

are both institutional with respect to the IASC Foundation including its governance and funding, as discussed in Section II. above, as well as operational with respect to the actual standard setting process. We recognize that our relationship with the IASB is less direct than our relationship with the FASB and that there are more and varied constituents of the IASB than of the FASB. The result may be that our view will be one of many views that the IASB receives from around the world and considers when developing future standards. We continue to support the IASC Foundation's objectives for its work to achieve a stable and independent funding structure.

B. Expected Costs

Under the amendments, the minimum required financial information that investors in the U.S. capital markets receive from any foreign private issuer will differ from what it was previously. The extent to which an investor receives less information for a particular foreign private issuer who reports under the amendments will depend upon how the issuer previously reported its financial statements. For instance, if the foreign private issuer currently files financial statements prepared in U.S. GAAP and transitions to reporting in IFRS, then this may or may not represent a loss of required information in absolute terms. Whether there is an absolute loss of information will depend upon whether IFRS financial statements yielded more or less information about a particular issuer than the U.S. GAAP financial statements yielded. On the other hand, if the foreign private issuer currently prepares its financial statements in IFRS and includes reconciling information to U.S. GAAP, then a loss of information will result as the reconciling information is omitted. A potential cost could be incurred if an investor loses information contained in the reconciliation that the investor would use to understand differences in certain financial results under IFRS and U.S. GAAP for a particular issuer. The usefulness of this omitted information depends on the extent to which the investor uses the information provided by the reconciliation to U.S. GAAP. Some investors, including investors who appear to be familiar with IFRS, currently make use of the information provided in the U.S. GAAP reconciliation by quantifying or estimating differences in certain financial results under IFRS and U.S. GAAP and comparing results in certain line items such as net income of foreign private issuers with those of domestic issuers.[190] Alternatively, other investors are familiar with IFRS as a basis of accounting and therefore may make limited use of the reconciliation from IFRS to U.S. GAAP.[191] Because investors may be differently situated in the market and have varying levels of familiarity with IFRS and with the information provided in the U.S. GAAP reconciliation, investors may not all bear the cost from the amendments equally and some commenters recognized this.[192] The use that a particular investor may make of the reconciliation will depend on many factors including the size and nature of the investor and the industry to which the issuer in question belongs.

Additionally, under the amendments, the comparability of IFRS and U.S. GAAP results may change. To the extent that an issuer elected IFRS accounting policies that were consistent with U.S. GAAP solely to avoid having to disclose a U.S. GAAP reconciling item, future accounting policy elections may not be influenced by this incentive. This may result in future IFRS financial information from that issuer differing

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[190] See, for example, letters from ITAC, Maverick, R.G. Associates, and Standard & Poor's.

[191] See, for example, letter from CRUF.

[192] See, for example, letters from CFA Institute and ITAC.

from U.S. GAAP. Eligible foreign private issuers who register their securities after this rulemaking is effective will not be influenced by this incentive.

The amendments may lead to some costs to both investors and to issuers. If the investor community prefers the information communicated by a U.S. GAAP reconciliation, a foreign private issuer that uses IFRS as issued by the IASB to prepare financial statements may face a reduced following in the marketplace. Investors that are not sufficiently familiar with IFRS accounting standards may prefer a U.S. GAAP reconciliation. In addition, unfamiliarity with IFRS as issued by the IASB may have an adverse effect on investors' confidence in the reported results which may lead them to insist on a risk premium.

The reconciliation may highlight the areas in which IFRS and U.S. GAAP are not converged, thus providing a possible benchmark to gauge convergence, although the efficacy of this benchmark could be affected by many other factors, and convergence may not eliminate all differences. With respect to IFRS financial statements, there are generally three sources for differences identified in the reconciliation to U.S. GAAP:

- Legacy differences arising from transactions that occurred before U.S. GAAP and IFRS became more converged;
- Self-selected differences that arise as a function of differing accounting elections that foreign private issuers make in accounting for the same area under IFRS and U.S. GAAP; and
- Regenerating differences that continue to recur each year in areas in which the standards are not converged.

With the differing reasons for reconciling items, we do not believe that the reconciliation solely or primarily provides investors or the IASB and FASB with an understanding of areas that are not yet converged.

There may be differing incentives for the convergence of IFRS and U.S. GAAP to continue. We believe, however, that the needs of the marketplace will support the IASB and the FASB working together to develop the best international standards to be used in the U.S. and internationally regardless of our regulatory requirement to reconcile financial statements. The current convergence work program includes topics such as revenue recognition, financial statement presentation, and leases. These are topics on which both the IASB and the FASB seek to develop better standards (rather than using the existing U.S. GAAP or IFRS standards). We believe that investors and issuers seek comparable information in global capital markets thereby providing an incentive for continued convergence of U.S. GAAP and IFRS.

This rulemaking also may create costs to investors in domestic issuers required by the Commission's rules to prepare their financial statements under U.S. GAAP. The desire of potential investors for comparability of financial information among companies that report in IFRS and domestic issuers that report in U.S. GAAP may create an incentive for domestic issuers to provide financial information prepared under IFRS as issued by the IASB in addition to U.S. GAAP financial statements. If domestic issuers make this choice, their investors bear additional preparation cost, while benefiting from additional information provided. Domestic issuers currently compete internationally for capital with companies who provide financial information prepared under IFRS. In spite of this international competition for capital, we do not believe it is currently a widespread practice for domestic issuers to provide financial information under IFRS.

VI. REGULATORY FLEXIBILITY ACT CERTIFICATION

Under Section 605(b) of the Regulatory Flexibility Act,[193] the Commission certified that the proposed amendments to Form 20-F under the Exchange Act, Forms F-4 and S-4 and Rule 701 under the Securities Act and Regulation S-X contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. It included this certification in Part VII of the Proposing Release. While the Commission encouraged written comments regarding this certification, none of the commenters responded to this request.

VII. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION ANALYSIS

Section 2(b) of the Securities Act[194] and Section 3(f) of the Exchange Act[195] require us, when engaging in rulemaking that requires us 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. When adopting rules under the Exchange Act, Section 23(a)(2) of the Exchange Act[196] requires us to consider the impact that any new rule would have on competition. In addition, Section

[193] 5 U.S.C. 605(b).

[194] 15 U.S.C. 77b(b).

[195] 15 U.S.C. 78c(f).

[196] 15 U.S.C. 78w(a)(2).

23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

In the Proposing Release we considered the proposed amendments in light of the standards set forth in the above statutory sections. We solicited comment on whether, if adopted, the proposed rule amendments would result in any anti-competitive effects or promote efficiency, competition and capital formation. We further encouraged commenters to provide empirical data or other facts to support their views on any anti-competitive effects or any burdens on efficiency, competition or capital formation that might result from adoption of the proposed amendments.

We did not receive any comments or any empirical data in this regard concerning the proposed amendments. Accordingly, since the adopted rules are substantially similar to the proposed rules, we continue to believe the new rules will contribute to efficiency, competition and capital formation. The purpose of the amendments to Form 20-F under the Exchange Act, Forms F-4 and S-4 and Rule 701 under the Securities Act, and Regulation S-X is to allow foreign private issuers that prepare financial statements that comply with IFRS as issued by the IASB to include those financial statements in their annual reports and registration statements filed with the Commission without reconciliation to U.S. GAAP. These amendments are designed to increase efficiency, competition and capital formation by helping to move towards a set of globally accepted accounting standards, as well as by alleviating the burden and cost that eligible companies would face if required to prepare a U.S. GAAP reconciliation for inclusion in annual reports and registration statements filed with us. Due to the cost to issuers of preparing the reconciliation to U.S. GAAP from IFRS, we believe that the amendments are likely to promote efficiency by eliminating financial disclosure that is costly to produce. We believe that investors would have adequate information on which to base their investment decisions and that capital may be allocated on a more efficient basis.

The amendments are expected to facilitate capital formation by foreign companies in the U.S. capital markets by reducing regulatory compliance burdens for foreign private issuers that rely on them. Reduced compliance burdens are expected to lower the cost of preparing disclosure for purposes of raising capital in the United States for those issuers.

The amendments also may have other impacts on efficiency and capital formation, which may not be felt equally by all market participants. For example, the amendments may have a more favorable competitive impact on foreign private issuers from jurisdictions in which the use of IFRS is already required or permitted. Issuers from such jurisdictions may be able to benefit from the amendments more quickly than issuers from jurisdictions that do not permit the use of IFRS. Also, some foreign private issuers may be concerned about the public perception costs of not including a U.S. GAAP reconciliation, particularly if they compete for capital with other foreign companies that provide a reconciliation or that prepare financial statements that comply with U.S. GAAP.

The amendments also are expected to have effects on efficiency and capital formation to the extent that investors need to increase their familiarity with IFRS in order to compare investment opportunities without reference to a U.S. GAAP reconciliation. If investors prefer the information provided in a U.S. GAAP reconciliation, a foreign private issuer that uses IFRS as issued by the IASB without reconciliation may face adverse competitive effects in the capital markets. For example, investor unfamiliarity with IFRS may adversely affect investor confidence in issuers that prepare IFRS financial statements without reconciliation to U.S. GAAP. This may lead investors to insist on a risk premium in those companies, which would affect their competitiveness in the capital markets. Also, if investors must incur costs in order to understand IFRS financial statements without a U.S. GAAP reconciliation, there may be an incentive for intermediary parties to provide U.S. GAAP reconciliation services.

VIII. STATUTORY BASIS AND TEXT OF FINAL AMENDMENTS

We are adopting the amendments to Exchange Act Form 20-F, Regulation S-X Rules 1-02, 3-10 and 4-01, Securities Act Forms F-4 and S-4, and Securities Act Rule 701 pursuant to Sections 6, 7, 10, and 19 of the Securities Act of 1933 as amended, Sections 3, 12, 13, 15, 23 and 36 of the Securities Exchange Act of 1934, and Sections 3(c)(2) and 108(c) of the Sarbanes Oxley Act of 2002.

Text of Amendments

List of Subjects

17 CFR Parts 210, 230, 239 and 249

Accounting, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 210 - FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for Part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 78c, 78j-1, 78l, 78m, 78n, 78o(d), 78q, 78u-5, 78w(a), 78ll, 78mm, 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202, 7218 and 7262, unless otherwise noted.

2. Section 210.1.02 is amended by adding a note that follows paragraph (w)(3) before the Computational note.

§210.1-02 Definitions of terms used in Regulation S-X (17 CFR Part 210).

* * * * *

(w) * * *

(3) * * *

Note to paragraph (w): A registrant that files its financial statements in accordance with or provides a reconciliation to U.S. Generally Accepted Accounting Principles shall make the prescribed tests using amounts determined under U.S. Generally Accepted Accounting Principles. A foreign private issuer that files its financial statements in accordance with IFRS as issued by the IASB shall make the prescribed tests using amounts determined under IFRS as issued by the IASB.

* * * * *

3. Section 210.3-10 is amended by:

a. Revising the introductory text of paragraph (i), and

b. Revising paragraph (i)(12).

The revisions read as follows.

§210.3-10 Financial statements of guarantors and issuers of guaranteed securities registered or being registered.

* * * * *

(i) Instructions for preparation of condensed consolidating financial information required by paragraphs (c), (d), (e) and (f) of this section.

* * * * *

(12) Where the parent company's consolidated financial statements are prepared on a comprehensive basis other than U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board, reconcile the information in each column to U.S. Generally Accepted Accounting Principles to the extent necessary to allow investors to evaluate the sufficiency of the guarantees. The reconciliation may be limited to the information specified by Item 17 of Form 20-F (§249.220f of this chapter). The reconciling information need not duplicate information included elsewhere in the reconciliation of the consolidated financial statements.

4. Amend §210.4-01 by revising paragraph (a)(2) to read as follows:

§210.4-01 Form, order and terminology.

(a) * * *

(2) In all filings of foreign private issuers (see §230.405 of this chapter), except as stated otherwise in the applicable form, the financial statements may be prepared according to a comprehensive set of accounting principles, other than those generally accepted in the United States or International Financial Reporting Standards as issued by the International Accounting Standards Board, if a reconciliation to U. S. Generally Accepted Accounting Principles and the provisions of Regulation S-X of the

type specified in Item 18 of Form 20-F (§249.220f of this chapter) is also filed as part of the financial statements. Alternatively, the financial statements may be prepared according to U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards as issued by the International Accounting Standards Board.

* * * * *

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

5. The authority citation for Part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, 80a-37, 7202 and 7218, unless otherwise noted.

* * * * *

6. Amend §230.701 by revising paragraph (e)(4) to read as follows:

§230.701 Exemption for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation.

* * * * *

(e) * * *

(4) Financial statements required to be furnished by Part F/S of Form 1-A (Regulation A Offering Statement) (§239.90 of this chapter) under Regulation A (§§230.251 through 230.263). Foreign private issuers as defined in Rule 405 must provide a reconciliation to generally accepted accounting principles in the United States (U.S. GAAP) if their financial statements are not prepared in accordance with U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board (Item 17 of Form 20-F (§249.220f of this chapter)). The

financial statements required by this section must be as of a date no more than 180 days before the sale of securities in reliance on this exemption.

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

7. The authority citation for part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, 80a-37, 7202 and 7218, unless otherwise noted.

* * * * *

8. Amend Form S-4 (referenced in §239.25) by revising instruction 2 to Item 17 to read as follows:

Note: The text of Form S-4 does not and this amendment will not appear in the Code of Federal Regulations.

FORM S-4

* * * * *

Item 17. Information with Respect to Companies other than S-3 Companies.

* * * * *

Instructions:

* * * * *

2. If the financial statements required by this paragraph are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board, provide a reconciliation to U.S.

GAAP in accordance with Item 17 of Form 20-F (§249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. when the financial statements are prepared on a basis other than U.S. GAAP.

* * * * *

9. Amend Form F-4 (referenced in §239.34) by:

a. Revising Item 10(c)(2);

b. Revising Item 10(c)(3);

c. Revising Item 12(b)(2)(iii) and (iv); and

d. Revising the Instruction to Item 17(b)(5) and (b)(6).

The revisions read as follows.

Note: The text of Form F-4 does not and this amendment will not appear in the Code of Federal Regulations.

FORM F-4

* * * * *

Item 10. Information With Respect to F-3 Companies.

* * * * *

(c) * * *

(2) Restated financial statements prepared in accordance with or, if prepared using a basis of accounting other than International Financial Reporting Standards

("IFRS") as issued by the International Accounting Standards Board ("IASB"), reconciled to U.S. GAAP and Regulation S-X if there has been a change in accounting principles or a correction of an error where such change or correction requires a material retroactive restatement of financial statements;

(3) Restated financial statements prepared in accordance with or, if prepared using a basis of accounting other than IFRS as issued by the IASB, reconciled to U.S. GAAP and Regulation S-X where one or more business combinations accounted for by the pooling of interest method of accounting have been consummated subsequent to the most recent fiscal year and the acquired businesses, considered in the aggregate, are significant pursuant to Rule 11-01(b) of Regulation S-X (§210.11-01(b) of this chapter); or

* * * * *

Item 12. Information With Respect to F-3 Registrants.

* * * * *

(b) * * *

(2) * * *

(iii) Restated financial statements prepared in accordance with or, if prepared using a basis of accounting other than IFRS as issued by the IASB, reconciled to U.S. GAAP and Regulation S-X if there has been a change in accounting principles or a correction of an error where such change or correction requires a material retroactive restatement of financial statements;

(iv) Restated financial statements prepared in accordance with or, if prepared using a basis of accounting other than IFRS as issued by the IASB, reconciled to U.S.

GAAP and Regulation S-X where one or more business combinations accounted for by the pooling of interest method of accounting have been consummated subsequent to the most recent fiscal year and the acquired businesses, considered in the aggregate, are significant pursuant to Rule 11-01(b) of Regulation S-X; and

* * * * *

Item 17. Information With Respect to Foreign Companies Other Than F-3 Companies.

* * * * *

Instruction to paragraph (b)(5) and (b)(6): If the financial statements required by paragraphs (b)(5) and (b)(6) are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP or IFRS as issued by the IASB, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20-F (§249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. when the financial statements are prepared on a basis other than U.S. GAAP.

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

10. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a et seq., 7202, 7218, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

11. Amend Form 20-F (referenced in §249.220f) as follows:

a. Add issuer contact information to the cover page below the address line;

b. Add a check box to the cover page indicating the basis of accounting used to prepare the financial statements below the accelerated filer line;

c. Revise the check box on the cover page indicating whether Item 17 or Item 18 was used below the new check box indicating the basis of accounting;

d. Revise General Instruction G.(a);

e. Remove General Instruction G.(b)(1)(A) and G.(b)(2)(A);

f. Redesignate General Instructions G.(b)(1)(B) and (G).(b)(1)(C) as General Instructions (G).(b)(1)(A) and G.(b)(1)(B) and redesignate General Instructions (G).(b)(2)(B) and (G).(b)(2)(C) as General Instructions (G).(b)(2)(A) and G.(b)(2)(B) ;

g. Revise General Instructions G.(d) and (e);

h. Revise General Instructions G.(f)(2)(B)(ii) and G.(f)(2)(B)(iii);

i. Revise General Instruction G.(h)(2);

j. Revise Instruction 2.b. to General Instruction G.(h);

k. Remove General Instruction G.(i);

l. Revise Item 3.A, Instruction 2;

m. Add Instruction 5 to Item 5;

n. Add a sentence to the end of Instruction 3 in Item 8.A.5;

o. Add Instruction 4 to Item 8.A.5;

p. Add an Instruction to Item 11 before Instruction to Item 11(a);

q. Revise the introductory text of Item 17(c);

r. Add a sentence at the end of Items 17(c)(2)(v) and (c)(2)(vi);

s. Remove Item 17(c)(2)(viii);

t. Remove Item 17, Instruction 6;

u. Add a Special Instruction to the end of Item 17;

v. Revise Item 18(b);

w. Revise the Instruction to Item 18; and

x. Add a Special Instruction to the end of Item 18.

The additions and revisions read as follows.

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 20-F

* * * * *

(Name, Telephone, E-mail and/or Facsimile number and Address of Company Contact Person)

* * * * *

Indicate by check mark which basis of accounting the registrant has used to prepare the financial statements included in this filing:

U.S. GAAP . . . . International Financial Reporting Standards as issued by the International Accounting Standards Board . . . . Other . . . .

If "Other" has been checked in response to the previous question, indicate by check mark which financial statement item the registrant has elected to follow.

Item 17 . . . . Item 18 . . . .

* * * * *

GENERAL INSTRUCTIONS

* * * * *

G. First-Time Application of International Financial Reporting Standards.

(a) Omission of Certain Required Financial Statements. An issuer that changes the body of accounting principles used in preparing its financial statements presented pursuant to Item 8.A.2 ("Item 8.A.2") to International Financial Reporting Standards ("IFRS") issued by the International Accounting Standards Board ("IASB") may omit the earliest of three years of audited financial statements required by Item 8.A.2 if the issuer satisfies the conditions set forth in this Instruction G. For purposes of this instruction, the term "financial year" refers to the first financial year beginning on or after January 1 of the same calendar year.

* * * * *

(d) Information on the Company. The reference in Item 4.B to the "body of accounting principles used in preparing the financial statements," means IFRS as issued by the IASB and not the basis of accounting that was previously used ("Previous GAAP") or accounting principles used only to prepare a U.S. GAAP reconciliation.

(e) Operating and Financial Review and Prospects. The issuer shall present the information provided pursuant to Item 5. The discussion should focus on the financial statements for the two most recent financial years prepared in accordance with IFRS as issued by the IASB. No part of the discussion should relate to financial statements prepared in accordance with Previous GAAP.

(f) Financial Information.

* * * * *

(2) * * *

(B) * * *

(ii) Two financial years of audited financial statements and interim financial statements (which may be unaudited) for the current and comparable prior year period, prepared in accordance with IFRS as issued by the IASB;

(iii) Three financial years of audited financial statements prepared in accordance with Previous GAAP; interim statements (which may be unaudited) for the current and comparable prior year period prepared in accordance with IFRS as issued by the IASB; and condensed financial information prepared in accordance with U.S. GAAP for the most recent financial year and the current and comparable prior year interim period (the form and content of this financial information shall be in a level of detail substantially similar to that required by Article 10 of Regulation S-X).

* * * * *

(h) <u>Financial Statements</u>.

* * * * *

(2) <u>U.S. GAAP Information</u>. The U.S. GAAP reconciliation referenced in Item 17(c) or 18 shall not be required for periods presented in accordance with IFRS as issued by the IASB.

<u>Instructions</u>:

* * * * *

2 * * *

b. <u>Present or incorporate by reference operating and financial review and prospects information pursuant to Item 5 that focuses on the financial statements for the two most recent financial years prior to the most recent financial year that were prepared in accordance with Previous GAAP. The discussion should not refer to a reconciliation to U.S. GAAP. No part of the discussion should relate to financial statements prepared in accordance with IFRS.</u>

* * * * *

Item 3. Key Information

* * * * *

Instructions to Item 3.A:

* * * * *

2. You may present the selected financial data on the basis of the accounting principles used in your primary financial statements. If you use a basis of accounting other than IFRS as issued by the IASB, however, you also must include in this summary any reconciliations of the data to U.S. generally accepted accounting principles and Regulation S-X, pursuant to Item 17 or 18 of this Form. For financial statements prepared using a basis of accounting other than IFRS as issued by the IASB, you only have to provide selected financial data on a basis reconciled to U.S. generally accepted accounting principles for (i) those periods for which you were required to reconcile the primary annual financial statements in a filing under the Securities Act or the Exchange Act, and (ii) any interim periods.

* * * * *

Item 5. Operating and Financial Review and Prospects

* * * * *

Instructions to Item 5:

* * * * *

5. An issuer filing financial statements that comply with IFRS as issued by the IASB should, in providing information in response to paragraphs of this Item 5 that refer to pronouncements of the FASB, provide disclosure that satisfies the objective of the Item 5 disclosure requirements. In responding to this Item 5, an issuer need not

repeat information contained in financial statements that comply with IFRS as issued by the IASB.

* * * * *

Item 8. Financial Information

* * * * *

Instructions to Item 8.A.5:

* * * * *

3. * * * * *

(a) * * * * *

(b) * * * * *

A registrant filing financial information that complies with IFRS as issued by the IASB is not required to provide the information described in paragraphs 3(a) and (b) to this Instruction to Item 8.A.5. if that registrant prepares its annual financial statements in accordance with IFRS as issued by the IASB.

4. A registrant that files interim period financial statements pursuant to Item 8.A.5 is not required to comply with Article 10 of Regulation S-X if that registrant prepares its annual financial statements in accordance with IFRS as issued by the IASB, prepares its interim period financial statements in compliance with IAS 34 "Interim Financial Reporting," and explicitly states its compliance with IAS 34 in the notes to the interim financial statements.

* * * * *

Item 11. Quantitative and Qualitative Disclosures About Market Risk.

* * * * *

Instruction to Item 11: An issuer filing financial statements that comply with IFRS as issued by the IASB should, in providing information in response to paragraphs of this Item 11 that refer to pronouncements of the FASB, provide disclosure that satisfies the objective of the Item 11 disclosure requirements. In responding to this Item 11, an issuer need not repeat information contained in financial statements that comply with IFRS as issued by the IASB.

* * * * *

Item 17. Financial Statements.

* * * * *

(c) The financial statements and schedules required by paragraph (a) above may be prepared according to U.S. generally accepted accounting principles or IFRS as issued by the IASB. If the financial statements comply with IFRS as issued by the IASB, such compliance must be unreservedly and explicitly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB. If the notes and auditor's report of an issuer do not contain the information in the preceding sentence, then the U.S. GAAP reconciliation information described in paragraphs (c)(1) and (c)(2) must be provided. Alternatively, such financial statements and schedules may be prepared according to a comprehensive body of accounting principles other than those generally accepted in the United States or IFRS as issued by the IASB if the following are disclosed:

* * * * *

(c)(2)(v) * * * Issuers that prepare financial statements using IFRS as issued by the IASB that are furnished pursuant to §210.3-05 may omit the disclosures specified by paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this Item regardless of the size of the business acquired or to be acquired.

(c)(2)(vi) * * * Issuers that prepare financial statements using IFRS as issued by the IASB that are furnished pursuant to §210.3-09 may omit the disclosures specified by paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this Item regardless of the size of the investee.

* * * * *

Special Instruction for Certain European Issuers:

An issuer incorporated in a Member State of the European Union that has complied with the carve out to IAS 39 "Financial Instruments: Recognition and Measurement," as adopted by the European Union, in financial statements previously filed with the Commission, may file financial statements for its first two financial years that end after November 15, 2007 without reconciling to U.S. GAAP if that issuer's financial statements otherwise comply with IFRS as issued by the IASB and the issuer provides an audited reconciliation to IFRS as issued by the IASB. This reconciliation to IFRS as issued by the IASB is to contain information relating to financial statement line items and footnote disclosure based on full compliance with IFRS as issued by the IASB, and is to be prepared and disclosed in the same manner that an issuer would provide a reconciliation to U.S. GAAP, following the requirements in Item 17(c)(2). All financial statements of such an issuer for periods prior to the financial year that ends after November 15, 2007 must continue to be reconciled to U.S. GAAP. For financial years following the two financial years ending after November 15, 2007, such an issuer will be required to include reconciliations to U.S. GAAP unless the issuer complies with the requirements in Item 17(c).

Item 18. Financial Statements.

* * * * *

(b) If the financial statements are prepared using a basis of accounting other than IFRS as issued by the IASB, all other information required by U.S. generally accepted accounting principles and Regulation S-X unless such requirements specifically do not apply to the registrant as a foreign issuer. However, information may be omitted (i) for any period in which net income has not been presented on a basis reconciled to United States generally accepted accounting principles, or (ii) if the financial statements are furnished pursuant to §210.3-05 or less-than-majority owned investee pursuant to §210.3-09 of this chapter.

Instructions to Item 18:

1. All of the instructions to Item 17 also apply to this Item, except Instruction 3 to Item 17, which does not apply.

2. An issuer that is required to provide disclosure under FASB Statement of Accounting Standards No. 69, "Disclosures about Oil and Gas Producing Activities," shall do so regardless of the basis of accounting on which it prepares its financial statements.

Special Instruction for Certain European Issuers:

An issuer incorporated in a Member State of the European Union that has complied with the carve out to IAS 39 "Financial Instruments: Recognition and Measurement," as adopted by the European Union, in financial statements previously filed with the Commission, may file financial statements for its first two financial years that end after November 15, 2007 without reconciling to U.S. GAAP if that issuer's financial statements otherwise comply with IFRS as issued by the IASB and the issuer provides an audited reconciliation to IFRS as issued by the IASB. This reconciliation to IFRS as issued by the IASB is to contain information relating to financial statement line items and footnote disclosure based on full compliance with IFRS as issued by the IASB, and is to be prepared and disclosed in the same manner that an issuer would provide a reconciliation to U.S. GAAP, following the requirements in Item 18. All financial statements of such an issuer for periods prior to the financial year that ends after November 15, 2007 must continue to be reconciled to U.S. GAAP. For financial years following the two financial years ending after November 15, 2007, such an issuer will be required to include reconciliations to U.S. GAAP unless the issuer complies with the requirements in Item 18(a).

By the Commission.

Nancy M. Morris

Nancy M. Morris
Secretary

Dated: December 21, 2007

Commissioner Atkins
Dissented as to
the censure

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57053 / December 27, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2761 / December 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12797

In the Matter of **RICHARD E. SELLERS, CPA,** **and** **LESTER REX ANDERSEN, CPA** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 4C AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE**

I.

On September 13, 2007, the Securities and Exchange Commission ("Commission") issued an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C [1] and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice [2] ("OIP") against Richard E. Sellers, CPA ("Sellers") and Lester Rex Andersen, CPA ("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.

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

III.

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

Respondents

A. Respondent Richard E. Sellers, CPA, is a resident of the State of Nevada and has been a licensed CPA for over 37 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.

B. Respondent 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.

Facts

1. S&A's Failure to Register with the Public Company Accounting Oversight Board

C. 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 public reporting company after October 22, 2003. S&A did not register with the Board on or before October 22, 2003.

D. 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.

E. 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.

F. 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.

2. S&A's Proceeding Before the Board

G. 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.

H. 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.

I. 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, an agreement was reached whereby S&A withdrew its application for registration.

J. 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.

K. 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.

Violations

L. 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]

M. The provisions of Section 102(a) of the Act became effective on October 22, 2003.[4]

N. 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."

O. Although Sellers and Andersen were aware of the registration requirement, they nevertheless knowingly or recklessly 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.

P. 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.

Findings

Q. As a result of the conduct described above, Sellers and Andersen willfully aided and abetted and caused violations of Section 102(a) of the Act.

R. As a result of the conduct described above, Sellers and Andersen did not possess the requisite qualifications to represent others.

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.

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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).

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

A. Respondents shall cease and desist from committing or causing any violations and any future violations of Section 102(a) of the Act.

B. Respondents are censured.

C. Respondents may practice before the Commission as independent accountants provided that:

1. The public accounting firm with which they are associated is registered with the Board in accordance with the Act, and such registration continues to be effective; and

2. They have submitted to the Commission staff (attention: Office of the Chief Accountant) the Board's letter notifying the public accounting firm with which they are associated that its registration application has been approved.

D. Respondents shall, jointly and severally, within 20 days of the entry of this Order, pay disgorgement of $7,615 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 Richard E. Sellers and Lester Rex Andersen as Respondents in these proceedings and includes the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Kenneth D. Israel, Regional Director, Securities and Exchange Commission, Salt Lake Regional Office, 15 West South Temple Street, Suite 1800, Salt Lake City, Utah 84101.

By the Commission.

Nancy M. Morris
Secretary

/

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57056 / December 27, 2007

INVESTMENT ADVISERS ACT OF 1940
Release No. 2689 / December 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12915

In the Matter of

NATIONAL INVESTMENT ADVISORS, INC. and DOUGLAS A. JIMERSON,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND 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 administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), against National Investment Advisors, Inc. ("NIA") and Douglas A. Jimerson ("Jimerson") (collectively "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement, 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 21C of the Securities Exchange Act of 1934 and Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, as set forth below.

Document 35 of 37

III.

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

SUMMARY

1. This matter involves fraudulent schemes through which NIA, a registered investment adviser, and Jimerson, its principal and an associated person, marketed and sold "insured" investment programs that purported to guarantee clients against loss of principal if they kept their assets under management with NIA for a continuous five-year period. In actuality, between at least 2002 through 2005, NIA enrolled clients in three "insured" management programs that either lacked the appropriate insurance, or insurance entirely, necessary to protect clients against loss of principal.

2. Moreover, NIA, which was managed by Jimerson at all relevant times, failed to disclose to its clients material information regarding its precarious financial condition and did not maintain certain books and records required under the Advisers Act.

3. As a result of the foregoing, NIA and Jimerson willfully violated or willfully aided and abetted and caused violations of the antifraud and other provisions of the Exchange Act and Advisers Act, as provided herein.

RESPONDENTS

4. National Investment Advisors, Inc. ("NIA"), is a Maryland corporation based in North Potomac, Maryland. NIA has been registered with the Commission as an investment adviser since 1986.

5. Douglas Alan Jimerson ("Jimerson"), age 55, is the President and majority owner of NIA, and has been since its inception. Jimerson was a registered representative at H. Beck, Inc. from October 1986 to December 1997 and at Wall Street Strategies, Inc. from February 1998 to May 1999. Through NIA, Jimerson has been registered as an advisory representative with the states of Maryland and Virginia since November 1990 and March 1991, respectively. Jimerson is a resident of North Potomac, Maryland.

FACTS

6. Starting in 1997, NIA offered an insured investment program backed by a Florida-based insurance company ("Original Program"). The theory underlying the Original Program was that if clients kept their funds invested with NIA for a period of five consecutive years, their initial principal investment (minus certain expenses) was guaranteed against loss. For this insured product, NIA charged clients an annual fee of three percent of assets under management, with one percent going to NIA as a management fee, one percent going to the solicitor for referring the client to the program, and one percent going to the insurance company and its agent for insurance

and program management. In September 2001, the Florida-based insurance company stopped accepting new accounts under this program.

7. In an effort to continue offering an insured investment product, Jimerson looked for an insurance policy to replace the policy used in the Original Program. Jimerson had trouble finding a similar policy, so he turned his efforts toward creating his own off-shore captive insurance company, which Jimerson named Professional Insurance Limited ("PIL").

8. In late 2002, while trying to raise capital to fund PIL, Jimerson and NIA began offering a new insured investment program. Jimerson told NIA's solicitors that this new insured program operated just like the Original Program, except that the required management period increased from five to seven years (the "7-Year Program"). In addition, Jimerson claimed that, unlike in the Original Program, the new insurer did not provide certificates of endorsement to confirm and verify that clients' accounts were covered under the insurance policy.

9. Jimerson had clients in the 7-Year Program sign a document that contained the following representation from NIA, "[a]s the risk manager of your account we have purchased 'Registered Investment Advisors Professional Liability Insurance' which insures that our risk management strategy will not result in a loss of principal to our clients' accounts when continuously managed under our Insured Fund Management Program for a continuous seven-year period."

10. However, at no point during the period when NIA offered and sold the 7-Year Program, between at least November 2002 and April 2003, did NIA have insurance to support the 7-Year Program. During this period, eight clients invested over $3.5 million in NIA's 7-Year Program. Investors in the 7-Year Program were required to pay annual fees of three percent of assets under management, one-third of which was to be used to purchase insurance. However, because there was no insurance policy to fund, NIA kept this money as an undisclosed addition to its management fee.

11. Jimerson testified, under oath, that (1) NIA did not have insurance for the 7-Year Program, (2) he and NIA were essentially the ones "guaranteeing" clients against loss of principal, and (3) he and NIA never disclosed these facts to any solicitors or clients because he believed the off-shore captive insurer (PIL) would eventually become funded.

12. While offering and selling the 7-Year Program, Jimerson enrolled clients with the promise that NIA had insurance to protect their principal against loss, while at the same time using those same client funds to induce other companies to help fund PIL, his off-shore captive insurance company.

13. At some point in early 2003, Jimerson realized that funding for PIL was not available, so he continued his search for alternatives to the insurance policy used in the Original Program. Unable to locate any insurers willing to provide a financial guarantee, Jimerson purchased an errors and omissions insurance policy from a new insurance company ("E&O Policy").

14. Errors and omissions insurance (aka professional liability insurance) does not provide the same coverage as financial guarantee insurance. Errors and omissions insurance indemnifies the insured against a loss sustained because of an error or oversight on the part of the insured; it does not protect an insured against financial loss (such as a change in market conditions) if there are no errors or oversights.

15. Immediately after the E&O Policy became effective on April 25, 2003, Jimerson promoted the insurer as the underwriter for NIA's insured program, notified his network of solicitors, and published information on NIA's website about a new five-year insured management program (the "5-Year Program"). Jimerson promoted the insurance carrier as an A-rated insurer whose insurance policy for the 5-Year Program would guarantee preservation of principal if a client stayed in the program for five years.

16. Jimerson sent 5-Year Program enrollment documents to each existing client of the 7-Year Program to sign, telling them that NIA had been able to negotiate better terms with the insurance carrier. Every 7-Year Program client signed the documents and converted to the 5-Year Program, which left no one in the 7-Year Program. The management fees NIA charged for the 5-Year Program were identical to the management fees it charged for the 7-Year Program.

17. In September 2003, the insurance company learned that NIA was representing on its website that the E&O Policy operated as a financial guarantee. The insurance company notified NIA that it needed to stop referring to the E&O Policy as a form of financial guarantee and to eliminate all references to the insurance company. After six weeks passed with no action by NIA, the insurance company sent a cease-and-desist letter to NIA dated November 12, 2003 that recited, among other things, "there is no component of the Investment Advisor's Management Liability Coverage that conforms to the description of such insurance as contained on the web sites ... we believe the description provided by NIA suggesting and/or implying that [the insurance company] is providing some form of financial guarantee insurance coverage is incorrect and perhaps fraudulent."

18. In response to the insurance company's November 2003 letter, Jimerson removed all mention of the insurance company from NIA's web site. Jimerson and NIA never disclosed the existence or substance of the November 2003 letter to its clients. Several months later, in April 2004, the insurance company renewed the E&O Policy with NIA.

19. In the fall of 2004, the insurance company became aware that NIA was again misrepresenting the coverage provided by the E&O Policy. The insurance company saw an April 16, 2004 letter that NIA had sent to its clients enrolled in the Original Program, in which NIA marketed the E&O Policy as a replacement for the policy in the Original Program and urged clients to convert from the Original Program to the 5-Year Program.

20. The insurance company felt that NIA's April 2004 letter mischaracterized the coverage provided by the E&O Policy. On October 28, 2004, the insurance company ended its relationship with NIA by voiding the E&O Policy *ab initio* and returning to NIA the entire policy

premium of $105,060 that NIA paid for the policy renewal in April 2004. Not only did NIA fail to inform its clients that the insurance on which the 5-Year Program was based had been voided, but NIA also failed to return refunded policy premiums to its investors.

21. After the insurance company voided its policy with NIA, Jimerson sought out a new insurance policy so that NIA could continue to offer an insured investment product. A Houston, Texas-based insurance company extended terms to NIA for an errors and omissions policy with limited coverage that specifically excluded the type of coverage NIA needed to run an "insured" program. Nonetheless, NIA purchased a policy from the Houston-based company with an annual premium of $38,000, and then offered and sold an insured investment program based on the new insurance ("Final Program").

22. From at least 2002 through 2005, NIA collected at least $703,730 as a three-percent management fee from investors in the 7-Year Program, the 5-Year Program, and the Final Program. One-third of the management fee ($234,456) was forwarded to solicitors for referring clients to NIA. Two-thirds of the management fee ($468,913) was retained by NIA, split evenly between its own advisory fee and funds purportedly to purchase insurance for the insured programs. NIA required pre-payment of its fees more than six months in advance.

23. NIA and Jimerson improperly retained at least $234,456 that should have been spent on insurance to protect clients in the 7-Year Program, 5-Year Program, and Final Program against loss of principal, but was not, and retained at least $234,456 in advisory fees from clients who were told by NIA and Jimerson that their investment was being guaranteed against loss of principal by proper insurance.

24. Jimerson and NIA misrepresented to clients that NIA had an insurance policy to underwrite the 7-Year Program, when in fact it did not. Jimerson and NIA also misrepresented to clients that the respective insurance policies for the 5-Year Program and the Final Program would protect clients against loss of principal, when in fact the insurance policies were only errors & omissions policies and did not protect clients against loss of principal. Jimerson and NIA also failed to disclose to its clients that NIA's liabilities exceeded its assets, and that if any client submitted a claim to NIA to recoup losses incurred from the 7-Year, Five-Year or Final Programs, NIA did not have the capital to fulfill its obligation to cover the claim.

25. In its Forms ADV filed with the Commission on January 27, 2004 and October 28, 2004, NIA stated that all of its assets under management were non-discretionary. In fact, a large portion of NIA's assets under management, including all funds invested in NIA's insured programs, were discretionary.

26. In its Forms ADV filed with the Commission on January 27, 2004 and October 28, 2004, NIA stated that it had $165 million of assets under management. In fact, NIA had less than $100 million of assets under management.

27. During at least 2004, NIA failed to maintain certain required information, including records showing which NIA clients have a position in certain securities and records showing the securities purchased and sold for each NIA client.

VIOLATIONS

28. As a result of the conduct set forth above, NIA and Jimerson 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.

29. As a result of the conduct set forth above, NIA and Jimerson willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit an investment adviser from, directly or indirectly, employing any device, scheme or artifice to defraud any client or prospective client, or engaging in any transaction, practice or course of business that operates as a fraud or deceit upon any client or prospective client.

30. As a result of the conduct set forth above, NIA, acting through Jimerson, willfully violated Section 206(4) of the Advisers Act, which prohibits an investment adviser from engaging in any act, practice or course of business that is fraudulent, deceptive or manipulative, as defined by the rules and regulations thereunder, and Rule 206(4)-1(a)(5) thereunder, which prohibits an investment adviser from, directly or indirectly, publishing, circulating, or distributing any advertisement that, among other things, contains any untrue statement of material fact, or that is otherwise false or misleading.

31. As a result of the conduct set forth above, Jimerson willfully aided and abetted and caused NIA's violations of Section 206(4) of the Advisers Act and Rule 206(4)-1 thereunder.

32. As a result of the conduct set forth above, NIA, acting through Jimerson, willfully violated Rule 206(4)-4(a)(1) of the Advisers Act, which requires investment advisers registered or required to be registered with the Commission to disclose to clients all material facts with respect to financial conditions that are reasonably likely to impair the adviser's ability to meet contractual commitments to clients if the adviser has discretionary authority or custody over such client's funds or securities, or requires prepayment of advisory fees of more than $500 from such client, six months or more in advance.

33. As a result of the conduct set forth above, Jimerson willfully aided and abetted and caused NIA's violations of Rule 206(4)-4(a)(1) of the Advisers Act.

34. As a result of the conduct set forth above, NIA, acting through Jimerson, willfully violated (a) Section 204 of the Advisers Act, which requires investment advisers to make and keep certain records for prescribed periods of time and to furnish such records to the Commission; (b) Rule 204-1(a) of the Advisers Act, which requires investment advisers to annually file an amendment to their Form ADV, and (c) Rule 204-2(c)(1), which requires that investment advisers make and keep true, accurate, and current certain books and records relating to its investment advisory business.

35. As a result of the conduct set forth above, Jimerson willfully aided and abetted and caused NIA's violations of Section 204 of the Advisers Act and Rules 204-1(a) and 204-2(c)(1) thereunder.

36. As a result of the conduct set forth above, NIA and Jimerson willfully violated Section 207 of the Advisers Act, which makes it unlawful for any person willfully to make any untrue statement of 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.

DISGORGEMENT AND CIVIL PENALTIES

37. Respondent NIA has submitted a sworn Statement of Financial Condition dated July 24, 2007 and other evidence and has asserted its inability to pay disgorgement, prejudgment interest, or a civil penalty.

38. Respondent Jimerson has submitted a sworn Statement of Financial Condition dated July 19, 2007 and other evidence and has asserted his inability to pay disgorgement, 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 NIA's and Jimerson's respective Offers of Settlement.

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

A. Respondent NIA 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 Sections 204, 206(1), 206(2), 206(4), and 207 of the Advisers Act and Rules 204-1, 204-2, 206(4)-1, and 206(4)-4 thereunder.

B. Respondent Jimerson 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 Sections 204, 206(1), 206(2), 206(4) and 207 of the Advisers Act and Rules 204-1, 204-2, 206(4)-1, and 206(4)-4 thereunder.

C. Respondent NIA's registration as an investment adviser shall be, and hereby is, revoked.

D. Any reapplication for registration by NIA 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 NIA, 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 the basis for the Commission order.

E. Respondent Jimerson be, and hereby is, barred from association with any investment adviser.

F. Any reapplication for association by Jimerson 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 Jimerson, 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 the basis for the Commission order.

G. Respondents NIA and Jimerson shall pay, jointly and severally, disgorgement of $468,913 plus prejudgment interest of $84,644.11, but payment of such amounts is waived, and no penalties imposed, based upon Respondents' sworn representations in their Statements of Financial Condition and Financial Information dated July 24, 2007 and July 19, 2007, respectively, and other documents submitted to the Commission.

H. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen the matter to consider whether Respondents provided accurate and complete financial information at the time such representations were made; (2) seek an order directing 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 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, interest, or a penalty 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57051 / December 27, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12913

In the Matter of **MICHAEL J. PIETRZAK, Esq.** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3) OF THE COMMISSION'S RULES OF PRACTICE**

I.

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

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

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II.

The Commission finds that:

A. RESPONDENT

1. Pietrzak is and has been an attorney licensed to practice in the State of Illinois. He served as the General Counsel, Executive Vice President, Secretary and Director of Hexagon Consolidated Companies of America, Inc. ("HCCA").

B. COURT FINDINGS & INJUNCTION

2. On August 3, 2007, a jury of the United States District Court for the Northern District of Illinois, after nearly a three-week trial, issued a unanimous verdict finding that Pietrzak "knowingly or recklessly engaged in fraud in connection with" numerous HCCA reports and registration statements, filed with the Commission, that fraudulently overstated the value of HCCA's assets. Pietrzak personally prepared and/or signed several of these filings. The jury also found that Pietrzak "knowingly or recklessly engaged in fraud when he caused publication" of various false and misleading press releases by further overstating the value of HCCA's assets. Finally, the jury concluded that Pietrzak aided and abetted HCCA in substantially overstating the value of its assets in the company's accounting records and, furthermore, failed to implement a system of adequate internal accounting controls at HCCA that were sufficient to allow the preparation of HCCA's financial statements in conformity with generally accepted accounting principles.

3. Based on these findings, the court entered final judgment against Pietrzak on November 19, 2007, permanently enjoining him from (i) violating Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 16(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5, 16a-2 and 16a-3 thereunder; (ii) violating and aiding and abetting violations of Sections 13(a), 13(b)(2)(A), 13(b)(2)(B) and 13(b)(5) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, 13a-13 and 13b2-1 thereunder; (iii) acting as an officer or director of any publicly held company; and (iv) participating in any offering of a penny stock. Securities and Exchange Commission v. Pietrzak, et al., Civil Action Number 03-cv-1507.

III.

Based upon the foregoing, the Commission finds that a court of competent jurisdiction has permanently enjoined Pietrzak, an attorney, from violating the Federal securities laws within the meaning of Rule 102(e)(3)(i)(A) of the Commission's Rules of Practice. The Commission also finds that a court of competent jurisdiction has found that Pietrzak, an attorney, violated the Federal securities laws within the meaning of Rule 102(e)(3)(i)(B) of the Commission's Rules of Practice. In view of these findings, the Commission deems it appropriate and in the public interest that Pietrzak be temporarily suspended from appearing or practicing before the Commission.

IT IS HEREBY ORDERED that Pietrzak be, and hereby is, temporarily suspended from appearing or practicing before the Commission. This Order will be effective upon service on the Respondent.

IT IS FURTHER ORDERED that Pietrzak may, within thirty days after service of this Order, file a petition with the Commission to lift the temporary suspension. If the Commission receives no petition within thirty days after service of the Order, the suspension will become permanent pursuant to Rule 102(e)(3)(ii).

If a petition is received within thirty days after service of this Order, the Commission will, within thirty days after the filing of the petition, either lift the temporary suspension, or set the matter down for hearing at a time and place to be designated by the Commission, or both. If a hearing is ordered, following the hearing, the Commission may lift the suspension, censure the petitioner, or disqualify the petitioner from appearing or practicing before the Commission for a period of time, or permanently, pursuant to Rule 102(e)(3)(iii).

This Order shall be served upon Pietrzak personally or by certified mail at his last known address.

By the Commission.

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57064 / December 28, 2007

ADMINISTRATIVE PROCEEDING
File No. 3-12916

In the Matter of MONEESH K. BAKSHI, Esq. Respondent.	ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3) OF THE COMMISSION'S RULES OF PRACTICE

I.

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

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

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II.

The Commission finds that:

A. RESPONDENT

1. Bakshi is and has been an attorney licensed to practice in the State of New York, the Commonwealth of Massachusetts, and the District of Columbia.

B. COURT FINDINGS & INJUNCTION

2. On October 25, 2007, the U.S. District Court for the Southern District of New York issued a Memorandum of Decision finding that Bakshi knowingly violated Sections 5 and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and knowingly aided and abetted Ramoil Management, Ltd.'s violation of Section 15(d) of the Securities Exchange Act of 1934 and Rule 15d-1 thereunder. Also on October 25, 2007, the court entered its final judgment against Bakshi, permanently enjoining him from future violations of those securities laws. Securities and Exchange Commission v. Ramoil Management, Ltd., et al., Case No. 01-CV-9057 (S.D.N.Y.).

3. The court found that Bakshi knowingly filed a Form 10-KSB that included an unsigned and falsified audit report that, among other things, stated it had been audited by a certified public accountant when in fact the named individual was not a CPA and had not conducted any audit. The court also found that Bakshi knowingly made false representations in each of four Forms S-8 and supporting opinion letters that he filed on behalf of Ramoil, which purported to issue shares in exchange for consulting services that were never actually rendered.

III.

Based upon the foregoing, the Commission finds that a court of competent jurisdiction has permanently enjoined Bakshi, an attorney, from violating the Federal securities laws within the meaning of Rule 102(e)(3)(i)(A) of the Commission's Rules of Practice. The Commission also finds that a court of competent jurisdiction has found that Bakshi, an attorney, violated the Federal securities laws within the meaning of Rule 102(e)(3)(i)(B) of the Commission's Rules of Practice. In view of these findings, the Commission deems it appropriate and in the public interest that Bakshi be temporarily suspended from appearing or practicing before the Commission.

IT IS HEREBY ORDERED that Bakshi be, and hereby is, temporarily suspended from appearing or practicing before the Commission. This Order will be effective upon service on the Respondent.

IT IS FURTHER ORDERED that Bakshi may, within thirty days after service of this Order, file a petition with the Commission to lift the temporary suspension. If the Commission receives no petition within thirty days after service of the Order, the suspension will become permanent pursuant to Rule 102(e)(3)(ii).

If a petition is received within thirty days after service of this Order, the Commission will, within thirty days after the filing of the petition, either lift the temporary suspension, or set the matter down for hearing at a time and place to be designated by the Commission, or both. If a hearing is ordered, following the hearing, the Commission may lift the suspension, censure the petitioner, or disqualify the petitioner from appearing or practicing before the Commission for a period of time, or permanently, pursuant to Rule 102(e)(3)(iii).

This Order shall be served upon Bakshi personally or by certified mail at his last known address.

By the Commission.

Nancy M. Morris
Secretary